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REPORTS OF CASES

DECIDED BETWEEN
JULY 7, 1948 AND MARCH 11, 1949

IN THE

Supreme Court of Nebraska

JANUARY AND SEPTEMBER TERMS, 1948
AND JANUARY TERM 1949

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WALTER D. JAMES
OFFICIAL REPORTER

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By WALTER D. JAMES, REPORTER OF THE SUPREME COURT

For the benefit of the State of Nebraska

SUPREME COURT

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[1] Term expired January 5, 1949.
[2] Term began January 6, 1949.
[3] Term expired January 5, 1949.
[4] Term began January 6, 1949.

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[1] Term expired January 5, 1949.
[2] Took office January 6, 1949.
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CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

JANUARY TERM, 1948

EDWIN H. HAMMOND, APPELLEE, V. JEREMIAH HARRINGTON ET AL., APPELLEES, IMPLEADED WITH WILLIAM NIKLAUS ET AL., APPELLANTS.

33 N. W. 2d 293

Filed July 7, 1948. No. 32343.

1. **Judgments.** A judgment on the merits is a bar to subsequent action founded on the same claim, concluding the parties and those in privity with them as to every matter offered and received to sustain or defeat the claim and any other matter which might have been received for that purpose.
2. **Improvements.** A defendant in a suit to quiet title cannot avail himself of the provisions of the Occupying Claimants Act, section 76-301, R. S. 1943, where all his interests in the improvements, including possession, have been divested by judicial sale prior to his demand for compensation for their value.

APPEAL from the district court for Lancaster County: RALPH P. WILSON, JUDGE. *Affirmed.*

T. R. P. Stocker, William Niklaus, pro se, and *Bartlett E. Boyles,* for appellants.

Ginsburg & Ginsburg, for appellees.

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

CARTER, J.

The plaintiff brought this suit to quiet the title to certain lands in Lancaster County. From a decree quieting the title in plaintiff an appeal has been taken to this court.

The record shows that the plaintiff acquired title to the real estate herein involved by warranty deed from The Lincoln Joint Stock Land Bank of Lincoln, Nebraska, on August 22, 1945. It is further shown that the land bank acquired title to the property by sheriff's deed from the sheriff of Lancaster County, Nebraska, under date of September 1, 1942, as a result of a foreclosure suit in the district court for Lancaster County in which The Lincoln Joint Stock Land Bank was plaintiff and Lafayette P. Barnes and others, including Gertrude D. Reed, William Niklaus and Mary V. Niklaus, were defendants. Thereafter, in reliance upon the record of the foreclosure proceeding, plaintiff purchased said premises, paying full value therefor. On or about August 30, 1945, the defendant William Niklaus caused a notice of lis pendens to be filed with the register of deeds, giving notice that he claimed to be the owner of the real estate and thereby clouding plaintiff's title.

The defendants Niklaus filed an answer in which they alleged that one Erickson obtained title to said property by warranty deed and entered into possession of said real estate on or about October 1, 1928. Defendant Niklaus, after the decease of Erickson, obtained a deed to the property from his heirs and alleges that Erickson, the heirs of Erickson, and himself were in continuous, open, notorious, hostile, adverse possession of the property for more than ten years following October 1, 1928. Defendant Niklaus alleged that the note and mortgage foreclosed in the proceeding, through which plaintiff claims title, were not executed and delivered by persons having any interest in the lands because of the title procured by the defendant Niklaus by adverse possession. Defendant Niklaus further contends that if his claim of

title is not sustained he is entitled to recover $25,000 for improvements placed upon said land under the Occupying Claimants Act, section 76-301, R. S. 1943.

The defendant Reed claims an interest in the lands by virtue of a number of judgments procured against one Theodore F. Barnes, alleged to be a former owner of the property. It is her contention that her interest is superior to that of the plaintiff to the extent of the amounts due on the judgments.

The plaintiff asserts that the defendants are estopped to assert the defenses set forth and that the issues raised have been previously litigated by the parties, making the defense of res adjudicata operative as to them.

The evidence shows that the three answering defendants were parties defendant in the case of The Lincoln Joint Stock Land Bank v. Lafayette P. Barnes et al., the foreclosure suit upon which plaintiff relies to sustain his title. It is not questioned that the foreclosure suit involved the same real estate which is the subject of the present action. The defendants William Niklaus, Mary V. Niklaus, and Gertrude D. Reed filed answers in the foreclosure suit. In that case the court held that the deed to H. E. Erickson was void and that the lien of The Lincoln Joint Stock Land Bank was superior to the interests of the defendants Niklaus. It was further held that Niklaus was not an innocent purchaser for value. These holdings were affirmed by this court. Lincoln Joint Stock Land Bank v. Barnes, 143 Neb. 58, 8 N. W. 2d 545. The record further shows that on March 1, 1944, the defendant William Niklaus commenced an action in the district court for Lancaster County against The Lincoln Joint Stock Land Bank, alleging that he was the owner and entitled to the immediate possession of the real estate here involved, and demanding that the land bank be ejected therefrom. This case was tried and judgment entered for the land bank on all the issues presented. No appeal was taken from the judgment entered and it has become final. The foregoing

judgments finally determine that the defendants Niklaus are not the owners of the property or entitled to the possession thereof. They determine, also, that the defendants Niklaus obtained no title by adverse possession. These judgments are a bar to a further litigation of the issues tried in those cases and constitute an absolute defense to similar issues submitted in the present case. See Munger v. Beard & Bro., 87 Neb. 527, 127 N. W. 872.

The defendant Niklaus further contends that he has made lasting and valuable improvements on said lands which enhanced their value to the extent of $25,000. In the event his title is not sustained, defendant Niklaus claims the benefit of the Occupying Claimants Act, section 76-301, R. S. 1943. The improvements made were generally set forth in the previous suits, but no claim under the Occupying Claimants Act was specifically made. We think Niklaus was required to set up all the claims he had relative to the making of improvements in the cases previously tried. He is not entitled to try his case piecemeal. A judgment on the merits is a bar to subsequent action founded on the same claim, concluding the parties and those in privity with them as to every matter offered and received to sustain or defeat the claim and any other matter which might have been presented for that purpose. Triska v. Miller, 86 Neb. 503, 125 N. W. 1070.

But in any event, the defendant Niklaus is not entitled to the benefit of the Occupying Claimants Act in the present case. He was adjudicated not to be the owner, and was divested of his possession before any benefits under the Occupying Claimants Act were demanded by him. In La Bonty v. Lundgren, 58 Neb. 648, 79 N. W. 551, we said: "The judgment in favor of defendant in the sum of $1,439.16 was entirely erroneous and must be set aside, since the record before us shows that whatever title or interest Lundgren ever had in the land had been divested and transferred to the inter-

vener Atwood long prior to the entry of said judgment, by virtue of a judicial sale of the property and deed issued in pursuance thereof. Lundgren, when the value of the improvements was assessed, had no claim of title to the real estate, was not in possession of the premises, and could not avail himself of the benefits of the occupying claimants' act." See, Wightman v. City of Wayne, 148 Neb. 700, 28 N. W. 2d 575; Moreland v. Berger, 93 Neb. 724, 141 N. W. 831.

In addition to the foregoing, the record demonstrates that Niklaus placed the improvements on the land with full knowledge of the existence of the mortgage. Most of the improvements for which reimbursement is sought were made after the Erickson deed through which he claimed title had been judicially determined to be void. We cannot say that the necessary good faith was present to bring him within the act. Ohme v. Thomas, 134 Neb. 727, 279 N. W. 480.

The defense advanced by the defendant Reed is likewise barred because it had been previously litigated. In the foreclosure action designated as The Lincoln Joint Stock Land Bank v. Barnes, hereinbefore referred to, the defendant Reed was made a party. The judgments against Theodore F. Barnes which she now attempts to assert as liens on the property were in existence when the foreclosure proceeding was brought. If they were valid judgment liens she was obliged to assert them at that time. The foreclosure action is clearly res adjudicata of any claim of interest by the defendant Reed in the lands described in that action which are identical with the lands involved in this suit. It might be pointed out also that in the case of Reed v. Barnes, 113 Neb. 414, 203 N. W. 567, it was determined that Lafayette P. Barnes and not Theodore F. Barnes was the real owner of the property here involved and that judgments against the latter were not liens against the land. Defendant Reed is bound by this holding. In any event, defendant Reed did not question the validity of the mortgage in

Reed v. Barnes, *supra,* and consequently she is in no position to deny that the lien of the mortgage is superior to any interest she may have. Plaintiff's title is derived from a valid sale of the premises under the foreclosure decree, a decree and sale which she is in no position to question. The contentions of the defendant Reed are without merit.

The defendant Niklaus contends that plaintiff, in offering the evidence adduced in previous trials without reservation or limitation, opened up for relitigation all the issues therein contained. This contention is without merit. It will be noted that plaintiff pleaded the previous judgments as a bar to the claims of the defendants Niklaus set forth in their answer. In determining whether a judgment is a bar to a pleaded issue for the reason that it had been previously litigated, it is proper to examine the record, including the evidence adduced at the hearing of the former action, to determine that question. The record and evidence offered by the plaintiff were in support of this issue. The court will so assume and will not place a strained interpretation upon the offer made which is inconsistent with the pleadings. We hold that the offer of the records of the previous cases under the circumstances here shown did not have the effect of opening up old issues which had been previously litigated. The purpose of the offer was clearly just the opposite.

We find no merit in the claims of these defendants. The plaintiff was entitled to have his title quieted in the manner in which it was ordered by the district court. The judgment is affirmed.

AFFIRMED.

PEARL WAGNER, APPELLEE, V. LOUP RIVER PUBLIC POWER DISTRICT, A CORPORATION, APPELLANT.
33 N. W. 2d 300

Filed July 7, 1948. No. 32372.

1. New Trial. Evidence of facts occurring after a trial ordinarily cannot be made the basis for a motion for a new trial on the ground of newly discovered evidence.
2. ———. In any but an extraordinary case in which an utter failure of justice will unequivocally result, evidence of facts occurring after the trial will not support a motion for a new trial as newly discovered evidence.
3. ———. While the trial court has great discretion in ruling upon a motion for a new trial, the discretion is a judicial one, and where there is no newly discovered evidence within the meaning of section 25-1142, R. S. 1943, it is error to grant a new trial on that ground.

APPEAL from the district court for Platte County: ARTHUR C. THOMSEN and LOUIS LIGHTNER, JUDGES. *Reversed.*

Walter & Flory and *Neighbors & Danielson*, for appellant.

Walker, Luckey & Hunter and *Milton Wagner*, for appellee.

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

CARTER, J.

This is an action to recover damages to riparian lands for injuries resulting from the diversion of water from the Loup River. The jury returned a verdict for the defendant. The trial court set the verdict aside on the ground of newly discovered evidence. From the order setting the verdict aside, the defendant has appealed.

Plaintiff's cause of action is based on article 1, section 21, of the Nebraska Constitution, which provides in substance that the property of no person shall be taken or damaged for public use without just compensation therefor. Proof of negligence or the commission of a

wrongful act is not, therefore, necessary to a recovery.

It is the contention of the plaintiff that the lands involved were subirrigated from the Loup River which flows along the north boundary thereof, until the acts of defendant occurred, of which complaint is made. It is claimed that the diversion of water by the defendant for power purposes about 35 miles upstream from plaintiff's land changed existing conditions to the damage of plaintiff in the following respects: Prior to the diversion, the quantity and velocity of the water were such that it kept the south bank of the river free from silt, and thereby prevented a sealing of its banks and permitted the water of the stream to flow into plaintiff's land below the surface of the ground, thereby bringing about a subirrigation of said lands. Due to the diversion of the water by the defendant the height of the stream has been lowered to such an extent that the water, since 1940, flows into plaintiff's land at such a level as to destroy the benefits previously received by a subirrigation of the lands. It is also urged that the defendant removes all sand, silt, and sediment from the water diverted from the stream and discharges clear water into the stream below plaintiff's land. It is contended that this clear water immediately picks up a new load of sand, silt and sediment, causing a deepening of the bed of the stream. It is further contended that this deepening process brings about a deepening of the channel upstream and causes a lowering of the bed of the stream along the north bank of plaintiff's land, resulting in a lowering of the water level of the underground waters beneath plaintiff's lands from two and one-half to three feet. This is alleged to have materially reduced or destroyed the subirrigation of said lands.

In addition to special defenses the defendant denies generally the contentions alleged by the plaintiff.

The record shows that evidence was produced by both parties on the issues thus raised. That the evi-

dence was sufficient, if believed, to sustain the verdict of the jury is amply shown by the record. The application for a new trial is grounded primarily on the alleged discovery of new evidence. The correctness of the ruling of the trial court is properly raised by direct appeal under the provisions of section 25-1315.03, R. S. Supp., 1947. Cozad v. McKeone, 149 Neb. 833, 32 N. W. 2d 760.

The evidence offered by the plaintiff shows that for many years prior to 1940 the land was subirrigated; that the ground-water level remained uniform during the summer months, irrespective of varying amounts of precipitation, with the result that great productivity was maintained by the subirrigation of the land. Plaintiff also produced evidence to the effect that after 1940 the water level of the Loup River dropped approximately two and one-half feet, that ponds and sloughs dried up, and that productivity was materially decreased in the years when rainfall was inadequate. If this evidence had been accepted by the jury and a verdict returned thereon, it would have been ample to sustain an award for damages.

There was evidence offered by the defendant which was in direct conflict with that of plaintiff's witnesses. It is true that plaintiff claims that most of these witnesses were impeached and their credibility impugned. These are matters which are traditionally for the jury to determine. The conflict in the evidence which is primarily involved in the motion for a new trial on the ground of newly discovered evidence arises out of the testimony of the expert witnesses. The plaintiff called Roy N. Towl and the defendant called Adolph Meyer as expert witnesses, both being shown by the record to be qualified to testify concerning the engineering problems involved in the case. The motion for a new trial involves the evidence of Meyer, and consequently we shall review briefly the testimony which he gave.

The witness Meyer testified that he had made a study

of the annual precipitation in this area over a long period of years and the run-off waters and ground-water levels resulting therefrom. He made a study of the natural flow of the Loup River, the amount diverted by the defendant, and the result produced. He investigated the well recordings in the area, including those on the plaintiff's lands, for the purpose of determining ground-water fluctuations and their causes. He examined river gauging records to determine the height of the water in the stream over a period of years and to determine if the river bed was lower after 1940 as alleged by the plaintiff. From these investigations and findings, the basis of which was before the jury in great detail, the witness testified that the river bed had remained at substantially the same height throughout the years, that any changes in the height of the stream itself was due to variance in the amount of precipitation, and that there was no lowering of the ground water on the Wagner land resulting from water diversions made by the defendant. The foregoing evidence was in conflict with that given by plaintiff's expert, Towl. The weight of the evidence and the credibility of the witnesses were for the jury. Evidently the jury gave credence to the testimony of Meyer.

In the course of his evidence the witness Meyer testified that the readings and conditions relating to 1944 and 1945 showed improving water levels in plaintiff's lands which, in his opinion, would continue with good rainfall. The affidavits and testimony produced in support of the motion for a new trial tend to show that more than one year after the trial no such improvement had come about. The plaintiff argued that this evidence which became existent subsequent to the trial shows that Meyer's opinion was in error and that Towl's opinion, in the light of subsequent events, appears to have been the correct one. We do not believe that such evidence affords a basis for a new trial.

The statutory provision governing new trial is in part

as follows: "The former verdict, report or decision shall be vacated and a new trial granted on the application of the party aggrieved, for any of the following causes, affecting materially the substantial rights of such party; * * * (7) newly discovered evidence, material for the party applying, which he could not, with reasonable diligence, have discovered and produced at the trial; * * *." § 25-1142, R. S. 1943. Newly discovered evidence within the purview of this provision of the statute is evidence in existence at the time of the trial, but which could not, by reasonable diligence, have been procured. Cassidy v. Johnson, 41 Ind. App. 696, 84 N. E. 835. A new trial will not be granted on the ground of newly discovered evidence where it appears that such evidence was not available at the time of the trial, but rather the result of changed conditions since. Johnson v. City of Waterloo, 140 Ia. 670, 119 N. W. 70. In Johnson v. Johnson, 18 Colo. App. 493, 72 P. 604, the court said: "Admitting the allegations of the affidavit to be true, it cannot be made the basis of a motion for a new trial as, from the very nature of the case, such testimony could not have been produced at the trial, as the fact complained of did not exist at that time." See, also, Denny v. Broadway Nat. Bank, 118 Ga. 221, 44 S. E. 982; Geiman-Herthel Furniture Co. v. Geiman, 160 Kan. 368, 161 P. 2d 518; Hutt v. Young, 47 Ohio App. 390, 191 N. E. 879.

The authorities are not, however, in complete accord on the subject. See, State v. Watrous, 177 Minn. 25, 224 N. W. 257; Giles v. Robinson, 114 Me. 552, 96 A. 745. Many of the cases which appear to support the minority rule do not do so in fact. They are cases where it was shown by evidence occurring after the trial that the verdict was procured by perjury, fraud, or concealment on the part of the prevailing party. Rogers v. Goforth, 121 W. Va. 239, 2 S. E. 2d 903. No such contention is advanced in the present case. In State v. Watrous, *supra*, although adhering to the minority view, the court re-

fused to apply it in that case, saying: "What effect the jury gave to drainage in making up its verdict cannot be known. The granting of a new trial, if followed as a precedent, would result in further litigation of issues which should be deemed settled by the verdict. And in every case, where the evidence was by way of prediction or prophecy of the damages which would result and either party was dissatisfied, there could be a demand for a new trial. In any but a very extraordinary case the evidence at the trial must end the controversy."

Our holding that evidence of facts occurring after the trial does not ordinarily afford a basis for a new trial is grounded on sound policy, a policy that is intended to secure care and vigilance and prevent parties from coming forward subsequently with claims of new evidence which tend to prolong litigation unduly. A failure of justice in a particular instance is ofttimes not so great an evil as that there should be no certain end to litigation. In any but a very extraordinary case in which an utter failure of justice will unequivocally result, a verdict on the evidence at the trial will not be set aside and a new trial granted on the basis of evidence of facts occurring subsequent to such trial.

We are of the opinion that the majority view is the proper one and that evidence of facts happening after trial ordinarily cannot be considered as newly discovered evidence on which to justify the granting of a new trial. The evidence in the present case is not within the exception noted.

The plaintiff alleges misconduct of the jury and of the prevailing party, its officers, agents, representatives and employees, by which plaintiff was prevented from having a fair trial. It is charged in the motion for a new trial also that defendant's counsel and witnesses followed a deliberate and planned policy of injecting prejudicial argument, objections, comments, and remarks which deprived plaintiff of a fair and impartial trial on the material evidence. The affidavits and testimony pro-

duced in support of the motion for a new trial, when viewed in connection with similar evidence in opposition thereto, do not sustain these allegations, and the trial court so found.

The trial was fairly conducted. The verdict of the jury is sustained by sufficient evidence. The motion for a new trial on the ground of newly discovered evidence was improperly sustained because there was no newly discovered evidence within the meaning of section 25-1142, R. S. 1943. The allegations of misconduct on the part of the jury, defendant, witnesses, and counsel for defendant are not established. Under these circumstances the order of the district court granting a new trial is erroneous. While the trial court has great discretion in ruling upon a motion for a new trial, such discretion is a judicial one and where, as here, there is no newly discovered evidence within the meaning of section 25-1142, R. S. 1943, it is reversible error to grant a new trial on that ground. The order granting a new trial is therefore reversed with directions to vacate such order and to enter judgment for the defendant on the verdict rendered.

REVERSED.

IN RE APPLICATION OF BERNARD C. EFFENBERGER ET AL., DOING BUSINESS AS FORT CROOK BUS LINES. BERNARD C. EFFENBERGER ET AL., DOING BUSINESS AS FORT CROOK BUS LINES, ET AL., APPELLANTS, V. OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY ET AL., APPELLEES.

33 N. W. 2d 296

Filed July 7, 1948. No. 32439.

1. **Public Service Commissions.** The sole power to grant or deny a certificate of convenience and necessity to a common carrier rests with the Nebraska State Railway Commission.
2. ———. Courts are without authority to interfere with the findings and orders of the railway commission except where it exceeds its jurisdiction or acts arbitrarily.

3. **Carriers.** Duplicate lines of transportation by competing common carriers are ordinarily incompatible with the public interest. Such a competing line will be authorized only for compelling reasons.
4. ———: **Public Service Commissions.** Where an established common carrier is ready, willing, and able to comply with any reasonable order of the railway commission in providing adequate service to the public in its field, an order denying a certificate of convenience and necessity to a new, competing carrier is not arbitrary.

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

George E. Truman and *Floersch & Floersch*, for appellants.

Kennedy, Holland, DeLacy & Svoboda, J. A. C. Kennedy, Jr., Grenville P. North, Warren C. Schrempp, James P. Keenan, G. C. Holdrege, Edward F. Fogarty, Edward Sklenicka, James M. Paxson, Herbert M. Fitle, and *Collins & Collins*, for appellees.

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

CARTER, J.

This is an application by the operators of the Fort Crook Bus Lines for a certificate of public convenience and necessity authorizing an extension of service between Bellevue, Nebraska, and Fourteenth Street and Capitol Avenue, Omaha, Nebraska. The Nebraska State Railway Commission denied the application and the applicants have appealed.

The present operations of the Fort Crook Bus Lines, hereinafter called the bus lines, are substantially as follows: From Fort Crook a line is operated to Twenty-fourth and N Streets in Omaha on Highway No. 73-75. From Bellevue a line is operated to Twenty-fourth and N Streets by way of Highway No. 31 and Bellevue Boulevard. At Twenty-fourth and N Streets passengers must change to streetcars or busses of the Omaha & Council

Bluffs Street Railway Company, hereinafter called the street railway company. The proposed new service would route applicant's busses north on Thirteenth Street, from the point where Highway No. 31 and Highway No. 75 come together, to Fourteenth Street and Capitol Avenue in downtown Omaha.

The evidence shows that Bellevue had an approximate population of 1,100 people in 1941 and that it now has a population of 4,600. It is located about five miles from the city of Omaha. The distance to Thirteenth Street and Capitol Avenue in downtown Omaha is 12½ miles by way of Twenty-fourth and N Streets and nine and one-half miles by the proposed route. The present terminal of the bus lines at Twenty-fourth and N Streets is served by a streetcar line and a bus line insofar as downtown Omaha is concerned. There is evidence that the busses are often loaded before arriving at Twenty-fourth and N Streets to the inconvenience of the passengers unloaded at that point by the bus lines. There is much evidence in the record showing the necessity for better service to downtown Omaha from Bellevue and Fort Crook. The usual time in going from Bellevue to downtown Omaha by the means now provided is one hour and twenty minutes. Applicant proposes to provide this service by a thirty-five-minute schedule. The proposed route is over the least congested streets which would permit a faster time schedule and a maximum of safety. The evidence shows that the people of Bellevue and Fort Crook, the government employees and military personnel at the fort, and the employees of Offutt Field require better service to and from downtown Omaha than they are now receiving. We will not undertake a review of all the evidence which supports this conclusion.

The street railway company produced evidence to the effect that there was no public interest involved which required any action on the part of the railway commission. It contends also that the service rendered

by it at Twenty-fourth and N Streets to downtown Omaha is adequate and as efficient as that available to the citizens of Omaha generally. There is evidence in the record that the railway commission has valued the transportation system of the street railway company at $10,483,135. The rates permitted to be charged are based on this investment and the number of passengers hauled. The margin is so narrow that any material reduction of revenue would cause the company to operate at a loss. This result would almost certainly come about if this application is granted and other similar bus lines saw fit to apply for and obtain similar privileges at the hands of the commission. It is the contention of the street railway company that if additional service is required, it, and not the applicant, should have the opportunity to provide it. This it offers to do if the railway commission concludes that the public interest requires it.

The evidence of the city of Omaha objecting to the allowance of the application is based upon the added congestion which would accrue in the downtown section of the city by having an additional number of busses operating there, and the consequent loss of taxes resulting from a loss of revenue by the streetcar company. We do not think the evidence produced by the city of Omaha is sufficient to warrant the denial of the application, assuming that there is a public necessity for granting it. The prospective loss of tax income, or the possibility of adding to the traffic problem, are not of themselves sufficient to defeat such an application if there is a public need for the proposed service. Other interveners appearing in the case raise no objections which are not covered by the position taken by the street railway company. Consequently, the case can be determined upon the issues raised by the application and the objections made thereto by the street railway company.

The city of Bellevue, Offutt Field, and Fort Crook,

under the facts shown, require service which is suburban in nature, although each is outside the corporate limits of the city of Omaha. They are within the metropolitan area of Omaha. The public interest involved is not confined to the city of Omaha but is a matter which is independent of arbitrary geographical limits. Municipal boundaries play a part in determining who should be permitted or required to perform common carrier service, but they are unimportant in determining public convenience and necessity.

Under the existing plan of operation the bus lines carry their passengers to Twenty-fourth and N Streets, where they are required to transfer to the streetcar or bus service provided by the street railway company. This interlined service operates without the benefit of an integrated schedule assuring a prompt continuance of the trip. The evidence shows that Twenty-fourth and N Street is not a terminal point for the busses and streetcars of the street railway company. The result is that loaded cars and busses come into this point during peak periods, causing delay in the movement of passengers unloading from the applicant's busses. The fact that a transfer is required is not of itself a controlling factor. Transfers are necessary in moving the public in heavily populated points. That a direct service from these outlying districts to downtown Omaha on a faster schedule and without the necessity of transferring would be much more convenient for the users of the service must be conceded. The questions submitted to us by this appeal, however, go to the powers of the railway commission and the rights of the various common carriers involved.

The Nebraska State Railway Commission has original jurisdiction and the sole power to grant, amend, deny, revoke, or transfer common carrier certificates of convenience and necessity. Moritz v. Nebraska State Railway Commission, 147 Neb. 400, 23 N. W. 2d 545. Courts are without authority to interfere with the findings and orders of the railway commission, except where it ex-

ceeds its jurisdiction or acts arbitrarily. Publix Cars, Inc., v. Yellow Cab & Baggage Co., 130 Neb. 401, 265 N. W. 234. The purpose of commission control of common carriers is to secure adequate and sustained service for the public at a minimum cost and to protect investments already made in accomplishing such purposes. Competition which results in a duplicated service and a consequent reduction in revenue is economically wasteful and tends toward high fares and inefficient service. Certain duties are imposed upon established carriers to provide service to all the public. This requires service to be rendered where it is unprofitable as well as where it is profitable. Competition is not ordinarily permitted where the business is desirable, leaving the burden of supplying service to the undesirable areas to the established carrier. The determination of these questions rests with the railway commission, and its findings and orders will not be interfered with on appeal if any reasonable basis exists upon which they can be supported. Furstenberg v. Omaha & C. B. Street Ry. Co., 132 Neb. 562, 272 N. W. 756; Publix Cars, Inc., v. Yellow Cab & Baggage Co., *supra*.

We think the evidence shows that the service rendered to the places here involved fails to meet the standards the public has a right to expect. The improvement of the service is a matter peculiarly within the control of the railway commission. We think the evidence shows that the street railway company has the means, by operating cooperatively with the applicant, to provide proper transportation facilities to the inhabitants of Bellevue, Offutt Field, and Fort Crook. This it has volunteered to do if the railway commission deems it necessary. This being true, the order of the railway commission denying the application to extend the facilities of the Fort Crook Bus Lines into downtown Omaha is not an arbitrary one. Furstenberg v. Omaha & C. B. Street Ry. Co., *supra;* Moritz v. Nebraska State Railway Commission, *supra*. The evidence indicates that adequate service

can be provided by the established carrier. Clearly, it has the first right to so do in the manner and by the means which the railway commission might prescribe. If the established carrier failed in its duty or refused to comply with the orders of the commission with respect thereto, the railway commission might then be obliged to favorably consider applications of others to perform the service. The whole theory of commission control is to eliminate unbridled competition between common carriers when it will result in higher costs to the public. Competitive routes will ordinarily be authorized only where the existing carrier refuses or has failed to provide adequate service upon the order of the railway commission. Where the evidence does not show that such a situation exists, the established carrier may properly resist invasion of its field before the commission. An order of the commission sustaining the objections of the established carrier under such circumstances is not arbitrary. Consequently, it is a lawful order.

This court has no power to regulate public utilities. Its function on appeal is limited to an examination of the jurisdiction of the railway commission over the subject matter and a determination of whether or not the order made by the railway commission is reasonable as distinguished from arbitrary action. The policy or wisdom of its action cannot be reviewed by the courts where the foregoing requirements to lawful action are found to exist.

We are of the opinion that the action of the railway commission in the present case has evidentiary support in the record and constitutes a proper exercise of the powers vested in the railway commission by the Constitution and laws of this state. Under such circumstances this court is without authority to interfere with the result.

AFFIRMED.

NETTIE M. LORENZ ET AL., APPELLEES, V. WILLIAM F. LORENZ ET AL., APPELLANTS.
33 N. W. 2d 162

Filed July 7, 1948. No. 32401.

Partition. Where the record in a partition action shows that the interests of the parties in the land are not in dispute and plaintiffs pray for an accounting of rents and profits to be made by the agent of the parties, the proceedings with reference thereto are incidental and collateral to the partition of the real estate, as is the claim of a mortgagee to whom the plaintiffs have assigned their interests in the proceeds of the sale; therefore, such proceedings do not bar the allowance of attorney's fees in the partition action for the reason that they are not adversary thereto.

APPEAL from the district court for Otoe County: THOMAS E. DUNBAR, JUDGE. *Affirmed.*

Ginsburg & Ginsburg and *Clements & Clements*, for appellants.

Moran & James and *Otto H. Wellensiek*, for appellees.

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

MESSMORE, J.

The plaintiffs filed a suit in partition on June 20, 1946, in which they alleged and set up the ownership of real estate situated in Otoe County, Nebraska, described in the petition, and further set forth the respective interests of the parties therein. There was no contest with reference to such shares and interests. The plaintiffs further alleged that one of the defendants, Arthur W. Lorenz, had assumed to act as agent for them in collecting the rents, for which the plaintiffs prayed for an accounting. The petition further named a savings bank in Council Bluffs, Iowa, and alleged that such bank had a mortgage lien upon the interests of the plaintiffs which had been duly assigned by them to the bank. The bank, under date of June 25, 1946, entered its voluntary ap-

pearance in the case and filed its answer and cross-petition, setting up a mortgage lien upon the plaintiffs' interests in the real estate and the amount due the bank thereon under the terms of the mortgage.

The defendant Arthur W. Lorenz, the agent heretofore mentioned, filed an answer and cross-petition wherein he set up and claimed as a charge against the interests of the plaintiffs in the real estate described in their petition, certain notes, together with interest thereon, and prayed that all indebtedness due from any of the parties in the case to him as agent be offset as a charge against the interests of the various parties in and to the real estate, and that the court charge the principal and interest as a lien upon the interests of the plaintiffs in the property involved.

The remaining defendants, being the other co-owners of the real estate, filed an answer wherein they prayed that the defendant Arthur W. Lorenz be ordered and required to offset and recoup from any interests of the plaintiffs in the action the amounts of any and all notes executed by plaintiffs, and that the amounts so withheld be distributed among the parties in proportion to their respective interests.

The plaintiffs, in their reply to the answer and cross-petition of the defendant Arthur W. Lorenz, pleaded that the notes were outlawed by virtue of the statute of limitations, that they were under no obligation thereon, and that they be not required to make any payment; further alleged that the amounts withheld from them by such defendant were unlawfully withheld, and they were entitled to payment thereof.

The plaintiffs filed a reply to the answer of the remaining defendants, wherein they denied each and all of the allegations of the said answer.

We deem it unnecessary to set forth the evidence with reference to the accounting and the advancements made by the defendant Arthur W. Lorenz to the respective

parties as shown by the evidence, for the reason the same would unnecessarily lengthen this opinion.

After hearing, the trial court found, on the issues of the accounting, generally in favor of the defendant Arthur W. Lorenz, and that he had fully and properly accounted for everything received by him in the capacity of agent for the respective parties; further found that such defendant should withhold from the plaintiffs the additional sum of $645.45 as interest due from them; further found that the indebtedness of the plaintiffs should be deducted from the respective shares of the plaintiffs in the property; and, in addition thereto, found that the sum of $702, which represented advancements made by the defendant Arthur W. Lorenz as agent of the plaintiffs, should be offset against the shares of the plaintiffs in the real property. The court then found the interests of the parties subject to the charges against them and each of them, and appointed a referee to make partition. Partition was granted, sale had, and confirmed.

After the overruling of the motion for new trial the defendants appealed from an order of the trial court wherein, on the motion to confirm the sale, the appellees' attorneys requested an attorney's fee which was allowed by the trial court in the amount of $640. Objections were filed by the defendants to such allowance and overruled by the trial court. From the overruling of the allowance of attorney's fees as hereinbefore set forth, the defendants appeal.

For convenience the appellants will be referred to as the defendants and the appellees as the plaintiffs.

Defendants contend the trial court erred in failing and refusing to find that the action in the instant case was adversary and therefore the plaintiffs' attorneys were not entitled to allowance of attorney's fees.

From an examination of the pleadings and the record we conclude that the accounting involved in the case at bar, and the rights of the savings bank in Iowa, are collateral and incidental to the partition action. In the

partition action there was no contest with reference to the respective interests of the parties herein involved, and such interests are conceded.

From this analysis we arrive at the conclusion that the following authorities are appropriate to a determination of this appeal.

Section 25-21,108, R. S. 1943, provides that all the costs of the proceedings in partition shall be paid in the first instance by the plaintiffs, but eventually by all the parties in proportion to their interests, except those costs which are created by contests previously provided for by law.

In Wilcox v. Halligan, 141 Neb. 643, 4 N. W. 2d 750, an appeal was taken from an award of attorney's fees for plaintiffs' attorneys in a partition action. Defendants filed an answer setting forth their respective interests, but did not deny the interest of the plaintiff in the premises sought to be partitioned. The proof thereon was not contradicted, which is true in the instant case. The court stated: "It follows that, so far as the pleadings are concerned, this proceeding in partition may not be deemed adversary in character, and plaintiff's right to partition is conceded by all parties and cannot be made an issue in this case. * * * This jurisdiction is quite committed to the doctrine that in an amicable proceeding under our statutes the plaintiff is entitled to have his reasonable attorneys' fees taxed as costs to be paid out of the proceeds of the sale of the partitioned property, where a sale is had." See, also, Annotation, 146 A. L. R., pp. 1269, 1271, 1272, and 1274.

In the above case we have a proceeding which the record discloses was wholly without contest and strictly amicable in all respects up to and including the decree of partition, the appointment of the referee, the approval of his report, and the order of the district court directing the sale of the premises. See, also, Johnson v. Emerick, 74 Neb. 303, 104 N. W. 169, 12 Ann. Cas. 851; Annotation, 73 A. L. R., pp. 16, 21, 23, and 33;

Mabry v. Mudd, 132 Neb. 610, 272 N. W. 574; Annotation, 146 A. L. R., pp. 1269, 1271, 1274, 1275, and 1278.

In the instant case the accounting for rents as against the defendant Arthur W. Lorenz, the advancements made by him and notes incident thereto, all appear in the evidence. They do not constitute a contest upon the respective rights or interests of the parties to the land to be partitioned in this action, nor can such proceedings interfere with the rights of the savings bank in Iowa in setting up its indebtedness against the plaintiffs' interests. Such subject matter is purely collateral and incidental to the partition action. This being true, there is nothing adversary therein that would affect or prohibit the allowance of attorney's fees. We conclude the trial court did not err in such respect.

The next question that confronts us is whether or not the trial court abused its discretion, on the theory that the amount allowed as attorney's fees was excessive. Considering the pleadings, the evidence adduced, and the respective interests of the parties which must be considered in determining this phase of the case, we conclude that the trial court did not abuse its discretion in the allowance of attorney's fees.

The plaintiffs, by cross-appeal, again except to the accounting as made, upon the theory that the notes involved therein, owing by the plaintiffs, were outlawed by the statute of limitations. We have examined the authorities in connection with the plaintiffs' cross-appeal with respect to the subject matter as contained therein, and also the motion of the defendants to dismiss the cross-appeal. From an analysis thereof and the decree of the trial court we conclude that the cross-appeal is without merit. It was fully determined upon the plaintiffs' injection of the accounting in the original case, from which the defendants have not appealed.

For the reasons given, we conclude the judgment of the trial court should be affirmed.

AFFIRMED.

FRED W. ROTHERY ET AL., APPELLANTS, V. PAUL A. POUNDS ET AL., APPELLEES.
33 N. W. 2d 347

Filed July 7, 1948. No. 32423.

1. **Fraud.** The measure of general damages for fraud in inducing the purchase of property is the difference between the actual value of the property at the time of the purchase and the value it would have had if the seller's representation had been true.
2. **Damages.** Where the facts stated in a petition show that plaintiff is entitled to damages of some sort, it is not fatal error that the pleader has mistaken the rule by which such damages should be measured.
3. **Pleading.** As a general rule, a motion for nonsuit or dismissal will be granted where the pleadings fail to state a cause of action if the defects are such that they cannot be amended by subsequent proceedings. Dismissals or nonsuits, however, should not be ordered without giving the party offering the defective pleadings an opportunity to amend.

APPEAL from the district court for Douglas County: WILLIS G. SEARS, JUDGE. *Reversed and remanded.*

Hotz & Hotz, William J. Hotz, William J. Hotz, Jr., and *William F. Dalton,* for appellants.

Kennedy, Holland, DeLacy & Svoboda and *L. J. Tierney,* for appellees.

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

MESSMORE, J.

This is an action at law to recover damages for alleged false and fraudulent representations made by the defendants to induce the plaintiffs to purchase a rooming house.

The plaintiffs' petition sets forth a factual situation which relates itself to false and fraudulent representations made by the defendants as to the gross income of a rooming house. The plaintiffs contend they relied upon the defendants' representations as to such income and purchased the rooming house. The defendants' an-

swer was a general denial and further pleaded that the plaintiffs were fully informed with reference to all matters pertaining to the monthly gross income of the rooming house as exemplified by the Office of Price Administration, a governmental agency commonly referred to as the O. P. A.

The reply to the defendants' answer was a general denial to the new matter set up therein, and reiterated the facts set forth in plaintiffs' petition.

The factual situation, insofar as it relates itself to the allegations of the plaintiffs' petition, was to the effect that the plaintiffs contacted a realty company that represented the defendants, being induced by an ad in a local newspaper which depicted the gross income of the premises as being in the amount of $327.50 per month, when in fact the same was $265.50 per month; purchased the premises, went into possession thereof and remained therein nearly three years, and then brought this action, premising their whole cause of action upon false representations and fraud; and setting forth the measure of damages as constituting the gross income of the premises herein involved to be $327.50 as represented, when in fact and in truth such amount was $265.50, which the defendants well knew and which was falsely and fraudulently represented to the plaintiffs.

Further detail of the facts is unnecessary to a determination of this appeal.

During the progress of the trial and before the evidence was completed on the part of the plaintiffs, the record discloses the following in substance: The defendants moved the court to excuse the jury, which was done, and thereafter moved the court to dismiss the action for the reason that there was no element of damage before the court which the court could submit to the jury as a part of the issues in the case as the damages which they had sustained; further, there was no showing that the plaintiffs had been damaged, and nothing upon which the jury could measure any damage, and specifically on

the grounds that the measure of damages was the difference in the value of the premises as represented as compared with the value of the premises as they actually were and considering the rent they were receiving. Plaintiffs' attorneys then informed the court that they were in the middle of a lawsuit, and further offered to prove by several witnesses the allegations of the plaintiffs' petition, that is, the representations and fraud alleged to have been practiced by the defendants and the gross monthly income of the property as compared to the gross monthly income of the property actually proved to be.

The trial court sustained the defendants' motion as heretofore related, and discharged the jury. The plaintiffs filed motion for new trial which was overruled, and from which judgment they appeal.

For convenience, the appellants will be referred to as the plaintiffs and the appellees as the defendants.

This court, in Dill v. Farmers Co-operative Co., 132 Neb. 256, 271 N. W. 692, held: "Where the facts stated in a petition show that plaintiff is entitled to damages of some sort, it is not a fatal error that the pleader has mistaken the rule by which such damages should be measured." See, also, Kraft v. Rice, 45 App. Div. (N. Y.) 569, 61 N. Y. Supp. 368; Colrick v. Swinburne, 105 N. Y. 503, 12 N. E. 427; 1 Bancroft, Code Pleading, § 164, p. 281.

This jurisdiction adheres to what is known as the "benefit-of-the-bargain" rule, that is, that the measure of general damages for fraud in inducing the purchase of property is the difference between the actual value of the property at the time of the purchase and the value it would have had if the seller's representation had been true. See, Young v. Filley, 19 Neb. 543, 26 N. W. 256; Smith v. Leu, 110 Neb. 297, 193 N. W. 703; Rankin v. Bigger, 128 Neb. 800, 260 N. W. 202; Welch v. Reeves, 142 Neb. 171, 5 N. W. 2d 275; Falkner v. Sacks Bros., 149 Neb. 121, 30 N. W. 2d 572.

It is apparent from the plaintiffs' petition in this ac-

tion that a cause of action has been stated, although it may be that the measure of damages as contained therein is not the proper measure of damages. It is also apparent that the trial court, as shown by the record, did not give the plaintiffs an opportunity to amend their pleadings or proceed further with the case. We are unable at this juncture of the case to determine what the plaintiffs might have done with reference to amending their pleadings, or what further evidence they might have introduced with reference to the proper measure of damages prior to resting their case.

"As a general rule, a motion for a nonsuit or dismissal will be granted where the pleadings fail to state a cause of action if the defects are such that they cannot be amended by subsequent proceedings. Dismissals or nonsuits, however, should not be ordered without giving the party offering the defective pleadings an opportunity to amend." 17 Am. Jur., Dismissal and Discontinuance, § 52, p. 86, and decisions under note 2. See, also, 18 C. J., Dismissal and Nonsuit, § 104, pp. 1187, 1188, and cases cited under notes 64 and 66; 27 C. J. S., Dismissal and Nonsuit, § 64, pp. 226, 227, and cases cited under notes 48 and 49.

For the reasons herein given, we conclude that the judgment of the trial court should be reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

GEORGE RIEDEL, APPELLEE, V. SMITH BAKING CO., A CORPORATION, ET AL., APPELLANTS.
33 N. W. 2d 287

Filed July 7, 1948. No. 32457.

1. **Workmen's Compensation.** When a judge of the Workmen's Compensation Court, pursuant to section 48-178, R. S. 1943, makes and enters a judgment which he is authorized by law to make, such judgment shall be conclusive on all parties at

interest, when no appeal is taken therefrom as provided by section 48-170, R. S. 1943, except as otherwise provided for by statute.

2. ———. The statute, section 48-141, R. S. 1943, authorizing a decrease or increase on the ground of incapacity due solely to the injury, limits the basis for the modification to that increase or decrease of incapacity which is due solely and only to that violence to the physical structure of the body which resulted from the accident, and which increase or decrease has occurred since the award was rendered.

3. ———. Upon an application to modify an award under the workmen's compensation statutes, the burden of proof rests upon the petitioner to establish by a preponderance of the evidence that the disability has increased, decreased, or terminated as alleged.

4. ———. The pleadings and evidence have been reviewed and it is held that there has not been an increase of plaintiff's incapacity due solely to his injury arising since the award of compensation was rendered, which plaintiff seeks to modify.

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

Cline, Williams & Wright, for appellants.

Chauncey E. Barney and *Lester L. Dunn,* for appellee.

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

MESSMORE, J.

This is a workmen's compensation case. The plaintiff, while in the employ of a baking company on September 21, 1941, received personal injuries arising out of and in the course of his employment when his left arm was caught in an automatic proofing machine which he was operating at the time. When he was released from the machine he suffered pain in his left arm and neck and felt dizzy, but was not unconscious. At that time he informed the doctor that he had pain in his back which appeared to be in the right side and in the middle thereof. He was taken to a hospital and his left arm was amputated about six inches below his

shoulder. A few days later he told the doctor he had a rupture. He was operated on for this condition.

On January 13, 1942, the plaintiff instituted an action in the Nebraska Workmen's Compensation Court, and on January 28, 1942, filed an amended petition therein. The amended petition alleged in substance that as a direct and proximate result of the accident the plaintiff sustained injuries to his left arm, requiring amputation of the same above the elbow, and a double hernia involving an extensive tearing and disarrangement of plaintiff's abdominal muscles and other internal and bodily injuries; that plaintiff was conveyed to a hospital and there attended by physicians, submitting to the amputation of his left arm and to an operation for the purpose of repairing a double hernia; that plaintiff was paid compensation by defendants at the rate of $15 per week for the period from September 22, 1941, to November 9, 1941, inclusive, a period of seven weeks; that the loss of the plaintiff's left arm and the general weakness and loss of use of the plaintiff's abdominal muscles occasioned by the double hernia and other internal bodily injuries sustained by the plaintiff resulted in the total and permanent disability of the plaintiff; further, that plaintiff was skilled in his trade as a baker and as a result of the injuries sustained will always continue to be unable to obtain employment in his trade and in any other trade or profession for which he would be otherwise fitted except for said injuries; and prayed that the plaintiff be awarded compensation for permanent total disability as provided by law, plus all hospital and medical expenses and other and further benefits as provided by law.

The evidence given by the plaintiff at the hearing detailed the accident and injuries received, and was to the effect: That since the accident the plaintiff was unable to work or lift, and was told by the attending doctor not to lift. He was unable to stand on his feet or walk for any period of time, and was forced to sit

down on account of his back. The bakery trade in which he was skilled required him to use his hands and to be on his feet most of the time, and he would be unable to carry on that occupation.

The award, entered February 11, 1942, by a judge of the Nebraska Workmen's Compensation Court, allowed the plaintiff $15 per week for a period of seven weeks from and after September 21, 1941, ending November 10, 1941, on account of temporary total disability; allowed the plaintiff the sum of $15 each week for a period of 225 weeks from and after November 10, 1941, on account of total and permanent loss of the use and function of his left arm; and found that the medical and surgical attention furnished the plaintiff, and all hospitalization furnished had been paid by defendants. There was no appeal taken from this award. On March 9, 1946, the plaintiff acknowledged receipt of all payments as provided for by the award, as shown by exhibit 6.

On June 15, 1946, the plaintiff filed a petition in the Nebraska Workmen's Compensation Court setting forth the accident of September 21, 1941, the previous litigation, and the award rendered; further alleged that the plaintiff was still totally disabled and as a result of the injuries sustained, as pleaded in paragraph 4 of the petition, in substance as follows: That as a direct and proximate result of said accident the plaintiff sustained injuries to his left arm, requiring amputation of the same above the elbow, and a double hernia involving an extensive tearing and disarrangement of the plaintiff's abdominal muscles, and other internal and bodily injuries; and alleged in paragraph 5 of the petition, "* * * that plaintiff is still totally disabled and as a result of the injuries sustained as aforesaid plaintiff is now totally and permanently disabled; that plaintiff has incurred hospital and medical expense as a result of the injuries and disabilities and will continue to require hospital and medical expenses"; that de-

fendants refuse to pay further compensation benefits; and plaintiff prayed that he be awarded compensation for total and permanent disability as provided by law, plus hospital and medical benefits, and such other and further benefits as provided by law.

On June 25, 1946, defendants filed an answer to the petition, admitting the allegation relating to the previous litigation and award, and that the award had been paid in full; alleged that the plaintiff had been paid all the compensation and furnished all the benefits to which he was entitled under the Nebraska Workmen's Compensation Act on account of the accident of September 21, 1941; denied that the plaintiff was suffering from any disability due and traceable to the accident of September 21, 1941, other than that for which an award of compensation was made by a judge of the Nebraska Workmen's Compensation Court on February 11, 1942; and alleged that any disability from which the plaintiff was suffering was due to causes in no way connected with the employment by the baking company.

The cause was tried by a judge of the Nebraska Workmen's Compensation Court on November 1, 1946. On November 6, 1946, the judge of the compensation court dismissed the plaintiff's cause of action for the reason that the evidence adduced at the hearing was insufficient to sustain the plaintiff's contention that he was totally disabled as a result of the accident and injuries, and that plaintiff's present disability, other than the loss of his left arm, was due to natural causes and advanced years and was not affected or due to the accident and injury, as alleged in plaintiff's petition.

On November 13, 1946, the plaintiff filed an application for rehearing before the Workmen's Compensation Court based on the following grounds: (1) That the evidence offered by plaintiff showed that plaintiff had never been able to work on any productive work since the accident; (2) that plaintiff had developed a total and permanent disability as a result of the accident

and injury which at the time of the award of February 11, 1942, was thought only to consist of the double hernia and loss of hand and arm; (3) that the plaintiff had developed a total permanent disability which at the time of the award of February 11, 1942, was unforeseen and undiscernible; and (4) that the accident and injuries sustained have now culminated into total and permanent disability.

Plaintiff filed an amended petition, setting forth that at the time of the hearing before the first judge of the Nebraska Workmen's Compensation Court on or about February 10, 1942, it was thought and expected that the plaintiff would fully recover except for the loss of the plaintiff's left arm and hand; that plaintiff's disability has now developed and culminated into a total and permanent disability; and prayed compensation for total and permanent disability.

The defendants' answer to the amended petition admitted the award entered by a judge of the compensation court on or about February 11, 1942; that the same had been paid in full; admitted the defendants refused to pay additional compensation; alleged that the plaintiff had been paid all of the compensation and benefits he was entitled to under the Nebraska Workmen's Compensation Act; denied the plaintiff's disability, if any, was due and traceable to the accident of September 21, 1941; alleged any disability from which the plaintiff was suffering was due to causes in no way connected with the plaintiff's employment with the baking company; and alleged further that the plaintiff's cause was barred by operation of law, since no suit was filed within one year from the alleged accrual of the alleged cause of action for modification of the award.

The three judges of the Nebraska Workmen's Compensation Court on December 19, 1946, entered a dismissal on rehearing and made the following findings: (1) That the plaintiff testified that on September 21,

1941, he suffered injuries to his back and arm and sustained a double hernia; (2) that those complaints were made at all times; (3) that the award entered by a judge of the Workmen's Compensation Court on February 11, 1942, was not appealed from, became final, and has been fully complied with; (4) that the evidence adduced was insufficient to sustain the finding that the plaintiff's alleged development and culmination of disability into total disability was the result of his accidental injury sustained in the course of his employment by the defendants; (5) that the plaintiff's present disability, other than the loss of his left arm, is due to natural causes and advanced age and is not in any way connected with an accidental injury in the course of his employment; and (6) that the order of dismissal entered by the compensation judge on November 6, 1946, should be sustained.

On December 31, 1946, the plaintiff filed a petition on appeal in the district court for Lancaster County, alleging that the dismissal on rehearing by the compensation court was contrary to the evidence and the law, and that the findings of fact were not supported by the record and did not support the order of dismissal. Defendants' answer was substantially similar to the answer to plaintiff's amended petition in the Nebraska Workmen's Compensation Court. Trial was had in the district court on July 16, 1947. The court entered a decree reversing the dismissal on rehearing, and after setting forth the facts of the original injury on September 21, 1941, the original award of compensation for the loss of the arm, and the payment of that award, made the following findings, in substance: That as a result of the accident and injury sustained by plaintiff while in the employment of the baking company, plaintiff's disability developed and culminated into a total and permanent disability, which disability at the time of the hearing on or about February 10, 1942, and the award of February 11, 1942, was unforeseen and undis-

cernible; that at said time it was thought the plaintiff would fully recover, except for the loss of plaintiff's left arm and hand; that plaintiff was totally and permanently disabled and the dismissal on rehearing made and entered by the Nebraska Workmen's Compensation Court on December 19, 1946, should be reversed and set aside and compensation benefits should be allowed to the plaintiff for total and permanent disability; that plaintiff's claim was not barred by the statute; and, further, that the plaintiff was entitled to compensation for total and permanent disability in the amount of $15 per week for a period of 68 weeks from and after March 10, 1946, and $10 per week thereafter for the remainder of the life of the plaintiff.

Motion for new trial was overruled on February 24, 1948, and defendants have perfected appeal to this court.

The record disclosed that at the time of the hearing in the trial court the plaintiff was 70 years of age. He testified in detail with reference to the accident and the injuries sustained; that he had pains at the present time in his back and in the middle thereof; and that he informed the doctor of a pain on the right side of his back. He further testified that he has not been able to work because of the trouble in his back, the hernia that he received at the time of the accident, and the loss of his left arm; that this has been true since the time of the accident; that he informed the judge of the Workmen's Compensation Court on the first hearing that due to the hernia and loss of the arm and the pain in his back he would not be able to work any more; that he knew this to be true since the accident; and that he has had such complaints since the time of the accident.

The attending physician who made an examination of the plaintiff shortly after the accident on September 21, 1941, testified in substance that the examination showed a mangled arm to and including the elbow, and a right

abdominal rupture; there was no other trouble that was disclosed at the time except the patient was in extreme shock and had naturally lost considerable blood. The doctor amputated the plaintiff's left arm immediately, and a few days thereafter when his condition would warrant, repaired the abdominal rupture. The patient had both a direct and indirect hernia as a result of severe strain, for which he was operated on. "* * * the strain pushed the gut through the canal and at the same time ruptured the muscles of the belly." This condition was repaired. There was no other difficulty at the time. The patient complained of the pain in the back, but nothing was discovered with reference thereto. Some seven months later the patient began to pass blood in the urine and was having severe pains. He was then taken to the hospital, examined by an urologist, and a small stone had come loose and stuck in the ureter, which was removed, resulting in a good recovery and restoring the kidney to normal function. The condition of the stone in no manner related itself to the injury sustained in the accident. The doctor believed the patient had as much pain from muscular strain of the lumbar muscle of the back, because of extreme exertion when the plaintiff endeavored to extricate himself from the machine he was operating, as from the stone. The strain of the muscles was connected with the injury, due to the fact that the plaintiff was exerting every ounce of effort to extricate himself from the machine, to the extent that he had a rupture of his "belly" muscles, which would strain the muscles in the back, to which the doctor attributed his pain. Since the injury the doctor has seen the plaintiff at intervals and at all times the plaintiff complained of injury to his back which the doctor felt was a chronically strained muscle.

With reference to his condition at the time of the hearing, the doctor testified in substance that the plaintiff was totally disabled; that he had suffered a serious injury that would be expected to disable a man of the

plaintiff's age, especially a laboring man making a living by his arms; that the loss of an arm would upset him psychically as well; and that plaintiff was of an age where he could not rehabilitate himself, which would result in a psychical effect which was attributable to the accident and injury. The abdomen had healed and disclosed a good result from operating work.

Before the hearing of February 10, 1942, the doctor considered the plaintiff had recovered insofar as his treatment was concerned. It was following this treatment that he passed blood in the urine. The complaints made by the plaintiff when the doctor did see him were the loss of the arm, the difficulty with the hernia, and the strain and difficulty in the back. There was no infection in his body. With the exception of the kidney stone development, there had been no change since February 10, 1942, except that the doctor felt the patient was suffering from a psychic effect from the injury and loss of his arm which has been present at all times, and he has never been able to work since the accident. The psychic effect is mental, the accident and injury having impressed him more than it would a man who was making his living in other methods. He is honest about his psychic effect, knowing that he required two hands in the work that he was doing. When the plaintiff was discharged the doctor did not think he could go back to work, but did feel that he might do some type of work that a man with one hand could do, and that the plaintiff always claimed when the doctor saw him that his back hurt so that he could not work. The doctor expressed an opinion that he did not know whether he had tried to work or not, and that he could not do the work that he had been doing.

The plaintiff testified further that he was unable to work; that he had an opportunity at one time to obtain employment but due to the fact that he could not lift or stand on his feet for any period of time could not take such employment, and in his trade he would by necessity

be compelled to use both hands and to be on his feet.

There is other testimony as to the plaintiff's nervousness and complaint of pain in his back that has continued since the time of the accident and injuries he received. There are letters appearing in the record from the attending physician to counsel representing the plaintiff, showing that the plaintiff would be unable to carry on remunerative work; that there would be no possibility of him regaining his strength; that his complaints are general weakness, pain in the right flank, and lower right abdomen; that he is permanently and totally disabled, and no possibility of improvement to the point where he could carry on remunerative work; and that he will never be able to carry on productive work.

The foregoing constitutes a résumé of the relevant and material evidence adduced at the hearing.

The plaintiff contends that the increased disability shown by the evidence is that he is presently suffering from extreme pain as a result of the chronically strained lumbar muscles and a psychic condition as a result of the fixed impression made upon his mind by loss of his arm, these combined with a consideration of his advanced age make him at the present time totally and permanently disabled. Under this state of the record it stands then undenied that the plaintiff is presently, permanently and totally disabled when, after the accident of September 21, 1941, he was found to have suffered no permanent injury other than the loss of his arm. Therefore, the only fair conclusion is that either the disability has developed since the first hearing, or that it was latent and undiscovered at that time; that the neurotic psychic condition which has been induced by the loss of the arm was an unforeseen result of the loss, leaving the patient with a deep-seated fixation of his inability to work; further, that his testimony stands undenied and unrefuted to the effect he has severe pain in his back at all times. He is unable to lift anything or to sit for

any considerable period, but must walk to ease the nervous tension caused by the pain.

With the foregoing in mind, we proceed to the alleged errors that are pertinent, as contended for by the appellants.

Appellants contend that by comparison of the pleadings filed by the appellee in the litigation in 1942 with the pleadings in the present litigation, it becomes apparent that the claims of the appellee are the same in each case; that awards of the compensation court are final unless modified in the manner provided by statute.

Section 48-178, R. S. 1943, provides for hearings, judgment, and when conclusive. The part pertinent to the instant case is as follows: "When proceedings are had before a judge of the court, his findings, orders, awards, and judgments shall be conclusive upon all parties at interest unless reversed or modified upon appeal as hereinafter provided."

In Gilmore v. State, 146 Neb. 647, 20 N. W. 2d 918, this court held that where there had been a hearing on the merits before a judge of the Workmen's Compensation Court in a proceeding properly brought and an award entered, such an award was a final order and, where not legally appealed from, constituted an absolute bar to a subsequent suit based upon the same cause of action. Such an award cannot be litigated in a subsequent action between the same parties or their privies, except as otherwise provided for by statute. See, also, Gray v. Burdin, 125 Neb. 547, 250 N. W. 907.

The award entered by a judge of the Workmen's Compensation Court in the first hearing, under the authority of this court, is final and conclusive on the parties unless the appellee can establish facts sufficient to bring the case under the provisions of section 48-141, R. S. 1943, which provides, as far as necessary here to relate: "All amounts paid by an employer or by an insurance company carrying such risk, as the case may be, and received by the employee or his dependents, by lump sum pay-

ments, shall be final, but the amount of any agreement or award payable periodically for six months or more may be modified as follows: (a) At any time by agreement of the parties with the approval of the compensation court; or (b) if the parties cannot agree, then at any time after six months from the date of the agreement or award, an application may be made by either party on the ground of increase or decrease of incapacity due solely to the injury * * *."

The incapacity therefore into which the courts may inquire and use as a basis for a modification of award is that increase or decrease of incapacity which is due solely and only to that violence of the physical structure of the plaintiff's body which resulted from his accident, and which increase or decrease has occurred since the award was rendered. See Ludwickson v. Central States Electric Co., 142 Neb. 308, 6 N. W. 2d 65.

It is incumbent under the authorities above cited, that the appellee must prove by a preponderance of the evidence that his incapacity has been increased (meaning amplified, enlarged, expanded, extended or intensified. Webster's New International Dictionary); that is, that there now exists a material and substantial change for the worse in the plaintiff's condition, - a change in circumstances that justifies a modification, distinct and different from that for which an adjudication has been previously made. See Kucera v. Village of Prague, 141 Neb. 180, 3 N. W. 2d 201. See, also, Huff v. Omaha Cold Storage Co., 136 Neb. 907, 287 N. W. 764; Metropolitan Dining Room v. Jensen, 126 Neb. 765, 254 N. W. 405.

Applying the principle of law announced in the foregoing authorities, the question presented is whether or not the evidence offered by the appellee does establish an increase of incapacity, and whether or not there has been a substantial change subsequent to the award entered in the first hearing.

From an analysis of the evidence as heretofore set forth and the findings of the judges of the Nebraska

Workmen's Compensation Court, it was determined in the first hearing before said court that the plaintiff's temporary total disability terminated on November 10, 1941, and the only permanent disability resulting on account of the accident was the loss of his left arm. He had testified at the first hearing that he could not work, or lift, or engage in the occupation of a baker, and was totally and permanently disabled. Upon a review of the pleadings and evidence, we find that there has not been an increase of plaintiff's incapacity due solely to his injury, arising since the award of compensation was rendered which the plaintiff seeks to modify.

We therefore reverse the judgment of the trial court and dismiss the plaintiff's action.

REVERSED AND DISMISSED.

GEORGE FLOYD, ADMINISTRATOR OF THE ESTATE OF ARTHUR FLOYD, DECEASED, APPELLANT, V. FLOYD EDWARDS, APPELLEE.

33 N. W. 2d 555

Filed July 7, 1948. No. 32405.

1. **Negligence.** Where contributory negligence is pleaded as a defense but there is no evidence to support such defense, it is prejudicial error to submit such issue to the jury.
2. **Automobiles: Negligence.** As a general rule, it is negligence, as a matter of law, for a motorist to drive an automobile so fast on a highway at night that he cannot stop in time to avoid collision with an object within the area lighted by his lamps, but there are well-established exceptions thereto, dependent upon the nature or condition of the object in relation to conditions on or adjacent to the highway adversely affecting immediate visibility of the object.

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

Hubka & Hubka, for appellant.

Jack, Vette & Elliott, for appellee.

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

CHAPPELL, J.

This action was brought to recover damages for the death of Arthur Floyd, a pedestrian in the street, who lost his life when struck by defendant's family car, driven by his son. The jury returned a verdict for defendant, upon which judgment was entered. Plaintiff's motion for new trial was overruled, and he appealed, assigning that the trial court: (1) Erred in submitting the issue of contributory negligence to the jury; (2) erred in overruling plaintiff's motion at the close of the trial to withdraw the question of negligence from the jury and submit only the question of the amount of plaintiff's damages; (3) erred in refusing to give plaintiff's requested instructions No. 3 or 4; and (4) the verdict was contrary to the law and the evidence. We sustain plaintiff's first assignment of error, reverse the judgment, and remand the cause for a new trial.

Disposition of the fourth assignment follows naturally as a corollary of our conclusions with reference to assignments 1 and 2. Therefore, it will not require separate discussion. Hereinafter, Arthur Floyd will be generally referred to as the deceased and defendant's son as the driver.

We turn first to the relevant evidence as a primary basis for our conclusions, under well-recognized rules of applicable law hereafter discussed.

Concededly, the car involved was the family car of defendant, which, at the time in question was being driven by his son with defendant's permission. The evidence discloses that the accident happened between Twentieth and Twenty-first on East Court Street, a black-topped highway, 41 feet 10 inches wide, extending east and west in Beatrice. The street was also designated as Highway 3 and 4. There were no sidewalks on either side of the street from Nineteenth east, and it was

customary for pedestrians to walk in the street. Deceased, during his lifetime, lived one block east and one south of Twenty-first and East Court, and he was in the habit of walking home nights. In reporting to the police after the accident, the driver said in part that he "Did not see pedestrian walking in lane of traffic."

At the time of the accident on August 17, 1945, the street was dry, and the night was dark with some clouds. There was evidence that it looked like a storm was coming, with lightning flashes in the east. There was a one-bulb street light at the intersection of Twentieth Street, and also at Twenty-first Street. The latter was on the northwest corner, where a tree taller than the light pole shut off or shaded away the effect of the light to the west on the street.

In that regard, a police officer testified: "Q On this night with the aid of these street lights, even if there had been no other light, with the aid of these street lights in the vicinity where this accident happened you could see an object? A My experience in driving out that way every night, six or seven, maybe a half dozen times a night, is that it is awfully hard to see anybody from 19th clear to 26th."

A witness who drove out East Court Street while the body was still in the street, testified: "Q Well, did that tree have any effect on the light? A I think so, that is, when I drove past, if the tree wasn't in the road, a fellow could see the body more plainly there. Q You had difficulty seeing the body? A Yes, if I hadn't seen the flashlight. Q You wouldn't have seen it at all? A Probably not."

The county attorney who came upon the scene testified: "Q I asked you whether it would be possible that night, I mean from these street lights where this accident happened, even if there hadn't been any light from his car for any distance, for a person to see a man dressed exactly as Floyd was, in your judgment?

A If he was in the area of the lights, I would say yes. * * * Q As a matter of fact, even without any headlights at that point, if a person was looking down the street, the person could see with just the aid of the street lights? A I would say, if within the area cast by the street light, one should be able to see somebody."

There was a house on the northwest corner of Twenty-first Street, and another next west of it. The accident happened in front of the latter, at a point varying in the evidence as from 125 to 200 feet west of the Twenty-first Street intersection.

At about 11:30 p. m., the driver, a boy 18 years of age, on leave from naval service, and driving his father's car, proceeded east on the street involved, toward his home in Crab Orchard. A girl friend was with him. Concededly, they had not been drinking any intoxicating liquor. The car was in good mechanical condition. There is evidence that the driver had both hands on the steering wheel and that he was driving on the right side of the highway from 20 to 30 miles an hour, within the legal limits as provided by the ordinances of the city of Beatrice. His lights were on dim for city driving, and so adjusted as to make the highway visible from 50 to 75 feet ahead.

The driver testified that he was looking down the road when just instantly he saw a pedestrian two feet in front of his car. There was a crash. The driver immediately applied his brakes. They did not slide, screech, or leave skid marks. The person struck, dressed in dark blue overalls, dark blue jacket, and dark cap, rolled off the left fender to the pavement, and the car stopped. It did not swerve. The driver says that he stopped within two car lengths, and when he opened the door, the body was in the street by the side of his car. There was evidence that the girl got out of the car, after which the driver made a U-turn, then parked on the other side of the street facing west, and came

back, where the body of deceased lay in the street.

There was other evidence that after the body rolled off into the street the driver went on east without stopping, until in or almost in the intersection, when he stopped momentarily, then turned around and came back. The left front headlight and left windshield were broken. The glass therefrom lay south of the center of the street 30 or 40 feet west of the place where deceased rolled off and lay in the street. There were three disinterested witnesses who heard the crash, saw the car, and observed either its speed or movements at or after the accident, but none saw deceased in the street prior to the accident.

After the accident, the body lay in the street, head to the northeast, feet southwest, concededly south of the center of the street. The exact distance was in dispute, and varied from close to the center to several feet south. He was still living, but unconscious and breathing heavily. His death occurred a short time after an ambulance removed him to a hospital.

The driver testified that after the accident: "I noticed a slight alcoholic odor. * * * I didn't make any examination, only I did just catch an aroma. * * * I caught the odor." However, he did not know whether the odor came from the breath or body of the injured man, or where it came from.

A taxicab driver testified that she saw deceased sometime between 10 and 11 p. m. walk out and stand behind a car between Fourth and Fifth Streets. She said he "looked like he was just getting ready to cross the street. * * * I said 'Hello, Art,' and he said hello." She did not stop to talk to him or anything. She was asked: "Q Did he look like he had been drinking? A I thought he did. * * * Q All you did is you walked by him, said hello, he walked out, stood there on the paving, yet you want to tell the jury he was drunk? A No, I thought he had been drinking." She didn't "smell anything," "didn't see him drink anything," or

"wobble or anything," and she could not "tell anything from his talk."

Concededly, when the body got to the undertaking parlors, his clothes were removed and a flat, broken, pint-size, ordinary-type whisky bottle was found therein, and there was the odor of liquor from saturation of his clothes. Whether or not the bottle was still sealed or had been previously opened, and whether or not deceased ever consumed anything from the bottle or drank any liquor prior to the accident, was not shown. The undertaker and county attorney both testified that there was no odor of acoholic liquor on the body, but that it was from his clothes. The persons who saw deceased while he was still living and breathing heavily had no recollection of smelling liquor upon his breath.

In rebuttal, a friend and chum of deceased testified that he saw him about 20 minutes before the accident, at which time deceased was normal. He testified that he never knew of him drinking whisky, and that deceased was absolutely not intoxicated. Members of the family of deceased testified that they never saw or heard of him drinking whisky.

In the situation aforesaid, the trial court submitted to the jury the question of whether or not deceased was intoxicated as a circumstance for their consideration in determining whether or not he was guilty of contributory negligence proximately causing the accident.

In that connection, we conclude that there was no competent evidence adduced which could possibly sustain any finding that deceased was intoxicated or guilty of any contributory negligence. There was no presumption that deceased was guilty of contributory negligence. Rather, under the circumstances presented, the presumption was otherwise. Pedestrians have the right to use a public street at any time of the day or night. They have a legal right to travel or stand momentarily in the street, and the mere fact that one does so does not render him guilty of contributory negligence

as a matter of law. It is generally recognized that in the absence of restrictive applicable statutes or ordinances, a pedestrian has a right to walk longitudinally in a street or highway, and is not as a matter of law guilty of contributory negligence in doing so. A person walking in the streets or highways is bound to use ordinary care to discover approaching motor vehicles, and a failure to do so is negligence, but he is not, as a matter of law, negligent in failing to turn about constantly and repeatedly to observe the possible approach of vehicles from behind him, especially where there is ample room for a vehicle to pass him. Pedestrians lawfully upon a street or highway may ordinarily rely upon the reasonable care of automobile drivers, and it is not negligence as a matter of law in failing to anticipate a driver's negligence. Cotten v. Stolley, 124 Neb. 855, 248 N. W. 384; Brenning v. Remington, 136 Neb. 883, 287 N. W. 776; and Johnson v. Anoka-Butte Lumber Co., 141 Neb. 851, 5 N. W. 2d 114.

We conclude that since the alleged intoxication and contributory negligence of deceased was without any competent factual support in the evidence, the issues should not have been submitted to the jury and the trial court erred in doing so. In that regard, this court has recently held that: "Where contributory negligence is pleaded as a defense, but there is no evidence to support such defense, it is prejudicial error to submit such issue to the jury." Allen v. Clark, 148 Neb. 627, 28 N. W. 2d 439. See, also, Johnson v. Anoka-Butte Lumber Co., *supra*.

We turn then to the question of whether or not defendant was negligent as a matter of law, as argued by plaintiff. We conclude that he was not. Plaintiff, as reflected both in his petition and proferred instructions Nos. 3 and 4, which the trial court refused, relied primarily upon the rule, established in Roth v. Blomquist, 117 Neb. 444, 220 N. W. 572, 58 A. L. R. 1473, wherein it was held: "As a general rule it is negligence as a matter of law for a motorist to drive an automobile so

fast on a highway at night that he cannot stop in time to avoid a collision with an object within the area lighted by his lamps."

However, there are well-established exceptions to the rule, dependent upon the nature or condition of the object in relation to conditions on or adjacent to the highway adversely affecting immediate visibility of the object. Their nature is discussed at length in the recent opinion of Buresh v. George, 149 Neb. 340, 31 N. W. 2d 106. We need not discuss at length or repeat them here.

It is sufficient to say that the factual circumstances heretofore recited bring the case at bar squarely within such exceptions, which required submission of the issues of the driver's alleged negligence to the jury for its determination, as was done by the trial court in its instructions.

By analogy, the foregoing discussion adversely disposes of plaintiff's contention that the trial court erred in its refusal to give his requested instructions Nos. 3 and 4, which makes it unnecessary to further discuss plaintiff's third assignment of error, except to say that the trial court in instructions Nos. 9 and 10 gave as much thereof as was applicable under the circumstances.

For the reasons heretofore stated, the judgment of the trial court should be and hereby is reversed, and the cause is remanded for a new trial.

REVERSED AND REMANDED.

BERNARD J. FOLEY, AN INDIVIDUAL DOING BUSINESS AS B. J. FOLEY BROKERAGE COMPANY, APPELLANT, V. W. A. WESCOTT, FIRST AND REAL NAME UNKNOWN, AN INDIVIDUAL DOING BUSINESS AS WESCOTT WATER SOFTENER COMPANY, REVIVED IN ORDER TO PROCEED IN NAME OF SYBIL WESCOTT, ADMINISTRATRIX OF ESTATE OF W. A. WESCOTT, DECEASED, APPELLEE.

33 N. W. 2d 165

Filed July 7, 1948. No. 32402.

Trial: Appeal and Error. Where, pursuant to the provisions of section 25-1145, R. S. 1943, a new trial is sought by means of a petition filed after the term at which the judgment or decree was rendered, and the petition stands denied, the petitioner is required to adduce the evidence at the former trial, when material, as well as the newly discovered evidence or other ground alleged therefor, and both must be preserved in a bill of exceptions in order to entitle the unsuccessful party to a review of such proceedings in this court.

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

Cloid J. Wilson and *Louis B. Finkelstein,* for appellant.

Davis, Stubbs & Healey, for appellee.

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

WENKE, J.

This is an appeal taken from an order of the district court for Lancaster County denying and dismissing the appellant's petition for a new trial. The petition was filed pursuant to the provisions of section 25-1145, R. S. 1943, and is based on the ground of newly discovered evidence.

It should be mentioned that the appellee died while this appeal was pending and the action was revived in the name of the administratrix of his estate.

Section 25-1145, R. S. 1943, provides as follows: "Where the grounds for a new trial could not, with

reasonable diligence, have been discovered before, but are discovered after the term at which the verdict, report of referee or decision was rendered or made, the application may be made by petition filed as in other cases; on which a summons shall issue, be returnable and served, or publication made, as prescribed in section 25-519. The facts stated in the petition shall be considered as denied without answer, and if the service shall be complete in vacation, the case shall be heard and summarily decided at the ensuing term. The case shall be placed on the trial docket, and the witnesses shall be examined in open court, or their depositions taken as in other cases, but no such petition shall be filed more than one year after the final judgment was rendered."

It will be observed that the statute provides: "The facts stated in the petition shall be considered as denied without answer, * * *. The case shall be placed on the trial docket, and the witnesses shall be examined in open court, or their depositions taken as in other cases, * * *."

While a bill of exceptions accompanies the record which contains the evidence adduced at the original trial held on October 9 and 10, 1946, from which no appeal was taken after the appellant's motion and additional motion for new trial filed therein were overruled on July 19, 1947, and the affidavits of Milo L. Thompson and Bernard J. Foley in support of the petition, it does not show that this evidence was offered and received as such at the time of the hearing on the petition for a new trial. In fact, the record shows that no evidence was offered in support of the petition for a new trial at the time of the hearing thereon. That the statute so requires is clearly evident from its language and we have said, in a case involving the procedure thereunder, that: "The litigant moving for the new trial should introduce the evidence adduced during the former trial as well as the newly discovered evidence.

Omaha, N. & B. H. R. Co. v. O'Donnell, 24 Neb. 753." Clemont v. Cudahy Packing Co., 90 Neb. 449, 133 N. W. 842. See, also, Western Gravel Co. v. Gauer, 48 Neb. 246, 67 N. W. 150.

Where, pursuant to the provisions of section 25-1145, R. S. 1943, a new trial is sought by means of a petition filed after the term at which the judgment or decree was rendered, and the petition stands denied, the petitioner is required to adduce the evidence at the former trial, when material, as well as the newly discovered evidence or other ground alleged therefor, and both must be preserved in a bill of exceptions in order to entitle the unsuccessful party to a review of such proceedings in this court.

Since, under the statute, the petition stood denied and there is no record of any evidence offered in support thereof, the judgment of the lower court denying the appellant the relief asked must be affirmed.

AFFIRMED.

THOMAS R. P. STOCKER, APPELLEE, V. FRANK WELLS ET AL., APPELLANTS.
33 N. W. 2d 445

Filed July 16, 1948. No. 32384.

1. **Equity.** The relief ordinarily granted in equity is such as the nature of the case, the law, and the facts demand, not at the beginning of the litigation, but at the time the decree is entered.
2. **Waters.** It is the duty of those who build structures across natural drainways to provide for the natural passage through such obstruction of all waters which may be reasonably anticipated to drain there. This is a continuing duty.
3. ———. A stream which is accustomed to extend itself beyond its banks in times of high water and to flow over the adjacent

lands in its flood plane in a broader stream, retains its character as a live stream, and the law relating to floodwaters applies.

4. ———. The flood channel must be considered as a part of the channel of the stream and no structures or other obstructions can be placed in its bed which will have a tendency to dam the water back upon the property of upper riparian or adjacent owners.

5. ———. The owners or proprietors of lands bordering upon either the normal or flood channels of a natural watercourse are entitled to have its water, whether within its banks or in its flood channel, run as it is wont to run according to natural drainage, and no one has the lawful right by diversions or obstructions to interfere with its accustomed flow to the damage of another.

6. **Injunction: Waters.** Injunction is a proper remedy to prevent recurring damages to crops or continuing injury to lands by water unlawfully diverted from a natural watercourse over or upon lands of adjacent or adjoining proprietors.

7. ———: ———. Where a person constructs a dam or dike that diverts floodwater from its natural flood plane where it was wont to flow in its natural state for many years before the construction of the obstruction, injunction affords the proper remedy to relieve from the continuing damage from recurring floods which are certain to occur in the future and which are the proximate result of the dam or dike construction.

APPEAL from the district court for Nemaha County: THOMAS E. DUNBAR, JUDGE. *Affirmed in part; reversed in part; and remanded with directions.*

Ferneau & Ferneau, Lee Kelligar, John C. Mullen, and *Gerald M. Mullen,* for appellants.

Kennedy, Holland, DeLacy & Svoboda, Armstrong & McKnight, and *T. R. P. Stocker,* pro se, for appellee.

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

SIMMONS, C. J.

In this action plaintiff sought and secured a mandatory injunction requiring the defendants to remove certain dikes upon their premises, and enjoining them from constructing, keeping, maintaining, repairing, or erecting any dike or dikes that would impede the natural flood-

waters of the Nemaha River. We reverse and dismiss as to the defendants Lehr, and affirm in part and reverse and remand in part as to the defendants Wells.

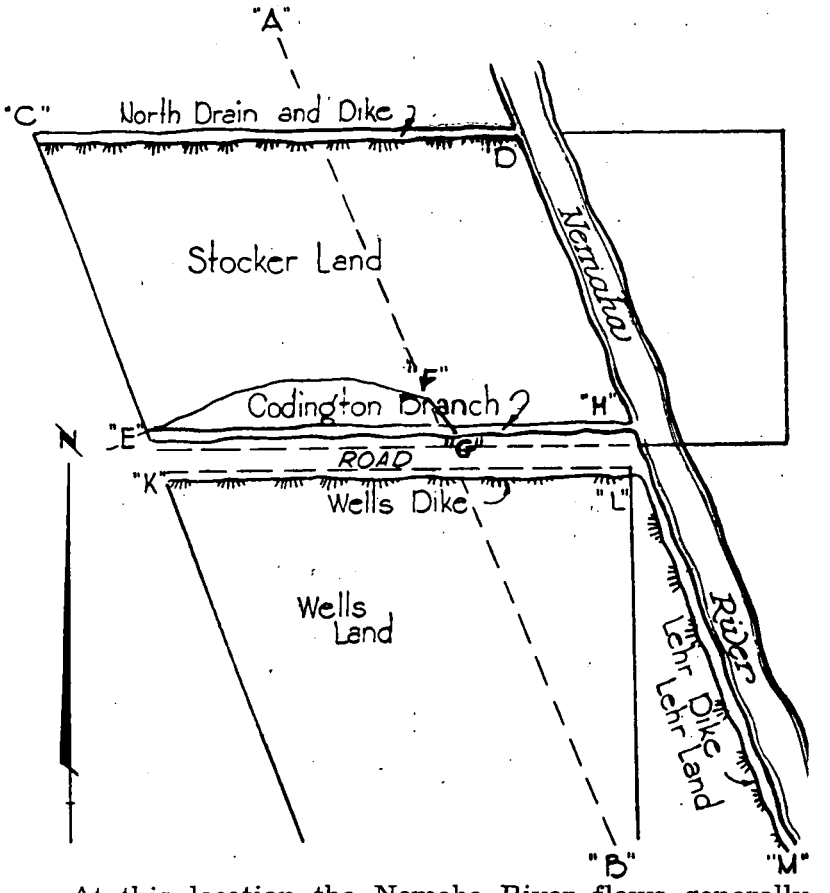
The lands involved, besides that owned by the plaintiff, are two separate tracts. One is owned by Frank B. Wells and Eugene M. Wells, minors. The other is owned by Vergil L. Lehr and Hazel M. Lehr, husband and wife. So far as this appeal is concerned, the action is one against Frank E. Wells, individually; Frank E. Wells and Adah B. Wells, guardians of said minors; and Vergil L. Lehr and Hazel M. Lehr. The Wells defendants will be referred to herein as the Wells, and the two Lehr defendants as the Lehrs.

Defendants' first argued assignment of error is that the trial court was unconsciously prejudiced against them or their defense, and that by reason thereof they did not have a fair trial. We have examined this record and find in it no basis for the contention of prejudice.

The cause is here for trial de novo. We summarize the evidence contained in a voluminous record, covering many days of oral testimony and numerous exhibits.

The Nemaha River and its tributaries drain an area of some 900 square miles. The lands involved here lie southeast of the city of Auburn and in the Nemaha River valley.

For brevity of description and better understanding of the factual situation, and without being accurate in detail, we have prepared and use a chart for the purpose of showing the relative positions of the lands, the physical conditions, and structures involved.



At this location the Nemaha River flows generally from the northwest to the southeast. Between 1909 and 1912, extensive drainage work was done on the Nemaha River. Its channel was changed so as to eliminate meanderings and a new channel was made through the lands involved in approximately a straight line as indicated on the chart.

Plaintiff's land, formerly in one piece, was bisected by the new channel so as to leave about 80 acres east of the river. The lands are higher at the river bank; going southwest from the river the elevation drops to a de-

pression or swale indicated on the chart by the broken line A to B. From there it rises gradually to the southwest of the lands involved, and beyond that to hilly, higher-elevation land.

About 1930, plaintiff's predecessor in title built a drain along the north line of the Stocker land, indicated by the letters C to D. In 1945, this drain was cleaned out and deepened, the removed dirt being placed to the south, forming a dike of a few feet in height. The testimony is in conflict as to whether or not it formed a continuous and effective dam across the land at that place. This change in 1945 was made with the approval of the land owners to the north, and in part at their expense. The evidence as to this drain and dike is that so far as effective as a dike, it withholds water from both the plaintiff's land and the defendants' land and is in nowise detrimental to defendants. We refer to this as the north dike.

Originally there entered plaintiff's land at E a live stream known as Codington Branch. It drains an area of four square miles. It flowed northeast, as indicated on the chart, thence southeast, crossed and recrossed the road between the Stocker land and the Wells land, and finally emptied into the Nemaha River at about point H. During the 1909 to 1912 drainage operations, a lateral was made so as to carry this stream from point F to G to H, and cut out its meander across the road. In 1930, plaintiff's predecessor in title dug a drain from E to G and diverted Codington Branch so that it ran in an artifical channel from E to H. In 1945, plaintiff cleaned out and enlarged this channel, placing the removed dirt to the north, for a distance east of point E, which distance we are unable to determine with any exactness. The evidence is that the changed Codington Branch structure is larger and better able to dispose of the waters flowing therein than was the natural channel. We refer to this as the Codington Branch.

During the river change work from 1909 to 1912,

waste dirt was thrown along the river bank from L to M for a distance of three-quarters of a mile or more. During the subsequent years parts of this bank were eroded, and sometime between 1942 and 1945, defendants Lehr filled in the eroded places, leaving a continuous dike from L to M generally parallel to the river. We refer to this as the Lehr dike.

During the winter of 1945-1946, the defendants Wells built a dike beginning at high ground at point K to point L, where it was connected with the Lehr dike by an "elbow." We refer to this as the Wells dike. This dike was about three-quarters of a mile in length and was built high enough, so it was intended, to prevent any waters flowing from the Stocker land onto the Wells land. The dirt for the dike was removed from the north side leaving an irregular-bottomed drain from point K to L, emptying into the river at about point L. The Lehrs had no part in the building of the Wells dike. With the completion of the Wells dike there was a continuous structure on the north and east sides of the Wells and Lehr lands from K to L to M. These are the structures which plaintiff sought to have removed and which the decree ordered removed.

The evidence shows that the Nemaha River has been subject to severe floods. When these floods occur, the water overflows the normal flow banks and, forming a stream down the swale A to B, as it continues to rise in the more severe floods, it overflows the entire valley with a flood channel from one and a quarter to one and a half miles wide in the area here involved. When those severe floods occurred prior to the building of the Wells dike, moving water covered the Stocker land to a depth of five feet or more at its lowest area, and flowed on down and across the Wells and Lehr lands. The result of the Wells dike then was to dam up and close approximately one-half of the flood channel of the river.

Defendants' evidence by expert engineers is that the

Wells and Lehr dikes constituted proper construction; that plaintiff should increase the north dike and likewise dike his east boundary and thereby confine the floodwaters to approximately the normal channel of the river.

The taking of evidence in the trial of the case closed in April 1947, and the case was taken under submission by the trial court in May 1947. Between the time of the construction of the Wells dike and the close of the trial there had been no severe floods in that area.

The evidence established that the effect of the Wells dike was to close off the outlet so that if floodwaters came they would be held on the Stocker land until able to escape through the remaining channel; that water on the Stocker land would damage or destroy growing crops depending on the variable factors of the amount and depth of water, the duration of the flood, the time held on the land, the time of the season, the condition of the crops, and the temperatures existing. The evidence is that resulting damage would also occur to the plaintiff's land east of the river.

On July 10, 1947, the trial court made general and special findings of fact and entered the following decree:

"IT IS THEREFORE ORDERED, adjudged and decreed that the defendants remove the dike or dikes in and upon and near their said lands which the defendants, their agents and legal representatives have constructed and which said dikes are described in the pleadings and which were the subject of this litigation, and that they, and each of them, their agents, servants, employees, legal representatives, heirs assigns or grantees, be and are hereby enjoined from constructing, keeping, maintaining, repairing or erecting any other dike or dikes thereafter which will impede the natural flood waters of the Nemaha River during times of flood, and that the costs of this action be taxed equally against the defendants; that defendants Ned Ray and Ed Stanton recover their costs from plaintiff.

"It is further ordered that the defendants shall have

sixty days from the date of this decree to comply with the requirements thereof and make report to the court showing that the terms of this decree have been fully complied with as to the removal of said dikes."

Motions for a new trial were filed and evidence by affidavit and parol was taken and preserved, and is a part of the bill of exceptions. This evidence discloses that during the month of June 1947, there were four severe floods in the Nemaha River. The first one flooded the plaintiff's land to a depth of several feet. The Wells dike diverted the water to the east and it ran off after having been appreciably retarded and held on the plaintiff's land. The second flood, a week later, of greater volume, came and was again held back by the Wells dike for several hours, when that dike finally gave way and was washed out for a distance of 250 to 280 feet. The waters then flowed upon the Wells land, and the level of the water on the plaintiff's land dropped appreciably thereafter, although the flow was retarded by the remaining portions of the dike. The two subsequent floods passed down across the plaintiff's and Wells' lands without gaining the depth of the two earlier floods.

The trial court denied the motions for a new trial. This appeal followed.

Defendants' principal contention is that the decree of the district court is not supported by and is contrary to the evidence and the law. By section 25-1925, R. S. 1943, we are required to retry de novo the issues of fact complained of upon the evidence preserved in the bill of exceptions, and to reach an independent conclusion thereon.

The rule is: "The relief ordinarily granted in equity is such as the nature of the case, the law, and the facts demand, not at the beginning of the litigation, but at the time the decree is entered." Conrad v. Kaup, 137 Neb. 900, 291 N. W. 687.

The above summary constitutes our conclusions of the factual situation as preserved in the bill of exceptions,

subject to certain other conclusions to be hereinafter stated.

The law applicable to this situation has been repeatedly stated in our decisions.

"It is the duty of those who build structures across natural drainways to provide for the natural passage through such obstruction of all waters which may be reasonably anticipated to drain there. This is a continuing duty." Faught v. Dawson County Irrigation Co., 146 Neb. 274, 19 N. W. 2d 358.

That the Wells dike is a structure across a natural drainway is clear. That the defendants Wells did not provide for the natural passage through such obstruction of any water whatever is equally clear.

"* * * a stream which is accustomed to extend itself beyond its banks in times of high water and to flow over the adjacent lands in its flood plane in a broader stream, retains its character as a live stream and the law relating to floodwaters applies." Cooper v. Sanitary District No. 1, 146 Neb. 412, 19 N. W. 2d 619.

"The flood channel must be considered as a part of the channel of the stream and no structures or other obstructions can be placed in its bed which will have a tendency to dam the water back upon the property of upper riparian or adjacent owners." Cooper v. Sanitary District No. 1, *supra.*

"The owners or proprietors of lands bordering upon either the normal or flood channels of a natural watercourse are entitled to have its water, whether within its banks or in its flood channel, run as it is wont to run according to natural drainage, and no one has the lawful right by diversions or obstructions to interfere with its accustomed flow to the damage of another." Olson v. Roscoe, 149 Neb. 189, 30 N. W. 2d 664. See, also, Mohatt v. Olson, 146 Neb. 764, 21 N. W. 2d 516.

"Injunction is a proper remedy to prevent recurring damages to crops or continuing injury to lands by water unlawfully diverted from a natural watercourse over

or upon lands of adjacent or adjoining proprietors." Olson v. Roscoe, *supra.*

In Frese v. Michalec, 148 Neb. 567, 28 N. W. 2d 197, we said: "Where a person constructs a dam or dike that diverts flood water from its natural flood plane where it was wont to flow in its natural state for many years before the construction of the obstruction, injunction affords the proper remedy to relieve from the continuing damage from recurring floods which are certain to occur in the future and which are the proximate result of the dam or dike construction."

That the Wells dike constitutes an obstruction in a natural watercourse which constitutes a continuing and permanent injury to plaintiff's land is clearly demonstrated by this record. That recurring floods are bound to occur is demonstrated by the record. The construction of the Wells dike was obviously done in anticipation of recurring floods.

Defendants' testimony is that the Wells dike was also constructed to prevent water flowing upon the Wells land from the floodwaters of the Codington Branch. The same rules apply to those waters as apply to the floodwaters of the Nemaha River.

Defendants also contend that because plaintiff has built a drain and dike along the north side of his land, they have the right to do that along the south side of his land, and that plaintiff, having done what he seeks to prohibit the defendants from doing, is not in equity with clean hands, and that injunctive relief should be denied. In addition to the factual situation hereinbefore recited, the simple answer to that is that no one is here complaining about the maintenance of the north drain and dike on plaintiff's land. Defendants seek no relief against it.

The evidence is, however, that a part of the Wells dike on the west end is above the flood stage level of the Nemaha River. Plaintiff testified that that part of the dike is "harmless." Obviously, defendants Wells should

not be required to remove that part of their dike. We are unable to determine from the evidence just how much of the Wells dike falls within the harmless classification.

With the exception of that part of the Wells dike which is above the flood stage level of the Nemaha River, the decree of the trial court as to the defendants Wells and the Wells dike is affirmed. As to that part above the flood stage level of the Nemaha River, the judgment is reversed and the cause remanded with directions to take evidence as to the single issue as to where the flood stage level is and to remove that part of the Wells dike above that level from the operation of the decree.

Defendants, referring to that part of the dike removed by the June 1947 flood, contend that the decree requires them to remove a dike which did not exist when the decree was entered. The decree made no such requirement. It required the removal of the "dike or dikes in and upon and near their said lands." As modified herein, it makes that same requirement.

The Lehr dike is parallel to the river and parallel to the flow of the river both at normal and flood stages. So far as appears from this record, it does not in anywise interfere with the flow of the water from and across plaintiff's land. We see no basis for granting plaintiff injunctive relief as to the Lehr dike. Accordingly, the judgment of the trial court, insofar as it relates to the Lehr dike, is reversed and the cause as to the defendants Lehr is dismissed.

The judgment of the trial court is affirmed in part, reversed in part, and the cause remanded with directions, as to the defendants Wells. As to the defendants Lehr, the judgment is reversed and the cause dismissed.

The costs of the defendants Lehr are taxed to the plaintiff; all other costs are taxed to the defendants Wells.

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

JOE REDMON, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.
33 N. W. 2d 349

Filed July 16, 1948. No. 32412.

1. **Sodomy.** In a prosecution for sodomy, evidence of the immoral character of the prosecuting witness may be shown, and the defendant is not restricted to proof of the general reputation of the witness for truth and veracity.
2. **Witnesses: Criminal Law.** There is one situation in which morality may have a direct connection with veracity, and that is when one person charges another with a sex crime.
3. ———: ———. When a sex crime is charged to have been committed and the prosecuting witness testifies thereto, which is denied by the accused, great latitude should be allowed in the cross-examination of the prosecuting witness.

ERROR to the district court for Lancaster County: HARRY R. ANKENY, JUDGE. *Reversed and remanded.*

Carl E. Sanden and *E. J. Jackson,* for plaintiff in error.

Walter R. Johnson, Attorney General, and *Homer L. Kyle,* for defendant in error.

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

PAINE, J.

In a prosecution by the State in the district court for Lancaster County, the defendant was convicted of sodomy and sentenced to the penitentiary for a period of not less than fifteen years. Defendant brought the case to this court by petition in error.

The evidence discloses that the defendant was 33 years of age and a married man, with one child by his first wife and one born to his second wife before the trial, and that his family were living with his wife's father on a farm in Seward County.

The prosecutrix testified that she would be 23 years old in a week; that she was then working in a laundry; and that she lived with her parents, but was not working on May 22, 1947, when the alleged crime took place.

She testified that she married a soldier in 1940, when she was 16 years old; that she had two children, one being nearly three years old and the other one eleven months; and that she had separated from her husband about two years before, although he had returned on occasions for a short time, but she was not divorced from him.

The sordid details of the alleged offense, as shown in the bill of exceptions, need not be discussed.

The entire assignments of error on the part of the defendant consist of the two sentences: (1) "The trial court abused its discretion and prevented the defendant from having a fair trial by sustaining objections to questions asked the prosecutrix on cross-examination and thus excluding evidence that the prosecutrix had many sexual relations with other men." (2) "The sentence imposed by the court is excessive."

The first proposition of law advanced by defendant as a ground for reversal is: "In prosecutions for sexual crimes, for the purpose of reflecting on the credibility of the prosecutrix, she may be cross-examined to show she is accustomed to having promiscuous sexual relations."

We have examined all of the many citations of the defendant in support of this proposition and have found many others along the same line. One of the earliest opinions was that in New York of People v. Abbot, 19 Wend. 192, in which it was held "that the general character of the prosecutrix as a common prostitute may be shown; and that the prisoner is not restricted to proof of her general character for truth and veracity, but may give evidence of her general moral character."

The admissibility of evidence of particular acts of unchastity has been criticized, but has been constantly gaining support. See State v. Patterson, 88 Mo. 88, 57 Am. R. 374.

While the crime alleged in the instant case is sodomy, we find few cases thereon, and believe that the same

rule governing the admission of such evidence in rape cases is applicable. We find many rape cases holding it was error to refuse to allow the accused to prove the general reputation of the prosecutrix as a common prostitute, if he could do so, as indicating whether she consented to the act charged, and not merely for the sole purpose of impeaching her credibility. See, Campbell v. State, 147 Tex. Cr. 192, 179 S. W. 2d 547; Graham v. State, 125 Tex. Cr. 210, 67 S. W. 2d 296.

In the brief of defendant, several rulings are specifically pointed out similar to this one. Prosecutrix testified that she lived with her husband off and on; that he leaves Lincoln and stays away, then comes back for short intervals; and she admitted they had family arguments.

Repeatedly during the long cross-examination of the prosecutrix, the defendant attempted in various ways to put in evidence before the jury that the moral character of the prosecutrix was bad. The county attorney met each of these attempts with various forms of objections, generally to the effect that it was improper cross-examination, incompetent, irrelevant, and immaterial, and not tending to either prove or disprove the issues in the case, and no longer an attempt to test the credibility of the prosecutrix, but to get evidence and facts in the minds of the jury theretofore kept out by the court.

The court in repeated rulings held that the purpose of such inquiries was not confined to testing the credibility of the witness, and such objections were therefore sustained in each instance that we can find.

In answer to the defendant's argument and authorities cited, the Attorney General's brief affirms that "Evidence of general reputation that a female witness is, or has been, not law-abiding, unchaste, or a prostitute, is inadmissible for the purpose of impeaching the witness either upon cross-examination or by way of rebuttal; nor can these facts be shown for the purpose of impeach-

ment by evidence as to specific acts or instances."

He supports this by the case of Daggett v. State, 114 Neb. 238, 206 N. W. 735. In that opinion it is said: "The state, during the course of the trial, in cross-examination and also by the introduction of evidence in rebuttal, sought to impeach two female witnesses, whose evidence was given in behalf of the defendant, by proving them immoral, unchaste, and prostitutes. * * * These attempts on the part of the prosecution were wholly unwarranted by law and highly prejudicial to the defendant."

In our opinion, this Nebraska case does not support the rulings of the trial court in the case at bar, for it is discussing and deciding the proper limits on the cross-examination of two witnesses. The rule in regard to the cross-examination of a prosecuting witness is not so limited. See, State v. Rivers, 82 Conn. 454, 74 A. 757; 44 Am. Jur., Rape, § 97, p. 964; Annotation, 65 A. L. R. 426; Annotation, 140 A. L. R. 364; Rowe v. State, 155 Ark. 419, 244 S. W. 463; McGehee v. State, 162 Ark. 560, 258 S. W. 358.

Dean Wigmore says in regard to such evidence: "There is, however, at least one situation in which chastity may have a direct connection with veracity, viz. when a *woman or young girl testifies* as complainant against a man charged with a sexual crime, — *rape, rape under age, seduction, assault.* Modern psychiatrists have amply studied the behavior of errant young girls and women coming before the courts in all sorts of cases. Their psychic complexes are multifarious, distorted partly by inherent defects, partly by diseased derangements or abnormal instincts, partly by bad social environment, partly by temporary physiological or emotional conditions. One form taken by these complexes is that of contriving false charges of sexual offences by men. The unchaste (let us call it) mentality finds incidental but direct expression in the narration of imaginary sex-incidents of which the narrator is the heroine

or the victim." 3 Wigmore on Evidence (3d ed.), § 924a, p. 459.

Dean Wigmore's discussion is in line with a case back in 1867, in which it was said: "The defense * * * usually rests mainly on circumstances, and the cross-examination of the party who complains that she has been forced. Such cross-examination should, therefore, be allowed to be as unrestrained and searching, as is consistent with the rules of law." State v. Reed, 39 Vt. 417, 94 Am. Dec. 337.

We find it is well established by the later opinions of the courts of many states that evidence of the character of the prosecutrix is admissible and it is prejudicial error to exclude evidence which tends to show prior unchaste acts with other men. Such evidence can be weighed by the jury in deciding the weight and credibility to which her evidence is entitled. See, Jones v. Commonwealth, 154 Ky. 640, 157 S. W. 1079; Johnson v. State, 182 P. 2d (Okla. Cr.) 777.

" 'But equally well established is the principle that where the defendant is charged with the crime of rape * * *, accomplished by means of force or violence, it is error to exclude evidence which tends to show prior unchaste acts of the prosecutrix either with the defendant or with other men. * * * the evidence is admissible, not for the direct purpose of impeaching her character, but for the purpose of discrediting her testimony relating to the use of force or violence by the defendant in accomplishing his purpose.' " People v. Pantages, 212 Cal. 237, 297 P. 890.

In the case at bar, the defendant testified that, when he woke up in the automobile he accused the prosecutrix of taking his money and threatened to complain against her, and it was for the jury, after hearing all the facts, to decide if there may not have been an ulterior motive for the prosecutrix rushing to phone the police and make this charge. In such a case we believe the court should be liberal in permitting cross-examination of the habits

and past conduct of the prosecutrix. See, People v. Keller, 227 Mich. 520, 198 N. W. 939; Goldman v. State, 128 Neb. 684, 260 N. W. 373.

We have reached the conclusion that, as in this case all of the events on which the alleged crime was based happened in the space of a little over half an hour, while they were alone, and are charged by the prosecutrix to have been committed by the defendant and are as positively denied by the defendant, the cross-examination of the prosecutrix was too narrowly restricted by the court, and it was prejudicial to exclude evidence of unchaste acts of the prosecutrix.

Under the record in this case, we conclude that the defendant did not have a fair and impartial trial, because he was too limited in attempting to prove the kind of woman he claimed the prosecutrix was. He should have been given full opportunity, as granted by so many other courts, to have proved, if he could, under the rules of evidence, the character of the woman making the charge against him.

The judgment is reversed and the cause remanded to the district court for a new trial.

REVERSED AND REMANDED.

IN RE ESTATE OF ADDIE FARR, DECEASED. FERN ALLEN ET AL., APPELLEES, V. CLIFFORD D. FARR, EXECUTOR, APPELLANT.

33 N. W. 2d 454

Filed July 16, 1948. No. 32438.

1. Wills. No right of a citizen is more valued, and more assured by law, than the power to dispose of his property by will. He is entitled to the control of his property while living, and by will to direct its use after his death, subject only to the restrictions which are imposed by law. Where a man has sufficient memory to make a will, and such instrument is not the result

of undue influence, it is not to be set aside without sufficient evidence, nor upon sentimental notions of equality.

2. ———. The burden of proving that a will resulted from undue influence is on the contestants. Undue influence cannot be inferred alone from motive or opportunity, and mere suspicion of undue influence on the testator is insufficient to require submission of the question to the jury.

3. ———. The elements necessary to be established to warrant the rejection of a will on the ground of undue influence are: (1) That the testator was subject to such influence; (2) that the opportunity to exercise it existed; (3) that there was a disposition to exercise it; and (4) that the result appears to be the effect of such influence.

4. ———. In a will contest on the ground of undue influence, if the evidence is insufficient to sustain a verdict in favor of the contestants, then the trial court should withdraw the issue from the jury and direct a verdict.

5. Trial. Where a request for a directed verdict is made at the close of all of the evidence and is overruled, the party against whom such ruling is made may, within ten days after rendition of an adverse verdict, file a motion to have the verdict set aside and judgment entered in accordance with his request for a directed verdict, and the district court may upon such motion enter judgment in accordance therewith. § 25-1315.02, R. S. Supp., 1947.

6. ———. Upon an appeal from an order denying a motion for judgment notwithstanding the verdict, the Supreme Court may direct judgment to be entered in favor of a party who was entitled to such judgment. § 25-1315.03, R. S. Supp., 1947.

APPEAL from the district court for Rock County: DAYTON R. MOUNTS, JUDGE. *Reversed and remanded with directions.*

Arthur A. Weber and *Wells, Martin & Lane,* for appellant.

G. A. Farman, Jr., and *Julius D. Cronin,* for appellees.

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

PAINE, J.

This is an appeal from a judgment of the district court for Rock County entered on the verdict of a jury deny-

ing probate of the last will of Addie Farr, deceased. The principal ground of the contest was that it was procured by the undue influence of her son Clifford. The principal question before this court is whether there is sufficient evidence to sustain the verdict of the jury.

Addie Farr, of Newport, Rock County, executed her last will October 30, 1945. She died January 2, 1947, at the age of 81 years. This will gave to her son W. E. Farr, $5; to Elmo Keller, a grandson, $5; to Clesson Keller, a grandson, $5; to a granddaughter, Thelma Holiday, $100; to her son Roy M. Farr the southwest quarter of Section 4, Township 30, Range 17, in Rock County; to her son Clifford D. Farr she gave all the rest of her estate, both real and personal, in the residuary clause, subject only to the provision that Clifford D. Farr should pay to her daughter, Fern Allen, the sum of $1,000 in cash within six months from the date of her death.

Clifford D. Farr, as executor, filed a petition in the county court of Rock County and offered the will for probate. W. E. Farr, a son, and Fern Allen, a daughter, filed objections to the probate, assigning four grounds: (1) That the will was not executed according to law; (2) that the will was not properly attested; (3) that the purported will was not the last will of the deceased; and (4) that the will was procured by undue influence of Clifford D. Farr. The reply was a general denial.

After trial in the county court, the will was admitted to probate. Contestants appealed to the district court, and by stipulation of the parties the case was tried there on the same pleadings which were filed in the county court. Trial was had to a jury in the district court. The proponent called the county judge, W. Harold Allen, the county superintendent, Glen Estes, and the county attorney, Arthur A. Weber, who drew the will in his office in the courthouse in Bassett, Estes and Weber being the attesting witnesses to the will,

and the proponent, having thus made a prima facie case, rested.

The two contestants each testified at length, as well as Roy M. Farr, a son, and Lewis C. Woodcock, who had been employed for about 20 years on the ranches of Farr Brothers. Thereupon, the contestants rested and the jury were excused. The proponent, reserving the right to introduce further evidence if the motion was overruled, moved that the jury be dismissed and the court enter an order directing that exhibit No. 1 be admitted to probate as the last will of Addie Farr, deceased, for the reasons: (1) That the evidence conclusively showed that the instrument was executed in the manner and form required by law; (2) that the evidence conclusively established that Addie Farr had the required testamentary capacity to execute said will; and (3) that the contestants had wholly failed to sustain the burden of proof to show that the will was the result of undue influence exercised by Clifford Farr or any other person, and that to submit the case to the jury would be to allow the jury to speculate without any substantial evidence upon which their verdict could be based.

The contestants objected to this motion, the same was argued to the court, and the motion of the proponent was overruled. The jury were called into court, and the proponent then called six witnesses in rebuttal.

The proponent offered eight instructions, all of which were refused by the court. The contestants offered eight instructions, all of which were refused by the court. In instruction No. 7 the court told the jury that the execution and attestation of the purported will had been established by the evidence; in instruction No. 8 he instructed the jury that the testatrix possessed sufficient mental capacity to make a will at the time the instrument was executed by her; and in instruction No. 9 the court told the jury that but one question was submitted for their consideration, which was whether or

not Addie Farr was unduly influenced to make the will, exhibit No. 1.

The case was submitted to the jury and eleven members signed the verdict, to the effect that proponent's exhibit No. 1 was not the will of Addie Farr and should be denied admission to probate. Motion for new trial was overruled, and supersedeas bond was given in the sum of $500.

The proponent assigned as error the overruling of his motion for a directed verdict at the close of the contestants' evidence, and again at the close of all the evidence, and the overruling of proponent's motion to vacate the verdict of the jury and enter judgment in favor of proponent. He assigned as error the refusal to give instructions Nos. 1, 7 and 8 requested by the proponent. He assigned as error the giving of the court's instructions Nos. 10, 11, 12 and 14½. He assigned as error that the verdict of the jury and the judgment entered thereon are not sustained by the evidence and are contrary to law and the evidence.

As the proponent does not assign error to the giving of instructions Nos. 7 and 8, and the contestants have not taken a cross-appeal, it will be accepted as established in this opinion that the will was properly executed and attested, and that the testatrix had sufficient mental capacity to make a will at the time she executed the instrument.

This leaves for our consideration but one question: Was the will of Addie Farr executed through undue influence practiced upon her by her son Clifford D. Farr?

It is necessary to set out facts to show the family relationships and circumstances which led the mother to make the will in question.

William E. Farr, the father, was a very energetic and successful rancher, and with his young wife moved to and lived on what is known as the south ranch in Rock County from about 1882 until about 1914, when he

bought a general store in Newport and moved into that town. While running that store he still conducted and extended his ranching operations by buying additional ranch lands, which became the nucleus of the north ranch.

The father died on Christmas day in 1916. He had extended his operations too far, so that when his untimely death occurred his estate was insolvent. He left his widow, the testatrix, and five children, Clifford D. Farr, the proponent, Fern Allen and W. E. (Gene) Farr, who are the contestants, and Roy M. Farr and Gertrude Keller.

Under the father's will, his widow was given the house in Newport, and an undivided one-third of the south ranch, and one-third of all personal property. The three sons were given the remaining two-thirds of the south ranch and the two-thirds of the personal property, and over 1,100 acres making up the then north ranch. The sons were required by the will to pay off the indebtedness on both ranches, and if they failed the land was all to go to the widow. The two daughters were given bequests of $3,000 each, to be paid after all the mortgages were paid off, and finally they released their liens against the land so new loans could be secured.

Clifford, as executor of his father's estate, filed an inventory, exhibit No. 6, listing real estate of 2,240 acres at $102,244, which included the house in town at $3,000; personal property, $25,875, of which the value of the stock of merchandise in the store was given at $11,250; the balance being livestock and machinery on the ranches.

The debts, claims and mortgages against the father's estate amounted to some $68,560, and that leaves a net estate of $60,559, yet it appears that the inventory values on the land were placed higher than the property could be sold for in order to assist in securing new loans on the property, and if the property of the estate had been

put up at forced sale at that time doubtless the estate would not have paid out.

The shape in which the father left the titles compelled the three sons and the mother to operate the whole property on a partnership basis. Clifford as executor kept all the bank accounts, ran the store in town, and lived with the mother.

The brother Roy insisted upon withdrawing from the partnership in 1927 because he could not get along with Clifford and Gene. They thought he was not doing things right, and so he withdrew. They made a settlement with him and deeded him some property, and after that he never had anything to do with the partnership. He was friendly with his mother and would go and talk matters over with her, but not partnership matters after he withdrew in 1927, and he had little to do with his brothers.

After Roy withdrew from the partnership the mother, Gene, and Clifford continued the partnership and increased the size of their ranches by buying more land. In July of 1945 Gene insisted to his mother and Clifford that he was through, and demanded a division of all partnership assets. He insisted that they divide the bank account right then. The next morning they went to Atkinson. Each brother took out one-half of the money in the bank and put it in his own account.

In July 1945, when this crisis was reached, haying time was just on, they had to continue to put up the hay, and the mother, in that summer of 1945, as she had in seasons before, went out to help cook for the haying hands at her advanced age.

It was not possible for the three members of the partnership to reach an amicable division of the ranch properties. Gene made out a list of the properties constituting the north ranch, and also the south ranch, with the mortgages against each. It appears, from reading the evidence, that Clifford thought that the net value of the two ranches was about the same. Gene

insisted that to take care of the mother's interest in the partnership she should be given by Clifford a half-section from the north ranch, clear of debts. Clifford thought the mother should be taken care of entirely outside of the trade of the two ranches, but Gene absolutely refused to trade on that basis. This dispute dragged along for some weeks and became more bitter between the two brothers. While the mother would have preferred to have continued their holdings as a partnership matter, she finally advised Clifford to accede to Gene's terms and dissolve the partnership.

On October 24, 1945, they had attorney Weber come out to Mrs. Farr's home in Newport, and in the big kitchen around the table they checked all of the properties described in each of the various deeds. A deed for a half-section from the north ranch was signed by Gene and his wife and Clifford and his wife, transferring this 320 acres to the mother, clear of encumbrance. The attorney testified that the mother hesitated about signing any deeds for a few minutes, but finally the mother, Clifford, and his wife signed the deed giving the south ranch to Gene, and Gene, his wife, and the mother signed the deed to the north ranch to Clifford, from which a half-section had been taken out to go to the mother. Gene testified that, after he made out a list of the property in each ranch and the debts against each one, he gave Clifford his choice of the two ranches, but Clifford implies that this was something of a bluff on Gene's part. The evidence is not very clear on that feature of the deal. After that time Gene and Clifford avoided having anything to do with each other as far as possible. The general store in Newport had been sold some years prior to this settlement, so each of the three brothers, Roy, Gene, and Clifford, now had their own lands and handled their own affairs.

On October 30, 1945, six days after these deeds had been signed up, the mother asked Clifford to call the attorney at Bassett and make an appointment for that

afternoon, as she wanted to make a new will. Clifford and his wife drove his mother to Bassett, where the mother and Clifford went into the county judge's office and got a will executed by her in January 1941 that had been deposited with the county judge. The three of them then went to the county attorney's office. She asked the county attorney to draw her a new will, handing him her old will, and telling him the changes she wished to have made in the new will. She had indicated right after the division of the ranch property that Gene had gotten all he would get from her. She left Gene but five dollars in this will, and the same amount to her two grandsons, but to Thelma Holiday, daughter of Fern Allen, who had lived with her and gone to school, as other grandchildren had done, she left $100.

It appeared from the evidence of the several witnesses present that the only discussion was as to the payment to her daughter Fern, who had then moved to Grand Island. She thought a cash bequest would be better than to leave her the home in Newport, as she had done in the first will, and decided to leave her $1,000. She asked Clifford how that could be paid, whether by a bond or in some other manner. Clifford said that if he was given time he could pay the cash. So the mother directed that Clifford pay to Fern Allen $1,000 within six months from the date of her death.

In the will, exhibit No. 1, the testatrix gave to her son Clifford in the residuary clause all of her property, covering the house in town and the 320 acres of land which had been deeded to her out of the north ranch six days before this will was written, out of which he was to pay the $1,000 to his sister Fern.

The evidence in this record from several witnesses is that the mother was a strong-minded woman, that she kept up with current events in the newspapers, that she took an interest in everything going on around her, and that her mind was certainly clear at the time she executed this will and she knew what she wanted to do for

each person. She did not die until more than a year after the will was executed.

Clifford absolutely denied that he ever suggested any particular provision in the will to his mother. There is evidence to the effect that Clifford lived with his mother several years after his father died, including a year or two after he was married, and that he handled all business affairs and was on much more friendly terms with his mother during all these years than the others. This question was asked and the answer given: "Q Did you do anything, by act or word, to try and influence your mother in regard to the conditions of her Will? A I did not."

We will now consider the law governing such cases. Under Nebraska law, we cannot try this case de novo on this appeal under the issues here. We are limited to the single question of the sufficiency of the evidence to sustain the verdict of the jury. See In re Estate of Kerr, 117 Neb. 630, 222 N. W. 63.

"No right of a citizen is more valued, and more assured by law, than the power to dispose of his property by will. He is entitled to the control of his property while living, and by will to direct its use after his death, subject only to the restrictions which are imposed by statute. Where a man has sufficient memory to make a will, and such instrument is not the result of undue influence, it is not to be set aside without sufficient evidence, nor upon sentimental notions of equality." In re Estate of Bose, 136 Neb. 156, 285 N. W. 319.

Our court has held time after time that the burden of proving that the will resulted from undue influence is on the contestants, and the mere suspicion of undue influence on testatrix is insufficient to require the submission of that question to the jury. Even if some of the circumstances surrounding the execution of the will seem to support the hypothesis that undue influence entered into its preparation and execution, it still must be shown that such circumstances are inconsistent with the con-

trary hypothesis. See, Boggs v. Boggs, 62 Neb. 274, 87 N. W. 39; Spier v. Spier, 99 Neb. 853, 157 N. W. 1014; In re Estate of Dovey, 101 Neb. 11, 162 N. W. 134; In re Estate of Wilson, 114 Neb. 593, 208 N. W. 961.

Our latest cases have consistently followed the earlier ones to the effect that "The burden of proving that a will resulted from undue influence is on the contestants. Undue influence cannot be inferred alone from motive or opportunity, and mere suspicion of undue influence on the testator is insufficient to require submission of the question to the jury." In re Estate of Inda, 146 Neb. 179, 19 N. W. 2d 37. See, also, In re Estate of Alton, 128 Neb. 411, 258 N. W. 871; In re Estate of Keup, 145 Neb. 729, 18 N. W. 2d 63; In re Estate of Kajewski, 134 Neb. 485, 279 N. W. 185.

"The elements necessary to be established to warrant the rejection of a will on the ground of undue influence are: (1) That the testator was subject to such influence; (2) that the opportunity to exercise it existed; (3) that there was a disposition to exercise it; and (4) that the result appears to be the effect of such influence." In re Estate of Scoville, 149 Neb. 415, 31 N. W. 2d 284. See, also, In re Estate of Woodward, 147 Neb. 270, 23 N. W. 2d 75; In re Estate of Johnston, 147 Neb. 886, 25 N. W. 2d 526; In re Estate of George, 144 Neb. 887, 15 N. W. 2d 80; In re Estate of Goist, 146 Neb. 1, 18 N. W. 2d 513; In re Estate of Inda, *supra*.

" 'Influence, to vitiate a will, must be such as to amount to force and coercion, destroying the free agency of a testator, * * * and it must be shown that the circumstances of its execution are inconsistent with any hypothesis but undue influence, which cannot be presumed, but must be proved, and in connection with the will and not with other things.' Bradford v. Vinton (Mich.) 26 N. W. Rep., 401." Latham v. Schaal, 25 Neb. 535, 41 N. W. 354. See, also, Stull v. Stull, 1 Neb. (Unoff.) 389, 96 N. W. 196.

Cases have arisen in disposing of property by deed

which are closely akin to undue influence in the execution of a will. This court has said in such cases: "Undue influence which will avoid a deed is an unlawful and fraudulent influence which controls the will of the grantor. The affection, confidence and gratitude of a parent to a child which inspires the gift is a natural and lawful influence, and will not render it voidable, unless this influence has been so used as to confuse the judgment and control the will of the donor." Blochowitz v. Blochowitz, 122 Neb. 385, 240 N. W. 586, 82 A. L. R. 949. See, also, Brugman v. Brugman, 93 Neb. 408, 140 N. W. 781.

When it is shown that proponent was a confidant of his mother, the testatrix, and did give her advice and suggestions, in discussing their business affairs, more than any or all of her other children, that does not in itself constitute undue influence unless it is shown that she was unable to resist adopting such advice. 68 C. J., Wills, § 437, p. 748.

Undue influence may be proved by circumstantial evidence, but it must be such as to substitute the will of the person exercising it for that of the testator. It must be equivalent to moral coercion. It must operate at the time the will is made and dominate and control its making. It is not established by proof of opportunity and disposition to exercise it. Importunity, request and persuasion that do not control the will are not enough. See, In re Estate of Hollis, 234 Iowa 761, 12 N. W. 2d 576; In re Estate of Mott, 200 Iowa 948, 205 N. W. 770.

In our opinion, the contestants failed to show that the testatrix was wrongly influenced or controlled by the proponent. It must be manifest that, within the rules hereinbefore announced, the evidence in the instant case was insufficient to support the claim of the contestants.

It is the duty of the trial court to determine the issues upon which there is competent evidence and submit them to the jury. In a will contest on the ground of undue influence, if the evidence is insufficient to sustain

a verdict in favor of the contestants, then the trial court should withdraw the issue from the jury and direct a verdict. See, In re Estate of Inda, *supra*; Johnson v. Anoka-Butte Lumber Co., 141 Neb. 851, 5 N. W. 2d 114; In re Estate of Witte, 145 Neb. 295, 16 N. W. 2d 203.

We have reached the conclusion that the testimony in this case, taken as a whole, has failed to meet the burden of proof required under the authorities cited to support a charge of undue influence.

In this case the proponent moved for a directed verdict at the close of all the evidence. After the verdict was returned, the proponent on October 21, 1947, within ten days after the verdict was rendered, filed a motion to set aside the verdict and to enter judgment in favor of proponent in accordance with his motion for directed verdict. The judgment of the district court was rendered on January 8, 1948. The verdict, motion, and judgment all occurred after the effective date of sections 25-1315.02 and 25-1315.03, R. S. Supp., 1947. These sections were enacted pursuant to recommendation of the Judicial Council of Nebraska. Nebraska Legislative Journal 1947, pp. 167-168. Under the procedure authorized by section 25-1315.02, R. S. Supp., 1947, the district court had the power to set aside the verdict of the jury and "direct the entry of judgment as if the requested verdict had been directed." Under section 25-1315.03, R. S. Supp., 1947, this court on appeal from an order denying said motion "may order and direct judgment to be entered in favor of the party who was entitled to such judgment."

The appropriate course of this court, therefore, in the light of the new statutory procedure, is to reverse the judgment of the district court, with directions to set aside the verdict of the jury, and enter judgment for the proponent, on his motion for directed verdict, that the instrument offered for probate is the last will and testament of Addie Farr, deceased.

In view of this new procedure authorized by statute,

the opinion of this court on rehearing in the case of In re Estate of Witte, 145 Neb. 305, 17 N. W. 2d 477, is no longer controlling and applicable to the situation disclosed in the case at bar.

This judgment of the district court should be certified to the county court as provided in section 30-1607, R. S. 1943.

REVERSED AND REMANDED WITH DIRECTIONS.

GEORGE FIELDER, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.
33 N. W. 2d 451

Filed July 16, 1948. No. 32390.

1. **Homicide.** Where the physical facts undisputably demonstrate that the collision out of which the charge of manslaughter arose was not caused by the defendant, the case should be dismissed and the defendant discharged.
2. **Criminal Law.** Where the evidence is so lacking in its probative force that as a matter of law it is insufficient to support a finding of guilt beyond a reasonable doubt, the defendant is entitled to be discharged and the case dismissed.

ERROR to the district court for Adams County: FRANK J. MUNDAY, JUDGE. *Reversed and remanded with directions.*

J. E. Willits, for plaintiff in error.

Walter R. Johnson, Attorney General, and *Walter E. Nolte,* for defendant in error.

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

MESSMORE, J.

Plaintiff in error, hereinafter called defendant, was found guilty of manslaughter by a jury in the district court for Adams County, Nebraska. He was sentenced to the Nebraska State Penitentiary, and prosecutes error

to this court. The defendant's principal assignment of error is that the evidence is insufficient to sustain his conviction. We proceed to a discussion of this assignment of error.

Section 28-403, R. S. 1943, defining the crime of manslaughter reads as follows: "Whoever shall unlawfully kill another without malice, either upon a sudden quarrel, or unintentionally, while the slayer is in the commission of some unlawful act, shall be deemed guilty of manslaughter; * * *."

This court held, in Benton v. State, 124 Neb. 485, 247 N. W. 21, that: "When one drives an automobile in violation of law pertaining to the operation of such vehicles on the public highway and in so doing, as a result of the violation of law, causes death to another, he is guilty of manslaughter." See, also, Schultz v. State, 89 Neb. 34, 130 N. W. 972, 33 L. R. A. N. S. 403; Crawford v. State, 116 Neb. 125, 216 N. W. 294; Cowan v. State, 140 Neb. 837, 2 N. W. 2d 111; Puckett v. State, 144 Neb. 876, 15 N. W. 2d 63; Annotation, 30 A. L. R. 66.

The record discloses that the accident occurred at approximately 11 p. m. on September 15, 1947, at the intersection of E Street and Burlington Avenue in the city of Hastings, Nebraska. Burlington Avenue runs in a north and south direction, is practically level, and is part of highways Nos. 34 and 281 in that vicinity. It is an arterial highway heavily traveled, with stop signs on each side of the intersection and stop lights at some intersections. It consists of concrete pavement 42 feet in width from gutter to gutter. E Street runs in an east and west direction, is 35 feet in width, graveled to the west of the intersection and paved with black top to the east. There is a stop sign 37 feet west of the center line of the intersection at the point of Burlington Avenue. As shown by exhibit 12 appearing in evidence, the Cornelius house is 130 feet from the southwest corner of the intersection and is 30 feet west of the curb. The Missouri Pacific tracts are located six

hundred feet south of the intersection of Burlington Avenue and E Street, with a clear vision from the tracks to the north to the intersection. At the southwest corner of the intersection to the west of Burlington Avenue are some trees the limbs of which hang close to the ground on the west side and partially obstruct the view to the south. On the southeast and northwest corners of the intersection are two city electroliers that furnish light. The intersection is well lighted. On the northwest corner of the intersection of Burlington Avenue and E Street is a service station; and there is a house just east of Burlington Avenue and north of E Street on the northeast corner of the intersection facing west.

The defendant, prior to the time of the accident, left his brother's home after having an altercation with his wife, and proceeded in his truck east on E Street to Burlington Avenue. His truck was a 1938 Ford V-8 with a stock and grain combination body, and was 21 feet eight inches in length, weighing 6,060 pounds and equipped with dual wheels and tires 7.50 by 20, 10 ply. He was followed by a police cruiser containing two police officers and his brother. His brother had complained to the police about the defendant, and as a consequence they were searching for him. When he arrived at the stop sign at the intersection, he testified he stopped and proceeded east across the intersection at a speed of from five to seven miles per hour.

Both police officers testified that the defendant did not stop at the stop sign. One gave as his opinion that the defendant proceeded across the intersection at a rate of speed of 20 miles per hour; the other that he was driving very slowly. Defendant's brother estimated the speed of the truck at that time to be between five and ten miles per hour. There was no violation of speed on the defendant's part in crossing the intersection.

When the back wheels of the defendant's truck were approximately six feet east of the intersecting line of Burlington Avenue, and this evidence is not disputed,

a 1946 Ford V-8 coach, driven by one Paulsen and in which William J. McKenna was riding, struck the rear of the box of the truck and the rear right dual wheels. The police officers were unable to estimate the speed of the Paulsen car, and said that it was about 50 feet distant from the defendant's truck when they first saw it. One of the officers saw a flash of light and heard a crash which he described as happening within the "twinkling of an eye." At the time of the collision the police cruiser was 50 to 75 feet west of the intersection.

The defendant's brother testified he saw the collision, and the impact completely turned the defendant's truck around, knocking it a distance of approximately 20 feet, the truck weighing 6,060 pounds. Its position after the collision was on the terrace of the northeast corner of the intersection, facing northwest. The evidence shows that the Paulsen car, at the time of the impact, turned and whirled around in a northwesterly direction, rolled backwards northward on Burlington Avenue a distance of approximately 130 feet and, when stopped, was sitting in an east and west position in front of what is referred to as the Cornelius house. The occupants of the house on the northeast corner of the intersection were awakened by a spare tire from the truck striking the house.

The evidence is replete with the violence and force of the crash. Exhibit 6 shows almost complete demolishment of the right front and right side of the Paulsen car. The impact drove the right rear dual wheels of the truck together, after striking the rear box of the truck.

Paulsen testified that he was driving north on Burlington Avenue on the right side thereof, at a speed of 25 miles per hour at the time of the accident. The evidence of speed of the Paulsen car must give way to the physical facts shown by the result of the collision. It is utterly inconsistent with such results. See Schultz v. State, *supra*. He had lights on his car, and his car was equipped with hydraulic brakes which he applied.

The evidence shows these brakes to be defective, and that the car would not come to a complete stop unless the brake lever was pumped fast. The vision of the driver of the Paulsen car was unobstructed for a distance of 600 feet on a well-lighted arterial highway.

The defendant, due to the impact, was hurled from his truck, lighting on his head, and was in a dazed condition. Testimony was given as to the condition of Paulsen and McKenna. All three were removed to a hospital. As a result of injuries sustained, McKenna died.

The police officers testified that the defendant's breath smelled of intoxicating liquor. There is no competent evidence in the record that the defendant was intoxicated or driving his truck while in an intoxicated condition at the time of the collision. The submission of this phase of the case to the jury constituted prejudicial error.

The contention of the defendant is that under the evidence the physical facts are so conclusive as to the speed of the Paulsen car that no other deduction can be reached except that the negligence of Paulsen was the direct and proximate cause of the death of McKenna.

We are concerned only as to whether or not the evidence was sufficient to warrant the submission thereof to the jury to determine whether the defendant was guilty of manslaughter as defined in section 28-403, R. S. 1943.

The following statutory provisions are self-explanatory and have been considered in connection with section 28-403, R. S. 1943, to determine whether or not the defendant was in the commission of an unlawful act at the time of the collision.

Section 39-728, R. S. 1943, provides: "Motor vehicles traveling upon public highways shall give the right of way to vehicles approaching along intersecting highways from the right, and shall have the right of way over those approaching from the left when said vehicles shall reach the intersection at approximately the same time.

In all other cases the vehicle reaching the intersection first shall have the right of way."

By section 39-729, R. S. 1943, power is conferred upon the proper authorities, in order to further promote safety, to erect and maintain stop or warning signs at intersections of streets and highways.

Section 39-732, R. S. 1943, provides that the violation of sections 39-728 and 39-729, R. S. 1943, constitutes a misdemeanor and fixes the penalty in the form of a fine of not less than ten dollars nor more than twenty dollars.

The undisputed evidence shows that the defendant's truck was in the intersection first. Paulsen's testimony lacks any degree of clarity as to when he saw the defendant's truck. He testified that he was unable to stop and smashed into the truck when its rear wheels were six feet beyond the center line of the intersection. These facts being true, the defendant was not in the commission of an unlawful act at the time of the collision.

It is true, as held in Benton v. State, *supra,* where a defendant is negligent, the contributory negligence of the driver of the car in which deceased was riding, even if it were imputable to the deceased, is no defense in a criminal prosecution. See, also, Thiede v. State, 106 Neb. 48, 182 N. W. 570; Schultz v. State, *supra.*

The evidence failing to show that the defendant was in the commission of an unlawful act, or negligent, at the time of the collision, makes the foregoing rule inapplicable.

In Pruitt v. Lincoln City Lines, 147 Neb. 204, 22 N. W. 2d 651, quoting from Riekes v. Schantz, 144 Neb. 150, 12 N. W. 2d 766, this court held: "The physical facts are sufficient to bar a recovery for negligence only when they indisputably demonstrate that the collision out of which the cause of action arose was not caused by the party charged." The foregoing constitutes the rule in civil cases, and the rule would be no different in a criminal case.

We believe that the physical facts in the instant case

undisputably demonstrate that the collision out of which this charge of manslaughter arose was not caused by any violation of the law on the part of the defendant. This being true, he would not be guilty of manslaughter.

In Severin v. State, 146 Neb. 506, 20 N. W. 2d 377, this court held that it would not interfere with a verdict of guilty in a criminal case which was based upon conflicting evidence unless it was so lacking in probative force that the court could say as a matter of law that it was insufficient to support a finding of guilt beyond a reasonable doubt. See, also, Williams v. State, 115 Neb. 277, 212 N. W. 606; Buckley v. State, 131 Neb. 752, 269 N. W. 892.

We conclude that the evidence in the instant case is so lacking in probative force that as a matter of law it is insufficient to support a finding of guilt beyond a reasonable doubt. The evidence does not show that the defendant was in the commission of an unlawful act at the time of the collision.

For the reasons given herein, the judgment is reversed and the cause remanded with directions to discharge the defendant and dismiss the case.

REVERSED AND REMANDED WITH DIRECTIONS.

CARTER, J., dissenting.

ALMA PIERSON, APPELLEE, V. T. C. JENSEN, FIRST AND REAL NAME UNKNOWN, ET AL., APPELLANTS.
33 N. W. 2d 462

Filed July 16, 1948. No. 32267.

1. **Venue.** An action for tort is maintainable in the county where the cause of action arose or in one in which the plaintiff or a defendant resides at the time the action is commenced.
2. **Negligence.** It is error for the court to submit to a jury a charge of negligence which finds no support in the evidence.
3. **Trial.** An inadvertent substitution of one word for another in an instruction is harmless error, when it is clear from the

instruction itself or from the record and other instructions given that the jury could not have been confused or misled thereby.

4. **Negligence.** As a general rule leaving an unlighted vehicle on a highway at night without any warning constitutes gross negligence within the meaning of the comparative negligence statute.
5. ———. A plaintiff in an action for negligence who was guilty of contributory negligence which in itself was more than slight or which by comparison with the negligence of the defendant was more than slight may not recover.
6. ———. In an action for negligence if contributory negligence sufficient to defeat a recovery has been established by evidence concerning which different minds may not reasonably draw different conclusions or inferences it is the duty of the court to withdraw the case from the jury and so find as a matter of law.
7. ———. Where different minds may reasonably draw different conclusions or inferences from the adduced evidence, or if there is a conflict in the evidence, as to whether or not the evidence establishes negligence or contributory negligence, and the degree thereof, when one is compared with the other, such issues must be submitted to a jury.

APPEAL from the district court for Lancaster County: JEFFERSON H. BROADY, JUDGE. On motion for rehearing, former opinion and judgment vacated and set aside. See 148 Neb. 849, 29 N. W. 2d 625. *Affirmed.*

Baylor, Bloss & Evnen, for appellants.

Davis, Stubbs & Healey, for appellee.

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

YEAGER, J.

This is an action for damages for personal injuries instituted by Alma Pierson, plaintiff, appellee here, against T. C. Jensen, first and real name unknown, and Robert Gillming, defendants, appellants here.

A trial was had in the district court to a jury which resulted in a verdict in favor of plaintiff and against both defendants for $5,500. A motion for new trial was duly filed and by the court overruled. From the verdict and judgment and the order overruling the motion for new trial the defendants appealed.

On a previous hearing this court reversed the judgment and dismissed the action. The opinion is reported in 148 Neb. 849, 29 N. W. 2d 625. On rehearing it was concluded that this former disposition of the case was erroneous, therefore the opinion is withdrawn.

It therefore becomes necessary to restate the case and to treat of assignments of error not considered in the former opinion.

On August 12, 1945, the defendant Robert Gillming was operating a truck-trailer owned by the defendant T. C. Jensen and in furtherance of the business of Jensen. The truck was loaded with 23 head of cattle and one horse. The trailer portion was equipped with a stock rack the rear of which was painted white and equipped with clearance lights, a cluster of three lights, and below the bed of the trailer a taillight. In addition there were reflectors at each corner directly above the bed of the trailer. The bed of the trailer was four feet above the ground and the stock rack extended about five and one-half feet above the bed. On the date in question Gillming was proceeding eastward from Kearney, Nebraska, on State Highway No. 2. At about 10:30 p. m. on the evening of the day in question at a point somewhat more than a mile west of Seward, Nebraska, an automobile operated by plaintiff ran into the rear end of the truck-trailer being at the time operated by the defendant Gillming. The automobile operated by plaintiff was properly equipped with lights and immediately before the accident it was proceeding at the speed of about 40 miles per hour.

The plaintiff alleged in her petition that it was negligence on the part of Gillming in the operation of the truck-trailer that caused her to drive into the rear of the truck-trailer. The negligence alleged and which plaintiff sought to support by evidence was substantially that the truck was caused to be on the highway at night in an unlighted condition; that there was a failure to warn approaching traffic of the unlighted condition of

the truck; that no flares or flags were placed to give warning of the presence of the truck on the highway; that the truck as a motor vehicle was being operated with defective lights which were insufficient to properly light the tractor and trailer; that no proper lookout was kept for approaching traffic; that there was a failure to remove the truck-trailer from the highway; that the vehicle was not equipped with a red light visible 500 feet to the rear; that the speed of the vehicle was suddenly decreased without giving an appropriate signal by hand, light, or semaphore; that the vehicle was parked upon the paved and improved portion of the highway when it was practicable to remove it therefrom; and that in stopping the vehicle on the highway defendants failed to leave a clear and unobstructed width thereon of not less than 15 feet opposite such vehicle.

The defendants in answer to the petition denied the allegations of negligence and of damage therein contained. Affirmatively they alleged that any injury or damage sustained by plaintiff was proximately caused and contributed to by the negligence of the plaintiff. There was also an allegation of renewal of objection to the jurisdiction of the court by the defendant Gillming but no such objection appears in the transcript.

The affirmative allegations of the answer were denied by reply.

The defendants have assigned numerous alleged errors as grounds for reversal of the judgment. The first two treat of the power of the court to entertain jurisdiction of the case for trial. It is the contention of the defendants that the plaintiff at the time of the commencement of the action was not a resident of Lancaster County, Nebraska, the county in which the action was instituted, and the defendants were not residents of that county, and the cause of action not having occurred in that county, action in that county was improper under section 25-409, R. S. 1943.

Pursuant to the terms of this section of the statute

an action in tort is not maintainable except in the county where the cause of action arose, or where one of the defendants or the plaintiff resided at the time the action was commenced.

On the record the district court did not submit this question to a jury but in effect held that the evidence was conclusive that plaintiff was a resident of Lancaster County, Nebraska, and that therefore in this respect no jury question was presented.

In this there was no error. In disposition of these assignments we adopt the following from the former opinion of this court: "Regarding the question as to plaintiff's residence, the testimony of plaintiff is that she had lived in Lincoln for about two years before the filing of her petition; that she voted in Lancaster County, Nebraska; and that in June 1946, sometime after the filing of her petition, she went to make her home with her brother in Valley County, until such time as she could again work, when it was her intention to return to Lincoln. This evidence stands undisputed."

The fifth assignment of error is an objection that the court erred in submitting in instruction No. 1 an issue that the truck was not equipped with reflectors.

From an examination of the instruction it becomes apparent that this contention is groundless. The jury was told the following: "Plaintiff further says that traffic approaching from the east and traveling west with bright headlights blinded the plaintiff and such glare from automobiles approaching from the east temporarily blinded plaintiff so she could not see defendant's truck ahead of her because of the absence of rear lights, reflectors or lighted flares." This is contained in a recital of the general claims of plaintiff but it does not purport to be a charge of negligence against the defendants. The charges of negligence are specifically set out later on in the instruction and in them is not found a charge of negligence based on a failure to have the truck equipped with reflectors.

The sixth assignment is a contention that it was error for the court to submit as a ground of negligence the sudden decrease of the speed of the truck without giving an appropriate signal by hand, light, or semaphore. The theory of the assignment was that the charge was not sustained by evidence.

If the charge was without evidentiary support the court was in error in submitting it to a jury. Blue Valley State Bank v. Milburn, 120 Neb. 421, 232 N. W. 777; Tighe v. Interstate Transit Lines, 130 Neb. 5, 263 N. W. 483; McClelland v. Interstate Transit Lines, 139 Neb. 146, 296 N. W. 757; Johnson v. Anoka-Butte Lumber Co., 141 Neb. 851, 5 N. W. 2d 114; Allen v. Clark, 148 Neb. 627, 28 N. W. 2d 439. However here there was direct evidence that there was no warning light displayed and other evidence upon which a reasonable inference might rest that no other kind or character of signal was given. The charge was therefore supported by evidence.

In the seventh assignment of error it is contended that the court erred in reciting that one of the charges of negligence was that the trailer was stopped on the highway without white lights visible for a distance of 500 feet to the rear and in submitting this to the jury as an issue of negligence.

There can be no doubt that this was error since there is no requirement that any vehicle on a highway shall have a white light or lights visible for any distance to the rear. The only question is as to whether or not the error was prejudicial and in consequence reversible.

If this amounted to but an inadvertent substitution of one word for another and if in the light of the entire instructions it may be said that the error could not reasonably have misled the jury then it was error without prejudice. In Blanchard v. Lawson, 148 Neb. 299, 27 N. W. 2d 217, it was said: "The inadvertent substitution of one word for another in an instruction is at most harmless error, when it is clear from the instruction itself or from the record and other instructions given

that the jury could not have been confused or misled thereby."

In Hampton v. State, 148 Neb. 574, 28 N. W. 2d 322, it was said: "An instruction will not be held to be prejudicially erroneous merely because of a harmless imperfection which cannot reasonably be said to have confused or misled the jury to the prejudice of the party complaining."

In instruction No. 7 the court correctly instructed with regard to the lighting requirements for vehicles such as the one involved here. The jury was told that the statutes required under circumstances such as were disclosed by the evidence that there shall be a lamp to the rear exhibiting a red light visible for a distance of 500 feet.

This coupled with the general information that motor vehicles do not have white lights but do have red lights on the rear and the presumptive knowledge that no such lights are required we are of the opinion that this error must be considered an inadvertence which could not reasonably have misled the jury.

For their ninth assignment of error the defendants assert that the court erred in giving instruction No. 13. The particular complaint is that the following from the instruction incorrectly reflects the meaning of the comparative negligence statute of the State of Nebraska: "You are instructed that, as a general rule, leaving an unlighted vehicle on a highway on a dark night without warning constitutes gross negligence within the meaning of the comparative negligence statutes of the State of Nebraska. To this rule, however, there are exceptions - where, for reasons beyond the control of the vehicle operator, it is impracticable or impossible to move said vehicle or maintain lights thereon."

This statement conforms to a previous pronouncement of this court and we think it expresses a proper attitude in law and common understanding toward situations such as are contemplated by the instruction. It

cannot be denied that the leaving of an unlighted vehicle on a public highway at night creates a highly dangerous condition. It therefore cannot well be said that the person responsible for the condition, in the absence of legal justification or excuse, was not in a high degree or grossly negligent.

In Monasmith v. Cosden Oil Co., 124 Neb. 327, 246 N. W. 623, it was said: "Leaving an unlighted vehicle on highway, on dark night, without any warning, constitutes gross negligence, within the meaning of the comparative negligence statute."

In Giles v. Welsh, 122 Neb. 164, 239 N. W. 813, it was said: "It is evident that defendants were guilty of gross negligence in leaving an unlighted truck upon the highway on a dark night, without warning of any kind to protect approaching travelers."

As pointed out by appellants it properly is inferable from the comparative negligence statute and the decisions construing it that ordinarily and generally whether or not an act or omission is gross negligence is ascertainable by comparison with the negligence of an opposing party against whom contributory negligence has been charged. § 25-1151, R. S. 1943; Sodomka v. Cudahy Packing Co., 101 Neb. 446, 163 N. W. 809; Morrison v. Scotts Bluff County, 104 Neb. 254, 177 N. W. 158; Dodds v. Omaha & C. B. Street Ry. Co., 104 Neb. 692, 178 N. W. 258; Haffke v. Missouri P. R. Corporation, 110 Neb. 125, 193 N. W. 257; Troup v. Porter, 126 Neb. 93, 252 N. W. 611; Thomison v. Buehler, 147 Neb. 811, 25 N. W. 2d 391.

This however we think does not have the effect of preventing the court under certain circumstances, such as were dealt with in Monasmith v. Cosden Oil Co., *supra*, and Giles v. Welsh, *supra*, from saying that acts or omissions may be regarded as gross negligence as a matter of law. The principle is not different from the well-recognized one which permits the court, if the facts warrant, to say that one against whom contributory

negligence has been charged is guilty as a matter of law of more than slight negligence.

We think there was no error in the quoted portion or in the instruction as a whole.

In their eighth assignment the defendants say that the court erred in omitting from its charge any reference to the answer of the defendant Gillming or his denials and affirmative defenses therein contained.

It is true as contended that no reference was made in the instructions to the answer of this defendant although the answer filed was on behalf of both defendants. The answer was entitled "SEPARATE ANSWER OF T. C. JENSEN" but in its body it was a joint answer.

We fail to see however how it may be reasonably said that the jury could have been misled. The answer denied negligence on the part of both defendants and both of them appeared in person in defense of the action. The instructions correctly outlined the evidentiary burden of the plaintiff as to both defendants. It also correctly fixed the burden of both defendants with reference to the affirmative allegations of the answer.

The remaining five assignments will be treated together. They deal with the question of whether or not, assuming that the defendants were guilty of negligence, the plaintiff was guilty of contributory negligence in a degree and to an extent that she would under the comparative negligence law be barred from a recovery, and the question of whether or not in any event there was evidence of negligence on the part of defendants sufficient to submit to a jury.

The evidence in these respects was clearly sufficient upon which to submit the question of whether or not the defendants were guilty of negligence, provided of course that the plaintiff was not guilty of such contributory negligence as would prevent its submission. If the record is such that it may be said as a matter of law that plaintiff was guilty of contributory negligence more than slight then she cannot recover and the necessity

for submission of the negligence of defendants did not exist.

If plaintiff was guilty of contributory negligence which in itself was more than slight (Roth v. Blomquist, 117 Neb. 444, 220 N. W. 572, 58 A. L. R. 1473; Dickenson v. County of Cheyenne, 146 Neb. 36, 18 N. W. 2d 559) or which by comparison with the negligence of defendants which was gross was more than slight (Sodomka v. Cudahy Packing Co., *supra;* Morrison v. Scotts Bluff County, *supra;* Dodds v. Omaha & C. B. Street Ry. Co., *supra;* Troup v. Porter, *supra*) then plaintiff cannot be permitted to recover.

In the consideration of evidence of contributory negligence two rules are to be observed.

One is that if contributory negligence sufficient to defeat a recovery has been established by evidence concerning which different minds may not reasonably draw different conclusions or inferences it is the duty of the court to withdraw the case from the jury and so find as a matter of law. Roth v. Blomquist, *supra;* Sodomka v. Cudahy Packing Co., *supra;* Morrison v. Scotts Bluff County, *supra;* Troup v. Porter, *supra;* Thomas v. Poulson, 149 Neb. 44, 30 N. W. 2d 59; Buresh v. George, 149 Neb. 340, 31 N. W. 2d 106.

The other is that where different minds may reasonably draw different conclusions or inferences from the adduced evidence, or if there is a conflict in the evidence, as to whether or not the evidence establishes negligence or contributory negligence, and the degree thereof when one is compared with the other, such issues must be submitted to a jury. Fulcher v. Ike, 142 Neb. 418, 6 N. W. 2d 610; Miers v. McMaken, 147 Neb. 133, 22 N. W. 2d 422; Thomison v. Buehler, *supra;* Thomas v. Poulson, *supra;* Buresh v. George, *supra.*

The defendants contend that the evidence adduced in this case was such as to require the application of the former of the two rules.

Pertinent evidence necessary to be considered in the

determination of this question is that plaintiff at night was driving eastward at the rate of about 40 miles an hour on the right side of a practically straight and level paved highway which highway had a marked dividing line down its center. The lights were in good condition and were properly pitched for driving under the circumstances testified to. The lights had a range of more than 100 feet. The truck in question was moving in the same direction on the same highway ahead of plaintiff. As plaintiff drew up near the truck from the rear, lights of a car coming from the opposite direction temporarily blinded plaintiff. Plaintiff did not see the truck until she was up close to it. When she saw the truck it was too late to avoid a collision. The car which she was operating collided with the rear end of the truck. At the time of the collision about four feet of the rear end of the truck extended onto the paved portion of the highway. The remaining portion was off to the right. It was either standing or moving forward slowly. Plaintiff saw no reflectors on the rear of the truck and testified that there were no rear lights burning. The rear end of the truck was white. This we think is a fair version of the testimony adduced by plaintiff.

It is from this that we must determine the question of whether or not the court erred in refusing to conclude as a matter of law that plaintiff was guilty of contributory negligence more than slight and in consequence find in favor of defendants. We do not think the court erred in this respect.

In the case of Miers v. McMaken, *supra,* a case which does not differ significantly in point of fact from the version of the facts given herein by plaintiff, in holding that it could not be said that the plaintiff was guilty of contributory negligence as a matter of law, this court said: "We are unwilling to say on the record that the plaintiff was lacking in the care and caution required of him under the circumstances or more specifically that

in the exercise of reasonable care he could have seen the corner of the truck of the defendants in time to avoid the consequences of his attempt to avoid striking it." Accordingly we held that the question of whether or not plaintiff was guilty of contributory negligence was one to be determined by the jury.

What was said and held there is controlling here. It was therefore proper to submit the question of contributory negligence provided that there was sufficient evidence of negligence on the part of the defendants to submit to a jury. It is not contended that if this question was proper for submission that it was improperly submitted.

The charges of negligence have been hereinbefore substantially set forth and they will not be repeated. As to them, there was evidence that the truck was on the highway in an unlighted condition, that there was a failure to warn approaching traffic of the unlighted condition of the truck, that there was a failure to place flares or flags to warn of the presence of the truck, that there was a failure to remove the truck from the highway, that the trailer was not at the time displaying a red light to the rear, that the speed of the truck was decreased or stopped suddenly without giving a signal, and that in stopping on the highway there was a failure to leave a clear and unobstructed width thereon of not less than 15 feet in the driving lane opposite the truck.

Much of this evidence was disputed but clearly it was sufficient for submission to a jury on the question of whether or not the defendants were guilty of negligence, or gross negligence within the meaning of the comparative negligence law.

It is not contended that if this evidence was sufficient for submission on the question of the negligence that it was improperly submitted, except as to the contention that it was improper for the court in its instructions to say that, as a general rule, leaving an unlighted vehicle on a highway on a dark night without warning

constitutes gross negligence within the meaning of the comparative negligence statute of the State of Nebraska. The ruling on this exception being adverse to the contention of the defendants, it follows that the court did not err in submitting the question of defendants' negligence to the jury.

It cannot therefore be said that the court erred in overruling the demurrer to the evidence or the motions for directed verdict and for a new trial, and neither may it be said that the verdict and judgment are not supported by the evidence or that they are contrary to law.

The judgment of the district court is affirmed.

AFFIRMED.

SIMMONS, C. J., dissenting.

I dissent as to the disposition of the fifth assignment of error. The opinion states that the assignment is groundless because the recital of facts is not a charge of negligence.

Instruction No. 1 consists of several paragraphs. It has one paragraph containing the quoted language which is followed immediately *in the same paragraph* with this: "She *claims* the *defendant*, Robert Gillming, *was negligent* which was the proximate cause of the collision and injuries to the plaintiff." The next paragraph recites allegations that the *defendants* were negligent in the following particulars. The first one is that "Defendant caused the truck to be on the highway in the nighttime without lights and unmarked as a warning to plaintiff."

Instruction No. 2 is: "You are instructed that before plaintiff would be entitled to recover on the claims in the petition the burden is upon her to prove by a preponderance of the evidence that the defendant Gillming was negligent in the operation of the truck at the time in one or more of the particulars, as claimed by plaintiff and set forth and enumerated in Instruction No. 1,

and that such negligence was the proximate cause of the accident and injuries to the plaintiff."

The second paragraph in instruction No. 2 refers to the answer alleging plaintiff's negligence and states: "* * * if you shall first find that the defendant was negligent in one or more of the particulars claimed by the plaintiff, then the burden of proof is upon the defendants to prove * * *."

In Hutchinson v. Western Bridge & Construction Co., 97 Neb. 439, 150 N. W. 193, we said: "Jurors are not lawyers, and are not always prepared to discriminate between that portion of a lengthy charge which contains statements made in pleadings, and the remainder of it. * * * Where a petition contains allegations of fact not supported by any evidence, it may be reversible error to include such statements in that part of the charge of the court defining the issues to be tried, and, if the reviewing court is satisfied that the jury has been misled by so doing, it will be its duty to grant a new trial." We followed that case and others in McCelland v. Interstate Transit Lines, 139 Neb. 146, 296 N. W. 757, wherein we said: "In stating the issue to the jury, it is likewise error, which may be prejudicial, for the trial court to include allegations of which there is no proof."

In Allen v. Clark, 148 Neb. 627, 28 N. W. 2d 439, we went further and said: "It is reversible error for the court to include, in its instructions to the jury, allegations of fact found in the pleadings but which have not been supported by any evidence."

It seems to me that the opinion contains a modification of the Allen case. If we are to do that we should so state, and then we must go further and point out the ground for our saying the jury was not misled.

PAINE, J., concurs in this dissent.

FAY E. WILLIAMS, APPELLANT, V. VINCENT BECKMARK, APPELLEE.

33 N. W. 2d 352

Filed July 16, 1948. No. 32380.

1. **Judgments.** A judgment on the merits constitutes an absolute bar to a subsequent action founded upon the same claim or demand, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but also as to any other admissible matter which might have been offered for that purpose.
2. **Improvements.** In the absence of statute, permanent improvements placed upon the land of another, by one having no interest or title therein, without the owner's consent, prima facie become a part of the realty and belong to the owner of the fee, precluding the right of removal thereof by the maker, although they were placed thereon by mistake or with a view of enforcing an adverse right in the land, unless there is an express agreement which takes the case out of the rule, or unless the owner is estopped to claim such ownership.
3. ———. As a general rule, in order that one may recover compensation for improvements made on another's land, as equitable relief, three concurrent elements must be shown to exist: (1) The occupant must have made the improvements in good faith; (2) he must have been in possession, actual or constructive, adversely to the title of the true owner; and (3) his possession must have been held under color or claim of title.
4. ———. As a general rule, an occupant of land is not a possessor in good faith and hence is not entitled to compensation for improvements which he makes thereon after he has notice or knowledge that his title is defective, or notice or knowledge of an adverse title or claim to the property in another.
5. **Use and Occupation.** As a general rule, an occupant of property who has made improvements thereon for which no compensation is recoverable, should be required to account only for rents and profits which might have been reasonably charged had the improvements not been made.
6. **Damages.** Where property, a part of the realty to which it is attached, is damaged, removed, or destroyed without damage to the realty itself, and where the nature of the thing is such that it is capable of being repaired or replaced at once and the cost of doing so is capable of reasonable ascertainment, the measure of damages for its damage, removal, or destruction is the

reasonable cost of repairing or replacing the property in like kind and quantity.

APPEAL from the district court for Morrill County: CLAIBOURNE G. PERRY, JUDGE. *Reversed and remanded.*

Paul Rhodes, Mothersead & Wright, and *Robert G. Simmons, Jr.,* for appellant.

Morrow, Lovell & Bulger and *Bern R. Coulter,* for appellee.

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

CHAPPELL, J.

Plaintiff originally filed a petition in ejectment and to recover from defendant damages for unlawfully withholding possession of the realty here involved. The answer of defendant thereto was a general denial, a factually-claimed, valid, and enforceable contract of purchase, and the making of lasting and valuable improvements in good faith while claiming title and lawful possession of the property. His prayer was for dismissal, or in case of judgment dispossessing him, that defendant should recover under the provisions of the Occupying Claimants Act for the improvements, or, in the alternative, that his contract of purchase should be specifically performed, and "for such other and further relief as may be just and equitable."

After hearing upon the merits, the trial court entered judgment, ejecting defendant and awarding plaintiff damages for unlawful possession, same being the reasonable rental value of the property for the period involved. The judgment found, however, that defendant had placed lasting and valuable improvements on the premises and was entitled to the benefit and protection of the Occupying Claimants Act. Plaintiff appealed from that part of the judgment granting defendant relief under the act, and defendant cross-appealed from that part ejecting him from the premises. Our conclusions therein are

reported in Williams v. Beckmark, 146 Neb. 814, 21 N. W. 2d 745. In that opinion we concluded substantially that defendant had no valid enforceable contract of purchase, either oral or written, and that plaintiff was at all times entitled to possession and the damages awarded, but we reversed that part of the judgment awarding defendant the benefit of the Occupying Claimants Act, primarily upon the ground that defendant had no color of title.

While that appeal was pending, and until April 29, 1946, after judgment on the mandate and execution of writ of possession, defendant kept possession of the property without payment of rents, whereupon plaintiff filed the present action. Plaintiff's petition was in two causes of action. The first was to recover the reasonable rental value of the property from October 17, 1944, to April 30, 1946. The second was to recover the reasonable cost of replacing certain described fixtures or improvements which defendant had put in the house during his alleged unlawful possession, but had torn out and removed when he vacated the property. That cause of action also sought to recover damages to the house itself, not only by reason of the removal aforesaid, but tortiously otherwise having no connection with the removal.

For answer, defendant denied generally the allegations of both causes of action, but admitted that plaintiff was the owner of the property during the period involved, and admitted that defendant had removed the fixtures and improvements described in plaintiff's petition. He alleged, however, that it was done without any substantial injury to the remainder of the house, which was allegedly worth more at the time defendant vacated it than when he took possession.

As a further defense to plaintiff's second cause of action, defendant's answer set forth at length and almost verbatim the allegations of his answer in Williams v. Beckmark, *supra,* relating to his alleged lawful right to possession, and averring that the improvements were

made by him in good faith, believing that he had a valid enforceable contract for purchase of the property. Defendant prayed that plaintiff's action should be dismissed, primarily upon the premise, as argued in the brief and before this court, that defendant was entitled to equitable relief, and that plaintiff could not recover rent or for the reasonable cost of restoring the fixtures or damages if other improvements placed on the property by defendant had increased the value of the property equal to or in excess of the reasonable rental value and damages to the premises by reason of defendant's removal of the fixtures or otherwise. At the same time, defendant also filed an offer to confess judgment in favor of plaintiff and against defendant for $500.

For reply, plaintiff denied generally the allegations of defendant's answer, and set forth verbatim the material allegations of defendant's answer in Williams v. Beckmark, *supra,* together with that part of the final judgment therein to the effect that: "IT IS FURTHER ORDERED ADJUDGED AND DECREED by the Court, that all relief prayed for by the defendant herein is denied." In the light thereof, plaintiff then pleaded res adjudicata.

The issues thus pleaded were over objections of plaintiff and contrary to his proffered instructions, factually submitted and tried to a jury, whereupon defendant was awarded a verdict and judgment thereon. Plaintiff's motion for new trial was overruled, and he appealed, assigning some 17 alleged errors of the trial court. They need not and will not be discussed separately or at length. It is sufficient to discuss and decide that Williams v. Beckmark, *supra,* was res adjudicata of defendant's rights to have credit for or remove the improvements, and that in any event they were not placed on the property by defendant in good faith.

All of the improvements here involved were on the property at the time the former action was filed, heard, and decided. Defendant's answer in the case at bar, as

heretofore pointed out, pleaded substantially the same state of facts as in his answer filed in the former action. The present action is between the same parties as the former. They both involved the recovery of accrued rentals and damages for the unlawful possession of the same property. The relevant evidence in the case at bar was practically identical with that in the former. The only difference in the two defenses was that in the former action defendant prayed for relief under the Occupying Claimants Act and for such other relief as might be just and equitable, while in the case at bar defendant sought only the latter relief. There is no question here of election of remedies or mistake of chosen remedy. Defendant chose and pleaded both remedies in the former case, but stressed only one for his own advantage, while in the present case he simply chose to rely upon the one which he contended had not yet been adjudicated.

The applicable rule is that: "A judgment on the merits constitutes an absolute bar to a subsequent action founded upon the same claim or demand, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but also as to any other admissible matter which might have been offered for that purpose." Triska v. Miller, 86 Neb. 503, 125 N. W. 1070. See, also, Baker v. Somerville, 138 Neb. 466, 293 N. W. 326; Shepard v. City of Friend, 141 Neb. 866, 5 N. W. 2d 108.

In Wightman v. City of Wayne, 148 Neb. 700, 28 N. W. 2d 575, it was held: "A party may not be vexed more than once for the same cause of action, and the doctrine of res judicata includes not only the things which were determined in the former suit, but also any other matter properly involved which might have been raised and determined therein."

In Boomer v. Olsen, 143 Neb. 579, 10 N. W. 2d 507, it was said: "It is well-settled law that one may not

be permitted to split a cause of action; that if he might have had complete relief in an action which was prosecuted to final judgment he may not again vex his former adversary with another suit based upon the same wrong. First Nat. Bank of Plattsmouth v. Gibson, 74 Neb. 232, 104 N. W. 174. It is just as well settled that one may not present issues for determination and avoid the effect of an estoppel by withholding proof thereof. Slater v. Skirving, 51 Neb. 108, 70 N. W. 493."

As a general rule, in order that one may recover compensation for improvements, as equitable relief, three concurrent elements must be shown to exist: (1) The occupant must have made the improvements in good faith; (2) he must have been in actual or constructive possession adversely to the title of the true owner; and (3) his possession must have been held under color or claim of title. See 42 C. J. S., Improvements, § 7, p. 432, and 31 C. J., Improvements, § 27, p. 319, together with sections cited *infra* in the notes. The latter element was fully adjudicated in the former action as being nonexistent. It would appear then without doubt that defendant's right to recover for or have credit for the improvements placed on the premises by him was entirely litigated and determined in the former action, and thus res adjudicata.

In any event, even if defendant were not estopped by the former judgment from making claim for the right to remove or to recover the value of the improvements placed on the premises by him, still the evidence conclusively shows that as a matter of law they were not made in good faith, which would itself bar defendant's claimed rights.

As stated in 42 C. J. S., Improvements, § 7, p. 435: "As a general rule an occupant of land is not a possessor in good faith and hence is not entitled to compensation for improvements which he makes thereon after he has notice or knowledge that his title is defective, or notice or knowledge of an adverse title or claim to the

property in another; and this rule has been held to apply, although the owner knew that the improvements were being made and offered no objections. Otherwise stated, an occupant making improvements must, to be a possessor in good faith, be ignorant that his title is contested by one having or claiming a better right." See, also, 31 C. J., Improvements, § 29, p. 321, § 31, p. 323.

Also, as stated in 27 Am. Jur., Improvements, § 14, p. 270: "The right to recover the value of improvements depends upon the good faith of the occupant, and not upon any lack of diligence in the owner in claiming his rights; hence, the fact that while the improvements were in progress the owner was not in a condition to assert his title will not affect the occupant's right as to the improvements. On the other hand, the personal belief of an occupant that he acted in good faith is not conclusive on that issue. A purchaser who knows all the facts about an outstanding valid title, but who in good faith mistakes the law in reference thereto, has been held not to be a bona fide purchaser entitled to an allowance for his improvements."

In Cram v. Cotrell, 48 Neb. 646, 67 N. W. 452, 58 Am. S. R. 714, this court held that: "For the purpose of redemption a purchaser in good faith at the judicial sale, believing he has a good title, will be entitled to credit for improvements made upon the property; but one who buys with notice of the facts is not a purchaser in good faith within the meaning of the rule, and is not entitled to such credit." In the opinion it was said: "Stoddar was not a purchaser in good faith within the meaning of this rule. If he did not know of plaintiffs' rights when he took the mortgage, he learned them within a very few days thereafter. * * * He had full notice of all the facts. A mistake of law would not protect him."

In the case at bar, defendant himself testified substantially that on April 19, 1944, plaintiff came to his home, mad, and asked him why he was working in the

house, told defendant that the place belonged to him, wanted to know what defendant was doing in his house, and said that he was going to Scottsbluff and get somebody that could handle it. A letter offered by defendant, which threatened plaintiff with a suit for specific performance, demonstrated that defendant knew of plaintiff's claim to the property on April 10, 1944. The evidence disclosed that defendant immediately after talking with plaintiff, made investigation and became possessed of all the facts relative to plaintiff's claims and ownership. The evidence disclosed that all of the improvements here involved were made by defendant after he had notice and knowledge of plaintiff's claims. Thereafter, it was not possible for defendant to have placed the improvements upon the property in good faith. The case at bar does not come within any exception to the general rule heretofore set forth.

A statement appearing in Williams v. Beckmark, *supra,* has application here. Therein it was said: "The difficulty with defendant's theory is that Williams did not give nor authorize the giving of possession to the defendant. Plaintiff has made no binding contract nor has he performed or partially performed any purported agreement. Clearly, the defendant cannot by his own unilateral action put himself in a position to invoke the powers of a court of equity when the defendant has made no binding agreement and has so asserted at every stage of the proceedings."

It is generally the rule that: "In the absence of statute, any permanent improvement placed upon the land of another, by one having no interest or title therein, without the owner's consent, prima facie becomes a part of the realty and belongs to the owner of the fee, although it was placed thereon by mistake, or with a view of enforcing an adverse right in the land, unless there is an express agreement which takes the case out of the rule, or unless the owner is estopped to claim such ownership." 31 C. J., Improvements, § 3, p. 309; 42 C. J. S.,

Improvements, § 3, p. 423. See, also, Carter v. Brown, 35 Neb. 670, 53 N. W. 580. It is also the rule that if improvements become a part of the realty, they may not be lawfully removed by the person making them, in the absence of statutory authority or agreement with the owner. 31 C. J., Improvements, § 7, p. 311; 42 C. J. S., Improvements, § 4, p. 425.

The case at bar comes squarely within the foregoing general rule and not within any of its exceptions. Admittedly, the realty belonged to plaintiff, and in the situation presented here, the fixtures having been made as an improvement thereon, also belonged to plaintiff as a part of the realty. Defendant had no lawful right to remove them, and when he did so plaintiff was entitled to recover from him the reasonable cost of replacing such improvements with like kind and quality, and otherwise restoring the property to substantially the same condition it was before vacated by defendant.

In that connection, the applicable measure of plaintiff's damages will be found in Koyen v. Citizens Nat. Bank, 107 Neb. 274, 185 N. W. 413, wherein it was held that: "Where property, a part of the realty to which it is attached, is destroyed without damage to the realty itself, and where the nature of the thing destroyed is such that it is capable of being replaced at once, and the cost of doing so is capable of reasonable ascertainment, the measure of damages for its negligent destruction is the reasonable cost of replacing the property in like kind and quality." The rule was applied in Wendt v. Yant Construction Co., 125 Neb. 277, 249 N. W. 599. See, also, 25 C. J. S., § 84, p. 604.

With regard to the rents recoverable by plaintiff, it is the general rule in the absence of statute "that in estimating the rents and profits to be charged against the occupant, he should be required to account only for those rents and profits which might properly have been charged had the improvements not been made, and not for rents and profits on the land as enhanced in value

by the improvements placed thereon by him." 42 C. J. S., Improvements, § 12, p. 450; 31 C. J., Improvements, § 60, p. 339. As indicated in said authorities, the rule has particular application where no compensation is allowed the occupant for improvements, as in the case at bar.

For the reasons heretofore stated, we conclude that the only issues which should have been submitted to the jury were the reasonable rental value of the property for the period involved, and the reasonable cost of replacing the fixtures and improvements admittedly removed by defendant, together with the reasonable cost of restoring the house itself to substantially the same condition it was before vacated by defendant, if it were otherwise tortiously damaged by him, as claimed by plaintiff.

We decide that the trial court erred in submitting any other issues to the jury and that the judgment should be and hereby is reversed and the cause is remanded for new trial in conformity with this opinion.

REVERSED AND REMANDED.

STATE OF NEBRASKA EX REL. ELIZABETH STRANGE ET AL., RELATORS, V. SCHOOL DISTRICT OF NEBRASKA CITY, OTOE COUNTY, NEBRASKA, ET AL., RESPONDENTS.

33 N. W. 2d 358

Filed July 20, 1948. No. 32455.

1. **Pleading.** Section 25-829, R. S. 1943, authorizes the verification of pleadings before the attorney of record. A petition for mandamus, injunction, and equitable relief is such a pleading.
2. **Mandamus: Juries.** The trial of issues of fact on an application for a mandamus is not one in which a jury may be demanded as a matter of right.
3. **Schools and School Districts.** Sections 79-221 and 79-223, R. S. 1943, apply to school districts operating under the provisions of law relating to rural schools, as distinguished from schools in cities and villages.
4. **Mandamus.** The court has no power by mandamus to control

the decision of those matters which are left by statute to the discretion of the governing body of a governmental agency.

5. ———. A peremptory writ of mandamus should be issued only where the legal right to it is clearly shown.

APPEAL from the district court for Otoe County: THOMAS E. DUNBAR, JUDGE. *Affirmed.*

John L. Mattox, for relators.

Moran & James, for respondents.

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

SIMMONS, C. J.

In this action relators sought a writ of mandamus requiring the respondents to conduct the first, second, third, and fourth grades, with adequate teachers, in the Kearney school in the respondent district during the school years 1947-1948, and thereafter, and that they be enjoined from closing or discontinuing any of said grades in said school, and for equitable relief. An alternative writ was issued and served. On motion of respondents the alternative writ was recalled. An alias alternative writ was issued. Respondents answered. On issues made, trial was had resulting in a denial of a writ and the dismissal of relators' petition. Relators appeal. We affirm the judgment of the trial court.

The litigation arises out of the following factual situation. Nebraska City is a municipal corporation with approximately seven thousand population. The respondent school district comprises the city and some contiguous rural area. It is a body corporate with a board of education of nine members. It operates schools in eight different school buildings, of which one is the Kearney school.

Prior to the school year 1946-1947, school for grades one to four was conducted in the Kearney building with two teachers for the four grades. The enrollment for the year 1945-1946 was 34 pupils in the four grades. At

the beginning of the school year 1946-1947, the enrollment dropped to 27, with one teacher. In October 1946, parents of the children in the school requested that an additional teacher be provided at the Kearney school. A meeting of representatives of parents and the school board followed, resulting in a decision of the board to transfer the third and fourth grade pupils to an adjoining school. This was based on the financial necessities of the respondent school district. The parents did not protest the decision. The Kearney school was operated for the first and second grades during the balance of the school year.

On March 24, 1947, the board adopted a resolution closing the Kearney school. On May 5, 1947, there was presented to the board a petition of 235 residents and taxpayers of the district served by the Kearney school protesting the proposed discontinuance and requesting that the school be kept open and that grades one, two, three, and four be taught therein. The board did not grant the request.

Subsequent to the resolution to close the school, legislative authority to increase the levy was had, which it was anticipated would increase the available funds of the respondent for the support of the schools. On June 23, 1947, the board adopted a motion to continue the Kearney school for the year 1947-1948. From the evidence it appears that the board contemplated continuing instruction in grades one and two at the Kearney school, and that the third and fourth grade pupils would attend a school approximately half a mile distant from the Kearney school. Pupils in the Kearney school area, so transferred, are required, by the convenient route, to go to the adjoining school along a heavily traveled interstate highway, intersected by a main-line railroad, and to pass a business section where there are stores and a beer tavern. The evidence is that there is considerable train movement on the railroad tracks during the day, and congestion of traffic at the stores and beer tavern,

both in the street and on the sidewalk. These hazards would not be met if the children attended school at the Kearney school.

Relators brought this action in May 1947, in which they alleged the above situation generally.

The petition is based upon two theories of a right to the writ. They alleged that there are more than five children between the ages of seven and 16 years who will attend school during the term, and that the proposed plan to close the school is without the approval of the superintendent of schools of Otoe County, or of the Superintendent of Public Instruction of the state. They also alleged that the proposed plan is an abuse of the discretion vested in the board in the management of the affairs of the school district.

The respondent board answered that its action was originally taken as an economy measure, and its determinations were administrative matters within the sound discretion of the board.

As above stated, the trial court sustained respondents' motion to recall the first alternative writ. This was based on the proposition that the verification to the petition was sworn to before relators' attorney. The trial court ordered the re-verification of the original petition, and that was done before the clerk of the court. It resulted in the issuance of the alias writ and a few days' delay in the proceedings. Relators assign the sustaining of the motion as error.

Section 25-829, R. S. 1943, provides: "The affidavit verifying pleadings may be made before any notary public or other officer authorized to administer oaths, and must be signed by the party making the same; and the officer before whom the same was taken shall certify that it was sworn to or affirmed before him and signed in his presence. The certificate of such officer, signed officially by him, shall be evidence that the affidavit was duly made, that the name of the officer was written by himself, and that he was such officer, and nothing

herein shall be construed to prohibit an attorney at law, who is a notary public, from swearing a client to any pleading or other paper or affidavit in any proceeding of the courts of this state."

This act was construed in Horkey v. Kendall, 53 Neb. 522, 73 N. W. 953, 68 Am. S. R. 623. It was there held that this act authorized the verification of pleadings before the attorney of record. Clearly the verification here is within the scope of that holding, and it was error to sustain the motion. However, it was error without prejudice.

Prior to trial, the relators demanded a jury trial. They so moved at the beginning of the trial. The demand was overruled. Relators assign this as error. As heretofore pointed out, the relators, in addition to praying for a writ of mandamus, sought also an injunction and equitable relief.

As to mandamus, the rule is: "The trial of issues of fact on an application for a mandamus is not one in which a jury may be demanded as a matter of right." Mayer v. State, 52 Neb. 764, 73 N. W. 214.

Clearly the relators had no right to a jury trial and the court did not err in denying it.

Relators next assign as error the admission in evidence of certain exhibits. Two only are questioned directly. As to exhibit 8, a budget of the respondent district for 1947-1948, the record shows that, while it was identified as respondents' exhibit, relators offered it in evidence. Certainly relators cannot predicate error as to that. Exhibit 14, about which complaint is made, is in part an exact copy of exhibit 8 and the remainder is a statement of the various funds showing items of expenditure which are shown only by totals in exhibit 8. A large part of the items in this exhibit had been read into the record, without objection, prior to the offering and admission of the exhibit. We see no error in the admission of exhibit 14.

Relators next contend that the judgment is contrary

to law and rely on sections 79-221 and 79-223, R. S. 1943. Under certain conditions including the permission of the parent and the approval of the county superintendent, these sections provide for the closing of schools and the transfer of pupils, where there are less than five children who are seven years of age and less than 16 years of age, who will attend school during the term and who reside in the district. The evidence establishes that there are more than the recited number of pupils in the district and that such permission and approval were not had.

An examination of the statutes and their history shows that there is no merit in this contention. In the revision of 1943, the Statute Commission divided section 79-218, C. S. Supp., 1941, into six separate sections which appear as sections 79-220 to 79-225, R. S. 1943. Section 79-218, C. S. Supp., 1941, was originally enacted as section 14, subdivision II, Laws 1881, page 341. What now appears as sections 79-221 and 79-223, R. S. 1943, was added thereto in the years 1921 and 1939, respectively, by amendment. In Gaddis v. School District, 92 Neb. 701, 139 N. W. 280, we reviewed the history of school legislation in this state. We there pointed out that the first five subdivisions of the 1881 act apply to school districts organized on the town meeting plan, or as we there said, to "country districts." We also pointed out that a separate provision of that act, subdivision XIV, page 376, applied to school districts in cities and villages, subject to population limitations. In turn, subdivision XIV is obviously the foundation of chapter 79, article 25, R. S. 1943. As we said in the Gaddis case, these provisions create two systems, one vesting the control of the corporation in the electors at the school meeting where the "government and control is almost a pure democracy," and the other making the board of education the governing body where the plan of government is representative in form. Both by pleading and proof relators demonstrate that the respondent district is without the

provisions of sections 79-221 and 79-223, R. S. 1943. Those sections have no application to the respondent district.

Relators' next contention is that the judgment is contrary to and not supported by the evidence.

The school is under the direction and control of the board of education. Richardson v. Braham, 125 Neb. 142, 249 N. W. 557. The court has no power by mandamus to control the decision of those matters which are left by statute to the discretion of the governing body of a governmental agency. State ex rel. Nebraska B. & I. Co. v. Board of Commissioners, 105 Neb. 570, 181 N. W. 530. A peremptory writ of mandamus should be issued only where the legal right to it is clearly shown. Hess v. Taylor, 142 Neb. 184, 5 N. W. 2d 346.

Relators have shown that to transfer pupils from the Kearney school to the adjoining school results in inconvenience and hazards of travel to those involved. These inconveniences and hazards are common in a greater or lesser degree to all school children in urban and, in many instances, rural areas. It may well be that the respondent board could have budgeted funds so as to have maintained four grades with two teachers at the Kearney school. It appears from the evidence, however, that economical administration of the affairs of the school was the course followed. It also appears that better facilities and instructional staff and equipment are had for pupils at the alternate school than at the Kearney school. All of these matters are for the consideration of the board. The action to be taken was for the board to determine, and not for the relators, the 235 petitioners, or for the court. The evidence does not show that the relators have a right to the writ.

The judgment of the trial court is affirmed.

AFFIRMED.

CARTER, J., participating on briefs.

IVAN ANDERSON, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.
33 N. W. 2d 362

Filed July 20, 1948. No. 32417.

1. **Indictments and Informations: Courts.** The sufficiency of an information charging an offense under the law of this state is not a federal question.
2. **Homicide.** The manslaughter statute (section 28-403, R. S. 1943) does not make the time and place of the death an essential element of the crime.
3. **Criminal Law: Evidence.** It is a rule of criminal law that evidence to rebut or disprove statements as to material facts, made on direct examination by the defendant, may be offered and received in evidence.
4. **Evidence.** It is not prejudicial error for the court to overrule objections and receive in evidence the testimony of a witness as to a conversation had with the defendant, when such witness had at some time read a memorandum of the conversation made by another, and which he knew to be correct.

ERROR to the district court for Scotts Bluff County: CLAIBOURNE G. PERRY, JUDGE. *Affirmed.*

Mothersead & Wright and *Robert G. Simmons, Jr.*, for plaintiff in error.

Walter R. Johnson, Attorney General, *Clarence S. Beck*, and *Homer L. Kyle*, for defendant in error.

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

PAINE, J.

The defendant as plaintiff in error brings an appeal to this court from a conviction for involuntary manslaughter in the alleged death of Virginia Buechler, arising out of an automobile accident on May 18, 1947. The information charged that such death occurred while defendant was driving an automobile on the public highway in an unlawful, reckless, careless, and negligent manner, while under the influence of intoxicating liquor. After the jury returned a verdict of guilty and

the motion for new trial was overruled, the trial court sentenced the defendant to five years in the penitentiary.

We will set out a brief statement of the facts shown in the bill of exceptions. The accident happened about 4:15 on the afternoon of Sunday, May 18, 1947. Carl Schwartzkopf was driving west on Highway No. 26 at about 50 miles an hour. He was accompanied by Miss Virginia Buechler in a 1947 Studebaker automobile. At a point about one mile east of the city of Scottsbluff a Plymouth coupé, driven east by defendant, collided with them, while Schwartzkopf was on the north and his right-hand side of the road. Miss Buechler was removed to the Methodist Hospital in Scottsbluff. Carl Schwartzkopf's right knee, arm, and jaw were injured.

The defendant testified that he lived with his wife and four-year-old son at the home of his wife's parents, and was 35 years old. He served in the South Pacific in the last war, where he worked on repairing amphibious tanks. When he came back from the war he had failed to find a place to live, but had secured jobs in a blacksmith shop and also at a garage.

The evidence discloses that the defendant arose about 9 a. m. on this Sunday and took a drink of whisky. He spent the day working on his Plymouth coupé. He testified that he bought it as a junker; that it would not run when purchased; that he had to fix the valves, rings, and pins; that it needed a couple of tires and the radiator repaired; and that the steering sector was well worn, along with the tie rod ends, which made an excessive play in the steering mechanism. Before the day of the accident he had fixed it up so he had been able to drive it in all about ten miles.

At about four o'clock on the afternoon of the accident he started for Lake Minatare. He stopped at a filling station not far from home, where he got gas and oil for his car. He went in the rest room and took a drink of whisky from the bottle in his pocket, but denied that

he drank any whisky during the day except when he first got up.

He had proceeded east from the filling station about two miles and passed other cars; and while attempting to pass a car he saw oncoming traffic and pulled back to the south and his right side, but his brakes held unevenly. The left brakes held too tightly and caused his vehicle to skid over into the north lane, where it collided head-on with the Schwartzkopf car, in which Virginia Buechler was a passenger. Defendant sustained injuries to his leg and a slight concussion. A cork came out of the bottle of whisky and some of the contents were spilled upon his clothing.

The chief of police of Scottsbluff and two members of the state highway patrol arrived very shortly after the accident. They testified that there was a strong smell of whisky on the defendant's breath and in defendant's car. One of them testified that Anderson was very thick-tongued and unsteady on his feet, sort of reeled around, and that he was under the influence of intoxicating liquor at the time of the accident. When they got him to the hospital they took a bottle of whisky out of his pocket. There was also a bottle in the glove compartment in his car, which was nearly empty.

Dr. Riddell testified that he treated Virginia Buechler and first saw her about 5 p. m. on May 18 at the Methodist Hospital in Scottsbluff; that her left jugular vein and windpipe were severed in two, her skull fractured, and she was covered with lacerations and bruises. He described the surgical and medical treatment given her, but said that she died on May 21 as the result of a cerebral hemorrhage resulting from a compound fracture of the skull. In answer to a hypothetical question, he testified that in his opinion the injuries which resulted in her death were caused by the automobile collision. On cross-examination he testified that she was a stranger to him, as he had never seen her before, and that she was continuously unconscious until the time she died.

The defendant discussed the following assignments of error: The district court erred in submitting this cause to the jury when the information failed to allege the time and place of death; failing to declare a mistrial on misconduct of the county attorney; submitting issues to the jury when there was no competent proof of the death of the persons alleged to have been killed; permitting the county attorney to introduce evidence indicating that defendant knew of the defective condition of his motor vehicle; instructing the jury that knowledge of mechanical defect is immaterial; in not striking the testimony of a witness who had refreshed his recollection from notes made by another; sentencing the defendant for a period of five years; the verdict is contrary to the evidence; the verdict is contrary to law; the district court erred in not withdrawing from the consideration of the jury the question of whether or not plaintiff in error was intoxicated while driving a motor vehicle; and in overruling the motion for new trial.

We will consider the first error alleged, that the information was fatally defective in that it failed to allege the time and place of death. The information charged on that element of the case that on May 18, 1947, the defendant wounded and injured Virginia Buechler, from the effects of which she died.

The "manslaughter" statute, section 28-403, R. S. 1943, provides generally that if a person shall unlawfully kill another without malice, unintentionally, while in the commission of some unlawful act, it is manslaughter. Section 39-727, R. S. 1943, makes it unlawful to operate a motor vehicle while under the influence of alcoholic liquor.

In Crawford v. State, 116 Neb. 125, 216 N. W. 294, the language of the information was very similar to the one at bar, except that it charged "and being in a state of intoxication did cause the automobile which he was driving to collide with another * * *, thereby wounding and injuring one Clarence Nelson, from the effects

of which the said Clarence Nelson died;" while in the case at bar it is the same except for the words, "while under the influence of intoxicating liquor." The information there was held good.

The defendant cites us to what he styles the leading case on the subject, that of Ball v. United States, 140 U. S. 118, 11 S. Ct. 761, 35 L. Ed. 377, in which the United States Supreme Court reversed a case holding generally that the indictment was fatally defective and that a capital conviction, even if otherwise regular, could not be sustained if the indictment failed to allege the time and place of death.

However, our Nebraska court has held that the sufficiency of an information charging an offense under the law of our state is not a federal question. See Chadek v. State, 138 Neb. 626, 294 N. W. 384.

In a case in which a man driving an automobile admitted drinking beer and committed manslaughter by hitting a 17-year-old boy, who was roller-skating in the street, and killing him, this court said: "The Criminal Code of this state does not require that detailed particulars of the crime be set forth in the information in the meticulous manner prescribed by the common law." Cowan v. State, 140 Neb. 837, 2 N. W. 2d 111.

The manslaughter statute, section 28-403, R. S. 1943, does not make the time and place of the death an essential element of the crime; and section 29-1512, R. S. 1943, says it is not necessary to set forth the manner or means by which the death was caused. If it informs the defendant of the charge against him, in order that he may plead the judgment as a bar to any subsequent prosecution for the same offense, it is sufficient. See, Puckett v. State, 144 Neb. 876, 15 N. W. 2d 63; Benton v. State, 124 Neb. 485, 247 N. W. 21.

We do not find that the alleged defect in the information was called to the attention of the trial court in the motion for new trial, but it was first assigned as error in the 56th paragraph of the petition in error. This

court has held that an information first questioned on appeal must be held sufficient unless it is so defective that by no construction can it be said to charge the offense for which the accused was convicted. See Hunt v. State, 143 Neb. 871, 11 N. W. 2d 533.

The defendant charged, as his next assignment of error, misconduct of the county attorney in offering in evidence exhibit No. 8, being a sheet of paper containing a certificate of analysis, the one line of which read: "Blood Alcohol_____0.79 milligrams per cc. (0.08 per cent)." It appears that shortly after defendant's arrest Dr. John A. Rosenau took a specimen of blood from defendant's ear at about 5:15 of the afternoon of the accident, and it was sent to Lincoln for analysis.

This sheet of paper, exhibit No. 8, was offered in evidence and objection was made that defendant was deprived of opportunity of cross-examining the man who made the report, and that it was incompetent, irrelevant and immaterial. The objection was sustained.

Then, in the judge's chambers, outside the presence of the jury, the county attorney was sworn and examined by defendant's attorney. Such record constitutes some 14 pages of the bill of exceptions. Briefly, the defendant based his motion for a mistrial on the ground that the county attorney offered exhibit No. 8 in evidence when he knew at the time that he did not have the evidence of the chemist who made the analysis of the blood, and also because the county attorney remarked in the presence of the jury that the defendant could waive the objection. The defendant insists that no admonition of the court will cure this prejudice and error. In the evidence the county attorney testified: "The reason I offered this exhibit in evidence was that Mr. Mothersead in his opening statement to the jury said that we had in our possession evidence with respect to a blood test that had been taken of the defendant Ivan Anderson, and that we would not offer it in evidence, * * * feeling

that if Mr. Mothersead would desire to accept it that he could do so, and for no other reason."

Prior to the offer of this exhibit No. 8, on the cross-examination of Sgt. Leo Knudtson, who had taken the defendant to the hospital right after the accident, these questions and answers appear: "Q- Then you saw Dr. Rosenau? A- Yes, that's right. Q- That was after you had given the whiskey bottle, so-called, to Steve Warrick? A- Yes, sir. Q- And you requested Dr. Rosenau to take a specimen of Ivan Anderson's blood? A- Yes. * * * Q- You were having this blood test sample taken so that you could have it tested for alcoholic content? A- That was the idea, yes. Q- Then when did you get the sample? A- Tuesday following the accident. * * * Q- And you got one of these paste board packing tubes? A- A round paste board packing tube, right. * * * Q- You mailed it to a laboratory in Lincoln? A- Yes, sir. Q- You got a report back? A- Yes, sir. Q- From that laboratory as to the results of the test? A- Yes, sir. Q- Did you give that report to the county attorney? A- Yes, sir."

Defendant cites the general annotation in 109 A. L. R. 1089, on offering improper evidence as ground of new trial. He also cites Wilson v. State, 87 Neb. 638, 128 N. W. 38, a homicide case, where the county attorney had defendant's wife sit in the courtroom and witnesses point to her as his wife, although she could not have been used as a witness against him. There were many serious errors that occurred in the trial and a reversal followed. We cannot see that it supports the defendant.

However, in the case at bar we feel that an answer to a somewhat similar situation may be found in Lee v. State, 124 Neb. 165, 245 N. W. 445. It was said in that case that remarks made by the county attorney, which were brought about and made in answer to argument by the prisoner's attorney, unless necessarily prejudicial, do not necessitate a reversal.

There was nothing about the offer of this sheet of

paper, exhibit No. 8, which would inflame the passions or arouse the prejudices of the jury. The objection to the offer was sustained by the court, and, further, the court covered the entire situation in instruction No. 12, which read as follows: "The jury are instructed that they have been admonished by the Court to disregard in its entirety the offer on the part of the State of Nebraska of Exhibit No. 8, and were further admonished to disregard any remarks of counsel made with reference thereto. Evidence has been offered in this case to the effect that said Exhibit pertained to a specimen of the blood of the defendant, Ivan Anderson, procured at the suggestion of the State Highway Patrol at a time when the defendant, Ivan Anderson, was in the hospital, without his knowledge or consent, and at a time when he was apparently unconscious. The jury are further instructed that the procuring of such a blood specimen under such circumstances constituted a violation of the person of the defendant and legally constituted an assault upon the body and person of the said Ivan Anderson, and the jury are entitled to take this into consideration in connection with all of the other evidence offered in this case in determining whether or not the defendant is guilty of the charge contained in the information filed herein."

We cannot find that the defendant was in any way prejudiced by the offer of exhibit No. 8, under the facts shown in the record and the instruction given by the court.

The defendant alleged that there was no proof of the death of Virginia Buechler. We have heretofore set out the testimony of Dr. Riddell as to his treatment of her at the hospital from 5 p. m., May 18, until her death on May 21, at 10:15, from a compound fracture of the skull. He testified that he had never met her before the afternoon of the accident; and that he would estimate her age at about 24 years. He had a neurological surgeon from Denver come as a consultant. He kept full records

on the chart of her case. We are not cited to any rule of evidence that, where a patient is brought in unconscious from an accident, a surgeon must have met the patient formally before he can testify who the patient was he treated and that the patient died.

The next assignment of error argued by defendant is that the county attorney was allowed to ask him about his activities the day previous, and also about the mechanism of his car, and to call a witness on rebuttal who contradicted and impeached some of his testimony. It is an elementary rule of criminal law that evidence to rebut or disprove statements made on direct examination of defendant as to material facts may be offered and received in evidence. See Brown v. State, 125 Neb. 287, 250 N. W. 67.

The defendant charged that the court erred in not striking out the testimony of a witness who refreshed his recollection from notes made by another. It appears from the bill of exceptions that S. K. Warrick, Jr., deputy sheriff, and W. H. Kirwin, deputy county attorney, went to the hospital the day following the accident, had a talk with the defendant, and that Mr. Kirwin made some notes of this conversation at the time, which notes Mr. Warrick saw at some time later. There is no claim that the deputy sheriff had Kirwin's notes while he was testifying, but simply that he saw them once after they were written. On cross-examination, Mr. Warrick testified: "Q- You are really testifying from Mr. Kirwin's notes, aren't you, Mr. Warrick? A- I am testifying from my memory. They might have been a refresher when I looked at the notes. Q- That is, you might have refreshed your memory when you looked at Mr. Kirwin's notes? A- Yes. Q- You would not pretend to remember all you have testified to without Mr. Kirwin's notes? A- I wouldn't say. I can remember quite well in those kind of conversations."

The defendant offered instruction No. 16, the last sentence reading as follows: "You are instructed that the

witness has no right to refresh his recollections by reading notes made by other persons, and unless you can determine as to what facts the witness, Warrick, testified from his own recollections without having the same refreshed by reading the notes made by another person, then you must disregard his entire testimony as to such conversation." This instruction was refused by the court.

A witness may be permitted, for the purpose of refreshing his memory, to use a memorandum or writing, made at the time by himself or another, where he knows it to be correct. See, City of Kearney v. Themanson, 48 Neb. 74, 66 N. W. 996; Atchison, T. & S. F. R. R. Co. v. Lawler, 40 Neb. 356, 58 N. W. 968.

The extensive annotation in 125 A. L. R. 19 covers all phases of the use of such memoranda, but in this case two men examined a defendant, one made the notes, the other read such notes but did not see them again or have them in court, and testified clearly from memory as to the conversation. We see nothing prejudicial to defendant in this occurrence, and defendant's instruction No. 16 was properly refused.

We conclude from the evidence hereinbefore set out that the defendant was engaged in the commission of an unlawful act which directly and proximately caused the death of Virginia Beuchler, as charged in the information, and that this amply supports the verdict of the jury.

It is charged by the defendant that the sentence of five years for the death of this young woman is excessive, and we are cited to several manslaughter cases where the sentence pronounced was less than in the instant case. We are urged to reduce the sentence under the power granted this court in section 29-2308, R. S. 1943. This section reads as follows: "In all criminal cases that now are, or may hereafter be pending in the Supreme Court on error, the court may reduce the sentence rendered by the district court against the accused, when in its opinion the sentence is excessive, * * *. No judgment shall be set aside, or new trial granted, or judgment

rendered in any criminal case, on the grounds of misdirection of the jury, or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, if the Supreme Court, after an examination of the entire cause, shall consider that no substantial miscarriage of justice has actually occurred."

"This court will not interfere with a verdict of guilty in a criminal case which is based upon conflicting evidence unless it is so lacking in probative force that we can say as a matter of law that it is insufficient to support a finding of guilt beyond a reasonable doubt." Haffke v. State, 149 Neb. 83, 30 N. W. 2d 462. See, also, Severin v. State, 146 Neb. 506, 20 N. W. 2d 377.

This sentence of five years was fixed by the trial court, who saw the defendant and other witnesses and heard their testimony, and we do not believe the sentence was excessive. We have examined all assignments of error argued in the defendant's brief and find no prejudicial error in the record.

AFFIRMED.

FRED E. JOHNSON, APPELLANT, V. ARNOLD GRIEPENSTROH, APPELLEE.
33 N. W. 2d 549

Filed July 20, 1948. No. 32354.

1. **Trial.** When an instruction correctly states the law in language commonly used and generally understood, it is not necessary that the trial court on its own motion define the language used.
2. **Automobiles: Negligence.** It is the duty of the driver of an automobile to exercise reasonable care in its operation, and where pedestrians are numerous and traffic is congested, the degree of care must be commensurate with the danger reasonably to be anticipated.
3. ———: ———. It is the duty of a pedestrian to look to the right and left in crossing an intersection and exercise reasonable care to observe cars coming from either direction. However, he has the right to assume that vehicles approaching from the

rear will exercise ordinary care in keeping a lookout for him, and has no duty to maintain a lookout to the rear to avoid a charge of negligence.

4. **Trial.** It is the duty of the trial court, without request, to submit to and properly instruct the jury upon all the material issues presented by the pleadings and the evidence.
5. **Negligence.** When contributory negligence is relied upon by defendant as an affirmative defense, the burden is upon him to prove it by a preponderance of the evidence pertinent to that issue contained in the whole record, except insofar as the same may appear in evidence adduced for the plaintiff, and the trial court should so instruct the jury.
6. ———. The emergency rule cannot be successfully invoked by either party in a negligence case unless there is competent evidence to support a conclusion that a sudden emergency actually existed, and then it cannot be successfully invoked by one who has brought that emergency upon himself by his own acts or who has not used due care to avoid it.
7. **Evidence.** When a litigant files an amended pleading, the averments of which are inconsistent with the averments of his original pleading, the original is evidence which may be offered in the case as an admission of the litigant contrary to his claim in the amended pleading.
8. ———. Such original pleading is not conclusive evidence but competent, as any other admission of a party against interest, and it should be given such weight as the trier of fact deems it entitled in the light of the pleader's explanation, if any, of the circumstances under which the admissions were made.
9. **Trial.** Generally, in order to predicate error upon a ruling of the court refusing to permit a witness to testify or to answer a specific question, the record must show an offer to prove the facts sought to be elicited. However, when the condition of the record and the form of the question itself show that it is relevant, material, and competent, no offer of proof is necessary.
10. **Witnesses.** Cross-examination of a witness to show bias, hostility, or that he is actuated by a spirit of revenge is entirely distinct from impeachment, which is governed by its own rules of evidence.
11. ———. Generally, on cross-examination of a witness, any fact may be elicited which tends to show bias, hostility, or a spirit of revenge, and if a witness denies the facts showing that such exist, the cross-examining party may call other witnesses to contradict the witness.

APPEAL from the district court for Otoe County:

THOMAS E. DUNBAR, JUDGE. *Reversed and remanded.*

Lloyd E. Peterson and *Betty Jean Peterson,* for appellant.

Rosewater, Mecham, Stoehr & Mecham and *John M. Dierks,* for appellee.

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

CHAPPELL, J.

Plaintiff, a pedestrian, was struck by defendant's car at an intersection, and brought this action to recover damages for personal injuries allegedly resulting therefrom. Upon trial to a jury, defendant was awarded a verdict and judgment. Plaintiff's motion for new trial was overruled, and he appealed. Assignments of error were substantially that the trial court erred: (1) In giving instruction No. 3 on its own motion, and in failing to instruct the jury that plaintiff's alleged contributory negligence was an affirmative defense to be proved by defendant; (2) in giving instructions Nos. 13 and 14, and each of them respectively, on its own motion; (3) in failing to give the statutory definition of right-of-way accorded a pedestrian under section 39-751, R. S. 1943; and (4) in excluding certain rebuttal evidence offered by plaintiff. We sustain the foregoing first, second, and fourth assignments. Other assignments appear in plaintiff's brief, but, in view of our conclusions, they will not require separate discussion.

Concededly, Central Avenue, a paved street approximately 50 feet wide, runs east and west in Nebraska City. It is a busy main thoroughfare, intersected by Eighth Street, a paved street approximately 44 feet wide, running north and south. At the time of the accident, there was a metal stop button in the middle of Eighth Street, north of but adjacent to its intersection with Central Avenue, into which the movement of traffic was

not being regulated by traffic officers or mechanical signal-changing devices.

Competent evidence introduced by plaintiff in support of the material allegations of his petition were substantially as follows: That on March 1, 1945, between 4:30 and 5 p. m., plaintiff, standing on the sidewalk at the edge of the curb, on the northwest corner of Central Avenue's intersection with Eighth Street, looked both ways, west and east, and then started to walk south in the sidewalk space. He had taken three or four steps when defendant, driving his car from the north on Eighth Street at 10 to 15 miles per hour or more, failed to stop at the stop button, came on into the intersection, turned west on Central Avenue, without sounding his horn or giving any other signal, and, although plaintiff tried to step back, defendant's car struck him on his left side, leg, and hip, with the front of the right front fender. Plaintiff was thrown up on the car between the fender and the hood, and defendant's car proceeded west until it stopped at a point where the front end was about a car-length west of the intersection, or where the front half of it was west of the sidewalk space and the back half was still therein, where plaintiff rolled off the car into the street.

There was evidence adduced in plaintiff's behalf that defendant got out of the car to give assistance, and told plaintiff "I didn't see you until I hit you. The sun was in my eyes." Defendant admitted that the sun flashed on his windshield and that he was blinded for a split second, seeing plaintiff afterward. An ambulance took plaintiff to a hospital, and it was discovered, without dispute, that he had a fractured left hip, and he claimed serious and permanent injuries and damages.

On the other hand, competent evidence introduced by defendant in support of the material allegations of his answer, was substantially as follows: That defendant stopped at the stop button on Eighth Street until several cars passed and its intersection with Central Avenue had

cleared of traffic. Thereafter, he proceeded to make a right-hand turn west, in low gear, at three or four miles an hour, when he saw plaintiff just one or two steps before the collision. Plaintiff was then on the left, or south, side of defendant's car, not within the area of the cross-walk but at the west edge thereof, jaywalking to the northwest. At that time, defendant proceeded to stop, but plaintiff kept on walking, and walked right into the left front fender of defendant's car, after which plaintiff fell or rolled in front of the left side of the car and there lay in the street on his left side, head to north, feet south.

Defendant assisted plaintiff over to the north side of the car, out of the lane of traffic, where he leaned upon the right fender until an ambulance arrived. At the time of the accident, plaintiff purportedly said to defendant, in the presence of defendant's father, that: "he didn't see me, and he didn't know what had hit him." "I didn't see no car coming * * * You made an awful quick stop." In the hospital three or four days later, plaintiff allegedly made similar statements.

Plaintiff, in his original petition, alleged that he was lawfully walking from the "southwest corner to the northwest corner" which was amended before trial to read "from the northwest corner to the southwest corner." As held in Arman v. Structiform Engineering Co., 147 Neb. 658, 24 N. W. 2d 723: "When a litigant files an amended pleading, the averments of which are inconsistent with the averments of his original pleading, the original is evidence which may be offered in the case as an admission of the litigant contrary to his claim in the amended pleading." It must be remembered, however, as discussed and held in the opinion, that such original pleading is not conclusive evidence but competent, as any other admission of a party against interest, and should be given such weight as the trier of fact deems it entitled in the light of the pleader's explanation, if

any, of the circumstances under which the admissions were made.

In the foregoing situation, we conclude that the issues of negligence pleaded by plaintiff, and contributory negligence affirmatively pleaded by defendant, were questions for determination by the jury under appropriate instructions of the trial court.

At the outset, we will discuss plaintiff's contention that the trial court erred in failing to give the statutory definition of right-of-way accorded a pedestrian under section 39-751, R. S. 1943. That contention of itself has no merit for the reason that plaintiff's requested instruction No. 1, although marked "Refused" was actually given verbatim by the trial court in instruction No. 7. It correctly and exactly quoted the applicable provisions of the statute relating to the right-of-way of pedestrians crossing a highway within a business or residence district and vehicles traveling thereon.

In that connection, the term "right-of-way" used in the statute and in the instruction required no definition as argued by defendant, since they are words of common use, generally understood by everyone of ordinary intelligence.

As stated in Johnson v. Batteen, 144 Neb. 384, 13 N. W. 2d 625: "Jurors are accepted because they are men and women of common sense and have a common understanding of words ordinarily used in our language." Also, as held in Horn v. Goldberg, 137 Neb. 813, 291 N. W. 493: "Where an instruction correctly states the law in language commonly used and generally understood, it is not necessary that the trial court, on its own motion, define the language used. A party desiring a definition of the terms so used should offer such an instruction. In the absence of a specific request, the failure of the trial court to define the terms used in the requested instruction is not error."

With few immaterial exceptions, the evidence adduced herein was very similar to that in Halliday v. Raymond,

147 Neb. 179, 22 N. W. 2d 614, and was generally controlled by the propositions of law therein set forth.

If the accident happened as claimed by plaintiff, then defendant, under the situation, would be guilty of negligence, which was the proximate cause of the accident. Under plaintiff's theory and evidence, he had the right-of-way under the statute, and "It is the duty of the driver of an automobile to exercise reasonable care in its operation, and where pedestrians are numerous and traffic is congested, the degree of care required must be commensurate with the danger reasonably to be anticipated." Christoffersen v. Weir, 110 Neb. 390, 193 N. W. 922. See, also, Halliday v. Raymond, *supra;* Tews v. Bamrick, 148 Neb. 59, 26 N. W. 2d 499.

It was plaintiff's duty, as an ordinarily cautious and prudent person, to look to the right and left in crossing an intersection, to observe cars coming from either direction. However, he had the right to assume that vehicles approaching from the rear would exercise ordinary care in keeping a lookout for him, and there was no duty imposed upon him to maintain a lookout to the rear to avoid a charge of negligence. On the other hand, if plaintiff was proceeding from the south, as contended by defendant, and saw, or by the exercise of reasonable care should have seen, defendant's car, and then suddenly either walked into its path or into it, he would be guilty of negligence as a matter of law. The evidence being in conflict, however, the questions of negligence and contributory negligence were for the jury. Halliday v. Raymond, *supra,* and cases cited therein.

Instruction No. 13, about which plaintiff complained, left out the qualification that plaintiff, if proceeding from the north on the cross-walk, had a right to assume that vehicles approaching from the rear would exercise ordinary care in keeping a lookout for him, and that under such circumstances he was under no duty to maintain a lookout to the rear to avoid a charge of negligence. Viewed in that light, instruction No. 13 presented only

defendant's theory, and was thus prejudicially erroneous.

Plaintiff complained of instruction No. 3, upon the ground that it wrongfully placed upon him the burden of proving that he was not guilty of contributory negligence, and that the trial court failed to instruct the jury that the burden of establishing contributory negligence was upon defendant as an affirmative defense. We conclude that instruction No. 3 did have the effect of erroneously placing the burden of proof entirely upon plaintiff. The other instructions given failed in any manner to instruct the jury in conformity with the rule that: "If contributory negligence is relied upon by defendant as an affirmative defense, the burden is upon him to prove it by a preponderance of the evidence pertinent to that issue contained in the whole record, except in so far as the same may appear in evidence adduced for the plaintiff." Roberts v. Carlson, 142 Neb. 851, 8 N. W. 2d 175. See, also, Meyer v. Platte Valley Construction Co., 147 Neb. 860, 25 N. W. 2d 412.

In that regard, Thomas Kilpatrick & Co. v. London Guarantee & Accident Co., 121 Neb. 354, 237 N. W. 162, relied upon by defendant, is not controlling here, because clearly distinguishable. The instructions therein, taken as a whole, properly placed the burden of proof upon the party who was required to assume it. Here contributory negligence was an affirmative defense, pleaded by defendant in his answer. It was thus a material issue, presented by the pleadings and evidence, and it was the duty of the trial court to submit to and properly instruct the jury upon that issue whether requested to do so or not. In re Estate of Inda, 146 Neb. 179, 19 N. W. 2d 37; In re Estate of Keup, 145 Neb. 729, 18 N. W. 2d 63. The failure to do so was prejudicial error. Carlson v. Roberts, 133 Neb. 166, 274 N. W. 473; Kirchman v. Kratky, 51 Neb. 191, 70 N. W. 916; McIninch v. Evans, 90 Neb. 243, 133 N. W. 187.

Plaintiff argued that instruction No. 14, giving defendant the benefit of the doctrine of emergency pleaded by

him, was prejudicially erroneous. We sustain that contention.

In the realm of negligence cases, an emergency has become the basis for a rule of law which is dependent for application upon two factual elements. This court has held that: "Where one driving an automobile is suddenly confronted by an emergency, requiring instant decision, he is not necessarily guilty of negligence in pursuing a course which mature reflection or deliberate judgment might prove to be wrong." Belik v. Warsocki, 126 Neb. 560, 253 N. W. 689.

However, that rule cannot be successfully invoked by either party in a negligence case unless there is competent evidence to support a conclusion that a sudden emergency actually existed, and then it cannot be successfully invoked by one who has brought that emergency upon himself by his own acts or has not used due care to avoid it. Hughes v. Omaha & C. B. Street Ry. Co., 143 Neb. 47, 8 N. W. 2d 509.

An examination of instruction No. 14 discloses that it gave defendant the benefit of the doctrine of emergency, not only by factually assuming that an emergency existed, but also by omitting the factual qualification that the doctrine could not be invoked by defendant if it were found that he had brought the emergency upon himself by his own acts or had not used due care to avoid it. Both elements were factual questions for determination by the jury, and the failure to so submit them was prejudicially erroneous.

Finally, plaintiff argued that the trial court erred in the exclusion of certain rebuttal evidence. We sustain that contention.

In that connection, an alleged eyewitness testified in detail and at length in support of defendant's contentions. There is other evidence from which it could be reasonably inferred that he was not an eyewitness, but got his first information thereof from a newspaper. Concededly, he had previously become involved with

plaintiff and his wife over the disappearance of a tire, which they claimed he had taken, but which he denied. The matter was reported to the sheriff, who called up the witness, and he paid for the tire, believing, as he testified, that, having used plaintiff's car at the time of its disappearance, he was liable therefor.

Upon cross-examination, the witness was asked: "Now, at that time and place, when you paid for the tire, didn't say that you would get — didn't you say to Mrs. Fred Johnson in words or substance that you would have your revenge for this deal? A No, I never did. * * * Q Now, didn't you make that statement that you would have your revenge for this matter in the presence of Fred Johnson too? A No sir."

In rebuttal, Mrs. Eva B. Johnson was asked: "Q Now, Mrs. Johnson, you heard his statement regarding the controversy about the automobile tire, did you not? A Yes sir. Q You heard his statement that he stated that he did not make the statement that he would have revenge on you and Fred Johnson; you heard that too? A Yes sir." She was then asked to "tell the jury what conversation you had with" the witness "during last fall regarding the automobile tire; what he said to you, and what you said to him." Objection sustained. She was then asked whether, when the witness made settlement with her for the tire, he had said that "he would have revenge for that?" Objection thereto was also sustained, whereupon plaintiff made no offer of proof.

It is generally the rule that: "Ordinarily in order to predicate error upon a ruling of the court refusing to permit a witness to testify, or to answer a specific question, the record must show an offer to prove the facts sought to be elicited." In re Estate of Woodward, 147 Neb. 270, 23 N. W. 2d 75. However, in In re Estate of Johnson, 100 Neb. 791, 161 N. W. 429, this court held: "When a question is asked that does not 'indicate to the trial court the relevancy of the testimony,' it is not error to exclude the testimony, unless the party pro-

pounding the question informs the trial court as to the relevancy of the testimony, and an offer of proof will enable the trial court to determine whether the evidence is competent. When the condition of the record and the form of the question itself show that it is relevant and competent, no offer of proof is necessary. The many decisions of this court in regard to requiring an offer of proof should be so understood." See, also, Gormley v. Peoples Cab, 142 Neb. 346, 6 N. W. 2d 78. The case at bar comes squarely within the latter rule.

Viewed in that light, we call attention to the rule that: "Cross-examination of a witness to show bias, hostility, or that he is actuated by a spirit of revenge, is entirely distinct from impeachment, which is governed by its own rules of evidence." Vassar v. Chicago, B. & Q. R. R. Co., 121 Neb. 140, 236 N. W. 189, 74 A. L. R. 1154.

In the latter opinion, it was said: "A very old New York case states: 'It is always competent to show that a witness is hostile to the party against whom he is called; that he has threatened revenge, or that a quarrel exists between them. A jury would scrutinize, more closely and doubtingly, the evidence of a hostile than that of an indifferent or friendly witness. Hence, it is always competent to show the relations which exist between the witness and the party against, as well as the one for, whom he was called.' Starks v. People, 5 Denio (N. Y.) 106.

" 'Hostility of a witness to the defendant may be proved by any competent evidence, either by the witness himself or by examination of other witnesses as to facts from which such hostility appears; it being unnecessary in such case to first examine the witness as to his hostility.' People v. Michalow (229 N. Y. 325) 128 N. E. 228.

" 'Generally, on cross-examination of a witness, any fact may be elicited which tends to show bias or partiality, and if the witness denies the fact showing the bias or interest, the cross-examining party may call other

witnesses to contradict the witness.' Cabel v. State, 18 Ala. App. 557. * * *

"And it is further held that considerable latitude should be allowed in eliciting from a witness, or in attempting to elicit and to establish, bias, hostility, corruption, or interest of the witness bearing upon his credibility. Glass v. State, 147 Ala. 50." See, also, 70 C. J., Witnesses, § 921, p. 762; § 1143, p. 936; § 1144, p. 937.

For the reasons heretofore stated, the judgment should be and hereby is reversed, and the cause is remanded for new trial.

REVERSED AND REMANDED.

CLARA I. JONES ET AL., APPELLEES, V. J. E. SHRIGLEY, TRUSTEE, APPELLANT.
33 N. W. 2d 510

Filed August 6, 1948. No. 32385.

1. **Wills: Courts.** The county court has jurisdiction to construe wills when necessary for the benefit of the executor in carrying out the terms of the will, but it has no jurisdiction to construe wills to determine rights of devisees or legatees as between themselves and it has no authority to bind the heirs, devisees, or legatees by any construction.
2. ———: ———. The construction of a will by the county court is for the information and benefit of an executor or administrator only, in order to advise him what course to pursue. Such a construction adjudicates nothing beyond his rights and liabilities in the execution of his office. Controversies between adverse claimants under a devise or bequest or between him and persons claiming adversely to the estate will not be affected thereby.
3. **Trusts: Wills.** In determining whether or not a trust has been created by a will the intent and purpose of the testator as disclosed by the language used, if it is so disclosed, is to be ascertained and given effect if not contrary to law or public policy.
4. ———: ———. In order that there may be a valid trust created by a will there must be a trustee, an estate devised to

him, and a beneficiary, and the trustee and beneficiary must be separate and distinct entities.

5. ———: ———. If a trust is passive, that is if the trust imposes no affirmative or substantial duties upon the trustee of real estate, but seeks to convey to him the bare naked title, the legal title as well as the beneficial use passes to the cestui que trust.
6. ———: ———. The rule that in order that a valid trust may be created by will there must be a trustee, an estate devised to him, and a beneficiary, and the trustee and beneficiary must be separate and distinct entities, does not apply where several are named as trustees and the same persons are named as beneficiaries.
7. **Wills: Joint Tenancy.** A devise which purports by its language to create a joint tenancy in lands which by its terms positively excludes an essential or essentials to a joint tenancy is not effective for that purpose.
8. **Trusts: Wills.** If a trust created by a will is passive with no duties to be performed by the trustee the beneficiaries are entitled to full control of the property.
9. **Wills: Estates.** The power granted by a will to a beneficiary or life tenant to dispose of the fee title to the property does not in and of itself enlarge the beneficial estate to a fee.
10. **Estates.** Where a conveyance contains a limitation of a life interest and two further limitations purporting to create future interests, of which only one can become a present interest if the life interest ends in accordance with its terms, the estate which follows the life interest is an alternative vested remainder subject to defeasance in accordance with the terms of the will.

APPEAL from the district court for York County: CLOYDE B. ELLIS, JUDGE. *Affirmed in part, and in part reversed and remanded with directions.*

Kirkpatrick & Dougherty, Van Pelt, Marti & O'Gara, and *John L. Riddell,* guardian ad litem, for appellant.

Perry & Perry and *Herman Ginsburg,* for appellees.

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

YEAGER, J.

In order that the matters in controversy and the issues involved herein may be comprehended a detailed history

of the incidents and events leading up to them becomes necessary.

Emily J. W. Spencer at the time of her death was a resident of Boston, Massachusetts. She died testate and at the time of her death she was the owner of certain lands in York County, Nebraska. Her will was probated in Massachusetts and later in York County, Nebraska. With regard to the York County land the will contained the following provision:

"I give any and all real estate in York County, Nebraska, to which I may be entitled at the time of my death or which I may have power to dispose of by will to my sister Clara I. Jones and her son Edson T. Jones in equal shares as joint tenants and not as tenants in common, but in trust, nevertheless, to permit said Clara I. Jones and Edson T. Jones each to use and occupy during their respective lives one undivided half of said real estate. Upon the death of either beneficiary, the surviving trustee shall permit the half theretofore used and occupied by that beneficiary to be used and occupied until the termination of the trust as hereinafter provided by such person or persons as he or she may by will appoint, or in default of such appointment to be used and occupied by the heirs of the deceased beneficiary. Upon the death of the survivor of said Clara I. Jones and Edson T. Jones, the trust shall terminate and the legal title as to one undivided half interest in the premises shall vest in such person or persons as said Clara I. Jones shall by will appoint and as to the other undivided half interest in such person or persons as said Edson T. Jones shall by will appoint, or, if the power of appointment as to either half interest be not exercised, that half interest shall vest in the heirs of the person failing to appoint that interest. I direct that so long as the trust shall continue no part of the premises shall be sold without the consent of said Clara I. Jones and Edson T. Jones or the survivor of them."

The defendant J. E. Shrigley was duly appointed ad-

ministrator with the will annexed by the county court of York County, Nebraska. On June 21, 1944, a final decree was entered. On the same day the county court by decree upon the petition of Clara I. Jones and Edson T. Jones appointed the said J. E. Shrigley trustee of the York County lands and of the crops and income which had come into being and had accumulated after the death of Emily J. W. Spencer.

Shrigley under this appointment continued in charge of the lands and made his accounting in accordance with the terms of the appointment without interference until the commencement of this action. The regularity of his acts under the terms of the appointment is not brought into question.

The action here as originally commenced was by Clara I. Jones and Edson T. Jones, plaintiffs, against J. E. Shrigley, Trustee under the Last Will and Testament of Emily J. W. Spencer, deceased, defendant, and the prayer was for a decree construing the last will and testament of Emily J. W. Spencer, deceased, as to the York County real estate and in construing it to declare and confirm in Clara I. Jones and Edson T. Jones a vested fee simple title thereto either as tenants in common or as joint tenants with right of alienation and to thus quiet title in them; for a declaration that the appointment of J. E. Shrigley as trustee was ultra vires and void; and for an injunction enjoining J. E. Shrigley from further interference with the rights of plaintiffs with regard to the land. The case was not finally tried alone on the issues thus tendered.

A contract was entered into for the sale of the lands to one Helen Krenz by Clara I. Jones and Edson T. Jones.

By amended petition Mildred Wade Jones, wife of Edson T. Jones, was made additional party plaintiff and Helen Krenz and Marcia Ann Jones, a minor daughter of Edson T. Jones, were made additional parties defendant.

The prayer of the original petition was substantially renewed in the amended petition. In addition the plaintiff prayed that Helen Krenz be required to specifically perform her contract to purchase the real estate. Also plaintiffs prayed for an accounting of the rents, profits, and income of the real estate by J. E. Shrigley.

By appropriate pleadings there was a joinder of the issues tendered by the plaintiffs.

Following trial a decree was rendered by the court declaring a fee simple title absolute in Clara I. Jones and Edson T. Jones and title was quieted in them with full right to sell and convey the said land subject only to the rights of Helen Krenz, the holder of the contract of purchase. Specific performance of the contract of purchase by Helen Krenz was decreed. It was further decreed that J. E. Shrigley, as trustee of the last will and testament of Emily J. W. Spencer, deceased, and individually, forthwith make an account of the rents, profits, and income of the real estate involved. It was decreed in this connection that if an accounting could not be amicably agreed upon that supplemental issues involving that question be framed and that the question be reserved for future hearing and determination. The defendant Shrigley was also enjoined and restrained from interference with the use of the land and from any effort to prevent a sale thereof.

From this decree the defendant J. E. Shrigley has appealed.

The assignments of error urged as grounds for reversal are: (1) The trial court erred in finding that it was not the intent of testatrix Emily J. W. Spencer, by paragraph 1 of her last will and testament, to create a trust in and to the real estate involved herein; (2) the trial court erred in finding that the testatrix intended that the plaintiffs Clara I. Jones and Edson T. Jones should be vested with absolute fee simple title in and to the real estate; (3) the trial court erred in finding that no remainder estate in the heirs of Clara I. Jones and

Edson T. Jones was created by the last will and testament of the deceased; (4) the trial court erred in finding that the proceedings in the county court of York County, Nebraska, were not res judicata of the issues in this case; and (5) the court erred in ordering specific performance of the contract of sale between plaintiffs and Helen Krenz.

A determination of the first, second, third, and fifth assignments of error is dependent upon the kind, character, and quality of estate or estates devised by the quoted provision of the will of Emily J. W. Spencer, hence it shall not be necessary hereinafter to refer to or to treat of these assignments separately.

The fourth assignment deals with the question of whether or not the decree of the county court of York County, Nebraska, appointing J. E. Shrigley trustee of these lands was such an adjudication as would bar the district court from considering and determining the question of whether or not Emily J. W. Spencer by her will declared a valid trust and whether or not these lands were the subject of the trust so declared.

The legal questions involved in this assignment have by the previous decisions of this court been resolved against the contention of the appellant herein. We think those decisions are fundamentally sound and that there should be no departure from them in this case.

In Merrill v. Pardun, 125 Neb. 701, 251 N. W. 834, it was said: "The county court has jurisdiction to construe wills when necessary for the benefit of the executor in carrying out the terms of the will, but has no jurisdiction to construe wills to determine rights of devisees or legatees as between themselves, and where under the terms of the will an executor can assign the property without a construction of the will and does not request a construction, the court has no authority to bind the heirs or legatees by any construction."

In Youngson v. Bond, 69 Neb. 356, 95 N. W. 700, it was said: "The construction of the will in such a case

(in probate court), is for the information and benefit of such executor or administrator only, in order to advise him what course to pursue. It adjudicates nothing beyond his rights and liabilities in the execution of his office; controversies between adverse claimants under the devise or between the executor or administrator and persons claiming adversely to the estate, will not be affected thereby." See, also, Annable v. Ricedorff, 140 Neb. 93, 299 N. W. 373; Hahn v. Verret, 143 Neb. 820, 11 N. W. 2d 551; Hiatt v. Hiatt, 146 Neb. 652, 20 N. W. 2d 921.

The county court of York County under these authorities was without jurisdiction to adjudicate any such rights as are involved in this action, therefore it follows that any pretended adjudication of any such right could not prevent the adjudication of such rights in the district court.

We return now to the question of the kind, character, and quality of the estate or estates devised by the will.

As the basic ground for the relief sought plaintiffs Clara I. Jones and Edson T. Jones assert that though the language of the will indicated that the lands were placed in trust, no trust was, within the true interpretation and intendment thereof and a proper application thereto of controlling legal principles, actually brought into being, but that to the contrary a fee simple title to the lands passed to said plaintiffs.

On the other hand the defendant J. E. Shrigley asserts that the will created a valid and subsisting trust and that therefore none of the relief prayed by plaintiffs was available to them.

In an approach to the question of whether or not a trust is created by a devise in a will it must be borne in mind that the intent and purpose of the testator or testatrix is to be ascertained from the language of the will and this intent and purpose when ascertained must be given effect if not contrary to law or public policy. In re Estate of Mooney, 131 Neb. 52, 267 N. W. 196.

Another fundamental proposition to be borne in mind is that in order that there may be a finding of the existence of a valid trust there must be a trustee, an estate devised to him, and a beneficiary. The trustee and the beneficiary must be separate and distinct entities. Greene v. Greene, 125 N. Y. 506, 26 N. E. 739, 21 Am. S. R. 743; Weeks v. Frankel, 197 N. Y. 304, 90 N. E. 969; 69 C. J., Wills, § 1828, p. 705; 54 Am. Jur., Trusts, § 30, p. 43; Peterborough Savings Bank v. Pierce, 54 Neb. 712, 75 N. W. 20; Watson v. Dalton, on rehearing, 146 Neb. 86, 20 N. W. 2d 610; Swisher v. Swisher, 157 Iowa 55, 137 N. W. 1076; Tilton v. Davidson, 98 Me. 55, 56 A. 215; Collins v. Mosher, 115 F. 2d 900 (Certiorari denied 313 U. S. 581, 61 S. Ct. 1097, 85 L. Ed. 1537). There appears in Milligan v. Gallen, 64 Neb. 561, 90 N. W. 541, a disapproval of the doctrine of Peterborough Savings Bank v. Pierce, *supra,* but the doctrine disapproved has no relation to the legal proposition on which the case is cited herein.

Still another fundamental proposition to be remembered is that if the trust is passive, that is if the trust imposes no affirmative or substantial duties upon the trustee of real estate but seeks to convey to him the bare naked title, the legal title as well as the beneficial use passes to the cestui que trust. Hill v. Hill, 90 Neb. 43, 132 N. W. 738, 38 L. R. A. N. S. 198; Flanagan v. Olderog, 118 Neb. 745, 226 N. W. 316; Lancaster County Bank v. Marshel, 130 Neb. 141, 264 N. W. 470; Beals v. Croughwell, 140 Neb. 320, 299 N. W. 638, 138 A. L. R. 1330; 54 Am. Jur., Trusts, § 12, p. 29.

The plaintiffs assert, as a basis for their contention that they received a fee simple title to the lands devised, that the will did not create a trust since it did not meet the essential legal requirement that there be a genuine separation of the equitable and legal interests.

The plaintiffs however are not entitled to the relief prayed on the ground that the will did not indicate and contemplate such a separation. If instead of two

named trustees and two beneficiaries who were identical there had been one named trustee and one beneficiary with the two being the same person the rule of law contended for would have application but it has no application where, as here, a will names two persons as cotrustees and the same two as the beneficiaries of a trust. The rules in this respect are set forth tersely in Restatement, Trusts, § 99, p. 269, and in comments a. and b. as follows:

"(1) One of several beneficiaries of a trust can be one of several trustees of the trust.

"(2) One of several beneficiaries of a trust can be the sole trustee of the trust.

"(3) The sole beneficiary of a trust can be one of several trustees of the trust.

"(4) If there are several beneficiaries of a trust, the beneficiaries may be the trustees.

"(5) The sole beneficiary of a trust cannot be the sole trustee of the trust.

"Comment: a. Where one person has both the legal title to property and the entire beneficial interest, he holds it free of trust. There is no separation of the legal and beneficial interests, and there are no duties running from himself to himself, and no rights against himself. He is in a position where he can dispose of the property as freely as any owner can do, since there is no one who can maintain a proceeding against him to prevent him from so doing, and if he transfers the property there is no one who can make him accountable for the proceeds or can reach the property in the hands of the transferee. He cannot himself maintain an action against the transferee since he cannot base an action upon his own voluntary act in making the transfer. * * *.

"b. On the other hand, there can be a trust where there are several beneficiaries who are also the trustees. In such a case each of the beneficiaries has an equitable interest which is separate from the legal interest held by the whole group. As trustees they hold the legal title

as joint tenants, and ordinarily they hold the beneficial interests as tenants in common. No one of them, without the concurrence of the others, can properly transfer an undivided legal interest in the property free of trust. If a creditor of one of the beneficiaries seeks to reach his interest he can do so only by proceedings appropriate for reaching an equitable interest, and cannot levy execution in an action at law upon his legal interest."

In the opinion in Swisher v. Swisher, *supra,* is language which appears to be in conflict with the rule that where there is more than one trustee the trustees and the beneficiaries may be the same persons. In actuality that question was not before the court. The decision there was that where a person was made a cotrustee of an estate in lands and in legal effect was granted a legal estate to an undivided portion of the lands title thereto vested in him since a person cannot hold the legal title in trust for his own benefit. The true holding and the one called for by the issues made was that there was no separation in the instrument of conveyance of the beneficial interest and the legal estate.

On the basis of these principles therefore plaintiffs may not be allowed to prevail on the theory that trustees may not be the same persons as those who are named as beneficiaries of a trust in a testamentary devise of real estate. The provision of the will designating trustees and beneficiaries was not violative of law.

We pass to the question of the intent and purpose of the testatrix as disclosed by the language used in the provision creating the devise. This intent and purpose as has been pointed out must be fulfilled if it conforms to and is not violative of law. As a corollary to the rule in this respect it appears proper to say that regardless of intent and purpose as disclosed, if the language used when weighed in the light of existing law defeats that intent and purpose such intent and pur-

pose must be discarded by the courts and the law allowed to control.

Obviously the language employed by the testatrix expressed an intention and purpose to create a trust in joint tenancy for the benefit of Clara I. Jones and Edson T. Jones so long as the two should live and for the survivor of the two and the heirs or devisees of the other until the death of the survivor, and thereafter to pass fee simple title to the heirs or devisees of the two named beneficiaries. By the language employed the beneficiaries or the survivor of them were empowered to consent to sales of the real estate.

It must be ascertained then if this declared intent and purpose may be carried into effect or if it contravenes law and legal principle in whole or in part thus requiring a disposition other and different from that contained in the expression of intention and purpose.

There is no contention that the provision of the will was insufficient as a conveyance of the land. The only question is as to the character and quality of the estate or estates conveyed. We shall therefore thus limit ourselves in our discussion.

The declared intent of the will was to make Clara I. Jones and Edson T. Jones beneficiaries in joint tenancy. This was entirely ineffective since one of the essentials of a joint tenancy was by declaration of the will itself absent, that is the right of survivorship. Black's Law Dictionary (3rd ed.), p. 1711; Stuehm v. Mikulski, 139 Neb. 374, 297 N. W. 595, 137 A. L. R. 327. In actuality then they were devised a tenancy in common in the real estate. A tenancy in common, as defined in Black's Law Dictionary (3rd ed.), p. 1713, is as follows: "A tenancy in common is where two or more hold the same land, with interests accruing under different titles, or accruing under the same title, but at different periods, or conferred by words of limitation importing that the grantees are to take in distinct shares." The will clearly

indicates that these two parties were to take in equal and undivided but distinct shares.

There was no restriction placed upon the use of either his or her estate during his or her lifetime or after the death of either of them. The only direction as to use was that in case of death of one before the other the use of the estate going to the one who died first should extend to the one testamentarily designated and if there was no one testamentarily designated then the use should go to the heirs of the one so dying first.

After the death of both of them the title to their respective portions of the estate was to descend in fee simple to their heirs respectively in the event that they did not, again respectively, by will designate the takers.

This interpretation is made for its bearing on the question of whether or not, assuming the will in terms created a trust, the trust was active or passive. If it was passive with no duties to be performed by the trustee then the beneficiaries are entitled to full control of the property. Hill v. Hill, *supra;* Flanagan v. Olderog, *supra;* Beals v. Croughwell, *supra;* 54 Am. Jur., Trusts, § 12, p. 29.

There was clearly no duty to be performed by a trustee during the life of the named beneficiaries. Exclusive control each of an undivided one-half remains in the two beneficiaries so long as they both shall live. In case of the death of one exclusive but likewise divided control remains in the survivor and one who may be designated by will by the one who shall predecease the other and if no one is designated then the heirs of that one.

On the death of both then the entire estate in undivided equal shares shall pass to those designated by will of these two and if no designation shall be made it passes to their heirs. Then likewise there was nothing to be acted upon by a trustee after the death of these two devisees of the beneficial interest, this all provided the land shall not be sold pursuant to the terms of the

will. It follows that this was a passive trust and Clara I. Jones and Edson T. Jones were and are entitled on that ground to full control of the property, again so long as it shall not be sold pursuant to the terms of the will.

Having concluded that here no active trust came into being or could come into being under the terms of the will in the absence of sale of the land it becomes necessary, as was said earlier herein, to define the estate or estates conveyed.

It is clear that Clara I. Jones and Edson T. Jones were devised life estates, each with the alternative power to dispose of the property composing his or her estate at death by will or to allow it to descend to heirs. This power of disposition did not enlarge the life estate to a fee. In other words each was devised a life estate with power to direct the remainder. 69 C. J., Wills, § 1633, p. 560; Heilwig v. Nybeck, 179 Mich. 292, 146 N. W. 141, Ann. Cas. 1915D 356; Derse v. Derse, 103 Wis. 113, 79 N. W. 44; Merrill v. Pardun, *supra;* Bretschneider v. Farmers Nat. Bank, 131 Neb. 495, 268 N. W. 278.

The devise in this respect did not offend against any legal rule the effect of which is to say that in truth these parties took the fee title since the fee did not vest in remaindermen or a trustee upon the death of the testator. Under well-recognized legal principles there was a vesting of title. Here was created an alternative future interest or alternative remainder. It falls within the rule that where a conveyance contains a limitation of a life interest and two further limitations purporting to create future interests, of which only one can become a present interest if the life interest ends in accordance with its terms, the estate created is an alternative vested remainder subject to defeasance in accordance with the terms of the will. Restatement, Property, § 277, p. 1428; § 278, p. 1436.

The effect of this is to say that Clara I. Jones and Edson T. Jones, not having fee simple title but only a

life estate in the real estate in question, could not convey title thereto as fee simple owners.

This is not to say however that they were without power to sell the land or to enter into a valid and enforceable contract for the sale thereof to the defendant Helen Krenz. The will granted the power of sale, if sale should be consented to by Clara I. Jones and Edson T. Jones or the survivor. That there was consent is evidenced by the contract of sale in which they joined. Pursuant to the terms of the will, as holders of the life estates, but without power to destroy the remainder interest, they had the right under the facts disclosed to enter into a contract of conveyance and to convey the full interest in the real estate to Helen Krenz. Abbott v. Wagner, 108 Neb. 359, 188 N. W. 113.

The question of whether or not the proceeds of the sale of this land, if the sale is consummated, will become trust funds in the hands of Clara I. Jones and Edson T. Jones is pertinent on an interpretation of this will but since the subject has been adverted to but not fully or sufficiently briefed it will be said only that undoubtedly they will, that is, they will become trust funds to the end that the corpus may be preserved for the benefit of the remaindermen.

It is our conclusion that Clara I. Jones and Edson T. Jones do not have an equal and undivided fee simple title in and to the lands in question, but on the contrary that they are life tenants in common thereof; that there was created by the will an alternative future interest or alternative remainder subject to full enjoyment after extinguishment of the life tenancies; that the life tenants had the power to convey fee simple title to the lands and that their attempt to exercise that right was under the facts in all respects regular; that there was nothing upon which the testamentary trust could operate, hence Clara I. Jones and Edson T. Jones were and are entitled to full use and control of the property; that J. E. Shrigley was properly enjoined and restrained; that Clara I.

Jones and Edson T. Jones are entitled to have the real-estate contract with Helen Krenz specifically performed; and that the defendant J. E. Shrigley should render an accounting as provided by the decree.

To the extent that the conclusions of this opinion conflict with the decree of the district court the said decree is reversed and to the extent that they do not it is affirmed. The cause is remanded with directions to enter decree in conformity herewith.

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

LEONARD O'HARE, APPELLEE, V. PETRUS PETERSON ET AL., A COPARTNERSHIP, APPELLANTS.
33 N. W. 2d 566

Filed August 6, 1948. No. 32444.

1. **Evidence.** An offer of compromise of a claimed cause of action is incompetent as evidence in an action subsequently instituted to enforce the claim.
2. ———. Material statements made by an adverse party prior to trial with regard to a fact or facts in issue inconsistent with the facts alleged or testified to by such party constitute admissions against interest and are receivable in evidence.
3. **Trial.** Where evidence is introduced over objection but afterwards the objecting party introduces the same evidence or evidence of a like character error cannot be predicated thereon.

APPEAL from the district court for Kimball County: J. LEONARD TEWELL, JUDGE. *Affirmed.*

Torgeson & Halcomb and *Bernard F. O'Brien*, for appellants.

Kuns & Van Steenberg, for appellee.

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

YEAGER, J.

This is an action by Leonard O'Hare, plaintiff and appellee, against Petrus Peterson and Mamie Peterson, a copartnership, defendants and appellants, for $1,215.25, being the value of certain potatoes sold by plaintiff to defendants. The defendants admit that the amount sued for represented the correct value of the potatoes purchased by them and that the amount had not been paid but they claimed a set-off against the claim in the amount of $730.20 as damages on account of failure of plaintiff to deliver additional quantities of potatoes which defendants contended he had contracted to deliver.

There was a trial to a jury. The jury rejected the contention of defendants and returned a verdict in favor of plaintiff for the full amount of his claim without interest. Judgment was entered for the amount named in the verdict with interest. A motion for new trial was filed. The motion was overruled. From the judgment and the order overruling the motion for new trial defendants have appealed.

There are but two assignments of error. They are that the court erred in overruling the motion for new trial and that the court erred in allowing plaintiff to prove an offer to compromise made by the defendants.

Only the second requires discussion here since the right to a new trial, if it exists, depends on the question of whether or not the court erred in admitting into evidence what defendants contend was an offer of compromise.

The record discloses that on or about March 8, 1947, plaintiff entered into an oral agreement with defendants whereby he agreed to sell and deliver to defendants potatoes. Plaintiff says that no amount was agreed upon. Defendants say that plaintiff agreed to sell all of his potatoes amounting to approximately 3,500 bags. Plaintiff says that he was to receive the market price as it appeared at the time or times of delivery. Defendants say that he agreed to sell by grades at fixed

prices. A decision as to the quantity of potatoes agreed to be sold or the price therefor is not called for here. While delivery was being made the market price was increased and after delivery of a quantity of potatoes with a value representing the amount of money for which plaintiff instituted this action plaintiff refused to deliver any more potatoes. He sold the remainder to another dealer. The last delivery of potatoes to defendants was made on March 8, 1947. On that date plaintiff demanded payment for the potatoes delivered. Defendants agreed to make payment in part on that date but refused payment in full. Plaintiff left without receiving payment either in whole or in part. Without further communication with plaintiff one of the defendants prepared a statement on an account form of the defendants. On this statement appeared the quantity of potatoes received from plaintiff, the grades, the prices for the grades, the total price for all grades or $1,215.25, then was entered an item of $243.40 "Deducted acct no Delivery of 2434 Bags." This amount was subtracted from $1,215.25. A check was drawn for the amount after deduction or $971.85 and this statement and check were sent to the plaintiff. Typed on the back of the check was the following: "This is Payment and settlement in full for all potatoes sold to Peterson & Company to date." Plaintiff did not endorse or cash the check.

As a part of his evidence in chief plaintiff offered in evidence as an exhibit the statement and check. It was received over objection of defendants. The objection was that the exhibit was incompetent, irrelevant, and immaterial, and this was an attempt to show an offer of settlement.

It is this exhibit that defendants say was an offer of compromise made to plaintiff by defendants and therefore inadmissible in evidence.

It is true that an offer of compromise of a claimed cause of action is incompetent as evidence in an action subsequently instituted to enforce the claim. Kierstead

v. Brown, 23 Neb. 595, 37 N. W. 471; Eldridge v. Hargreaves, 30 Neb. 638, 46 N. W. 923; Callen v. Rose, 47 Neb. 638, 66 N. W. 639; Wright v. Morse, 53 Neb. 3, 73 N. W. 211; Boice v. Palmer, 55 Neb. 389, 75 N. W. 849.

Was this evidence under the facts as disclosed by the record an offer of compromise? We think it was not. It has not the elements of an effort to bring about a compromise as that term is defined. This was, in the light of the evidence, a statement of a declaration of indebtedness of defendants to plaintiff and the statement of a fixed amount claimed to be due them from him. There is nothing in the exhibit itself and there was no extraneous evidence the effect of which was to say that in view of equities involved or for the purpose of adjusting their difficulties by mutual consent the statement and check were tendered as a basis of settlement, these being elements of compromise.

Compromise has been defined as follows:

"An arrangement arrived at, either in court or out of court, for settling a dispute upon what appears to the parties to be equitable terms, having regard to the uncertainty they are in regarding the facts, or the law and the facts together."

"An agreement between two or more persons, who, for preventing or putting an end to a lawsuit, adjust their difficulties by mutual consent in the manner which they agree on, and which every one of them prefers to the hope of gaining, balanced by the danger of losing." Black's Law Dictionary (3rd ed.), p. 382.

If the exhibit is to be characterized it must be characterized in the light of the facts as an admission against interest. It was an admission of the quantity of potatoes sold and the value thereof. Also since the claim of the exhibit against the plaintiff for damages was less than the claim made in his answer plaintiff had the right to have it considered by the jury on the theory of admission against interest.

The applicable rule of law is that material statements

made by an adverse party prior to a trial with regard to a fact or facts in issue inconsistent with the facts alleged or testified to by such party constitute admissions against interest and are receivable in evidence. Young v. Kinney, 79 Neb. 421, 112 N. W. 558; Havlik v. Anderson, 130 Neb. 94, 264 N. W. 146; McDaniel v. Farlow, 132 Neb. 273, 271 N. W. 905; Tuttle v. Wyman, 146 Neb. 146, 18 N. W. 2d 744.

There is another reason why the assigned error that exhibit No. 1 was erroneously admitted in evidence is not available to defendants. The exhibit at the time it was offered was, as pointed out, duly objected to but later on in the presentation of their own evidence the defendants introduced a carbon duplicate of the statement in evidence.

In the early case of Chicago, K. & N. R. R. Co. v. Wiebe, 25 Neb. 542, 41 N. W. 297, it was held that where evidence is introduced over objection but afterwards the objecting party introduced the same evidence or evidence of like character error cannot be predicated thereon. This rule has been consistently followed in later decisions. See, Hoagland & Co. v. Scottish Union & Nat. Ins. Co., 131 Neb. 112, 267 N. W. 242; Allen v. Massachusetts Mutual Life Ins. Co., 149 Neb. 233, 30 N. W. 2d 885.

The judgment of the district court is affirmed.

AFFIRMED.

ROY KIPF, APPELLEE, V. ANITA J. BITNER, APPELLANT.
33 N. W. 2d 518

Filed August 6, 1948. No. 32463.

1. **Trial.** A motion for directed verdict must, for the purpose of decision thereon, be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed, and such party is entitled to have every controverted fact resolved in his favor and

have the benefit of every inference that can reasonably be deduced from the facts in evidence.

2. ———. Where different minds may reasonably draw different conclusions from the evidence adduced or if there is a conflict in the evidence as to whether or not they establish negligence or contributory negligence, and the degree thereof, when one is compared with the other, such issues must be submitted to the jury.
3. **Evidence.** "Admissions" in the law of evidence are concessions or voluntary acknowledgments made by a party of the existence of certain facts, and they are ordinarily classified as judicial and extrajudicial.
4. **Pleading.** A judicial admission is a formal act done in the course of judicial proceedings which is a substitute for evidence, thereby waiving or dispensing with the production of evidence by conceding for the purpose of litigation that the proposition of fact alleged by the opponent is true.
5. **Evidence.** An extrajudicial admission is simply an item of evidence in the mass of evidence adduced during a trial, admissible in contradiction and impeachment of the present claim and other evidence of the party making the admission.
6. **Pleading.** A judicial admission is ordinarily final and conclusive upon the party by whom it was made, unless the trial court, in the exercise of a judicial discretion, timely relieves him from that consequence.
7. **Evidence.** An extrajudicial admission is not ordinarily final and conclusive upon the party by whom it was made, in the absence of controlling elements of estoppel.
8. **Depositions: Trial.** An extrajudicial admission appearing in the deposition of a party taken before trial is not ordinarily final and conclusive upon him, but it may be competent and admissible as evidence in contradiction and impeachment of his present claim and his other evidence given at the trial, to be given such weight as the trier of fact deems it entitled.

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

Davis, Stubbs & Healey, for appellant.

Sterling F. Mutz, for appellee.

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

CHAPPELL, J.

This action was brought to recover for personal injuries and property damages arising out of a collision between plaintiff's motorcycle and defendant's automobile, at an intersection upon which traffic was controlled by an overhead signal light. Upon trial to a jury, plaintiff was awarded a verdict and judgment. Defendant's motion for new trial was overruled, and she appealed, assigning substantially that the trial court erred: (1) In overruling defendant's motion for a directed verdict; (2) in giving instruction No. 2; and (3) that the verdict and judgment were contrary to the law and the evidence. We conclude that the assignments should not be sustained.

Without dispute, the accident occurred in the intersection of 48th and O Streets in Lincoln, between 4:35 and 4:40 p. m., October 4, 1946. It was cloudy, misty, and drizzling rain. The pavement was wet. Prior to the accident, plaintiff was driving his motorcycle west, and defendant was driving her automobile east on O Street. The overhead signal light was green for east and west traffic at the time of the accident.

The record discloses that the pavement on O Street and on 48th Street south of O Street was 30 feet wide from curb to curb, but the pavement on 48th Street north of O Street was 42 feet wide from curb to curb. The width of the intersection was 120 feet between property lines on the north side, and 66 feet on the south side of O Street. Therefore, the angling curb lines on the northwest and northeast corners of the intersection were constructed in a wider arc for the movement of traffic into 48th Street from O Street, or into O Street from 48th Street. Thus, with the property lines extended on this intersection of varying dimensions, a vehicle coming from the east on O Street would enter the intersection approximately 50 feet east of the center line of 48th Street, and a vehicle coming from the west

on O Street would enter the intersection approximately 45 feet west of the center line of 48th Street.

A plat, drawn to scale, and appearing in the record as offered by plaintiff, illustrates the foregoing situation. It also demonstrates, by designation, the manner and circumstances of the accident, together with the point of impact as supported by evidence adduced in plaintiff's behalf. Photographs appearing in the record also illustrate the topography of the intersection, and its approaches. Also appearing in the record, as offered by plaintiff, are photographs taken three or four minutes after the accident. They graphically illustrate the approximate position of the vehicles at the time of the impact and after the accident, since competent evidence disclosed that they moved but little, if any, after the impact. They also picture defendant sitting in her car, with two other passengers, and plaintiff lying injured where he fell on the pavement.

Evidence adduced in plaintiff's behalf, as summarized, was substantially as follows: Plaintiff, with a co-employee friend riding behind him on plaintiff's motorcycle, equipped for two passengers, left their place of employment at 65th and O Streets immediately after 4:30 p. m., and proceeded west in the right lane of traffic. His windshield served only as such, and coming up only about to his shoulders, enabled him to see over the top of it. At a slow sign some distance east of 48th Street, plaintiff, traveling at 25 miles an hour, shifted into intermediate and slowed down. As he approached the intersection of 48th and O Streets, the traffic light was green. When he was in the intersection about 10 feet west of the east property line of 48th Street extended, and driving at 17 or 18 miles an hour, plaintiff saw defendant's car coming east in the south lane of O Street about 25 feet west of the intersection. He could not estimate her speed. Plaintiff proceeded on west in the intersection, and while traveling at about 15 miles an hour, saw defendant suddenly, without previously having given any

signal or warning, come on out in a circular angle to the northeast, and cross the center line of O Street at a point west of the intersection. Thereupon, plaintiff turned north and west to avoid collision, but, upon seeing that one was imminent, first shut off the gas, and then applied his brakes, but the vehicles collided at a point, as shown on the plat, in the northwest corner of the intersection approximately 35 feet west of the center line of 48th Street and 25 feet north of the center line of O Street, or approximately 40 feet northwest of the overhead signal light, 20 feet northeast of the west property line of 48th Street extended, and 10 feet southeast of the west curb as it curved to the northeast in forming the west curb line of 48th Street.

At the time of the collision, plaintiff was traveling about eight miles an hour, and defendant was traveling five or six miles an hour. The front wheel of plaintiff's motorcycle and defendant's front bumper collided to the right of the center of defendant's car. The photographs so disclose. After collision, the vehicles both stopped immediately, with the motorcycle under the front of the car. Its motor was still running, whereupon someone stopped it, pulled the motorcycle from under and stood it upright near the car, which car then moved forward about a foot, where the vehicles remained when the photographs were taken.

Plaintiff was thrown by the impact northwest over his windshield to the pavement, where he lay six or eight feet northwest of the point of impact. He was conscious, but concededly received serious and permanent injuries, disability, and damages, the amount of which was not questioned here. As he lay in the street, plaintiff noticed that defendant's windshield was hazed over with mist and rain.

The other rider of the motorcycle, who, being taller than plaintiff could see over him, substantially corroborated plaintiff's testimony in its material aspects. He was thrown into the grille of defendant's car, and then

over its hood to the pavement three or four feet north of defendant's car, where, injured, he crawled or dragged himself on his side, three or four feet to the curb.

Another fellow employee of plaintiff, also proceeding west on O Street in a car, arrived at the scene of the accident almost momentarily after it happened, and, being an amateur photographer, forthwith took the photographs which generally supported and corrobrated the material evidence adduced by plaintiff and in his behalf.

Evidence adduced in defendant's behalf was substantially as follows: There were two other ladies with defendant in her Plymouth coupé as it was being driven east on O Street. Concededly, the windshield wiper on the left or defendant's side was working, but the one on the other side was not working. Defendant testified, however, that she had very clear vision, and that after the accident her windshield was hazed over by the escape of fluid from her car radiator. As defendant came up the hill before reaching the intersection, the light was red, and there were no cars in front of her. The light turned green when she was about 125 feet west of the intersection, and she thereafter put out her hand straight to give a signal for a left turn, and continued to do so for 110 or 115 feet, until she arrived at the point of turning. Defendant noticed plaintiff's motorcycle coming from the east, but thought it was still far enough back to give her time to make a safe turn to the left, and she did so. After she had turned slightly, the motorcycle, much farther back, approached, a little out of control, at a speed estimated at 35 or 40 miles an hour, more speed than she had anticipated, and it weaved and turned directly northwest into her pathway, striking her car almost directly in front of the driver's seat. She testified that the impact, which knocked the car up and back, was at a point where her car was over the center line of O Street, not quite its full length, and at a point north of the west curb of 48th Street on the south side.

One of the occupants of defendant's car, seated on the right side, testified that before making the turn she saw the motorcycle coming, but it had not yet reached the intersection. Defendant held out her arm until she started to turn, making a little short turn across the center of O Street, about four feet east of the curbing on the west side of 48th Street going north, at which time plaintiff's motorcycle, weaving and coming pretty fast, 35 miles an hour, suddenly veered north and west. She did not see it strike defendant's car, but felt the jolt of the impact. Rain and mist were on the windshield on her side because the wiper was not working there.

A witness testified that, standing at the southeast corner of the intersection, he saw plaintiff about 100 yards east of the intersection, and estimated his speed as then being 35 miles an hour. He testified that when it was about 20 yards from the intersection and defendant was just beginning to make the turn, plaintiff applied his brakes, about the only thing he could have done because the pavement was slippery, and the impact occurred about five feet north of the center line of O Street, and parallel with the curb line on the west side of South 48th Street, after which both vehicles moved slightly northeast.

Another witness testified that, standing at the northeast corner, he did not see defendant's car, but saw plaintiff about 75 yards away, coming toward the intersection at about 25 or 30 miles an hour.

A police officer who arrived at the scene, testified that from oil and debris on the pavement, it appeared that the impact occurred 33 feet west of the center line of 48th Street and 8 feet north of the center line of O Street, and that the vehicles had come to rest north of that point. Another witness testified that he stepped off the distance from debris on the pavement, and that the impact was 30 feet west and 5 feet north of the overhead traffic signal.

The driver of a taxicab which stood on the north side of

O Street, west of but near the center line of 48th Street, waiting for the light to turn green so he could proceed straight south, testified he saw defendant give a left-hand signal for about 50 feet. He testified that she stopped three or four seconds waiting for a car to go west, and then started to turn. The witness did not see the impact, but testified that just guessing, he thought it occurred at a point where defendant's front wheels were about four feet north of the center of O Street, and between 15 and 30 feet west of the overhead signal light.

The pleadings raised the issues of defendant's negligence and plaintiff's contributory negligence as an affirmative defense. In the foregoing situation, without question those issues and the amount of plaintiff's damages, if recoverable, were for determination by the jury under appropriate instructions. The applicable rules are: "A motion for directed verdict must, for the purpose of decision thereon, be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed, and such party is entitled to have every controverted fact resolved in his favor and have the benefit of every inference that can reasonably be deduced from the facts in evidence. * * *

"Where different minds may reasonably draw different conclusions from the evidence adduced or if there is a conflict in the evidence as to whether or not they establish negligence or contributory negligence, and the degree thereof, when one is compared with the other, such issues must be submitted to the jury." Roby v. Auker, 149 Neb. 734, 32 N. W. 2d 491. See, also, Thomison v. Buehler, 147 Neb. 811, 25 N. W. 2d 391.

Instruction No. 2, about which defendant complained, purported to summarize and submit the allegations of negligence pleaded in plaintiff's petition. To recite its content herein would serve no useful purpose and would unduly prolong this opinion. It is sufficient to say that the allegations of alleged negligence submitted thereby

were each and all amply supported by competent evidence adduced in plaintiff's behalf. That conclusion is unquestionable unless plaintiff's own evidence, given at the trial, should be, as argued by defendant, discredited and disregarded as a matter of law.

In that regard, defendant's principal argument, as primarily related to the merits of all her assignments of error, was based upon that contention.

The circumstances raising that question were that in a deposition of plaintiff taken by defendant 11 days before the trial, plaintiff testified substantially that he first saw defendant's car when he was approximately even with the center line of 48th Street, at which time defendant's car, 40 feet away, something like that, was headed in a northeasterly direction, more east than north, cutting across the intersection or street, half over the center line of O Street, coming right out into his lane of traffic. Defendant did not offer the deposition as evidence, but on cross-examination, plaintiff substantially admitted, with qualifications, that he so testified in the deposition. Defendant called our attention to the fact that plaintiff, on direct examination at the trial, testified that he first saw defendant's car when he was about 10 feet in the intersection, and that defendant was then in the south lane of traffic on O Street about 25 feet west of the west property line of 48th Street.

In the light of the foregoing, defendant's primary contention was that such alleged inconsistency under oath precluded plaintiff from any recovery by reason of the holdings in Ellis v. Omaha Cold Storage Co., 122 Neb. 567, 240 N. W. 760; Peterson v. Omaha & C. B. Street Ry. Co., 134 Neb. 322, 278 N. W. 561; Bonacci v. Cerra, 134 Neb. 588, 279 N. W. 314; Gormley v. Peoples Cab, Inc., 142 Neb. 346, 6 N. W. 2d 78; and Gohlinghorst v. Ruess, 146 Neb. 470, 20 N. W. 2d 381. We cannot sustain that contention because those cases are distinguishable from the one at bar, not only upon the facts but also upon the law,

and in any event there was other competent evidence in the record amply sufficient to sustain the judgment.

They were all cases wherein plaintiff pleaded and testified to one story in one or more actions or trials, and after obtaining a benefit therefrom, or imposing a detriment thereby, it was found that they could not thus substantiate their claim, in which event they materially and substantially changed their testimony or pleadings and testimony in another trial, manifestly with a fraudulent motive for the purpose of obviating objections pointed out by the court in a former trial, or to meet the exigencies of their case, and, by thus experimenting and toying with litigants in courts, they vainly sought to obtain a recovery. That such cases were so limited was affirmed in Gutoski v. Herman, 147 Neb. 1001, 25 N. W. 2d 902.

The cases relied upon by defendant were all in the final analysis grounded primarily upon elements of estoppel. The case at bar contains none of such elements which could make plaintiff's testimony, given in his deposition, conclusive upon him or discredit, as a matter of law, all his testimony given at the trial. Rather, plaintiff's testimony, about which defendant complained, must be classified in the field of admissions. In the law of evidence, admissions are concessions or voluntary acknowledgments made by a party of the existence of certain facts, and they are designated generally as extrajudicial or quasi admissions, and judicial or true admissions. 31 C. J. S., Evidence, § 270, p. 1022.

As stated in 4 Wigmore on Evidence (3d ed.), § 1058, p. 20, and § 1059, p. 21: "The law of Evidence has suffered, in its most vital parts, from an ailment almost incurable, - that of confusion of nomenclature. The term 'admissions' exhibits this misfortune in one of its notable aspects. There are two principles, not at all connected, which for a century or more have had to be discussed by the aid of a single and common term. One * * * authorizes the receipt of any statement made by an opponent, as evidence in contradiction and impeachment of his

present claim. (The form of which, if admissible, is immaterial. It may be oral or written or it may be a sworn statement, as for example a deposition. 3 Wigmore on Evidence (3d ed.), § 1040, p. 727.) Such statements * * * should better * * * be designated Quasi-Admissions.

"The true Admission, in the fullest sense of the term, is another thing, and involves a totally distinct principle. It concerns a method of escaping from the necessity of offering any evidence at all. The former (quasi admissions) is an item in the mass of evidence; the latter (judicial admissions) is a *waiver relieving the opposing party from the need of any evidence.* * * *

"An Admission, in the latter and correct sense, is a formal act, done in the course of judicial proceedings, which waives or dispenses with the production of evidence, by conceding for the purposes of litigation that the proposition of fact alleged by the opponent is true. * * *

"A quasi-admission * * * being nothing but an item of evidence, is therefore *not in any sense final or conclusive.* The opponent, whose utterance it is, may none the less proceed with his proof in denial of its correctness; it is merely an inconsistency which discredits, in a greater or less degree, his present claim and his other evidence.

"No one would ever have entertained doubts on this point, had not the two doctrines noticed in the preceding sections tended, by their superficial resemblance to the present doctrine, at certain points to produce confusion, - namely, the doctrines of estoppel and of judicial admission. An Estoppel, *i. e.* a representation acted on by the other party, by creating a substantive right does oblige the estopped party to make good his representation, - in other words, but inaccurately, it is conclusive. So, too, but for an entirely different reason, a Judicial Admission is conclusive, (unless the court in the exercise of its judicial discretion relieves from that consequence. 9 Wigmore on Evidence (3d ed.), § 2590,

p. 588) in the sense that it formally waives all right to deny, for the purposes of the trial, *i. e.* it removes the proposition in question from the field of disputed issues. But statements which are not estoppels nor judicial admissions have no quality of conclusiveness, and on principle cannot have.

"This has always been conceded by the judges, in modern times. * * *

"The only instances in which any apparent contradiction may be found are those in which questions of Estoppel * * * were under discussion." See, also, 9 Wigmore on Evidence (3d ed.), § 2588, p. 586, § 2589, p. 587, § 2590, p. 587; 31 C. J. S., Evidence, § 379, p. 1164, § 380, p. 1164, § 381, p. 1170; 22 C. J., Evidence, § 502, p. 417, § 505, p. 421.

The deposition herein was not made any part of plaintiff's evidence adduced in this or any other action. It contained no relevant judicial admission, as heretofore defined. It was never used by plaintiff for his own purposes or benefit to the detriment of defendant. It was not inconsistent with or contrary to any allegation of plaintiff's petition. It was taken by defendant for her own purposes and benefit, and rightly used by her as such on cross-examination, simply to contradict and impeach the plaintiff's present claim and his other evidence given at the trial. It was in the same category as an original petition filed in an action, which petition has been inconsistently amended. In such a situation, the original is competent but not conclusive evidence, which may be offered as an admission against interest to be given such weight as the trier of fact deems it entitled. Arman v. Structiform Engineering Co., 147 Neb. 658, 24 N. W. 2d 723.

The evidence in the case at bar, about which defendant complained, was at most only an extrajudicial or quasi admission, involving no element of estoppel. While admissible as an admission against interest, to be given such weight as the jury deemed it entitled, it was not

conclusive and could not discredit all of plaintiff's testimony given at the trial or preclude his recovery as a matter of law.

We conclude that the issues presented were for the jury, and that the judgment was amply sustained by the evidence and in conformity with the law.

For the reasons heretofore stated, the judgment of the trial court should be and it hereby is affirmed.

AFFIRMED.

CARTER, J., participating on briefs.

IN RE ESTATE OF MARY J. WHITE, DECEASED. FRANK E. WHITE, APPELLANT, V. IRENE EDITH CHESTNUTT, EXECUTRIX, APPELLEE.

33 N. W. 2d 470

Filed August 6, 1948. No. 32443.

1. **Husband and Wife.** Under common law the husband is liable for his wife's necessaries, including the expenses of her last sickness and burial, and, under section 42-201, R. S. Supp., 1947, he continues to be primarily liable therefor.
2. **Wills: Husband and Wife.** A married woman may, by providing in her will that the expenses of her last sickness and burial shall be paid out of her estate, relieve her husband from liability therefor; however, such testamentary provision cannot be taken advantage of by the husband after he has elected to take under the statute of descent.

APPEAL from the district court for Kimball County: J. LEONARD TEWELL, JUDGE. *Affirmed.*

Kenneth C. Fritzler, for appellant.

Torgeson & Halcomb and *Bernard F. O'Brien,* for appellee.

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

WENKE, J.

The appellant, Frank E. White, appeals from an order of the district court for Kimball County disallowing a claim he filed against the estate of his deceased wife, Mary J. White.

The facts are not in dispute. Frank E. White and Mary J. White were husband and wife. On March 12, 1947, Mary J. White died leaving a last will and testament. On April 14, 1947, this will was duly allowed and admitted to probate by the county court of Kimball County. Thereupon, and within the time as provided by section 30-108, R. S. 1943, the husband elected to take under the statute of descent as provided by section 30-107, R. S. 1943.

During the wife's last illness there were incurred for doctor services, hospital services, etc., expenses in the sum of $362.55 and, after her death, expenses for burial services in the sum of $1,011.25. These expenses were paid by the husband and he then filed a claim therefor against her estate. The executrix of her estate filed objection to the allowance thereof on the ground that it was not an obligation of the deceased. From an order of the county court allowing the claim the executrix appealed to the district court. The district court disallowed the claim and, his motion for new trial having been overruled, claimant perfected this appeal.

The "First" provision of the last will and testament of the deceased provided as follows: "I direct that all my just debts, including the expenses of my last illness and burial, be paid as soon after my decease as may be convenient."

This appeal presents two questions: First, is the husband primarily liable for the expenses of the last illness and burial of his wife? Second, if so, did he waive the provisions of his wife's last will and testament making her estate liable therefor when he elected to take under the statute of descent and not under the will?

Under the common law the husband was liable for his wife's necessaries, including the expenses of her last

sickness and burial. See, 21 Am. Jur., Executors and Administrators, § 331, p. 569; 27 Am. Jur., Husband and Wife, § 456, p. 56; 41 C. J. S., Husband and Wife, § 61, p. 527; Hall v. Stewart, 135 Va. 384, 116 S. E. 469, 31 A. L. R. 1489; In re Estate of Skillman, 146 Iowa 601, 125 N. W. 343, 140 Am. S. R. 295; Moran v. LeBlanc's Estate, 256 Mich. 189, 239 N. W. 321; Reynolds v. Rice, 224 Mo. App. 972, 27 S. W. 2d 1059.

As to whether or not there has been a change in the nature of this liability, a careful consideration of the authorities cited leads to the conclusion that we cannot simply choose between the holdings of different courts but must construe our own statutes on the subject. As stated in McClellan v. Filson, 44 Ohio St. 184, 5 N. E. 861, 58 Am. R. 814: "* * * we regard the liability as resting on the statute, and upon that wholly."

As stated, at the common law the husband was liable for the expenses of the last sickness of his wife and for her proper burial as for necessaries furnished the family and, under section 42-201, R. S. Supp., 1947, he continues to be so primarily liable. Therefore, unless the Legislature has, by statute, expressly relieved him thereof he continues to be so liable. See Hall v. Stewart, *supra;* and 27 Am. Jur., Husband and Wife, § 457, pp. 56, 57.

There is no question but what the following sections of our statutes, to wit: Sections 30-229, 30-230, 30-615, and 30-1302, R. S. 1943, and section 30-103, R. S. Supp., 1947, make the estate of any deceased person, which would include the wife, liable for the expenses of last sickness and burial. These statutes are designed to recognize the duty of the estate of any deceased person to pay the expenses of his last sickness and burial and to fix the priorities thereof in order to establish the order of their payment as between claimants. Whoever furnishes these services has a valid claim against the estate of such deceased person for the fair and reasonable value thereof. However, there is nothing in these statutes which can be said to relieve the husband of his

primary obligation to pay them and, unless the Legislature expressly so provides, we should not interpret them to have such meaning for the determination of legislative policy is not one of our functions but is a function of the Legislature. See 27 Am. Jur., Husband and Wife, § 457, pp. 56, 57; and Reynolds v. Rice, *supra*.

If the effect of provision "First" of the will, which has hereinbefore been set forth, is to relieve the husband of his primary obligation to pay for the expenses of his wife's last sickness and burial, and we think it did, then it is, in effect, a legacy the benefit of which he has waived by electing to take under the statute of descent.

As stated in Richardson v. Johnson, 97 Neb. 749, 151 N. W. 314: "By his written statement he declared that he would not receive or accept the provision made in or benefit conferred on him by the will, and that he intended to take, have and receive the part of his deceased wife's estate given and awarded to him by the law of the state of Nebraska as the husband and widower of the deceased."

As stated in 41 C. J. S., Husband and Wife, § 61, p. 529: "A married woman may, by providing in her will that her funeral expenses shall be paid out of her own estate, relieve her husband from liability; but such a testamentary provision cannot be taken advantage of by the husband after he has elected to take against the will; * * *."

We have come to the conclusion that the judgment of the district court is correct and it is therefore affirmed.

AFFIRMED.

IN RE GUARDIANSHIP OF BEATRICE KRAFT. DR. A. H. FECHNER, SUPERINTENDENT OF LINCOLN STATE HOSPITAL, APPELLANT, V. JOSEPH O. BURGER, GUARDIAN OF BEATRICE KRAFT, INCOMPETENT, APPELLEE.

33 N. W. 2d 534

Filed August 10, 1948. No. 32416.

1. **Statutes.** In the construction of a statute and determination of the legislative intent effect must be given to all of its parts and no sentence, clause, or word should be rejected as meaningless or superfluous if it can be avoided, and the language employed must be interpreted in its plain, ordinary, and popular use.
2. ———. When a statute is ambiguous or susceptible of two constructions, one of which creates absurdities, unreasonableness, or unequal operation and the other of which avoids such a result, the latter should be adopted.
3. ———. Held, that the statute in the particular brought into question means that if there be an estate and also an income and if the two are sufficient or if there be either the one or the other and it is sufficient for the purpose named there is an obligation to pay.
4. **Case Distinguished.** State v. Heupel, 114 Neb. 797, 210 N. W. 275, 48 A. L. R. 728, distinguished.

APPEAL from the district court for Douglas County: ARTHUR C. THOMSEN, JUDGE. *Reversed and remanded with directions.*

James J. Fitzgerald and *Ephraim L. Marks*, for appellant.

Joseph O. Burger, pro se.

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

YEAGER, J.

Beatrice Kraft is an incompetent and an inmate of the Lincoln State Hospital. She is under guardianship and appellee Joseph O. Burger is her duly appointed guardian having been appointed as such by the county court of Douglas County, Nebraska. During the time

in question she was the owner of real estate in Cass County, Nebraska, of the value of between $6,000 and $9,000. The Lincoln State Hospital made a charge against the guardian for the care of said Beatrice Kraft for the period beginning June 6, 1946, and ending February 28, 1947, in the amount of $281.29 which charge the parties have stipulated was reasonable and proper and that it was computed in accordance with statute and that no part of it has been paid.

The action was commenced by the filing of a claim by the Superintendent of the Lincoln State Hospital in the guardianship proceeding. The claim was allowed by the county court. The guardian appealed from the order allowing the claim and in the district court, after hearing, the claim was disallowed. From the judgment disallowing the claim the Superintendent of the Lincoln State Hospital has appealed. The Superintendent of the Lincoln State Hospital accordingly is appellant and Joseph O. Burger, guardian, is appellee.

There is no disputed question of fact before the court. The sole question for determination is that of whether or not in view of the fact, and it is stipulated to be a fact, that the income of Beatrice Kraft was insufficient to pay the charges for her keep in the Lincoln State Hospital and was only sufficient to pay the charges of administration, she having no dependents, the Lincoln State Hospital is, under section 83-352, R. S. 1943, as amended by section 1, chapter 248, Laws 1945, entitled to recover the amount for which claim was made out of the estate of the said Beatrice Kraft. The provision is the following:

"If any patient in a state hospital for the insane is possessed of an estate and income sufficient to meet the expense of his care and maintenance in the hospital without depriving those dependent upon him of their necessary support, then the guardian of the patient shall pay to the superintendent of the hospital, quarterly during the time the patient is in the hospital, a sum to be

fixed by the Board of Control which shall be an amount equal to the per capita cost of maintaining the patient in the hospital. The amounts to be paid to the hospital under this section shall constitute a claim against the estate of the patient and be collectible therefrom."

Substantially the appellee contends that, under the statute, before such a claim as this shall become enforceable it must be made to appear that there is an estate and an income and that the income must be sufficient to meet the expense of care and maintenance.

The substantial contention of the appellant is that the statute properly interpreted means that if there be an estate and also an income and if the two are sufficient or if there be either the one or the other and it is sufficient then there is an obligation to pay.

In an approach to an interpretation of a statutory provision by the courts certain precautionary rules are to be observed.

In Hagenbuck v. Reed, 3 Neb. 17, it was said: "In the construction of a statute, effect must be given, if possible, to all its several parts. No sentence, clause or word should be rejected as meaningless or superfluous, if it can be avoided; but the subject of the enactment and the language employed, in its plain, ordinary and popular sense, should be taken into account, in order to determine the legislative will."

In Hansen v. Dakota County, 135 Neb. 582, 283 N. W. 217, the foregoing was quoted with approval and the following was said: "In construing a statute, it is the duty of the court to discover, if possible, the legislative intent from the language of the act and give effect thereto."

In Pierson v. Faulkner, 134 Neb. 865, 279 N. W. 813, it was said: "When a statute is ambiguous or susceptible of two constructions, one of which creates absurdities, unreasonableness or unequal operation and the other of which avoids such a result, the latter should be adopted."

This statute examined in the light of these rules leads

to a rejection of the interpretation placed upon it by the appellee and to an acceptance of one more nearly approaching that placed thereon by the appellant.

It cannot be other than reasonable to say that the Legislature intended that if a patient in a state hospital for the insane is possessed of an estate and income the total of which was sufficient to meet the expense of his care and maintenance in the hospital without depriving those dependent upon him for necessary support the guardian shall pay the amount fixed in accordance with the statute by the Board of Control. The words do not import a meaning that if there is an absence of the one or the other or that there is an insufficiency of income for this purpose that there is no obligation under the statute for support. Reasonably it cannot be said that the Legislature contemplated or intended the absurd results which could readily flow from such an interpretation as has been placed upon the provision by the appellee.

To accept the interpretation of the appellee would be to say that if there was an estate no matter how extensive but no income or an income no matter how large but no estate the obligation of the statute could not attach. This would lead to the kind of absurdity contemplated by the legal principle hereinbefore set out.

Conformable to another legal principle also set out herein the interpretation of appellee cannot be accepted. It must be assumed that the language employed by the Legislature was employed in its plain, ordinary, and popular sense.

The statute employs the words "estate" and "income." Estate in its plain, ordinary, and popular sense includes income which has been received.

In Black's Law Dictionary (3rd ed.), p. 683, it is said:

"The word 'estate' is a word of the greatest extension, and comprehends every species of property, real and personal."

" 'Estate' comprehends everything a man owns, real

and personal, and ought not to be limited in its construction, unless connected with some other word which must necessarily have that effect."

"It means, ordinarily, the whole of the property owned by any one, the realty as well as the personalty."

There is nothing in the statute to indicate an intention on the part of the Legislature to depart from this ordinary and popular meaning of the words employed which are here brought under question.

The appellee contends that the opinion in State v. Heupel, 114 Neb. 797, 210 N. W. 275, 48 A. L. R. 728, in its analogy conflicts with the conclusion herein reached. There the court was construing a statute which contained in all important respects the substance of the statute under consideration here except that it contained the words "estate or income" instead of the words of the present statute "estate and income." It was contended there that the word "or" should be interpreted to mean "and" and that thus interpreted no obligation existed to pay for maintenance in a state hospital unless there were both estate and income. The contention was rejected. There was no interpretation of the effect of the statute had the Legislature used "and" instead of "or" although in this connection the court did say: "While we have no quarrel with the principle of construction for which the defendant contends, the question here is whether the facts in the instant case are such as require its application. It would seem not."

The judgment of the district court is therefore reversed and the cause remanded with directions to render judgment allowing the claim.

REVERSED AND REMANDED WITH DIRECTIONS.

C. HUBERT RILEY, APPELLANT AND CROSS-APPELLEE, V. WILBERFORCE W. RILEY ET AL., APPELLEES AND CROSS-APPELLANTS.
33 N. W. 2d 525

Filed August 10, 1948. No. 32317.

1. **Specific Performance: Frauds, Statute of.** One seeking specific performance of an oral contract for the conveyance of real estate must prove a contract which is clear, satisfactory, and unequivocal in its terms.
2. ———: ———. One seeking specific performance of an oral contract to convey real estate has the burden of showing that he has performed the burdens imposed on him by the contract.
3. ———: ———. One seeking specific performance of an oral contract for the conveyance of real estate must show that his acts constituting performance were such as were referable solely to the contract sought to be enforced, and not such as might be referable to some other or different contract.
4. ———: ———. The rule that one seeking specific performance of an oral contract for the conveyance of real estate must sustain the burden of proving an oral contract the terms of which are clear, satisfactory, and unequivocal is one of quality and is satisfied when by his own evidence these elements are satisfied, however if his position is assailed, he has the further burden of sustaining his position by a preponderance of the evidence.
5. ———: ———. The rule that one seeking specific performance of an oral contract for the conveyance of real estate must show that his acts constituting performance were such as were referable solely to the contract sought to be enforced, and not such as might be referable to some other or different contract, is satisfied when by his own evidence he has thus shown, however if his position is assailed he has the further burden of sustaining his position by a preponderance of the evidence.
6. ———: ———. In determining whether or not acts of one seeking specific performance of an oral contract are referable solely to the contract alleged all acts of performance must be considered as a whole in their own light and in the light of all material and relevant facts and circumstances as shown by the evidence.
7. **Homesteads: Specific Performance.** Oral contracts for specific performance of a contract for the conveyance of a homestead are enforceable.
8. **Partnership.** A partnership may not be dissolved by decree of court on application of a partner under section 67-332, R. S.

1943, as amended by section 67-332, R. S. Supp., 1947, except on the grounds named in the statute.

9. ———. It is the duty of a partner to account to the partnership for any benefit, and hold as trustee for it, any profits derived by him without the consent of the other partners from any transaction connected with the formation, conduct, or liquidation of the partnership or from any use of its property.

APPEAL from the district court for Pierce County: FAY H. POLLOCK, JUDGE. *Affirmed in part, and in part reversed and remanded with directions.*

Fred H. Free, Moyer & Moyer, and *Jane E. Moyer,* for appellant and cross-appellee.

R. J. Shurtleff, E. D. Beech, Leonard A. Flansburg, and *Charles H. Flansburg,* for appellees and cross-appellants.

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

YEAGER, J.

This is an action by petition of C. Hubert Riley, plaintiff and appellant, to vacate and set aside a deed whereby the defendant, Wilberforce W. Riley, purported to convey to Margaret Riley Bowen 160 acres of land in Pierce County, Nebraska, and other lands in fraud of plaintiff; to quiet the title to the land in Wilberforce W. Riley subject and subservient to rights of the plaintiff under an oral partnership contract made and entered into between plaintiff and Wilberforce W. Riley in the spring of 1936 which contract had been performed by plaintiff, whereby plaintiff was to receive title to the 160 acres of land in question on the death of Wilberforce W. Riley; and to enjoin and restrain Wilberforce W. Riley and Margaret Riley Bowen from interfering with performance of the partnership by plaintiff or, during the pendency of the action, from alienating, conveying, mortgaging, or otherwise attempting to transfer or convey any right, title, or interest in the lands. Elvon

Bowen was made a party defendant as husband of Margaret Riley Bowen. Wilberforce W. Riley, Margaret Riley Bowen, and Elvon Bowen are defendants and appellees. The action was tried on the theory that plaintiff was entitled to have title quieted in Wilberforce W. Riley to the 160 acres and not the other lands but that he was entitled to have the other land for use in the partnership business during the life of Wilberforce W. Riley.

In the action the defendant Wilberforce W. Riley by cross-petition separately filed a cross-action and the defendants Margaret Riley Bowen and Elvon Bowen joined in an answer denying the claims of plaintiff. In the answer they claimed the right to have title to the lands quieted in Margaret Riley Bowen and for legal process to place her in possession.

The cross-action of Wilberforce W. Riley was for dissolution of the partnership, the appointment of a receiver to liquidate the partnership, an accounting, and injunction against disposition of partnership assets by plaintiff.

There was a joinder on the issues presented by the petition, cross-petition, and answers and thereafter trial was had to the court.

The relief prayed for by plaintiff in his petition was denied by the decree of the district court.

The relief prayed by defendants was in part granted and in part denied. Specifically title was quieted and confirmed in Margaret Riley Bowen subject to the right of plaintiff to continue in possession for the purpose of performing under the partnership agreement during the life of Wilberforce W. Riley. The defendants were enjoined from disturbing plaintiff in his use and occupancy or in his performance under the partnership agreement during the life of Wilberforce W. Riley. Dissolution of the partnership was denied. An accounting of one-half of partnership funds used in purchasing 61 steers and an accounting on a like basis was ordered

for all partnership transactions after July 1, 1946. Also not in conformity with the demand of any party the court by its decree restricted the rights of Wilberforce W. Riley within limits not contemplated by the partnership agreement and expanded or enlarged those of plaintiff.

From the part or parts of the decree adverse to his contentions plaintiff has appealed. The defendants have appealed from the part or parts which are adverse to their contentions.

Wilberforce W. Riley is the father of plaintiff and Margaret Riley Bowen is the sister of plaintiff and the daughter of Wilberforce W. Riley.

The plaintiff bases his claim for the relief prayed on an oral contract entered into by and between himself and his father during February 1936.

Plaintiff says that a contract was entered into at that time whereby the parties agreed to engage as partners in farming and raising, feeding, and marketing livestock on about 320 acres of land belonging to the father; that it was agreed the father should furnish the land and that there should be used all farm machinery and tools then on the land; that the livestock on the land at the time of making the contract should belong to the father but that the increase thereof should be divided equally; that each party should stand one-half of the expense of the business except necessary labor; that plaintiff should furnish all necessary labor and devote his time to the business; that the two should have an equal voice in the management of the business; and that there should be an equal division of the net profits of operations.

The parties agree that there was an agreement and that the foregoing recitals are reflected in the contract. The father contends that the foregoing reflects the full content of the contract. He insists that there was no time or incident named as a basis for termination of the contract and that no other subject matter was involved.

The son on the other hand urges, and this forms the

basis for his action, that in addition to the foregoing and as a part of the contract it was agreed for valuable considerations that the term of the contract was the life of the father. At his death it was agreed that the son should receive title to 160 acres of the land which was referred to as the home place and which was at the time of the entry into the contract the homestead of the father and his wife. His wife is now deceased.

Plaintiff says that continuously from the date of the contract he has fully performed every obligation of the contract but that the father in violation of the obligation of the agreement to plaintiff executed and delivered to Margaret Riley Bowen a warranty deed conveying title to the 160 acres of land to her the effect of which would be, if the deed of conveyance is allowed to stand, to deprive plaintiff from obtaining title thereto pursuant to the agreement at the death of his father. Accordingly plaintiff seeks to have this deed vacated and set aside and to have title to the land quieted and confirmed again in the father, and in substance that the father be decreed to have a life estate in the land and that title shall pass to plaintiff on the death of the father.

A denial of these additional unadmitted contentions of plaintiff by the defendants presents the questions to be determined as to plaintiff's cause of action. The decision thereon by the district court, as has been pointed out, was unfavorable to plaintiff. He seeks reversal of the decree in this respect in this court.

The claimed contract being in parol and the right of action, if one exists, being controlled by the principles involved in actions for specific performance of contracts for conveyance of real estate certain evidentiary burdens devolve upon the plaintiff.

A burden was on him to prove an oral contract the terms of which were clear, satisfactory, and unequivocal.

A further burden was on him to show that he had performed the burdens imposed on him by the contract and that the acts constituting performance were such as

were referable solely to the contract sought to be enforced, and not such as might be referable to some other or different contract. Taylor v. Clark, 143 Neb. 563, 13 N. W. 2d 621; Crnkovich v. Crnkovich, 144 Neb. 904, 15 N. W. 2d 66; Diez v. Rosicky, 145 Neb. 242, 16 N. W. 2d 155; Lintz v. Apking, 145 Neb. 714, 18 N. W. 2d 55; Caspers v. Frerichs, 146 Neb. 740, 21 N. W. 2d 513; Hackbarth v. Hackbarth, 146 Neb. 919, 22 N. W. 2d 184; Herbstreith v. Walls, 147 Neb. 805, 25 N. W. 2d 409; Baker v. Heavrin, 148 Neb. 766, 29 N. W. 2d 375; Smith v. Kinsey, 148 Neb. 786, 28 N. W. 2d 588.

Has plaintiff sustained the burden of proving an oral contract the terms of which are clear, satisfactory, and unequivocal; that is, does the evidence of plaintiff with clarity, satisfactorily, and unequivocally, or as unequivocally is defined, not doubtfully and not ambiguously but clearly, when all of its parts and the elements of a contract are taken into consideration, indicate the existence of a contract? If it does then the requirements of the rule in this respect have been satisfied.

The rule is not one of weight but of quality and substance of evidence. It means that when he has done this, in the absence of anything to the contrary, his burden in this respect has been sustained.

If however its weight is brought into question then before he shall be entitled to have his position sustained he, having the affirmative, must sustain it by a preponderance of the evidence.

The rule is that a party who affirmatively pleads the existence of a fact material to an issue assumes the burden of proving such fact by a preponderance of the evidence. Cohen v. Swanson Petroleum Co., 133 Neb. 581, 276 N. W. 190; Pierce v. Miller, 107 Neb. 851, 187 N. W. 105; Fairchild v. Fairchild Clay Products Co., 141 Neb. 356, 3 N. W. 2d 581; Fanders v. Davison, 142 Neb. 745, 7 N. W. 2d 652.

The oral contract claimed to the extent of the organization and method of functioning of the partnership

is admitted so that the only burden devolving on the plaintiff was to adduce proof in satisfaction of the rule that it was also agreed that at the death of the father the title to the land in question should pass to him, and of course the consideration therefor.

As to the consideration he proved that he gave up a going business in Seward, Nebraska, which at the time was his only source of income. His evidence of performance under the terms and requirements of the partnership agreement is amply sufficient. His testimony with regard to the agreement that he should receive title on the death of the father was clear, explicit, and unambiguous. The only thing lacking in certainty in this respect was the method whereby he was to receive title. His testimony in this respect was corroborated by direct evidence and circumstantial evidence.

This evidence was clearly sufficient as clear, satisfactory, and unequivocal proof of the terms of an oral contract for the conveyance of real estate. The question of whether or not plaintiff's evidence satisfied the rule with reference to preponderance will be considered later herein.

The other rule imposing a further burden on one seeking specific performance of a contract for the conveyance of real estate is in fact two rules. The first is that one claiming the existence of an oral contract must show that he has performed the burdens imposed by the contract. On the basis of what has been said we conclude that the plaintiff has sustained this burden, that is, his evidence is sufficient, taken alone, as proof in this respect. The final determination does not depend alone upon this prima facie showing but on whether or not on the basis of all evidence on this subject he has proved his contention in this respect by a preponderance of the evidence.

The other rule is that he has the burden of showing that the acts proved constituting performance were such as were referable solely to the contract sought to be

enforced and not such as might be referable to some other or different contract.

Properly interpreted and applied this rule means that if the evidence as a whole of a party seeking specific performance of an oral contract to convey real estate indicates that it is referable solely to the contract sought to be enforced and not to some other or different contract then the burden of the rule has been satisfied. The fact that there may be adversary evidence indicating that the acts refer to some other contract or situation will not defeat this satisfaction of the rule. Where one seeking specific performance of an oral contract to convey real estate has satisfied by evidence the requirements of this rule and there is evidence of an adversary in conflict therewith the decision on this question becomes one of preponderance with the preponderant burden on the one seeking performance.

It appears proper to say that in determining whether or not the acts of plaintiff were referable solely to the contract alleged his acts of performance must be considered as a whole in their own light and in the light of all other material and relevant facts and circumstances, present, antecedent, and subsequent as shown by his evidence with no part excluded.

The evidence of plaintiff considered in this light leads to the conclusion that his acts of performance were referable to the contract he seeks to have specifically performed and no other.

In the three respects mentioned the action is adversary and as to each of them there is a conflict of evidence. It therefore becomes necessary to determine as to each of them whether or not plaintiff has sustained his position by a preponderance of the evidence, that is, has he proved the contract by a preponderance of the evidence? Has he shown by a preponderance of the evidence that he has performed the burdens imposed on him by the contract? Has he proved by a preponderance of the evidence that his acts constituting perform-

ance were such as were referable solely to the contract and not such as might be referable to some other or different contract? These three subjects will be treated together since the evidence upon them is not capable of separation or segregation.

On the side of the plaintiff is his own evidence which on its face was sufficient, as has been pointed out, to meet the prima facie requirements of the rules set forth. The testimony of the plaintiff in this connection embraced the approximate date of entry into the agreement and its sufficiently complete details and also conversations leading up to the agreement and subsequent thereto explanatory and confirmatory of the agreement as it is claimed to be by the plaintiff. Also there is testimony of other witnesses some of whom claim to have heard and some of whom claim to have participated in conversations relating to the prospective arrangement between these two and relating to the purposes of the completed agreement after it had been entered into, which conversations as related are corroborative of the contentions of the plaintiff. In evidence is a letter of the mother of plaintiff, since deceased, dated February 5, 1936, which tends to corroborate the claim that the arrangement was to be a permanent one. In the letter appears the following: "Yes - it is to be a permanent thing - * * *." Also in the letter appears the following: "As I re-read your letter you want to know what we would offer - it would be a percentage basis but we can't figure what percentage till we talk with you." Plaintiff, as pointed out, gave up his existing means of livelihood and entered upon and invested of his funds in this enterprise with his father. The father in 1936 was about 70 years of age and largely incapacitated to perform the duties incident to the operations being carried on on the farm. In 1944 when he was confronted with the necessity for an operation the father executed a deed in which the plaintiff was named as grantee of the lands in question and gave instructions

that it should be held but that in case of his death it should be delivered to plaintiff, an act corroborative of the contention of plaintiff that he was to receive title to the land on the death of the father. This deed was not destroyed until later when difficulties arose between plaintiff and his father. The plaintiff performed consistently with the right to which he lays claim.

As against this there is but the substantial contention of the father that there was no agreement that plaintiff should ever receive title to any real estate and no agreement of permanency or as to duration of the partnership arrangement.

The evidence of the parties thus referred to would, uninfluenced by other pertinent considerations disclosed by the evidence, appear to preponderate in the particulars pointed out in favor of the plaintiff. These other considerations we think give added force to this conclusion.

About nine years before this arrangement was entered into plaintiff and his father, after some period of operation of the farm together, became estranged and the son remained away without any contact whatever with his father for about seven years. After that the wife of the one and mother of the other apparently recognizing the need by the father of the services of the son sought to get rid of the estrangement and to bring them together to their mutual benefit and advantage. Her purpose was accomplished in 1936 and it prevailed until 1945 which was after her death.

It is of course possible but highly improbable that in the light of his past difficulties with his father with the attendant long estrangement that he would have given up that which he gave up, though it may have been small, the income meagre, and the prospects none too promising, to return again to farming and livestock production without a rather definite plan for current income and future security.

We think that in the respects mentioned the evidence

preponderates in favor of the plaintiff and against the father. Accordingly it is our conclusion that the plaintiff has established the present right to have the deed to Margaret Riley Bowen vacated and set aside and the title to the 160 acres of land in question here quieted in Wilberforce W. Riley, and also at the appropriate time, which will be the death of Wilberforce W. Riley, to have the title thereto conveyed to or confirmed in the said plaintiff, however, subject to a finding on the question of whether or not an action for specific performance of an oral contract for the conveyance of a homestead may be sustained and the question of whether or not plaintiff has been guilty of a breach which would prevent a decree of specific enforcement in his favor.

The question of whether or not there has been a breach by the plaintiff will be considered later in connection with the matters raised by the father's cross-petition.

The question of whether or not an oral contract for the conveyance of a homestead is enforceable appears to be settled for the purposes of this case by the opinion in Denesia v. Denesia, 116 Neb. 789, 219 N. W. 142, unless we are disposed to depart from the conclusions therein set forth. In that opinion previous opinions which were in conflict were reviewed and a fixed conclusion arrived at that such contracts were enforceable. The opinion contains the latest direct expression of this court on the question. In the opinion it was said: "If such oral agreements are to be recognized at all, it must follow that they must also be enforced as against the homestead; therefore, we should follow the *Moline* case and expressly overrule the adverse holding in the *Teske* case. The statute of frauds, the statute on wills, and the homestead statute all require contracts affecting the respective subjects to be in writing. But this jurisdiction, and most others, hold, under similar statutes, oral agreements to devise real estate are not void because of such statutes. If good as against any one of

the above statutes, they certainly ought to be binding as against the others. There is no reason why they should not be."

The defendants contend that the authority of this opinion does not extend to a situation such as is presented in the instant case. They say substantially that the following from the opinion is a limitation upon the rule which removes this case under the facts from its application: "And there is this added reason why the homestead character of the premises should not exempt that particular class of cases. A very large proportion, if not a majority, of such agreements are in cases where the promisors are the father and mother of the promisee. They are usually old folks first beginning to fear the coming years of loneliness and old age, and assure one of the children that, in consideration of his or her staying on the home place with them, and looking after them while they recede down hill, * * * The arrangements being complete, the one stays on watching, the brothers and sisters pack up and leave, while John takes the milk bucket and goes out to the cow shed."

This may not be regarded as a limitation of the rule laid down but only as an observation, sentimental in quality, drawn from the opinions in cases of like character from the various jurisdictions. Even if it might be considered a limitation to be applied in a proper case still it seems that it would exclude no right of this plaintiff. From the status of the plaintiff a paraphrase could be formulated close to the observations there. The only significant difference would be that the plaintiff as promisee had the wisdom to see to it that his and his family's welfare should be safeguarded in the interim before the death of the parent.

We conclude therefore that an oral agreement for the conveyance of title to a homestead at the death of the promisor is capable of specific performance.

We turn now to the cross-petition of the father. He

seeks by it a dissolution of what he insists was solely and alone a partnership agreement and an accounting on the substantial ground that legally he cannot be prevented from withdrawing and thus causing the relationship to come to an end and on the ground of breach by plaintiff.

The important substantial breach claimed is that plaintiff violated the provision of the agreement requiring him to devote all of his time to the business of the partnership.

The parties are in accord on the proposition that the agreement did so provide. Likewise the parties agree that on a considerable number of occasions the plaintiff left the farm for short periods of time to buy cattle on order for other people and to make delivery of such cattle, an enterprise not connected with the partnership business. The father wanted and took no part in this enterprise. The record fails to disclose with any degree of certainty that any of the required duties or obligations reposing in him because of the partnership arrangement were neglected or not performed, nor is it shown sufficiently that the father was called upon to perform duties other and different than those contemplated by the agreement. There is evidence that he performed duties on occasions when plaintiff was away in quantity in excess of what were performed by him when plaintiff was not away. We do not find that there has been a breach by plaintiff.

By section 67-332, R. S. 1943, as amended by section 67-332, R. S. Supp., 1947, a partnership may be dissolved by a decree of court on application of a partner for the following reasons among others not pertinent here:

When a partner has been guilty of such conduct as tends to affect prejudicially the carrying on of the business.

When a partner wilfully or persistently commits a breach of the partnership agreement, or otherwise so

conducts himself in matters relating to the partnership business that it is not reasonably practicable to carry on the business in partnership with him.

When other circumstances render a dissolution equitable.

At any time if the partnership was a partnership at will when the interest was assigned or when the charging order was issued.

It is under the terms of this section that a decree of dissolution is sought by the father. He does not contend either by pleadings or proof that the partnership has been dissolved by act or acts of a party or of the parties by breach or otherwise thus entitling him to a decree declaring that a dissolution has been effected and that he is entitled to an accounting.

In order, therefore, that he shall be entitled to the decree of dissolution he seeks he must bring himself by proof within the stated provisions of the statute.

The evidence does not sufficiently show that plaintiff has been guilty of such conduct as would tend to affect prejudicially the carrying on of the business. To the contrary it shows that the business has at all times been well and profitably conducted in the interest of both parties and the reasonable inferences to be drawn from the evidence is that it will so continue and that plaintiff desires that it shall so continue.

We have already addressed ourselves to the question of breach by the plaintiff. What was said will not be repeated. In addition however it may well be said that no conduct of plaintiff has been made apparent which renders the carrying on of the business of the partnership reasonably impracticable.

No circumstances have been made to appear which would render a dissolution of the partnership equitable. On the other hand it is reasonably apparent that a dissolution would inequitably and adversely affect the plaintiff and that a continuance of it in operation as it

has operated in the past would not inequitably nor adversely affect the father.

By a preponderance of the evidence it has been shown that this was not a partnership at will but one whose term was the life of the father.

The right of the father, if it exists, to withdraw from the partnership and thus compel a dissolution and an accounting of the assets and of the profits under such circumstances and the liabilities attendant thereupon have not and will not be considered herein, although touched upon in the briefs, since as we interpret the issues and proofs that question has not been presented. As we view the pleadings and proof the only question in this regard is that of whether or not the father is entitled to a decree of court dissolving a subsisting and active partnership contract.

We hold that the father has failed to establish the right to a decree dissolving the partnership contract.

One question remains and that is the matter of the accounting. The parties agree that there has been a full and complete accounting of the partnership business to July 1, 1946, except as to 61 head of cattle purchased by plaintiff by the use of partnership assets. We therefore are not required to consider anything occurring previous to that date except this item. An unwillingness has not been made to appear on the part of the plaintiff to properly account for the business of the partnership generally after that date and for 61 head of cattle as a part of the business of the partnership. It is his duty to account for both.

In Bode v. Prettyman, 149 Neb. 179, 30 N. W. 2d 627, it was said: "Every partner must account to the partnership for any benefit, and hold as trustee for it, any profits derived by him without the consent of the other partners from any transaction connected with the formation, conduct, or liquidation of the partnership or from any use by him of its property."

Therefore if the plaintiff shall fail to account the

father shall be entitled to a proper accounting thereon and to judgment against plaintiff in any amount or amounts found to be due.

The parties raise no question as to the form or type of relief that plaintiff is entitled to if his proof sustains his right to prevail on his pleaded cause of action.

In accordance with the various conclusions arrived at herein the decree with regard to the petition of plaintiff is reversed with directions to the district court to enter decree vacating and setting aside the deed to the 160 acres of land in question from Wilberforce W. Riley to Margaret Riley Bowen and to quiet title thereto in Wilberforce W. Riley and also to decree a right in C. Hubert Riley to receive title thereto on the death of Wilberforce W. Riley, subject however to performance or willingness of C. Hubert Riley to perform without breach his obligations under the parol contract for conveyance during the lifetime of Wilberforce W. Riley.

The decree as to the cross-petition of Wilberforce W. Riley to the extent that it denies a dissolution is affirmed, however, those portions which direct future control of the partnership business and future participation in its management are reversed since such matters were not in issue under the pleadings and were not litigated on any theory not incorporated in the pleadings. To the extent that it decrees an accounting in favor of Wilberforce W. Riley of only one-half of the investment in the 61 head of cattle it is reversed with directions to decree a right to an accounting with respect to the cattle as a partnership transaction and an accounting of all partnership transactions taking place after July 1, 1946.

The entire cause is remanded with directions to enter decree as indicated.

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

MESSMORE, J., participating on briefs.

CLIFTON R. MCCORMICK ET AL., APPELLEES, V. TILLIE F. MCCORMICK, APPELLANT.

33 N. W. 2d 543

Filed August 10, 1948. No. 32420.

1. **Equity.** A prayer for general relief in an equitable action is sufficient to authorize any judgment to which the parties are entitled under the pleadings and the evidence adduced in support thereof.
2. **Witnesses: Attorney and Client.** When a lawyer is a witness for his client, except as to merely formal matters, such as the attestation or custody of an instrument and the like, he should leave the trial of the case to other counsel.
3. ———: ———. It is against sound principles of professional ethics for one who knows that he is to be called as a witness in a case to accept the retainer as lawyer in that case. And where, after retainer, it is apparent to an attorney that his testimony will be material in behalf of his client, it is his duty to confer with his client and associate counsel at once and finally determine whether he will become a witness. If it is decided that he shall be a witness, he should immediately sever his connection with the litigation.
4. **Trusts.** If a party obtains the legal title to property by virtue of a confidential relation, under such circumstances that he ought not, according to the rules of equity and good conscience as administered in chancery, hold and enjoy the benefits, then, out of such circumstances or relations, a court of equity will raise a trust by construction and fasten it upon the conscience of the offending party and convert him into a trustee of the legal title.
5. **Wills: Deeds.** Courts should not set aside the disposition of property made by will or deed without good reasons, based upon clear, convincing, and satisfactory proof.
6. **Trusts.** So reluctant are the courts to engraft a trust by parol on the legal title to real estate that there is perhaps no better established doctrine than the one which requires a high degree of proof in order to establish the trust by parol evidence.
7. **Husband and Wife: Trusts.** When the person to whom a conveyance of real property is made is the wife, who is the natural object of the husband's bounty, it raises a presumption of a gift or settlement rather than of a trust. This presumption is rebuttable.

APPEAL from the district court for Howard County:

WILLIAM F. SPIKES, JUDGE. *Reversed and remanded with directions to dismiss.*

Charles F. Adams, for appellant.

F. E. Edgerton, H. G. Wellensiek, and *E. H. Powell,* for appellees.

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

WENKE, J.

Clifton R. McCormick and Paul A. McCormick, as plaintiffs, brought this action in the district court for Howard County against Tillie F. McCormick, as defendant. The purpose of the action is to establish and enforce an alleged trust in certain lands situated in Howard County which are held in the name of the defendant. From a decree in favor of the plaintiffs, her motion for new trial having been overruled, the defendant appeals.

The allegations of the amended petition are sufficient, if sufficiently established, to show a constructive trust in favor of the appellees. Pollard v. McKenney, 69 Neb. 742, 96 N. W. 679. And, as has often been stated by this court, a prayer for general relief in an equitable action is sufficient to authorize any judgment to which the parties are entitled under the pleadings and the evidence adduced in support thereof. Glissmann v. Bauermeister, 149 Neb. 131, 30 N. W. 2d 649; Johnson v. Radio Station WOW, on rehearing, 144 Neb. 432, 14 N. W. 2d 666; Van Steenberg v. Nelson, 147 Neb. 88, 22 N. W. 2d 414.

During the course of the trial one of appellees' counsel was sworn as a witness and although proper objection was made he was permitted to testify as to a conversation had with the appellant and to continue as active counsel. The nature of the conversation, as testified to by counsel, related itself directly to the principal issue involved in the case. Although the appellant admitted having had a conversation with this witness, she denied making the statements which he testified she had made.

This had the effect of causing their testimony to be in direct conflict on a material issue affecting appellant's rights.

By article X of the Rules Creating, Controlling, and Regulating Nebraska State Bar Association the canons of Professional Ethics of the American Bar Association were adopted as the ethical standards for the practice of law in this state. Canon 19 thereof provides in part as follows: "When a lawyer is a witness for his client, except as to merely formal matters, such as the attestation or custody of an instrument and the like, he should leave the trial of the case to other counsel."

The correct application of this principle is stated in 28 R. C. L., Witnesses, § 57, p. 470, as follows: "It is against sound principles of professional ethics for one who knows that he is to be called as a witness in a case, to accept the retainer as lawyer in that case. And where after retainer it is apparent to an attorney that his testimony will be material in behalf of his client, it is his duty to confer with his client and associate counsel at once and finally determine whether he will become a witness. If it is decided that he shall be a witness, he should immediately sever his connection with the litigation." See, Cox v. Kee, 107 Neb. 587, 186 N. W. 974; In re Estate of Bayer, 116 Neb. 670, 218 N. W. 746.

If this was an action at law wherein the credibility of this witness had been submitted to a jury, the trial court's ruling would constitute prejudicial error that would require a reversal. However, since the action is equitable in its nature wherein we consider the record de novo, it does not require a reversal but we will consider the record accordingly. However, it is a practice which should be discountenanced by the courts and which ought not be indulged in by counsel.

As to the creation of a constructive trust it is stated in Restatement, Restitution, § 183, p. 737, as follows: "Where the owner of an interest in land transfers it inter vivos to another upon an oral trust in favor of a

third person or upon an oral agreement to convey the land to a third person, and the trust or agreement is unenforceable because of the Statute of Frauds, and the transferee refuses to perform the trust or agreement, he holds the interest upon a constructive trust for the third person, if, but only if, * * * (b) the transferee at the time of the transfer was in a confidential relation to the transferor, or (c) the transfer was made by the transferor in contemplation of death."

We have often approved the following, as stated in Pollard v. McKenney, *supra*: "* * * if a party obtains the legal title to property by virtue of a confidential relation, under such circumstances that he ought not, according to the rules of equity and good conscience as administered in chancery, hold and enjoy the benefits; out of such circumstances or relations, a court of equity will raise a trust by construction and fasten it upon the conscience of the offending party and convert him into a trustee of the legal title." See, Koefoed v. Thompson, 73 Neb. 128, 102 N. W. 268; Smullin v. Wharton, 73 Neb. 667, 103 N. W. 288; O'Shea v. O'Shea, 143 Neb. 843, 11 N. W. 2d 540; Box v. Box, 146 Neb. 826, 21 N. W. 2d 868; In re Estate of Scott, 148 Neb. 182, 26 N. W. 2d 799; Watkins v. Waits, 148 Neb. 543, 28 N. W. 2d 206.

However, courts should not set aside the disposition of property made by will or deed without good reasons, based upon clear, convincing, and satisfactory proof. Doane v. Dunham, 64 Neb. 135, 89 N. W. 640; Woodring v. Seibold, 136 Neb. 647, 287 N. W. 75; O'Shea v. O'Shea, *supra;* Holbein v. Holbein, 149 Neb. 281, 30 N. W. 2d 899.

This being an appeal in an equity action the statute requires this court, in determining questions of fact, to reach an independent conclusion without reference to the findings of the district court. However, if there is an irreconcilable conflict therein on a material issue this court will, in determining the weight of the evidence of witnesses who appeared in court to testify, consider the fact that the trial court observed them and their manner

of testifying and must have accepted one version of the facts rather than the other. Kucaba v. Kucaba, 146 Neb. 116, 18 N. W. 2d 645; Dier v. Dier, 141 Neb. 685, 4 N. W. 2d 731; Brown v. Brown, 146 Neb. 908, 22 N. W. 2d 148; Meredith v. Meredith, 148 Neb. 845, 29 N. W. 2d 643.

While cited cases are helpful in determining the issues, because there may be some similarity to the case at hand, however, the facts in cases of this kind are never completely alike and the ultimate decision in each case must necessarily be based on the facts thereof. Kucaba v. Kucaba, *supra*.

The record discloses that Roy C. McCormick, the grantor in the deed to the lands herein involved, married appellant on November 25, 1937, at which time he was approximately 57 years of age and she 52. Prior thereto he had been married to Artie May McCormick from whom he was divorced on May 19, 1937. Appellees were the only children of the first marriage and, at the time of trial, Clifton was 41 years of age, married, and living with his family at Oberlin, Kansas, and Paul was 38 years of age, married, and living with his family in Grand Island, Nebraska. McCormick was an engineer for the Burlington railroad and, during the period of time herein involved, lived in Aurora, Nebraska.

The lands involved in this action consist of the south half of the northeast quarter of Section 3, and the south half of the northeast quarter of Section 10, all in Township 14 North, Range 9 West, of the 6th P. M., in Howard County, Nebraska. McCormick apparently purchased the south half of the northeast quarter of Section 3 in 1905 for a consideration of $2,000. The south half of the northeast quarter of Section 10 was apparently purchased by McCormick's father, Curtis B. McCormick, in 1894 for a consideration of $1,400. In 1927 the father sold this land for $8,000 and took back a mortgage thereon for $7,000. In 1929 the father assigned this mortgage to his three children: R. C. McCormick, Chlorie A. Grammer, and Hazel I. Harris. Thereafter, in 1934, the

purchaser of this land deeded it to these three children, the assignees of the mortgage. In 1935 McCormick apparently bought the interest therein of his sister, Hazel I. Harris, for a consideration of $2,000 and, in 1937, he bought the other interest therein from Beatrice and Lester Wages. It appears the sister, Chlorie A. Grammer, had sold her interest to Beatrice Wages. The consideration for this one-third interest was not shown. Thus McCormick became the owner of the entire tract.

At the time of McCormick's divorce from his first wife, Artie May, on May 19, 1937, she was given their home in Aurora, Nebraska, together with all furniture, fixtures, and furnishings therein, and the sum of $2,500. McCormick retained the two eighty-acre tracts in Howard County, which have already been described, and these he owned at the time he married appellant.

It appears that in 1931 McCormick had a malignancy of the posterior part of his tongue but it responded to treatment and cleared up and at the time of his marriage to appellant he appeared to be and was in good health.

At the time of their marriage appellant had property of her own. It appears there was some sort of an oral understanding between the parties, prior to their marriage, to the effect that each of them should keep his or her own property separate and that the children of each should have it. This, of course, did not comply with the provisions of section 30-106, R. S. 1943, as to antenuptial contracts and, even if it did, there would be nothing to prevent a party thereto from abrogating it by giving the other, either by will, deed, or otherwise, any part or all of his or her property. The most that can be said for this testimony is that, prior to the marriage, McCormick evidenced a desire that his children, the appellees, should have what property he then owned.

After their marriage McCormick continued to work as an engineer for the Burlington and they made their home in Aurora. The evidence shows that this marriage was very successful. His feelings toward appellant

were shown by his desire to have her take care of him whenever he was ill, particularly during his last illness. The evidence shows that she did so on each such occasion and that she gave him splendid care. They also got along very well with his two sons and their families. The family relationship was good. The evidence further shows that at various times during this period he financially helped his sons.

In June 1944 McCormick suddenly became ill. His condition was due to a malignancy in the pancreas. This resulted in a jaundiced condition. He was operated upon and made a good recovery. Apparently because of his condition, resulting from the operation, he retired from active duty with the railroad. However, for over a year thereafter he worked around home taking care of the yard and, together with appellant, did some remodeling in their home.

On December 8, 1944, McCormick executed his last will. The effect of this will was to give appellant all of his property except two legacies of $25 each, one to each of his two sons. The testimony of the witnesses thereto fully establishes that he was then possessed of his full mental faculties and that the will was not the result of anyone's influence but expressed McCormick's own desires.

Thereafter, on December 16, 1944, while he and appellant were visiting in Ravenna, Nebraska, he went to the office of J. H. Harrison, an attorney at law, and had him prepare a warranty deed to this property in favor of his wife. He executed this deed before Harrison, who was a notary public, and then placed it in his safety deposit box in the Farmers State Bank in Aurora. It remained there until sometime in the fore part of November 1945. At that time McCormick became ill and was advised to go to the hospital for an operation. Prior to going to the hospital he went to the bank and took the deed out of his safety deposit box. He then delivered it to the appellant and directed her to have

it recorded. This she did on November 19, 1945, by personally going to St. Paul, Nebraska, and delivering it to the proper county official for recording.

There are no conditions in either the will or the deed as they relate to these lands. The witnesses to the will and the party who drafted the deed testified that no mention was made to them or in their presence of any such condition as the appellees herein claim.

After his illness in November 1945 McCormick continued to decline in health, although his mental faculties remained satisfactory until some two weeks before his death. He died on January 1, 1946, and was buried on January 4, 1946.

On the day after McCormick's funeral appellees testified they talked with appellant about the deed to these lands, which deed they said they had discovered on record, and that she made certain statements in regard thereto. Clifton R. McCormick testified: "She said that my father wanted her to have this land for her lifetime, and if we treated her right, then we were to get this land at her death." Paul A. McCormick testified: "She told us, well, if I remember right, that she knew that Dad wanted her to have the land and the use of the land, and at the time of her death it was to be given to us boys if we treated her right." And further: "She said, 'That's the way Roy wanted it;' that she should have the use of the land and then at the time of her death it was to be given to us boys."

F. E. Edgerton, one of the appellees' counsel, testified he talked with appellant sometime in February 1946. His testimony, insofar as material, is as follows: "* * * she said that she had a deed to this land in controversy, and she said that her late husband had wanted her to have the use of it for her lifetime and then he wanted his boys to have it; and she used the further provision that if they were good to me, she says, 'If they were good to me.' "

Appellant denied making the statements as testified

to by the appellees and Mr. Edgerton. There is no other evidence that McCormick ever referred to or talked of such a provision or condition to anyone, including appellant, during their married life and particularly in connection with the making of his will or the drafting, execution, and delivery of the deed. In fact, outside of the evidence as to the admissions of appellant, which she denies having made, there is no evidence of any such oral arrangement or agreement. This is particularly significant in view of the fact that these instruments contain no such provision or condition.

As recently stated in Holbein v. Holbein, *supra:* "So reluctant are the courts to engraft a trust by parol on the legal title to real estate, that there is perhaps no better established doctrine than the one which requires a high degree of proof in order to establish the trust by parol evidence."

And, as has already been stated herein, the proof in such cases must be clear, unequivocal, and convincing.

Here the grantee was the wife of the grantor and with whom, during all of the years since their marriage, he had been living in a relationship that was close and harmonious. When the person to whom a conveyance of real property is made is the wife, who is the natural object of the husband's bounty, it raises a presumption of a gift or settlement rather than of a trust. This presumption is, of course, a rebuttable one. 54 Am. Jur., Trusts, § 605, p. 469; 30 C. J., Husband and Wife, § 298, p. 702.

We have come to the conclusion that the evidence fails to establish such a factual situation that a court of equity should raise a trust by construction and fasten it upon the appellant and convert her into a trustee for the purpose of enforcing it. In fact, we have come to the conclusion that the grantor, Roy C. McCormick, intended to and did, by his deed of December 16, 1944, convey to the appellant a fee title in and to the lands therein described.

The decree of the trial court is therefore reversed and the cause remanded with directions that the trial court enter a decree in favor of the appellant and that her prayer for dismissal of appellees' cause of action be sustained.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

PAULINE A. PATRICK, APPELLANT, V. THE UNION CENTRAL LIFE INSURANCE COMPANY, A CORPORATION, APPELLEE.
33 N. W. 2d 537

Filed August 10, 1948. No. 32425.

1. **Trial: Appeal and Error.** Under section 25-1315.02, R. S. Supp., 1947, when a request for a directed verdict is made at the close of all the evidence, and it is overruled, the party against whom such ruling is made may, if a verdict is rendered against him, file a motion to have the verdict set aside and judgment entered in accordance with his request for a directed verdict. If such motion is filed within the time as provided in said statute, then the district court has authority to enter judgment in accordance therewith. Upon appeal from an order sustaining such motion this court, under section 25-1315.03, R. S. Supp., 1947, may direct judgment to be entered in favor of the party entitled thereto.
2. **Death.** A presumption of death arises from the continued and unexplained absence of a person from his home or place of residence for seven years, where nothing has been heard from or concerning him during that time by those who, were he living, would naturally hear from him.
3. **Evidence.** The facts or circumstances which are the basis of the presumption or inference of fact are, of course, evidence to be considered by the jury. In such cases it is not the presumption or inference that the jury consider, as such; they consider the facts and draw the inference therefrom.
4. ———. Although the presumption as such disappears from the case when substantial countervailing evidence is produced, the facts and circumstances which give rise to it remain and afford the basis for a like inference by the trier, whether court or jury.
5. **Trial.** Triers of fact have the right to test the credibility of witnesses and to weigh their undisputed parol testimony against

the facts and circumstances in evidence from which a conclusion may properly be drawn that the witness was mistaken.

6. ———. It is the duty of the trial court to instruct the jury on all issues raised by the pleadings which find support in the evidence.

APPEAL from the district court for Buffalo County: EDMUND P. NUSS, JUDGE. *Reversed and remanded with directions.*

Blackledge & Sidner, for appellant.

Hamer, Tye & Worlock, for appellee.

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

WENKE, J.

Appellant, Pauline A. Patrick, commenced this action in the district court for Buffalo County against the appellee, The Union Central Life Insurance Company, a corporation. The purpose of the action is to recover on an insurance policy issued by the appellee on the life of Gomer C. Patrick. The basis of appellant's claim is that the insured is dead because of the legal presumption of his death arising by reason of his continued and unexplained absence since shortly after October 2, 1938, which was more than seven years prior to the commencement of this action. Issues were joined and trial had to a jury.

After all the evidence had been adduced the appellee moved for a directed verdict. This motion was overruled and the cause submitted to the jury. The jury returned a verdict for the appellant. Thereupon appellee, in accordance with section 25-1315.02, R. S. Supp., 1947, which was then in force, moved to set aside the verdict of the jury and for judgment in its favor in accordance with its motion for a directed verdict. At the same time it filed a motion for new trial. Appellee's motion for judgment notwithstanding the verdict was sustained, its motion for new trial overruled, and ap-

pellant's cause of action was dismissed. Thereupon appellant filed her motion for new trial. It is from the overruling thereof that she appeals.

Under section 25-1315.02, R. S. Supp., 1947, when a request for a directed verdict is made at the close of all the evidence, and it is overruled, the party against whom such ruling is made may, if a verdict is rendered against him, file a motion to have the verdict set aside and judgment entered in accordance with his request for a directed verdict. If such motion is filed within the time as provided in said statute, then the district court has authority to enter judgment in accordance therewith. Upon appeal from an order sustaining such motion this court, under section 25-1315.03, R. S. Supp., 1947, may direct judgment to be entered in favor of the party entitled thereto.

The principle here involved, and which has long been adopted by this court, has been recently stated in Banks v. Metropolitan Life Ins. Co., 142 Neb. 823, 8 N. W. 2d 185, as follows: "A presumption of death arises from the continued and unexplained absence of a person from his home or place of residence for seven years, where nothing has been heard from or concerning him during that time by those who, were he living, would naturally hear from him." See Holdrege v. Livingston, 79 Neb. 238, 112 N. W. 341.

The effective date of the presumption is at the end of the seven years. It is based on two facts: Namely, that the absence of the person from his home or place of residence for seven years, where nothing has been heard from or concerning him during that time by those who, were he living, would naturally hear from him, must be both continuous and unexplained. If the evidence relating thereto is undisputed and fully establishes these facts, then the presumption arises therefrom as a matter of law in favor of the party so contending and he is entitled to the benefit of such presumption.

Of course, the presumption is rebuttable by showing

that the facts do not actually exist from which the presumption arises. If either or both are in dispute then the question of whether or not they have been established is one of fact for the jury and should be so submitted. If the jury finds that they are established then, of course, the same situation arises and the party in whose favor the finding is made is entitled to the benefit of the presumption as a matter of law.

In an annotation in 95 A. L. R. at page 880, it is stated: "The rule which is approved by most text-writers and the majority of the courts which have discussed the subject is thus stated by Professor Wigmore: 'The peculiar effect of a presumption "of law" (that is, a real presumption) is merely to invoke a rule of law compelling the jury to reach the conclusion in the absence of evidence to the contrary from the opponent. If the opponent does offer evidence to the contrary (sufficient to satisfy the judge's requirement of some evidence), the presumption disappears as a rule of law, and the case is in the jury's hands free from any rule. * * *.' Wigmore, Ev. 2d ed. § 2491."

And it is further stated in the annotation in 95 A. L. R. at page 892:

"The facts or circumstances which are the basis of a 'presumption' or inference of fact are, of course, evidence to be considered by the jury. In such cases it is not the presumption or inference that the jury consider, as such; they merely consider the facts, and draw the inference therefrom.

" 'Although the presumption as such disappears from the case when substantial countervailing evidence is produced, the facts and circumstances which give rise to it remain and afford the basis for a like inference by the trier, whether court or jury.' O'Dea v. Amodeo (1934) 118 Conn. 58, 170 A. 486."

This principle is discussed in Tyrrell v. Prudential Ins. Co. of America, 109 Vt. 6, 192 A. 184, 115 A. L. R. 392, as follows: "A disputable presumption is a rule

of law to be laid down by the court, which shifts to the party against whom it operates the burden of evidence, merely. It points out the party on whom lies the duty of going forward with evidence on the fact presumed. And when that party has produced evidence fairly and reasonably tending to show that the real fact is not as presumed, the office of the presumption is performed, and the fact in question is to be established by evidence as are other questions of fact, without aid from the presumption, which has become functus officio. To translate this statement into the language of this Court, all such presumptions are locative, merely. A presumption, of itself alone, contributes no evidence and has no probative quality. It takes the place of evidence, temporarily, at least, but if and when enough rebutting evidence is admitted to make a question for the jury on the fact involved, the presumption disappears and goes for naught. In such a case, the presumption does not have to be overcome by evidence; once it is confronted by evidence of the character referred to, it immediately quits the arena."

Appellant's evidence establishes that she and the insured were natives of Kentucky and married there; that they subsequently, in 1909, came to Nebraska; that she has lived here ever since and that the insured lived here until October 2, 1938; that they moved to Kearney about 1924 and have made that their home ever since; that the family consisted of themselves and one son who, at the time insured disappeared, was married and living with his family in McCook, Nebraska; and that the family relations were pleasant.

It further shows that on Sunday morning, October 2, 1938, insured was going south of Kearney and appellant was going with him; that his business, at that time, was the buying and selling of livestock and that he used a truck for that purpose; that about 11 or 11:30 a. m. on that day, while appellant was preparing a lunch to take along, he left the house to go downtown

to have the truck serviced; that he took no luggage, toilet accessories, or clothes with him other than the clothes he had on his person; and that he did not return to the home.

The evidence further shows that the next appellant heard from him was about two weeks later when she received a letter postmarked Plattsmouth, Nebraska. In this letter he enclosed a money order in the amount of $75 and directed appellant to apply it on the indebtedness which he had against the truck. Later it was discovered that he had sold the truck in Omaha. Although appellant made diligent search and inquiry among their relatives, friends, and others likely to know about him and in places where he was likely to go, to ascertain his whereabouts, she and her family have never again heard from or about him.

However, in appellant's testimony, particularly her cross-examination, it appears that the insured had gotten into some serious difficulty in January 1938 when he issued insufficient fund checks to parties from whom he bought cattle. He left Kearney at that time and was gone two or three months and was finally brought back by the authorities. All but one of these checks had been taken care of by October 2, 1938, and apparently no action was ever taken on any of them. However, this trouble seems to have hurt his pride and his business for after he returned he appears to have been embarrassed by what happened and to have done very little business. He asked appellant to go with him to some other place to start life over again. This she did not want to do until things were straightened up and she asked him to stay and do that. Appellee introduced some evidence to the same effect.

This evidence raised an issue of fact as to whether or not his absence from his home for seven years was unexplained and that question is, of course, for the jury.

As stated in Shaw v. Prudential Ins. Co., 158 Wash. 43, 290 P. 694: "In other words, and more accurately

speaking, such evidence is an attack upon the very foundation upon which the presumption rests, rather than upon the presumption itself. If the evidence be sufficient to explain the absence to the satisfaction of the jury, then the absence is no longer unexplained and the presumption no longer obtains, because its fundamental basis has been removed. But in all cases of this kind, the question is necessarily for the jury, because the facts and circumstances are of such a nature as to call for the drawing of inferences; and one might draw the inference that the absentee, for sufficient reason, absented himself and willfully refused to communicate with his family, friends and associates, while another might conclude that the circumstances shown were insufficient to account for so long an absence and abstinence from communication with family and friends, and that death alone would fairly account for the absence." See, also, Maxwell v. Maxwell, 106 Neb. 689, 184 N. W. 227; Banks v. Metropolitan Life Ins. Co., *supra;* Tyrrell v. Prudential Ins. Co. of America, *supra;* Magness v. Modern Woodmen of America, 146 Iowa 1, 123 N. W. 169; and Rosencrans v. Modern Woodmen of America, 97 Neb. 568, 150 N. W. 630.

Appellee further put in issue the question of the insured's continued absence by the evidence of the witness Henry Norgaard of Minden, Nebraska. Norgaard testified by deposition that in 1937 he became acquainted with a man by the name of Patrick who lived in Kearney; that during the years of 1937 and 1938 he saw him at various times; and that the Patrick he knew had a pick-up truck and was engaged in the business of buying and selling cattle. Norgaard stated he did not know any of the other members of the Patrick family, nor does it appear that they knew him.

Norgaard further testified that after he got out of the service on October 17, 1945, at Jefferson Barracks, St. Louis, Missouri, he went to Santa Barbara, California, to get his wife. His wife had been living with her folks

in Santa Barbara during the time Norgaard was in the service. When Norgaard and his wife left Santa Barbara they went through Los Angeles, California. While in Los Angeles on either the 1st or 2nd of November, 1945, he went to the Greyhound Bus Depot to get his baggage and there he met Patrick, who was working there handling baggage. He testified he spoke to the party he so recognized and asked him if he wasn't Patrick from around Minden and that the party he spoke to said he was and that he kind of remembered him (Norgaard) but did not remember his name. Norgaard testified he then talked with Patrick, that Patrick asked about Martin Jorgensen and Jim Bang of Minden who lived there at the time he knew Patrick. He testified it was the same Patrick he knew at Minden and who he identified as the same person appearing on two snapshots. These snapshots were admitted to be of Gomer C. Patrick, the insured. No direct evidence was offered to rebut Norgaard's testimony except such as would naturally flow from the facts and circumstances shown in the record to which appellant was entitled.

This is no claim based upon, nor does the evidence establish, facts from which the actual death of Gomer C. Patrick could be found. The opinion concerns itself with the sufficiency of the evidence to authorize a finding by the jury that the facts, from which the presumption of death arises as a matter of law, have been established.

We recognize that there are jurisdictions wherein it is held that the legal presumption is completely overcome by positive, uncontradicted, and unimpeached evidence that the person is in fact alive and that in such the party relying on the presumption is not entitled to prevail thereon. As stated in Columbia Life Ins. Co. v. Perry's Adm'x, 252 Ky. 793, 68 S. W. 2d 393: "* * * the testimony of these three witnesses completely overcame and destroyed all evidence upon which to base a presumption of the death of insured." And in National Life & Accident Ins. Co. v. Hankerson, 49 Ga. App. 350, 175

S. E. 590, as follows: "The alleged death of the insured at the end of the seven-year period of absence thus resting only upon the presumption of law, it was entirely rebutted by direct, positive, and uncontradicted evidence." See, also, Heath v. Salisbury Home Telephone Co., Mo. App., 27 S. W. 2d 31.

We think that the effect of this evidence is but to leave a conflict between that which is circumstantial and that which is direct and that appellant was entitled to have the weight of the facts and circumstances arising out of the circumstantial evidence, as against the direct parol evidence in opposition thereto, submitted to the jury.

Triers of fact have the right to test the credibility of witnesses and to weigh their undisputed parol testimony against the facts and circumstances in evidence from which a conclusion may properly be drawn that the witness was mistaken. See Teresi v. Filley, 146 Neb. 797, 21 N. W. 2d 699, and authorities therein cited.

In a similar situation the Michigan court in Samberg v. Knights of the Modern Maccabees, 158 Mich. 568, 123 N. W. 25, 133 Am. S. R. 396, stated as follows: " 'There is no evidence that directly contradicts the evidence of the witness Frank E. Bowen to the effect that he was acquainted with Charles A. Samberg, and that he saw him, recognized him, and talked with him September 28 or 29, 1908. If you believe that either Bowen or the witness Paul saw Mr. Samberg in 1908, then that ends the case, and your verdict must be for the defendant. The evidence of Bowen can be overcome only upon the finding by you that he was either mistaken in his identification of Samberg, or that he is falsifying. I shall leave it for you to determine whether he did see and know Samberg as he claims. This is to be considered by you in connection with all the other proofs of the plaintiff and defendant in the case respecting the disappearance, absence, and all other matters that will enable you to determine whether Mr. Samberg was seen alive in Petoskey in 1908, as claimed. As I have explained, if

the defendant has shown by proof that Mr. Samberg was alive in 1908, then your verdict should be for the defendant.' This is as favorable a charge as to the law upon that feature of the case as the defendant is entitled to."

Although not exactly authority for the reason that the action was brought more than seven years after Beadle testified he knew and talked with the insured at Winnemucca, Nevada, in October of 1904, nevertheless, we think the following statement in the case of Rosencrans v. Modern Woodmen of America, *supra,* with reference to his testimony is correct and applicable here: "It was for the jury to say whether they believed the testimony of the witness Beadle. If they did not believe his evidence (and they may have felt bound to question it) there was nothing to prevent the application of the usual rule which would enable the jury to consider the presumption of the assured's death a fact after the expiration of seven years."

While the case of Thomas v. Thomas, 19 Neb. 81, 27 N. W. 84, involved testimony of witnesses who had seen Samuel Price within the seven-year period, however, the opinion is not based solely on that fact but upon the insufficiency of the facts generally, including that of the defendant, who was seeking the benefit of the presumption of death. We find it in no way conflicts with the holdings in this opinion.

Having come to the conclusion that the evidence presented an issue of fact for the jury, we find it was proper to submit it and consequently appellee's motion for a judgment notwithstanding the verdict should have been overruled. We therefore come to the question presented by appellee's cross-appeal. The cross-appeal relates to the overruling of its motion for a new trial.

It is of course true, as appellee contends, that it is the duty of the trial court to instruct the jury on all issues raised by the pleadings which find support in the evidence.

The court's instructions properly submitted the issues in accordance with the instructions approved in Banks v. Metropolitan Life Ins. Co., *supra*. In addition thereto the court instructed as follows: "You are instructed that if you should find from the evidence in this case that the Gomer C. Patrick, whose death is alleged by the plaintiff, was seen by the witness Henry Norgaard in Los Angeles, California, on or about the 1st or 2nd day of November, 1945, then the presumption of the death of the said Gomer C. Patrick, if such has been established by the evidence herein, is rebutted, and your verdict should be for the defendant." We think this instruction fully protected the appellee on the issue presented by Norgaard's testimony.

From an examination of the instructions as a whole, we find the case was properly submitted to the jury and judgment should have been entered on the verdict it returned. The judgment is reversed and the cause remanded with directions to enter a judgment on the verdict.

REVERSED AND REMANDED WITH DIRECTIONS.

MESSMORE, J., participating on briefs.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

SEPTEMBER TERM, 1948

FRANCES MACA ET AL., APPELLEES, V. JOSEPH L. SABATA ET AL., APPELLANTS.
34 N. W. 2d 267

Filed October 7, 1948. No. 32378.

Trusts. Where the title to real estate is conveyed inter vivos subject to payments to be made to third persons, it constitutes an implied or constructive trust as between the trustee and the cestuis que trust, and may be enforced by them directly by a suit brought in their own names.

APPEAL from the district court for Butler County: HARRY D. LANDIS, JUDGE. *Affirmed.*

F. H. Mize, for appellants.

Coufal & Shaw, for appellees.

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

PAINE, J.

This is an action in equity arising out of the fact that a mother conveyed land to two sons on their agreement that on her death they would pay the purchase price in equal shares to her ten children. One son carried out his part of the agreement, and suit was brought against the other son and his wife, who are the only defendants.

In legal terminology, it is an action by third party donee beneficiaries against the promisor to recover upon his promise made to the promisee for the benefit of said third party beneficiaries. The court found for plaintiffs and entered judgment against defendants, who appealed.

A petition in equity was filed August 23, 1945, to which answers were filed by defendants, having attached thereto certain exhibits. On the same day a reply was filed in the form of a general denial. The case thereupon went to trial in September of 1946, in which month evidence was taken on a number of days. Other evidence was taken as late as April 1947, it appearing that adjournments were had for the convenience of the court, the parties, and the witnesses, and the evidence is found in the two volumes of the bill of exceptions.

This action involves only the members of one pioneer family of industrious people, of very little schooling, and who always spoke the Czech language with their parents and probably in their homes. Some of the witnesses required an interpreter. This language difficulty accounted for and justified the court in overruling objections to many leading questions asked by plaintiffs' attorneys.

The family involved in this suit consisted of five sons, to wit, Frank, Charley, Anton, Vaclav (James), and Joseph, and five daughters, Mary Kominek, Mollie Kozisek, Frances Maca, Sophia Styskal, and Stazie Svoboda. The sons and two daughters testified. Two daughters were dead. Mary Kominek died in November 1941. She left surviving her ten children, and two grandchildren who were the sons of a daughter who predeceased her. Mollie Kozisek died March 8, 1941, leaving her husband and two sons. The husband, John Kozisek, was named as special administrator of his wife's estate. A son of Mary Kominek, Bohumil Kominek, was special administrator of the estate of his mother. The plaintiffs are Frances Maca, Charley Sabata, the

two special administrators, the husband and children of Mollie Kozisek, and the children and grandchildren of Mary Kominek. The defendants are the son Joseph L. Sabata and his wife, Otylie Sabata.

The record shows that, after the oral evidence had been taken and both sides had rested, the plaintiffs asked leave to file an amended petition to conform to the evidence, and tendered such amended petition to the court. Objections were made by the defendants on the ground that the amended petition did not reflect the evidence correctly, raised new issues, and questioned the mental soundness of the decedent, Cecelia Sabata. It was charged that plaintiffs had changed the relief for which they prayed and had also changed the entire theory of the case.

The court overruled the objections and allowed the amended petition, with paragraph 12 omitted, to be filed. Thereupon the defendants asked leave to refile their original answer as an answer to the amended petition, with certain additional amendments to five paragraphs and with leave to strike out certain words. The plaintiffs objected to the application for amendment of certain paragraphs for the reason that said paragraphs did not tend to support or conform to the evidence and contained conclusions of law, and that said amended paragraphs did not constitute any defense to the plaintiffs' action. The objection of plaintiffs was overruled by the court and leave was granted to defendants to refile their original answer, with the additional amendments and changes allowed by the court. Plaintiffs were granted leave to refile their reply to the answer as amended. Defendants were allowed to refile the demurrer filed to the original answer, and said refiled demurrer was thereupon overruled. Thereupon the defendants were allowed to take the oral evidence of James Sabata, the son of Joseph Sabata, and to recall for further examination Frank Sabata, Sr., C. M. Hamaleh, and Otylie Sabata, who were cross-examined, and the parties again rested.

The amended petition alleged: That Josef Sabata died intestate in 1921, leaving land in Butler County, and leaving his widow, Cecelia, and ten children, five sons and five daughters; that the widow inherited one-third of the real estate and each of the children one-fifteenth thereof, but that by some arrangement between them the children conveyed 80 acres of the land to their mother, Cecelia, in fee simple; that the mother sold and conveyed the said 80 acres to two of her sons, Anton and Joseph, for an unpaid purchase price of $6,000, each giving a note for $3,000, bearing 4 percent interest, with the agreement and understanding that they would pay the mother only the 4 percent interest during her lifetime upon said $6,000 and that on her death the entire principal sum of $6,000 would be paid by the grantees in equal shares to said ten children; and that such agreement was approved by all of the plaintiffs in 1922.

It was further alleged in the amended petition that defendant Joseph L. Sabata repudiated any obligation to pay anyone except the mother, who sold him the 40 acres of land for $3,000. The plaintiffs prayed that the court find that none of the funds had been paid to the beneficiaries to whom defendant Joseph Sabata agreed to pay said $3,000, and that a judgment be entered against him in the sum of $2,400.

Defendant Joseph Sabata by his amended answer denied each and every allegation of the amended petition, except that he admitted that his mother sold the 80-acre tract to his brother Anton and himself for $6,000. He further alleged that he made partial payment on his note until the same was reduced to $1,000, as admitted by the mother in her writing, copy of which is attached to the amended answer as an exhibit.

This defendant alleged that he continued to make further payments to his mother by paying her doctor bills, medical expenses, insurance dues, church dues, expense of her last illness, and provided her with nursing and care in his own home for the last two months of

her life, and such expenses amounted to more in cash value than the balance remaining unpaid on the last $1,000 note which he had given to her. He charged that the alleged agreements are in violation of the statute of frauds, and an attempt to create an interest in land, contrary to the provisions of said statute, and such alleged agreement is therefore void. He further charged that said agreements and understandings are testamentary in character and not in writing, are contrary to the provisions of the statute providing for the execution of wills, and are therefore void, and further are barred by the statute of limitations.

The judgment and decree entered by the trial court, after describing the land and the relationship of all the parties, found that the mother sold and conveyed the 80 acres to her sons Anton and Joseph on December 27, 1921; and that the sons agreed, in consideration of said conveyance to them by their mother, that on her death they would pay $6,000 in equal shares to her ten children, each son to pay one-half thereof, and that in addition each of the sons would pay the mother interest at 4 percent on $3,000 of said purchase price during the term of her natural life.

The court found in its decree that Anton Sabata had fully performed his part of said agreement by making the payments which he was obligated to make by his promise to his mother. The court then found that defendant Joseph Sabata performed his promise to his mother to pay her interest only in part; that he had failed and refused to pay any part of the $3,000 due his brothers and sisters; that a one-fifth portion of said $3,000 would be payable to himself; and that the remainder of $2,400 should be paid $600 each to Frances Maca, Charley Sabata, John Kozisek as special administrator of the estate of Mollie Kozisek, deceased, and to Bohumil Kominek, as special administrator of the estate of Mary Kominek, deceased, with interest at 6 percent from October 3, 1942. Each of the plaintiffs last

named was awarded a lien to secure the amount of such judgment upon the land belonging to the defendants and to pay the costs of the action.

We will first consider the written statement signed by the mother, and which is discussed at length in each of the briefs. This defendants' exhibit A, written in the Bohemian language, was attached to defendants' answer, together with exhibit B, a translation thereof made by County Judge Hranac, and the exhibits were offered in evidence and refused admission by the court, and proper exceptions were taken to such ruling by the defendants.

This exhibit A consists of three pages written on sheets from a lead-pencil tablet, and the translation, exhibit B, shows it was written June 27, 1942, and signed by the mother, Cecelia. In this statement the mother cuts off the children of her two deceased daughters with five dollars to each family. The important statement as translated therein is: "$1200 is at the postoffice, Joseph will put there one thousand and I with him will be settled that now with him I have nothing." The defendants insist that this writing, signed by the mother, saying that the defendant Joseph must only pay $1,000, is presumptive evidence against the interest of the person making the statement and should have been received in evidence, as it complies with section 25-1221, R. S. 1943. Defendants cite Bratt v. Wishart, 127 Neb. 836, 257 N. W. 258, and the annotation to 96 A. L. R. 686. See, also, Bratt v. Wishart, 136 Neb. 899, 287 N. W. 769.

The plaintiffs argue that this exhibit A was drafted only three months before the mother's death. At that time she was 87 years old, senile, and had been taking sleeping powders regularly for two years. The evidence shows that at times she did not recognize her own children, even long before this exhibit A was written. It is charged that the words were put in her mouth by Joseph. It is written in exhibit A that there was $1,200 postal savings, when it is claimed that the fund had

been cashed six months before. The facts set out in exhibit A do not agree with other competent evidence that Anton had made all his payments under his agreement, while exhibit A seeks to place a liability on Anton of $1,000.

Evidence contradictory to exhibit A is found in the old lady's statements made the year before, according to Stazie Svoboda, who testified that she lived a quarter of a mile from the old home place, where her mother lived until December 1941. She said she had been doctoring for about four years and was really a sick woman. During the four years Stazie went to see her mother every day unless she knew that somebody else had been there. "I had to take care of her. She had a sore back and had to be dressed every day. I went there to bring her cobs and water and to see what she needed. If she would feel good, I went back, but sometimes I had to stay there overnight." Her sisters also went there, Mrs. Frances Maca the most often. "Q Now, during this time that you were taking care of her over those four years, was she taken to the doctor? A Well, yes, at the beginning, kinda, we had to take her to the doctor to kinda know what was wrong with her. It was pretty hard for her. I just talked to the doctor and would tell him how she was and he gave different treatments."

She testified that her mother told her of the sale of the 80 acres. "Q What did she say to you about it? * * * A Well, she kinda told me that she sold it; wasn't renting it anymore; don't own it anymore; she said that she sell it. Q Did she tell you on what terms? A Seventy-five dollars an acre. That amounted to six thousand. Q What more did she say about the sale and about how the money was to be paid? * * * A That she sold it to the boys, Anton and Joe. Q And how were they to pay? A After she died they should divide the money equally between us children; six hundred to each of us. And she said they are going to pay her while she was living, four percent, and out of

that four percent she can live and use that money." She said that Anton paid his interest.

Without setting out additional evidence, we find that exhibit A was admissible, and as the matter is here for consideration de novo we find that, when exhibit A is considered with all the other evidence, it is not sufficient to overcome the competent evidence in direct opposition thereto.

The defendants assigned as error the finding of the court that the alleged oral contract was binding on defendants after they had given their promissory note in full payment of the purchase price. We are cited by them to Cameron v. Nelson, 57 Neb. 381, 77 N. W. 771, which holds that when the entire interest is conveyed by warranty deed a contemporaneous oral agreement cannot be enforced. However, we find that the facts in the case cited are not the same as in the case at bar.

We find the case of Fox v. Fox, 77 Neb. 601, 110 N. W. 304, much more in point, for in that Butler County case Thomas Fox had three sons and five daughters and divided his land of 800 acres between his sons and required the sons to pay their five sisters $1,500 apiece. Three daughters received their shares from the sons William and John, but the third son, Michael, died and a sister attempted to charge his estate with $1,500 still due her. Thomas Fox, still living, was the principal witness for the claimant. She lost in county court, but won in the district court, and this court affirmed such judgment. In the opinion this court cited authorities to the effect that, where property is conveyed inter vivos subject to payments to third persons, it constitutes an implied or constructive trust, as between the trustee and the cestuis que trust, and may be enforced by them directly by a suit brought in their own names and right. This is the same procedure as we find in the case at bar.

The defendants insist that the proof does not support

the decree in the case at bar, and cite our recent holding reading: "So reluctant are the courts to engraft a trust by parol on the legal title to real estate, that there is perhaps no better established doctrine than the one which requires a high degree of proof in order to establish the trust by parol evidence." Holbein v. Holbein, 149 Neb. 281, 30 N. W. 2d 899. This can be supported by Annotation, 23 A. L. R. 1502; Roddy v. Roddy, 3 Neb. 96; 1 Perry on Trusts, § 137, p. 219.

In our opinion the plaintiffs did establish a constructive trust by the degree of proof required in such cases.

It is true that the defendant testified positively that he made many payments on the $3,000 note, and that his mother waived all interest on his note, but two checks that he introduced were for $240 each, which would exactly cover the interest due his mother for a two-year period each, and another check, defendants' exhibit W, for $400, dated December 16, 1930, bore unmistakable evidence of some word being erased and the word "note" written over it, so the exhibit now reads, "Part payment on note."

We have examined all of the other assignments of error set out by the defendants and find them without merit. Without setting out and comparing many other items in the evidence in which the defendants' testimony is in sharp and direct conflict with that of other witnesses, we have reached the conclusion that the case at bar is clearly one depending on the facts proved, as shown in the bill of exceptions, and an examination of this evidence of all these witnesses and the exhibits convinces this court that the decree of the trial court was right and should be affirmed.

AFFIRMED.

WALTER BRANDEIS ET AL., APPELLEES, V. J. L. ERVINE BRANDEIS ET AL., APPELLANTS.

34 N. W. 2d 159

Filed October 7, 1948. No. 32442.

1. **Wills.** Pertinent facts and circumstances which may be reasonably supposed to have influenced a testator in the making of a will are admissible to aid in the ascertainment of his intention.
2. ———. Surrounding facts and circumstances which are so remote as to permit of only speculation as to the intent of a testator in the making of a will are not admissible.
3. ———. In the construction of a will, the court is required to give effect to the true intent of the testator so far as it can be collected from the whole instrument if such intent is consistent with law.
4. ———. Extraneous evidence is admissible for the purpose of construing a will only if there is a latent ambiguity occurring when the language of the will fails to comport with or is in conflict with the facts and circumstances on which the will operates.
5. ———. Where on the basis of the language employed by a testator a will is capable of more than one interpretation the ambiguity is patent and not latent and extrinsic evidence is inadmissible to aid in its interpretation.
6. ———. A bequest in remainder does not lapse on the death of the remainderman if by the will there is designated a substitute or alternate remainderman.
7. ———. Where a will contains a patent ambiguity extraneous evidence is inadmissible for the purpose of explaining its meaning or the intent of the testator and the meaning and intent must be ascertained from an examination of the will and all of its parts.
8. ———. In the construction of a will the generally accepted literal, natural, and grammatical meaning must be given to the words used.
9. ———. A will speaks as of the date of the death of the testator.
10. ———. The law favors the early vesting of estates, and a remainder will be declared a vested one unless a contrary intent is apparent from the will.
11. ———. If the intention of the testator is clear and a will so indicates an estate may properly pass as of a special time or the happening of a named event to one described as heir without such person being in a technical sense an heir.

12. ———. The rule of law which favors the early vesting of estates is not a rule of prohibition but one of direction of preference.

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

Kennedy, Holland, DeLacy & Svoboda, for appellants.

Flansburg & Flansburg and *White & Lipp,* for appellees.

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

YEAGER, J.

This is an action which was instituted in the district court for Douglas County, Nebraska, by Walter Brandeis and Loyal B. Cohn, plaintiffs and appellees, against J. L. Ervine Brandeis, and George Brandeis and Karl Louis, trustees, defendants and appellants, under the Uniform Declaratory Judgments Act for the purpose of having construed a paragraph of the last will and testament of H. Hugo Brandeis, deceased.

The action was commenced by the filing of a petition by plaintiffs which was later amended. The defendants answered the petition. The plaintiffs moved for an order striking parts of the answer which motion was sustained. Thereafter plaintiffs moved for judgment on the pleadings which motion was sustained and a decree was entered applying to the provision of the will in question the construction prayed for by plaintiffs.

The cause comes here on appeal. Error is assigned with respect to the order striking parts of the answer and the decree construing the will.

That portion of the appeal which brings into question the propriety of the order of the district court striking parts of the answer relates itself to the pleadings filed, therefore it becomes necessary to review them and point out their contents herein in considerable detail.

In the petition it is set out, among other things, in

substance that on May 16, 1911, H. Hugo Brandeis made a will which contained the following provision:

"I give and bequeath to my beloved wife, Lyela Brandeis, for her sole use and benefit during her natural life, all of the capital stock of J. L. Brandeis & Sons, now owned by me and hereafter acquired; and, at her death, said stock shall pass to and vest absolutely in my brothers, Arthur D. Brandeis and Emil Brandeis, in equal proportions. Should either of my said brothers die during the life-time of my wife, his lawful male heirs, as of the date of her death, shall take his share." Lyela Brandeis as indicated by this provision was the wife of H. Hugo Brandeis.

At the time of making his will two brothers, Arthur D. Brandeis and Emil Brandeis, and a sister, Sarah Brandeis Cohn, were living. Emil Brandeis had no children. He was never married. Arthur D. Brandeis had a son whose name is J. L. Ervine Brandeis. He is still living. He also had two daughters but for the purposes of this decision further mention of them is not required. Sarah Brandeis had two sons. They are still living and are known as Walter Brandeis and Loyal B. Cohn. No children were born to H. Hugo Brandeis and his wife. J. L. Ervine Brandeis, Walter Brandeis, and Loyal B. Cohn were the only nephews of the Brandeis blood of H. Hugo Brandeis.

H. Hugo Brandeis died July 21, 1912, at which time he was the owner of 833⅓ shares of the capital stock of J. L. Brandeis & Sons, a Nebraska corporation. Emil Brandeis had died previously on April 15, 1912. Arthur D. Brandeis died June 10, 1916. Sarah Brandeis Cohn died October 31, 1936. Lyela Brandeis died July 29, 1946.

The plaintiffs alleged that by a proper interpretation and construction and within the true meaning of the quoted provision of the will of H. Hugo Brandeis, J. L. Ervine Brandeis, Loyal B. Cohn, and Walter Brandeis were the lawful male heirs of Emil Brandeis on the death of Lyela Brandeis and that they were and are entitled

to take, share and share alike, one-half of the 833⅓ shares of capital stock and the increase thereof in J. L. Brandeis & Sons, a Nebraska corporation.

They alleged that J. L. Ervine Brandeis claims that the term "lawful male heirs" as used in the provision of the will relates to lawful male heirs as of July 21, 1912, the date of the death of H. Hugo Brandeis, and that at that date Arthur D. Brandeis was the only lawful male heir of Emil Brandeis, hence on account of the death of Arthur D. Brandeis he became entitled to take in the stead of his father.

They alleged that J. L. Ervine Brandeis has assumed control of the capital stock as though it were his own and has transferred it to George Brandeis and Karl Louis, trustees, reserving for himself the beneficial interest therein. George Brandeis and Karl Louis were made parties defendant as trustees.

The prayer is for an adjudged interpretation and construction of the provision of the will which will conform to the claims made in the petition.

The answer of defendants is of considerable length and nothing need be said with regard to the portion which is in essence a traverse of the issue presented for determination except to say that it presents the contention of J. L. Ervine Brandeis with reference to the provision of the will substantially as it was presented in the petition of the plaintiffs. In it and as a part of it by reference there were parts which were stricken by order of the district court. The propriety of this action, as has been pointed out, has been brought into question by this appeal, therefore it becomes necessary to refer to them.

The parts which were stricken were (1) a paragraph setting out that J. L. Brandeis was the founder and organizer of J. L. Brandeis & Sons, a corporation, the date of incorporation, the capitalization, and the character of the business of the corporation; (2) a part of a paragraph setting out that J. L. Brandeis and his three sons were officers and engaged in the operation of the

corporation during the lifetime of each of them; (3) a paragraph setting forth the distribution of the shares of stock on the death of J. L. Brandeis the result of which in the end caused H. Hugo Brandeis to become the owner of 833⅓ shares of the capital stock, together with exhibit 1 attached to the petition; (4) a paragraph whereby the will of Emil Brandeis was identified for attachment to and as a part of the answer and wherein the details of the administration of the estate of Emil Brandeis were set out, together with exhibit 2 attached to the petition; and (5) a part of a paragraph wherein the will of Arthur D. Brandeis was identified for attachment to and as a part of the answer, together with exhibit 4 attached to the petition.

These portions of the answer were ordered stricken obviously on the ground that they were of no proper benefit to the court in construing the provision of the will of H. Hugo Brandeis.

We think that in all respects, with the possible exception of that part referring to the will of Arthur D. Brandeis, the district court was not in error.

The will of Arthur D. Brandeis will become important in the determination of the right of J. L. Ervine Brandeis to take only if it shall be determined that heirship of Emil Brandeis within the meaning of the questioned provision of the will of H. Hugo Brandeis was the date of the death of H. Hugo Brandeis rather than the date of the death of Lyela Brandeis, since the right, if it exists, of J. L. Ervine Brandeis to take the capital stock of Emil Brandeis in its entirety depends upon the will of his father rather than as an heir of Emil.

In point of fact it was not alleged that H. Hugo Brandeis executed his own will with reference to the wills of his two brothers or either of them or even that he knew of their wills or the contents thereof. As to the other allegations of the answer which were stricken, with the exception noted, nothing is therein contained, if evidence had been adduced to fully support them, which

could throw any light on the intention of H. Hugo Brandeis in the making of his will even if under some rule of law extraneous facts having no connection with the making of a will could be considered in arriving at the intent of a testator. No such rule has however been cited and we know of none.

The appellants contend that evidence in support of these allegations was admissible for the purpose of a correct understanding of the bequest and of the facts and circumstances which may have been reasonably supposed to have influenced the testator in making the will in order that the court might ascertain his intention. For support they rely on Little v. Giles, 25 Neb. 313, 41 N. W. 186; Elliott v. Quinn, 109 Neb. 5, 189 N. W. 173; In re Estate of Zimmermann, 122 Neb. 812, 241 N. W. 553; In re Estate of Schuette, 138 Neb. 568, 293 N. W. 421; In re Estate of Dimmitt, 141 Neb. 413, 3 N. W. 2d 752, 144 A. L. R. 704.

With this as an abstract rule of law which may have application to an appropriate statement of facts no fault is found but it can have no application here. The matters involved in these portions of the answer in and of themselves were so remote as to permit of only bare speculation that they had any influence upon the intent of H. Hugo Brandeis at the time he made his will. To bring them out of the field of speculation would require the testimony of witnesses in explanation, a step not permissible under well-settled principles of law.

In the construction of a will, the court is required to give effect to the true intent of the testator so far as it can be collected from the whole instrument if such intent is consistent with law. Martens v. Sachs, 138 Neb. 678, 294 N. W. 426, 134 A. L. R. 356; In re Estate of Pfost, 139 Neb. 784, 298 N. W. 739; In re Estate of Darr, 114 Neb. 116, 206 N. W. 2; Reuter v. Reuter, 116 Neb. 428, 218 N. W. 86; Krause v. Krause, 113 Neb. 22, 201 N. W. 670; In re Estate of Zimmermann, *supra*.

Extraneous evidence is admissible for the purpose of

construing a will only if there is a latent ambiguity occurring when the language of the will fails to comport with or is in conflict with the facts and circumstances on which the will operates. In re Estate of Pfost, *supra;* Roberts v. Roberts, 147 Neb. 494, 23 N. W. 2d 774; Lincoln Nat. Bank & Trust Co. v. Grainger, 129 Neb. 451, 262 N. W. 11.

Where on the basis of the language employed by a testator a will is capable of more than one interpretation the ambiguity is patent and extrinsic evidence is inadmissible to aid in its interpretation. In re Estate of Pfost, *supra;* Roberts v. Roberts, *supra.*

The ruling on the question of whether or not the court erred in striking the will of Arthur D. Brandeis and the reference thereto will be deferred until construction of the provision of the will is made since, as pointed out, the propriety of the trial court's ruling depends upon this construction.

The question of construction presented is the intention of the testator in the use of the words: "Should either of my said brothers die during the life-time of my wife, his lawful male heirs, as of the date of her death, shall take his share."

"Her" refers to Lyela Brandeis. The term "his share" when limited to the present inquiry refers to the share of Emil Brandeis. Emil Brandeis predeceased the testator. Lyela Brandeis and Arthur D. Brandeis survived him. Lyela Brandeis survived Arthur D. Brandeis by many years.

In order to make clear the observations and conclusions of this opinion we think it well to point out that the parties are in accord that the bequest in remainder of H. Hugo Brandeis to Emil Brandeis did not lapse with the death of Emil since substitute or alternate remaindermen were named by the testator to take in case of his death. We are in accord with this view.

The intent in this respect was drawn from an examination of the will itself, the circumstances of the testator

at the time he made his will, and a presumption that one who makes a will does not intend any of his property to be divided as though he died intestate. Jones v. Hudson, 93 Neb. 561, 141 N. W. 141, 44 L. R. A. N. S. 1182.

The provision of the will under consideration in the case at bar left nothing in doubt in this respect. The testator declared an intention that there should be no lapse in case of the death of a first named taker. Within the meaning of Restatement, Property, § 277, p. 1428, and illustration 1 thereunder, it was the intention of H. Hugo Brandeis to bequeath a remainder subject to defeasance by death of remaindermen before the death of Lyela Brandeis with the lawful male heirs as substitutionary remaindermen.

The burden devolving upon the court is to determine, within the limits of this inquiry, whether in the use of the quoted words H. Hugo Brandeis had reference to those who were lawful male heirs of Emil Brandeis at the date of his, Emil's, death, or those who would have been his lawful male heirs at the death of Lyela Brandeis had he survived the testator, his brother Arthur D. Brandeis, and his sister Sarah Brandeis Cohn.

If he intended the former then the defendants are entitled to prevail. If he intended the latter then the plaintiffs are entitled to prevail. There is no contention on the part of any of the parties to this action that the intention of the testator in this respect, no matter what it shall be found to have been, may not be allowed to prevail.

In arriving at this determination certain rules of construction are to be borne in mind. They are those which have already been stated together with the following:

Where a will contains a patent ambiguity extraneous evidence is inadmissible for the purpose of explaining its meaning or the intent of the testator but the meaning and intent must be ascertained from an examination of the will and all of its parts. In re Estate of Zimmermann, *supra;* In re Estate of Pfost, *supra;* Roberts v. Roberts,

supra; In re Estate of Schuette, *supra;* In re Estate of Wirsig, 128 Neb. 297, 258 N. W. 467.

In the construction of a will the generally accepted literal, natural, and grammatical meaning must be given to the words used. In re Estate of Pfost, *supra;* Roberts v. Roberts, *supra.*

In the construction of a will whose terms are unambiguous the intent of the testator appearing from the words used in their general literal, natural, and grammatical sense is to be accepted. Hill v. Hill, 90 Neb. 43, 132 N. W. 738, 38 L. R. A. N. S. 198; Lincoln Nat. Bank & Trust Co. v. Grainger, *supra;* Salmons v. Salmons, 142 Neb. 66, 5 N. W. 2d 123; In re Estate of Grblny, 147 Neb. 117, 22 N. W. 2d 488; In re Estate of Zents, 148 Neb. 104, 26 N. W. 2d 793.

A will speaks as of the date of the death of the testator. Lacy v. Murdock, 147 Neb. 242, 22 N. W. 2d 713.

The law favors the early vesting of estates, and a remainder will be declared a vested one unless a contrary intent of the testator is apparent from the will. Davis v. Davis, 107 Neb. 70, 185 N. W. 442; In re Estate of Hanson, 118 Neb. 208, 224 N. W. 2.

Without difficulty, under the cited decisions dealing with that subject, we have arrived at the conclusion that this provision of the will contains no latent ambiguity or one which is subject to explanation by extraneous evidence.

Is there a patent ambiguity? Assuming that there is, as pointed out in the decisions, that must be resolved by reference to the content of the will and its provisions and the language employed.

As is apparent from the will the testator by declaration recognized the uncertainties of life. It is reasonable to say by reference to the will, we think, since he provided against the eventuality of their death, that he had in mind the uncertainty of life of his brothers as well as of himself. With this in mind, again we think it reasonable to say that he intended to make a full testamentary

disposition, or at least what he thought was a full disposition, of his estate, one which would in the light of the potential of these uncertainties provide for testamentary disposal of his entire estate. The intention in this respect is not confusing or obscure but is clearly expressed. No ambiguity is apparent.

We think this provision of the will clearly by its terms expresses the intention that in case of the death of Emil Brandeis or Arthur D. Brandeis before that of Lyela Brandeis the estate which would have gone to him would go to the class which was closest to him in the lawful male line of the Brandeis blood. To hold this not to be true would be to render, in violation of rules heretofore adverted to herein, useless and meaningless the words "as of the date of her death." To attribute to them the only meaning of which they are capable, especially considering their juxtaposition to the words "his lawful male heirs" immediately preceding, is to construe the entire provision in conformity with the contention contained in the petition of plaintiff and the prayer thereof.

This conclusion conforms to well-established authority in the interpretation and construction of wills which permits estates to become effective or pass "as of" a special time or the happening of a named event. Lacy v. Murdock, *supra;* Proctor v. Clark, 154 Mass. 45, 27 N. E. 673, 12 L. R. A. 721; Warren v. Sears, 303 Mass. 578, 22 N. E. 2d 406, 127 A. L. R. 595; Mitchell v. Dauphin Deposit Trust Co., 283 Ky. 532, 142 S. W. 2d 181; Wood v. Schoen, 216 Pa. 425, 66 A. 79; New York Life Ins. & T. Co. v. Winthrop, 237 N. Y. 93, 142 N. E. 431, 31 A. L. R. 791. In this light it is clear from the will that the testator did not use the term "heirs" in a technical sense but with the purpose and intention of indicating those of a particular class closest in blood relation to the named beneficiary if such beneficiary died prior to the death of Lyela Brandeis. To accept and enforce such an intention and purpose will conform to well-accepted principles of law. Baker v. Hibbs, 167 Iowa 174, 149 N. W.

85; In re Wagar's Estate, 302 Mich. 243, 4 N. W. 2d 535; Mitchell v. Dauphin Deposit Trust Co., *supra;* Costello v. Costello, 149 F. 2d 379; Worcester County Trust Co. v. Marble, 316 Mass. 294, 55 N. E. 2d 446; Gilliam v. Guaranty Trust Co. of New York, 186 N. Y. 127, 78 N. E. 697, 116 Am. S. R. 536.

Also this conclusion is not violative of the rule that the law favors the early vesting of estates, and that a remainder will be declared a vested one unless a contrary intent of the testator is apparent from the will. We have found nothing in the rule or the reported cases which makes of it a rule of prohibition. It appears to be one of direction of preference. Its requirement is that in wills where the intention of the testator is found to be doubtful in this respect and a choice becomes necessary the doubt should be resolved in favor of a vested rather than a contingent remainder.

Assuming that Arthur D. Brandeis took a vested remainder in the estate of Emil Brandeis, that could have no material bearing upon and could not defeat or adversely affect this construction of the provision of the will.

If Arthur D. Brandeis took a vested remainder in the estate of Emil Brandeis it was a vested remainder subject to defeasance by his death before the death of Lyela Brandeis, with the lawful male heirs of Emil Brandeis as of the death of Lyela Brandeis becoming substituted testamentary remaindermen. Restatement, Property, § 277, p. 1428, and illustration 1.

The district court in no wise erred in striking parts of the answer, and the decree construing the provision of the will of H. Hugo Brandeis is in all respects correct and is affirmed.

AFFIRMED.

STATE OF NEBRASKA EX REL. VIOLA BEESON ET AL., RELATORS, V. FRANK MARSH, SECRETARY OF STATE OF THE STATE OF NEBRASKA, RESPONDENT.

34 N. W. 2d 279

Filed October 12, 1948. No. 32571.

1. **Elections.** Article II, section 1, of the Constitution of the United States does not provide that the appointment of presidential electors shall be by popular vote, nor that the electors shall be voted for upon a general ticket, nor that a majority of those who exercise the elective franchise can alone choose the electors.
2. ———. Article II, section 1, of the Constitution of the United States recognizes that the people act through their representatives in the Legislature, and leaves it to the Legislature exclusively to define the method of effecting the appointment of presidential electors.
3. **Constitutional Law.** The word "appoint" used in article II, section 1, of the Constitution of the United States grants to the Legislature the broadest power of determination.
4. ———. The words "in such Manner as the Legislature thereof may direct" in article II, section 1, of the Constitution of the United States operate as a limitation upon the state in respect of any attempt to circumscribe the legislative power.
5. **Elections.** The manner directed by the Legislature of the appointment of presidential electors in this state contemplates the creation and existence of political parties in this state, the nomination by such parties of presidential electors, the placing of the names of candidates for President and Vice President of such parties on the ballot with the party designation of each, and the counting of the ballots cast for President and Vice President for the electors of the party.
6. ———. The filing of a certificate of nomination of candidates for President and Vice President by the officers of a national convention of a political party is not alone sufficient to entitle its nominees to a place on the ballot in this state.

Original proceeding in mandamus. *Writ denied.*

Ginsburg & Ginsburg, for relators.

Walter R. Johnson, Attorney General, and *Robert A. Nelson,* for respondent.

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

SIMMONS, C. J.

This is an original action in which relators seek a peremptory writ of mandamus to compel the respondent Secretary of State to accept, file, and process nominating petitions, and to certify and cause to be placed on the ballot for the election to be held November 2, 1948, the names of the first six relators as presidential electors or the names of Henry A. Wallace and Glen H. Taylor as candidates for President and Vice President of the United States. The respondent answered. The cause is submitted here upon the petition and answer, the allegations of fact not being controverted. The issues presented are questions of law. We deny the issuance of the writ.

The Progressive Party held a convention in Philadelphia, Pennsylvania, on July 23, 24, and 25, 1948, at which it nominated Henry A. Wallace as its candidate for President of the United States and Glen H. Taylor as its candidate for Vice President of the United States. The names of the candidates have been certified to the Governor and to the Secretary of State by the officers of the National Convention of the Progressive Party.

At the primary election held in Nebraska on April 13, 1948, no delegates or alternates to the said national convention were elected and hence there were no duly elected delegates from Nebraska in attendance at or participating in that convention.

The Progressive Party called a convention to be held in Omaha, Douglas County, Nebraska, for the purpose of organizing a political party within this state, pursuant to section 32-1135, R. S. Supp., 1947. At that convention not to exceed 283 qualified electors signed the agreement and roster to form such new party and support its nominees at the convention. The required 750 electors, signing the roster and agreement, not having been se-

cured, the movement to organize the Progressive Party as a new political party in this state failed.

Prior to September 23, 1948, petitions directed to respondent were circulated among the electors, in the following words:

"CERTIFICATE OF NOMINATION

"To the Secretary of State of Nebraska:

"Pursuant to the provisions of Section 1107 of Chapter 32 of the revised statutes of Nebraska, the undersigned, electors of the State of Nebraska, hereby nominate the following named person for the office of presidential elector to be voted for at the general election to be held on the Second day of November, 1948, viz.:

Name	Residence	P.O. Address	Business
Mrs. Viola Beeson	2020 Spencer, Omaha	2020 Spencer, Omaha	Housewife
Ben Martin	5443 S.24th St., Omaha	5443 S.24th, Omaha	Storekeeper
Ed Kohler	Schuyler, Nebr.	Schuyler, Nebr.	Farmer
Rev. Arthur Stearns	2119 Emmett, Omaha	2119 Emmett, Omaha	Retired minister, presently a painter
Carl Hansen	Newman Grove, Nebr.	Newman Grove, Nebr.	Farmer
James Reed	1550 So.28th St., Omaha	1550 So. 28th St., Omaha	Carpenter

"The undersigned group of petitioners hereby certify that their candidate for the office of President of the United States is Henry A. Wallace, who resides at South Salem, New York, and whose occupation is that of farmer, and that their candidate for Vice-President of the United States is Glen H. Taylor, whose residence is Pocatello, Idaho, and whose occupation is that of United States Senator.

"In witness whereof the undersigned have signed this certificate of nomination.

Name Residence (City or Town) P. O. Address (Street and Number or R.F.D.) Place of Business (City or Town)"

More than 1,500 qualified electors signed these petitions, together with a statement of their residence, P. O. address, and place of business. These petitions were presented to the respondent on September 23, 1948, who refused to accept and file the same or to process them, and refused to certify to the county clerks the names of the candidates named therein for President and Vice President, and the names and descriptions of the relators as nominees for the office of presidential electors. The relators are willing to accept and file written notice of the acceptance of said nomination.

Relators seek a writ commanding the respondent to accept, process, and file the nominating petitions; and to certify to the county clerks the names of Henry A. Wallace and Glen H. Taylor as candidates for President and Vice President of the United States upon the presidential ticket, or in the alternative to certify the names and descriptions of the six nominees for said office as candidates for presidential electors, pledged to cast their votes for Henry A. Wallace and Glen H. Taylor.

The nominating petition, heretofore set out in full, which the relators ask that the respondent be commanded to accept, process, and file, invokes the provisions of section 32-1107, R. S. Supp., 1947. It undertakes to nominate pursuant to that section the first six relators "for the office of presidential elector." It does not identify the electors sought to be so nominated with the Progressive Party which held a convention at Philadelphia in July of this year, and it does not purport to pledge said proposed electors or show that said proposed electors are pledged to cast their votes in the electoral college for Mr. Wallace and Mr. Taylor. It contains only a statement of fact that Mr. Wallace and Mr. Taylor

are the candidates of the petitioners for the offices of President and Vice President. It makes no request or demand that the names of Mr. Wallace and Mr. Taylor be placed on the ballots.

However, by brief and oral argument relators contend that the first six named relators are entitled to be placed on the ballot as candidates for presidential electors because of the provisions of section 32-1107, R. S. Supp., 1947, together with sections 32-219 and 32-924, R. S. 1943. They likewise contend that because the officers of the National Convention of the Progressive Party have certified to the Governor and the Secretary of State the names of Mr. Wallace and Mr. Taylor as its candidates for President and Vice President, as provided in section 32-301, R. S. 1943, the names of such candidates must be placed on the ballot in this state.

Article II, section 1, of the Constitution of the United States provides in part: "Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector."

The Supreme Court of the United States in McPherson v. Blacker, 146 U. S. 1, 13 S. Ct. 3, 36 L. Ed. 869, has construed this provision and held: "The Constitution does not provide that the appointment of electors shall be by popular vote, nor that the electors shall be voted for upon a general ticket, nor that the majority of those who exercise the elective franchise can alone choose the electors. It recognizes that the people act through their representatives in the legislature, and leaves it to the legislature exclusively to define the method of effecting the object." It further held that the word "appoint" " * * * was manifestly used as conveying the broadest power of determination."

The question then is—what manner of appointment

of electors has the Legislature of this state directed?

The Legislature has recognized the existence of political parties and has directed the appointment of electors in part through the medium of political parties. It has authorized and outlined the procedure for the formation of new political parties in this state. § 32-1135, R. S. Supp., 1947. It has provided that existing political parties shall, at their post-primary convention, "select electors for President and Vice President of the United States, the names of whom shall be certified to the Governor by the officers of such convention," § 32-1171, R. S. Supp., 1947; that "Certificates of nomination for a new party may be filed with the Secretary of State or the county or municipal clerk * * * as the case may require," § 32-1134, R. S. Supp., 1947; and that "All nomination papers shall be filed as follows: (1) for officers elective in more than one county, * * * in the office of the Secretary of State, * * *." § 32-1120, R. S. 1943. It has directed the form of the official ballot and, applicable here, that "(3) if the election be in a year in which a President of the United States is to be elected, in spaces separated from the foregoing by a heavy black line and entitled 'Presidential Ticket,' in black type not less than eighteen point, shall be the names and spaces for voting for candidates for President and Vice President; the names of candidates for President and Vice President for each political party shall be grouped together, each group enclosed with brackets with one square to the left in which the voter indicates his choice, and the party name to the right according as near as possible to the following form or schedule:

JOHN DOE, President

☐ Republican

RICHARD ROE, Vice President

with a heavy line across the column, separating the group of the different political parties; no blank lines are to be left for writing in names for President and

Vice President; * * *." § 32-503, R. S. 1943. It has directed that at the general election "each presidential elector nominated by any party or group of petitioners shall receive the combined vote of the electors of the state for the candidates for President and Vice President of such party or group of petitioners, and a vote cast for the candidates for President of the United States shall be a vote for the electors of the respective party or group of petitioners." § 32-219, R. S. 1943.

The Legislature has directed that after the election the county canvassing board shall on a separate sheet make an abstract of the votes cast for President and Vice President. § 32-919, R. S. Supp., 1947. It has directed that a copy of the abstract so made shall be transmitted to the Secretary of State. § 32-923, R. S. 1943. It has directed that the votes cast for President and Vice President shall be canvassed by a board of canvassers, consisting of the Governor, Secretary of State, Auditor of Public Accounts, State Treasurer, and Attorney General, and "* * * the return thereof shall be a canvass and return of the votes cast for the electors of the same party or group of petitioners respectively, and the certificate of such election made by the Governor shall be in accord with such return." § 32-924, R. S. 1943. It has likewise provided in sections 32-1501, 32-1502, and 32-1503, R. S. 1943, for the notice of appointment of the electors, their meeting procedure, and the election by them.

The summary of this procedure is that the electors are nominated by political parties organized in this state, and while in practice the voters vote directly for the candidates of a party for President and Vice President, the legal effect of their vote is to vote for the electors of the party whose candidates are named on the ballot.

The question then is—have the relators brought themselves within the provisions of the law as directed by the Legislature?

The relators first rely upon section 32-1107, R. S.

Supp., 1947. This section provides for the nomination of candidates by petition "except candidates whose nomination is expressly provided for by specific statutory provision relating to a specific office"; that candidates nominated under its provisions shall be termed "candidates by petition" and upon the ballot there shall be printed after their names the words "By petition." It is clear that this section has no applicability to the petition here presented. The nomination of presidential electors is expressly provided for by specific statutory provisions relating to that specific office as has been pointed out. The provision that the names of the candidates shall appear on the ballot followed by the words "By petition" is in direct conflict with the specific provision as to the form of the ballot hereinabove quoted. The section obviously refers to candidates who are not the candidates of political parties.

The relators also rely upon the language contained in section 32-219, R. S. 1943—"each presidential elector nominated by any party or group of petitioners," and in section 32-924, R. S. 1943, that the canvass of the votes for candidates for President and Vice President "shall be a canvass and return of the votes cast for the electors of the same party or group of petitioners * * *." Relators contend that these provisions demonstrate a legislative intent that candidates for presidential electors may be nominated by a "group of petitioners" and that they (the first six relators) have been nominated by a group of petitioners and hence are entitled to a place on the ballot.

It, of course, is clear that the 1,500 petitioners whose names are on the petitions involved herein are grouped together on 100 sheets of paper comprising the entire petition. However, that does not constitute them a "group of petitioners" within the meaning of the statutes involved. Webster's New International Dictionary, Second Edition, Unabridged, defines the noun "group" as "An assemblage of persons or things regarded as a

unit because of their comparative segregation from others; * * *." By statute a political party is "an assemblage or organization of electors by the law designated as such." § 32-1103, R. S. 1943. The language "group of petitioners" came into the statutes involved by amendment in 1927. Laws 1927, c. 105, p. 287. The statute which, as amended, became section 32-219, R. S. 1943, before amendment was section 1918, Comp. St. 1922, and provided: "In the year nineteen hundred and twenty and every four years thereafter, the governor shall appoint as electors of president and vice-president, those persons selected in the preceding delegate state convention by the political party whose candidates for president and vice-president received the highest number of votes at the general election held in the within year and years, on such day as congress may appoint."

It is noted that by section 1918, Comp. St. 1922, the Governor was limited in his appointment of electors to those selected in a preceding delegate state convention of the successful political party. Obviously that language did not include the nominees of a new political party organized under the laws of this state which had not held a delegate state convention. By the 1927 amendment, the Legislature removed the restriction, retained the word "party" in its original meaning, and added the words "group of petitioners." Section 2041, Comp. St. 1922, likewise was amended so as to reconcile it with the amendment to section 1918.

The legislative meaning of the words "group of petitioners" at the time it was used in the 1927 act becomes clear upon an examination of other provisions of the statute as they then existed. The statutes then provided for the organization of a new political party. §§ 2125 and 2126, Comp. St. 1922. Section 2127, Comp. St. 1922, provided that candidates of a new party "shall be required to file nomination papers signed by at least fifty per cent of those who subscribed the agreement to form such new party." In short, the method then provided

for the nomination of candidates by a new party was by petition of at least fifty percent of those who in convention met and formed the new party. The group of petitioners represented the new political party formed under the laws of this state and made the nomination for the new party by petition. Section 2127, Comp. St. 1922, was amended in 1929 (Laws 1929, c. 100, p. 368), and the above requirement of nomination by petition was repealed leaving in force the provisions of section 2124, Comp. St. 1922, that certificates of nomination of a new party may be filed with the Secretary of State.

While the method of making the nomination has been changed, the meaning of the provision remains. We find nothing to indicate a contrary legislative intent. To hold as relators contend would be to say that the Legislature, after having directed in detail the method whereby established and newly-formed political parties were to nominate presidential electors, then, by the use of the words "group of petitioners," intended to permit an unorganized number of electors to nominate presidential electors, and thereby in effect nullify all the directions of the Legislature in that regard. Such a legislative intent is not found in the statutes.

Section 32-301, R. S. Supp., 1947, provides as follows: "Thirty days previous to any election at which any United States officer, (including especially candidates for President and Vice President, which candidates shall have been previously certified to him by the officers of the different national conventions of the different political parties within and for the United States) or state officer is to be elected, the Governor shall issue his proclamation designating all the offices to be filled by vote of all the electors of the state, or by those of any congressional, legislative or judicial district, and transmit a copy thereof by mail to the county clerk of each county."

Relators here urge that because of the language in parentheses in the above section, and because the officers of the National Convention of the Progressive Party have

certified to the Governor and respondent the names of Mr. Wallace and Mr. Taylor as its candidates for President and Vice President, and because of the nominations made in the petition herein discussed, the respondent is required to certify to the county clerks the names of Mr. Wallace and Mr. Taylor as candidates for President and Vice President, pursuant to the provisions of section 32-1166, R. S. Supp., 1947. The requirement of section 32-301, R. S. Supp., 1947, is clearly for the information of the Governor in the issuance of his election proclamation. It does not require that he do anything with reference to the certified candidates.

There is a fundamental reason why the filing of the certificate by the officers of the national convention of a political party is not alone sufficient to entitle its nominees to a place on the ballot in this state. Article II, section 1, of the Constitution of the United States, hereinbefore set out, leaves to the Legislature of the state the manner of determining how "Each State" shall appoint its presidential electors. It is a matter within the control of the state Legislature. Pursuant to that provision the Legislature of this state has directed the manner of the appointment. To accept the contention that the names of Mr. Wallace and Mr. Taylor shall be placed on the ballot on the nomination certificate of officers of a national convention would be to nullify the directions of the Legislature in that regard. We need not determine whether or not the Legislature could so direct. Clearly they have not done so. A contrary determination obviously is indicated by the provisions of section 32-1130, R. S. 1943, which is as follows: "No person shall be entitled to or allowed to file a nomination certificate, or to have his name placed upon a primary election ballot for any primary election to be held, unless the political party which he states in said affidavit he affiliates with, polled at the last election before the primary election to be held, at least five per cent of the entire

vote in the state, county or subdivision or district in which he seeks the nomination for office."

Assuming that a political party in this state failed to poll the required number of votes provided by the act, then, if relators' contentions are correct, the officers of a national convention of that party by certifying the names of candidates for President and Vice President to the Governor would thereby be able to keep the party name and party candidates on the ballot, notwithstanding the "at least five per cent of the entire vote" provision of the statute.

There are other reasons why the names of Mr. Wallace and Mr. Taylor cannot be placed on the ballot in this state in the manner followed by relators. Section 32-503, R. S. 1943, provides that the names of the candidates for President and Vice President of each party shall be grouped together and followed by the party name. The certificates filed with the Governor and respondent designate Mr. Wallace and Mr. Taylor as the candidates of the Progressive Party, but there is no such party organized in this state. To comply with the statute, the respondent would be required to follow the names with the name "Progressive Party." We find no authority for him to do so. The relators suggested at the bar of the court that the names alone be placed on the ballot. To do so would be to violate the provisions of the statute.

Section 32-503, R. S. 1943, provides that "no blank lines are to be left for writing in names for President and Vice President." The reason for that is patent. Should names be so written in, there would be no "electors of the same party or group of petitioners" for whom the write-in votes could be canvassed and returned, and there would be no electors nominated in the manner directed by the Legislature, concerning whom the certificate provided for in section 32-924, R. S. 1943, could be issued.

The same situation would arise if the names of Mr. Wallace and Mr. Taylor were placed on the ballot, either

with or without the designation of the Progressive Party. The petition presented to the Secretary of State, even if accepted, would not meet this requirement. It does not identify the proposed nominees for presidential electors with the Progressive Party or any other party, nor even with the candidacies of Mr. Wallace and Mr. Taylor. It merely states that Mr. Wallace and Mr. Taylor are the candidates of the petitioners.

In brief, the manner directed by the Legislature of the appointment of presidential electors in this state contemplates the creation and existence of political parties in this state, the nomination by such parties of presidential electors, the placing of the names of candidates for President and Vice President of such parties on the ballot with the party designation of each, and the counting of the ballots cast for President and Vice President for the electors of the party.

It is obvious that relators and the petitioners have failed to follow the procedure directed by the Legislature, have no right to enforce the procedure selected by themselves, and accordingly have no right to the issuance of the writ which they seek.

The relators contend that if the statutes are construed so as not to permit the nomination of candidates for presidential electors of electors not affiliated with any party, it denies the relators, the petitioners, and the electors the right to vote for whomsoever they may choose for such offices, and that so construed the statutes are in violation of sections 1, 3, and 22, of article I of our Constitution and the fourteenth amendment to the Constitution of the United States.

Relators in their argument here refer only to article I, section 22, of the Constitution. The relators make no argument in their brief with reference to the claimed violation of the fourteenth amendment to the Constitution of the United States.

It would seem that the relators misconceive the scope of article II, section 1, of the Constitution of the United

States and the powers therein granted to the Legislature. That provision is exhaustively treated in McPherson v. Blacker, *supra*. As was said there, so we say here, the question presented is not one of policy but of power. The Supreme Court of the United States held that the provision "leaves it to the legislature exclusively" to define the method of effecting the appointment of electors; that "practical construction of the clause has conceded plenary power to the state legislatures in the matter of the appointment of electors"; and that the words "in such Manner as the Legislature thereof may direct" operate as a "limitation upon the State in respect of any attempt to circumscribe the legislative power * * *." We must construe the power of the Legislature and our statutes in accord with those pronouncements.

Further, the Supreme Court of the United States in the McPherson case, directly answering a charge that the fourteenth amendment was violated by a denial of the right to vote for presidential electors, said: "There is no color for the contention that under the amendments every male inhabitant of the State being a citizen of the United States has from the time of his majority a right to vote for presidential electors." That holding disposes of relators' unpressed contention that they have a constitutional right to vote for presidential electors.

Article I, section 22, of our Constitution provides: "All elections shall be free; and there shall be no hindrance or impediment to the right of a qualified voter to exercise the elective franchise." In accord with the holding in the McPherson case this provision may not operate to "circumscribe the legislative power" granted by the Constitution of the United States. It becomes unnecessary therefore to consider whether or not there is a conflict between the method of appointment of presidential electors directed by the Legislature and the state constitutional provision.

The writ of mandamus prayed for by relators is denied.

DENIED.

ANNA LUNKWITZ, APPELLEE, v. J. P. GUFFEY, ADMINISTRATOR OF THE ESTATE OF WILHELMIA LUNKWITZ, DECEASED, ET AL., APPELLANTS.
34 N. W. 2d 256

Filed October 15, 1948. No. 32403.

1. **Frauds, Statute of.** Where one is claiming the estate of a person deceased under an alleged oral contract, the evidence of such contract and the terms of it must be clear, satisfactory and unequivocal.
2. ———. Such contracts are on their face void as within the statute of frauds, because not in writing, and, even though proved by clear and satisfactory evidence, they are not enforceable unless there has been such performance as the law requires.
3. ———. The thing done, constituting performance, must be such as is referable solely to the contract sought to be enforced, and not such as might be referable to some other and different contract—something that the claimant would not have done unless on account of the agreement and with the direct view to its performance—so that nonperformance by the other party would amount to fraud upon him.
4. ———. The burden in the light of this rule has devolved upon the plaintiff (1) to prove an oral contract the terms of which are clear, satisfactory and unequivocal, and (2) that his acts constituting performance were such as were referable solely to the contract sought to be enforced, and not such as might have been referable to some other or different contract.
5. ———. Each case is to be determined from the facts, circumstances, and conditions as presented therein.

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

J. G. McIntosh and *S. S. Diedrichs*, for appellants.

E. H. Evans, for appellee.

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

SIMMONS, C. J.

This is an action for specific performance of an alleged oral contract for the conveyance of land. The trial court found that the contract had been made and was fully performed by plaintiff, and decreed accordingly.

The administrator of the estate of Wilhelmia Lunkwitz, Augusta and Fred Mueller, defendants, appeal. We reverse the judgment of the trial court and dismiss the action.

The plaintiff Anna Lunkwitz is the daughter of Edward and Wilhelmia Lunkwitz. They will be referred to hereinafter as the father and mother. The defendants are the administrator of the estate of the mother; Henry Lunkwitz, son, and brother of the plaintiff; Augusta Mueller, daughter, and sister of the plaintiff; Fred Mueller, husband of Augusta; and Joney Lunkwitz, son of Augusta Mueller, who is joined as a tenant in possession. The children will be referred to hereinafter by their first names.

Plaintiff alleged that the mother died intestate in August 1945, and was the owner of a quarter section of land in Lincoln County; that her father and mother, and particularly the latter, promised and agreed orally, about the time of the acquisition of the land involved in 1917, that "should the plaintiff reside with them and care for them during their respective lifetimes that such property should become the sole property of the plaintiff and that title to such should be transmitted to her by deed or documentary disposition"; that her father was dead (his death, according to the evidence, having occurred in 1937); that her mother lived to be 78 years of age; that "during the last years of her life (she) was physically incapacitated and ill to such an extent as to require daily and constant care and that during all of the years from and after said promise of conveyance had been made the plaintiff remained with her parents in the family home, gave them daily and constant care and attention, and performed the manual work about the lands in question over a number of years and at the home where the parents of the plaintiff resided. * * * and that she cared for her said parents during their lifetime, and did toil in and about the place over all the years, in faithful compliance with her obligations as a

child, and in faithful performance of caring for said parents in compliance with their offer and promise that she should become the sole owner of said lands in question after their respective deaths"; that at various times over the years the mother reiterated her promise and agreement but death overtook her before her promise was consummated; that plaintiff, in "performance of her said obligation and so as to entitle her to the sole and independent title to said property has remained single and unmarried notwithstanding opportunities to wed that she has devoted her entire life and physical efforts to the support and care and attention of her parents and immediate family and that thereby she has fully performed her part of the offer and promise of said parents, and furnished full consideration for the specific performance thereof and * * * that the failure to carry out said agreement would operate as a constructive fraud upon the plaintiff, * * *."

The defendant Henry filed an unverified answer admitting the allegations of the plaintiff's petition and joining in the prayer. The administrator, Augusta, and her husband filed a joint answer denying the allegations material here.

The long-followed rule controlling cases of this character was restated in Overlander v. Ware, 102 Neb. 216, 166 N. W. 611, as follows: "In considering cases of this character, where one is claiming the estate of a person deceased under an alleged oral contract, the evidence of such contract and the terms of it must be clear, satisfactory and unequivocal. Such contracts are on their face void as within the statute of frauds, because not in writing, and, even though proved by clear and satisfactory evidence, they are not enforceable unless there has been such performance as the law requires. The thing done, constituting performance, must be such as is referable solely to the contract sought to be enforced, and not such as might be referable to some other and different contract—something that the claimant would

not have done unless on account of the agreement and with the direct view to its performance—so that nonperformance by the other party would amount to fraud upon him."

This rule has been repeatedly followed and applied down to Riley v. Riley, *ante* p. 176, 33 N. W. 2d 525.

We held in Lintz v. Apking, 145 Neb. 714, 18 N. W. 2d 55, that "The burden in the light of this rule has devolved upon the plaintiff (1) to prove an oral contract the terms of which are clear, satisfactory and unequivocal, and (2) that his acts constituting performance were such as were referable solely to the contract sought to be enforced, and not such as might have been referable to some other or different contract."

Again in Caspers v. Frerichs, 146 Neb. 740, 21 N. W. 2d 513, we held: "Generally in a suit to enforce specific performance of an oral contract embraced within the statute of frauds, the burden is upon the plaintiff to establish two distinct elements by a preponderance of the evidence which must be clear, satisfactory, and unequivocal in character or quality. Those elements are acts of part performance of the contract and the terms of the contract itself."

Each case is to be determined from the facts, circumstances, and conditions as presented therein. Lennox v. Anderson, 140 Neb. 748, 1 N. W. 2d 912.

The Lunkwitz family first lived near McCook where Augusta and then Henry were born. Sometime prior to 1898 they moved to Lincoln County, where they acquired by homestead and otherwise 320 acres of pasture and hay land with some 20 to 40 acres of farm land. There Anna was born in 1898. About 1910, when Augusta was 19 years of age, she gave birth to a son Joney. The family continued to live and work together. In 1914, a house was built on the home place. In 1917, the land involved in this action, about five miles from the home place, was purchased. About 1919, a farm was bought in Keith County. Some eight or nine years later

this land was sold. Augusta married in 1921. In 1933, Joney married. In 1936, the father and mother deeded the home place to Anna by warranty deed, without reservation, for a recited consideration of $1,000. The deed was recorded the day after execution.

In 1937, the father died at the age of 74 years. In 1945, the mother died.

This record discloses a family, living and working together in harmony. The education of the children is not shown with the exception of Henry, who testified to having only a first-grade education. With the exception of the time of Joney's birth, Augusta worked at home, in the fields, plowing, planting, and harvesting crops, and helping in the heavy labor of the farm not only at the home place but on the land in dispute, until her marriage at the age of 29 years.

Henry lived at home, likewise working on the home place. It appears that he farmed the Keith County land, or at least lived and worked on that land during the period of its ownership. After its sale he worked for neighbors and at home. He became disabled with rheumatism, which progressively became more crippling, and at the time of the trial he was not physically fit for much hard labor. He was living at home with Anna when this case was tried.

Anna likewise lived at home throughout, working as did the others, slowing up a bit in the later years when the tillable lands of the home place and of the land here involved have been rented.

Joney lived at the home until he was 23 years old. For the last ten years of that period he worked in the fields doing a man's work. He farmed the home place in 1932 and 1933 and again from 1941 to 1944 on a share basis, receiving two-thirds of the crop, and his grandmother and Anna one-third and the roughness. He farmed the land involved in this action from 1931 to 1940, and from 1943 to 1947. The first two years he

received one-half of the crop and the other years two-thirds of the crop.

It does not appear that any of the children received payment for labor performed. They got their keep. Joney said he trapped for spending money.

Beginning in 1908, the father became ill mentally and physically. He was at home most of the time until his death, doing some work but unable to carry the burdens of work the others performed, and requiring some care, which was rendered by Anna and the mother.

The mother appears to have been an active hard-working woman, both within the home and about the farm. She suffered from rheumatism and stomach trouble, for which she received medical treatment. She had two serious illnesses of a few weeks' duration. But with those exceptions she appears to have continued to work rather persistently until the last weeks of her life. When ill and when she needed to go to the doctor, Anna or Joney provided the care and transportation.

We now come to the evidence upon which plaintiff relies to prove the contract. One witness testified to a statement made by the mother 27 years prior to his testimony. Another testified as to conversations had with the mother two years before his testimony. We are mindful of our statements as to the probative value of such testimony made in Overlander v. Ware, *supra,* and later in Goodwin v. Freadrich, 135 Neb. 203, 280 N. W. 917.

A neighbor exchanging work and helping in the 1920 harvest on the land in question testified that on one occasion there were present at the dinner table the father, the mother, Augusta, Anna, and others. Mention was made of the land recently bought in Keith County and "* * * they said they had a quarter for each one of the girls; one for Anna and one for Gussie. They said: the one we are threshing on, was Anna's and the one south of Roscoe was Gussie's; providing, they werent (sic) married as long as the Old Folks lived."

This cannot be accepted as sufficient proof of the contract under the rule hereinabove stated. Obviously the statement is the conclusion of the witness as to what he remembers. Who said it? The "they" would indicate that both the father and the mother said the same thing in the same words—an obviously improbable occurrence. At best the statement is one of intention. It contains nothing in the nature of a promise, agreement or contract. There was no indication of an agreement on the part of either Anna or Augusta. Augusta testified that she never heard of any such conversation and knew nothing of such an agreement; yet, if there were such an agreement, it applied to both of the girls, and Augusta forfeited her right when she married. Anna testified that she rejected three proposals of marriage in 1925, 1929, and 1933, and that she rejected the proposals because her mother "asked" her to, "She didnt (sic) want me to leave her, she needed me," and she "stayed there at her request." The statement that there was a contract at that time becomes more improbable in view of the fact that not one of the family appears to have heard of it during all the intervening years before the mother's death. Not to be overlooked is the fact that it does not include the elements of the contract which plaintiff alleges, but rather goes to what plaintiff alleged she did in order to enable her to perform the contract alleged.

The other evidence which plaintiff submitted as proof of a contract was conversations which a witness had with the mother a short time before her death. He testified as to several conversations. One of these took place at the home a few months before the mother's final illness. He testified the mother then said, "Everything that is here then is supposed to go to Anna after her death." Again the statement is at best a statement of the witness' understanding, as is demonstrated by the use of the third-person pronoun. But the conversation took place at home. Anna then had a deed to the home place, and as we point out later herein, claimed ownership of the

principal items of personal property then there. The statement makes no direct mention of the land involved in this action.

The witness testified concerning another time when he was at the home visiting with the mother, and a suitor of Anna called. He stated the mother said that one son-in-law was enough, and that there would not be another on the place so long as she lived. Explaining why, she said, "Anna is doing the work, she kept the family going; if it hadnt (sic) been for the girls, I wouldnt (sic) have had enough to eat." He then asked her about making a will and the "properties," and she said she would make a will and "* * * what little is here, the girl is supposed to have." "Anna is supposed to have it." He testified that he discussed the matter again at the hospital a few weeks before her death and the mother said, "* * * there is only one thing that worries me, I havent (sic) made a will." She said that she intended to and "I make the will over to Anna." He testified that he talked with her again the day before her death when she was again at home and she said, "* * * I still am going over my Will. If I should get up, I am going to have Anna bring me to town and I am going to make this Will, what I have got left, in my name, is supposed to go to her."

It is noted that the witness states they discussed "properties." At that time the mother had title to but one piece of land—that involved in this action. It would seem from this and other evidence that she had in mind the home place, which already had been conveyed to Anna. The evidence contains no reference to any words of agreement or promise. Rather, the evidence shows that in her last months and last days, the mother was considering the making of a will and its provisions, and to this witness she revealed her thought that Anna should be the beneficiary of her will. This condition of mind is evidenced by the testimony of other witnesses. One witness testified that some two years before her death the mother told her she did not have a will and

that "There was only three heirs and there will be no trouble"—a not unnatural statement in view of the harmony that then appeared to exist among the children. Other witnesses testified that during the later months of her life, the mother told them that Anna had had enough and expressed a desire that Henry and Joney have the land in dispute. That disposition could only be made by will. The evidence does not disclose any thought in the mind of the mother that the disposition of this property had long since been determined by a binding agreement. Rather it discloses a disturbed mind as to how it should be done by will. If that question was finally determined in her mind it was not consummated by the execution of a will. That act cannot be done by the courts.

The proof as to the alleged contract does not meet the test as to quality of being clear, satisfactory, and unequivocal that the rule requires.

But plaintiff argues that any deficiency in the direct proof of the contract is supplied by the evidence of full performance of the contract on her part. We go then to the sufficiency of proof of performance under the rule.

The evidence establishes that plaintiff lived with and served her parents, cared for them, and worked long and hard. Is that evidence such as is referable solely to the contract sought to be enforced, something that the plaintiff would not have done unless on account of the agreement and with the direct view to its performance? We think not. The services rendered and care given were identical in kind to those rendered by plaintiff before the time of the alleged contract and those rendered by Augusta, Henry, and Joney both before and after the alleged contract was made, and without reference to any such contract or agreement.

Plaintiff likewise contends that the services performed were full consideration for the specific performance, and

that the failure to carry out the contract would operate as a constructive fraud upon her.

It is clear from the evidence that whatever property the father and mother acquired was accumulated by their joint efforts, together with those of the children, including Joney. At the time Augusta married and left home, the father and mother had the three farms free of debt, and personal property for their operation. The record indicates that the proceeds of the sale of the Keith County land went to the use of the family, excluding Augusta. Anna testified that the father and mother sold her the home place because they needed money; that she paid them $500 by check in 1934, $300 in 1935, and $200 in 1936; and that she took receipts for the money. She was asked about the receipts and the check and testified that they were lost. She also was asked to produce bank records showing the transaction and apparently made no effort to do so. On cross-examination, inquiry was made as to what "happened" to that money. She testified that "* * * she had places to pay out, I believe it was some here in Court and she gave some of it to Joney, for his funeral of his wife, and she gave him the money to buy a horse, and she gave him a good start, and she gave him money to buy a new Chevrolet car, and different second-hand cars"; and later "They were needing some to live on it." The $1,000 received from 1934 to 1936 was well spread out if so paid and spent. Was it so spent? The record contains evidence that in 1931 the mother paid for Joney a fine and possibly attorney fees on an illegal liquor sale matter. No other such event is shown in the record. Joney testified that the mother did not buy him a car; that he bought one in 1931; and that the mother did not pay for it. That was the year Joney was engaged in the illegal liquor business, on his own account according to Anna, and on the joint account of Anna and the mother, according to Joney. These events occurred three years before the first payment by Anna to her parents

is claimed to have been made. Joney testified that the mother did not buy him any farm equipment, and he testifies where he bought it. It is undisputed that he was farming on his own account in 1933, a year before the first payment is claimed to have been made. Joney's wife died. There is no showing as to who paid the funeral expense, but the death occurred in 1939, three years after the last payment of $200 is claimed to have been made.

Assuming that Anna paid the $1,000 for the deed to the home place, then we have the situation that the father and mother were in need of money in the depression years of 1934, 1935, and 1936, and that Anna, living and working with them, had money in reserve and exacted land in return for it. Whatever money Anna had, she secured as a result of her operations on the farms of her parents. No other source of income is suggested. There is undisputed evidence that the mother on several occasions through the years had considerable money about her person and the home, or, as one witness put it, she always had money. She had money "out" in 1943, represented by a promissory note, the collection of which was disturbing her. Anna testified that the mother had no money at the time of her death. During those last years the land involved in this action was rented and producing a return to the owner. Anna claimed ownership of the car and from one answer indicated a claim of ownership to all the personal property except her mother's "belongings."

The evidence shows that the father and mother owned cattle in the earlier years. Anna testified that some 30 years or more ago her mother gave her a heifer calf; that she kept her cattle unbranded; that by 1936, the father and mother owned no cattle and, as Anna stated, "At last, they were all mine"; yet they were raised and fed on the land of the father and mother. There is one reference to feed being purchased, the years not being shown. At the time of the trial Anna had a herd of 27

cattle. The mother was penniless, save for the land involved in this action.

It appears that Anna had collected her compensation as the years have progressed, and considering the economic status of the family, has been well paid, at least by contrast with that which the others received. To deny her petition does not mean that the plaintiff's work and services go unpaid.

We hold that the plaintiff has failed to prove the second element, namely, performance—within the rule.

It is unnecessary to consider plaintiff's cross-appeal as to the taxation of costs in the trial court.

The judgment of the trial court is reversed and the cause dismissed.

REVERSED AND DISMISSED.

DARRELL WILLOUGHBY, APPELLANT, V. JAMES O. SWETT, APPELLEE.
34 N. W. 2d 287

Filed October 15, 1948. No. 32428.

Appeal and Error. If no prejudicial error appears in the record, and the verdict returned by the jury has sufficient competent evidence to support it, the judgment entered on such verdict will not be disturbed on appeal.

APPEAL from the district court for Cass County: THOMAS E. DUNBAR, JUDGE. *Affirmed.*

Lloyd E. Chapman, for appellant.

Smith & Lebens, Cline, Williams & Wright, and *Warren C. Johnson,* for appellee.

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

PAINE, J.

The plaintiff brought action for damages for personal injuries caused by a collision between an automobile

he was driving and a Dodge truck on U. S. Highway No. 6. The plaintiff lost his left arm in the accident. Trial was had in the district court for Cass County. The plaintiff did not move for a directed verdict, and the jury returned a verdict for the defendant. Plaintiff appealed.

The evidence as found in the bill of exceptions discloses that the plaintiff was 33 years of age and was part owner of the Randolph Grocery in Lincoln; that he was returning from Louisville to Lincoln late Sunday afternoon, July 29, 1945, being alone in his DeSoto coupé; and that at a place a little less than a mile east of Greenwood a collision occurred between his coupé and a Dodge farm truck belonging to the defendant, a stockman and farmer, of Fairbury, about 57 years of age, who was taking eight cattle to the Union Stockyards at Omaha.

The plaintiff testified that he was at all times on the north side of the center line and was driving west at a speed of about 35 miles an hour; that just as he was passing the truck it came over across the center line toward him; and that the collision occurred when the truck was a foot to a foot and a half over on his side of the center line. The plaintiff's car then veered over to the left, ran through the ditch, and struck a heavy post supporting a signboard, which post crashed in the left front end of plaintiff's coupé.

F. L. Rank, a commercial photographer, of Lincoln, went to the scene of the accident on August 1, 1945, and took a half dozen pictures, which were introduced in evidence. Exhibit No. 1 showed a very heavy tire mark, a rubber burn. Other exhibits showed the plaintiff's car in its damaged condition.

The proprietor of the garage at Greenwood, A. J. Leadabrand, also testified to the marks on the highway about a foot and a half north of the center black line, and light marks where fresh concrete was gouged out. It was 60 inches between those gouge marks. He identified the broken rim and automobile tire from the left front wheel of plaintiff's car when they were introduced

in evidence. The car, when it stopped in the field, broke off one of the posts holding up a sign.

M. A. Carlson, a farmer from Waverly, testified that on Tuesday after the accident he went to the scene of the accident with W. H. Dick, a banker at Waverly, who asked him to ride out with him. He saw scratches on the pavement and dark marks where the tire had rubbed the pavement.

W. H. Dick testified that he drove out to the place of the accident at the request of the plaintiff's father and saw the tracks in the road, and that exhibit Nos. 1 and 2 are pictures that give a correct reproduction of what he saw.

The defendant's first witness was Glenn Ullstrom, who testified that he lived in Omaha and was a salesman for Ed Phillips & Sons Company, wholesale liquor distributors, and was driving to Lincoln with his brother, Frank Ullstrom, and wife; that he had been following the plaintiff's car for two or three miles; that he saw a medium-sized stock truck coming from the opposite direction; that he was less than a block behind the cars at the time of the collision; that at the time of the collision no part of the truck was over the middle black line of the road, but that plaintiff's car angled across the black line and struck the rear of the truck about even with the rear wheels; that the plaintiff's car slid off the back end of the stock truck into the ditch on the left-hand side of the road; and that the stock truck bounced almost off the pavement and stopped within 100 feet. Ullstrom said he stopped his car, and the plaintiff said to take him to a doctor. He then noticed that plaintiff's arm had been completely torn off, and he drove him immediately to the doctor in Greenwood. He then returned to the scene of the accident and found that no one had called the highway patrol. He drove back to the grain elevator at Greenwood, called the highway patrol in Lincoln, and then drove on to Lincoln. He

never noticed any broken glass or debris at the point of the collision.

Frank Ullstrom testified that he had been the appropriations clerk in the State Treasurer's office for 15 years, and his brother was bringing him and his wife back to Lincoln after spending the week end in Omaha; that their car was being driven 35 to 40 miles an hour; that they had been gradually gaining on the plaintiff's car ahead of them, which he testified was going about 25 or 30 miles an hour; that he saw the actual collision, and testified that immediately prior to the collision part of plaintiff's car was south of the center line of the road, at least two feet; that when the collision occurred he thinks they were about 50 yards behind; that the plaintiff did not cross the center line abruptly, but just slowly crossed it; and that after the collision the plaintiff's car went down the road a ways, then to the left through the ditch and into the edge of a cornfield.

The defendant testified that as the plaintiff approached him he thought he was going to hit him and so he swerved to the south to avoid being hit, so his right duals were off of the pavement, but plaintiff's coupé hit his stock rack over the back wheel of his truck. Defendant testified that he immediately stopped his truck and walked back about a hundred feet to the place of the accident.

The defendant identified exhibit No. 13, a picture of his truck after the accident, and marked a dark strip, "B", leading from the fourth and fifth upright stakes at the rear end of the truck at about the height of his cab window, which mark was made by blood from plaintiff's arm.

The trial court gave 14 instructions to the jury, and their verdict was for the defendant. The motion for new trial was overruled.

The plaintiff assigned as error: (1) That the verdict of the jury for the defendant was wrong because the jury disregarded the physical facts and circumstances

and the overwhelming evidence which required a verdict in favor of the plaintiff and against the defendant; and (2) that the verdict for the defendant induces the belief that such verdict must have been found by the jury through passion, prejudice, or mistake.

It will be noted that the plaintiff does not assign error in any of the instructions given to the jury. The two questions assigned as error, therefore, required an examination of the evidence, for which reason we have set it out briefly in this opinion. A careful examination of this testimony on the points in dispute appears to this court to fully support the verdict rendered by the jury.

This court has adhered to the rule that if no prejudicial error appears in the record, as in the case at bar, and the verdict returned by the jury has sufficient competent evidence to support it, the judgment entered on such verdict will not be disturbed. See, Torres v. Bollman, 149 Neb. 762, 32 N. W. 2d 642; Blanchard v. Lawson, 148 Neb. 299, 27 N. W. 2d 217; Gallagher v. Law, 135 Neb. 381, 281 N. W. 806.

It is contended by the defendant in the case at bar that the evidence is in conflict, and is such that reasonable minds might draw different conclusions therefrom. In such a case, a verdict of the jury supported by substantial competent evidence will not be set aside on appeal. See, Dischner v. Loup River Public Power District, 147 Neb. 949, 25 N. W. 2d 813; Moore v. Krejci, 139 Neb. 562, 297 N. W. 913.

Finding no reason to question that the verdict rendered was right and was not the result of passion or prejudice, the judgment entered thereon is hereby affirmed.

AFFIRMED.

IN RE ESTATE OF JOHN BUCY, DECEASED. CLARENCE E. BUCY ET AL., APPELLEES, V. JESSIE HIEBER ET AL., APPELLANTS.
34 N. W. 2d 265

Filed October 15, 1948. No. 32430.

1. Wills. A presumption of the due execution of a will arises from the presence of an attestation clause which recites the facts necessary to the validity of the will and in the absence of evidence discrediting the statements the will is entitled to admission to probate.
2. ———. Where a prima facie case as to testamentary capacity and ability of the testator to transact ordinary business is made and contestant offers no evidence touching testamentary capacity such proof on the part of the proponent is sufficient upon which to admit the will to probate.
3. ———. Where in a will contest the proponent has made a prima facie case that the testator was mentally competent to make a will, the contestant must produce sufficient evidence to support a contrary finding by a jury, otherwise there is no disputed question of fact to submit to a jury.
4. ———. In the contest of a will on the ground of mental incompetency of the testator the trial court should withdraw the issue from the jury and direct a verdict for the proponent where the evidence is insufficient to support a finding of testamentary incapacity.

APPEAL from the district court for Burt County: HENRY J. BEAL, JUDGE. *Affirmed.*

A. D. Raun, C. O. Stauffer, and *Keith Hopewell,* for appellants.

H. R. Ellenberger, for appellees.

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

YEAGER, J.

This is an appeal by Jessie Hieber and others, contestants and appellants, from a judgment of the district court for Burt County, Nebraska, admitting to probate the last will and testament of John Bucy, deceased. Clarence E. Bucy and others are proponents and appellees.

The objectors filed objections to the probate of the will on the grounds, among others, that at the time of the execution of the will offered for probate John Bucy was not possessed of sufficient mental or physical capacity to make a will; that he was mentally incompetent to understand, realize, or appreciate what disposition he had made or was making of his affairs and did not comprehend or understand its meaning or effect; and that the instrument is not the last will and testament of the said John Bucy.

The other objections found no support in evidence or by presumption in the district court hence they were not considered there and in consequence require no consideration in this opinion.

A jury was duly impaneled to try the issues presented by the objectors after which the proponents produced the will, had it identified, and called the two attesting witnesses to the will who testified to the facts and circumstances surrounding the signing and witnessing of the will. They and each of them testified to many years of acquaintanceship with the testator and of frequent contacts with and observations of him over the years down to and including the date the will was executed. Under appropriate questioning they gave it as their opinion that within the purview of legal requirements and exactions the testator was capable of making a valid will. They testified that the testator signed the will in their presence and that they signed the will at the request of the testator in his presence and in the presence of each other. The foundation for or the competency of this testimony is not brought into question on this appeal. The will had appended the usual attestation clause signed by the witnesses.

At the conclusion of this testimony the proponents rested their case whereupon the objectors moved for a directed verdict in their favor on the ground that the proponents had failed to prove that the will offered and received in evidence was the last will and testament of

John Bucy, deceased, and on the further ground that the proponents had failed to prove a prima facie case by competent evidence, that is that they had failed to prove that at the time the will was executed the testator knew the nature of the act he was performing, that he knew the nature, extent, location, and value of his property, that he knew the natural objects of his bounty, and that he knew the effect of the instrument signed by him.

Thereafter, with leave of court, the proponents withdrew their rest and adduced additional evidence. They called a licensed and practicing physician who had frequently attended the testator and who in the light of appropriate questioning gave it as his opinion that the testator had sufficient mental capacity to make a valid will. The competency of this evidence or of the witness to give testimony is not brought into question.

The proponents again rested whereupon the objectors renewed their motion for a directed verdict.

The motion was overruled. The objectors adduced no evidence and announced to the court that they were standing on their motion for a directed verdict.

Thereupon the proponents moved for a directed verdict in their behalf or in the alternative that the jury be discharged and that judgment be entered admitting the will to probate. This motion was sustained. The jury was discharged and judgment rendered as prayed by proponents.

It is from this judgment that the objectors have appealed. As grounds for reversal they assert that the district court erred in finding and decreeing that the instrument in controversy was the last will and testament of John Bucy, deceased, and that the district court erred in not sustaining contestants' objections to the said purported will.

There being no evidence on behalf of objectors the sole question for determination is that of whether or not the evidence of proponents is sufficient within the meaning of established legal principles as proof that the instru-

ment in question is the last will and testament of John Bucy, deceased.

The evidence of proponents has already been summarized and reviewed herein and it will therefore not be repeated.

The following rules are applicable to the situation described in this case:

"A presumption of the due execution of a will arises from the presence of an attestation clause which recites the facts necessary to the validity of the will, and, in the absence of evidence discrediting the statements, the will should be admitted to probate." Holyoke v. Sipp, 77 Neb. 394, 109 N. W. 506.

"Where a prima facie case is made as to testamentary capacity and ability of deceased to transact ordinary business, and contestant offers no evidence touching the testamentary capacity of deceased, then such proof, in this respect, on part of proponent of will is sufficient." In re Estate of Wotke, 133 Neb. 739, 277 N. W. 45.

Where in a will contest the proponent has made a prima facie case that the testator was mentally competent to make a will, the contestant must produce sufficient evidence to support a contrary finding by a jury, otherwise there is no disputed question of fact to submit to a jury. In re Estate of Thomason, 144 Neb. 300, 13 N. W. 2d 141.

"In the contest of a will on the ground of mental incompetency of the testator the trial court should withdraw the issue from the jury and direct a verdict for the proponent where the evidence is insufficient to support a finding of testamentary incapacity." In re Estate of Thomason, *supra*.

From the record as outlined and analyzed in the light of these legal principles it becomes clear that the district court did not err in dismissing the jury and admitting the will of John Bucy, deceased, to probate.

The judgment of the district court is affirmed.

AFFIRMED.

FRED MCNALLY, APPELLEE, v. LOUIS PONCE ET AL., APPELLANTS.

34 N. W. 2d 262

Filed October 15, 1948. No. 32470.

1. **Trial.** Where from the facts adduced to sustain an issue reasonable minds can draw but one conclusion it is the duty of the court to decide the question as a matter of law rather than to submit it for determination to a jury.
2. **Contracts.** In a broad sense a contract is an agreement, obligation, or legal tie whereby a party binds himself, or becomes bound, expressly or impliedly, to pay a sum of money, or to perform or omit to do some certain act or thing.
3. **Trial.** Where a motion for a directed verdict is made or where there is a motion for the discharge of the jury and for judgment in favor of the moving party the evidence must be viewed in the light most favorable to the party against whom the motion is made.

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

Carr & Hoagland, for appellants.

C. L. Baskins, for appellee.

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

YEAGER, J.

This is an action at law by Fred McNally, plaintiff and appellee, against Louis Ponce and Jess Ponce, defendants and appellants, for the balance claimed to be due on a promissory note.

A jury was duly impaneled to try the issues. At the conclusion of the evidence a motion was made by plaintiff for a directed verdict in his behalf or in the alternative that the jury be dismissed and that judgment be rendered in his favor. The motion was sustained, the jury dismissed, and judgment was rendered in favor of plaintiff and against the defendants for $1,006.55 with interest at eight percent per annum from the date of

judgment and for costs in the amount of $46.63. From this judgment the defendants have appealed.

The note which was the basis of the action was dated March 22, 1946, was for $1,700 with interest at the rate of eight percent per annum, and due November 20, 1946. The note was past due when the action was commenced. Evidently the note was secured by a chattel mortgage on certain farm equipment and machinery. The mortgage has not been described in either the pleadings or evidence and it has not been adduced as an exhibit. Both parties however treat and assume it, without objection, basic in the determination of the questions presented by this appeal.

The petition sets forth the note and certain credits thereon and declares a balance due and prays for judgment for the balance with interest and costs.

The pleadings of defendants admit the execution of the note, claim certain credits which had not been allowed by plaintiff, and charge, not too definitely, that a chattel mortgage was given to secure payment of the note; that to obtain possession of the property described in the mortgage for the purpose of foreclosure plaintiff instituted an action in replevin; that one Stanley Carlson went to the premises of one of the defendants in the company of the plaintiff; that at that time an agreement was entered into whereby the said defendant permitted them to take the machinery and equipment in settlement and satisfaction of the balance due and owing on the note; and that the machinery and equipment was at that time so received in satisfaction of such balance. The pleadings set forth further that relying on the alleged agreement the defendants did not defend the replevin action and that by reason of the premises the judgment in replevin was void.

For reply the plaintiff alleged the commencement of the replevin action and alleged that the property taken was properly taken therein; that the action proceeded to judgment; and that sale of the property was duly ad-

vertised, sale had, and the amount received duly credited on the note. Plaintiff denied that any agreement was ever entered into for the purpose of or in settlement of the balance due on the note.

On the trial as in the pleadings the plaintiff admitted certain credits on the note. These were made up of certain payments and the amount received as the proceeds of the sale of the property taken under the writ of replevin. There was no contest in this respect. Other credits were proved by defendants and as to them the plaintiff made no contest. The sole question therefore was as to whether or not there was sufficient proof of the agreement alleged by defendants to require the submission of the question of its existence to a jury. The district court concluded that there was not sufficient such evidence. From this conclusion and the resultant judgment the defendants have appealed.

While it is true that there are other assignments of error set forth in the brief yet a determination upon this one is decisive of the appeal herein. If there was no agreement, all other matters standing without substantial contradiction or dispute, the proper function of the court was to render judgment upon the note according to its tenor and effect, after allowing proper deductions, in accordance with the motion made by plaintiff at the conclusion of the evidence.

The appropriate rule is the following: "Where the facts adduced to sustain an issue are such that reasonable minds can draw but one conclusion therefrom, it is the duty of the court to decide the question, as a matter of law, rather than submit it to a jury for determination." Loudy v. Union P. R. R. Co., 146 Neb. 676, 21 N. W. 2d 431; McIntosh v. Union P. R. R. Co., 146 Neb. 844, 22 N. W. 2d 179. See, also, Witthauer v. Paxton-Mitchell Co., 146 Neb. 436, 19 N. W. 2d 865.

The determination of whether or not there was sufficient evidence upon which to submit the question of the existence of the agreement claimed by defendants

depends upon the evidence of the defendant Jess Ponce. No other witness testified to the existence of any such agreement.

The entire testimony in this respect is the following: "Q And, did someone come out to the place at that time; Mr. McNally out there? A Mr. McNally and the deputy sherrif. Q And, who was the deputy sherrif? A Stanley Carlson, I think. * * * Q Did you have a conversation with them at that time, either with Mr. McNally, or with Mr. Carlson in the presence of Mr. McNally? A I did. Q Just tell us what was said and by whom it was said, as near as you can in the conversation you had there together. * * * A Well, he said that—* * * A Mr. Carlson said to me, Jess since you can't pay Mr. McNally for the mortgage, he says he has taken over the machinery, and he handed me a slip of paper and he says he takes over the machinery and that will make everything all right. * * * Q And, was all of the property delivered to Mr. McNally, at that time? A It was. * * * Q What did you say the sherrif told you when they were out there; the deputy sherrif? A he told me as long as I couldn't pay Mr. McNally what I owed him he was going to take the machinery, and that would make everything all right. Q He told you that he was going to take the machinery? A That is right. Q He told you that he had a Court order? A He gave me a paper too. Q And, he gave you a copy of the replevin? A That is right. Q Mr. McNally didn't say anything to you? A No. Q Mr. McNally was accompanied with Carlson when he was there, wasn't he? A He was. Q He stated nothing to you in any shape or form about it? A They told me to get in the car; he was going to get the equipment. * * * Q Now, Mr. McNally never told you that he was ever going to take that machinery there? A He didn't say a word. Q He didn't say a word about that in any shape, way or form? A No, he didn't say a word. * * * Q Now, while you were talking about that, who did the talking to you there at your place? A Well, mostly

Mr. Carlson. Q Mr. Carlson told you that he was going down there and get that machinery, didn't he? A That is right. Q And, he was the one that asked you into the car and go on down with him? A Yes, and Mr. McNally said so too."

In its broad sense a contract is an agreement, obligation, or legal tie whereby a party binds himself, or becomes bound, expressly or impliedly, to pay a sum of money or to perform or omit to do some certain act or thing. 17 C. J. S., Contracts, § 1, p. 310.

In the case at bar there was neither offer of anything by plaintiff nor acceptance by defendants and likewise there was neither offer by defendants of anything nor acceptance by plaintiff. There appears to have been no conversational interchange whatever between plaintiff and defendant Jess Ponce with regard to the subject matter of the chattel mortgage or note. In fact there is not even a conversational interchange between the deputy sheriff and Jess Ponce recorded in the bill of exceptions. The sum total of what occurred conversationally at the time in question was a declaration by the deputy sheriff as to his purpose in being on the premises and a direction to Jess Ponce to accompany him to aid in locating the property sought to be taken under the writ of replevin.

The evidence viewed in the light most favorable to defendants, as it must be viewed, that is after resolving every controverted fact in their favor and allowing them the benefit of every reasonable inference, falls far short of proof of the agreement pleaded by the defendants in their answer. Dickman v. Hackney, 149 Neb. 367, 31 N. W. 2d 232.

It cannot therefore be said that the court erred in dismissing the jury and rendering judgment in favor of the plaintiff.

The judgment of the district court is affirmed.

AFFIRMED.

REUBEN BORDY, APPELLEE, V. ROBERT SMITH, APPELLANT, COUNTY OF DOUGLAS, APPELLEE, SCHOOL DISTRICT OF OMAHA ET AL., INTERVENERS AND APPELLANTS, METROPOLITAN UTILITIES DISTRICT, INTERVENER AND APPELLEE.
34 N. W. 2d 331

Filed October 15, 1948. Nos. 32448, 32449, 32450.

1. **Officers.** The liability of a public officer in this state for funds entrusted to his care by virtue of his office is that of an insurer, except as it has been modified by statute.
2. **Interest.** It is the general rule, where there is no statute to the contrary, that interest becomes a part of the fund by whose investment it was produced.
3. **Cases overruled.** Scotts Bluff County v. McHenry, 130 Neb. 717, 266 N. W. 586, and County of Wayne v. Bressler, 32 Neb. 818, 49 N. W. 782, are overruled.

APPEAL from the district court for Douglas County: JACKSON B. CHASE, JUDGE. *Affirmed as modified and remanded with directions.*

Swarr, May, Royce, Smith & Story, for appellant Robert Smith. *W. Ross King, Edward F. Fogarty, Edward Sklenicka, James M. Paxson,* and *Herbert M. Fitle,* for appellants School District of Omaha and City of Omaha.

James J. Fitzgerald, Ephraim L. Marks, Alfred A. Fiedler, and *Dana Van Dusen,* for appellees.

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

WENKE, J.

This action involves the question as to who is entitled to the sum of $10,328.35 received by Robert Smith, defendant and appellant, as interest on the proceeds of tax foreclosure bids delivered to him by the sheriff of Douglas County.

The stipulated facts are that defendant and appellant, Robert Smith, as clerk of the district court for Douglas

County, received from the sheriff of said county, pursuant to the provisions of section 77-1912, R. S. 1943, the proceeds of all bids in tax foreclosures instituted by Douglas County. While holding these funds, pending the ultimate disposition thereof, appellant invested part of the funds in United States Treasury certificates. It is the interest received from these investments, during the period from October 2, 1943, to June 6, 1947, that is here involved.

The trial court held that the funds belonged to Douglas County. From this holding the defendant Robert Smith, clerk of the district court for Douglas County, the School District of Omaha, an intervener, and the City of Omaha, an intervener, have appealed. For convenience we shall refer to the parties as clerk, county, city, and school district.

Prior to September 7, 1947, the effective date of what are now sections 77-2326.01 to 77-2326.09, inclusive, R. S. Supp., 1947, passed by the 1947 Legislature, there appears to have been no statutory provisions providing a depository for funds held by clerks of the district courts. In the absence of such statute a public officer in this state is an insurer of funds which are entrusted to his care by virtue of his office. As stated in Village of Hampton v. Gausman, 136 Neb. 550, 286 N. W. 757: "The liability of a public officer in this state for funds entrusted to his care by virtue of his office is that of an insurer, except as it has been modified by statute. Ward v. School District No. 15, 10 Neb. 293, 4 N. W. 1001; Thomsen v. Hall County, 63 Neb. 777, 89 N. W. 389." See, also, Knox County v. Cook, 126 Neb. 477, 253 N. W. 649. In City of Cozad v. Thompson, 126 Neb. 79, 252 N. W. 606, we approved the following from 22 R. C. L. 226, § 5: "He is answerable in all events. The theory on which the doctrine is based is that a public officer having public moneys in charge is a debtor bound to account and pay over the exact sums received."

There are jurisdictions wherein the courts hold that

where the officer is thus absolutely liable for the moneys received by him he thereby becomes, in effect, the owner thereof and can keep any interest earned thereon. Therein he is only required to account for the money received and this even when the statutes make it an offense for the officer to use or loan the funds. As stated in Commonwealth v. Godshaw, 92 Ky. 435, 17 S. W. 737, wherein a recovery of the interest was denied: "The whole theory of the public official being bound for the money at all hazards is, that by the terms of his bond he agrees to pay the money over when collected without any condition annexed to his liability, and that as between the State and the official in determining this liability it must be treated as his money and not that of the State. * * * It results, therefore, that no recovery can be had for this interest either of the principal or the surety collected up to the 14th of September, 1886." As stated in State v. Walsen, 17 Colo. 170, 28 P. 1118: "In those jurisdictions where the liability of the officer is held to be absolute, no action can be maintained against him for the interest or profits made upon the money, in the absence of a statute authorizing such recovery." See, also, Maloy v. County Commissioners, 10 N. M. 638, 62 P. 1106.

Under this theory our holding in Scotts Bluff County v. McHenry, 130 Neb. 717, 266 N. W. 586, which is an identical fact situation, would be correct. Therein we held: "Interest received on public funds held by a county officer is a perquisite."

However, we do not think these cases reflect the true relationship and liability of the public officer. As stated in Rhea v. Brewster, 130 Iowa 729, 107 N. W. 940:

"As noted, these decisions rest upon the assumption that the obligation of the official is that of a private indebtedness, and hence the rule which requires the trustees in all cases to account for profits does not apply. We think that the clerk of the district court in receiving fees or moneys by virtue of his office does not become the owner thereof, * * *. He does not become the owner

of the property or moneys received. He is simply the custodian thereof. He receives his compensation from the county and is bound not merely to pay, but to account and pay over all moneys coming into his hands by virtue of his office.

"The true test, as it seems to us, is not whether he is absolutely liable to account, but whether he is the owner of the funds in his hands. If he is not such owner and the moneys coming into his hands, belong to the county or some one else, any increment thereto is and should be treated as a part of the principal. This is the view approved in the better considered cases, and the only one consonant with sound public policy. In an early New York case (Board of Supervisors v. Wandel, 6 Lans. (N. Y.) 33; Id., 59 N. Y. 645) a county treasurer was held liable for interest received by him on county funds, not only because of his fiduciary relation, but for the interest belonging to the county, the court saying: 'The notion that a public officer who would keep back interest which he has received upon a deposit of public moneys as a prerequisite of office, is an affront to the law and morals; * * *.'"

As stated in State v. Anderson, 117 Kan. 117, 230 P. 315: "The weight of authority, although there is some difference of opinion on the subject, is to the effect that interest paid by a bank on money in the custody of an officer does not belong to him, but to the beneficial owner of the fund. (29 Cyc. 1425; 22 R. C. L. 465.) Various reasons are given for this view, some of them more or less technical, involving the question of where the title is vested and the character of the trust. Regardless of analogies and of the words that may be used to describe the relations of the persons concerned, we think the right of the real owner of the fund to whatever interest is paid upon it may be best sustained on the ground that it is against good conscience that one under a public duty to care for money intrusted to him by virtue of his office shall receive and keep for his own benefit what it has

earned during his custody. That the practice may have been tolerated and condoned does not affect the matter. We do not believe that enlightened public sentiment has countenanced it."

We think the reasoning in Adams v. Williams, 97 Miss. 113, 52 So. 865, 30 L. R. A. N. S. 855, is particularly applicable and correctly reflects the relationship and liability of a public officer with reference to the earnings on any funds he may receive as such officer. Therein it is said: "It is a very singular confusion of mind into which some courts have fallen, when they say, as is argued for appellee, that, if an officer is absolutely bound as an insurer, therefore any interest which he receives on the money is his, and not the state's. As well remarked by Judge Newman, quoted in the McFetridge case: 'Nobody ever heard of the claim that a common carrier, by reason of its absolute liability, became the owner of the goods it carried.' And in the main case (84 Wis., at page 517, 54 N. W., at page 11, 20 L. R. A., at page 237) the court says: 'While such absolute liability of the treasurer will be assumed, for the purposes of the case, it seems to us that no such conclusion necessarily results therefrom. The treasurer may well be held liable absolutely for all money of the state coming into his hands, and be held liable also for interest on deposits. As stated in another form, such absolute liability does not estop the state to maintain that such interest was received by the treasurer, by virtue of his office, and belongs to his office.' And this we think is plainly sound. It is a complete non sequitur to say that, because Williams was an absolute insurer, therefore the interest belonged to him. The two principles have no relation whatever to each other. Once settled clearly and definitely whose money the principal sum was, the interest necessarily belongs to that person as an increment to the principal fund, and to argue to the contrary is simply to lose one's self in a metaphysical fog of sophistry, failing to give effect to the central principle of right and

justice, making the interest the property of the party who owned the principal sum." To like effect and for further discussion of this principle see Williams v. Hooks, 199 N. C. 489, 154 S. E. 828; Puckett v. Walker, 194 Ga. 401, 21 S. E. 2d 713; State v. McFetridge, 84 Wis. 473, 54 N. W. 1, 20 L. R. A. 223; Vansant v. State, 96 Md. 110, 53 A. 711. As stated in Nemaha Valley Drainage District v. Nemaha County, 100 Neb. 64, 158 N. W. 438: "It is the general rule, where there is no statute to the contrary, that interest becomes a part of the fund by whose investment it was produced, * * *."

Pursuant to this conclusion the interest, as an increment thereof, goes to those to whom the principal sum belongs. It necessarily follows that it cannot be a perquisite of the office, whether that of a clerk of the district court or otherwise, and our holding to that effect in the case of Scotts Bluff County v. McHenry, *supra,* is therefore overruled.

Our opinion in the case of County of Wayne v. Bressler, 32 Neb. 818, 49 N. W. 782, is also cited as authority for the proposition that this action cannot be maintained. That case, although involving a county treasurer, is similar in fact. A reading of the opinion does not clearly reflect the basis of the holding. The opinion would indicate that it was based on the proposition that no civil action would lie because of the relief granted by section 124 of the criminal code, which is now section 28-543, R. S. 1943. It also mentions the case of State v. Keim, 8 Neb. 63, to the effect that an unauthorized or unsatisfied loan or deposit of public money constitutes no cause of action in the name of the state and cites subsequent authorities based thereon. However, in Farmers & Merchants Banking Co. v. City of Red Cloud, 62 Neb. 442, 87 N. W. 175, we overruled State v. Keim, *supra.* Therein we held: "When an officer charged with the collection and custody of public money unlawfully deposits the same in a bank for safe-keeping, and the same is subject to the check or demand of such officer, the

state, county or other municipal body for whom such officer acted may maintain an action in its own name to recover such deposit. State v. Keim, 8 Nebr., 63, overruled."

We do not think the criminal statute, section 28-543, R. S. 1943, which, upon conviction thereunder, imposes "a fine equal to double the amount of money or other property so embezzled" in any way limits or restricts the right of the proper parties to maintain a civil suit to collect the interest or increment to funds which are actually theirs but which a public officer may have invested contrary to the provisions thereof. However, if it can be said that the case of County of Wayne v. Bressler, *supra,* intended to hold that because of the heretofore quoted provisions of the criminal statute no civil suit can be maintained against public officers to recover for funds owing, such as here, we think it is in error and should be and is overruled.

The clerk suggests that a decision to the effect that the interest money belongs to the beneficial owners would present serious difficulties in determining who are such owners and in computing how much each would be entitled to receive. Such difficulties, if actually present, would be of no benefit to the clerk because the interest goes with the principal to the owners thereof and no difficulty in determining such owners and their proportionate share thereof would entitle the clerk to keep such funds. The same is true of the county's reference to the difficulty of division as a basis for letting them keep the whole thereof. See, City of Chicago v. Danisch, 224 Ill. App. 454; Puckett v. Walker, *supra.*

Since the interest passes to the beneficial owners of the funds and is not a perquisite of the office there is no merit to the county's claim that it should receive the same under the provisions of section 33-106, R. S. Supp., 1947, which provides that: "The clerk of the district court of each county shall in no case retain for his own use any fees, revenues, perquisites or receipts, fixed,

enumerated or provided in this or any other section of the statutes of the State of Nebraska, but shall * * * pay the same to the county treasurer who shall credit the same to the general fund of the county." Nor is this interest revenue or receipts as fixed, enumerated or provided for by the statutes of the state but it is interest on unauthorized loans clearly not within the contemplation thereof.

As already stated, the sum of $10,328.35 was received by the clerk as interest on United States Treasury certificates in which, during the period from October 2, 1943, to June 6, 1947, part of the funds received in tax foreclosures was invested.

We direct that this interest be divided proportionately between the beneficial owners of the funds which had been paid to the clerk in tax foreclosure cases on and prior to October 2, 1943, and then held by him, and all such funds paid to him thereafter, up to and including June 6, 1947. In making such division each party is to receive that proportionate share of the interest as the amount he has or may receive from the tax foreclosures, from which said funds as hereinbefore defined were received, bears to the total thereof.

As to who is entitled to the benefit of this interest, which attaches itself to the principal, it would appear that it should be distributed to several different groups. In those cases wherein the property was or may be redeemed or the sale was or may be set aside, the bid necessarily was or will be returned to the bidder. Consequently, in such cases the bidder is entitled to his proportionate share of the interest. Where the sale was or may be confirmed and the proceeds of the bid distributed the interest should be distributed in the same proportion as the bids are distributed. In some instances this may result in some owner of an equity of redemption or a lienholder being entitled to participate if the amount of the bid exceeds the total of costs, general taxes, and special taxes, if any.

As to the amount distributed upon confirmation to apply on general taxes the interest proportioned thereto should flow to the various political subdivisions that are entitled thereto. It would appear that the division of such funds are proportioned as follows: 20 percent to the county and 80 percent to the city. Of the amount received by the city, the school district receives 44.8276 percent thereof and the Municipal University of Omaha 3.4483 percent, the balance being held by the city. As to whether or not there is any distribution of the share received by the county the record does not show. In any event the interest allocated to the amount applied on general taxes should be distributed proportionately to the recipients of the taxes.

The case is therefore affirmed insofar as it holds that the clerk is not entitled to the fund but is modified as to whom it should be distributed with directions that a decree be entered ordering distribution in accordance herewith.

AFFIRMED AS MODIFIED AND REMANDED WITH DIRECTIONS.

UNION TRANSFER COMPANY ET AL., APPELLEES, V. BEE LINE MOTOR FREIGHT ET AL., APPELLANTS.
34 N. W. 2d 363

Filed October 28, 1948. No. 32419.

1. **Public Service Commissions.** The term "willful failure," as used in section 75-238, R. S. 1943, is such behavior through acts of commission or omission which justifies a belief that there was an intent entering into and characterizing the failure complained of.
2. ———. Where there is evidence which, if believed, is sufficient to sustain the finding of the railway commission that a willful failure to comply with an order of the commission had occurred, an order based on such finding is not unreasonable or arbitrary.
3. ———. Unless an order of the railway commission is shown

to be unreasonable or arbitrary, this court is not authorized to interfere with the power of the commission to regulate common carriers.

4. ———. The operating rights authorized by a certificate of convenience and necessity are not subject to lease after the revocation of the certificate, and an order of the railway commission denying an application to lease is not unreasonable or arbitrary under such circumstances.

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

Willard F. McGriff and *R. E. Powell,* for appellants.

Harry E. Gantz, Donald E. Williams, George E. Truman, and *George E. Wiard,* for appellees.

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

CARTER, J.

This is an appeal from an order of the Nebraska State Railway Commission vacating a portion of the operating authority granted to the Western Ice and Cold Storage Company by a certificate of convenience and necessity and denying the joint application of the Bee Line Motor Freight and the Merchants Motor Freight, Inc., successor in interest to Western Ice and Cold Storage Company, requesting that the former be permitted to lease from the latter the operating rights revoked by the vacation of a portion of the operating authority granted by the aforesaid certificate.

The record shows that on March 28, 1938, the railway commission issued a certificate of public convenience and necessity to the Western Ice and Cold Storage Company authorizing certain regular and irregular route operations for the hauling of commodities generally. One of the routes was from Sidney to Chadron and return, via Scottsbluff, Alliance, and Crawford. On October 7, 1943, the railway commission approved the lease of these operating rights evidenced by the certificate to Merchants Motor Freight, Inc., for three years.

Further lease agreements were made which purported to extend the lease to October 7, 1949. On February 19, 1948, the railway commission approved the extension of the lease to October 7, 1949.

On July 8, 1946, Bee Line Motor Freight sought authority from the railway commission to lease from Merchants Motor Freight, Inc., the Sidney-Chadron route, via Scottsbluff, Alliance, and Crawford, more particularly described in the certificate of convenience and necessity originally issued to the Western Ice and Cold Storage Company. The evidence shows that Bee Line Motor Freight has authority to operate other routes within the state and has terminals in Omaha and Scottsbluff. It is also shown that Bee Line Motor Freight has an option to purchase these operating rights from Merchants Motor Freight, Inc., and the latter has a similar option to purchase from the Western Ice and Cold Storage Company which it claims to have exercised. Bee Line Motor Freight asserts an intent to exercise its option to purchase as soon as possible.

On July 30, 1946, a complaint was filed by Union Transfer Company, Brown Transfer Company, State Transfer Company, and Neilsen-Petersen Transfer Lines, all being common carriers operating between Sidney and Scottsbluff, alleging that Merchants Motor Freight, Inc., since its lease of the operating rights from the Western Ice and Cold Storage Company on October 7, 1943, had failed to serve any points north of Sidney and had thereby abandoned its rights, that it had not held itself out as a common carrier to the points involved in the application and, by reason of the abandonment, it now has no rights to transfer to the Bee Line Motor Freight.

The evidence shows, and the representative of Merchants Motor Freight, Inc., admits, that the latter has not operated over the route in question since it leased the operating rights on October 7, 1943. The evidence is that war conditions and post-war difficulties made

it impossible to obtain necessary equipment and personnel. With more freight being offered by the public than its physical plant could handle, Merchants Motor Freight, Inc., found it necessary to spread its available equipment very thin. This resulted in its equipment being used in territories where business was heavier and in a failure to place any equipment on the route here involved. The representative of Merchants Motor Freight, Inc., testified that the volume of business in the territory was small and that a regular run over the route was impractical and nonprofitable. The primary question is whether such evidence is sufficient to sustain the order of the railway commission in vacating the operating authority of Merchants Motor Freight, Inc., in this territory.

The nature of the railway commission and the powers allotted to it have been set forth by this court in numerous decisions. Publix Cars, Inc. v. Yellow Cab & Baggage Co., 130 Neb. 401, 265 N. W. 234; Furstenberg v. Omaha & C. B. Street Ry. Co., 132 Neb. 562, 272 N. W. 756; In re Application of Hergott, 145 Neb. 100, 15 N. W. 2d 418. Briefly stated, the railway commission is created by section 20, article IV, of the Constitution. It is granted powers and duties which include the regulation of rates, service, and general control of common carriers as directed by the Legislature. In a field where the Legislature has not acted, the commission is authorized to exercise the powers and perform the duties enumerated in the constitutional provision. This means, of course, that the Legislature may properly enact specific legislation limiting the scope of the commission's powers.

Pursuant to the aforesaid authority, the Legislature in 1937 enacted a comprehensive act pertaining to the regulation of motor carriers for hire engaged in the transportation of passengers and property. The provisions of this act are found in sections 75-222 to 75-250, R. S. 1943. Among other things they provide for the

issuance of certificates of convenience and necessity. It is here contended that the certificate issued to the Western Ice and Cold Storage Company, out of which the claimed rights of Merchants Motor Freight, Inc., stem, was revoked contrary to the provisions of section 75-238, R. S. 1943. This section provides: "Permits and certificates shall be effective from the dates specified therein, and shall remain in effect until terminated as herein provided. Any such permit or certificate may, upon application of the holder thereof, in the discretion of the State Railway Commission, be revoked or may, upon complaint or on the commission's own 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 contended that the evidence does not establish a "willful failure" to comply and consequently the order revoking the certificate is arbitrary and unreasonable.

The word "willful" like many other words in our language has varied meanings which are dependent upon the nature of the subject under discussion. The word often denotes an act which is voluntarily, knowingly, or permissively done as distinguished from one which is accidental or otherwise beyond the control of the person to be charged. The general notion that a willful act implies a bad purpose is derived from criminal statutes. It has no such meaning when used in a statute to denounce an act not in itself wrong. "Willful failure," as used in section 75-238, R. S. 1943, is such behavior through acts of commission or omission which justifies a belief that there was an intent entering into and characterizing the failure complained of. A failure to perform an act for a long period of time, which is required by law to be performed, generally constitutes a willful failure to perform. In the case before us the

failure to put into effect the service authorized by the certificate of convenience and necessity for more than three years may well constitute a willful failure within the meaning of the statute. There is evidence that equipment and personnel could not be obtained to provide the authorized service. There is additional evidence that the service was not rendered because it was unprofitable to provide it. We think the evidence was sufficient to sustain the finding of the railway commission that the latter statement was true and that there was a willful failure to comply with the requirements of the statute or the orders, rules, and regulations of the railway commission. The willful failure or refusal of a carrier to obtain permission from the railway commission to discontinue in whole or in part the service authorized under a certificate of convenience and necessity constitutes sufficient grounds to suspend, change, or revoke the certificate under general rules adopted by the railway commission. No claim is advanced that any such permission was sought or obtained. The evidence being sufficient to sustain the finding of willful failure to comply, the holding that the operating rights had been abandoned, and the order revoking the certificate, cannot be said to be unreasonable or arbitrary. The railway commission clearly acted within the scope of its authority. The evidence is sufficient to sustain the action of the commission. Under such circumstances this court will not interfere with findings of fact made by the commission.

The order of the commission revoking the certificate of convenience and necessity as to the route here involved being in all respects valid, the denial of the joint application requesting that the Merchants Motor Freight, Inc., be permitted to lease its operating rights to Bee Line Motor Freight must necessarily follow. Operating rights which have been lawfully revoked cannot become subject to lease. A certificate of convenience and necessity is in the nature of a permit or license and

is not property in the ordinary sense. Effenberger v. Marconnit, 135 Neb. 558, 283 N. W. 223. It can be revoked in the manner and for the reasons which the Legislature prescribes. When such a revocation is lawfully made there is nothing left to be conveyed.

AFFIRMED.

RAYMOND W. REID ET AL., APPELLANTS, V. THE CITY OF OMAHA, A MUNICIPAL CORPORATION, ET AL., APPELLEES.
34 N. W. 2d 375

Filed October 28, 1948. No. 32414.

1. **Pleading.** A general demurrer admits all allegations of fact in the pleading to which it is addressed, if the allegations are issuable, relevant, material, and well pleaded, but does not admit the pleader's conclusions, except if supported by, and necessarily resulting from, the facts pleaded.
2. ———. A demurrer to a petition only lies to the statement of facts constituting the supposed cause of action, not to the prayer for relief, which may be much in excess of what those facts warrant the court to grant.
3. **Municipal Corporations.** A municipal corporation is a creature of the law established for special purposes, and its corporate acts must be authorized by its charter and other acts applicable thereto. It therefore possesses no power or faculties not conferred upon it, either expressly or by fair implication, by the laws which created it or by other laws, constitutional or statutory, applicable to it.
4. ———. The power conferred upon municipal corporations by their charters to enact ordinances on specified subjects is to be construed strictly, and the exercise of the power must be confined within the general principles of the law applicable to such subjects.
5. ———. Where a certain power is conferred upon a municipality and the method of its exercise is prescribed, such method constitutes the measure of the power.
6. ———. Plaintiffs' petition examined; and held to state a cause of action in alleging facts sufficient to disclose noncompliance and violation of certain provisions of the home rule charter of the municipality by its duly authorized officers.

APPEAL from the district court for Douglas County: JACKSON B. CHASE, JUDGE. *Reversed and remanded with directions.*

G. H. Seig, for appellants.

Fraser, Connolly, Crofoot & Wenstrand, Edward F. Fogarty, Edward L. Sklenicka, James M. Paxson, and *Herbert M. Fitle,* for appellees.

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

MESSMORE, J.

Plaintiffs brought this action against the metropolitan city of Omaha, its mayor and council, the Cassel Realty Company, the Metcalfe Construction Company, corporations, and Theodore W. Metcalfe, to obtain a judgment finding and declaring the acquisition by the city of a 20-acre tract of land referred to as Krug Park to be ultra vires, illegal, and void. The defendant city and members of its council demurred specially to the plaintiffs' third amended petition, challenging the plaintiffs' right to maintain the action and the jurisdiction of the court to entertain it. By agreement of the parties the special demurrers were overruled. The city of Omaha and the members of the city council demurred generally to the third amended petition of the plaintiffs. The general demurrer was sustained. Upon the overruling of the motion for new trial, plaintiffs appeal.

Plaintiffs contend the trial court erred in sustaining the general demurrer and dismissing plaintiffs' action, and that its judgment in such respect was contrary to law.

The sole question to be determined in this appeal is whether or not the plaintiffs' third amended petition states a cause of action. This requires an analysis of the petition under the well-established rule as follows: A general demurrer admits all allegations of fact in the pleading to which it is addressed, if the allegations are issuable, relevant, material, and well pleaded, but does

not admit the pleader's conclusions, except if supported by, and necessarily resulting from, the facts pleaded. See Richter v. City of Lincoln, 136 Neb. 289, 285 N. W. 593.

The defendant city in its brief sets forth briefly the prayer of the petition, presumably for the purpose of calling attention to the extent of the relief prayed. In this connection the following authority applies: "A demurrer to a petition only lies to the statement of facts constituting the supposed cause of action, not to the prayer for relief, which may be much in excess of what those facts warrant the court to grant." Burnham v. Bennison, 121 Neb. 291, 236 N. W. 745.

The petition alleges that the plaintiffs are property owners and taxpayers of the metropolitan city of Omaha. The city of Omaha is operating under a home rule charter adopted by vote of the electors July 18, 1922. The mayor, council, and other officers of the city and defendants to the action are properly identified. The petition sets out the boundaries of the 20-acre tract commonly referred to as Krug Park, and alleges it was gradually abandoned and was zoned for residential purposes, as appears in the case of Cassel Realty Co. v. City of Omaha, 144 Neb. 753, 14 N. W. 2d 600. Plaintiffs further allege that relying upon the representations made by the position assumed by the city in the afore-cited case, they acquired property interests adjacent to the tract of land involved, and expended large sums of money in developing and using the same for residential purposes.

While it is indicated in the defendants' brief that the plaintiffs acquired no vested rights by virtue of the zoning for residential purposes, for the reason that a city may acquire land in a residential district for park purposes and if need be the zoning ordinance could be amended at any time to meet such a situation, we deem that this proposition has no particular significance in determining this appeal.

The petition further alleges that the defendant mayor and other persons conceived a plan to acquire the tract

of land in question for public use by the city as a park or recreational center, and to subsequently install the necessary appurtenances incident thereto. Failing to obtain approval or support of the plan from a majority of the members of the city council or the residents affected thereby, and being unable to acquire said tract of land legally in the manner provided by law, the defendant mayor solicited and received, directly and indirectly, from various persons, some of whom were licensees and city contractors, and corporations, sums of money totaling $30,000. This money he delivered to the city comptroller who in turn deposited it with the city treasurer, and the city paid said amount to the defendants Theodore W. Metcalfe and the Cassel Realty Company on October 31, 1945, and obtained from the Cassel Realty Company a warranty deed to the land which was recorded with the register of deeds. The plaintiffs allege further that such acts on the part of the defendant mayor and the officers of the city constitute a violation of the home rule charter amendment of the city adopted by vote of electors May 3, 1927, which will be set out as occasion requires in the discussion of this appeal, and were also in violation of the home rule charter, section 14-224, R. S. 1943, which will be set out and discussed subsequently in the opinion.

The petition further alleges that the money so solicited and turned over to the city treasurer did not constitute a gift, or gifts thereof, for the reason that different representations and promises were made to the contributors as to the purpose for which the money would be used, and was obtained from persons from whom such contributions were unauthorized by the city charter, and that therefore the acts of the mayor in such respect were contrary to public policy, ultra vires and void. It further alleges, if said amount could be considered to be a gift, it became the duty of the city council to submit the matter to the planning commission of the city for its recommendation, as required by section 14-374, R. S. 1943.

Other allegations are to the effect that a large amount

of money will be spent in the construction and maintenance of such tract of land as a public park; that the tract of land is not of the value of $30,000; and that the plaintiffs, as taxpayers, have an interest in such expenditures and the value of the property purchased for the benefit of the public for park purposes.

In 1922, the metropolitan city of Omaha adopted as its home rule charter, chapter 116, Laws of 1921, in toto, under the provisions of article XI, section 5, of the Constitution of the State of Nebraska. The original home rule charter and amendments adopted thereto pursuant to constitutional authority appear in chapter 14, Revised Statutes 1943. In the opinion we will refer to the sections as the same appear in the Revised Statutes 1943. Strictly speaking, such sections of the statutes are not applicable to the city of Omaha as such, but as provisions of its home rule charter. We will have occasion to make reference to the Omaha charter amendment appearing as a note in volume 1, Revised Statutes 1943, p. 490 as such, in addition to the sections of the statute pertinent thereto.

It will be noted that plaintiffs' petition alleges noncompliance of the city with section 14-224, R. S. 1943, and a violation thereof. This section provides in part: "The mayor and councilmen and all other officers, agents and employees of the city are prohibited from soliciting or receiving, directly or indirectly, any contribution of money or supplies of whatsoever kind, or any valuable or special privilege at the hands of any city contractor, or his agents, or from any franchised municipal corporation for any purpose whatsoever, * * *."

The defendant city contends that it is not prohibited by any rule of law or public policy from accepting or soliciting gifts through its officers from anyone, including licensees or city contractors.

Referring to the petition, it alleges in substance that the mayor of defendant city did solicit or receive, directly and indirectly, contributions of money from city con-

tractors, or their agents, for the purpose of acquiring the Krug Park tract of land for public purposes; that a part of the funds solicited from city contractors was included in the $30,000 which was solicited or received by the defendant mayor and used to purchase said tract of land. The defendants contend that the intent of the statute is to condemn the use of public offices for illicit gain, and not to limit the opportunities of public servants to help their communities by praiseworthy efforts above and beyond the call of duty. The language of the statute is clear and definite. It specifically prohibits the officers therein named from soliciting or receiving, directly or indirectly, "any contribution of money * * * at the hands of any city contractor, or his agents, * * * for any purpose whatsoever, * * *." Thus, it condemns the act of the city official, and not the purpose of the donor.

Defendants further contend that their acquisition of the Krug Park tract of land for park purposes constitutes a gift of real estate, and the funds contributed for such use were impressed with a trust and could be used for no other purpose. The petition alleges in substance that the various sums of money totaling $30,000, so solicited by the defendant mayor and turned over to the city treasurer as hereinbefore appears, were not a gift or gifts. We make reference to the petition as to the manner by which the contributions were obtained.

Other allegations of the petition are to the effect that different representations and promises were made to the contributors as to the purposes for which the money so contributed would be used, and as to the kind and type, or character of the park or playgrounds. The petition therefore indicates that there was complete lack of mutuality, understanding or agreement, and under such situation the contributions were not voluntarily made for a specific purpose.

The petition alleges that the tract of land in question was acquired by purchase by the city. No declaration

of a gift of land to the city appears in the petition. It is true that a city may acquire a tract of land as a gift for park purposes. In this connection we make reference to section 14-407, R. S. 1943, which in substance provides for a board known as the city planning commission, which shall acquire or prepare a city plan and have power to carry out and maintain said plan after its adoption by the city council and as provided for in section 14-373, R. S. 1943.

Section 14-374, R. S. 1943, provides in part: "Each city of the metropolitan class acting through its council and upon recommendation of such city planning commission shall have the power to acquire by gift, purchase or condemnation, real estate for establishing, * * * parks, playgrounds, * * *."

Plaintiffs' petition alleges that the foregoing statutory provisions were not complied with and were violated, even assuming the amount contributed be considered to be a gift. The petition alleges that the matter was not submitted to the city planning commission, nor was its recommendation received. It is apparent the plaintiffs' petition states a cause of action in such respect.

The Omaha charter amendment, adopted May 3, 1927, provides in part: "The city council may purchase or acquire by the exercise of the powers of eminent domain, in this section granted, private property * * * for * * * parks, parkways, playgrounds, * * * and for other needed public uses or purposes authorized by this act, and for the purpose of adding to, enlarging, widening or extending any of the foregoing named. * * * Whenever property is purchased for any of the purposes above stated and as in this act provided, the purchase thereof shall be made by ordinance." Section 14-366, R. S. 1943, is analogous to the foregoing.

Section 14-367, R. S. 1943, provides in part: "Whenever property is purchased for any of the purposes stated in section 14-366 (for parks, playgrounds) the purchase thereof shall be made by ordinance. When-

ever it becomes necessary to appropriate property for the purposes stated in said section the purpose and necessity for such appropriation shall be declared by ordinance. Thereupon the council shall appoint three disinterested freeholders of the city, who, after having been duly sworn to perform the duties required of them by this act with fidelity and impartiality, shall give reasonable notice to the owners and parties interested in the property to be appropriated, of the time and place of the hearing thereof. After such notice and hearing, they shall appraise and assess damages sustained in the taking of such property by the owners and the parties interested therein respectively, and make awards respectively of such damages. The appraisers shall thereupon report such appraisal and award to the city council for its action thereon. If the award is confirmed it shall be paid in as in this act provided, but if rejected, proceedings anew may be commenced."

Section 14-368, R. S. 1943, provides in part as follows: "If it is confirmed, then the payment of the award shall be made as in this act provided. For the purpose of making payments thereof, special taxes and assessments shall be levied on the properties especially benefited by the improvement and to the extent of the benefits thereby conferred, and if such levy be insufficient to pay the full cost of the improvement then the city council may issue bonds of the city, to the extent of the excess of the cost of the improvement over the fund provided by special assessments, distributing payments from bonds equitably and pro rata among the respective awards."

The plaintiffs allege in their petition that the defendant city did not comply with the amendment to the home rule charter and the statutes pertinent thereto hereinbefore set out but, through its officers, violated the same; that the defendant city acquired the tract of land for park purposes by purchase and, having so acquired by purchase, the foregoing cited provisions of the city char-

ter govern the action of the city in such respect; and that the same were violated and not complied with for the reason that when land is acquired by purchase for park purposes there must be an ordinance passed, as required by law, further, there must be an appraisement made and notice of hearing given owners and parties interested in the property to be appropriated, none of which was done by the defendant city in the instant case. The defendant city contends the afore-cited provisions of the home rule charter govern the acquisition of property for certain public purposes and authorize the expenditure of tax money therefor and the issuance of bonds in payment thereof under certain circumstance; that when the electors adopted the foregoing provisions of the home rule charter it is apparent they did not contemplate to foreclose or bar the right of the city to be the recipient of private benefactions; nor do such provisions apply to a case where funds are contributed for the purpose of purchasing a specific tract of land for park purposes. Under the allegations of plaintiffs' petition as hereinbefore summarized, we conclude a cause of action is stated.

The following authorities are applicable to this appeal: "A municipal corporation is a creature of the law established for special purposes, and its corporate acts must be authorized by its charter and other acts applicable thereto, and therefore possesses no power or faculties not conferred upon it, either expressly or by fair implication, by the laws which created it or by other laws, constitutional or statutory, applicable to it.

" 'The power conferred upon municipal corporations by their charters to enact ordinances on specified subjects is to be construed strictly, and the exercise of the power must be confined within the general principles of the law applicable to such subjects.' * * *." Falldorf v. City of Grand Island, 138 Neb. 212, 292 N. W. 598.

"Where a certain power is conferred upon a municipality and the method of its exercise is prescribed, such

method constitutes the measure of the power." Consumers Coal Co. v. City of Lincoln, 109 Neb. 51, 189 N. W. 643.

Having concluded that the plaintiffs' third amended petition states a cause of action for the reasons heretofore given, we have determined the sole proposition submitted on this appeal. It is not for us to determine at this time whether or not on the issues joined or trial had the law has been complied with by the city in every respect with reference to the acquisition of the 20-acre tract of land for park purposes. We reverse the judgment of the trial court and remand the cause with directions to overrule the general demurrer.

REVERSED AND REMANDED WITH DIRECTIONS.

IN RE ESTATE OF OMAR A. KAISER, DECEASED.
M. B. McDOWELL, APPELLEE, V. NETTIE A. PARKER ET AL., APPELLANTS.
34 N. W. 2d 366

Filed October 28, 1948. No. 32467.

1. **Wills.** Issues of fact in will contest cases are determined in this court by the sufficiency of the evidence under the law to sustain the verdict of the jury or the findings of the district court, and where the evidence in a case tried to the jury is conflicting, issues of fact are questions for its determination.
2. ———. The burden is upon proponent of a will, both in the county court and the district court on appeal, to prove by a preponderance of the evidence the lawful execution of the will and the testamentary capacity of the testator at the time when the will was made. However, if the proponent makes a prima facie case in chief as to both, then it devolves upon a contestant to proceed and adduce sufficient competent evidence to overcome the presumption arising therefrom, after which the burden of going ahead and proving those issues by a preponderance of the evidence, devolves upon proponent.
3. ———. Statutory provisions regarding the manner in which wills must be executed are generally held to be mandatory and

subject to strict construction, and if not substantially complied with, the will is inoperative.

4. ———. The attestation required of witnesses to a will consists in their seeing that those things exist and are done which the statute requires to exist or to be done in order to make the instrument, in law, the will of the testator.

5. ———. A presumption of the due execution of a will arises from the presence of an attestation clause which recites the facts necessary to the validity of the will, and, in the absence of evidence discrediting the statements, the will should be admitted to probate.

6. ———. If the signing of a will is in fact the testator's own act with the intention of making a will, though with the assistance of another, it is not necessary to prove any express request for assistance on his part.

7. ———. A testator signs his will when he makes the physical effort and performs the act, even though his hand is steadied or guided by another, if something is produced upon the paper sufficient to identify his signature, and his own purpose to sign accompanied the action while he was assisted and not controlled.

8. ———. A codicil ratifying and confirming a will, in whole or in part, will amount to a republication of the will.

9. ———. A codicil signed by the testator and attested and subscribed in substantial compliance with the statute, which codicil in express terms ratifies and confirms a will, is a republication and reacknowledgment thereof, and remedies all defects in its execution.

10. ———. A will may be valid if written on several sheets, provided: (1) They are connected physically by mechanical, chemical, or other means when executed; or (2) they are so connected by the meaning, adaptation, and coherence of their internal sense and subject matter that they may be thus identified as parts of one will; or (3) the disconnected sheets are appropriately identified by the testimony of the attesting and subscribing witnesses as connected parts of the will signed by the testator and attested and subscribed by them.

11. ———. A testator who is competent may dispose of his property as he pleases and he is not required to recognize relatives in his will.

12. ———. Testamentary capacity is tested by the state of the testator's mind at the time of the execution of the will, and he is mentally competent to make a will if he knows the extent and character of his property, the proposed disposition of it, and the natural objects of his bounty.

13. **Evidence.** Error cannot be predicated on the admission of certain testimony when ample testimony of the same nature was admitted without objection.
14. ———. If, when evidence is offered, the other party consents to its introduction, or fails to object, or to insist upon a ruling on an objection to the introduction of such evidence, and otherwise fails to raise the question of its admissibility, he waives whatever objection he may have had thereto.

APPEAL from the district court for Dawes County: ARTHUR C. THOMSEN and J. LEONARD TEWELL, JUDGES. *Affirmed.*

Porter & Porter, for appellants.

Charles A. Fisher, for appellee.

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

CHAPPELL, J.

Brothers and sisters of Omar A. Kaiser, deceased, contested the probate of his will and codicil thereto, upon the grounds that the instruments were not signed by the testator or attested and subscribed as required by law; that they were obtained by undue influence; and that the testator lacked testamentary capacity. Proponent prevailed in the county court and contestants appealed to the district court, where, upon trial to a jury, proponent was awarded a verdict and judgment. Motion for new trial was overruled, and contestants appealed to this court, assigning as error substantially that the trial court erred in refusing to direct a verdict for contestants at the conclusion of proponent's evidence in chief; in giving instructions Nos. 7, 8, 12, and 15 respectively, and refusing to give contestants' proferred instructions Nos. 1 and 2; in permitting proponent, over objection of contestants, to respectively identify the beneficiaries under the will and permit the jury to observe them in open court; and, that the verdict and judgment were contrary to law and not sustained by the

evidence. We find that the assignments should not be sustained.

At the outset it should be stated that the issue of undue influence was not supported by any competent evidence, and concededly is not involved in this appeal. Our conclusions with reference to the other issues are dependent upon the evidence adduced and well-established rules of law applicable thereto.

Without dispute, Omar A. Kaiser, testator, 70 years of age, whose death occurred September 10, 1946, was during his lifetime a bachelor farmer and rancher. He had accumulated a substantial estate, consisting of lands, securities, and cash. On June 12, 1945, he suffered a cerebral hemorrhage, and, upon his physician's orders, was removed to the Chadron Municipal Hospital, where he remained until his death.

Proponent's evidence in chief consisted of the testimony of testator's attending physician, his attorney, the other witnesses who attested and subscribed his will and codicil, and two friends of testator who not only visited with him in the hospital near the time of the execution of the instruments involved, but also thereafter.

The testimony of those witnesses, together with the instruments themselves, buttressed with other evidence adduced by proponent subsequent to the introduction of contestants' evidence contra thereto upon the issue of testamentary capacity, may be briefly summarized as follows: As a result of the hemorrhage, testator suffered a paralysis of his left side. He also had an old genitourinary trouble which became aggravated and painful a short time after he entered the hospital, but favorably responded to treatment, and never affected his testamentary capacity. The paralysis affected his speech, which was impaired for approximately two weeks after he entered the hospital. Thereafter, his speech and general physical condition improved, and at all times involved, without relapse mentally, testator was normal

mentally and possessed the testamentary capacity essential to the making of a valid will and codicil, as hereinafter defined.

After testator had been in the hospital a few days, his attorney, who had represented him for 30 or 40 years, and had personally known him for 50 years or more, visited him. After the attorney's first visit, he returned upon other occasions at the request of testator. During such visits, testator consulted with the attorney about several business matters involving his property, and at the request of testator, the attorney looked after such matters for him.

On July 13, 1945, testator inquired about and asked the attorney to draw a will for him, and requested that he come back soon. On the following day, the attorney returned. At that time they talked about the testator's brothers and sisters and where they lived, as well as his property, and the disposition thereof, whereat the testator said: "Well, * * * this property is to go to two little boys. * * * they are the sons of Mike Kaiser. * * * I understand they are in San Diego, California." Thereafter, the attorney wrote out the will in longhand in the presence of the testator, and read it to him.

The will consisted of two sheets numbered (1) and (2) respectively. The dispositive portion of the will thus written, and signed by the testator, all appeared on page (1). The perfected attestation clause thereof, subscribed by the witnesses, alone appeared on page (2). Both the will and the attestation clause recited respectively that the testator's last will and testament was "on two pages (1 & 2)" and that it was an "instrument of two pages." Whether or not the two sheets were physically attached to each other at the time of execution does not affirmatively appear in the evidence. There is competent evidence, however, that page (1) was the paper signed by the testator as his last will and testament in the presence of the attesting and subscribing witnesses, who signed the attestation clause on page (2) in his

presence and in the presence of each other, and that after the execution of the will both pages were placed in a sealed envelope and on the same day delivered into the custody of the county judge, who thereafter opened it only after testator's death. The dispositive portion of the will provided: "I hereby give, devise and bequeath to James Kaiser and Elwin Kaiser, sons of James Kaiser all of San Diego, California, share and share alike, all of my estate of both real and personalty wherever situate."

The codicil thereto, executed July 18, 1945, was all on one page, with a perfected attestation clause thereon, which codicil was likewise placed in a separate sealed envelope and delivered into the custody of the county judge on the day following its execution, who thereafter opened it only after testator's death.

After the will was written by the attorney, he told testator that a couple of witnesses were needed, and testator replied "Well, you will have to get them, I am depending on you." Thereupon, the attorney procured a clerk at the hospital to act as a witness and testator asked her if she was "going to watch him to sign his name to that piece of paper," identified by her and the attorney as page (1) of the will, a part of proponent's exhibit 1, as offered and received in evidence.

Testator was then raised up in bed and a candy box or book was procured, upon which to place the will for signature. He was given a pen, and in the presence of the attorney and the other witness, wrote "Omar A" and started to write "Kaiser" when his hand trembled and "he looked up at his attorney" and asked him "to help him finish." Thereupon, the attorney assisted him in finishing the word "Kaiser" by guiding testator's hand. Thereafter, both the attorney and the other witness signed the attestation clause on page (2) of the will, in the presence of the testator and each other.

Soon after execution of the will, the attorney learned that the beneficiaries under the will then actually lived in

Chadron with their mother, although for a while they had lived in California, and that their names, as well as the descriptive identifying name of their father, were not in all respects complete and correct as written in the will. It appears that their father, although sometimes known as "Mike," was actually named "Fred Elwyn Kaiser." Thereafter, the attorney consulted with testator about the matter, telling him that he, the attorney, "must have misunderstood him," and advised testator that a codicil would be proper procedure to remedy the inadvertent mistake, whereupon testator replied: "Whatever you say; that's all right. I want it down right."

In conformity therewith, such a codicil was prepared by the attorney and read to the testator, who said: "Well, that's all right; just right." At that time, on July 18, 1945, the codicil was executed for that purpose, correctly describing the beneficiaries under the will as to full names and identifying fatherhood, residence, and age. It then recited: "I do give, devise and bequeath unto Robert Eugene Kaiser and James Norris Kaiser, sons of Fred Elwin Kaiser, share and share alike, all of my property of every nature soever, real, personal and mixed and wherever situate and to their heirs and assigns forever.

"Otherwise than herein stated, this is to positively affirm, corroborate and establish my last will and testament as heretofore stated and in my said last will and testament stated of July 14th, 1945."

The codicil, offered and received in evidence as exhibit 4, was executed under circumstances comparable with those under which the will was executed, except that testator also asked another person to sign as a witness for him. At that time, in the presence of three attesting witnesses, testator wrote "O." and "A.", when his hand trembled again, and he asked the attorney "if he would help him, kind of guide his hand," and the attorney took hold of his hand and assisted him in writing the name "Kaiser." The three witnesses then signed the attestation

clause as witnesses in the presence of testator and each other, after which testator said: "I am very glad that this was done, I am glad. I am glad it is on the road, and I believe that I will be around in a little while again, and when I can get around I will pay you."

After execution of the will and codicil, testator lived for approximately 14 months, and at subsequent times, when he was concededly competent in every respect, stated that he had enough money to pay his hospital and doctor bills and that he had made a will, leaving his property to Mike's little boys and appointing his physician as administrator. There is evidence that testator in his lifetime often visited and cared for the boys in their home, lived there with them for some time after their father had left their home, and that they visited him at the hospital upon several occasions at his request, where they played, talked, and joked with testator.

In disposing of contestants' assignments of error, we turn then to applicable rules of law, bearing in mind that: "It is elementary that a defeated litigant in a will contest case is not entitled to a trial de novo on appeal to this court. Issues of fact in such cases are determined in the Supreme Court by the sufficiency of the evidence under the law to sustain the verdict of the jury or the findings of the district court, and where the evidence in a case tried to the jury is conflicting, issues of fact are questions for its determination." In re Estate of Woodward, 147 Neb. 270, 23 N. W. 2d 75. See, also, In re Estate of Renter, 148 Neb. 776, 29 N. W. 2d 466; In re Estate of Kerr, 117 Neb. 630, 222 N. W. 63.

This court has consistently held that the burden is upon proponent of a will, both in the county court and in the district court on appeal, to prove by a preponderance of the evidence not only the lawful execution of the will, but also the testamentary capacity of the testator at the time when the will was made. However, if the proponent makes a prima facie case in chief as to both, then it devolves upon a contestant to proceed and

adduce sufficient competent evidence to overcome the presumption arising therefrom, after which the burden of going ahead and proving those issues by a preponderance of the evidence devolves upon proponent. In re Estate of Keup, 145 Neb. 729, 18 N. W. 2d 63; In re Estate of Witte, 145 Neb. 295, 16 N. W. 2d 203; In re Estate of Inda, 146 Neb. 179, 19 N. W. 2d 37; In re Estate of Scoville, 149 Neb. 415, 31 N. W. 2d 284; In re Estate of Renter, *supra*; In re Estate of Woodward, *supra*.

Section 30-204, R. S. 1943, provides: "(1) No will made within this state, except such nuncupative wills as are mentioned in section 30-205 shall be effectual to pass any estate, whether real or personal, nor to change, or in any way affect the same, unless it be in writing, and signed by the testator, or by some person in his presence, and by his express direction, and attested and subscribed in the presence of the testator by two or more competent witnesses; * * *."

The statutory provisions controlling the manner in which wills must be executed are generally held to be mandatory and subject to strict construction, and if not substantially complied with, the will is inoperative. In re Estate of Cagle, 132 Neb. 47, 270 N. W. 664; In re Estate of Smith, 130 Neb. 739, 266 N. W. 611.

In the latter cited case, it was held that: "The attestation required of witnesses to a will consists in their seeing that those things exist and are done which the statute requires to exist or to be done in order to make the instrument, in law, the will of the testator. 68 C. J. 673."

In Holyoke v. Sipp, 77 Neb. 394, 109 N. W. 506, it was held: "A presumption of the due execution of a will arises from the presence of an attestation clause which recites the facts necessary to the validity of the will, and, in the absence of evidence discrediting the statements, the will should be admitted to probate." The opinion cited and quoted with approval 1 Underhill, Law of Wills, § 201, p. 276, to the effect that: " 'So, when the

subscribing witnesses are present at the probate and admit the genuineness of their signatures, but deny or are unable to recollect some or all of the facts which were attendant upon the execution, so that one or both of them are unable or unwilling to testify with positiveness and of their own knowledge that all the requirements of the statute were complied with, a presumption of due and proper execution will arise from the recitals of a perfect attestation clause, which becomes conclusive in the absence of satisfactory proof to the contrary.'" See, also, Dame, Probate and Administration, (3d ed.), § 141, p. 151.

With regard to the signature of the testator, a distinction must be borne in mind, which contestants have failed to do, between those cases where the act of signature was in fact and in law the act of the testator himself, and those where the act of signature was in fact by another in the testator's presence and by his previous express direction. In the latter situation, we have held: "When in a contested proceeding for the probate of a will, it is disclosed that the name of the alleged testator was affixed to the instrument in controversy by some person *other than himself,* it is incumbent upon the proponent to establish by unequivocal evidence that the deceased gave direction to such person for writing his name, consciously and explicitly, and in the free and voluntary exercise of his faculties." (Italics ours) McCoy v. Conrad, 64 Neb. 150, 89 N. W. 665. See, also, Murry v. Hennessey, 48 Neb. 608, 67 N. W. 470; Elliott v. Elliott, 3 Neb. (Unoff.) 832, 92 N. W. 1006; and Isaac v. Halderman, 76 Neb. 823, 107 N. W. 1016.

On the other hand, in Thompson v. Thompson, 49 Neb. 157, 68 N. W. 372, this court approved the general applicable rule appearing in Schouler, Wills, (2d ed.), § 303, which is that: "'Wherever, in truth, the act is the testator's own act, *animo testandi,* though with the assistance of another, it is not necessary to prove any express request for assistance on his part. And under

any circumstances, a testator signs his will where he makes the physical effort and performs the act, even though his hand be steadied or guided by another, if something is produced upon the paper sufficient to identify his signature, and his own purpose to sign accompanied the action, while he was assisted and not controlled.'" See, also, 68 C. J., Wills, § 291, p. 659. In re Estate of Lodge, 123 Neb. 531, 243 N. W. 781, is not in any manner inconsistent or in conflict with such general rule, but the opinion therein simply based its conclusions affirming validity of the will upon the facts of that particular case.

Since Hawke v. Euyart, 30 Neb. 149, 46 N. W. 422, 27 Am. S. R. 391, it has been the rule that: "A Codicil ratifying and confirming a will, in whole or in part, will amount to a republication of the will, bringing down its words and causing it to speak as of the date of the codicil." It is also generally held that a codicil signed and attested in strict compliance with the statute, which in express terms confirms a will, is a republication and reacknowledgment of such will, and remedies all the defects in its execution. Dame, Probate and Administration, (3d ed.), § 69, p. 61; Woerner, The American Law of Administration, (3d ed.), § 47, p. 122, § 56, p. 163.

There is no statutory provision in this state designating just where a will shall be attested and subscribed by the witnesses, or forbidding the use of separate sheets in making a will, or directing how or that they shall be physically attached to each other in order to make a valid will. As a matter of fact, a will may be probated without any attestation clause whatever, provided the subscribing witnesses testify that it was duly executed according to law. Williams v. Miles, 68 Neb. 463, 94 N. W. 705, 110 Am. S. R. 431, 62 L. R. A. 383; Monroe v. Huddart, 79 Neb. 569, 113 N. W. 149, 14 L. R. A. N. S. 259; Spier v. Spier, 99 Neb. 853, 157 N. W. 1014, L. R. A. 1916E 692; Dame, Probate and Administration, (3d ed.), § 141, p. 151.

Contrary to contestants' contentions, and as stated in 68 C. J., Wills, § 267, p. 639: "A will need not be written entirely on one sheet of paper, but may be written on several sheets, provided the sheets are so connected together that they may be identified as parts of the same will. While connection by the meaning and coherence of the subject matter is sufficient, as physical connection by mechanical, chemical, or other means is not required, although it is sufficient when made, in the absence of such physicial connection, the papers must be identified as one will by their internal sense. Where there is sufficient credible proof of the identity of disconnected sheets propounded as one will, neither the physical nor coherent rule of attachment is applicable." See, also, 57 Am. Jur., Wills, § 224, p. 188, § 225, p. 189, and § 226, p. 189; Annotation, 30 A. L. R. 424. In the case at bar, the sheets were not only connected by their internal sense, but identified by the subscribing witnesses as connected parts of testator's will.

This court has consistently adhered to the rule that a testator who is competent may dispose of his property as he pleases, and he is not required to recognize relatives in his will. In re Estate of Bose, 136 Neb. 156, 285 N. W. 319; In re Estate of Thomason, 144 Neb. 300, 13 N. W. 2d 141; In re Estate of Goist, 146 Neb. 1, 18 N. W. 2d 513; In re Estate of Scoville, *supra.*

Testamentary capacity is tested by the state of the testator's mind at the time of execution of the will, and he is mentally competent to make a will if he knows the extent and character of his property, the proposed disposition of it, and the natural objects of his bounty. In re Estate of Woodward, *supra;* In re Estate of Goist, *supra;* In re Estate of Scoville, *supra.*

In the light of the foregoing evidence and cited authorities, we conclude that the trial court correctly overruled contestants' motion for directed verdict, made at the conclusion of proponent's case in chief; that the issues presented by the evidence were properly for determina-

tion by a jury, under appropriate instructions; and that the verdict and judgment were amply sustained by the evidence.

Also, in the light of the evidence and the authorities heretofore cited, we have examined instructions Nos. 7, 8, 12, and 15, given by the trial court, and without further discussion conclude that they correctly stated the law and were not prejudicially erroneous, as argued by contestants. We conclude, also, that instruction No. 1, requested by contestants, which related to the act of signing but did not reflect the applicable rule, was properly refused, and that the refusal of contestants' requested instruction No. 2 could not be prejudicially erroneous because it was in fact given almost verbatim in instruction No. 13.

There remains for discussion then only the question of whether or not the court erred in permitting proponent, over objection of contestants, to respectively identify the beneficiaries under the will and permit the jury to observe them in open court. In that connection, during the trial the mother of the beneficiaries under the will testified that she had been previously married to Fred Elwyn Kaiser, father of the beneficiaries, whereupon she was asked, and answered without objection: "Q They are the two little boys sitting over here? A That's right. Q How old are they now? A Now? They are nine and ten." Thereafter, counsel for proponent said: "Q That is all. Will you call the children forward so the jury may see them, and tell the jury which is which?" Counsel for contestants then said: "We object to this as incompetent and immaterial and improper conduct. I am glad to have the jury see them, but I think I should preserve the right ____." The purported objection was overruled, whereupon the witness answered: "This is Robert Eugene and this is James Morris (indicating.)" Q "How old are they?" A "This is ten and this is nine."

Contestants cite no authority in point which could sustain their contention that the foregoing was prejudi-

cially erroneous. To the first part of the evidence, no objection was made. To the latter, identical in all material respects, there was consent rather than objection. In other words, contestants objected to the introduction of the evidence for the purpose of making and preserving the record upon appeal, but at the same time consented to its introduction, doubtless to avoid an unfavorable impression upon the minds of the jury. Under the circumstances, contestants waived whatever objection they may have had thereto.

In that connection it was held in Hickman v. Layne, 47 Neb. 177, 66 N. W. 298: "Error cannot be predicated on the admission of certain testimony, where ample testimony of the same nature was admitted without objection." As stated in 64 C. J., Trial, § 189, p. 167: "A party may, by his acts or omissions, waive, or be estopped to make, objections to the admission or exclusion of evidence. Such waiver or estoppel may arise from failure to object, from acts done or omitted before the evidence is offered, as by failure to object to previous similar evidence, or from some affirmative act done after the ruling on the evidence." Also, as stated in 53 Am. Jur., Trial, § 143, p. 127: "If when inadmissible evidence is offered the party against whom such evidence is offered consents to its introduction, or fails to object, or to insist upon a ruling on an objection to the introduction of such evidence, and otherwise fails to raise the question as to its admissibility, he is considered to have waived whatever objection he may have had thereto, and the evidence is in the record for consideration the same as other evidence."

For the reasons heretofore stated, the judgment of the trial court should be and hereby is affirmed.

AFFIRMED.

R. G. FUELBERTH, APPELLANT, v. ROLAND SPLITTGERBER, APPELLEE.

34 N. W. 2d 380

Filed November 5, 1948. No. 32473.

1. **Bailments.** The general rules of bailment apply to aircraft.
2. ———. The burden is upon the party who seeks recovery to establish upon the whole case facts and circumstances showing a breach by the opposite party of some duty under the bailment upon which a liability may be predicated.
3. ———. If bailor's action is to recover for the bailee's failure to exercise the required care, whereby the property became injured, the burden is on bailor to prove negligence.
4. ———. When a bailment is reciprocally beneficial to both parties, the law requires ordinary diligence on the part of the bailee and makes him responsible for ordinary negligence.
5. ———. A bailee for hire has the duty to exercise due care to prevent damage to bailor's property, and if he fails to exercise due care he is liable for any damage resulting by reason of such failure.

APPEAL from the district court for Wayne County: FAY H. POLLOCK, JUDGE. *Reversed and remanded.*

H. D. Addison, for appellant.

Budd B. Bornhoft, for appellee.

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

PAINE, J.

This is an action by the owner of an airplane for $850 damages to said airplane while it was in the exclusive possession of the defendant as bailee. A jury was waived. The trial court entered judgment for defendant and dismissed the action. The plaintiff appealed.

The plaintiff filed a petition in the district court alleging that on August 21, 1947, he was the owner of airplanes and equipment and had for several years operated the Wayne airport at Wayne; that he rented and hired out airplanes for compensation to licensed pilots who desired to fly and use the same; that on said date at

about 7 p. m. the defendant rented and hired of plaintiff a J-3 Piper Cub airplane; and that defendant was at said time a licensed pilot in good standing and had taken off and landed airplanes at said airport a number of times.

Plaintiff alleged that said defendant, while in possession of said airplane as bailee, carelessly, unlawfully, wrongfully, negligently, and willfully operated said airplane and flew same into telegraph and telephone wires close to the north edge of said airport, and as a result thereof said airplane was completely demolished. He also alleged this accident was entirely due to defendant's unlawful acts and omissions, in that he drove said airplane at too low an altitude, failed to properly steer and operate it and to have it under control, but on the contrary operated said airplane at too low an altitude outside the boundaries of the airport, did not keep a proper lookout, negligently failed to land said airplane on the runway, and wrongfully flew said airplane into telegraph and telephone wires close to said airport. Plaintiff further alleged that the above negligence, wrongful acts and omissions on the part of the defendant, was the proximate cause of the accident and crash; that immediately before the accident said airplane was worth $1,000, and its salvage value thereafter was $150. Plaintiff prayed for damages in the sum of $850.

The defendant for answer to said petition admitted that plaintiff owned the airplane and rented it to defendant; admitted that said airplane was wrecked, but denied that this was due to any carelessness, negligence, wrongfulness, unlawfulness, or fault on the part of the plaintiff; and denied all other allegations of the petition. For further answer he alleged that the accident was solely and proximately caused by the careless, negligent, wrongful, and unlawful manner in which plaintiff operated his airport, contrary to the laws of the State of Nebraska and the rules of the Department of Aeronautics of Nebraska; that plaintiff maintained a nuisance as

defined in sections 3-301 and 3-302, R. S. Supp., 1945, in that he reduced the size of the landing area by maintaining such area too close to overhead wires; that he failed to maintain a 20-1 glide path to the landing strip, contrary to section 6 (b) (3) of the rules and regulations of the Department of Aeronautics of Nebraska; failed to mark said landing area with red flags or red electric lights; and failed to maintain said landing area in a safe condition. Defendant further alleged that plaintiff rented said plane to defendant at a time of day when darkness was immediately imminent, thereby assuming the risk of landing in the dark. He prayed judgment for the defendant.

The plaintiff for a reply thereto denied each and every allegation except as therein admitted. He alleged that said airport was owned by the city of Wayne and leased to plaintiff, and that he had no control over the use of any property adjoining and outside of the boundaries of the airport.

Plaintiff also alleged that defendant took off on said flight while visibility was clear and suitable for flying and that the accident occurred at about 7:50 p. m. on said evening. He further alleged that the north and south runway, from which defendant took off and attempted to land, was in good condition; that the distance from the fence on the south edge of the runway to the fence on the north edge of the runway was one-half mile; that the airplane defendant was flying could take off or land within a distance of four or five hundred feet, and that defendant had between January 14, 1947, and June 8, 1947, taken off and landed airplanes more than 100 times on said field; that he had received his student instructions at said airport, and was familiar with the adjoining land and obstructions thereon, and well knew that the north edge of said airport was the south edge of the railroad right-of-way, on which there were telephone and telegraph wires.

By written stipulation, a jury was waived, and the

case was tried to the court. The court found that the plaintiff operated the Wayne airport; that the defendant was a Wayne County youth of limited experience, having had 40 hours of flying, which included dual instruction and solo flight; that he had not flown alone at dusk; that on the evening of August 21, 1947, defendant rented the plane for an agreed rental of $8 an hour; that after a flight of eight to ten minutes defendant approached the airport from the north; that in attempting to land on the runway he struck telegraph wires at a height of about 15 feet over the north end of the runway; that the plane was damaged in the sum of $850; that the relationship of the parties was one of bailment, for the mutual benefit of the parties; and that defendant, in the absence of a specific contract, was liable only for failure to exercise ordinary care.

The court found that defendant was fully aware of the presence of telegraph wires, and flags and lights could not have better apprised him of this hazard, as he had been trained to fly above these wires when approaching a landing strip. The court found that defendant circled the field and made his glide in the approved manner; that there was no proof that his speed was excessive, and his direction was perfect; and that encountering the problem of dusk with which he was not familiar, his estimate of altitude proved inaccurate and the accident resulted.

The court found that all that plaintiff was entitled to expect was the defendant's best judgment, and not perfection; that the damages sustained by plaintiff were such as could have been reasonably expected to occur; and that it was a risk of the business. The court entered judgment for the defendant and dismissed the action at the costs of plaintiff.

The plaintiff's assignments of error charge that the judgment is not sustained by the evidence and is contrary to law; that the court erred in finding defendant not guilty of any negligence; that the court erred in finding that the damages to the plane were such as could have

been reasonably expected; that the court also erred in finding that this was an unavoidable accident, and that plaintiff was guilty of contributory negligence.

The defendant testified that he had rented this plane from Marvin Nelson, an employee of the plaintiff, who was not there at the time; and that he was in the air eight or ten minutes.

The defendant had a friend with him, Del Lemke, who was not a relative but was just going for the ride. Lemke testified that they were up in the air about eight minutes, and that he did not see the railroad right-of-way, for he was not looking out of the window.

The defendant on cross-examination testified that when he started to land he was aware of where the railroad right-of-way was, but does not believe that he looked at it. He admitted that he knew the fence and the telegraph wires were there; that as he came toward the north-south runway, with the airplane pointing to the south, he attempted to put his airplane down on the first one-third of the runway; and that he knew it was impossible to land at the north edge of the runway because of the fence and wires, which he had been taught to avoid. He testified that one wheel tripped on the wire, and if he had been two feet higher he would have cleared it.

The general rules of bailment apply to aircraft as well as to automobiles for hire. See, Ambassador Airways, Inc. v. Frank, 124 Cal. App. 56, 12 P. 2d 127; Wilson v. Colonial Air Transport, 278 Mass. 420, 180 N. E. 212, 83 A. L. R. 329.

"The burden is upon the party who seeks recovery to establish upon the whole case facts and circumstances showing a breach by the opposite party of some duty under the bailment upon which a liability may be predicated. * * * If his action is to recover for the bailee's failure to exercise the required care, whereby the property became lost, destroyed, or injured, the burden is on him to prove negligence." 6 Am. Jur., Bailments, § 367, p. 445.

"When a bailment is reciprocally beneficial to both parties, the law requires ordinary diligence on the part of the bailee and makes him responsible for ordinary negligence." Shiman Bros. & Co. v. Nebraska Nat. Hotel Co., 146 Neb. 47, 18 N. W. 2d 551.

A bailee for hire has the duty to exercise due care to prevent damage to bailor's property, and if he fails to exercise due care he is liable for any damage resulting by reason of such failure. See Johnson v. Steinhauer, 81 Ohio App. 202, 70 N. E. 2d 483.

"In Baron Alderson's well-known definition, 'Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.' But, as Sir Frederick Pollock points out, we must remember that 'negligence will not be a ground of legal liability unless the party whose conduct is in question is already in a situation that brings him under the duty of taking care.' That the navigator of an aircraft is in this situation will not be doubted. When he is taxiing along an aerodrome, he is in this situation, and when he rises into the air, his duty is certainly no less; * * *." McNair, The Law of the Air, § 22, p. 49.

In a Wisconsin case, brought by the owner of an airplane to recover damages to same, sustained in alighting on a hay rake which the management of the airport had allowed to be left on the field, a judgment was entered in favor of the plaintiff, and on appeal the judgment was reversed with directions to dismiss the complaint. The accident happened on July 10, 1928, at about 8 p. m., while the sun was still shining. The hay rake was painted red, and its wheels yellow. It was readily observable 500 feet away. The court stated that the plaintiff's pilot should have continued to circle about the field until he had a sufficient lookout so that he would not collide with the hay rake, and if the pilot alighted when his vision was obscured by the rays of the sun he

was contributorily negligent as a matter of law, which so contributed to the collision as to defeat plaintiff's right to recover. Davies v. Oshkosh Airport, Inc., 214 Wis. 236, 252 N. W. 602.

We are convinced that in the case at bar the defendant was negligent in not observing that he was about to come in contact with the telegraph wires next to the railroad right-of-way.

In conclusion, we find that there is no material contradiction or dispute in the facts as set out in the bill of exceptions. The defendant had taken his training and secured his license, after making many flights from this same airfield. He was entirely familiar with the railroad right-of-way and telegraph wires on the edge of the field, and had often made a landing coming in just over them. When a pilot, under circumstances such as are presented by this record, comes down for a landing he must use ordinary care to observe the fixed objects adjoining the field and look where he is going to land. Defendant violated the elementary rules of flying by not keeping at a safe distance from the telegraph wires, which he had been taught to avoid.

The defendant's explanation of the accident is that he misjudged his altitude, although he admits that he did not notice the right-of-way, and was apparently attempting to land by his memory from former landings of the hazards that he must avoid at that end of the field.

We do not believe that the fact that he rented this plane to take a friend up on a flight some eight minutes before he crash-landed would indicate that the defendant thought that the approaching dusk made flying at that time dangerous for him.

Under the facts and the law in this case we believe that the defendant was guilty of negligence, and that the judgment of the trial court should be reversed and the action remanded for further proceedings.

REVERSED AND REMANDED.

CHAPPELL, J., dissents.

GRANT TRASK, APPELLEE, V. JACOB KLEIN ET AL., APPELLANTS.
34 N. W. 2d 396

Filed November 5, 1948. No. 32460.

1. **Witnesses.** As a general rule a party calling a witness vouches for his credibility and is ordinarily bound by any evidence he gives which is not contradicted or shown to be unreliable.
2. **Evidence.** A party who offers the evidence of a witness cannot subsequently object that it should not have been received or that it is insufficient to sustain a judgment based thereon.
3. ———. But where such evidence is contradicted, either expressly or by inference, by evidence which would justify the trier of facts in arriving at a different conclusion, the party offering it is not ordinarily concluded thereby.
4. ———. Opinion testimony as to value is not conclusive, although when uncontradicted it may be regarded by the jury as sufficient proof of the fact sought to be established.
5. **Trial.** The trial court is not required to instruct upon matters not within the issues and upon which evidence was not permitted.
6. **Appeal and Error.** When the jury was properly instructed and a verdict returned which is supported by the evidence, the judgment will not be reversed on appeal even though the evidence on material points was highly conflicting.

APPEAL from the district court for Red Willow County: VICTOR WESTERMARK, JUDGE. *Affirmed.*

Perry & Perry, for appellants.

Butler & Eisenhart and *J. F. Ratcliff*, for appellee.

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

CARTER, J.

This is an action at law to recover damages caused to plaintiff's truck when it was forced off the highway to avoid a collision with defendant Klein's tractor. The jury returned a verdict for the plaintiff in the amount of $804 and the defendants appeal.

The evidence shows that plaintiff's truck was engaged in hauling gravel from McCook, Nebraska, to Oberlin, Kansas, over the graded and oiled highway between

those two points. On January 9, 1947, about 5:15 p. m., as the truck was proceeding south it came upon defendant Klein's tractor with two loads of hay in tow which was also being driven south by the defendant Miley. Plaintiff's driver testified that he saw the defendant's outfit at a distance of a quarter of a mile and that he first sounded his horn at a distance of six blocks. The rear load of hay was described as being eight feet wide and nine feet high. The tractor could not be seen from the rear. Plaintiff's driver says that he approached the vehicle at a rate of speed of 15 miles per hour. The tractor and trailing vehicles were then traveling at ten miles per hour. The evidence shows that there was a turn-in to a farmhouse on the left side of the highway near the scene of the accident. Plaintiff's driver testifies that as he came even with the rear load of hay and turned to the left to pass, Miley turned the tractor to the left to enter the turn-in on the opposite side of the road. Miley applied his brakes and blocked the highway as he brought the tractor to a stop. Plaintiff's driver states that he was obliged either to collide with defendant's tractor or to turn his truck off of the highway to avoid a collision. He did the latter and suffered the damage to the truck complained of. Plaintiff's driver also states that defendant appeared to have gone past the turn-in at the time he turned to the left. This appears to have been done to enable the two loads of hay to make the turn into the farm entrance. Plaintiff's evidence shows that the operator of the tractor made no signal before turning, that in fact he could not be seen until he turned to the left of the load of hay that concealed him. Plaintiff's driver says that the gravel truck was equipped with air brakes and a loud-sounding horn, both of which were used and were in good working order. He says that he was 20 feet from the tractor when it suddenly turned and blocked the road. There was a four-foot shoulder on the left side of the highway and an eight-foot drop-off to the left of the shoulder. Plain-

tiff's truck came to a stop approximately 60 feet southeast of the farm entrance. Plaintiff testified that the truck was completely demolished. There is evidence that the truck had a reasonable market value of $2,500 before the accident and no value thereafter. Evidence was offered that the loss of the use of the truck was $35 per day, which was not admitted when defendants objected thereto. One expert witness called by plaintiff testified that the truck was worth about $350 before the accident and $100 thereafter. He also stated that the truck could be repaired for $200.

The defendants offered evidence that plaintiff's truck was traveling 50 or 60 miles per hour as it started to pass the first hayrack; that there was ample space to pass on the pavement and shoulder; that the driver failed to sound his horn; and that the driver stated, after the accident, that his brakes did not seem to take hold. The record shows a conflict in the evidence on these points, but in view of the jury's findings we are obliged to view the facts most favorable to the plaintiff in considering the sufficiency of the evidence to sustain the verdict.

The evidence of plaintiff and his witnesses was sufficient to sustain a finding of negligence on the part of the driver of defendant's tractor. If the tractor was turned to the left suddenly in front of plaintiff's truck without a warning signal or without the driver looking to determine whether any vehicles were approaching from the rear, and caused the accident by suddenly blocking the highway, as the jury found, the evidence is sufficient to sustain the jury's verdict of negligence on the part of the operator of the tractor. A verdict based upon conflicting evidence will not be reversed on appeal if there is evidence from which reasonable minds might draw different conclusions. Dischner v. Loup River Public Power District, 147 Neb. 949, 25 N. W. 2d 813.

The defendants complain of the refusal of the trial

court to instruct the jury that the loss of the use of plaintiff's truck was not a proper element of damage to be considered where the truck was damaged to such an extent as to be beyond repair. In this connection the record shows that the trial court instructed the jury on the theory alleged in the petition that the truck was completely demolished. In stating the measure of damages to the jury, the trial court in part said: "* * * the measure of plaintiff's recovery under the issues and evidence in this case is the fair and reasonable market value of said plaintiff's truck immediately before said accident, less the reasonable market value of any salvage you may find from the evidence plaintiff recovered from the truck after the accident." The trial court did not submit the question of damages resulting from a loss of the use of the truck nor in any way make reference thereto in its instructions to the jury. In fact, the defendants objected to the offer of such evidence and their objection was sustained. The trial court is not required to instruct upon matters not within the issues.

The defendants urge that the trial court erred in instructing the jury on the theory that plaintiff's truck was demolished when it appears from the evidence that one of plaintiff's expert witnesses testified that it was not demolished and that it could be repaired for the sum of $200. It is further urged that plaintiff is bound by this evidence and that a judgment in an amount greater than $200 is excessive. The record shows that plaintiff called one Dallas G. Divine and qualified him as an expert on the value of used cars and trucks. He then gave it as his opinion that the truck in question was of the reasonable value of $350 before the accident and $100 after the accident. He later stated that he had not seen the truck for almost a year and that he did not know the condition of the truck on the date of the accident. On cross-examination he reaffirmed his estimates as to value and stated that in his opinion the

truck could have been repaired at a cost of $200. No objection was made to this evidence.

As a general rule a party calling a witness vouches for his credibility and is ordinarily bound by any evidence he gives which is not contradicted or shown to be unreliable. In other words, a party who offers the evidence of a witness cannot subsequently object that it should not have been received or that it is insufficient to sustain a judgment based thereon. But a party calling a witness is not necessarily bound by his testimony. This is true where the testimony is contradicted, either expressly or by inference, by evidence that would justify the trier of facts in arriving at a different conclusion. The foregoing rule appears to have been recognized in Zimman v. Miller Hotel Co., 95 Neb. 809, 146 N. W. 1030. In that case plaintiff called defendant's elevator operator to establish negligence in the operation of the elevator. The witness testified to facts which absolved himself of fault. No other evidence was produced showing, or tending to show, how the accident occurred. This court said: "He was the plaintiff's own witness, and under those circumstances plaintiff was bound by his testimony. It follows that there was a failure of proof showing, or tending to show, that the elevator conductor was negligent in failing to close the door on floor B. It is true that, if there had been any other evidence from which the plaintiff could claim that the conductor was negligent in that respect, that question might have been submitted to the jury." See Ross v. Carroll, 138 Neb. 1, 291 N. W. 726.

An authoritative text states the rule as follows: "Expert opinions are not ordinarily conclusive in the sense that they must be accepted as true on the subject of their testimony, but are generally regarded as purely advisory in character; the jury may place whatever weight they choose upon such testimony and may reject it, if they find that it is inconsistent with the facts in the case or otherwise unreasonable. * * * Opinion

testimony as to value is not conclusive; when uncontradicted, it may be regarded as sufficient proof, but even in such case the jury may exercise their independent judgment." 20 Am. Jur., Evidence, § 1208, p. 1060.

In a case similar in principle the Kansas court said: "Where a plaintiff introduces evidence sufficient to prove all the material facts of his case prima facie, some of which facts however are proved only by circumstantial evidence, and also introduces the direct testimony of one witness contradicting some of the facts proved by this circumstantial evidence, and no other evidence is introduced in the case, the court may rightfully overrule a demurrer to the evidence, and may also rightfully sustain a verdict found by the jury in favor of the plaintiff upon the evidence." Kansas City, Ft. S. & G. R. R. Co. v. Foster, 39 Kan. 329, 18 P. 285. See, also, Yerkes v. Kansas Pipe Line & Gas Co., 133 Kan. 429, 1 P. 2d 271. It would seem to us that the foregoing rule would have particular application to an expert witness whose opinion might be based on evidence considerably different than that of some other expert witness. In the case at bar the witness Divine testified that he had not seen the truck for almost a year, while other witnesses had full knowledge of its condition. The jury has a right to consider these matters when the evidence as a whole is sufficient to sustain the cause of action alleged. If in so considering the evidence, the jury believes the witness whose evidence is contradictory to that of plaintiff's other witnesses, plaintiff is in no position to complain since he vouched for the credibility of the witness by offering his evidence in the case. But the fact that an expert witness called by a plaintiff may testify contrary to plaintiff's other witnesses and in a manner helpful to the defendant does not bind the plaintiff to accept it as true when other evidence sufficient to sustain plaintiff's case is in the record. It remains a question for the jury.

The defendants rely upon the case of McClary v. En-

dom's Transfer & Storage Garage, 19 La. App. 515, 139 So. 702. This case appears to have been tried to the court without a jury. The evidence as to the cost of repairs to the damaged car was very conflicting. Plaintiff's two witnesses testified that it was damaged to the extent of $763.50 and $660.90 respectively. After the case was closed it was reopened for the taking of additional evidence as to the cost of repairs. Plaintiff then produced evidence that the damage was $432.10. The trial court entered judgment for $400, an amount which was not justified by any evidence in the record. In considering the case on appeal the court in discussing plaintiff's claim that the judgment should have been for the full amount prayed for said: "He is surely bound by this estimate and cannot contend for the higher figure." The court thereupon increased the judgment to $432.10. We do not think this case is authority for the contention here advanced because of the special circumstances to which the rule was there applied.

We have examined all other assignments of error and find them to be without merit. The issues were fairly submitted to the jury and the verdict returned is sustained by the evidence.

AFFIRMED.

CECIL ROBERT HALLOWELL ET AL., APPELLEES, V. GEORGE R. BORCHERS ET AL., APPELLANTS.
34 N. W. 2d 404

Filed November 5, 1948. No. 32436.

1. **Adverse Possession.** The plea of title to land by adverse possession, to be effective, must be proved by actual, open, exclusive, and continuous possession under claim of ownership for the full statutory period of ten years.
2. ———. Where one by mistake enters upon and takes possession of the land of another, claiming it as his own to a definite and certain boundary, and continues in the open, notorious, and exclusive possession thereof under such claim, for ten years or

more, he acquires title thereto by adverse possession although the land was not enclosed.

3. ———. The purchase or attempted purchase of an outstanding title by one in adverse possession, after the expiration of the statutory period, is not alone sufficient to break the continuity of possession or divest it of its adverse character, although the occupant may believe that he is thereby acquiring the true title.

4. **Trespass.** Willful trespass within the contemplation of section 25-2130, R. S. 1943, means that the act must be done knowingly or intentionally, and that the act was committed with knowledge, and that the will consented to, designed and directed the act, as distinguished from a violation of the law where it appears to be in the honest and reasonable belief of the parties that they were acting within their legal rights and the conduct was rightful.

5. **Costs.** Within the contemplation of sections 25-1708 and 25-21,119, R. S. 1943, in a suit to quiet title in persons claiming adverse possession to specific real property, the costs follow the judgment.

APPEAL from the district court for Douglas County: JACKSON B. CHASE, JUDGE. *Affirmed in part; reversed in part; and remanded with directions.*

Fischer, Fischer & Fischer, for appellants.

Swarr, May, Royce, Smith & Story and *Robert K. Andersen,* for appellees.

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

MESSMORE, J.

This is an action to quiet title in plaintiffs to certain strips of disputed land described in their amended petition, and to enjoin the defendants from entering upon such land and committing damage thereon.

For convenience appellants will be referred to under their original designation as defendants, and the appellees as plaintiffs.

On or about April 26, 1919, the plaintiffs purchased Lots 15 and 16 in Benson Acres, an addition to the city of Omaha, and immediately went into possession. Plaintiffs allege in their amended petition that for

several years prior to April 1919, the exact time being unknown to them, the owners of Lots 15 and 16 above described had occupied and cultivated along with said lots, narrow strips of land on the north and west thereof, described as follows: "Commencing at the northeast corner of Lot 14, thence southerly along the east line of Lot 14, 248.1 feet more or less to the southeast corner of Lot 14; thence westerly along the south line of Lot 14, 15 feet; thence northerly on a straight line intersecting the north line of Lot 14 5 feet west of the northeast corner of Lot 14, 254.3 feet more or less to a point 6.8 feet beyond the north line of Lot 14; thence easterly 241.0 feet more or less to the east line of Lot 17 at a point 20 feet from the southeast corner of Lot 17; thence southerly along the east line of Lot 17, 20 feet to the southeast corner of Lot 17; thence westerly along the south line of Lot 17, 247.1 feet more or less to the point of beginning." The total of the disputed strips of land is approximately one-tenth of an acre.

Plaintiffs further allege they believed and understood that they had purchased all of the land as herein described; that they and their predecessors in title before and since April 1919 have been in the actual, open, notorious, exclusive, continuous, and adverse possession of the described land and by virture thereof are the owners of the fee title.

The defendants purchased Lots 13, 14, and 17 in Benson Acres on September 30, 1946, and moved on the land in February 1947. Lot 14 adjoins the plaintiffs' property on the west, and Lot 17 on the north.

Defendants' answer denied adverse possession of the strips of land in dispute, in the plaintiffs, and alleged that plaintiffs only claimed land they purchased extended to the actual boundary lines. In October 1946, defendants had a survey made of Lots 13, 14, and 17. Subsequently the same surveyor made a survey for the plaintiffs, which included the disputed strips of land in question, designated as the "claimed" boundaries of the

plaintiffs. The plaintiff Maud Hallowell accompanied the surveyor and pointed out certain objects around what she considered to be the boundary lines. Exhibit 1, in evidence, is a plat drawn to scale, which shows the actual boundary lines, and the disputed strips of land as claimed which, according to the original survey, was considered an encroachment over the actual boundary lines.

When the plaintiffs first purchased their land it was in alfalfa and had a three-room stucco house on it. The land adjoining it on the north was a plot of land full of weeds, as was the land to the west of them. Plaintiffs' land was left in alfalfa for a year or so. Thereafter the plaintiffs made garden, planted fruit and other trees, and sowed grass seed. At that time and since, the plaintiffs have considered the boundary of their land to the north at the edge of the alfalfa which separated their land from other acreage. The alfalfa gradually died out and blue grass grew in place of it. To the north where this occurred, plaintiffs called this land the "meadow," and that is where they planted the trees, most of which were Russian olives, which they refer to as the hedge. The trees along the claimed boundary line are somewhat irregular, not being in an exact straight line. The plaintiffs located their boundary line on the west by the edge of the alfalfa on their place.

Plaintiffs at all times cultivated what they considered to be their own land within the boundary of the lines claimed. The land to the north and west of plaintiffs' land has been cultivated at different times throughout the years that the plaintiffs occupied their land. The persons cultivating the adjoining land stopped planting and plowing at the claimed boundary lines thereof, and on the west have always left a ditch, until the defendants' plowman plowed it up in the spring of 1947. This ditch was a distinct and straight line until it was filled in. On the north claimed boundary line they left a furrow which

the plaintiffs kept dug out to keep the water from running over their meadow.

In 1931, the plaintiffs put a chicken-yard fence within a few inches of the north claimed boundary line enclosing a part of the disputed strip of land, and erected a chicken house in the northwest corner of the chicken yard. In 1933, maple trees were planted in the chicken yard. In 1935, plaintiffs planted Russian-olive trees along the claimed boundary line on the north, some of which were destroyed by drought in the following year, and some on occasion of a fire. Some of the trees remaining are of a height of five to six feet. Other trees and shrubs appear along the north and west claimed boundary lines.

The plaintiff Cecil Robert Hallowell testified that he planted most of the trees on their land, and kept the grass to the north claimed boundary line mowed at all times. He corroborated the foregoing facts.

A witness who cultivated the lots now owned by the defendants for a period of three years until 1932, and who is familiar with the plaintiffs' property as it appears at the present time, testified that the north part of the plaintiffs' property was in blue grass, and he cultivated close to what he supposed to be the boundary line, 18 to 20 inches north of the Russian-olive hedge. Along the west of the plaintiffs' property where he cultivated, there was a small ditch and he kept on the west side of this ditch. It looked to him that at the present time the ditch had been filled in. There were trees just east of where he cultivated. He located the boundary line from where it had been plowed out.

The plaintiff Maud Hallowell testified that the first time she knew that the plaintiffs had been using any ground outside of their own property was in the fall of 1946 when a survey was made by direction of the defendants. She was "dumfounded" to learn these facts, and thereafter offered to purchase the disputed strips of land from the defendants for the amount of $200, because the plaintiffs did not want trouble with their neighbors.

Plaintiff Cecil Robert Hallowell further testified that when the plaintiffs entered upon their land they made no inquiry as to the boundary lines of the property, did not do so at any time subsequent thereto, and actually learned where the true boundary line was when the defendants' survey was made. He thought the boundary of his property was the claimed boundary lines on the north and west thereof. On occasions when friends visited, plaintiffs would show them the boundaries of their land, which were as shown on exhibit 1 as the claimed boundary lines. Other witnesses corroborated the foregoing testimony.

The defendant George Borchers testified that when the defendants purchased their land it consisted mostly of weeds, and they were unable to determine where the boundary lines were so decided to have it surveyed. A short time after the survey the defendants went to see the plaintiffs at their residence. This witness informed plaintiffs that evidently, without their knowing it, they were occupying some of the defendants' land, and suggested if they had any trees to save, the fall of the year would be the right time to transplant them; that they intended to put in a fence and have the whole thing plowed up and used. The plaintiff Cecil Robert Hallowell seemed to be agreeable; his wife, Maud Hallowell, did not want a fence between the properties. This witness told them that if they were not satisfied, they could have the land surveyed. At that time the plaintiffs made no claim to any land other than that which constituted the true boundary line between the properties. Defendants, under advice of counsel, proceeded to prepare to construct a fence on the true boundary line.

With reference to the chicken-yard fence, plaintiff Cecil Robert Hallowell testified that the defendant George Borchers asked him to move the fence in order that a survey could be had of the land, so this plaintiff took the fence down and moved the chicken house. The plaintiff Maud Hallowell testified that when the survey

was made and the plaintiffs found that the fence was over the actual boundary line which they had always thought was their acreage, they moved the chicken-yard fence at the request of the defendants, to bring the line in. After they consulted counsel they put the fence in exactly the position it had been in before. The defendants thereafter cut the wire and took the fence up. The defendant George Borchers testified that in a conversation with the plaintiff Cecil Robert Hallowell the Sunday after the survey was made that Mr. Hallowell agreed that the chicken fence and chicken house were over the line and that he would move them. At any rate, he did move them. The plaintiffs, at the request of the defendants, also removed some debris in the disputed strip of land to the west.

Plaintiffs' counsel wrote a letter to the defendants informing them that they had trespassed on the plaintiffs' land and caused damage thereon, and to refrain from any such acts in the future. The defendant Lois Borchers was engaged in cutting down trees on the disputed strip of land on Decoration Day, 1947. This was after the defendants had received the letter.

A witness engaged in the nursery business produced a list of trees alleged to have been destroyed by defendants, and estimated the cost of replacing trees which were destroyed on Decoration Day to be in the amount of $144.05. Plaintiffs testified that by virtue of the destruction of the trees by the defendants, they were damaged to the extent of $200. Most of the trees planted by the plaintiffs were seedlings and apparently were obtained at no expense.

The trial judge inspected the premises.

The trial court quieted title in the plaintiffs to the land as described in their petition, finding that plaintiffs, for the full statutory period prior to the time defendants acquired their property, had acquired the disputed strips of land by adverse possession; enjoined the defendants from entering upon said land and from in any manner

damaging or destroying any trees, shrubs, sod, or fences thereon; finding further that the plaintiffs suffered no damage and allowed no recovery therefor, and that each party should pay their own costs. Thereafter defendants perfected their appeal to this court.

This jurisdiction is committed to the rule: "The plea of title to land by adverse possession, to be effective, must be proved by actual, open, exclusive and continuous possession under claim of ownership for the full statutory period of ten years." Ellsworth Corporation v. Stratbucker, 134 Neb. 246, 278 N. W. 381. See, also, Conkey v. Knudsen, 135 Neb. 890, 284 N. W. 737; Wells v. Tietge, 143 Neb. 230, 9 N. W. 2d 180, 161 A. L. R. 1167.

It is the defendants' contention that under the facts as heretofore related the plaintiffs had no intention at any time to claim the disputed strips of land by adverse possession. In this connection, the case of Colvin v. Republican Valley Assn., 23 Neb. 75, 36 N. W. 361 is cited: "The possession must not only have been actual, open, and continuous, but it must have been accompanied by an intention on his part to hold the land as the owner of it. It must have been under a claim of ownership. No matter how exclusive and hostile to the real owner, in appearance, it cannot be effectually adverse, unless accompanied by the intent, on the part of the plaintiff in error, to make it so. A naked possession, unaccompanied with any claim of right, will never constitute a bar, but will inure to the advantage of the real owner."

In the above cited case there was evidence as to who should remain in possession. The plaintiff's memory was somewhat defective and the purchaser of the land was dead. This court, from the record, determined that it was reasonably clear that the plaintiff in error retained the possession by the consent of the purchaser, without any purpose of asserting ownership, or claiming to own it, until after a certain time. We mention the foregoing to show that the facts are very much dissimilar from the

facts in the instant case and, as will be shown later, the case is not applicable to the case at bar.

In the case of Obernalte v. Edgar, 28 Neb. 70, 44 N. W. 82, this was an action of ejectment for a narrow strip of land one-half mile long, 73 links wide at one end and running to a point at the other. The plaintiff charged in his petition that the defendant was keeping him out of possession of this strip of land. The defendant admitted the charge and claimed that he was not only then in possession of said land, but had been in possession continuously for a sufficient length of time to give him the title thereto by adverse possession. There was apparently no dispute between the parties as to the true boundary lines, or corners, as they originally existed with reference to the disputed land. It is apparent the land was not fenced. The trial court instructed with reference to the rule as to what constitutes adverse possession, and further instructed that to constitute adverse possession it must appear that what was done by the person claiming title thereunder was not done with the permission of the owner but was done under a claim of right in himself and recognizing no right in the real owner; and not done through inadvertance or mistake, but under a claim of right in himself and in hostility to the right and possession of the owner; further, that the actual possession of land may arise in many different ways, and in any of the different ways of improving it which are open and notorious in character, which show an intention to appropriate to some useful purpose - that is, by enclosing by fence, erecting buildings, planting groves or trees - going to indicate the appropriation of the property of the parties claiming to own it.

There is evidence that the plaintiffs offered to purchase the disputed strips of land from the defendants. While this point is not raised in this court, it is well to point out that in Oldig v. Fisk, 53 Neb. 156, 73 N. W. 661, it is said: "It is generally conceded that one may purchase an outstanding title to 'buy one's peace' or pre-

vent threatened litigation. There is no room to distinguish in this behalf, between litigation threatened by word of mouth, and litigation threatened by the fact that the title is outstanding, - a constant menace from the very fact of its existence. * * * In buying what is outstanding there is nothing partaking of the nature of an acknowledgment of the superiority of that title or an abandonment of one's former claim. The old title is not conveyed away or lost. Such an act admits, and admits only, that the occupant deems it worth while to get rid of the outstanding title and unite it to the one under which he has been holding. It does not prove, and alone it does not even tend to prove, a change in the character of the possession or a recognition of a title paramount."

It is also the defendants' contention that the claimed boundaries are not sufficiently well defined; that under the law of Nebraska the adverse claim must be to fixed monuments and to certain lines; that in the survey made for the plaintiffs, the plaintiff Maud Hallowell established an arbitrary line which included what she wanted to include, with utter disregard to the ground to which the plaintiffs claim they had been doing acts of adverse possession; that under the evidence, assuming the plaintiffs had been claiming any of the land for over ten years, where is the boundary line to which they have been claiming? Where are the fixed monuments? The defendants contend that the only case that constitutes an exception in such respect is Brownfield v. Bleekman, 4 Neb. (Unoff.) 443, 94 N. W. 714.

The bulk of the Nebraska cases involve disputed boundaries, and in most of these cases the land claimed by the adverse possessor was enclosed by him or occupied by him up to a fixed monument, such as a road or a ditch. In Tex v. Pflug, 24 Neb. 666, 39 N. W. 839, it is said: "If one by mistake inclose the land of another and claim it as his own to certain fixed monuments or boundaries, his actual and uninterrupted possession for

the statutory period will work a disseizin and his title will be perfect." The statement is repeated in Levy v. Yerga, 25 Neb. 764, 41 N. W. 773, Obernalte v. Edgar, *supra,* and other cases.

In Brownfield v. Bleekman, *supra,* this court said, in speaking of Tex v. Pflug, *supra,* Levy v. Yerga, *supra,* and Obernalte v. Edgar, *supra*: "It is true, in the three cases cited, the rule is announced in the same language and reference is made to fixed monuments and the inclosure of the land; but that the inclosure of the land is not an essential element of the rule, appears from the fact that, in the last of the cases cited, it does not appear the land was inclosed. (See Obernalte v. Edgar, *supra.*) The importance of the inclosure in any case, we think, is due to the fact that it renders the possession open and notorious and tends to show that it was exclusive. That this is not the only way by which possession may be rendered open and notorious is clear from one of the instructions, approved in *Obernalte v. Edgar, supra,* whereby the jury were instructed that 'the actual possession of the land may arise in many different ways, and in any of the different ways of improving it which are open and notorious in their character, which show an intention to appropriate to some useful purpose - that is, by inclosing by fence, erecting buildings, planting groves or trees - going to indicate an appropriation of the property of the persons claiming to own it.' "

In this connection we make reference to Obernalte v. Edgar, *supra,* as appears above.

The defendants seek to distinguish Brownfield v. Bleekman, *supra,* from other Nebraska cases involving the same subject matter and from the instant case, on the grounds that in Brownfield v. Bleekman, *supra,* the stipulation appearing therein constituted agreement on the facts, and the land was described with mathematical accuracy in the petition and boundary lines were apparently clear and definite, which is not true in the instant case. The stipulation as appears at p. 445, sum-

marized, dealt with the possession of the disputed land but was not effective as against testimony offered in the case aside from the stipulation.

In the instant case the amended petition of the plaintiffs described the disputed strips of land and the claimed boundary lines thereof with mathematical accuracy. The evidence discloses that during all the time from 1919 to the present, the boundary to which the plaintiffs have occupied and claimed was easily recognized. The reasoning in Brownfield v. Bleekman, *supra,* from a practical standpoint is the same as in Obernalte v. Edgar, *supra.* We adopt the reasoning and conclusion in Brownfield v. Bleekman, *supra,* as the same applies to the instant case.

With reference to the testimony of the defendants to the effect that the plaintiffs made no claim to any other land than to the true boundary line, and other evidence of similar import heretofore appearing in the opinion, we might well add that it is clear that not too much importance should be attached to what an occupant may claim on the witness stand on this point, particularly when it is apparent that his testimony is altogether inconsistent with his acts and conduct during the period of his possession. Any honest witness, unless coached by counsel, would be likely to answer a question as to whether he claimed more than to the true boundary in the negative, and would not be likely to think of qualifying it by stating that the true boundary of which he speaks is the boundary as appears to him to be the true one. Hence, while we do not want to go so far as to hold that such testimony should not be taken into consideration in determining the true facts of the case, it is clear that to have a case depend entirely upon what might become a mere verbal quibble is dangerous and subversive of rights. Testimony that he claimed only to the true boundary may, in connection with acts of possession, aid in determining what the character of possession was, and whether thereby the true owner has been advised that adverse possession is claimed. See City of

Rock Springs v. Sturm, 39 Wyo. 494, 273 P. 908, 97 A. L. R. 1. See, also, Daily v. Boudreau, 231 Ill. 228, 83 N. E. 218, in which, apparently, the testimony of the occupant that he never intended to claim more land than called for by his deed was given no weight whatever.

In Bond v. O'Gara, 177 Mass. 139, 58 N. E. 275, 83 Am. S. R. 265, it was said that the law should choose the intention directed towards the physical object rather than the intention to hold in accordance with the deed.

In Anderson v. Richards, 100 Or. 641, 198 P. 570, the court said: "Adverse possession is founded upon the intent with which the occupant has held possession, and this intent is to be determined by what he has done: * * *."

An annotator, in speaking of possession as indicating adverse claim, said: "In a steadily increasing number of jurisdictions, the possession is the important element, and it is held that such possession is not the less adverse because the person takes possession of the land in question innocently and through mistake. In other words, it is the visible and adverse possession, with an intention to possess land occupied under a belief that it is the possessor's own, that constitutes its adverse character, and not the remote view or belief of the possessor. Or, as said in 1 R. C. L. 733, 'the mere fact of possession is allowed to override the intention; and it is held that a possession beyond the true boundary lines, irrespective of the intention with which it was taken, becomes adverse.'" 97 A. L. R. pp. 58, 62. Under this annotation are a number of Nebraska cases, Tex v. Pflug, *supra,* Levy v. Yerga, *supra,* Obernalte v. Edgar, *supra,* and Brownfield v. Bleekman, *supra,* cited in this opinion, together with others unnecessary to cite.

In view of the evidence and the foregoing authorities, it is apparent that in the instant case the plaintiffs, from and after April 26, 1919, made improvements on their own land of a substantial character and on the

disputed strips of land by planting trees and shrubs thereon more than ten years prior to any assertion of claim made to the disputed strips of land by the defendants. The performed acts with reference to the disputed strips of land were such as are usually performed by owners, and constitute evidence of claim of title. For actual possession, no particular act is required. What is sufficient to meet the requirements depends upon the character of the land and all of the circumstances of the case. We believe that the evidence in the instant case supports the judgment of the trial court, and it was not in error in determining adverse possession to the disputed strips of land in the plaintiffs.

The plaintiffs cross-appeal, contending the trial court erred in refusing to allow treble damages for willful trespass by the defendants onto the plaintiffs' land and committing damage to their property.

Section 25-2130, R. S. 1943, provides in substance that for willful trespass, injuring any trees or shrubs on the land of another, for any purpose whatever, the trespasser shall pay treble damages at the suit of any person entitled to protect or enjoy the property aforesaid. In this connection, the plaintiffs rely on a letter written by their counsel on May 10, 1947, the substance of the contents of which appear heretofore in the opinion. On May 30, 1947, one of the defendants entered onto the "claimed" boundary line and proceeded to chop down trees in preparation for the construction of a fence on the true boundary line as determined by defendants' survey. In doing this, it is apparent the defendants relied on their deed of conveyance describing the land they purchased, and on their survey and the advice of their counsel. Obviously, the letter written by plaintiffs' counsel to the defendants is not conclusive of the defendants' legal rights in the matter. The action of the defendants in such respect did not constitute a willful trespass. "Willfully," as used in connection with an act forbidden by law, means that the act must be

done knowingly or intentionally, and that the act was committed with knowledge, and that the will consented to, designed, and directed the act. See Woodhouse v. Railway Co., 67 Tex. 416, 3 S. W. 323. If the defendants violated the law, it appears to be in the honest and reasonable belief of the defendants that they were acting within their legal rights, and their conduct was rightful. See, State v. Shevlin-Carpenter Co., 102 Minn. 470, 113 N. W. 634; King v. Merriman, 38 Minn. 47, 35 N. W. 570. We conclude that there was no error made by the trial court as contended by the plaintiffs in such respect.

The plaintiffs contend the trial court erred in not allowing them actual damage for the alleged trespass onto their land; that in the absence of treble damages, actual damage for trespass should be allowed. The plaintiffs' evidence is to the effect that to replace the trees and shrubs destroyed by the defendants would cost $144.05. Plaintiffs testified the value of the trees and shrubs, that is, watering and caring for them, amounts to $200. It is apparent from the record that most of the trees were transplanted seedlings, and other items that were planted cost the plaintiffs nothing. The trial court inspected the premises and obviously determined that the damage was of such trivial significance that no recovery should be had. We conclude the evidence does not sustain any actual damage of a significant nature, and that the trial court did not err in its judgment in refusing to allow actual damages.

The plaintiffs further contend the trial court erred in finding and adjudging that each party pay their own costs. Plaintiffs cite section 25-1708, R. S. 1943, which provides: "Where it is not otherwise provided by this and other statutes, costs shall be allowed of course to the plaintiff, upon a judgment in his favor, in actions for the recovery of money only, or for the recovery of specific real or personal property."

Section 25-21,119, R. S. 1943, provides, in substance,

for assessing of costs where one or several defendants appear and disclaim title, lien, or interest adverse to the plaintiff, such defendant shall recover costs. In other cases the costs shall abide the final decree, judgment or order in the action.

The court's decree and judgment in the instant case quieted the title to specific strips of land in the plaintiffs by adverse possession. Within the contemplation of the afore-cited statutory provisions, in a suit to quiet title in persons claiming adverse possession to specific real property, the costs follow the judgment. We affirm the judgment of the trial court, with the exception of assessing costs as hereinbefore determined, and with reference to the costs that part of the judgment should be reversed and the cause remanded with directions to tax all costs to defendants.

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

ARDETH J. HANSON, APPELLANT, V. PAUL HANSON ET AL., APPELLEES.
34 N. W. 2d 388

Filed November 5, 1948. No. 32524.

1. **Habeas Corpus: Infants.** Habeas corpus is a proper remedy to determine the controversy concerning the rights of custody of infants.
2. **Divorce.** A judgment in a default divorce action affecting the custody of children, where there was no appearance by the defendant who was served by personal service in another state where she and her children are domiciled, is subject to collateral attack by habeas corpus.
3. **Divorce: Process.** Court granting divorce decree on constructive service against nonresident defendant is without jurisdiction to fix the custody of the parties' minor children living at the time with such defendant and never within the state where the divorce proceedings were instituted.
4. **Parent and Child.** The natural rights of the parents are of important consideration and, in the absence of special circum-

stances, the child or children should be awarded to the parent, or parents, as against more distant relatives or third persons.

5. **Habeas Corpus: Infants.** Touching the custody of children, the case stands before a district judge in a habeas corpus action as if there had been no former decree and the matter was before it to determine as to what would be to the best interests of the children.
6. **Infants: Parent and Child.** Custody of a child of tender years should be awarded the mother, unless it is shown that she is unsuitable or unfit to have such custody, or through some peculiar circumstance is unable to furnish a good home.
7. **Domicile: Habeas Corpus.** Children domiciled with their mother in another state, temporarily visiting or residing in this state and not acquiring a residence herein, may be subjects of a habeas corpus proceeding to determine their custody.
8. **Infants: Parent and Child.** Where the evidence shows that the mother had the custody of such children prior to the time that they were temporarily within this state and is not shown to be an improper or unfit person to have such custody, it should not be denied her.

APPEAL from the district court for Thayer County: FRANK J. MUNDAY, JUDGE. *Reversed and remanded with directions.*

John L. Richards, for appellant.

Carr & Hoagland and *Baldwin & Pike,* for appellees.

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

MESSMORE, J.

This is an action by the petitioner against the respondents for a writ of habeas corpus to obtain the custody of Donald Hanson and Keith Paul Hanson, minor sons of the petitioner and her former husband Donald E. Hanson. We deem a summary of the pleadings unnecessary. The contentions of the respective parties become manifest by the evidence shown by the record and as appears in the opinion.

The record discloses that Donald E. Hanson and Ardeth J. Hanson were married April 15, 1943, at Chester, Nebraska, and that at that time he was serving in the United

States Navy. After the marriage the couple went to live in Long Beach, California. On May 8, 1944, Donald Hanson was born, and on August 15, 1945, Keith Paul Hanson was born. Both were born in California. Donald E. Hanson, the husband and father, was discharged from the military service in November 1945. The family were living in California at the time. Subsequent to his discharge from the service Donald E. Hanson worked for a while in a restaurant in San Diego, California. The family lived together from October 1945, until December 4, 1946, when they separated. Donald E. Hanson, on that date, returned to Nebraska with his mother, Irene Hanson, who had been visiting him and his family since November 28, 1946. Ardeth Hanson and the children remained in California.

There appears in the record a separation agreement entered into December 3, 1946, between the parties, wherein they agreed each to reside at the place or places and with such relatives, friends, or other persons as they from time to time thought fit, without restraint, provided only that the home supplied by the wife should be a fit and proper home for the minor children; that the wife should have custody of the minor children and the husband pay $50 per month for their support. Since the date of the agreement, Donald E. Hanson has contributed $137.50 toward the support of the children.

After Donald E. Hanson left, the petitioner, in the latter part of December 1946, procured employment doing fountain and cashier work in a drive-in in San Diego, California, at a salary of $36 per week. She remained in this employment until July 4, 1947, when she accepted employment as a car hop at the same establishment on an agreed salary and tips which enabled her to make $75 or more per week. She remained in this work until she returned to Nebraska on April 23, 1948.

Exhibit 1 is a letter dated March 27, 1947, written to the petitioner by her husband apparently in reply to a letter of hers of March 10th and a wire of March 26th.

This letter calls attention to the husband's visit to California to see the petitioner and their children on March 3d. At that time he endeavored to persuade his family to return with him to Nebraska where he claimed he had his home and where he was employed and could support them. In this connection he called the petitioner's attention to an oral agreement that she made on March 3d, to the effect that she would permit the children to return to Nebraska and visit him and the grandparents. He also informed her that due to her failure to keep her word in such respect, and her unwillingness to return to Nebraska but to remain in her employment, he declared the agreement made between the parties in December 1946, no longer effective. He further wrote to the effect that his earning capacity was nil at that time due to an accident, and he could not send her any money.

When he returned to Nebraska in December 1946, he lived with his parents and engaged in the dairy business with his father. Connected with this business was a port-of-entry position held by the father.

On May 17, 1947, Donald E. Hanson instituted suit for divorce in the district court for Thayer County, charging in the petition that the defendant, Ardeth Hanson, was guilty of extreme cruelty. On May 25, 1947, Ardeth was served with a summons in San Diego, California. Shortly after the summons was served on her she wrote a letter to her husband, which is undated, to the effect that he should "come out and get the kids" and bring his mother to help take care of them. She also wrote some admonitions in the letter about his conduct toward the children, and stated she was not going to fight the case because she needed her job and was not making enough money to take care of them, and that her mother was leaving. She further wrote: "Maybe if you have the kids *you* folks will make you take care of them * * *."

The petitioner did not appear in the divorce action, and she was in default June 24, 1947. The default divorce decree was entered on March 15, 1948. At that time

the younger child, Keith Paul Hanson, was living with his mother in California. Petitioner testified that she had a conversation with her husband over the telephone on July 7, 1947, wherein she called his attention to the separation agreement providing for support money. His reply was that he did not have any money, but would send some when he got it. He further stated that if she would send the baby to Nebraska to visit his grandparents, he would send him back after the summer vacation, which would help her out until she got on her feet. The petitioner's reason for calling her husband was that she was unable at that time to take care of both of the children. On July 9, 1947, she sent the older boy to Nebraska with his uncle to visit his grandparents, in accordance with the telephone conversation.

In October 1947, Donald E. Hanson enlisted in the United States Army for a period of three years, and at the time of this hearing, was stationed at Spokane, Washington.

On April 3, 1948, Ardeth's mother had an opportunity to visit friends and relatives in Belleville, Kansas, a short distance from the home of respondents in Chester, Nebraska. Ardeth permitted the younger son, Keith Paul Hanson, to accompany her mother, and instructed her mother not to let the child go into Nebraska. On or about April 16, 1948, Ardeth's mother brought Keith Paul Hanson to visit his grandparents. She returned to get him the next night when both of the children were in bed, and took him without getting his clothes. His grandmother, Irene Hanson, testified she just did not get the child's clothes.

The record discloses a controversy with reference to the custody of Keith Paul Hanson by certain welfare agencies intervening in the interests of the child at Ogden, Utah, and Hebron, Nebraska, for the reason that when Ardeth's mother arrived at Ogden the child was ill and was without adequate clothing. There is some intimation in Ardeth's testimony that when she heard about

the child on or about April 19, 1948, from the Traveler's Aid, if she would permit the child to return to Nebraska, her mother would be released. Ardeth informed the inquirer that she was returning to Nebraska in the interests of her children. The record does not disclose that there was any threat by any proper authority to prosecute Ardeth's mother. The telegrams in the record are of an inquiring nature, and nothing more.

On cross-examination Ardeth testified that she held the job of car hop, and worked from six at night until two in the morning, and resided approximately six blocks from her work; that her mother lived with her and could take care of the children during Ardeth's working hours.

Pictures are in evidence which the respondents introduced apparently to show that Ardeth was indiscriminate or was in a compromising position with men other than her husband. It appears that she worked in a photograph gallery on what is known as the "Pike" where there is a carnival, while she and her husband were in California, to earn some money for the support of their minor children until the allotment checks by the government were received. There is nothing in the pictures that discloses any improper conduct on her part.

The testimony of the witnesses for the respondents is for the most part with reference to their fitness to have the care and custody of the minor children. The type of home, the reputation, the financial circumstances, and religious character of the respondents are favorable and not particularly denied.

The trial court adjudged that the application of the petitioner for a writ of habeas corpus be dismissed and that the custody of the minor children be left with respondents. Upon the overruling of the motion for new trial, the petitioner perfected her appeal to this court.

The petitioner will hereinafter be referred to as the appellant, and the respondents as the appellees.

The appellant contends the trial court erred in awarding the custody of the minor children to the appellees

for the reason that the judgment is contrary to the law and the evidence.

Section 42-305, R. S. 1943, provides for constructive service in divorce actions. It is in part and in substance as follows: No person shall be entitled to a divorce unless the defendant shall have been served with personal notice duly approved and appearing of record, if out of this state, or unless the defendant shall have entered an appearance in the case.

The appellant was served with personal notice at her home in San Diego, California. She entered no appearance in the divorce action.

Section 38-107, R. S. 1943, provides in part: "The father and mother are the natural guardians of their minor children and are equally entitled to their custody, * * * being themselves competent to transact their own business and not otherwise unsuitable."

Parents have a natural right to the custody of their children unless they are affirmatively shown to be unfit. See Voboril v. Voboril, 115 Neb. 615, 214 N. W. 254.

"In general, the writ of habeas corpus has been extended to, and may be used in, controversies regarding the custody of infants. Such proceedings are governed by considerations of expediency and equity, and should not be bound by technical rules of practice." 39 C. J. S., Habeas Corpus, § 41, p. 568.

"After the court's jurisdiction has been invoked by habeas corpus petition seeking custody of a child, the child is a ward of the court and its welfare lies in the hands of the court; * * *." 39 C. J. S., Habeas Corpus, § 41, p. 570. See, also, 25 Am. Jur., Habeas Corpus, § 80, p. 204; Kaufmann v. Kaufmann, 140 Neb. 299, 299 N. W. 617. In re Application of Schwartzkopf, 149 Neb. 460, 31 N. W. 2d 294; Brandon v. Brandon, 154 Ga. 661, 115 S. E. 115; Kline v. Kline, 57 Iowa 386, 10 N. W. 825; Sanders v. Sanders, 223 Mo. App. 834, 14 S. W. 2d 458; Rodgers v. Rodgers, 56 Kan. 483, 43 P. 779.

The foregoing authorities are clearly indicative that

habeas corpus is the proper remedy to try the issues of the custody and welfare of minor children in a case such as the one at bar.

"Domicile" may have a variety of significations depending on various applications. An exact and comprehensive definition is hard to formulate. It manifests the legal conception of home, and is synonymous with home. See 28 C. J. S., Domicile, § 1, p. 2. See, also, Brandon v. Brandon, *supra.*

"In a strict legal sense that place is properly the domicil of a person where he has his true, fixed, permanent home and principal establishment, and to which place he has, whenever he is absent, the intention of returning, and from which he has no present intention of moving." 17 Am. Jur., Domicil, § 2, p. 588.

It is true that while Donald E. Hanson was in the military services his domicile and residence may have been considered where he formerly lived. It is apparent that after his discharge from the military service he and his wife lived in California. He obtained employment there, apparently with the intention to remain at the time, and was so employed for a year before leaving for Nebraska to make his home. His wife remained in California with the children and her job after the separation, and the agreement of separation in evidence provides that she may choose her residence. She has done so, with the intention to make her home in the state of California.

"It is settled that the domicil of an unemancipated legitimate infant is the same as that of the father, and will be deemed to have continued the same until it is shown to have been legally changed in circumstances warranting the change." Annotation, 49 L. R. A. N. S. 860, and cases cited thereunder.

If the interest of the child is to be considered in cases of legal separation, when hostility between the father and mother exists, where the latter is endowed with the legal custody of the child, there is no wisdom or justice

to support the rule that the legal residence of the mother and child does not establish the domicile of the latter. See Fox v. Hicks, 81 Minn. 197, 83 N. W. 538, 50 L. R. A. 663; also, Annotation, 49 L. R. A. N. S. 565.

It is apparent in the instant case the husband and wife each had separate domiciles.

Appellant contends that a default decree of divorce rendered upon constructive service, the defendant making no appearance in the case and defendant and her children being domiciled in another state, is void under the fourteenth amendment to the Constitution of the United States insofar as the custody of the minor children is concerned.

In the case of Kline v. Kline, *supra,* it is said in effect that a decree in a divorce proceeding in regard to the custody of minor children, nonresidents of the state in which such decree is made, is, so far as it relates to the custody of such children, without jurisdiction and cannot be enforced. Where, in a divorce proceeding, the court has no jurisdiction of defendant, except as acquired by publication, it has jurisdiction only to declare the status of the parties before it, and grant the divorce, and the decree in excess of this is without jurisdiction. It was argued that the father was entitled to the custody of the children by virtue of the Wisconsin decree. The general rule, as claimed by counsel for appellant, that the domicile of the wife and children is the domicile of the husband and father, is no doubt correct. From this it is argued that the circuit court in Wisconsin had complete jurisdiction of all the parties, and that the decree awarding the custody of the children to the father is entitled to full faith and credit in this state. But the rule contended for is subject to the exception, that in proceedings for divorce in most, if not all, the states, the law recognizes the husband and wife as having separate domiciles, and a valid divorce may be decreed in the state where only one of the parties resides. A suit for divorce, in its nature, makes the husband and wife opposite and con-

tending parties, and the legal fiction of a unity of person and of domicile, by reason of the marriage, is destroyed by the law which authorizes the action. Such was the fact in this case. The husband procured his decree on service, by publication, after the wife and two children, had been nonresidents of this state for more than two years.

In Weber v. Redding, 200 Ind. 448, 163 N. E. 269, it is said: "* * * the weight of authority is in favor of confining the jurisdiction of the court in an action for divorce, where the defendant is a non-resident and does not appear, and process upon the defendant is by substituted service only, to a determination of the *status* of the parties." See, also, Rigney v. Rigney, 127 N. Y. 408, 28 N. E. 405, 24 Am. S. R. 462; Thrift v. Thrift, 54 Mont. 463, 171 P. 272; Silver Camp Mining Co. v. Dickert, 31 Mont. 488, 78 P. 967, 3 Ann. Cas. 1000, 67 L. R. A. 940; De la Montanya v. De la Montanya, 112 Cal. 101, 44 P. 345, 53 Am. S. R. 165, 32 L. R. A. 82; 2 Cooley's Constitutional Limitations (8th ed.) 857. This rule of law extends to children who are not within the jurisdiction of the court when the decree is rendered, where the defendant is not a resident of the state of the seat of the court, and has neither been personally served with process nor appeared to the action. See Kline v. Kline, *supra;* Harris v. Harris, 115 N. C. 587, 20 S. E. 187, 44 Am. S. R. 471; Steele v. Steele, 152 Miss. 365, 118 So. 721; 2 Cooley's Constitutional Limitations (8th ed.) 857; 1 Wharton on Conflict of Laws (3d ed.) § 239f, p. 530.

Does the fact that the older child was temporarily visiting in this state when the decree of divorce was rendered give the district court of this state jurisdiction to determine its custody?

"Since custody of a child by one parent carries with it domicil and a domestic status, jurisdiction to give the child to one parent or the other depends in principle on the domicil of the child; and a state which is the temporary residence of the child, not the domicil, cannot confer

the right to custody." 2 Beale, The Conflict of Laws, Status, § 144.3, p. 717.

In Lanning v. Gregory, 100 Tex. 310, 99 S. W. 542, the court said: "The child being in the lawful custody of the father, and its domicile with him in Louisiana, a District Court of Texas did not acquire jurisdiction of the child, by reason of its temporary presence in Texas, and had no authority to adjudge a change of relation between the father and the child."

In Motichka v. Rollands, 144 Wash. 565, 258 P. 333, it is said: "Full faith and credit must be accorded by the courts of this state to a decree of divorce of a sister state awarding the custody of an infant child to one of the parties, where the child was domiciled in such state and never acquired a residence in this state, simply temporarily sojourning here, where she was sent to spend a part of her school vacation in the custody of her other parent, in compliance with the terms of the decree of divorce." See, also, People v. Dewey, 50 N. Y. S. 1013, 23 Misc. 267. The court said it was apparent that the child was not sent to the respondent in another state with a view of becoming a resident of or becoming domiciled in such state. This is true in the instant case with reference to the custody of Donald Hanson.

In Callahan v. Callahan, 296 Ky. 444, 177 S. W. 2d 565, the child was living with her mother at the time of the rendition of a judgment in another state. Her domicile was with her mother, and the judgment awarding the custody of such child to the father had no effect. The court said: "Even if it be assumed that a showing was made at the time of the rendition of the Indiana judgment warranting the placing of the infant in the custody of the father * * *, the record now before us shows conclusively that the mother should have the custody of the child. No question whatever is raised as to her character or fitness in this respect, * * *."

In view of the afore-cited authorities, the fact that Donald Hanson was temporarily within the state at the

time the divorce decree was rendered creates no barrier against a proceeding in habeas corpus on the part of the mother to have the child's custody determined.

In a habeas corpus action touching the custody of children the case stood before the district court as if there had been no former decree and the matter was before him to determine as to what would be for the best interests and welfare of the children. See authorities heretofore cited, also, Steele v. Steele, *supra;* Haynie v. Hudgins, 122 Miss. 838, 85 So. 99.

The appellees cite Baldwin v. Burt, 54 Neb. 287, 74 N. W. 594, a foreclosure action, to the effect that once a decree is entered in a matter it may be attacked for want of jurisdiction, but such attack can only be directed against the decree and not against the evidence upon which it depended for its validity. The appellees contend that certain allegations in the petition for divorce indicating improper and immoral conduct on the appellant's part constitute evidence in the divorce action, and the court in its decree found the allegations of the petition to be true. There is a distinction between actions such as in Baldwin v. Burt, *supra,* and cases involving divorce and the custody of minor children. In the latter cases the state is a party, in that its interest adheres to any action concerning care and custody of infants when made the subject of judicial inquiry.

" 'Every child born in the United States has, from the time it comes into existence, a birthright of citizenship which vests it with rights and privileges, entitling it to governmental protection, "and such government is obligated by its duty of protection, to consult the welfare, comfort, and interests of such child in regulating its custody during the period of its minority." Mercein v. People, 25 Wend. (N. Y.) 64, 35 Am. Dec. 653.' In re Gould, 174 Mich. 663, 679." State ex rel. Bize v. Young, 121 Neb. 619, 237 N. W. 677. See, also, Weber v. Redding, *supra.*

In Cummins v. Cummins, 47 Neb. 872, 66 N. W. 858,

this court said: "It has been said that the state is a third party to all divorce cases. It is not true that a petition stands confessed because not answered; * * *."

Baldwin v. Burt, *supra,* has no applicability to the instant case.

The appellees rely on a letter written by the appellant which heretofore appears in the opinion. We are not unmindful that the letter referred to indicates an intention, at the time it was written, of surrendering the children to the father to be under the care of the grandparents. The motive for writing it is clear. The mother at that time needed financial help which was not forthcoming from her husband. She felt that he and the children's grandparents could take them and help her get on her feet. It was obviously written in a moment of stress and discouragement.

Parentage in its full import is not to be so lightly surrendered. The right to custody of children implies a correlative duty of the highest obligation. It cannot be divested or forfeited beyond recall by a letter written in a moment of caprice or discouragement. See Norval v. Zinsmaster, 57 Neb. 158, 77 N. W. 373.

In Terry v. Johnson, 73 Neb. 653, 103 N. W. 319, this court held: "The right of a parent to the custody of a minor child of tender years is not lightly to be set aside, and it should not be done where unfitness is not affirmatively shown or a forfeiture of such right clearly established." In the cited case the evidence disclosed that the grandparents were highly respected people, had a good home, and were in easy financial circumstances. There was no affirmative evidence showing that the father, who desired to obtain the custody of one of the children, was an unfit or improper person. It was said: "This, then, presents the question as one of law as to which has the superior right to the custody of a child of tender years, the father of the child or its grandparents, when each is shown to be a proper party for the exercise of such a duty. It is urged by counsel for

respondents that only the best interest of the child should be considered, and that the question of the natural right of the parent should be regarded as only of secondary importance. * * * 'The father and mother are the natural guardians of their minor children, and are equally entitled to their custody, * * *.'" See what is now section 38-107, R. S. 1943.

In Norval v. Zinsmaster, *supra,* it is said: "The court has never deprived a parent of the custody of a child merely because on financial or other grounds a stranger might better provide. The statute declares and nature demands that the right shall be in the parent, unless the parent be affirmatively unfit. The statute does not make the judges the guardians of all the children in the state, with power to take them from their parents, so long as the latter discharge their duties to the best of their ability, and give them to strangers because such strangers may be better able to provide what is already well provided." See, also, In re Application of Schwartzkopf, *supra.*

An analysis of the record in the instant case shows the children involved to be of approximately five and three years of age. The evidence does not show that the appellant was an unfit, unworthy, or improper mother to have the care and custody of the children. The law is well established that children of tender years should be placed in the custody of their mother where she is not shown to be unfit or unworthy to have such custody. See cases heretofore cited, also, Boxa v. Boxa, 92 Neb. 78, 137 N. W. 986; Swolec v. Swolec, 122 Neb. 837, 241 N. W. 771; Gillett v. Bryant, 203 Ill. App. 322.

For the reasons given in this opinion, we reverse the judgment of the district court and remand the cause with directions to enter judgment in favor of the appellant awarding her the custody and control of the two minor children constituting the subject matter of this action.

REVERSED AND REMANDED WITH DIRECTIONS.

SIMMONS, C. J., participating on briefs.

JOAN ZIMMERER ET AL., APPELLANTS, V. THE PRUDENTIAL INSURANCE COMPANY OF AMERICA ET AL., APPELLEES.
34 N. W. 2d 750

Filed November 12, 1948. No. 32426.

Judges. A judge before whom an action is tried is not disqualified under section 24-315, R. S. 1943, because of previous marriage to a sister of a party to the action where, before the action was commenced, the sister had died, even though she left issue living at the time of trial.

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

Thomas & Cattle, for appellants.

Joseph H. McGroarty, Harold F. Peyton, and *Paul H. Bek,* for appellees.

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

SIMMONS, C. J.

Plaintiffs in this action seek a decree that a foreclosure proceeding, resulting in the sale of land, is void. The cause is based upon the contention that the trial judge was disqualified by statute because of a claimed relationship by affinity with one of the defendants. The trial court denied the relief prayed, dismissed plaintiffs' action, and quieted the title of the defendants Prudential Insurance Company and Luebbe. Plaintiffs appeal. We affirm the judgment of the trial court.

The action involves 280 acres of land in Seward County. It formerly was owned by Philomena Zimmerer. She mortgaged it to the Prudential Insurance Company. On January 27, 1933, the insurance company began foreclosure proceedings. Philomena Zimmerer died and the action was revived in the name of John F. Zimmerer as her sole heir at law. During the early proceedings Robert T. Cattle was joined as a defendant and appeared in the action on a showing that he held title by an unrecorded deed from Philomena Zimmerer. The cause

proceeded to decree, in which it was found that Robert T. Cattle was the owner of the land and entitled to the equity of redemption. It appears from evidence in this action that the deed was in fact a mortgage, and that the indebtedness was compromised and the deed delivered to John F. Zimmerer.

Pursuant to the decree the land was sold. Before confirmation a moratorium was granted and later extended to March 1, 1937. May 25, 1936, the insurance company made application to terminate the moratorium. On the same day hearing was had; all matters in dispute were compromised and settled; the moratorium was terminated; and, at the request of the defendants, confirmation of the sale was made, and sheriff's deed ordered and issued.

March 12, 1937, the insurance company conveyed 120 acres of the land to the defendant Wilhelm Luebbe.

During the foreclosure proceedings John F. Zimmerer conveyed an undivided one-half interest in the land to Helena Zimmerer, now Albers, one of the plaintiffs herein. John F. Zimmerer died December 1, 1943, leaving as his sole and only heir at law Joan Zimmerer, the other plaintiff herein.

On January 13, 1937, the insurance company brought an action to quiet the title of this land in it. Robert T. Cattle was a party defendant in that action. A decree for the insurance company was entered.

It does not appear that, in any of these proceedings, the trial judge was called upon to decide any disputed question of fact or law.

In this action Joan Zimmerer and Helena Albers, claiming to be the owners of the land subject to the mortgage, seek to have all the proceedings declared void, and pray that the amount due on the mortgage be determined and offer to tender payment into court, and that title be quieted in them. The defendants are the insurance company, Wilhelm Luebbe and wife, and Robert T. Cattle.

All the proceedings referred to herein were had before, and the orders and decrees were entered and signed by Harry D. Landis, a judge of the district court for Seward County. In 1907, Judge Landis married Alice M. Cattle, a sister of Robert T. Cattle. To that union six children were born, and all are now living. Mrs. Landis died October 2, 1932, before any of the proceedings involved here were had.

Plaintiffs allege that Judge Landis, during the entire proceedings, was related to Robert T. Cattle by affinity within the fourth degree, being a brother-in-law, hence disqualified by the provisions of section 24-315, R. S. 1943, and thus all proceedings are void. Defendant insurance company joined issue by alleging that the relationship had terminated upon the death of Mrs. Landis, and denying that there existed any disqualification. The defendants Luebbe joined issue by a general denial. Other defenses and issues were presented.

Necessarily the first question presented for determination is whether or not Judge Landis was a disqualified judge within the terms of the statute.

The provision of the statute, so far as important here, is: "A judge or justice is disqualified from acting as such in the county, district or Supreme Court, except by mutual consent of the parties, in any case * * * where he is related to either party by consanguinity or affinity within the fourth degree, * * *." § 24-315, R. S. 1943.

Affinity is the relationship which arises as a result of the marriage contract between one spouse and the blood relations of the other, in contradistinction from consanguinity or relationship by blood.

Clearly, when Judge Landis married Miss Cattle, the relationship of affinity arose between him and Robert T. Cattle, her brother. It would seem that when that marriage was dissolved by the death of Mrs. Landis, the relationship of affinity with Robert T. Cattle likewise was dissolved, for the relationship by affinity rests upon a subsisting marriage, not a dissolved one.

However, we are confronted with statements, found in the texts, that it has generally been held that the disqualification of a judge or juror arising by affinity is removed by the dissolution of the marriage through which the relationship arose, in the absence of surviving issue of the marriage. See 2 C. J., Affinity, p. 379; 33 C. J., Judges, § 167, p. 1009; 48 C. J. S., Judges, § 88, p. 1076; 30 Am. Jur., Judges, § 69, p. 780; Annotation 117 A. L. R. 800, 801.

It would seem that as a matter of reason the birth of issue to the marriage, not being a condition to the creation of the relationship by affinity, would not operate to continue the affinity if issue were living after the marriage was dissolved.

We have searched the cases endeavoring to find the reason for the rule that death of a spouse dissolves the relationship by affinity where there are no surviving issue of the marriage, but that the relationship continues if there be surviving issue of the marriage.

Numerically the larger number of decisions following the rule that surviving issue continue the affinity relationship deal with the question of the disqualification of jurors. The rule has been applied to disqualification of judges in a few instances. Carman v. Newell, 1 Den. 25, where the rule was referred to and it was held that the justice was not disqualified, there being no evidence of surviving issue of the marriage; Paddock v. Wells, 2 Barb. Ch. 331, where a vice chancellor disqualified himself on the basis of relationship; Pegues v. Baker, 110 Ala. 251, 17 So. 943; Vannoy v. Givens, 23 N. J. Law 201; Spear v. Robinson, 29 Me. 531.

Whether the decisions deal with the disqualification of jurors or judges, where authorities are cited, they finally stem back to Coke upon Littleton, Butler & Hargrave's Notes, where it is said: "And it is to be knowne, that there is a principall cause of challenge to the array, and a challenge to the favour. Principall, in respect of partialitie. As first, if the sherife, or other

officers be of (a) kindred, or affinitie (1), to the plaintife or defendant, if the affinitie (2) continue (b)." 1 Coke upon Littleton, Of Rents, § 156. a. The note there is: "(2) Having issue living by the wife, though she is dead, is sufficient to continue the husband's affinity. Nor is it necessary that the issue should be inheritable to the land, where land is the subject of the action. Both of these positions I infer from the case of Mounson and West before cited from 1 Leon. 88.—Note 278.)"

It is noted that this quote is taken from a chapter dealing with the subject "Of Rents." It relates to "a challenge to the array" of jurors. In the preceding paragraph it is said that "* * * to challenge the array of the pannell is at once to challenge or except against all the persons so arrayed or impannelled, in respect of the partialitie or default of the sherife, coroner, or other officer that made the returne." So it would seem that the challenge there discussed goes not to the kindred or affinity of the juror but to the kindred or affinity of the "sherife, * * * or other officer" who made the return. The language of the quote clearly so indicates its scope.

Also in some of the decisions reference is made to "III. *Propter affectum:* And this is of two sorts, either working a principal challenge, or to the favour. And again a principall challenge is of two sorts, either by judgment of law without any act of his, or by judgment of law upon his owne act. And it is said that a principall challenge is, when there is expresse favour or expresse malice. 1. Without any act of his, as if the juror be (a) of blood or kindred to either partie, *consanguineus,* which is compounded *ex con & sanguine, quasi eodem sanguine natus,* as it were issued from the same blood; and this is a principal challenge, for that the law presumeth that one kinsman doth favour another before a stranger; (b) and how far remote soever he is of kindred, yet the challenge is good." 1 Coke upon Littleton, Of Rents, § 157. a.

This second quote goes to the "challenges to the polles"

which is stated in 156. b., and means a challenge "severally to the persons returned." The language above quoted is found under this third classification. It would seem that so far as this language is concerned, the challenge relates to consanguinity only.

However, the author goes further and states: "(e) Affinity or alliance by marriage is a principall challenge, and equivalent to consanguinity when it is between either of the parties, as if the plaintife or defendant marry the daughter or cousin of the juror, or the juror marry the daughter or cousin of the plaintife or defendant, and the same continues, or issue be (6) had. But if the son of the juror hath married the daughter of the plaintife, this is no principall challenge, but to the favour; because it is not betweene the parties. Much more may be said hereof; *sed summa sequor fastigia rerum.*" 1 Coke upon Littleton, Of Rents, § 157. a. The note to this above quote is: "But the issue must be *living.*" We are advised that the phrase "sed summa sequor fastigia rerum" literally means "but I seek after the topmost parts of things." See, also, 2 Cooley's Blackstone (3d ed.), Trial by Jury, p. 204 and following (Book III, chapter 23, pp. 358 to 363), where the same challenges are discussed. It is noted that Blackstone limits the challenge that a juror is of kin to either party to "within the ninth degree." (p. 363)

It may be pointed out here that the ancient case of Mounson and West (1 Leon. 88; 74 Eng. Rep. R. 82), cited by many of the courts and in the above note, related to a challenge to the array.

So it is that the rule as to jurors in our modern texts is stated: "It is a general rule that one related, within a prohibited degree, to a party in a case is disqualified to serve as a juror on such case and is subject to challenge by the adverse party. This applies to relationship by affinity as well as by consanguinity. The prescribed degree varies in the several jurisdictions. It has been said that relationship, either by consanguinity or af-

finity, to one of the parties to a suit, within the ninth degree, is, under the common law, a ground of principal challenge of a juror." 31 Am. Jur., Jury, § 134, p. 660. See, also, 35 C. J., Juries, § 331, p. 317; 50 C. J. S., Juries, § 218, p. 953.

It, therefore, appears that those courts which have followed the authorities here discussed have applied a common-law rule as to the disqualification of a juror because of relationship to a party in determining the disqualification of a judge.

Was a judge disqualified at common law because of relationship to a party?

The texts state: "The general rule at common law is that a judge is not disqualified by relationship to a party or to a person interested in the result of the litigation, although there are statements in some of the cases to the contrary. Under constitutional or statutory provisions, however, in practically all the states, a judge is disqualified to act in any cause wherein he may be related to one of the parties within certain specified degrees of consanguinity or affinity, which vary considerably in the different jurisdictions, or where the parties, or either of them, are connected with him by affinity or consanguinity, without specifying the degree." 30 Am. Jur., Judges, § 68, p. 779. See, also, 33 C. J., Judges, § 161, p. 1005; 48 C. J. S., Judges, § 84, p. 1070. The cited decisions support the texts.

In Inter Brookes and the Earl of Rivers, Hardres Reports, p. 503 (an ancient case), the judge and the plaintiff were brothers-in-law. It was held that the judge would be disqualified to determine the cause if he had an interest in the litigation (which did not appear), but that he was not disqualified because of the relationship "for favor shall not be presumed in a judge."

In Coke upon Littleton, it is stated: "* * * in law * * * judges or justices cannot bee challenged." 2 Coke upon Littleton, Of Releases, § 294. a. Blackstone states that a judge cannot take cognizance of an action brought

against himself. 2 Cooley's Blackstone (3d ed.), Pleadings in Suits at Law, p. 166 (Book III, chapter 20, p. 298). So far as our research discloses that is the only disqualification of a judge recognized at common law. But more important is this statement from Blackstone, found in his discussion of the subject of challenges to the polls: "Challenges to the polls, *in capita,* are exceptions to particular jurors; and seem to answer to the *recusatio judicis* in the civil and canon laws; by the constitutions of which a judge might be refused upon any suspicion of partiality. By the laws of England, also, in the times of Bracton and Fleta, a judge might be refused for good cause; but now the law is otherwise, and it is held that judges and justices cannot be challenged. (a) For the law will not suppose a possibility of bias or favour in a judge, who is already sworn to administer impartial justice, and whose authority greatly depends upon that presumption and idea. And should the fact at any time prove flagrantly such, as the delicacy of the law will not presume beforehand, there is no doubt but that such misbehaviour would draw down a heavy censure from those to whom the judge is accountable for his conduct." 2 Cooley's Blackstone (3d ed.), Trial by Jury, p. 206 (Book III, chapter 23, p. 361).

We are dealing here, then, with a statute fixing a legal disqualification for a judge which is in derogation of the common law.

Under these circumstances the rule of construction is: "Statutes are not to be understood as effecting any change in the common law beyond that which is clearly indicated." Nielsen v. Chicago, B. & Q. R. R. Co., 141 Neb. 584, 4 N. W. 2d 569.

This statute has in substance existed in Nebraska since territorial days. It appears that similar statutes have existed in most of the states of the Union for many years. The few cases where appellate courts have been called upon to apply the acts indicates the meticulous care of the judges in matters of this kind. In this case it appears

that all of the parties to the foreclosure action, and their attorneys, save the insurance company and its nonresident attorneys at the beginning of the action, knew that Mrs. Landis was a sister of Robert T. Cattle. No one questioned the judge's right to act in the cause. When the first controversial matter, that of setting aside the moratorium, arose, Judge Landis objected to hearing the matter, and entered the decree only after the parties stipulated in open court as to the facts and requested that he act. There is no indicated need of a statute going to the extent of the construction for which plaintiffs contend.

The question then comes—is it clearly indicated, by the provisions of section 24-315, R. S. 1943, here involved, that the Legislature intended to change the common-law rule so as to disqualify a judge whose deceased wife's brother was a party, there being living issue of the marriage at the time of the trial?

We do not think so. The Legislature did not extend the bar of affinity to the degree provided by the common-law rule as applied to jurors.

The plain meaning of the word "affinity" as used here implies a relationship that begins and ends with the beginning and ending of the marriage relation. The statement in Coke upon Littleton "if the affinitie continue" and the statement that "Affinity or alliance by marriage is a principall challenge, and equivalent to consanguinity when it is between either of the parties, * * * and the same continues" clearly indicate that the affinity may terminate. More important, the concluding phrase "or issue be had" (in 157. a., which does not appear in the text in 156. a., relating to a challenge to the array) indicates a disqualification of the juror arising after the affinity ends. Were it otherwise, the phrase would be surplusage.

But we need not rest our conclusion on the ancient writings. There is substantial authority for it within the decisions of the courts of the United States.

In Trout v. Drawhorn, 57 Ind. 570, a party's first wife was an aunt of the wife of the justice. Six children were born to the marriage, and all were living at the time of the trial. The wife died before the action began. It was claimed that a judgment rendered by the justice was a nullity. There the statute provided: "No justice shall have jurisdiction in any action * * * wherein * * * the justice be related by blood or marriage to either party." 2 R. S. Ind., 1876, § 10, p. 605. There was no claim of consanguinity. The court held that at the time of the action the justice was not related to the party either by blood or marriage; that there was at that time no marriage existing between the party and anyone related in any manner to the justice; that the relationship by affinity ceased with the dissolution of the marriage which created it; that the fact that the party had children, then living, by his first wife was of no importance; and that their existence did not continue the relationship which had existed between the justice and the party before the death of his first wife.

The distinction which we here are making is illustrated by an earlier decision of the Supreme Court of Indiana in Dearmond v. Dearmond, 10 Ind. 191. There a challenge to a juror for cause was made on the ground that plaintiff's first husband was a brother of the juror's wife, and that the juror's and the plaintiff's children by that husband were first cousins. The court held that the challenge should have been sustained, saying that had this plaintiff instituted a suit for any cause while her husband was living, the juror would have been incompetent and, as issue was left surviving by that husband, it would seem that the incompetency continued to exist.

The Supreme Court of Connecticut determined a similar contention in Winchester v. Hinsdale, 12 Conn. 87. There a party to the suit had married the aunt of the judge, but before the commencement of the suit she had died leaving issue living at the time of the trial. On appeal it was contended that the judge was disqualified

to try the cause and render judgment. The appellant urged that the affinity to the husband did not cease at the death of the wife, especially where there was issue living, and cited Mounson v. West, *supra,* and Coke upon Littleton, 156. a., n. 1. and 2., referred to hereinbefore. The appellee cited 3 Blackstone's Commentaries, p. 361, (2 Cooley's Blackstone, 3d ed., Trial by Jury, p. 206, hereinbefore quoted). The Supreme Court of Connecticut held that in England "no relationship existing between a judge and a party, is a disqualification"; that a judge was presumed to be impartial and uncorrupt; that by Connecticut law the relationship of uncle and nephew, by nature or marriage, disqualified a judge; that by marriage of his aunt to the party the judge became a nephew of the party by marriage; that the dissolution of the marriage by the death of the aunt dissolved the relationship which had been constituted by the marriage; that the circumstance that children of the marriage survived did not operate to continue the affinity; and that although the judge and the party were related to the surviving children in different degrees of consanguinity, they were not from that cause connected in any degree of affinity with each other.

Speaking of the Connecticut decision, the Supreme Court of Georgia said: "* * * we are much impressed with the sound sense and satisfactory reasoning of this decision. To multiply disabilities by a more than doubtful construction, when none are created by the words of the statute, we apprehend, would be as unwise as it is impolitic and harmful. The admirable sagacity of our British ancestors in extending to their judges the fullest confidence, and discouraging everything like distrust of their integrity and wisdom, has been amply vindicated by results. * * * This generous confidence has promoted, if not created, a pride of character and a pride of places, that has secured an incorruptible and efficient administration of justice and has afforded ample protection to every right of the subject and the crown. It has made

England, in this respect, a light to the world, and the admiration, if not the envy, of other nations." Patterson v. Collier, 75 Ga. 419, 58 Am. R. 472.

It appears that Georgia, while recognizing the distinction between the common-law rule as to judges and jurors, now applies the juror rule to judges. This seems to rest largely on the fact that in 1935 its Legislature passed an act which made the grounds of disqualification applicable alike to judges and jurors. Georgia Power Co. v. Watts, 184 Ga. 135, 190 S. E. 654, 110 A. L. R. 465; Georgia Power Co. v. Moody, 186 Ga. 343, 197 S. E. 844, 117 A. L. R. 798.

To hold that Judge Landis was disqualified under the statute would be to add a disqualification that is not there. We are neither inclined nor authorized so to do.

This conclusion makes it unnecessary to consider other assignments of error based on the foundation that the statute applied.

The judgment of the district court is affirmed.

AFFIRMED.

FRANK NAMA, APPELLEE, V. NICK SHADA, APPELLANT.
34 N. W. 2d 650

Filed November 12, 1948. No. 32454.

1. **Trial.** This court holds that if there is testimony by which a verdict in favor of the party on whom rests the burden of proof can be upheld, the trial court is not at liberty to disregard the testimony and direct a verdict against such party.
2. **Juries.** The right of counsel to interrogate jurors on their voir dire examination, in order to determine whether or not it is expedient to challenge any of them peremptorily, within proper limits, cannot be denied.

APPEAL from the district court for Buffalo County: ELDRIDGE G. REED, JUDGE. *Affirmed.*

Dryden & Jensen, for appellant.

Blackledge & Sidner, for appellee.

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

PAINE, J.

This is an action at law seeking to recover for personal injuries and property damage growing out of an automobile accident which occurred in Buffalo County. The jury returned a verdict for plaintiff for $1,100. Supersedeas bond was given in the sum of $1,500.

In his appeal the defendant sets out as assignments of error that the court should have sustained defendant's motions for an instructed verdict in his favor; that the court should have sustained defendant's motion to declare a mistrial because of prejudicial matters occurring in the voir dire examination of jurors; that the court erred in giving instructions Nos. 1, 5, 7, and 13; and that the verdict is contrary to the evidence and the law.

In the brief it was claimed that the principal ground for reversal is that the jury's verdict is not supported by the evidence, and for that reason we will set out the following:

The plaintiff, driving a Model A Ford automobile, started east from Kearney on Highway No. 30 about 9:15 p. m. on March 9, 1947. The pavement was slippery and it was snowing and misting. After an eastbound bus passed him he noticed cars coming from the east. The evidence discloses that the first one approaching him was a 1932 Chevrolet driven by Manuel Salano, whose wife was riding in the front seat with him. The second car approaching was the 1937 Buick of defendant. The third car was one driven by Eddie J. Brown, whose wife was in the front seat with him, and he had picked up two soldiers at the filling station in Gibbon.

The facts with respect to the collision, as the plaintiff contends, are as follows: The defendant attempted to pass the Chevrolet car driven by the Mexican, Salano,

and crossed over to the left or wrong side of the highway. Salano pulled far over to the right, with his right wheels off the pavement, as he did not think the defendant had room enough to get by him and back into the north side of the highway. Defendant's left rear bumper hit plaintiff's left front fender, the left front tire going flat, causing the plaintiff's car to go over into the north half of the highway, resulting in a head-on collision with the Salano car. The plaintiff was immediately taken to the hospital for treatment of his injuries.

The sheriff went out after the accident, arriving about 9:40 p. m. He said the snow was falling heavily, so that he had to use windshield wipers, and there was about two and a half inches of wet snow on the ground, so that he was unable to find any indication of the position of the cars in the highway when they collided. He said the defendant's car was 75 to 100 yards west of the cars of plaintiff and Salano, which cars were over to the north side of the road. Plaintiff's car was headed east, with its left front wheel off the north side of the paving, and the Salano car was headed in a northwesterly direction, with its left front wheel about a foot and a half from the north edge of the paving and its left rear wheel two and a half or three feet from the north edge of the paving, these two cars having collided head-on. The left rear fender of defendant's car was torn and the left end of the rear bumper was bent back about a foot and a half.

With this brief summary, we will examine the evidence and the claims made by defendant in reference thereto.

It is clear from reading the evidence that the plaintiff was not well versed in the English language, and also that Manuel Salano, who was a Mexican, was deficient in knowledge and use of all the words of our language.

When the plaintiff was examined by his own counsel he testified that the defendant's car attempted to pass the car driven by Salano, both of them going west, and

that the defendant's car struck him while he was going east on the south side of the highway.

The plaintiff's witness, Manuel Salano, whose car the defendant endeavored to pass, testified that he figured "it was going to hit the other car," so he ran his car out to the north so that only the left two wheels were still on the pavement, in an endeavor to give the defendant opportunity to get back into the road in front of him without striking the oncoming car of the plaintiff.

On cross-examination both the plaintiff and Salano testified that the defendant's car was north of the center of the road; in other words, that he had passed Salano's car and had returned to the north side of the road and was north of the center, and the defendant testified that the plaintiff's car came across the center of the highway and struck him. However, on their redirect examination the plaintiff and Manuel Salano were most carefully examined by plaintiff's attorney and positively reaffirmed their testimony as given on direct examination.

The defendant's counsel argued that, with the testimony entirely in defendant's favor on cross-examination, the court should have instructed a verdict for the defendant. On the other hand, it was argued by the plaintiff's attorney that the plaintiff and Salano, a Mexican, answered rapidly to questions on cross-examination which they did not understand; that, while no interpreter was used for either of them, they were deficient in a knowledge of the English language; that when they were examined more deliberately on redirect examination their evidence was straightened out and agreed exactly with what they had said on direct examination; that this matter of the apparent confusion in their testimony was a question for the jury to determine; and that the trial court, having heard the evidence and seen the witnesses while they were testifying, refused to instruct a verdict for the defendant and allowed the case to be submitted to the jury.

This court has repeatedly held that if there is testimony by which a verdict in favor of the party on whom rests the burden of proof can be upheld, the trial court is not at liberty to disregard the testimony and direct a verdict against such party.

One of the defendant's assignments of error is the failure of the court to declare a mistrial at the time the jury was being impaneled. In the bill of exceptions there is preserved a partial record relating to this assignment of error.

It appears that upon the voir dire examination of Mrs. Clarence Alcorn she was asked a question as to whether there was any reason why she should not serve as a juror in this case, and she started to make the reply that she understood that Mr. Shada, the defendant, had insurance, and the defendant's attorney stopped her and would not let her complete her answer.

The other jurors then retired to the jury room and Mrs. Alcorn alone remained in the courtroom for further examination. This matter was gone over at some length, and she was questioned by the court: "What statement did you make? Those were not your exact words, I don't believe. A I said I thought that he had insurance. I didn't get to finish it. * * * The Court: Well, what would have been your answer had you been permitted to finish it. A That he had insurance with the company my husband represents. The Court: What kind of insurance do you have reference to? A That is the Metropolitan Life Insurance Company."

Thereupon the defendant's attorney objected to any further procedure in the trial "before this jury panel, for the reason that the information as given by this jurywoman in the presence of the other jurors, will result in prejudice to the defendant and to his case, and asks that the jury be discharged and the matter continued over the term." This objection was overruled and the jury were recalled to the courtroom. Thereupon the attorney for plaintiff interrogated Mrs. Alcorn

as follows: "Q Mrs. Alcorn, what sort of business is your husband in. A Metropolitan insurance. Q That is life insurance coverage? A Life insurance. Q And the statement that you made about insurance, was that that maybe Mr. Shada had some life insurance with your husband? A It's life insurance. Q You know of no other reason why you should not serve as a juror in this matter? A No. Q You don't yourself collect the life insurance premiums or have anything to do with any life insurance dealings between your husband and Mr. Shada? A No, sir. Q And that would not in any way affect your—whether you could sit as a fair and reasonable juror in this matter? A It wouldn't affect it, no." The entire jury were thereupon sworn to try the case, including the jurywoman Mrs. Alcorn.

Defendant's counsel cites the case of Bergendahl v. Rabeler, 131 Neb. 538, 268 N. W. 459, to the effect that counsel must refrain from asking jurors any question on their voir dire which would indicate that defendant is indemnified against paying damages in case of a verdict against him, and in that case a verdict in the sum of $7,500 was reversed.

In the case at bar, we have reached the conclusion that the further voir dire examination of the juror, showing clearly that the insurance that she was talking about was life insurance and had nothing to do with automobile insurance, would clarify the matter so that none of the other eleven jurors who heard Mrs. Alcorn's statement could be misled as to the kind of insurance that she was referring to, and we have reached the conclusion that this assignment of error is without merit. See, Bainter v. Appel, 124 Neb. 40, 245 N. W. 16; Brewer v. Fischer, 144 Neb. 712, 14 N. W. 2d 315; Komma v. Kreifels, 144 Neb. 745, 14 N. W. 2d 591; Herman v. Firestine, 146 Neb. 730, 21 N. W. 2d 444; 15 Neb. Law Bulletin, 327.

"The right of counsel to interrogate jurors on their voir dire examination in order to determine whether

it is expedient to challenge any of them peremptorily, within proper limits, cannot be denied." Fielding v. Publix Cars, Inc., 130 Neb. 576, 265 N. W. 726, 105 A. L. R. 1306.

"The principal contention of the appellants is that there is insufficient evidence to sustain the verdict. The effect of this contention is that the trial court should have directed a verdict for the defendants and consequently the following rule is applicable: 'When the defendant in a jury trial moves for a directed verdict at the close of plaintiff's evidence, such motion must be treated as an admission of the truth of all material and relevant evidence favorable to the plaintiff and of all proper inferences to be drawn therefrom, and if it tends to sustain plaintiff's cause of action, the case should be submitted to the jury.' Gohlinghorst v. Ruess, 146 Neb. 470, 20 N. W. 2d 381." Tews v. Bamrick, 148 Neb. 59, 26 N. W. 2d 499.

In regard to the instructions of the court, the defendant argues as an error that the court in instruction No. 1, in setting out a very brief summary of the petition, stated as an act of negligence of defendant "That he drove said automobile at an excessive rate of speed," while in the petition the plaintiff, in setting out the acts of negligence of the defendant, alleged: "b. That he drove said automobile at an excessive rate of speed for the condition of the road and the travel thereon."

It is of interest to note that in the answer and cross-petition the defendant charged plaintiff "2. In that he drove his said automobile at an excessive rate of speed under the circumstances and conditions of the traffic and conditions of the weather thereon, said speed being in excess of 40 miles per hour." The court, in similarly summarizing the defendant's answer, in instruction No. 2 cut this statement to "That the plaintiff drove at an excessive rate of speed."

In this connection it may be well to note that section 39-7,110, R. S. 1943, provides generally that no vehicle

shall be driven to the left of the center of the roadway to pass another vehicle unless it can return to the right hand side of the roadway before coming within 100 feet of an approaching vehicle.

The jury could have found from the evidence that defendant violated this rule and also drove his car on a slippery highway in a snowstorm at a speed which was so great as to contribute to the accident in this case.

"Where the vision of the driver of an automobile is obstructed for any cause, ordinary care requires him to proceed with more caution than where he has an unobstructed vision. Obstruction of vision may arise from various causes." 5 Am. Jur., Automobiles, § 269, p. 652.

This court said in Tews v. Bamrick, *supra*: "What is a reasonable speed is necessarily largely dependent on the situation and the surrounding circumstances, it being obvious that a speed which would be safe, reasonable, and proper in some places and under some circumstances might be highly dangerous, unreasonable, and improper in other places and under other circumstances."

In instruction No. 4 the court said: "You are instructed that the foregoing Instructions No. 1, 2, and 3, set forth in substance the pleadings filed by the respective parties in this case, and are given to you for the sole and only purpose of advising you of the respective contentions of the parties.

"You are instructed that the pleadings filed in a case are not evidence except insofar as they may admit certain allegations to be true.

"Any and all allegations contained in the pleadings which are not supported by the evidence you will disregard."

This instruction clearly advised that the first three instructions just given were but a summary of the claims made by the parties and that any statement therein not supported by the evidence was to be disregarded.

The trial court was told in Franks v. Jirdon, 146 Neb. 585, 20 N. W. 2d 597, that pleadings must not be copied

into the instructions, but that a clear and concise statement of those issues which found support in the evidence should be set out. See Allen v. Clark, 148 Neb. 627, 28 N. W. 2d 439.

In the case at bar, the court might perhaps have omitted any reference to speed of the automobiles, but it was found in the allegations of both the petition and the answer and the court attempted to condense it in a manner the defendant insists is prejudicially erroneous. In our opinion, the clear statements of instruction No. 4 could leave the jury in no doubt that such statement was not evidence, and we do not find the same was prejudicially erroneous.

The judgment of the trial court on the verdict is hereby affirmed.

AFFIRMED.

ROBERT B. WHITEHOUSE, APPELLEE, V. GUY A. THOMPSON, TRUSTEE MISSOURI PACIFIC R. R., APPELLANT.
34 N. W. 2d 385

Filed November 12, 1948. No. 32409.

1. **Negligence.** In order to recover under the doctrine of the last clear chance there must be evidence to sustain a finding (1) that the party invoking the doctrine was by his own negligence immediately before the accident in a position of peril from which he could not escape by the exercise of ordinary care, (2) that the party against whom it is asserted knew or ought to have known the other's peril, (3) that the party against whom the doctrine is invoked had the present ability with the means at hand to avoid the accident without injury to himself or others, (4) that the failure to avoid the accident was due to a want of ordinary care on the part of the person against whom the doctrine is invoked and such failure was the proximate cause of the accident, and (5) that the negligence of the party imperiled is neither active nor a contributing factor in the accident.
2. ———. The doctrine of the last clear chance applies in those

cases where there is negligence of the defendant subsequent to the negligence of the plaintiff which is the proximate cause of the injury.

3. ———. Whether or not a plaintiff in the exercise of ordinary care could have avoided the consequences to himself caused by the negligence of the defendant in failing to avoid the accident under the last clear chance rule is ordinarily a question for the jury.

APPEAL from the district court for Douglas County: HENRY J. BEAL, JUDGE. *Affirmed.*

Kennedy, Holland, DeLacy & Svoboda, for appellant.

Pilcher & Haney, for appellee.

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

CARTER, J.

This is an action to recover for personal injuries and property damage growing out of an accident at a railroad crossing. The jury returned a verdict for the plaintiff and the defendant appeals.

The evidence shows that on January 30, 1946, plaintiff was driving his automobile in a southerly direction on 40th Street in Omaha, Nebraska. The day was gloomy and visibility was not good, although the evidence does not show that poor visibility was a contributing factor to the accident. The ground was covered with a light snow and the streets were somewhat icy. The defendant's railroad tracks cross 40th Street a short distance north of Leavenworth Street. In approaching from the north one first crosses a spur track. About 40 feet beyond are the two parallel main tracks of this defendant. It was near the north rail of the north main track that the accident occurred.

Plaintiff testified that as he approached from the north he was traveling about five miles per hour. He says that as he crossed the spur track he observed the train approaching from the east. He says that he attempted to stop his car, but due to road conditions he

was able to stop approximately two feet short of the near rail of the track on which the train was approaching. He says that his front wheel dropped into a water drain or catch basin from which he could not extricate himself because of the slippery condition of the street. His testimony is that the train was about 50 feet from him when the front wheel of his car dropped into the drain and that it was traveling six or seven miles an hour. It is the contention of plaintiff that the engineer saw or should have seen his predicament and should have stopped the train in time to avoid a collision. Plaintiff says that defendant's engineer failed to stop his train until it struck plaintiff's car and caused the injuries of which complaint is made.

Defendant's engineer testified that he observed the approach of plaintiff and assumed that he would stop. When he observed that plaintiff continued to approach the crossing at a speed indicating that a collision was imminent he applied his emergency brakes and stopped the train. The engineer says that plaintiff ran into defendant's engine after it was stopped. In view of the jury's verdict, we must accept the evidence most favorable to the plaintiff in passing on the questions here presented.

The trial court submitted the case under the doctrine of the last clear chance. Defendant contends that the evidence is not sufficient to take the case to the jury on that theory.

In order to recover under the doctrine of the last clear chance in this state there must be sufficient evidence to sustain a finding (1) that the party invoking the doctrine was by his own negligence immediately before the accident in a position of peril from which he could not escape by the exercise of ordinary care, (2) that the party against whom it is asserted knew or ought to have known of the other's peril, (3) that the party against whom the doctrine is invoked had the present ability with the means at hand to avoid the

accident without injury to himself or others, (4) that the failure to avoid the accident was due to a want of ordinary care on the part of the person against whom the doctrine is invoked and that such want of ordinary care was the proximate cause of the accident, and (5) that the negligence of the party imperiled is neither active nor a contributing factor in the accident. The trial court instructed the jury on the last clear chance doctrine in substantial compliance with the foregoing rule.

If we find the plaintiff's evidence to be true, as we are required to do under the present state of the record, it shows that plaintiff's car became lodged in a water drain in such a manner that the icy condition of the street prevented its removal under its own power. The evidence also shows that defendant's engineer saw the car from the time it came into view and should have seen plaintiff's predicament in ample time to stop. Defendant's engineer admits that the train was stopped in 26 to 28 feet, a much less distance than existed when plaintiff's car first lodged itself in the water drain. Consequently a present ability to avoid the accident existed if plaintiff's version of the accident is true. Under such circumstances the jury could properly find that the failure to stop the train before the collision constituted a failure to exercise due care and was the proximate cause of the accident. The only element remaining is whether the active negligence of the plaintiff had ceased or, inversely stated, whether the plaintiff was guilty of such contributory negligence up to the time of the collision as to bar a recovery. In this respect the defendant urges that the failure of the plaintiff to leave the car before the collision, when he had ample time to do so, constitutes negligence which would operate to defeat a recovery.

When the negligence of the party seeking to invoke the last clear chance rule is active and continuous as a contributing factor up to the time of the injury, the

last clear chance rule has no application. Long v. Guilliatt, 137 Neb. 199, 288 N. W. 689; Folken v. Petersen, 140 Neb. 800, 1 N. W. 2d 916. In Parsons v. Berry, 130 Neb. 264, 264 N. W. 742, the following language was used in explanation of the rule: "The doctrine of last clear chance applies in those cases where there is negligence of the defendant subsequent to the negligence of the plaintiff and the defendant's negligence is the proximate cause of the injury."

In the present case the plaintiff was clearly negligent in driving his automobile so close to the north rail of the track on which the train was approaching. When the car could not be moved back by its own power, a new condition existed which imposed new duties upon the parties, irrespective of any negligence which brought the condition about. If the defendant's engineer knew of plaintiff's peril or in the exercise of reasonable care ought to have known of it, a new duty is imposed upon him under the last clear chance rule to use all the means at hand to avoid the accident. As we have heretofore said, the evidence is sufficient to support a finding that the engineer was negligent in not stopping his train and avoiding the accident. It was a jury question on highly conflicting evidence. Whether or not plaintiff was negligent in not leaving his car and thus escaping personal injury is likewise a jury question. While we do not doubt that one's failure to escape injury by abandoning his car in favor of a safer position may under some circumstances amount to negligence sufficient to defeat recovery as a matter of law, we do not think that situation exists here. Plaintiff's car was not on the track and there was no certainty that the train would not clear it as it passed by. The train was admittedly proceeding at a very slow rate of speed. Plaintiff was endeavoring to extricate the car and avoid any possibility of a collision. The plaintiff might well have assumed that the car could have been moved from the place of danger and discovered too late the intervening condition

which made it impossible. Whether or not the plaintiff by the exercise of ordinary care could have avoided the consequences to himself caused by the negligence of the engineer in failing to stop his train, under the circumstances here shown, is a jury question. It is not contended that the damages caused to the automobile are affected by any negligence on plaintiff's part in failing to avoid the consequences of the engineer's negligence in not leaving his automobile. The claimed application of the rule is to plaintiff's personal injuries and not to the automobile damage. But, under the evidence here shown, both were properly submitted to the jury.

We think the following cases set forth the correct rule. In Orlowski v. Pere Marquette Ry. Co., 222 Mich. 580, 193 N. W. 201, it is said: "If it was within the range of a finding by the jury that a reasonably prudent man, under like circumstances, would endeavor to start the car, then it is not a question of law. * * * If the speed of the train had been such as to permit its usual stop would plaintiff have had time to leave his automobile when he made the attempt and get to a place of safety? This presented a question of fact for the jury."

In Alabama Great Southern R. R. Co. v. Molette, 207 Ala. 624, 93 So. 644, the court said: "This contention * * * treats plaintiff's failure to escape as the sole cause of his misfortune and relegates all negligence on the part of defendant or its agents to the limbo of remote causes. That the jury might have reached this conclusion cannot be denied, for they might have found that plaintiff was negligent in going upon the track, and it seems very probable that plaintiff might have escaped had he quit his truck promptly on seeing the approach of the train instead of trying to get his machine away. But there (these) were questions for the jury, as was the question whether, in the circumstances, plaintiff, after his machine 'choked down' or 'went dead' on the track, acted as a reasonably prudent man, and, further, whether defendant's engineer observed what plaintiff was about and the

improbability of his escape in time to have taken measures of his own which might have given plaintiff an opportunity to escape notwithstanding his efforts to save the truck or to save himself by getting the truck off the track."

See, also, St. Louis-San Francisco Ry. Co. v. Thompson, 30 F. 2d 586; Dickinson v. Erie R. R. Co., 81 N. J. L. 464, 81 A. 104; Cincinnati, N. O. & T. P. Ry. Co. v. Ross, 215 Ky. 114, 284 S. W. 1015.

We hold that the issue of the last clear chance was properly submitted to the jury and that the evidence is sufficient to sustain the verdict of the jury rendered thereon.

AFFIRMED.

ALOIS SLEPICKA, ET AL., APPELLANTS, V. THE CITY OF WILBER, A MUNICIPAL CORPORATION, ET AL., APPELLEES.
34 N. W. 2d 646

Filed November 12, 1948. No. 32475.

1. **Municipal Corporations.** The only powers a municipal corporation possesses and can exercise are: (1) Those granted in express terms; (2) those necessarily or fairly implied in, or incident to, the powers expressly granted; and (3) those essential to the declared objects and purposes of the municipality, not merely convenient, but indispensable.
2. ———. When a city or village has acquired an electric light plant and distribution system the governing body thereof may, by virtue of sections 18-412 and 70-503, R. S. 1943, contract to maintain, improve, extend, and enlarge the same and issue either warrants, revenue bonds, or debentures pledging the net earnings or profits thereof, without liability upon the city or village, in payment thereof.
3. ———. The ordinary business affairs of a municipality are committed to the corporate authorities, and the courts will not interfere except in a clear case of mismanagement or fraud.
4. **Statutes.** In construing a statute, words should be given their usual meaning.

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

John E. Mekota, for appellants.

C. R. Stasenka, Clarence Kunc, Cline, Williams & Wright, Poppenhusen, Johnston, Thompson & Raymond, and *Perry & Perry,* for appellees.

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

WENKE, J.

Plaintiffs, as residents, electors, and taxpayers of the City of Wilber, and patrons of its electrical system, brought this action in the district court for Saline County. The purpose of the action is to permanently enjoin the defendants, the City of Wilber, its mayor, councilmen, and clerk; the Fairbanks Morse and Company, a corporation; and The First Trust Company of Lincoln, Nebraska, a corporation, from carrying out any and all contracts which they have entered into relating to the city of Wilber's electric light and power plant and distribution system. The basis for the relief asked is the claim that the officials of the city acted without authority and, because thereof, the contracts entered into are void. From an adverse ruling, their motion for new trial having been overruled, the plaintiffs appeal.

The question presented by this appeal is, did the governing body of the city of Wilber, a city of the second class, under the facts as herein set forth but without a vote of its electors so authorizing, have authority under the provisions of sections 18-412 and 70-503, R. S. 1943, to purchase and have installed the diesel engines and electric generating equipment, for which it had contracted with the appellee, Fairbanks Morse and Company at a consideration of $118,374, and to issue and sell its revenue bonds, pledging the revenue and earnings of its electric light and power plant and system, in payment thereof?

The record discloses that as early as 1900 the board of trustees of Wilber, then a village, pursuant to a petition of a majority of its legal voters, passed an ordinance authorizing the construction of an electric lighting system and on October 23, 1900, let a contract for the construction of the plant to John T. Burk of Omaha for a consideration of $5,318.

Subsequent thereto, by an election held on May 15, 1913, the voters of Wilber, by a vote of 178 to 32, authorized the issuance of bonds in the sum of $12,000 to establish an electric lighting and steam heating system. On July 18, 1913, contracts were let pursuant thereto. As a result there was placed in the electric light and power plant of Wilber two steam engines with generators attached. One was of 75 and the other of 50 kilowatt capacity.

This generating capacity soon proved to be inadequate for the needs of Wilber for as early as 1929 the city started buying part of its electrical energy from outside sources. The record shows that the demand for electrical energy by the patrons of the Wilber system has greatly increased, particularly so in the last few years. Although a part of the electrical energy used by the city was purchased as early as 1929 the city continued to use both generators. It appears that about 1932 it discontinued their use during the summer months. It should be here stated that the light and power plant of Wilber included a steam heating system for its business district and that the steam engines used to generate electricity were run directly off of that system. This continued until about 1939 when the smaller of these two units was sold and only the 75 kilowatt unit remained. It was used during the winter months until about 1941. Then its active use was discontinued and it was kept for stand-by service only. A fair observation of this unit would indicate that it had become old, obsolete, and was inefficient to operate. While it could be maintained and operated it was not a practical

thing to do and, as has already been indicated, it had become entirely inadequate for the city's needs.

In 1947 the city of Wilber had its engineer prepare plans and specifications for improvements to its municipal electric system together with an estimate of the cost thereof. Pursuant to notice given contractors the city, on December 22, 1947, accepted the bid of Fairbanks Morse and Company in the sum of $118,374 to furnish and install said improvements and on that date entered into a contract with it for that purpose. The improvements, without going into too much detail, consisted of furnishing and installing three 300 horsepower diesel engines with generating units having a total capacity of 600 kilowatts, the material for rebuilding the switchboard, a cooling system for the engines, capacitors, transformer, fuel oil tanks, lubricating oil reclaimers, and other miscellaneous materials and the supplies and labor necessary to complete the work as in the plans and specifications set forth.

To finance the cost of these improvements the city of Wilber, on December 29, 1947, entered into a contract with The First Trust Company of Lincoln, Nebraska, whereby the latter agreed to buy $125,000 of revenue bonds of the city secured by the revenue and earnings of the electric light and power plant and system of the city and, on January 14, 1948, the city council passed and approved an ordinance authorizing the issuance thereof.

These improvements will fully meet the present demands of the city for electrical energy and were planned so as to have a reserve sufficient to meet any normal increase for some years in the future.

Section 70-503, R. S. 1943, which is a part of Initiated Law No. 324 (Laws 1931, c. 116, § 3, p. 337), provides, insofar as here material, as follows: "* * * any city, village * * * shall have the power and authority, by and through its governing body * * * to provide for or to secure the payment of the cost or expenses of pur-

chasing, constructing, or otherwise acquiring, extending and improving any real or personal property necessary or useful in its operation of any electric light and power plant, distribution system or transmission lines, by pledging, assigning, or otherwise hypothecating, the net earnings or profits of such * * * city or village, derived, or to be derived, from the operation of such electric light and power plant, distribution system or transmission lines, and to that end, to enter into such contracts and to issue such warrants or debentures as may be proper to carry out the provisions of this section."

Section 18-412, R. S. 1943, originally enacted by the 1935 Legislature (Laws 1935, c. 38, § 1, p. 153), provides in part, insofar as material here, as follows: "The requirement herein of a vote of the electors, however, shall not apply when a city or village seeks to pledge or hypothecate such revenue and earnings, or issue revenue bonds or debentures, solely for the maintenance, extension or enlargement of any electric light and power plant, distribution system, or transmission lines owned by such city or village."

It should be here stated, as is apparent from that part of section 18-412, R. S. 1943, above quoted, that the act also provides that where a city or village does not own an electric light and power plant, distribution system, or transmission lines that then, in order for the city or village to construct, purchase or otherwise acquire such and issue revenue bonds pledging the earnings in payment thereof that then such city or village must first be authorized to do so by a vote of its electors.

The foregoing was apparently enacted because of the construction we placed on Initiated Law No. 324 in Interstate Power Co. v. City of Ainsworth, 125 Neb. 419, 250 N. W. 649. Therein we said: "A careful examination of the title to the act, which is quite lengthy, clearly discloses that it applies only to such cities or villages as are engaged in the generation, transmission or distribution of electrical energy, and provides that such cities

may extend, improve and add to their plants and pay the cost of such extensions, additions or improvements by pledging the future earnings of such plants. Clearly, the act does not apply to a city which does not own any electric light or power plant or distribution system. Neither express nor implied power is conferred by said chapter 116 to acquire an electric light and power plant and pay for it by pledge of future earnings."

In Interstate Power Co. v. City of Ainsworth, *supra*, we approved the following from 1 McQuillin, Municipal Corporations (2d ed.), § 367, p. 1007: "That the only powers a municipal corporation possesses and can exercise are: (1) Those granted in express terms; (2) those necessarily or fairly implied in, or incident to, the powers expressly granted; and (3) those essential to the declared objects and purposes of the municipality, not merely convenient, but indispensable." See, also, Consumers Coal Co. v. City of Lincoln, 109 Neb. 51, 189 N. W. 643.

Even prior to Initiated Law No. 324 we said a city had authority to contract for improvements of an electric light and power plant already in operation and to pay for such improvements with available money on hand or with the net earnings of the plant. See Carr v. Fenstermacker, 119 Neb. 172, 228 N. W. 114.

And, after the adoption of Initiated Law No. 324, we held in Southern Nebraska Power Co. v. Village of Deshler, 130 Neb. 598, 265 N. W. 880: "Where a village has acquired an electric light plant and distribution system, the board of trustees thereof may, by virtue of section 70-603, Comp. St. Supp. 1931, (now sec. 70-503, R. S. 1943) contract to enlarge and extend the same and issue warrants pledging the future earnings of the plant, without liability upon the village for their payment, * * *."

What has been said of section 70-503, R. S. 1943, is also true of section 18-412, R. S. 1943.

While the amount of the contract would indicate that the improvements contemplated were extensive and a

substantial enlargement of the power plant, nevertheless the city officials having authority to do what they did it is not our right to question their judgment for as stated in Southern Nebraska Power Co. v. Village of Deshler, *supra*: "The ordinary business affairs of a municipality are committed to the corporate authorities, and the courts will not interfere except in a clear case of mismanagement or fraud."

And as stated in Best v. City of Omaha, 138 Neb. 325, 293 N. W. 116: "It is not the policy of the law to prevent a public administrative body from properly exercising its discretion in administering the affairs committed to its charge for the best interests of the municipality that it represents."

As stated in Veldman v. City of Grand Rapids, 275 Mich. 100, 265 N. W. 790: "In order to warrant the interposition of a court of equity in municipal affairs, there must be a malicious intent, capricious action or corrupt conduct, something which shows the action of the body whose acts are complained of did not arise from an exercise of judgment and discretion vested by law in them." Nothing of that nature appears in the record.

" 'In construing a statute, words should be given their usual meaning.' State v. Byrum, 60 Neb. 384." State ex rel. Thayer v. School District, 99 Neb. 338, 156 N. W. 641.

We think, by giving the usual meaning to the words extending, improving, maintenance, extension, and enlargement as used in these statutes, it was intended that the officials of a city or village having an established electric light and power plant, distribution system, or transmission lines should have authority to keep them modern, efficient, and of sufficient size to meet the public's needs and demands.

Nor do we think the fact that a city or village does not immediately do so, upon its plant becoming insufficient and inefficient, but temporarily buys a part and subsequently all of the electrical energy it needed from an out-

side source, prevents it from doing so. The authority to operate the utility having been granted by the voters and not having been taken away, it still exists. See Indiana Service Corp. v. Town of Warren, 206 Ind. 384, 189 N. E. 523.

For the reasons stated we find the acts of the city officials to have been within their authority and the judgment of the trial court is therefore affirmed.

AFFIRMED.

SIMMONS, C. J., participating on briefs.

ALWINE MEIER, APPELLANT, V. CAROLINE SCHMIDT, APPELLEE.
34 N. W. 2d 400

Filed November 15, 1948. No. 32462.

1. **Treaties.** Treaties made by the United States are the supreme law of the land and the courts of every state are bound thereby.
2. ———. Treaty provisions which require no legislation to make them operative are self-executing and they will ordinarily be enforced in accordance with their plain meaning unless they have been superseded or abrogated by a proper exercise of executive or legislative power.
3. **War.** The outbreak of war does not necessarily suspend or abrogate treaty provisions. When incompatibility between a treaty provision and the maintenance of a state of war exists, the treaty provision will not be given effect.
4. **War: Aliens.** Section 7 (b) of the Trading with the Enemy Act (50 U. S. C. A. Appendix) abrogates the provisions of the Treaty with Germany under date of December 8, 1923, granting freedom of access to the courts of this country by nonresident German nationals.
5. ———: ———. Such section bars a nonresident enemy alien from instituting an action during the continuance of the war, or from prosecuting an action instituted before its commencement.
6. **War.** This court will take judicial notice of the fact that the war with Germany has not officially ended.
7. ———. The existence of war and the restoration of peace are political questions to be determined by the legislative, supplemented by the executive, department of government. The

failure to conclude a treaty of peace is binding upon the courts even though actual warfare has long since ceased.

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

W. A. Stewart, Jr. and *Thomas & Cattle,* for appellant.

Carr & Hoagland and *York & York,* for appellee.

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

CARTER, J.

This is an action on a promissory note. The defendant died after the action was commenced and plaintiff applied for an order reviving the action against the personal representative of the deceased defendant. The trial court refused to revive the action and the plaintiff appeals.

The petition shows that one Gottlieb Niemann was the owner of certain lands in Seward County, Nebraska, on and after May 1889. In 1901 he removed to Germany, his former home. Upon the entry of the United States into World War I, Niemann thereby becoming an enemy alien, the Alien Property Custodian took possession of said lands and retained them until November 23, 1928, at which time he conveyed them to Caroline Schmidt for $27,000 pursuant to the Trading with the Enemy Act and certain executive orders issued pursuant thereto. In part settlement of the purchase price Caroline Schmidt executed and delivered her note to Gottlieb Niemann in the amount of $18,420.85, due on February 8, 1934. On December 20, 1934, Niemann assigned and delivered the note to the plaintiff. This action was commenced and service of summons personally had upon Caroline Schmidt on February 6, 1939. On April 1, 1942, an answer in the form of a general denial was filed. On July 1, 1947, plaintiff filed a motion for revivor, alleging that the defendant Caroline Schmidt died testate on January 28, 1947, and praying that the action be revived in the name of John A. Streiff, Executor of the Estate of

Caroline Schmidt, Deceased. The executor filed what is denominated a special appearance in which he asserts that plaintiff is a nonresident enemy alien of the United States, that as a nonresident German national she has no right to property within this country during the period that a state of war exists between the United States and Germany, that plaintiff failed to secure permission from the United States government through the office of the Alien Property Custodian to maintain this action, and that the court does not have jurisdiction. The trial court thereafter entered an order in which it is stated "that this action be and the same is not revived at this time, and the cause of action therein is not revived as against said administrator for the reason that said action cannot be litigated until the termination of the war." The correctness of this ruling is challenged by the present appeal.

The petition shows that the case was commenced on February 6, 1939. We take judicial notice of the fact that Germany declared war on the United States on December 11, 1941. Consequently the action was properly commenced by the plaintiff as a nonresident alien. It was not until December 11, 1941, that plaintiff became an enemy alien. Did the court lose jurisdiction of the case at the time plaintiff became an enemy alien? If not, was defendant entitled to have all proceedings stayed during the period of the war?

On December 8, 1923, the United States entered into a treaty with Germany which provided: "Nationals of either High Contracting Party may have full power to dispose of their personal property of every kind within the territories of the other, by testament, donation, or otherwise, and their heirs, legatees and donees, of whatsoever nationality, whether resident or non-resident, shall succeed to such personal property, and may take possession thereof, either by themselves or by others acting for them, and retain or dispose of the same at their pleasure subject to the payment of such duties or charges

only as the nationals of the High Contracting Party within whose territories such property may be or belong shall be liable to pay in like cases." Treaty with Germany of December 8, 1923, art. IV, 44 Stat. at L. 2135.

"The nationals of each High Contracting Party shall enjoy freedom of access to the courts of justice of the other on conforming to the local laws, as well for the prosecution as for the defense of their rights, and in all degrees of jurisdiction established by law.

"The nationals of each High Contracting Party shall receive within the territories of the other, upon submitting to conditions imposed upon its nationals, the most constant protection and security for their persons and property, and shall enjoy in this respect that degree of protection that is required by international law. Their property shall not be taken without due process of law and without payment of just compensation." Treaty with Germany of December 8, 1923, art. I, 44 Stat. at L. 2133.

Treaties made by the United States are specifically designated in Article 6 of the Constitution of the United States as "the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." Treaty provisions which require no legislation to make them operative are self-executing and they will be enforced in accordance with their plain meaning. It is fundamental that if the provisions of a treaty have not been superseded or abrogated, ordinarily no basis exists for their nonenforcement.

It is asserted in the present case that the formal commencement of hostilities between the United States and Germany on December 11, 1941, constituted an abrogation of the treaty insofar as it applied to the present case. But the outbreak of war between the signatories to a treaty does not necessarily suspend or abrogate treaty provisions. Where there is such incompatibility between a particular treaty provision and the maintenance of a

state of war as to make it clear that the treaty provision should not be enforced, the treaty provision will not be given effect. Karnuth v. United States, 279 U. S. 231, 49 S. Ct. 274, 73 L. Ed. 677. Also, the Chief Executive or Congress may have formulated a national policy inconsistent with the enforcement of the treaty in whole or in part. Techt v. Hughes, 229 N. Y. 222, 128 N. E. 185, 11 A. L. R. 166. But unless one of the foregoing events occurs, even though war still exists and the intentions of the political departments of the government remain unrevealed, the courts are required to give effect to the provisions of the treaty. The general rule is that treaties which are reasonably practicable to execute after the outbreak of hostilities must be given effect. They may be disregarded only to the extent and for the time required by the necessities of war, or when they conflict with policies established by the Chief Executive or the Congress. Techt v. Hughes, *supra,* cited with approval in Clark v. Allen, 331 U. S. 503, 67 S. Ct. 1431, 91 L. Ed. 1633, 170 A. L. R. 953.

It is here contended that the Trading with the Enemy Act suspends or abrogates the applicable portions of the treaty. The applicable provision of the act provides: "Nothing in this Act shall be deemed to authorize the prosecution of any suit or action at law or in equity in any court within the United States by an enemy or ally of enemy prior to the end of the war, except as provided in section ten hereof: * * * And provided further, That an enemy or ally of enemy may defend by counsel any suit in equity or action at law which may be brought against him." Trading with the Enemy Act, 50 U. S. C. A. § 7 (b).

In Caperton v. Bowyer, 81 U. S. 216, 14 Wall. 216, 20 L. Ed. 882, it was said: "Enemy creditors cannot prosecute their claims subsequent to the commencement of hostilities, as the rule is universal and peremptory that they are totally incapable of sustaining any action in the tribunals of the other belligerent. Absolute suspension

of the right to sue and prohibition to exercise it exist during war, by the law of nations, * * *." In the recent case of Ex Parte Colonna, 314 U. S. 510, 62 S. Ct. 373, 86 L. Ed. 379, this holding was reaffirmed in the following language: "This provision was inserted in the Act in the light of the principle, recognized by Congress and by this Court, that war suspends the right of enemy plaintiffs to prosecute actions in our courts."

In Wirtele v. Grand Lodge, 111 Neb. 302, 196 N. W. 510, this court held that plaintiff was an enemy alien under the Trading with the Enemy Act and could not therefore, so long as the war continued, resort to the courts of this country as plaintiff. See, also, In re Estate of Thiede, 102 Neb. 747, 169 N. W. 435.

It is plain, therefore, that the wording of the act bars a nonresident enemy alien from instituting an action during the continuance of the war or prosecuting an action instituted before its commencement. Taylor v. Albion Lumber Co., 176 Cal. 347, 168 P. 348, L. R. A. 1918B 185.

The purpose of the Trading with the Enemy Act is to prohibit and prevent the lending of aid and comfort to the enemy by frustrating the enemy's attempt to garner sinews of war. Confiscation of property is not the objective. It is not the purpose of the act to deprive the courts of jurisdiction in this type of case. It merely declares that nonresident enemy aliens may not commence litigation in the courts during the war period or prosecute a case during such period which was commenced prior to the beginning of the war. Consequently the trial court acted correctly in retaining jurisdiction of the case and staying further proceedings until the termination of the war.

The courts will take judicial notice of the fact that the war with Germany has not officially ended. The Trading with the Enemy Act therefore remains a bar to the prosecution of the action until that event occurs. The Michigan court aptly stated the reasons for the conclusion in the following language: "The existence of

war and restoration of peace are determined by action of the legislative, supplemented by the executive, department of government. Such determination is conclusive and binding upon the courts. War having been declared, that condition must be recognized by the courts as existent until the duly constituted national power of the country officially declares to the contrary, even though actual warfare has long since ceased." Kneeland-Bigelow Co. v. Michigan C. R. R. Co., 207 Mich. 546, 174 N. W. 605.

The judgment of the district court is in accordance with the foregoing holdings and is affirmed.

AFFIRMED.

SIMMONS, C. J., participating on briefs.

MAXWELL F. MCCOLLOUGH, APPELLEE, V. THE COUNTY OF DOUGLAS IN THE STATE OF NEBRASKA, APPELLANT.
34 N. W. 2d 654

Filed November 15, 1948. No. 32383.

1. **Counties.** The requirement of section 23-135, R. S. 1943, that claims against a county shall be filed with the county clerk within ninety days attaches only to claims ex contractu.
2. ———. The board of county commissioners acts quasi judicially in passing upon claims against the county when their action is not a mere formal requisite to the issuance of a warrant, but involves the determination of questions of fact on evidence or the exercise of discretion in ascertaining or fixing the amount to be allowed.
3. **Officers.** Where the salary or compensation of a public officer is fixed by statute no judicial action in that respect is required and in consequence the provisions of section 23-135, R. S. 1943, have no application.
4. ———. An "officer de jure" is one who is in all respects legally appointed and qualified to exercise the office; one who is clothed with full legal right and title to the office, in other words, one who has been legally elected or appointed to an office, and who has qualified himself to exercise the duties thereof according to the mode prescribed by law.

5. ———. A person is a de facto officer where the duties of the office are exercised (1) without a known appointment or election, but under such circumstances of reputation or acquiescence as were calculated to induce people, without inquiry, to submit to or invoke his action, supposing him to be the officer he assumed to be; (2) under color of a known and valid appointment or election, but where the officer had failed to conform to some precedent, requirement, or condition, as to take an oath, give a bond, or the like; (3) under color of a known election or appointment, void because the officer was not eligible, or because there was a want of power in the electing or appointing body, or by reason of some defect or irregularity in its exercise, such ineligibility, want of power, or defect being unknown to the public; (4) under color of an election or an appointment by or pursuant to a public, unconstitutional law, before the same is adjudged to be such.
6. ———. The de facto officer doctrine does not rest upon a vindication of the right of one to occupy a position or to perform official acts but upon the principle of protection to the interests of the public and third parties.
7. ———. The performance of the duties of an office by a de facto incumbent gives him no claim to the official compensation.
8. ———. In this jurisdiction the right of a public officer to compensation of the office occupied by him is incident to and dependent upon his right and title to the office.
9. ———. It was the intent of the Legislature in the enactment of sections 23-1101 and 23-1110, R. S. 1943, to designate the position of chief deputy clerk of the district court an office and the holder of the position an officer.

APPEAL from the district court for Douglas County: FRANK M. DINEEN, JUDGE. *Reversed and dismissed.*

James J. Fitzgerald and *Theodore L. Richling,* for appellant.

Eugene D. O'Sullivan, Arthur J. Whalen, Ernest S. Priesman, and *Eugene D. O'Sullivan, Jr.,* for appellee.

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

YEAGER, J.

This action as instituted was a claim filed by Maxwell F. McCollough, plaintiff in the district court and

appellee here, against the County of Douglas, Nebraska, defendant in the district court and appellant here, on August 27, 1945, wherein McCollough claimed that the County of Douglas was indebted to him in the amount stated at one place in the claim to be $6,755 and in another $6,785 which he alleged was the difference between the salary of a deputy clerk of the district court for the county of Douglas which was paid to him for the period beginning January 1, 1940, and ending June 30, 1945, and the salary of chief deputy which position he asserted that he held and occupied for the period named. McCollough will be referred to hereinafter as plaintiff and the County of Douglas as defendant.

The board of commissioners of Douglas County denied the claim on August 28, 1945. Following the denial of the claim plaintiff in due form of law appealed the decision to the district court wherein issues were joined on pleadings. Following the joinder of issues a jury was waived and trial was had to the court. On the trial plaintiff recovered a judgment for $4,970 with interest in the amount of $488.15 and costs. The district court sustained the position and contention of plaintiff but gave judgment for the four-year period preceding and including June 30, 1945. The earlier period was excluded on the ground that compensation therefor was barred by the appropriate statute of limitations. This exclusion need not be discussed or further referred to since the appeal does not bring the matter into question and no cross-appeal was taken. From this judgment the defendant has appealed.

In order that the matters presented by this appeal may be properly understood it becomes necessary to make reference to certain statutes which were in force and effect at the date of the commencement of the period covered by the claim and to subsequent statutory changes which came about in part by amendment and in part by repeal during that period and which became controlling with the effective date of the changes and

to apply thereto the facts as disclosed by the record. The provisions to be considered and applied relate generally to deputy clerks of district courts and particularly to chief deputy and deputy clerks of the district court in the county of Douglas. At the commencement of the time in question and continuing to August 29, 1943, the provisions of the Compiled Statutes of 1929 were controlling. From and after August 29, 1943, the provisions of the Revised Statutes of 1943 became controlling.

Section 27-401, Comp. St. 1929, is in part as follows: "The clerk of the * * * several district courts in this state shall have power to appoint deputies; * * * and provided further, in counties having over one hundred thousand inhabitants, the clerk of the district court shall appoint one chief deputy, whose salary shall be three thousand dollars per annum."

Section 33-109, Comp. St. 1929, is in part as follows: "If the clerk of the district court thinks necessary, said clerk may with the approval of the county board be allowed one deputy at a compensation of not to exceed one-half the amount paid the clerk of the court, * * *; Provided further, that in counties having one hundred fifty thousand inhabitants the clerk of the district court shall have the following deputies and assistants for such periods and at such salaries as he may determine, with the approval of the county board, all to be paid monthly out of the general fund of the county to-wit: One chief deputy at a salary of three thousand dollars per annum; one deputy and disbursing clerk, whose salary shall not exceed twenty-five hundred dollars per annum; one bookkeeper and cashier, whose salary shall not exceed twenty-one hundred dollars per annum; five deputies or assistants whose salaries shall not exceed eighteen hundred dollars each per annum; * * *."

Section 25-2219, R. S. 1943, is as follows: "Any duty enjoined by this code upon a ministerial officer, and any act permitted to be done by him, may be performed by his lawful deputy."

This provision was in full force and effect during all of the time with which this action is concerned.

By action of the Legislature in 1943, section 27-401, Comp. St. 1929, was repealed and section 24-401, R. S. 1943, was enacted in its place, the pertinent part of which is as follows: "The clerk * * * of the several district courts in this state shall have power to appoint deputies; * * *."

This provision became effective August 29, 1943. It will be noted that in it there appears no reference to a chief deputy or a salary for such an office or position.

Section 33-109, Comp. St. 1929, was repealed by action of the Legislature in 1943. The repeal became effective August 29, 1943. No similar provision was enacted.

By action of the Legislature in 1943 section 23-1110, R. S. 1943, was enacted, which is in part as follows: "In counties having a population of class (8), the county officers shall each receive as their annual salaries, to be paid monthly out of the general fund of the county, as follows: * * * deputy clerk of the district court, who acts as chief deputy, the sum of thirty-two hundred dollars; other deputy clerks of the district court, not to exceed the sum of twenty-seven hundred dollars; * * *."

All of these provisions have reference to the county of Douglas since this county met the requirements as to population and classification specified therein.

The rights of plaintiff and the liabilities of the defendant, if any, must, up to August 29, 1943, be ascertained with reference to the statutory provisions effective up to that time and thereafter with reference to the provisions which were effective on or after that date.

The district court found that plaintiff was de facto chief deputy clerk of the district court from January 1940 to August 29, 1943, and acting chief deputy thereafter until May 29, 1945, and accordingly rendered judgment for the difference between the salary received by plaintiff as deputy clerk of the district court and the

statutory salary of chief deputy and of deputy acting as chief deputy except for that portion of the difference which it was concluded was barred by the statute of limitations.

There are nine assignments of error urged as grounds for reversal. The first seven amount to an assertion that the judgment may not be sustained for the reason that during none of the time mentioned was plaintiff de jure or de facto chief deputy or acting chief deputy within the meaning of the statutes.

The remaining two contain a contention that the claim is barred by section 23-135, R. S. 1943, since it was not filed with the county clerk within ninety days from the time when the service was performed. This latter contention will be dealt with first herein.

The contention is without merit. This court, in Hollingsworth v. Saunders County, 36 Neb. 141, 54 N. W. 79, in construing a statute requiring claims against the county to be filed with the county clerk and passed upon by the county commissioners of the county, declared that the requirement attached only to claims ex contractu. This holding was followed in Douglas County v. Taylor, 50 Neb. 535, 70 N. W. 27, and Perkins County v. Keith County, 58 Neb. 323, 78 N. W. 630.

The statutes under consideration in those cases contained no limitation as to the time within which the claim should be filed. This limitation came into our statutory law by chapter 50, section 1, page 176, Laws 1935.

This court in later decisions, without departing from the earlier rule, has adopted other criteria for ascertainment of whether or not there is a necessity for filing a claim with the county clerk for action by the board of county commissioners. This later plan is made to depend upon the question of whether or not judicial action is required.

In Mitchell v. County of Clay, 69 Neb. 779, 96 N. W. 673, it was said: "County commissioners act quasi

judicially in passing upon claims against the county, whenever their action is not merely a formal prerequisite to the issuance of a warrant, but involves the determination of questions of fact, upon evidence or the exercise of discretion in ascertaining or fixing the amount to be allowed." See, also, Red Willow County v. McClain, 123 Neb. 209, 242 N. W. 423.

In Hansen v. Cheyenne County, 139 Neb. 484, 297 N. W. 902, it is made clear that where the salary or compensation of a public officer is fixed by statute no judicial action in that respect is required of the board of county commissioners and in consequence in any such case the provisions of section 23-135, R. S. 1943, do not apply. It is also made clear that where a claim may involve both judicial and ministerial action and where the judicial feature has been decided favorably to the claimant and the ministerial feature adversely further processes for recovery need not be in conformity with this provision of the statute.

In this as in that case the amount of service, which required judicial action, was involved. In this case as in that one the rate of compensation fixed by statute, which required only ministerial action, was involved. The judicial phase was determined by allowance periodically to plaintiff of his salary as a deputy clerk. The only thing which was left for determination was the allowance or disallowance of a rate of pay fixed by statute over which the board of county commissioners had only ministerial control. The claim did not arise ex contractu and at the time it was filed it only required ministerial action.

We conclude therefore that this proposition must be determined adversely to the defendant under the authority of the cases cited and the reasoning contained in the opinions.

Returning now to the questions involved in the first seven assignments of error it may readily be said that plaintiff was never at any time prior to August

29, 1943, a de jure chief deputy clerk of the district court.

"An 'officer de jure' is one who is in all respects legally appointed and qualified to exercise the office; one who is clothed with the full legal right and title to the office; in other words, one who has been legally elected or appointed to an office, and who has qualified himself to exercise the duties thereof according to the mode prescribed by law." 46 C. J., Officers, § 13, p. 927.

The plaintiff did not and does not claim to have met the requirements of this definition which is accepted in all jurisdictions as a proper definition of an officer de jure.

Was plaintiff during the period ending August 29, 1943, de facto chief deputy clerk of the district court? If so, was he entitled to receive the salary fixed for the office by statute?

The following from 43 Am. Jur., Public Officers, § 471, p. 225, is a widely accepted definition of a de facto officer: "A person is a de facto officer where the duties of the office are exercised (1) without a known appointment or election, but under such circumstances of reputation or acquiescence as were calculated to induce people, without inquiry, to submit to or invoke his action, supposing him to be the officer he assumed to be; (2) under color of a known and valid appointment or election, but where the officer had failed to conform to some precedent, requirement, or condition, as to take an oath, give a bond, or the like; (3) under color of a known election or appointment, void because the officer was not eligible, or because there was a want of power in the electing or appointing body, or by reason of some defect or irregularity in its exercise, such ineligibility, want of power, or defect being unknown to the public; (4) under color of an election or an appointment by or pursuant to a public, unconstitutional law, before the same is adjudged to be such."

Plaintiff was not a de facto officer within the first

numbered division of the definition for there were no duties under the law peculiar or directly assignable to the office of chief deputy. Any and all duties of the office were subject to full and legal performance by the clerk or any other deputy as well as the chief deputy when there was one. The protection of no right of the public depended upon performance of any act by a chief deputy. A custom of the office in vogue whereby when there was a chief deputy certain functions were assigned to him cannot have the effect of altering the status of a deputy assigned to the performance of those functions without affirmative action in that respect by the appointing power or authority. It matters not at all what the mental attitude of third persons was with reference to the title held by plaintiff since legally their reliance was upon him as deputy clerk clothed with the power to perform the functions imposed by law upon the clerk of the district court.

The de facto officer doctrine does not rest upon a vindication of the right of one to occupy a position or to perform official acts but upon the principle of protection to the interests of the public and third parties. It is well stated in 43 Am. Jur., Public Officers, § 470, p. 225, as follows: "The doctrine rests on the principle of protection to the interests of the public and third parties, not to protect or vindicate the acts or rights of the particular de facto officer or the claims or rights of rival claimants to the particular office. The law validates the acts of de facto officers as to the public and third persons on the ground that, although not officers de jure, they are, in virtue of the particular circumstances, officers in fact whose acts public policy requires should be considered valid."

Agreeable to this principle there having been no act which depended upon the question of whether or not plaintiff was chief deputy there was no opportunity for the employment of the de facto doctrine, hence it could not be said that he was de facto a chief deputy.

Plaintiff cannot be said to have become a de facto officer under any one of the other three divisions of the definition since they and each of them depend upon color of election or appointment. He was never in anywise appointed chief deputy and there was no provision for election. There is a suggestion that he was appointed but the evidence fails to support the suggestion.

The record discloses that prior to the time in question there had been a chief deputy who resigned. At about the time of his resignation the clerk had a conversation with plaintiff relative to the future conduct of the office. Plaintiff testified as to that conversation as follows: "Q. Do you recall what Robert Smith said to you on the occasion when you were in his office and you were told something about Gottneid taking the Federal Court position; do you recall that conversation? A. In substance. Q. And will you state what Mr. Smith said in that regard? A. He said Gottneid was going to take this position in the Federal Court next week. Q. And did he say anything else? A. He says, 'I want you to take over and we will carry on with the proper adjustments.' Q. After that was said did you say anything? A. I don't recall that I said anything more than we would do our best."

This cannot be construed to be an appointment as chief deputy. It is evident from the record that plaintiff did not consider it as such since there was no further discussion of the matter and since he continued to receive for his services without protest for more than five years his salary as deputy clerk.

We conclude therefore that plaintiff was not chief deputy clerk of the district court for the county of Douglas at any time prior to August 29, 1943.

Assuming that plaintiff was de facto chief deputy clerk still it would be necessary to say that he could not recover the salary of the office. This court in Frasier v. Dundy County, 115 Neb. 372, 213 N. W. 371,

said: "The authorities also generally hold that the performance of the duties by a de facto incumbent gives him no claim to the official compensation."

Zevin v. School District, 144 Neb. 100, 12 N. W. 2d 634, is a case wherein, while the de facto officer doctrine was not specifically mentioned, quoting from 24 R. C. L., Schools, § 73, p. 616, this court said: "* * * the right of a public officer to the compensation of his office is incident to and dependent upon his right and title to the office." This rule is by no means universal but it is the one followed in this jurisdiction.

Reverting now to the period beginning August 29, 1943, it will be observed from analysis of the statutory provisions referred to and quoted herein that there remained no provision for the appointment of a chief deputy clerk. There remained only provision for a fixed salary for a "deputy clerk of the district court, who acts as chief deputy."

In this connection plaintiff makes alternative contentions. One is substantially that within the meaning of the statute there was provision for a chief deputy as an officer and that he was a de facto officer holding the office. The other is that there remained legally no office of chief deputy but only an assignable position and that he held an office of deputy with assignment to and action in the position of chief deputy and that therefore he was entitled to the salary fixed by statute.

While more apt and conclusive language might have been used in declaring the intent of the Legislature yet we think when the quoted portion of section 23-1110, R. S. 1943, is quoted in its relation with section 23-1101, R. S. 1943, both being related provisions of the same act, it becomes clear that the Legislature intended to designate the position of chief deputy an office and the holder of the position an officer. The first clause of section 23-1101 is as follows: "Counties shall be classified for the purpose of fixing the salaries of county officers and their deputies as follows: * * *." The

pertinent part of section 23-1110 has already been quoted. The two read together as follows, as it is clear that they must be, contain the intent of the Legislature in this respect: "Counties shall be classified for the purpose of fixing the salaries of county officers and their deputies as follows: * * * In counties having a population of class (8), the county officers shall each receive as their annual salaries, to be paid monthly out of the general fund of the county, as follows: * * * deputy clerk of the district court, who acts as chief deputy, the sum of thirty-two hundred dollars; other deputy clerks of the district court, not to exceed the sum of twenty-seven hundred dollars; * * *."

Thus read it appears that the Legislature intended to designate the position of chief deputy an office separate and distinct from that of a deputy. The salaries specified were for legislatively named offices.

If this be a correct interpretation and we conclude that it is, then the claim of plaintiff must be treated on the same basis and in the same manner after August 29, 1943, as before, since his status remained after that date the same as before. He was neither de jure nor de facto chief deputy clerk of the district court and was never designated to so be or act.

For the reasons herein stated we conclude that the plaintiff was not entitled to recover all or any part of the amount claimed.

The judgment of the district court is therefore reversed and the action dismissed.

REVERSED AND DISMISSED.

ELVA REMMENGA, APPELLEE AND CROSS-APPELLANT, V. VIRGIL SELK, APPELLANT AND CROSS-APPELLEE.
34 N. W. 2d 757

Filed November 15, 1948. No. 32407.

1. **Appeal and Error.** In a law action, where the case is presented to the jury under proper instructions, a verdict based upon conflicting evidence will not be set aside on appeal unless clearly wrong.
2. ———. In testing the sufficiency of evidence to support a verdict it must be considered in the light most favorable to the successful party, that is, every controverted fact must be resolved in his favor and he should have the benefit of every inference that can reasonably be deduced therefrom.
3. **Negligence.** Where the evidence is conflicting and from the facts and circumstances proved reasonable minds might draw different conclusions concerning any negligence or lack of negligence, as well as comparative and contributory negligence, then the trial court should submit such issues to the jury.
4. ———. Where there is no evidence to support the defense of contributory negligence it should not be submitted to a jury and to do so is prejudicial error requiring the granting of a new trial.
5. ———. The negligence of a husband while driving an automobile, in which his wife is a guest, may not be imputed to her.
6. **Automobiles: Negligence.** Where an occupant of a motor vehicle is engaged in a common or joint enterprise with the driver and has an equal right to direct and control the operation of the vehicle, the contributory negligence of the driver is imputable to the occupant. This is so although one takes no actual control while the other is driving.
7. ———: ———. To constitute occupants of a motor vehicle joint adventurers there must be not only joint interest in the objects and purposes of the enterprise but also an equal right to direct and control the conduct of each other in the operation of the vehicle.
8. **Negligence.** The care required of a person who has voluntarily become intoxicated is the same as that required of one who is sober. If he fails to exercise that degree of care for his own safety which an ordinarily prudent sober person would exercise under the same or similar circumstances, and such failure contributes as a proximate cause to the injury of which he complains, he is guilty of contributory negligence.
9. ———. The fact that a person was intoxicated is a circumstance which may be considered in determining whether he exercised such care, but the mere fact that he was intoxicated at

the time he was injured does not of itself constitute contributory negligence.

10. **Automobiles: Negligence.** A person riding in an automobile driven by another, even though generally not chargeable with the driver's negligence, is not absolved from all personal care for his own safety but is under the duty of exercising reasonable care to avoid injury. The care exacted is that which an ordinarily prudent person would exercise under like circumstances.

11. ———: ———. A violation of statutes regulating the use and operation of motor vehicles upon the highway is not negligence per se but evidence of negligence that may be taken into consideration with all the other facts and circumstances in determining whether or not negligence is established thereby.

12. **Negligence.** Although a party may have negligently exposed himself to an injury, yet, if the defendant after discovering his exposed situation negligently injures him, or is guilty of negligence in not discovering his dangerous position until too late, and the plaintiff is because thereof injured, he may nevertheless recover.

13. ———. The doctrine of last clear chance is not applicable where the negligence of the party seeking to invoke it is active and continuous as a contributing factor up to the time of injury, but its applicability is not avoided by the mere continuing existence of the consequences or peril resulting from prior but completed conduct.

14. **Automobiles: Negligence.** It is the duty of an automobile driver, in driving his car, to keep such a lookout ahead that he will see an obstruction or a vehicle as soon as it is illuminated by his lights, and it is his duty to have his car under such control, under the driving conditions then existing, that he can stop it in time to avoid a collision with an object in the area lighted by his lights.

APPEAL from the district court for Lincoln County: J. LEONARD TEWELL, JUDGE. *Affirmed in part, reversed in part, and remanded with directions.*

V. H. Halligan, for appellant and cross-appellee.

Dent & Plummer, Beatty, Clarke & Murphy, and *Earl E. Morgan,* for appellee and cross-appellant.

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

WENKE, J.

This action was instituted in the district court for Lincoln County by Elva Remmenga, as plaintiff, and against Virgil Selk, as defendant. The purpose of the action is to recover damages resulting from injuries which plaintiff received in an accident allegedly caused by the negligence of the defendant in the operation of his automobile.

Plaintiff's petition sets forth two causes of action. The first is based on injuries which she personally suffered as a result of the accident. The second is an assigned claim from her husband, James Remmenga, for medical, surgical, hospital, nursing, household, and traveling expenses which he incurred in her care and treatment and for the loss of her services and consortium as a result of her injuries.

Both causes were submitted to a jury. The jury returned its verdict for the defendant. Plaintiff then filed a motion in accordance with the provisions of section 25-1315.02, R. S. Supp., 1947. This motion related to both causes of action. She therein asked the trial court to either set aside the verdict and enter a judgment therein in accordance with her motion for a directed verdict or grant a new trial. The trial court sustained her motion for a new trial as to the first cause of action but otherwise overruled said motion. From this ruling the defendant appealed and the plaintiff has cross-appealed.

Because there has been an appeal and a cross-appeal it will be more convenient to refer to the parties as they appeared in the district court, that is, as plaintiff and defendant.

In submitting the case to the jury the court, in both causes of action, submitted the issue of contributory negligence; however, it only granted a new trial as to the first cause of action because of having done so. Consequently, the appeal presents the question of whether or not the evidence justified the submission of

that issue as to the first cause of action. In considering this question certain basic rules are applicable.

"In a law action where the case is presented to the jury under proper instructions, a verdict based upon conflicting evidence will not be set aside on appeal unless clearly wrong." Scott v. New England Mutual Life Ins. Co., 128 Neb. 867, 260 N. W. 377.

In testing the sufficiency of evidence to support a verdict it must be considered in the light most favorable to the successful party, that is, every controverted fact must be resolved in his favor and he should have the benefit of every inference that can reasonably be deduced therefrom. Long v. Krause, 105 Neb. 538, 181 N. W. 372; Central Granaries Co. v. Nebraska L. M. Ins. Assn., 106 Neb. 80, 182 N. W. 582.

Where the evidence is conflicting and from the facts and circumstances proved reasonable minds might draw different conclusions concerning any negligence or lack of negligence, as well as comparative and contributory negligence, then the trial court should submit such issues to the jury. McDonald v. Wright, 125 Neb. 871, 252 N. W. 411; Parks v. Metz, 140 Neb. 235, 299 N. W. 643.

Of course, where there is no evidence to support the defense of contributory negligence it should not be submitted to a jury and to do so is prejudicial error requiring the granting of a new trial. Allen v. Clark, 148 Neb. 627, 28 N. W. 2d 439.

As stated in Blank v. Omaha & C. B. Street Ry. Co., 137 Neb. 632, 290 N. W. 464: "This court has, on repeated occasions, announced that where the evidence fails to show contributory negligence on the part of a plaintiff the issue should not be submitted to the jury." See, also, Fulcher v. Ike, 142 Neb. 418, 6 N. W. 2d 610; Hofrichter v. Kiewit-Condon-Cunningham, 147 Neb. 224, 22 N. W. 2d 703, 164 A. L. R. 1256.

The record discloses that for three or possibly four years prior to December 31, 1945, the plaintiff and her husband James, together with two other couples, namely,

John and Maxine Remmenga and Mr. and Mrs. L. R. (Jack) Seaman, had been going to North Platte, Nebraska, to spend New Year's eve; that prior to December 31, 1945, they again planned to do so and on that date did go to North Platte for that purpose. On the last occasion they had invited Richard Rasmussen, a single man, to go with them. He did so, using his car for that purpose. All these people live in or near Elwood, Nebraska. Elwood is some 70 miles from North Platte.

To avoid repetition it should be stated that all cities and towns herein referred to are in Nebraska.

Rasmussen, whose car they used, drove to North Platte. They left Elwood about 5:30 p. m. and arrived in North Platte about 7 p. m. Rasmussen's car was a 1938 Tudor Ford and the motor thereof was apparently not in too good condition because on the way to North Platte they had to stop at Gothenburg and add three quarts of oil and on their way home, as will hereinafter be more fully explained, they stopped some 4½ to 5 miles east of Maxwell to put in additional oil. After their arrival in North Platte they had dinner at a restaurant where they had previously made reservations. About 9 p. m. they went to a dance. They remained at the dance, except for intermission, until after midnight. Shortly after midnight they left to return to Elwood.

In returning to Elwood plaintiff's husband drove the car. Rasmussen and Seaman, in that order, also occupied the driver's seat. John Remmenga, Maxine Remmenga, Mrs. Seaman, and plaintiff, in that order, occupied the back seat. It is not clear as to whether Rasmussen asked James Remmenga to drive or whether he suggested driving but, in any event, there is no question but that he was driving Rasmussen's car on the return trip from North Platte to Elwood.

From this evidence, which is undisputed, there is no question but that plaintiff was riding in the car of Rasmussen as a guest and the trial court correctly, as to the

first cause of action, instructed the jury that the negligence, if any, of James Remmenga, the driver, was not imputable to her.

The negligence of a husband while driving an automobile, in which his wife is a guest, may not be imputed to her. Stevens v. Luther, 105 Neb. 184, 180 N. W. 87; Gleason v. Baack, 137 Neb. 272, 289 N. W. 349; Crandall v. Ladd, 142 Neb. 736, 7 N. W. 2d 642.

Nor is his negligence, if any, imputable to her on the basis that the parties were engaged in a common or joint enterprise. With reference to the basis for such responsibility we said in Hofrichter v. Kiewit-Condon-Cunningham, *supra,* the following: " 'Where an occupant of a motor vehicle is engaged in a common or joint enterprise with the driver and has an equal right to direct and control the operation of the vehicle, the contributory negligence of the driver is imputable to the occupant. This is so although one takes no actual control while the other is driving. To constitute occupants of a motor vehicle joint adventurers, there must be not only joint interest in the objects and purposes of the enterprise, but also an equal right to direct and control the conduct of each other in the operation of the vehicle.' 42 C. J., Motor Vehicles, § 957, p. 1179. * * * 'The test of a joint enterprise between the driver of an automobile and another occupant is whether they were jointly operating and controlling the movements of the vehicle or had an equal right to do so. * * *.' Illingworth v. Madden, 135 Me. 159, 192 A. 273, 110 A. L. R. 1090." And, as stated in Alperdt v. Paige, 292 Pa. 1, 140 A. 555: "To charge with contributory negligence on the ground that the party injured was engaged in a joint undertaking, something more must be shown than that the parties were riding together. It must further appear that the passenger had some voice in the control of the vehicle, so as to make it subject to common command, as well as possession: Hoffman v. P. & L. E. R. R. Co., 278 Pa. 246; McLaughlin v. P. R. R. Co., 252 Pa. 32."

There is nothing in the record that would in any way bring the plaintiff within the scope of this rule.

Upon the return of this group from North Platte they traveled east on U. S. Highway No. 30. They had passed through Maxwell, which is some 13 miles east of North Platte, and had proceeded east from there some 4½ to 5 miles when Rasmussen noticed the oil gauge on his car was not functioning. He asked the driver to stop so he might put some oil in the engine. It appears that he carried oil in the trunk for that purpose. While there is a dispute in the record, for witnesses in behalf of plaintiff testified they parked their car partly on the shoulder, leaving only the left wheels of the car on the surfaced highway and that they left the lights, both front and rear, burning; nevertheless, there was competent evidence from which the jury could have found that the driver, in parking, stopped his car on the south lane of traffic, near the south side thereof, and turned off all lights before getting out. There was, however, all of the north lane and part of the south lane, north of the car, open for travel and amply sufficient for any car to pass.

It should here be stated that U. S. Highway No. 30 at this point is a level, straight road with good shoulders of sufficient width on which to park a car; that it is straight for at least half a mile in either direction; that it runs in an east-west direction; that the driving surface is of concrete with a black center line; and that each driving lane is ten feet in width.

After stopping the car the driver got out on the left side. He was immediately followed by Rasmussen. Rasmussen asked for a flashlight that was in the glove compartment of the car. Seaman took it from the compartment and handed it to Rasmussen. Rasmussen gave the flashlight to Remmenga. They then proceeded to the back of the car, Remmenga holding the flashlight and Rasmussen proceeding to unlock the trunk. While these parties were going to the back of the car to get oil for

the purpose of putting it in the motor the other five people remained in the car.

The driver testified that as they were going to the back of the parked car he noticed two cars approaching from the west; that when he first noticed them they were up the highway a distance somewhere between a half mile and a mile; that he kept watching these cars approach; that they were apparently abreast of each other; that he waved his flashlight to warn the approaching cars; that he watched them until they were so close that he thought the one on the south side could not avoid hitting their car; that he then shouted to the others in the car to look out that they were going to be hit; and that he then jumped into the ditch that was along the side of the highway. The oncoming car did hit their car. The accident happened very shortly after they parked. There was not sufficient time for anyone in the parked car to get out after the warning cry. The accident occurred about 1:30 a. m. on January 1, 1946.

The evidence further shows that the defendant and his wife Charlotte, together with Mr. and Mrs. Von Rhone, had likewise, on this same evening, attended a dance at North Platte although not the same dance; and that shortly after midnight they had left North Platte to return to their home at Lexington. In doing so they proceeded east on U. S. Highway No. 30. They were traveling in a 1937 Chevrolet coupé owned by defendant. He was driving. Seated next to him was his wife and to her right was Rhone, who was holding his wife on his lap. As they approached the point of the accident both wives were sleeping. Rhone's view was obstructed by his wife. Immediately before the accident the defendant and Rhone were visiting.

Defendant testified he was traveling about 40 to 45 miles an hour; that he was traveling on the south or right lane of the highway; that the night was clear, the paving dry, and there was nothing in the air obstructing his view; that there were no cars coming from the east

to interfere with his vision; that he had good lights; that the lights could be adjusted either to high or low; that when on high his range of vision was from 275 to 325 feet; that when on low it was from 50 to 75 feet; that he did not know whether he was driving on high or low; that he did not think it would be safe to drive on the Lincoln Highway, which is U. S. Highway No. 30, with his lights on low when no cars were approaching; that he got a glimpse of the car, about 25 to 30 feet away, just before he hit it; that he attempted to turn to the left and apply his brakes; that he did not have time to do so; and that his car struck the left rear of the parked car.

After the accident defendant's car stopped in the ditch to the south of the highway some 114 feet from the point of impact. It was up against the railroad right-of-way fence. Rasmussen's car stopped just on the north edge of the paved highway, facing northeast, some 171 feet from the point of impact.

Except for Seaman, the plaintiff admits that, during the evening, everyone in her group had been drinking some intoxicating liquors. The extent thereof, according to her witnesses, was very moderate. However, there was testimony of empty pop and coke bottles in the Rasmussen car and that shortly after the accident three whisky bottles were found in the ditch some 8 or 10 feet north of the Rasmussen car at the point where it stopped after being hit. One of these bottles was full, one half full, and the other empty. There is also evidence of their conduct and mannerisms after the accident. From the evidence the jury could have come to the conclusion that they had been doing considerable drinking.

The duty of a person who has voluntarily become intoxicated is correctly stated in 45 C. J., Negligence, § 551, p. 997, as follows: "The care required of a person who has become intoxicated voluntarily is the same as that required of one who is sober. If he fails to exercise that degree of care for his own safety which an ordinarily prudent sober person would exercise under the same or

similar circumstances, and such failure contributes as a proximate cause to the injury of which he complains, he is guilty of contributory negligence. The fact that a person was intoxicated is a circumstance which may be considered in determining whether he exercised such care, but the mere fact that he was intoxicated at the time he was injured does not of itself constitute contributory negligence. In ability to exercise the care which an ordinarily prudent sober person would exercise under the same or similar circumstances, although due to intoxication, must nevertheless contribute as a proximate cause to the injury complained of. Thus a person is not guilty of contributory negligence where, although intoxicated, he exercises for his own safety the care which an ordinarily prudent person would have exercised under like circumstances, or where the circumstances were such that a sober man could not, by the exercise of ordinary care, have avoided injury." See, also, 38 Am. Jur., Negligence, § 203, p. 883; Nichols v. Havlat, 142 Neb. 534, 7 N. W. 2d 84.

It should here be said that the facts of this case do not bring it within the controlling principles announced in McGrath v. Nugent, 133 Neb. 237, 274 N. W. 549, and therefore that case is not applicable here.

A guest may be responsible for the consequences of his own negligence. Murphy v. Shibiya, 125 Neb. 487, 250 N. W. 746, and Crandall v. Ladd, *supra*.

As stated in Gleason v. Baack, *supra:* " 'A person riding in an automobile driven by another, even though generally not chargeable with the driver's negligence, is not absolved from all personal care for his own safety, but is under the duty of exercising reasonable care to avoid injury. The care exacted is that which an ordinarily prudent person would exercise under like circumstances.' 5 Am. Jur. 769, sec. 475."

Was the plaintiff's conduct in remaining in the car for a minute or thereabouts after it was parked and just before the accident such that under the circumstances

here disclosed it would justify a jury in finding that she was guilty of contributory negligence sufficient to defeat her right to recover? Under our holding in Allen v. Clark, *supra*, we think not. In the latter case Koessel, with whom the plaintiff was riding as a guest, drove his car toward the southeast and across the center line of the road and into the driving lane for northbound traffic, of which there appears to have been little at the time of the accident. The car, after it came to a stop, left some 7 or 8 feet of space between its front and the east curb. It was a four-lane road. Several cars passed while it was parked. Plaintiff testified he saw the car which hit them when it was a block and a half away but remained in the car. The trial court in that case submitted in its instructions the following: " 'That after plaintiff's car became stalled, plaintiff carelessly and negligently remained therein, although he had ample time to get out of said car.' " The court then went on to say: "This court finds that there was no evidence showing any negligence on the part of the plaintiff. This court has repeatedly said that, where contributory negligence is pleaded as a defense, but there is no evidence to support such defense, it is prejudicial error to submit such issue to the jury. See Koehn v. City of Hastings, 114 Neb. 106, 206 N. W. 19; Andersen v. Omaha & C. B. Street Ry. Co., 116 Neb. 487, 218 N. W. 135."

We find the facts and law of the foregoing case applicable and controlling here and the trial court was correct in granting a new trial as to the first cause of action.

The first question presented by the cross-appeal is the same question with reference to the plaintiff's second cause of action. The second cause of action being an assigned claim from the husband to the plaintiff she takes it subject to all defenses, including that of contributory negligence. Consequently, if the husband, as driver of the car, was guilty of any negligence which was the proximate cause of the accident she took the claim subject to such defense.

From the evidence the jury could have found that he left the car standing in the night, without lights, on the south lane of the main traveled portion of U. S. Highway No. 30, when there was ample room to have parked it on the shoulder. There is nothing in the record that would make it appear to have been impractical to do so. Such would be in violation of sections 39-757 and 39-778, R. S. 1943. As stated in Gleason v. Baack, *supra:* "The law is well settled by the decisions of this court that a violation of statutes regulating the use and operation of motor vehicles upon the highway is not negligence per se but evidence of negligence that may be taken into consideration with all the other facts and circumstances, in determining whether or not negligence is established thereby." In Huston v. Robinson, 144 Neb. 553, 13 N. W. 2d 885, we said: "But in the present case there is no evidence indicating that it was not practicable to have moved the car off the highway and consequently the evidence is sufficient to show that there was a noncompliance with the statute. This is evidence of negligence, which the jury may properly consider." Then we went on to say: "We think the evidence sufficient, under the state of the record, to take the question of the negligence of the driver of defendant's car to the jury. If, as contended by the plaintiff, the driver of defendant's car was negligent, under the circumstances shown, in parking or leaving the car standing on the paved portion of the highway, such negligence would be a direct contributing factor in the accident and afford the plaintiff a basis for recovery."

As stated in Ward v. Bandel, 181 Minn. 32, 231 N. W. 244: "There is ample evidence to sustain a finding that defendant was negligent. The accident happened more than half an hour after sunset, at a time when lights were required to be used. Whether the truck had a rear light burning, as required by L. 1927, p. 563, c. 412, § 54 (1 Mason, 1927, § 2720-54), and whether it was parked partly on the pavement when it was practicable to park

entirely off the pavement, so as to violate § 24 (1 Mason, 1927, § 2720-24) of the same chapter, were questions of fact for the jury."

And as stated in Renaud v. New England Transportation Co., 286 Mass. 39, 189 N. E. 789: "If as the jury could have found the truck was standing upon the right side of the travelled road and was without a rear red light, or other means adopted to warn travellers of its presence in violation of the statute, a finding of negligence on the part of the defendant was warranted. Woolner v. Perry, 265 Mass. 74. Lebowitz v. Bova, 274 Mass. 23. Tevyaw v. Hemingway Brothers Interstate Trucking Co. 284 Mass. 441."

From this summary there is no question but what there were sufficient facts upon which the jury could have based a finding that the driver of the Rasmussen car was guilty of negligence and that such negligence was a proximate cause of the accident. Consequently the matter of contributory negligence, as to the second cause of action, was properly for the jury.

Plaintiff pleaded that under the facts the defendant had the last clear chance to avoid the accident and sought the benefit of that doctrine.

As stated in Wilfong v. Omaha & C. B. Street Ry. Co., 129 Neb. 600, 262 N. W. 537: "This jurisdiction is committed to the rule that, 'although a party may have negligently exposed himself to an injury, yet, if the defendant after discovering his exposed situation negligently injures him, or is guilty of negligence in not discovering his dangerous position until too late, and the plaintiff is because thereof injured, he may nevertheless recover.' Omaha Street R. Co. v. Martin, 48 Neb. 65. See, also, Lucas v. Omaha & C. B. Street R. Co., 105 Neb. 432; Omaha Street R. Co. v. Larson, 70 Neb. 591; Zitnik v. Union P. R. Co., 91 Neb. 679; Zelenka v. Union Stock Yards Co., 82 Neb. 511."

We further clarified the applicability of this doctrine in Folken v. Petersen, 140 Neb. 800, 1 N. W. 2d 916, as

follows: "The doctrine of the last clear chance is not applicable where the negligence of the party seeking to invoke it is active and continuous as a contributing factor up to the time of injury, but its applicability is not avoided by the mere continuing existence of the consequences or peril resulting from prior but completed conduct." The opinion goes on to approve the following from Parsons v. Berry, 130 Neb. 264, 264 N. W. 742: "The doctrine of last clear chance applies in those cases where there is negligence of the defendant subsequent to the negligence of the plaintiff and the defendant's negligence is the proximate cause of the injury."

We conclude that the facts require that issue to be submitted.

Should the trial court have sustained the plaintiff's motion for a directed verdict? We have, since Roth v. Blomquist, 117 Neb. 444, 220 N. W. 572, 58 A. L. R. 1473, been committed to the doctrine that: "As a general rule it is negligence as a matter of law for a motorist to drive an automobile so fast on a highway at night that he cannot stop in time to avoid a collision with an object within the area lighted by his lamps." This has been recently affirmed in Allen v. Clark, *supra,* as follows: "The correct applicable rule is that it is the duty of an automobile driver, in driving his car, to keep such a lookout ahead that he will see an obstruction or a vehicle as soon as it is illuminated by his lights, and it is his duty to have his car under such control, under the driving conditions then existing, that he can stop it in time to avoid a collision with an object in the area lighted by his lights. See Anderson v. Byrd, *supra;* Fisher v. Megan, *supra;* Fairman v. Cook, 142 Neb. 893, 8 N. W. 2d 315."

"The basis of this rule is that a driver of an automobile is legally obligated to keep such a lookout that he can see what is plainly visible before him and that he cannot relieve himself of that duty. And, in conjunction therewith, he must so drive his automobile that when he sees the object he can stop his automobile in time to avoid

it." Buresh v. George, 149 Neb. 340, 31 N. W. 2d 106. See Huston v. Robinson, *supra.*

The factual situation here does not bring the defendant within any of the recognized exceptions but rather within the general rule. There was nothing to excuse his failure to see what was plainly in the range of his lights and vision if he had maintained a proper lookout.

We think the court should have directed the verdict for the plaintiff as to the first cause of action. As to the second cause of action the court should have instructed the jury that the defendant was guilty of negligence as a matter of law but that the plaintiff's right to recover thereon was subject to the defense of contributory negligence, unless the doctrine of the last clear chance was applicable. Of course, in both causes of action the quantum of recovery would be a question of fact for the jury.

The admissibility of defendant's plea of guilty to the charge of reckless driving, provided the foundation is sufficient, is subject to the rule announced in Piechota v. Rapp, 148 Neb. 442, 27 N. W. 2d 682. Therein we said: "The correct rule is: 'A plea of guilty entered by the defendant in a criminal action may be used against him as an admission that he committed the acts charged against him, in any subsequent action to which he is a party and which involves the same subject-matter.' Wisnieski v. Vanek, 5 Neb. Unof. 512, 99 N. W. 258. Under this rule only the plea of guilty was admissible." There are other errors assigned relating to evidence but we will not discuss them further as they will probably not reoccur in case of another trial.

We have come to the conclusion that the part of the judgment from which the cross-appeal was taken must be reversed and the cause remanded for retrial in accordance with the principles as herein announced. It is therefore directed that the judgment be reversed and the cause remanded for retrial. Since that part of the judgment from which the appeal was taken is affirmed

and the reversal arises out of the cross-appeal, all costs in this court are taxed to the defendant.

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

JOY U. MYERS, APPELLEE, V. CHARLES WILLMEROTH, APPELLANT.
34 N. W. 2d 756

Filed November 26, 1948. No. 32478.

1. **Forcible Entry and Detainer.** In an action of forcible detainer the plea of not guilty requires the plaintiff to prove every fact necessary to entitle him to recover.
2. **Appeal and Error: Trial.** The giving of an instruction which places on the wrong party the burden of proving an essential fact put in issue by the pleadings is reversible error.

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

J. E. Willits, for appellant.

James E. Addie, for appellee.

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

CARTER, J.

The plaintiff brings this action for the forcible detention of a residence property. It is claimed that defendant is holding over his term because of the failure to pay the rent when it became due. The answer was a plea of not guilty. The verdict and judgment were for the plaintiff and defendant appeals.

The evidence shows that defendant was a tenant of the property under a verbal lease from month to month for the agreed rental of $10 per month. Plaintiff alleges that the rent due on February 15, 1947, has not been paid. Defendant was served with a proper notice to quit the premises. Plaintiff asserts that defendant is

unlawfully and forcibly holding possession of the property, and prays for its restitution.

The defendant entered his plea of not guilty and thereby put in issue every fact necessary to entitle plaintiff to recover. Galligher v. Connell, 23 Neb. 391, 36 N. W. 566; Boehler v. Kraay, 130 Neb. 233, 264 N. W. 745. It became necessary, therefore, for the plaintiff to establish by a preponderance of the evidence that defendant was in default in the payment of his rent.

The evidence shows that the defendant was to perform certain work and provide supplies and cash which were to be credited on the rent. Defendant contends that he performed work and furnished supplies in excess of any amount of rent which became due. The evidence being in conflict, a jury question was presented.

The trial court instructed the jury that plaintiff was entitled to a verdict against the defendant unless the defendant established by the greater weight of the evidence that plaintiff was indebted to defendant on February 15, 1947, in an amount equal to or greater than the amount due the plaintiff for rent at that time. This constitutes error. The burden of proof rests upon the plaintiff to establish that defendant was in default in his rent on the date alleged. It is a fact which plaintiff must establish in order to show that defendant has forfeited his lease and is holding over his term. Without such proof the plaintiff fails to sustain a necessary element of his complaint, in which event the verdict and judgment should go against him. The giving of an instruction which places on the wrong party the burden of proving an essential fact put in issue by the pleadings is reversible error. Omaha St. Ry. Co. v. Boesen, 68 Neb. 437, 94 N. W. 619; Mercer v. Omaha & C. B. St. Ry. Co., 108 Neb. 532, 188 N. W. 296. The fact that the weight of the evidence may shift from side to side in the progress of the trial as the nature and quantum of the proof varies in the support or denial of the essential fact to be established does not have the effect of chang-

ing the burden of proof. Lincoln Traction Co. v. Webb, 73 Neb. 136, 102 N. W. 258; Olson v. Omaha & C. B. St. Ry. Co., 137 Neb. 216, 289 N. W. 356.

The judgment is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

CHARLES E. CLOUGH, APPELLEE, V. NORTH CENTRAL GAS COMPANY, A CORPORATION, APPELLANT, KENNETH P. GRIER ET AL., APPELLEES.

34 N. W. 2d 862

Filed November 26, 1948. No. 32469.

1. **Municipal Corporations: Gas.** When a city of the second class by ordinance grants to a gas company the right to supply gas to its inhabitants and to use the streets, alleys, and public ways of such city, the ordinance is a franchise, and after its acceptance by the company, or by performance of the company in compliance therewith, it becomes a contract between the city and the company.
2. **Municipal Corporations: Evidence.** Proof of the publication of an ordinance sworn to by the publisher of the newspaper in which such publication was printed, where such ordinance has been lost or destroyed, constitutes sufficient secondary evidence to prove the existence and publication of the ordinance.
3. ———: ———. Where the nonexistence of an ordinance is proved by one who has made search therefor, and a copy of the original ordinance is found among the city records, such copy, when it is shown to have been published as required by law, is admissible with reference to the contents of the original ordinance as secondary evidence.
4. **Gas.** Natural gas belongs to the company which dispenses it until it is sold through the meter to the consumer.
5. **Municipal Corporations.** Section 17-505, R. S. 1943, contemplates that, in addition to the special powers conferred upon a city of the second class, it shall have the power to make all such ordinances not inconsistent with the laws of the state as may be expedient to maintaining the peace, good government, and welfare of such city in its trade, commerce, and manufactories.
6. **Statutes.** Every legislative act comes before this court surrounded with the presumption of constitutionality and this

presumption continues until the act under review clearly appears to contravene some provision of the Constitution.

7. **Municipal Corporations.** Ordinances of cities of the second class are presumed to be valid, and the burden is upon the person attacking it to show that, having regard to the facts as may be disclosed with reference to it, such regulation so imposed is so unreasonable and arbitrary as to amount to depriving such person of property without due process of law.

8. ———. In the exercise of police power delegated by the state legislature to a city of the second class, the municipal legislature, within constitutional limits, is the sole judge as to what laws shall be enacted for the welfare of the inhabitants of such city, and as to when and how the police power shall be exercised.

9. **Constitutional Law.** In testing police power regulations, the court should inquire whether they have some relation to the public health, safety, or welfare, and whether such is in fact the end sought to be attained.

10. **Public Utilities: Gas.** A corporation like a gas company, dependent for the conduct of its business upon a license to use in part the streets, alleys, and public ways of a city of the second class, which are acquired avowedly for public use, is affected with a public interest for the reason that its business is public.

11. **Municipal Corporations: Gas.** A city of the second class, as a means of protecting its inhabitants, may establish and enforce regulations that are not inconsistent with the essential rights granted by a franchise to a gas company.

12. ———: ———. A city of the second class may enact ordinances to protect the public from the dangers resulting from the use of natural gas by imposing certain obligations upon the company furnishing such product.

13. ———: ———. The power to regulate the use of streets, alleys, and public places of a city of the second class by a gas company is not exhausted by the regulations prescribed by the municipal authorities at the time of granting the consent to use such streets, alleys, and public ways. It is a continuing power, and cannot be bargained away or otherwise parted with.

14. **Constitutional Law.** The prohibition contained in constitutional provisions against impairing the obligations of contracts is not an absolute one and is not to be read with literal exactness like a mathematical formula, and does not prevent a city of the second class from imposing regulations governing a gas company furnishing its product to the city's inhabitants where such regulation is not unreasonable and arbitrary and does not take such company's property without due process of law.

15. **Public Utilities: Gas.** A legal duty of a gas company as to third persons in reference to the escape of gas from service lines

owned and controlled by others on private property, and leading from the company's pipes in the street to its meter in the consumer's building, which pipes have been properly installed and tested, determined to be safe for use, and actually safely used for some time, does not extend to thereafter making inspection of said service pipes, unless the company has knowledge of a probable defective condition in such pipes, or has knowledge of circumstances rendering it probable that gas is escaping therefrom, or unless the company is bound by contract, franchise, or custom to make such inspection.

16. ———: ———. Where a public utility company engaged in the business of furnishing gas to its customers knows or should know that a service line owned by a customer is corroded to such an extent as to permit gas to escape, it is its duty either to cause the service line to be repaired by the customer, or to have the gas shut off at the street where the main is that furnishes the gas to the customer, in order to avoid the danger which might result.

17. ———: ———. Where the evidence discloses that the duly appointed agent of a gas company was charged with knowledge that gas transported through its pipes into a service line was leaking, and the evidence shows such fact to be true, the question as to whether or not the gas company had exercised such a degree of care and caution as was commensurate with the known danger of natural gas constitutes an issue of fact which under proper instructions should be submitted to a jury.

18. Gas: Evidence. Testimony referring to prior gas leaks and repairs which appears to be introduced solely to establish that the gas company employees who performed the work in such respect were its authorized agents to receive notice of such defects and to make repairs for the company, and where it is apparent that such evidence is not offered to show prior negligence of the company, is properly admissible in evidence to show that the company had notice of leakage of gas in its consumer's lines.

APPEAL from the district court for Scotts Bluff County: CLAIBOURNE G. PERRY, JUDGE. *Affirmed.*

Mothersead & Wright and *Robert G. Simmons, Jr.*, for appellant.

Atkins & Lyman and *True R. Ferguson*, for appellee Charles E. Clough.

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

MESSMORE, J.

This is an action for damages for personal injury incurred by the plaintiff and the loss of personal effects alleged to have been caused by the negligence of the defendant in failing to properly service and maintain natural gas lines in the city of Minatare, a city of the second class. The case was submitted to the jury, resulting in a verdict for the plaintiff. Upon the overruling of motion for new trial defendant appeals.

For convenience the appellant will hereinafter be referred to as the gas company, and appellee will retain the original designation of plaintiff.

On March 10, 1931, the proper officials of the city of Minatare passed Ordinance No. 110 granting the gas company the right and privilege to conduct, maintain, and operate in the public streets, alleys, and public ways, a pipe line, or pipe lines, for the conveyance and transmission, supply and distribution of natural gas in the city. Section 8 of the ordinance provides: "The opening of any and all streets, lanes and alleys and public places by the grantee, its agents or employees and the laying and erecting by them of any and all mains, pipes or other fixtures and appliances, under and by virtue of this ordinance shall at all times be subject to and under the rules, regulations and ordinances of said City and all streets, lanes, alleys and public places opened under and pursuant thereto shall be restored within a reasonable time thereafter to as good condition as is practicable * * *."

Section 10 provides that power and permission is granted the gas company to tap and make connections with said pipe line, or pipe lines, for the purpose of selling, furnishing, and distributing gas to the consumers within the city, and to lay and construct such connecting and distributing pipes in and under the streets, alleys, and public ways within the corporate limits of the city.

The ordinance provided that upon the acceptance by

the gas company within 30 days after the passage thereof, the ordinance would be in full force and effect. The gas company accepted the grant and the franchise.

Ordinance No. 110 constitutes a contract between the city of Minatare and the defendant gas company. See City of University Place v. Lincoln Gas & Electric Light Co., 109 Neb. 370, 191 N. W. 432. The authorities are practically united that ordinarily a grant to a gas company of the right to supply gas and to use the streets is a franchise and, after its acceptance and performance, becomes a contract. See 38 C. J. S., Gas, § 11, p. 633.

Ordinance No. 114 was passed and came into force and effect on July 9, 1931. This ordinance related to natural gas and was for the purpose of governing the installation of gas fittings; to provide for the inspection thereof; and to provide for the regulation and operation of natural gas service to citizens and other persons within the corporate limits of the city. Section 16 thereof provided: "The grantee of any natural gas franchise by said city shall furnish and install for its customers reliable meters and shall keep in repair and maintain all pipe-lines up to and including the meters without cost to the customer; all meters used by grantee shall at all reasonable times be subject to inspection by the City, and the City shall have the right to test said meters at reasonable times."

The gas company contends that Ordinance No. 114, constituting exhibit No. 9 and being a copy of the ordinance, was improperly admitted in evidence.

The city clerk since October 1941, testified he had charge of a part of the city records which included the ordinances; that he did not have the actual record or the minute book showing the procedure of the mayor and city council with reference to ordinances for the year 1931; and that he had made search for them and found two copies, one, Ordinance No. 110, the other Ordinance No. 114, in the bottom drawer of the old city files. The

publisher of the local newspaper of the city since 1925, testified that he kept a permanent file and had such file for the year of 1931; and that on July 16, 1931, publication of Ordinance No. 114 for the city of Minatare appeared in the paper. The gas company contends this publication was erroneously admitted in evidence. The publication shows the official proceedings of the city council of date July 9, 1931. These proceedings show the special session of the council called to order by the mayor to consider Ordinance No. 114; the councilmen present; that they waived the receiving of written notice; the vote; and the procedure with reference to the adoption of the ordinance.

The gas company argues that the city has failed to prove that the ordinance was in existence and has further failed to prove the number of councilmen representing the city, or that they had notice of the special meeting; and further, that the provisions of the statutes requiring certain procedure to be taken were not complied with, citing sections 17-103, 17-106, 17-613, and 17-614, R. S. 1943, of which we have taken cognizance.

Section 25-1282, R. S. 1943, provides that a certificate of a public officer that he had made diligent and ineffectual search for a paper in his office is sufficient proof of the lack of the record. The city clerk did so testify, as hereinbefore set forth. Nonexistence of record may be proved by anyone who has made search therefor. See Smith v. First Nat. Bank of Chadron, 45 Neb. 444, 63 N. W. 796.

This court has allowed and approved official records to be proven by secondary evidence. In City of Scottsbluff v. Kennedy, 141 Neb. 728, 4 N. W. 2d 878, it was held: "As evidence of compliance with the statute requiring the publication of notice, the trial court properly admitted proofs of publication sworn to by the publisher of the newspaper in which they were printed, which were found among the city's records, and the testimony of the publisher as to the fact of publication." See, also,

Larson v. Cox, 68 Neb. 44, 93 N. W. 1011; Regier v. Shreck, 47 Neb. 667, 66 N. W. 618.

There is no question but that secondary evidence as to the contents of a written instrument may be introduced where proof is made that the writing has been lost or destroyed. The copy of the ordinance is the best evidence of its contents. The secondary evidence in the instant case is sufficient, and the company's contention is without merit.

The record discloses that the Grier building, where the explosion of natural gas occurred and this is not denied, is located on Lots 7 and 8 of Block 10 of the original town of East Minatare. It is on the south end of Main Street, on the east side facing west. It is faced with brick, with plate glass windows and a flat roof. The floor is cement. The building apparently covers Lot 8, which is 140 feet in length. The south entrance to the building is equally distant from the front and rear. There is a rear entrance also. The building is solidly partitioned about 30 feet from the rear thereof and has a door in the partition. The Chambers building, occupied by a real estate and insurance agency and a dentist, is located on Lot 9 of Block 10, and adjoins Lot 8 on the north. It is a small wooden building of about 25 x 30 feet. There is about one foot distance in space between the Grier building and the Chambers building. On the back part of Lot 9 there is a cement-block garage practically 25 feet in length and 35 feet in width. The garage faces north, and north of the garage door is a street. East of the garage and east of the Grier building is an alley. The rear of the Grier building and the east side of the garage are about on the alley line. Between the two buildings on Lot 9 there is a vacant space where refuse is piled.

The natural gas was turned on in September 1931, and installed in the Chambers building in 1933. This service line was put in by a Mr. Zimmerman who at that time was the owner of the Chambers building, and installed

by a plumber for him and paid for by him. The two meters that meter the gas for the Chambers building are east of it, about a foot and a half from the building. There are three shut-offs, the first a shut-off riser before the gas goes to the regulator, and the other two to shut off each meter individually. These shut-offs were manual, as was the main.

The dentist occupying the Chambers building used gas continuously; the other party, engaged in the real estate and insurance business, only through the heating season. Gas from the main was in the service line all of the time for both meters, whichever one was being used. This is apparent because the gas belongs to the gas company until it is sold through the meter to the consumer. Consumers were billed on the amount of gas consumed, as shown by the meters. There was no gas metered into the Grier building.

On October 6, 1945, the plaintiff entered the south entrance of the Grier building to see a man who was helping Mrs. Grier fix a heating stove located to the west of the south entrance. Plaintiff and the repairman went into the back room. Later another person came into the back room. Mrs. Grier also entered the back room and then left and closed the partition door. Somebody lit a cigarette and the room caught fire all over, "flames flickering around in different places right in the air." The plaintiff sought to escape by opening the partition door. When he opened this door the air from the outside coming through caused the explosion. Plaintiff suffered severe burns and loss of personal effects, the extent of which is testified to in the record.

The operator of the insurance agency, Mrs. Agnes A. Kelso, identified the Chambers building, the dental office, and the Grier building from an exhibit. The plaintiff offered to prove by her that she called the manager of the gas company four days before the explosion in the Grier building, to make a test with reference to the gas equipment on account of the odor of gas;

that pursuant to the call the manager of the gas company came to her office and checked the stoves and connections leading from the stoves to the meter; that there is a window in the south side of the office building which is approximately 11 inches from the north wall of the Grier building, which she always keeps open; and that through the window and in both rooms of the office there was a strong odor of gas which remained until the service line was shut off from the main line after the explosion in the Grier building. Plaintiff also offered to prove that there was the same odor of gas in the Grier building four or five weeks prior to the explosion when this witness had been in the Grier building and noticed the odor and called Mrs. Grier's attention to it. This offer to prove will be discussed later in the opinion.

The manager of the gas company in the city from May 1931 to April 1947, testified that he knew the Grier building and the Chambers building; that there were separate meters for each of the occupants of the Chambers building although the service line to the meters was the same; and that after the installation of the line he never had any notice of leaks or of the presence of gas in the vicinity. He further testified that pursuant to the request made by the operator of the insurance agency he made an investigation in the Chambers building. He was the only employee of the company in the city prior to and at the time of the explosion. He applied soap to the joints, checked the two stoves, checked the lines to the regulators, and found nothing wrong. He found no gas escaping from any of the lines inside the building. All he could find was an accumulation of dust on a radiant fire which seemed to throw off an odor, and after he cleaned the radiants the odor disappeared. He further testified that the gas company has a special department to inspect and discover leaks and that it was not his duty to do so; that such department is located at the main office in Scottsbluff; that after the

inspection he made with reference to gas leaking in the Chambers building, he made no investigation of the service line and made no request of the gas company to inspect the service line into the Chambers building; and that gas has a distinctive and detectable odor due to the application of cal odorant.

A chemical engineer testified that he made a grid of the vacant part of the lot through which the service line ran, and tested every three feet of the grid from the garage to the Chambers building and from the Grier building to the curb. In his investigation he found gas in the soil in explosive and dangerous quantities near the garage on the east end of the lot. It tapered off to none at the Chambers building at the west end, and gas was present in the soil in the lot north of the Grier building. He found no gas along the main for a couple of hundred feet north and quite a distance south at the back of the Grier building. This indicated that there was none to the east at the alley, none to the north along the main, and none to the north of the vacant lot, and that it died off as you went west on the vacant lot. It meant that the gas was coming from a point toward the southeast corner of the vacant lot as the concentration was greatest there, and that it was prone to go to the Grier building. It tested very strong against the north side of the wall of the Grier building. The test toward the north wall in the back room of the Grier building showed presence of gas. He broke through the cement floor of the garage building on the rear of the Chambers lot, exposed the service line, and found the pipe with holes in it due to corrosion which he estimated had developed in a period of from three to six months. He testified that the holes in the pipe came from outside, and that the gas had been escaping from them for a minimum of from three to six months. The pipe he removed from the service line showed no evidence of protection from erosion or perforation. In referring to the holes found in the pipe, this witness testified that:

"Material simply gets thinner and thinner until it is only the thickness of a molecule and that is through, but that particular instant the gas starts escaping and then the corrosion continues and enlarges the hole. There was something in the pipe at that particular point, in the make up of the pipe, which caused that particular spot to start the corrosion and not some other particular spot." He gave as his opinion that the fire and explosion were caused by a spark or flame igniting a mixture of gas and air which came through the crack in the floor of the Grier building, coming to that point from the soil beneath the building, and to that point from the leak in the service line under the garage on the rear of the lot north of the Grier building. The place where the gas came into the Grier building was about 9 feet south of the place where the holes were found in the pipe, and the gas passed freely into the Grier building. The service line underneath the garage floor was about 30 inches in the ground.

A maintenance engineer of gas distributing systems testified that good practice for gas companies with pipes in corrosive areas requires the making of inspections every six months. He knew of no conditions that would require an inspection oftener than that.

The gas company contends that Ordinance No. 114 is unconstitutional and that Ordinance No. 110 constituted a contract between it and the city. Under Ordinance No. 110 there was no duty upon the gas company to repair and maintain the consumer's service lines without cost to the consumers, nor was there any other law or duty upon the company to keep the service lines in repair at their own cost. Ordinance No. 114 placed an additional burden on the gas company, one that it did not have at the time of the passage of the ordinance and one which substantially lessened the value of the franchise. Therefore the defendant contends this ordinance was unconstitutional in that it impaired the obligation of the franchise contract and took the property of the gas

company without due process of law.

In this connection the gas company relies upon the case of City of Plattsmouth v. Nebraska Telephone Co., 80 Neb. 460, 114 N. W. 588. In this case the city granted the telephone company the right to use the streets, alleys, and public grounds of the city in the construction, operation, and maintenance of its system. Thereafter the city, by subsequent ordinances after the construction was made, made certain requirements for underground conduits. This court held: "When an ordinance of a city has invited investments and expenditures, which are made in good faith and in reliance upon it, the city authorities, if the use be a public one, cannot arbitrarily impose by subsequent regulations, without necessity or the demands of public convenience, additional burdens upon the company which are clearly beyond the reasonable exercise of the police power." Other cases are cited to the same effect.

Applying the holding to the instant case, it is the gas company's contention that Ordinance No. 114 places additional burdens upon it for the reason that it requires it to pay the cost of maintenance of service lines on consumer's property which it did not do before and which made the franchise less valuable; and that the ordinance does not purport to be a regulatory ordinance. It is apparent that in the instant case Ordinance No. 114 was passed prior to the time of the completed construction of the gas system.

Section 17-505, R. S. 1943, provides in substance that in addition to their special powers second-class cities shall have the power to make all such ordinances not inconsistent with the laws of the state, as may be expedient for maintaining the peace, good government, and welfare of the corporation, and its trade, commerce, and manufactories.

The gas company further contends that even though Ordinance No. 114 was passed as a regulatory measure under the general welfare statute, section 16 thereof,

heretofore set out, is unconstitutional as an arbitrary and unreasonable regulation in that it imposes an unjust burden upon it; that the service lines are on the consumer's property, installed by the consumer at the consumer's expense; and the welfare of the city does not require that the consumer be relieved from liability of maintaining his own service line.

In determining this appeal the rule announced in Weekes v. Rumbaugh, 144 Neb. 103, 12 N. W. 2d 636, 150 A. L. R. 129, is applicable. "Every legislative act comes before this court surrounded with the presumption of constitutionality and this presumption continues until the act under review clearly appears to contravene some provision of the Constitution."

The ordinance under consideration is presumed to be valid, and the burden is upon the gas company to show that having regard to the facts disclosed by the record, the regulation imposed by Ordinance No. 114 is so unreasonable and arbitrary as to amount to depriving the gas company of its property without due process of law.

Undoubtedly the city, acting as an arm of the state, has a wide discretion in determining what precautions in the public interest are necessary or appropriate under the circumstances. See Terrace v. Thompson, 263 U. S. 197, 217, 44 S. Ct. 15, 68 L. Ed. 255. See, also, New Orleans Public Service Inc. v. City of New Orleans, 281 U. S. 682, 50 S. Ct. 449, 74 L. Ed. 1115; Littlefield v. State, 42 Neb. 223, 60 N. W. 724, 28 L. R. A. 588, 47 Am. S. R. 697; Peterson v. State, 79 Neb. 132, 112 N. W. 306, 14 L. R. A. N. S. 292, 126 Am. S. R. 651.

Section 17-127, Comp. St. 1929, in force at the time the ordinances in question were passed, provides in substance that a city of the second class has a right to grant a franchise subject to this section for a period not exceeding twenty-five years to any company to lay and maintain gas mains, pipes, service and all other necessary structures for the purpose of furnishing gas to the inhabitants thereof, and provides that such city

may after such period, make any reasonable regulation with reference to any corporation holding such franchise either as to charges for such gas or otherwise.

Section 17-138, Comp. St. 1929, in part provides: "To regulate and prevent the carrying on of manufactories dangerous in causing and promoting fires."

It is apparent from the foregoing statutory provisions that the city has the authority to regulate the gas company in the reasonable exercise of its police power.

In the exercise of police power delegated by the state legislature to a city, the municipal legislature, within constitutional limits, is the sole judge as to what laws should be enacted for the welfare of the people, and as to when and how such police power should be exercised. In testing police regulations, the court should inquire whether they have some relation to the public health, safety, or welfare, and whether such is in fact the end sought to be attained. See, State v. Withnell, 91 Neb. 101, 135 N. W. 376, 40 L. R. A. N. S. 898; Peterson v. State, *supra*.

It is an established rule of law that where the owner of property devotes it to a use in which the public has an interest, he must, to the extent of the interest thus acquired by the public, submit to the control of such property by the public for the common good. Gas companies are generally within the application of this rule, for a corporation like a gas company, dependent for the conduct of its business upon a license to use in part the highways, its rights in which are acquired avowedly for a public use, is something more than affected with a public interest. Its business is public. Accordingly, it has been held that the state, as a means of protecting the general public, may establish and enforce regulations that are not inconsistent with the essential rights granted by a gas company's charter, and it may also delegate its right of regulation to a municipality. Under such a delegation of power a municipality may enact ordinances to protect the public from the dangers resulting from the use of gas, by imposing certain obliga-

tions upon gas companies. However, even where there is no express delegation of authority by a state to a municipality, it has been held, in some jurisdictions, that municipalities, under implied and inherent police powers, possess sufficient authority to impose on gas companies operating within their limits all reasonable regulations which are necessary for the health, safety, or welfare of the city's inhabitants. See, 24 Am. Jur., Gas Companies, § 3, p. 672, also, 16 C. J. S., Constitutional Law, § 281, p. 701.

The power to regulate the use of the streets of a city by a gas company is not exhausted by the regulations prescribed by the municipal authorities at the time of granting the consent to use the streets. It is a continuing power, and cannot be bargained away or otherwise parted with. See, 38 C. J. S., Gas, § 3c, p. 620; City of New York v. Woodhaven Gaslight Co., 181 App. Div. 188, 168 N. Y. S. 429; Cincinnati Gas Light and Coke Co. v. Avondale, 43 Ohio 257, 1 N. E. 527.

The prohibition contained in constitutional provisions against impairing the obligation of contracts is not an absolute one and is not to be read with literal exactness like a mathematical formula, for the reason that it is apparent under the law that cities of the second class may make reasonable regulations with reference to the use of its streets, alleys, and public ways, and for the protection of the public health and welfare of its inhabitants, where the same are not arbitrary and unreasonable and relate to a company furnishing natural gas to its inhabitants. See 16 C. J. S., Constitutional Law, § 281, p. 701.

We conclude that the regulation imposed on the gas company by section 16 of Ordinance No. 114 does not impair the franchise contract evidenced by Ordinance No. 110. It is not an unreasonable or arbitrary regulation but comes within the police power of the city as provided for by law, and is not violative of the Constitution of the United States or of the State of Nebraska.

The basis of the plaintiff's cause of action is that, as provided for in section 16 of Ordinance No. 114, the duty to maintain the service line in question was on the gas company and therefore it was its duty to inspect its gas service lines for the purpose of discovering leaks, and its failure to properly inspect the gas service line in question constituted negligence on its part and creates liability against it for the personal injuries and loss of personal effects suffered by the plaintiff by virtue of the explosion.

The gas company cites Stephany v. Equitable Gas Co., 347 Pa. 110, 31 A. 2d 523 as to the liability of gas companies for natural gas explosions arising from defects in the lines of customers where the line is installed and paid for by the customer. On p. 113 it is said: "As to conditions arising from defects in the lines of consumers the responsibilities of the gas company are different for there it is the duty of the consumer to see that his lines are maintained in serviceable condition. The company knows that it is dealing with a dangerous agency and if it knows or should have known that the consumer's lines are not safe it is its duty to require the lines to be repaired or else to shut off the gas at the curb: Windish v. Peoples Natural Gas Co., supra, (248 Pa. 236, 93 A. 1003) p. 240. If it does not have such knowledge and there is no reason why it should have known that fact, it is the consumer and not the distributor who is responsible. The responsibility of the gas company arises from knowledge of a dangerous condition and not by reason of the condition."

In Wilson v. East Ohio Gas Co., 68 Ohio App. 490, 42 N. E. 2d 180, it is said that the legal duty of a gas company as to third persons in reference to the escape of gas from service pipes owned and controlled by others on private property, and leading from the company's pipes in the street to its meter in the customer's building, which pipes have been properly installed and tested, determined to be safe for use, and actually safely used

for some time, does not extend to thereafter making inspection of said service pipes, unless the gas company has knowledge of a probable defective condition in such pipes, or has knowledge of circumstances rendering it probable that gas is escaping therefrom, or unless the company is bound by contract, franchise, or custom to make such inspection. See, also, Kelley v. Public Service Co., 300 Ill. App. 354, 21 N. E. 2d 43.

In the annotation to 138 A. L. R., p. 883, in speaking of defects in customer's service line or appliances the rule stated is, in substance, that generally speaking, a gas company which does not install, own, or control the pipes or appliances in a customer's building is in no way responsible for the condition in which they are maintained, and consequently is not liable for injuries caused by a leak therein of which it has no knowledge. This rule is followed extensively in this country.

Referring to the testimony of the local manager for the gas company, it is apparent that he made no investigation or inspection of the service line to the Chambers building and requested none from the gas company. While he did testify that inspections were made, it is apparent that no inspection of the main in the alley that served the line to the Chambers building was made within a reasonable time. The plaintiff offered testimony of an occupant of the Chambers building who called the local manager for the gas company to make a test of gas that was escaping in that building. This evidence heretofore appears. It was obviously offered to show that the gas company had received notice that there were defects permitting the escape of gas in the Chambers building or immediate vicinity thereof.

"Testimony referring to prior gas leaks and repairs, introduced solely to establish that defendant's employees who performed the work involved in the present suit were its authorized agents to receive notice of such defects and to make repairs for the company, and not

offered to show prior negligence of defendant, was properly admitted in evidence." Heller v. Equitable Gas Co., 333 Pa. 433, 3 A. 2d 343.

"* * * a gas company owes the duty to the general public to so operate its business and maintain its pipes as to prevent the escape of gas therefrom in such quantities as to become dangerous to life or property." Newill v. Atlanta Gas-Light Co., 48 Ga. App. 226, 172 S. E. 232.

In Heller v. Equitable Gas Co., *supra,* the court held: "Where a public utility company engaged in the business of furnishing gas to its customers knows or should know that a service pipe owned by a customer is corroded to such an extent as to permit gas to escape, it is its duty either to cause the service line to be repaired by the customer, or to have the gas shut off at the street, in order to avoid the danger that might result."

In Julian v. Sinclair Oil & Gas Co., 168 Okla. 192, 32 P. 2d 31, where the gas company contended that since it was not the owner of the pipes at the point where the gas escaped it was not charged with the responsibility of inspecting said pipes and was not liable for injuries caused by faulty materials which it did not own, the court said: "As we view it, this fact alone would not absolve the company from liability. The gas which caused the damage was defendant's gas, and was turned into the pipes by defendant with knowledge on its part that it was a highly dangerous substance and subject to escape. Through the duly appointed agents and employees, defendant was charged with knowledge that its gas was being transported through the pipes in question." And the question as to whether the gas company had exercised such a degree of care and caution as was commensurate with the known danger of natural gas was held an issue of fact which under proper instructions should be submitted to a jury.

Thus, where it appears that a gas company has knowl-

edge that gas is escaping in a building occupied by one of its consumers it becomes the duty of the gas company to shut off the gas supply until the necessary repairs have been made, although the defective pipe apparatus does not belong to the company and is not in its charge or custody. See Clare v. Bond County Gas Co., 356 Ill. 241, 190 N. E. 278.

We believe the record discloses evidence sufficient from which the jury could find that the gas company had notice of the dangerous condition existent, and if it did have such notice, it becomes a question for the jury whether or not it made proper inspection and repairs with reference thereto.

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

AFFIRMED.

WILLIAM HENRY WILSON, ALSO KNOWN AS JAMES WILSON, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.
34 N. W. 2d 880

Filed November 26, 1948. No. 32458.

1. **Criminal Law.** A preliminary hearing before a magistrate is a right to which one charged with an offense triable to a jury in the district court is entitled but it is a right which may be waived by the person charged.
2. ———. An objection after verdict that a preliminary examination has not been had comes too late to be considered by this court.
3. ———. An objection that no preliminary examination was had must have been raised by motion to quash the information or by plea in abatement before going to trial in order to be available for review.
4. ———. A conviction of a criminal offense may rest upon the testimony of an accomplice where, considered with all the evidence, it satisfies the jury beyond a reasonable doubt of the guilt of the accused.
5. **Appeal and Error.** Error committed in the giving of an instruc-

tion unless prejudicial to the rights of a defendant may not be considered as ground for reversal.

6. ———. An instruction to a jury the effect of which is to invade or abridge a substantial right of a defendant in a criminal case is reversible error.
7. Witnesses. In jury cases juries are the judges of the credibility of witnesses and of the weight to be given their testimony and, within their province, they have the right to credit or reject the whole or any part of the testimony of a witness in the exercise of their judgment.
8. Trial. An instruction in a criminal case the effect of which is to infringe upon the right of a jury as the judge of the credibility of witnesses and the weight to be given their testimony is an invasion and an abridgment of a substantial right of the defendant.

ERROR to the district court for Otoe County: THOMAS E. DUNBAR, JUDGE. *Reversed and remanded.*

John L. Mattox, for plaintiff in error.

Walter R. Johnson, Attorney General, and *Walter E. Nolte,* for defendant in error.

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

YEAGER, J.

William Henry Wilson, also known as James Wilson, was convicted by the verdict of a jury on a charge of burglary in the district court for Otoe County, Nebraska, and sentenced to serve a term of three years in the state penitentiary. By petition in error to this court he seeks a reversal of the verdict and sentence. He will be hereinafter referred to as the defendant.

The factual situation here is that one R. P. Schruender was the owner and operator of a retail grocery and liquor store at 620 Central Avenue, Nebraska City, Nebraska. The store was broken into on the night of October 24, 1947, and several cases of whisky were removed, a portion of which was transported from the premises. It was for this act of breaking and entering or burglary that

the defendant was informed against, tried, convicted, and sentenced.

The brief of defendant contains numerous assignments of error but only a few require consideration. The others are so clearly without sound basis that comment with regard to them is not required.

Defendant says that he is entitled to a reversal because he had no preliminary hearing before an examining magistrate. It is true that no such hearing was had but this came about because following full information to defendant as to his rights such hearing was waived. A preliminary hearing before a magistrate is a right to which one charged with an offense triable to a jury in the district court is entitled but it is a right which may be waived by the person charged. Dinsmore v. State, 61 Neb. 418, 85 N. W. 445; Jahnke v. State, 68 Neb. 154, 94 N. W. 158; Meyers v. State, 104 Neb. 356, 177 N. W. 177; Greenough v. State, 136 Neb. 20, 284 N. W. 740. There was a rehearing and a new opinion in Jahnke v. State, *supra*, but this principle was not disturbed.

If this were not true still under another rule this assignment would not be available to defendant. This court said in Coffield v. State, 44 Neb. 417, 62 N. W. 875: "It is too late after verdict to raise the objection that a preliminary examination has not been had for the crime charged in the information. Such objection must be raised before going to trial by motion to quash the information or by plea in abatement." This statement was quoted with approval in Meyers v. State, *supra*. See, also, Nelson v. State, 115 Neb. 26, 211 N. W. 175; Roberts v. State, 145 Neb. 658, 17 N. W. 2d 666. No such motion or plea was made.

The contention of another assignment is that it was error to allow the verdict to stand since the conviction rests solely and alone upon the uncorroborated testimony of an accomplice. Proof of breaking and entering and the removal of the property involved was made, it is true, solely by the testimony of a witness admittedly an

accomplice. As authority reliance is had upon Jahnke v. State, *supra.*

No such rule was laid down in that case. The court made no determination of such a question in the opinion. All that appears on the subject is in the second opinion and is the following: "If the testimony of an accomplice who can so readily change his evidence from time to time is alone sufficient to support a conviction of so serious a charge, still this record contains a conclusive reason compelling us to reject his testimony."

In a syllabus point it was said: "The evidence of an accomplice should be closely scrutinized. If it appears that such witness has willfully sworn falsely in regard to a material matter upon the trial, his evidence cannot be sufficient, if uncorroborated, to support a verdict of guilty."

It is clearly observable that the testimony of the witness in question was not rejected on the ground that he was an accomplice but on the ground that he had given other testimony which was palpably false.

The rule as stated can have no application here since the basis for rejection is not present. There is nothing in this record upon which to base a conclusion that any of the testimony of the accomplice was palpably false.

This court has consistently held to the rule that a conviction may, in this kind of case, rest upon the testimony of an accomplice where, considered with all the evidence, it satisfies the jury beyond a reasonable doubt of the guilt of the accused. Olive v. State, 11 Neb. 1, 7 N. W. 444; Lamb v. State, 40 Neb. 312, 58 N. W. 963; Lawhead v. State, 46 Neb. 607, 65 N. W. 779; State v. Routzahn, 81 Neb. 133, 115 N. W. 759, 129 Am. S. R. 675; Barnes v. State, 124 Neb. 826, 248 N. W. 381; Millslagle v. State, 137 Neb. 664, 290 N. W. 725.

The defendant urges that it was error to give instruction No. 9-a. The grounds for objection are that the instruction was untimely or too late and that it responded to no issue in the case.

The effect of the instruction was to tell the jury that if the defendant aided, abetted, or procured another to commit the offense charged he could be prosecuted and punished as if he were a principal offender.

An examination of the record discloses that the evidence was in proof of guilt of this defendant as a principal and not as an aider, abettor, or procurer hence the instruction was upon an issue not presented. It was therefore, as contended, error to give it. The error was however without prejudice and cannot be considered as ground for reversal. The giving of it could have in nowise prejudiced any substantial right of the defendant. Unless the error complained of could be considered as prejudicial to the rights of defendant it may not be considered here as ground for reversal. § 29-2308, R. S. 1943; Mason v. State, 132 Neb. 7, 270 N. W. 661; Jackson v. State, 133 Neb. 786, 277 N. W. 92.

The next assignment to be considered is a contention that it was error to include the following in instruction No. 12: "* * * you have no right to reject the testimony of any of the witnesses without good reason and should not do so until you find it irreconcilable with other testimony which you may find to be true."

The entire instruction of which this is a part is the following: "It is your duty to carefully scrutinize and to dispassionately weigh the testimony of all the witnesses, giving to the several parts of the evidence such weight as in your judgment it should receive. Weight of evidence depends upon the credibility of witnesses, their accuracy of observing and remembering, their interest, bias or prejudice, if any, and their means of knowing the matters concerning which they testified. You are the sole judges of the credibility of the witnesses, and of the weight to be given to their testimony. You are not bound to accept as true any statement simply because it is sworn to by the greater number of witnesses, nor are you bound to accept the testimony of any witnesses as absolutely true if for any good reason it

appears unreliable or untrue. Yet, you have no right to reject the testimony of any of the witnesses without good reason and should not do so until you find it irreconcilable with other testimony which you may find to be true."

The only testimony in proof of the commission of the alleged crime was given by one Eldo Merl Klingenberg who, according to his testimony, was an accomplice in the commission of the crime. There was no evidence offered or adduced in refutation of the testimony of Klingenberg in this respect.

The contention of defendant in this respect is that notwithstanding the earlier directions, explanations, and admonitions of the instruction the portion objected to failed to leave the jury free to reject the testimony as false or incredible even though they may have disbelieved it or had a reasonable doubt as to its falsity or credibility. He says that the effect of the statement was to say to the jury that the testimony of Klingenberg was to be accepted as true since there was no irreconcilable testimony or testimony to the contrary.

We think the provision of the instruction contains the significance thus attached to it by the defendant. The testimony of no witness, especially if the witness be an accomplice, is surrounded with such sanctity as to require it to be accepted by triers of fact as true in the absence of controversion by other witnesses or conflict with other testimony. Millslagle v. State, *supra*. Clearly then the court was in error in giving it.

The State urges that if the court erred in this respect the error was without prejudice and does not constitute ground for reversal. It relies on the following from section 29-2308, R. S. 1943: "* * * No judgment shall be set aside, or new trial granted, or judgment rendered in any criminal case, on the grounds of misdirection of the jury, or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, if the Supreme Court, after an examination

of the entire cause, shall consider that no substantial miscarriage of justice has actually occurred." See, Lorimer v. State, 127 Neb. 758, 257 N. W. 217; Jurgensen v. State, 135 Neb. 537, 283 N. W. 228.

The effect of this statute is not however to authorize this court to declare that there has been no substantial miscarriage of justice in a criminal case merely because the court from an examination of the evidence may believe the defendant guilty of the crime charged. Scott v. State, 121 Neb. 232, 236 N. W. 608.

This court has held that where a substantial right of a defendant has been invaded or abridged this statute may not be effective to sustain a conviction. Fetty v. State, 119 Neb. 619, 230 N. W. 440.

This court has consistently held that in cases tried to them juries are the judges of the credibility of witnesses and of the weight to be given to their testimony and, within their province, they have the right to credit or reject the whole or any part of the testimony of a witness in the exercise of their judgment. Baker v. Racine-Sattley Co., 86 Neb. 227, 125 N. W. 587; Dore v. Omaha & C. B. St. Ry. Co., 97 Neb. 250, 149 N. W. 792; Kraemer v. New York Life Ins. Co., 134 Neb. 445, 278 N. W. 886.

The right of a defendant in a criminal case, or in truth the right of a litigant in any case triable to a jury, to have the jury weigh the evidence free from interference, we think, is a substantial right and a restriction upon or abridgment of that right by the trial court in instructions to a jury amounts to the deprivation of the benefits of this substantial right. In such an instance the statute relied upon by the State has no application.

We therefore conclude that the giving of the portion of the instruction to which objection was directed was prejudicially erroneous and for that reason the conviction and sentence should not be allowed to stand.

The verdict and sentence of the district court are

vacated and set aside and the cause is remanded to the district court for a new trial.

REVERSED AND REMANDED.

IN RE APPLICATION OF CHARLES C. ROBINSON. CHARLES C. ROBINSON, APPELLANT, V. O. L. (BARNEY) DISCOE, APPELLEE.

34 N. W. 2d 887

Filed November 26, 1948. No. 32452.

Habeas Corpus. In an application for a writ of habeas corpus if the applicant or petitioner sets forth facts which, if true, would make out a case which would entitle him to his discharge then the writ is a matter of right and the petitioner should be produced and a hearing held thereon to determine the question of fact presented.

APPEAL from the district court for Lincoln County: ISAAC J. NISLEY, JUDGE. *Reversed and remanded with directions.*

Beatty, Clarke & Murphy and *Earl E. Morgan,* for appellant.

James G. McIntosh, for appellee.

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

WENKE, J.

Charles C. Robinson filed his petition in the district court for Lincoln County seeking a writ of habeas corpus. From an order denying same, his motion for new trial having been overruled, he appeals.

The only question presented by the appeal is the sufficiency of the petition. As stated in In re Application of Tail, 145 Neb. 268, 16 N. W. 2d 161: "In an application for a writ of habeas corpus if the applicant or petitioner sets forth facts which, if true, would make out a case which would entitle him to his discharge,

then the writ is a matter of right and the petitioner should be produced and a hearing held thereon to determine the question of fact presented."

The petition alleges: "* * * that he is unlawfully deprived of his liberty by O. L. (Barney) Discoe, Sheriff of Lincoln County, Nebraska, in the County Jail in North Platte, in Lincoln County, Nebraska; that on the 29th day of January, 1948, petitioner was seized by the Chief of Police of North Platte, Nebraska, acting without any lawful warrant for the arrest of petitioner or other lawful authority, and was confined in the City Jail at North Platte, Nebraska, until January 30, 1948, on which day he was delivered to O. L. (Barney) Discoe, Sheriff of Lincoln County, Nebraska, and since said day has been confined in the County Jail of Lincoln County, Nebraska, by said Sheriff, unlawfully, and without any warrant of authority for his arrest or detention; that no person has filed any complaint against petitioner before any judge or other magistrate and that accordingly no fugitive warrant has been issued by any judge or magistrate, authorizing any officer to arrest or detain petitioner in accordance with the Uniform Criminal Extradition Act of the State of Nebraska, but that said officers have purported to act and to arrest and detain petitioner upon the request of one Richard Meissner, and to arrest and detain petitioner with no other authority whatever; that petitioner is unable to produce a copy of the commitment or cause of his detention for the reason that no commitment or warrant exists and that he has not been furnished with a copy of any such warrant or commitment."

The petition then further alleges: "That on the 5th day of February, 1948, the Governor of the State of Oregon filed with the Governor of the State of Nebraska a demand for the extradition of your petitioner as a fugitive from the justice of the State of Oregon, that hearing upon said application for the extradition of your petitioner has been set by the Governor for the

10th day of February, 1948, at 11 o'clock a. m. in the office of the Governor in the Capitol Building in Lincoln, Nebraska. The petitioner is not a fugitive from the justice of the State of Oregon and expects and intends to resist, at the hearing before the Governor, the demand of the State of Oregon for his extradition, and petitioner alleges that the State of Oregon has no ground, right, or authority, to arrest or detain him or to remove him from the State of Nebraska to the State of Oregon or elsewhere; * * *."

If the foregoing allegations are true then the petitioner would be entitled to his release.

Appellee suggests that petitioner is a parole violator of the State of Oregon; that Nebraska has entered into a compact with Oregon under paragraph (6) of the Uniform Act for Out-of-State Parolee Supervision which is section 29-2637, R. S. 1943; and that pursuant to paragraph (3) of the act the duly accredited officers of the State of Oregon may at all times enter the State of Nebraska and there apprehend and retake any person on probation or parole.

Paragraph (3) of section 29-2637, R. S. 1943, provides: "(3) That duly accredited officers of a sending state may at all times enter a receiving state and there apprehend and retake any person on probation or parole. For that purpose no formalities will be required other than establishing the authority of the officer and the identity of the person to be retaken. All legal requirements to obtain extradition of fugitives from justice are hereby expressly waived on the part of states party thereto, as to such persons. The decision of the sending state to retake a person on probation or parole shall be conclusive upon and not reviewable within the receiving state; Provided, however, that if at the time when a state seeks to retake a probationer or parolee there should be pending against him within the receiving state any criminal charge, or he should be suspected of having committed within such state a criminal offense,

he shall not be retaken without the consent of the receiving state until discharged from prosecution or from imprisonment for such offense."

Whether or not the appellee or officers of the State of Oregon had authority to take and hold the petitioner in custody is not here for our consideration as the petition expressly denies such authority.

If the party to whom the writ is directed claims to hold the petitioner in custody he must set forth the authority by which he does so and then, upon hearing, the legality thereof can be determined. See section 29-2817, R. S. 1943.

We do not hereby determine that petitioner was not being lawfully held but only that, based on the allegations of his petition, he was entitled to a writ of habeas corpus in order that a hearing might be had to determine that question.

The order of the trial court is therefore reversed and the cause remanded with directions that the writ issue.

REVERSED AND REMANDED WITH DIRECTIONS.

JACK WEBBER ET AL., APPELLANTS, V. THE CITY OF SCOTTSBLUFF, NEBRASKA, APPELLEE.
35 N. W. 2d 110

Filed December 3, 1948. No. 32440.

1. **Appeal and Error.** In a law action where the case is presented to the jury under proper instructions, a verdict based upon conflicting evidence will not be set aside on appeal unless clearly wrong.
2. **Juries: Evidence.** 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.
3. **Trial: Appeal and Error.** Instructions not complained of in such a way as to be reviewable in this court will be taken as the law of the case, and if, when tested by such instructions, the verdict

is not vulnerable to the objections lodged against it, the assignments will not be sustained.

4. ———: ———. It is presumed a jury followed the instructions given in arriving at its verdict and, unless it affirmatively appears to the contrary, it cannot be said that such instructions were disregarded.
5. **Eminent Domain: Interest.** The proper procedure in a condemnation action, where an appeal is taken from the award and the case is tried to a jury in the district court, is for the court to reserve the question of interest for its determination and direct the jury not to include it in its verdict.
6. **Trial.** Instructions should submit to a jury only issues of fact supported by evidence.
7. ———. It is not error for the trial court to reject an offer of proof not within the limits of the question on which the offer is based.

APPEAL from the district court for Scotts Bluff County: CLAIBOURNE G. PERRY, JUDGE. *Affirmed.*

Morrow, Lovell & Bulger, for appellants.

James H. Anderson and W. H. Kirwin, for appellee.

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

SIMMONS, C. J.

This is an appeal from a judgment of the district court, based on a jury's verdict assessing the amount of damages to be paid for land taken by eminent domain. We affirm the judgment of the district court.

The land involved was owned by Jack and Mamie Webber, who herein will be called the plaintiffs. The City of Scottsbluff, the condemner, will be herein referred to as the defendant.

The land of the plaintiffs, together with other land, was condemned for street purposes. Plaintiffs owned some 44 acres of land, adjoining the defendant on the southern and western boundaries of plaintiffs' land, but not within the defendant's corporate boundaries. The land taken was a strip 70 feet in width and 2,007.8 feet in length, containing 3.25 acres and running north and

south. Adjoining the land taken on the west and running north and south from the south boundary there was a dedicated road 30 feet in width and 1,277 feet in length. The condemnation widened and extended this road or street.

Plaintiffs' land on the south faced 27th Street which, in the area here involved, has been developed into a commercial and industrial section. At the time of the condemnation the land here involved was used for pasture purposes. It was improved with a picket fence along the west and south sides, within that a dike and irrigation lateral running north and south, and within that a woven wire fence 1,400 feet long.

Appraisers were appointed and damages assessed. The plaintiffs appealed from the award, and trial was had in December 1947. The issue tried in the district court was the amount of damages sustained by plaintiffs. The jury fixed the damages at $6,463.25. From the judgment rendered thereon, plaintiffs appeal.

Plaintiffs' first two assignments are that the damages are inadequate and the verdict is not supported by, but is contrary to the evidence and the weight thereof.

Plaintiffs used several expert witnesses who testified as to the fair and reasonable market value of the land taken. With two exceptions, these witnesses gave their opinion as to the value by mentally dividing the land taken into two tracts, i. e., that part 70 x 300 feet at the south end of the land taken, and the remainder of the tract. Mr. Webber fixed the value of the south 300 feet at $25,000, four of plaintiffs' witnesses fixed it at $7,000, one witness at $6,300, and one at $4,200. One witness fixed the value of the first 200 feet from the south at $4,200. As to the remainder of the tract, plaintiff fixed the value at $18,900, one witness at $5,020, one at $4,500, one at $5,000 to $5,500, and one at $1,250 to $1,375. One fixed the value of the second 300 feet at $1,800. It is apparent that all these witnesses arrived at their opinion as to value on the basis of the south part being used for

business purposes and the remainder of the land being platted and sold as city lots as a part of the other land owned by plaintiffs.

It does not appear that the value of the fences, dike, and lateral entered into the consideration of these witnesses in determining their opinions as to value.

Plaintiffs then offered proof that the cost of reconstruction of the lateral and dike on the land immediately to the east would be $2,044.20; that the cost of reconstruction of the two fences would be $1,820.38; and that a reasonable depreciation would be five percent a year. The fences were built in 1944-1945.

Defendant offered three expert witnesses to prove value. The first two had been appraisers of all the land taken by the condemnation proceedings, and fixed the value of the entire tract at $2,600, to which both in effect said should be added the cost of reconstructing the dike, and the removal and reconstruction of the fences. These witnesses testified that they gave consideration to the use of the land when taken, and to the fact that it was not within the defendant's corporate limits, and also gave a speculative value based upon future business and residential uses. The third witness, a former county assessor, fixed the value of the south 300 feet at $2,800, and the remainder at $275 or $100 an acre.

The rules are: "In a law action where the case is presented to the jury under proper instructions, a verdict based upon conflicting evidence will not be set aside on appeal unless clearly wrong." Scott v. New England Mutual Life Ins. Co., 128 Neb. 867, 260 N. W. 377. "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." Arman v. Structiform Engineering Co., 147 Neb. 658, 24 N. W. 2d 723.

The trial court instructed the jury that it should find for the plaintiffs in some amount; that the verdict should show the amount of damages the jury found from the

evidence the plaintiffs suffered by reason of the appropriation of the land by the defendant; and that the "* * * value of the fences thereon and the cost of reconstruction of the lateral and dike on the 17th day of June, 1947, should be taken into consideration and allowed as a part of the damages claimed by plaintiffs." The giving of these instructions is not assigned as error. Plaintiffs requested the giving of such an instruction so far as the value of the fences was concerned.

The rule is that instructions not complained of in such a way as to be reviewable in this court will be taken as the law of the case, and if, when tested by such instructions, the verdict is not vulnerable to the objections lodged against it, the assignments will not be sustained. Skinner v. Wilson, 76 Neb. 445, 107 N. W. 771.

It also is the rule that it is presumed a jury followed the instructions given in arriving at its verdict and, unless it affirmatively appears to the contrary, it cannot be said that such instructions were disregarded. Missouri Pacific Ry. Co. v. Fox, 60 Neb. 531, 83 N. W. 744.

The evidence here then is that the value of the fences was $1,820.38. Deducting depreciation at five percent a year for the two full years elapsing between the time of construction and the date of the taking, the jury might well have arrived at the figure of $1,638.35 as the then value of the fences. The cost of reconstruction of the dike and the lateral is fixed in the evidence at $2,044.20. Consistent with the instructions and the evidence, the jury could then have accepted the opinion of defendant's two witnesses that the value of the land taken was $2,600. The three items total $6,282.55.

The trial court also instructed the jury that to the amount determined as damages suffered, it should allow and add interest at the rate of six percent per annum from June 17 to December 10, 1947. We have held that "The proper procedure in a condemnation action, where an appeal is taken from the award and the case is tried to a jury in the district court, is for the court to

reserve the question of interest for its determination and direct the jury not to include it in their verdict." Langdon v. Loup River Public Power District, 144 Neb. 325, 13 N. W. 2d 168. However, the giving of this instruction is not assigned as error. Under the above rules it becomes the law of the case, and the presumption is that the jury followed it. Calculating the interest according to the instruction on the sum of $6,282.55, we arrive at a sum, which, added to the principal sum, makes a total which is a few cents less than the jury's verdict. About that over-allowance the plaintiffs are not in a position to complain.

Accordingly, it appears that the jury's verdict is supported by and not contrary to the evidence, nor is it against the weight and reasonableness of the evidence. The first two assignments of the plaintiffs are not sustained.

The plaintiffs' next six assignments of error are that the court erred in refusing to give requested instructions to the effect that in determining the damages the jury should consider the diminution in the market value of the remainder of the land owned by the plaintiffs; that the jury should consider the appreciation, if any, of the value of the land taken resulting from the opening of the street and give the plaintiffs the benefit of that increase; that in estimating the depreciation in the market value of the land remaining the jury should consider every element of disadvantage resulting from the taking; and that in giving an instruction as to the measure of damages the court failed to include the diminution in value of the remainder of the tract not taken and failed to include the appreciation in the value of the land taken resulting from the opening of the street. Plaintiffs cite no evidence that goes to any of these claimed elements of damage. The defendants assert there is none. We find none. The rule is that instructions should submit to a jury only issues of fact supported by evidence. Lebs v. Mutual Benefit Health and Accident Assn, 124 Neb. 491,

247 N. W. 19. The assignments are not sustained.

Plaintiffs' next assignment of error is that the court erred in overruling an offer of proof. On direct examination one of plaintiffs' witnesses was asked this question: "Now, you understand, of course, that there is a possibility of that land being taken into the city, do you not?" Objection was made and the witness answered "Yeah." The court sustained the objection but the answer was not stricken, there having been no motion to strike. Plaintiffs then offered to prove that the witness would answer in the affirmative. Objection was made and sustained. Plaintiffs then offered to prove by the witness that taking into consideration the possibility that the land could be taken into the city, the witness' opinion of the value on June 17, 1947, of the south 300 feet would be $100 a front foot. Objection was made and sustained. The assignment goes to the latter offer. The rule is: "It is not error for the trial court to reject an offer of proof not within the limits of the question on which the offer is based." Exchange Elevator Co. v. Marshall, 147 Neb. 48, 22 N. W. 2d 403. The assignment is not sustained.

Plaintiffs' next assignment of error goes to the refusal of the trial court to strike the evidence of one of defendant's witnesses. The witness had testified as to qualifications, his examination of the land, a description of it, his reasons for fixing a valuation, his opinion that the value of the land was $2,600, to which should be added the cost of moving the fence and the lateral. He was cross-examined at length on several matters. The examination contained 105 questions and answers, near the conclusion of which he testified that, based on an estimate of the city engineer, he thought he knew the cost of removing the fence. Plaintiffs then moved "* * * to strike out the evidence of this witness as incompetent and not based on the actual conditions under which this property was taken and condemned." The indefiniteness of the scope of the motion is apparent. By brief here plaintiffs assert the motion was to strike the evidence of the witness

"relative to his valuation of the land taken * * *." The motion was not so directed. It is not contended that all of the witness' evidence was incompetent. Obviously the court did not err in overruling the motion.

Plaintiffs' next assignment of error is that the trial court erred in permitting Claire Emery, the former county assessor, to testify over objections to interrogatories 1424 and 1425 that the witness understood that the proposed plattings of the strip taken would be in residential lots of 70 feet in depth. The question was if the witness understood that "* * * it is contended that these lots could be divided so that there would be a seventy-foot depth for the lot for residential purposes?" Objection was made that there was no evidence of that kind. The objection was overruled and the witness answered that was his understanding. The question was a foundation question for the opinion of the witness as to value. Obviously the witness should have given the factual basis upon which his opinion if offered was based. The assignment is not sustained.

Plaintiffs' next assignment is that the court erred in sustaining objections of defendant to questions 1443 and 1467 asked of the witness Emery on cross-examination. Question 1443 was: "And referring here to Plaintiff's Exhibit No. 4, which, so far as the extension of Avenue 'B' is concerned is identical with Exhibit No. 1, with the exception of the red and yellow shading, now, it is possible for Mr. Webber to take and plat that seventy feet in connection with the additional land that he owns there, is it not?" The witness had not previously been interrogated as to Exhibit 4. Objection was made. Plaintiffs' attorney said that the question was to show "* * * what it is possible for Mr. Webber to do with that land." The trial court sustained the objection. This witness was not offered as an expert witness on the platting of land. Obviously it was not for him to say what it was "possible" for Mr. Webber to do with the land. We see no error in the ruling. Thereafter on cross-examination

the witness testified that in his opinion the south 300 feet of the strip had a value of $2,800 and the remainder "$275.00. One hundred dollars per acre." He then was asked: "Now, in placing that estimate on it, did you take into consideration that it might be platted into lots and blocks in connection with the rest of the Webber land for residential purposes?" Objection was made and sustained. Plaintiffs' witnesses had testified that they had taken that matter into consideration. We think in view of the other evidence as to value and the base upon which it was given that the witness should have been permitted to answer the question. However, he was immediately asked for what purpose he considered the land would be used when he placed the value of $100 an acre upon it. He answered that the south half could be farmed and the north half would be pasture. (On direct examination he had testified that the land was class 5 irrigated land, class 1 being the best, and class 7 being the lowest.) He then testified that the fact that the land was adjacent to the city "enhanced its value a little." In the light of this testimony we see no prejudicial error in the ruling.

The next assignment is that the court erred in overruling an offer of proof made after the objection to question 1443 was sustained. The offer was "* * * that it is possible for Webbers to plat that seventy feet involved in this case with other land of his adjacent thereto into lots and blocks for both residential and business purposes." For the reasons given above the assignment is not sustained.

Plaintiffs, predicating the offer on the statement that in the event they were permitted to prove by the cross-examination of the witness that the 70-foot strip might be platted into regular lots and blocks for residential purposes in connection with the land adjacent thereto, then offered to prove that "* * * by so sub-dividing the land the opinion of the witness would be that the seventy-foot strip would become much more valuable than if platted separately in seventy-foot lots." This offer was objected

to and sustained. Plaintiffs assign the ruling as error. The offer was without the limits of the question on which the offer was based. The assignment is not sustained.

Following the sustaining of the objection to question 1467, plaintiffs offered to prove by the witness that he did not take into consideration the fact that the portion of the land taken, north of the south 300 feet, could be platted into lots and blocks for residential purposes. Objection was made and sustained. Plaintiffs assign this as error. For the reasons given this assignment is not sustained.

Plaintiffs' final assignment is that the court erred in overruling plaintiffs' motion for a new trial. This presents only matters herein determined.

The judgment of the district court is affirmed.

AFFIRMED.

WENKE, J., concurs in the result.

IN RE APPLICATION OF LLOYD MEYER. LLOYD MEYER ET AL., APPELLANTS, V. NEBRASKA STATE RAILWAY COMMISSION ET AL., APPELLEES.
34 N. W. 2d 904

Filed December 3, 1948. No. 32487.

1. **Carriers: Public Utilities.** Courts should review or interfere with administrative and legislative action of the Nebraska State Railway Commission only so far as it is necessary to keep it within its jurisdiction and protect legal and constitutional rights.
2. ———: ———. A certificate of public convenience and necessity issued to a carrier is not property in any legal sense, but is simply a permit or license to do business as therein limited. The Nebraska State Railway Commission has the sole power in this state to grant or amend such a certificate.

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

W. A. Stewart, Jr., for appellants.

Walter R. Johnson, Attorney General, *Bert L. Overcash,* and *George E. Truman,* for appellees.

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

PAINE, J.

This is an appeal from an order of the Nebraska State Railway Commission interpreting the certificate of public convenience and necessity of the appellants, authorizing operation as a common carrier of property by motor vehicle in Nebraska intrastate commerce.

The Nebraska State Railway Commission will be referred to in this opinion as the commission. The appellants, Lloyd Meyer and Clifford Bossung, dba Meyer Transfer, will be hereinafter referred to as the appellants.

The only question involved in this appeal is the interpretation and construction of the appellants' certificate of public convenience and necessity authorizing operation as a common carrier of property.

It is admitted that the appellants' certificate, issued January 28, 1946, provides the following service:

> "SERVICE AUTHORIZED:
>
> "Commodities generally including livestock but except those requiring special equipment.
>
> "ROUTE OR TERRITORY AUTHORIZED:
>
> "Irregular routes from Cozad, Gothenburg, Eddyville, Lexington and within a 35-mile radius of Lexington, to and from Omaha, Grand Island, Hastings and points in the vicinity of Lexington, occasionally to and from various points in all sections of the State of Nebraska."

The transcript further shows that, as the result of an investigation by its examiner, the commission had reason to believe that the appellants were willfully serving territory not described in their certificate, and in willful violation of General Order No. 81, and were failing to comply with the provisions of sections 75-222 to

75-250, R. S. 1943. The commission thereupon entered an order that the appellants should appear before an examiner in the commission hearing room in Lincoln on September 24, 1947, to show cause why an order should not be entered suspending, revoking, or changing their certificate for willfully serving territory which is not described therein.

On September 23, 1947, appellants filed an answer, denying the charges made against them by the commission and asking that the order to show cause be dismissed and withdrawn.

At the time stated all interested parties appeared for hearing. It was stated, prior to the taking of any testimony, that it was the position of the commission's motor transportation department that all shipments hauled by the appellants must originate or terminate within a 35-mile radius of Lexington; that appellants had an application pending to transfer respondents' certificate to a corporation, which application had been held up until the situation could be clarified; and that the examiner had previously warned appellants that they were operating outside the scope of their authority.

In reply thereto attorney for appellants said there were two issues involved: First, that the appellants deny that they have been operating outside the scope of their certificate, and maintain that shipments do not have to originate or terminate within a 35-mile radius of Lexington; second, that since April 1947, appellants have had pending an application for supplemental authority to haul heavy commodities requiring the use of special equipment, but have been unable to get a hearing on the same.

Numerous exhibits were introduced, and the oral evidence of Lloyd Meyer was taken at length. His evidence was generally to the effect that he had been actively engaged in motor transportation since 1933, and was the one who filed the original "grandfather" application; that his operating territory covers the entire

State of Nebraska; that he has hauled anything and everything offered except that requiring refrigeration or tanks; that he has hauled heavy machinery, at first on his cattle truck, and now has three lowboy trailers; that the equipment of the partnership consists of eleven trailers, five tractors, four straight trucks, four pick-up trucks, and one panel truck; that he has never willfully violated any of the laws intentionally; and that at his original hearing for the "grandfather" certificate he testified that he hauled oil and machinery and understood it covered all types of machinery.

He testified that he had hauled shipments to and from points outside the 35-mile radius of Lexington; "that he does not believe the 'thirty-five mile radius of Lexington' means anything, and is immaterial to the meaning of his certificate; that he reads his certificate to mean 'anywhere within the State'; * * *."

After the hearing the report of the examiner was as follows:

"Furthermore, the Examiner is of the opinion that the reasonable interpretation to be placed upon the certificate of respondents now outstanding is:

"SERVICE AUTHORIZED:

"Commodities generally, including livestock, but except those requiring special equipment.

"ROUTE OR TERRITORY AUTHORIZED:

"Between points and places within a 35-mile radius of Lexington, including Lexington on the one hand, and on the other hand, points and places within the State of Nebraska."

Thereafter the Nebraska State Railway Commission on January 6, 1948, entered an order reading as follows:

"IT IS THEREFORE ORDERED by the Nebraska State Railway Commission that the Order to Show Cause issued against Lloyd Meyer and Clifford Bossung, dba Meyer Transfer, Lexington, Nebraska, in Application No. M-7665 on August 29, 1947, be, and the same is hereby, held in abeyance; that the certificate of said

respondents be, and the same is hereby, interpreted to authorize the carriage of general commodities only, with all shipments originating or terminating within a 35-mile radius of Lexington, Nebraska, and that said certificate does not authorize the carriage of heavy commodities requiring the use of special equipment."

Appellants' motion for rehearing was overruled by the commission on April 6, 1948, in an order which directed that the appellants "cease and desist from conducting any operations outside the scope of their certificate as interpreted in the findings and conclusions herein." Appellants are further ordered to "cease and desist from hauling heavy commodities which by reason of size, weight or length require special equipment; and further they are hereby ordered to originate or terminate all shipments of general commodities within a 35-mile radius of Lexington, Nebraska."

It will be seen that there is little dispute as to the questions involved in this case. The appellants claim that their original certificate permitted them to occasionally go between various points in the State of Nebraska without regard to whether the load they were hauling started from the radius around Lexington or ended in that territory. In other words, the appellants contend that they had the right occasionally to make trips between any two points in Nebraska, and after the hearing the commission decided that they should be confined to loads arising within that 35-mile radius or terminating within that radius. This contention of the appellants and decision of the commission have been properly brought before this court.

The first rule governing our action in this matter is that stated as follows: "Courts should review or interfere with administrative and legislative action of the railway commission only so far as it is necessary to keep it within its jurisdiction and protect legal and constitutional rights." Moritz v. Nebraska State Railway Commission, 147 Neb. 400, 23 N. W. 2d 545.

The certificate issued in the case at bar is not property in any legal sense, but is simply a permit or license to do business as therein limited, and the commission has the sole power to grant or amend such a certificate. See Effenberger v. Marconnit, 135 Neb. 558, 283 N. W. 223.

In Kassebaum v. Nebraska State Railway Commission, 142 Neb. 645, 7 N. W. 2d 464, we have a case which required a construction of the act and a determination of whether or not the operations as detailed in the evidence and as found by the commission were authorized by appellant's certificate, and in that case this court recognized that the commission had the right to interpret a certificate.

In the case at bar, if this court permitted the appellants to haul freight to and from all parts of the state, even occasionally, as they contend their certificate permitted them to do, it would rewrite their certificate so that it would contain no limitation or restriction on the business they could conduct under it. If the commission allowed one carrier to thus broaden its rights and territory granted in its certificate to the unlimited extent claimed in the case at bar, it would be impossible for the commission to properly regulate such carriers in our state.

As this court views the matter, the judgment and order of the commission was right and is affirmed.

AFFIRMED.

CARTER and CHAPPELL, JJ., concur in the result.

GROVER STAPLEMAN, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.
34 N. W. 2d 907

Filed December 3, 1948. No. 32427.

1. **Indictments and Informations.** It is improper to charge a defendant with a felony and a misdemeanor in the same information

when the lesser charge is not wholly proved by evidence properly introduced in support of the greater.

2. ———. Where an information improperly charges a felony and a misdemeanor, the trial court on motion will require the state to elect. If no motion is made, the objection is waived.
3. **Evidence.** Errors, if any, in receiving incompetent evidence are waived unless timely objection is made thereto when the evidence is offered.
4. **Trial.** An oral instruction to the jury to disregard all evidence in support of a count of an information which was dismissed at the close of the state's case is ordinarily sufficient to protect the defendant from prejudice arising therefrom. If the instruction given is not deemed sufficient, the claimed error may be preserved by making timely objection thereto; otherwise it is waived.
5. **Rape.** Under the law of this state an accused charged with rape cannot be convicted solely on the uncorroborated testimony of the prosecutrix.
6. ———. If the prosecutrix is corroborated as to material facts and circumstances which tend to support her testimony and from which, together with her testimony as to the particular act, the inference of guilt may be drawn, the corroboration is sufficient.
7. **Criminal Law.** It is not reversible error, in the absence of a showing that the defendant was prejudiced thereby, to sentence a defendant after verdict and before the motion for a new trial has been overruled.
8. **Rape.** Evidence examined and held sufficient to support a sentence of eight years in the penitentiary for statutory rape.

ERROR to the district court for Hall County: WILLIAM F. SPIKES, JUDGE. *Affirmed.*

Lloyd W. Kelly and *Paine & Paine,* for plaintiff in error.

Walter R. Johnson, Attorney General, *Clarence S. Beck,* and *Homer L. Kyle,* for defendant in error.

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

CARTER, J.

Plaintiff in error was convicted of statutory rape and sentenced to serve eight years in the state penitentiary. He comes to this court by petition in error to secure a review of the case.

The plaintiff in error was a man 56 years of age at the time of the alleged offense. He had resided in Grand Island for approximately four years. He was engaged in selling used cars and in buying iron, copper, brass, and batteries. He carried on this business at the place of his residence. He lived in a trailer house located on a lot which he owned. He had never married. The prosecutrix was a girl 14 years of age. She had lived in Grand Island with her mother since she was a small girl. She states that her home was about two miles from the home of plaintiff in error.

The evidence shows that plaintiff in error permitted several young people from 13 to 19 years of age to frequent his place. On occasion he would give them food and candy, and give or loan them small amounts of money. Among the young girls who frequently visited plaintiff in error was the prosecutrix, Juanita Davidson. She testifies that on December 27, 1946, at 7:15 p. m. she came to the residence of plaintiff in error, who informed her that her sister and other young folks were coming over for a party and importuned her to stay until they came. She says plaintiff in error produced some whisky and that she had several drinks. She says that she "started getting drunk" and sat down on a cot. Plaintiff in error then made advances which finally resulted in an act of sexual intercourse. Prosecutrix says she then left and went to a nearby ladies rest room until she sobered up. She returned home about 9:30 p. m. and informed her mother that she had been at the home of a girl friend. The following day plaintiff in error came to the home of the prosecutrix and in the presence of her sister and brother told her he wanted to buy her a Christmas present. She went with him and he purchased a coat and dress for her. There is evidence in the record by other girls who visited plaintiff in error to the effect that he had shown them lewd pictures and cartoons and that he had made indecent exposures of his person in their presence. The prose-

cutrix testifies that these pictures and cartoons were shown to her by plaintiff in error when another boy and girl were present. There is evidence in the record that he made improper advances to one other girl who frequented the place.

Plaintiff in error denies the acts charged. He says that the prosecutrix was at all times unfriendly to him and made no complaint until trouble arose between him and her boy friend over a truck which the latter borrowed and damaged. The evidence shows that no complaint was made by the prosecutrix until five months after the happening of the alleged crime. The record shows further that the complaint was filed after prosecutrix was returned to Grand Island after running away and living with a 19-year-old boy.

The foregoing is substantially the evidence upon which the jury returned a verdict of guilty. Plaintiff in error contends that numerous errors occurred at the trial which require a reversal.

Plaintiff in error was originally charged on seven different counts with crimes ranging from indecent exposure of the person to rape. Five counts were dismissed by the state prior to the trial. The plaintiff in error went to trial on the charges of rape and indecent exposure. At the conclusion of the state's case the count charging indecent exposure was dismissed by the state. Plaintiff in error asserts that it is error to permit a joinder of a felony and a misdemeanor in the same information when the misdemeanor is not wholly proved by evidence properly introduced upon the greater. The foregoing states the rule correctly and if plaintiff in error had moved to require the state to elect upon which count it would proceed, it would have been error not to sustain it. Longsine v. State, 105 Neb. 428, 181 N. W. 175. But in the present case no objection was made to the joinder before or after the trial had commenced. In fact, the record shows an unchallenged statement by the trial judge that "it is agreed in open court that the defendant

shall be tried only on Counts One and Three." There being no objection made, it will be deemed to have been waived. Aiken v. State, 41 Neb. 263, 59 N. W. 888; Blodgett v. State, 50 Neb. 121, 69 N. W. 751.

Complaint is made of the admission of certain evidence tending to sustain the charge of indecent exposure. This evidence was given in support of a charge to which no objection had been made. It was not improperly offered at the time, but, even if it were, timely objection was not made to its admission. Consequently error cannot be predicated thereon. State v. Neimer, 147 Neb. 284, 23 N. W. 2d 81. See, also, Galloway v. State, 88 Neb. 447, 129 N. W. 987. The court however orally instructed the jury at the time the charge of indecent exposure of the person was dismissed that it should disregard all evidence adduced to sustain that charge. No mistrial was demanded at the time, nor was objection made to the manner in which the trial court disposed of the matter. If plaintiff in error was dissatisfied with the trial court's ruling, he was bound to make it known and give the court an opportunity to correct any error that it may have made. After taking his chances on a favorable verdict without making any objection, the error, if any, will be deemed to have been waived. Ordinarily an oral instruction to the jury that certain testimony should not be considered by it is sufficient to protect the interests of a defendant against any prejudice arising therefrom. If the instruction is deemed insufficient, the claimed error can be preserved only by voicing timely objection.

Plaintiff in error contends that the evidence was not sufficient to sustain a conviction for the reason that the story told by the prosecutrix was not corroborated. Under the law of the state, an accused charged with rape cannot be convicted solely on the uncorroborated testimony of the prosecutrix. The nature of the crime is such however that eyewitnesses seldom are available. It is not essential that the prosecutrix be corroborated as to

the particular act constituting the offense. If she is corroborated as to material facts and circumstances which tend to support her testimony and from which, together with her testimony as to the particular act, the inference of guilt may be drawn, it is sufficient. Beer v. State, 129 Neb. 366, 261 N. W. 824.

We think the testimony of prosecutrix is sufficiently corroborated to sustain the conviction. Prosecutrix states and plaintiff in error admits that prosecutrix frequented the trailer house where he lived. He curried the favor of prosecutrix, and other young girls who came to his place, by giving them food and candy and giving or loaning them small amounts of money. There is evidence that he showed them lewd pictures and cartoons from which the jury might well infer that plaintiff in error was laying the ground work for the success of his immoral designs. The evidence of other witnesses that he made indecent exposures of his person at or near the time of the offense charged is corroborative of his lascivious inclination toward prosecutrix. He purchased clothes for the prosecutrix the day following the specific act with which he is charged without a very good reason for doing so. We think this evidence shows opportunity, inclination, and a lustful purpose sufficient to corroborate the evidence of prosecutrix that he did in fact engage in sexual intercourse with her at the time and in the manner charged. Prosecutrix being under the age of 15 years, intent to rape is not an element of the crime and the consent of the prosecutrix is not a defense. We deem the evidence sufficient to sustain the verdict of the jury. Smith v. State, 127 Neb. 776, 257 N. W. 59; Hudson v. State, 97 Neb. 47, 149 N. W. 104; Whetstone v. State, 99 Neb. 469, 156 N. W. 1049.

Complaint is made of the action of the trial court in sentencing the accused before the motion for a new trial was overruled. While the better practice is to delay the sentencing of the accused until after the motion for a new trial is overruled, it is not reversible error to do

so except where the rights of the accused were prejudiced thereby. The motion for a new trial having been properly overruled, the premature sentencing of the accused did not prejudice his rights.

Plaintiff in error contends the sentence is excessive. The Legislature has fixed the penalty for rape at not less than 3 nor more than 20 years in the penitentiary. The trial court fixed the penalty at eight years. The defendant was 56 years of age. He made his trailer house a resort for young people of both sexes. He paved the way for his immoral advances with lewd talk, obscene literature, and indecent exposures of his person. His act was the climax of a series of studied artifices deliberately calculated to bring about the result attained with prosecutrix. His dissolute conduct contributed to the moral degeneration of many other young persons of both sexes who came under his influence. No mitigating circumstances are shown in the record. We do not see how any could exist. The trial court undoubtedly considered all this when it sentenced the defendant. We think, as did the trial court, that the sentence was commensurate with the offense committed. The judgment is affirmed.

AFFIRMED.

ROBERT G. KLAUSE, APPELLANT, V. NEBRASKA STATE BOARD OF AGRICULTURE, A CORPORATION, ET AL., APPELLEES.
35 N. W. 2d 104

Filed December 3, 1948. No. 32459.

1. **Trial: Appeal and Error.** An exception to a group of instructions collectively in a motion for new trial shall be deemed for the purposes of review in this court separately an exception to each instruction included within the group, and the contra rule of the earlier decisions is abrogated.
2. **Negligence.** In an action for damages where there is no evidence upon which to base a finding of contributory negligence on the

part of a plaintiff it is error for the court to instruct the jury on that subject.

3. **Theaters and Shows: Negligence.** A spectator at a wrestling event is required to exercise due care in protecting himself against known dangers or such as should be known and appreciated by a reasonable person in the exercise of due care.
4. ———: ———. A spectator at a wrestling event assumes the risk only of such dangers as are incident to such events of which he has knowledge or which are or should be obvious and apparent to him as a reasonable person under the circumstances in the light of his information and knowledge.
5. **Master and Servant.** A master may be held liable for the act of a servant if the act concerning which complaint is made was performed or done with a view to the service for which the servant was employed.
6. ———. Conversely a master may not be held liable for the act of a servant if the act was not done or performed with a view to the service for which the servant was employed.
7. **Theaters and Shows.** One who operates a place of public amusement or entertainment is held to a stricter accountability for injuries to patrons than owners of private premises generally; he is not the insurer of the safety of patrons, but owes to them only what, under the circumstances, amounts to ordinary and reasonable care.
8. **Trial: Appeal and Error.** A motion for new trial not filed in conformity with section 25-1143, R. S. Supp., 1947, as to time may not be considered by this court on review.

APPEAL from the district court for Lancaster County: JEFFERSON H. BROADY, JUDGE. *Reversed and remanded.*

William L. Walker, Leonard Dunker, and *Earl Ludlam,* for appellant.

Max Kier and *Joseph H. McGroarty,* for appellees.

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

YEAGER, J.

This is an action for damages by Robert G. Klause, plaintiff, appellant here, against Nebraska State Board of Agriculture, a corporation, Joseph Dusek, William Kuusisto, Adam Krieger, and Max Clayton, defendants, appellees here. Elmer Snodgrass and Charles Moon

were named defendants in the petition filed in the district court but they are not parties to this appeal.

The case was tried to a jury. At the conclusion of the evidence the defendants separately moved for dismissal of the action on the ground that no cause of action had been proved against them. The motion of the defendant Clayton was sustained. The other motions were overruled whereupon under instructions of the court the case was submitted to the jury for determination. On November 17, 1947, the jury returned a verdict against the plaintiff and in favor of all defendants whose motions for dismissal were overruled.

On November 19, 1947, plaintiff filed a motion for new trial as to all defendants except Max Clayton.

On November 26, 1947, plaintiff filed a motion for judgment notwithstanding the verdict, or for a new trial. The defendant Clayton was not mentioned in this motion.

On January 10, 1948, plaintiff filed an amendment to his motion for judgment notwithstanding the verdict or for new trial. No new matter is included in this amendment except an allegation that the court erred in directing a verdict in favor of the defendant Clayton. This amendment was not predicated on newly discovered evidence.

The various motions were overruled by the court. From the judgment in favor of defendants and the order overruling the various motions the plaintiff has appealed.

The assignments of error set out in the brief are substantially (1) that the verdict is against the clear weight of the evidence, (2) that the court erred in instruction No. 21 in submitting to the jury the question of contributory negligence on the part of plaintiff, (3) that the court erred in instruction No. 21 in submitting the question of comparative negligence, (4) that the court erred in instructing the jury in instruction No. 18 that the Fair Board (Nebraska State Board of Agriculture) and Adam Krieger could not be held liable for acts of

defendants Dusek and Kuusisto while wrestling outside the ring, (5) that the court erred in instruction No. 15 in telling the jury that the Fair Board (Nebraska State Board of Agriculture) and Adam Krieger were not insurers and for failure to define their duty to plaintiff, (6) that the court erred in instructing in instruction No. 14 that the defendant Dusek in assaulting plaintiff outside the ring was without the scope of his employment, (7) that the court erred in submitting in instructions Nos. 16 and 17 the issue of assumption of risk, and (8) that the court erred in directing a verdict in favor of Max Clayton.

The factual situation upon which the determination herein depends is substantially the following: On and prior to January 28, 1943, the Nebraska State Board of Agriculture, also known as the Fair Board, had a license to conduct wrestling matches in the 4-H building at the Nebraska State Fair Grounds at Lincoln, Nebraska. Adam Krieger was matchmaker for the Fair Board. Events were open to the public on tickets of admission. In the building is a square wrestling stand, or ring as it is commonly called. The platform is elevated about four feet above the ground. At the four corners of the platform are metal posts or uprights. Secured to these posts and surrounding the ring are ropes or cables. The purpose of the ropes or cables is to define the ring and to contain or confine therein the contestants. Outside and surrounding the platform and probably starting four to six feet away and extending backward are arranged seats for spectators.

On January 28, 1943, a card of wrestling events was being conducted at this place by the Fair Board. Adam Krieger was the promoter and matchmaker and was in active charge. The defendants Dusek and Kuusisto were the participants in one of the events. The defendant Dusek had been booked or procured through the defendant Max Clayton. Plaintiff was a spectator occupying

a front seat on the west side of the ring. One Elmer Snodgrass was referee for the event.

During the event the referee was outside the ring and in some manner came into contact with plaintiff who was sitting in his seat. The cause of the contact is in dispute. In consequence plaintiff's nose was broken. For the injury sustained and the consequential damages plaintiff contends that the defendants and each of them are liable.

The evidence on the part of plaintiff as to the manner in which he was injured is that Dusek threw or pushed the referee outside the ring and down onto the ground, then threw Kuusisto out, then got out himself, and started wrestling with Kuusisto outside the ring whereupon the referee attempted to separate them and in the melee was thrown back into the plaintiff.

There is some difference in the evidence of defendants as to what happened but in no important particular insofar as the issues involved are concerned. Their witnesses were in accord that the referee came into contact with plaintiff and the defendants do not contend that plaintiff was not injured as claimed by the contact. Certain of those who testified in relation to the subject said that the occurrence came about substantially as follows: The contestants were in the ring with Dusek standing against the ropes on the west side and Kuusisto on the east side. The referee was out of the ring on the west side. He was returning to the ring directly back of Dusek. Kuusisto made a flying tackle or leap toward Dusek. Dusek sidestepped and Kuusisto missed him and struck the referee and knocked him backward into the lap of plaintiff. Certain other witnesses for the defendants say and indicate that the contestants were out of the ring previously but their testimony does not connect that fact with the incident resulting in the injury to plaintiff. Factually therefore according to the evidence of plaintiff the activation which resulted in his injury was participated in by the two contestants

and the referee whereas according to the evidence of defendants it was activated solely by the defendant Kuusisto.

The defendants in the answers on which the case was submitted to the jury set up as defenses that the plaintiff assumed the risk of such dangers as caused the injury which he sustained by placing himself in the seat which he occupied and that therefore he was not entitled to recover, also that in the choice of his seat he was guilty of negligence which proximately caused or contributed to his injury sufficient to defeat a recovery.

The district court instructed on both assumed risk and contributory negligence and as pointed out by the assignments plaintiff urges this as error.

The defendants assert that these assignments are not available to plaintiff since they were not properly assigned as error in the motion for new trial. They assert, and it is a fact, that the instructions of the court with reference to contributory negligence and assumed risk are contained within certain instructions from 1 to 24 inclusive. They assert also, and this is likewise a fact, that the motion for new trial fails to attack the instructions 1 to 24 or any of them separately and independently but only as a whole and in the entirety. They therefore contend that these assignments may not be considered here since it is a rule of this court that an assignment of error in a motion for a new trial to the effect that the trial court erred in giving a group of instructions does not require a consideration of such assignment further than to ascertain that one of the instructions was properly given. Anderson v. Nebraska Defense Corporation, 146 Neb. 466, 20 N. W. 2d 322; In re Estate of Woodward, 147 Neb. 270, 23 N. W. 2d 75.

This is a long established rule. We however have come to the conclusion that if the rule ever had a reasonable basis the reason for it has disappeared, and accordingly when any such motion for new trial is filed the party filing such motion shall be deemed to have

assigned error separately as to each instruction contained within the specified group.

In the absence of a legal requirement that the specific ground of objection to an instruction or instructions shall be contained in a motion for new trial, and in view of the knowledge gained from an examination of the reported cases on this subject that the intention was in each instance to except separately to each instruction included, it appears that this is but a technical rule which ought no longer to be permitted to entrap the unwary and to hazard substantial rights of litigants who bring their causes to this court for review.

As already indicated plaintiff contends that there was no evidence upon which to base a finding that he was guilty of contributory negligence therefore it was error for the court to instruct the jury on this subject.

It is well settled that where there is no evidence upon which to base a finding of contributory negligence on the part of a plaintiff in an action by him for damages it is error for the court to instruct the jury on that subject. Koehn v. City of Hastings, 114 Neb. 106, 206 N. W. 19; Andersen v. Omaha & C. B. St. Ry. Co., 116 Neb. 487, 218 N. W. 135; Allen v. Clark, 148 Neb. 627, 28 N. W. 2d 439; Hartford Fire Ins. Co. v. County of Red Willow, 149 Neb. 10, 30 N. W. 2d 51.

On examination of the record in this case we have failed to find any evidence that would directly or by reasonable inference indicate contributory negligence on the part of plaintiff. All that he did was to sit in the seat to which his ticket entitled him. The seat was placed there under the authority of the Fair Board. He did not move from his place until after he received his injury. There is nothing to indicate that he was in a place known to him to be dangerous or that he was warned of the danger to which he was subjected in time to avoid its consequences.

The defendants suggest that plaintiff was familiar with wrestling matches and the manner in which they

were conducted and that he knew that incidents such as this were likely to occur, therefore he was guilty of contributory negligence in occupying the seat assigned to and occupied by him, also that he was guilty of contributory negligence in not removing himself, on his theory of the evidence, when the contestants and the referee were out of the ring.

To sustain their theory reliance is largely placed upon Tite v. Omaha Coliseum Corporation, 144 Neb. 22, 12 N. W. 2d 90, 149 A. L. R. 1164, and the cases cited and commented on therein. That case was one wherein a spectator, occupying an unprotected ringside seat at an ice hockey game, was struck by a flying puck and was seeking damages for injuries on account of being hit by the puck.

In that case after reviewing the cases involving injuries to spectators at baseball games and ice hockey games this court came to the conclusion that it was proper for a jury to consider and determine whether or not, in the light of her conduct and knowledge of the incidents of the game of ice hockey, the plaintiff in that case was guilty of contributory negligence. In arriving at that conclusion, it was said: "A spectator at a game of hockey must exercise due care in protecting himself against known dangers or such dangers as should be known and appreciated by a reasonable person in the exercise of due care."

The defendants contend that this rule is applicable in the present instance. An examination of the opinion and its theory and the supporting opinions discloses that the contention of defendants is not tenable.

The theory of these opinions is that in such an action contributory negligence is not necessarily involved in being seated in a seat provided for the spectator but that it may or may not be, depending upon the person's familiarity with the characteristics of the game and depending further upon whether or not in the light of the familiarity shown such person exercised due care to anticipate and

avoid being struck by a flying puck, a flying puck being a characteristic of the game of ice hockey.

There is nothing to indicate that flying tackles by participants the effect of which is to knock referees into the laps of spectators is a characteristic of wrestling, or if it is that under the circumstances of this case it could have been avoided in the exercise of due care by plaintiff. While it is shown that participants and referee often get out of the ring yet it is not shown that a known characteristic of such a departure from the regular wrestling precincts is the knocking of the referee into the laps of spectators.

In the absence of such a known characteristic or characteristics it cannot well be said that plaintiff was lacking in care in failing to anticipate and to guard against being struck as it has been shown that he was struck. He could not have been guilty of contributory negligence and the trial court committed reversible error in instructing on that subject.

Plaintiff assigns as error the giving of instructions on the defense of assumed risk. Our conclusions with regard to this assignment are the same as with regard to the defense of contributory negligence.

As pointed out in Tite v. Omaha Coliseum Corporation, *supra,* the plaintiff as a spectator assumed the risk of such dangers only as were incident to a wrestling match of which he had knowledge or which should have been obvious and apparent to him as a reasonable person under the circumstances in the light of his information and knowledge. On the facts adverted to herein and from the entire record we have failed to find anything to justify a conclusion that the plaintiff was derelict in any duty owed to himself which was imposed or implied by the definition of his rights and liabilities within the meaning of the doctrine of assumed risk.

We think that the contention that instruction No. 14 was erroneous has merit. In that instruction the jury was told that, if it found that while the two wrestlers

were on the ground outside the ring they continued to wrestle and while so doing the referee attempted to separate them and the defendant Dusek assaulted plaintiff by shoving the referee into him thus causing his injuries, there was no liability against anyone except Dusek, since any such act on the part of Dusek was outside the scope of his employment.

Even if it be assumed that Dusek was an employee of the other defendants or some of them the authorities cited to sustain the instruction fail to do so. The authorities were not sufficient to permit or require the court, as a matter of law on the facts, to inform the jury that in this respect the acts of Dusek were outside the scope of his employment.

The defendants rely, among other cases, upon Allertz v. Hankins, 102 Neb. 202, 166 N. W. 608, L. R. A. 1918F 534. In that case it was said: "In an action to hold a master liable for the act of a servant, if the act complained of is within the scope of the agent's employment, the master may be liable if the servant did the act with a view to the service for which he was employed. If, then, the question is whether the servant at the time had some purpose of his own and not connected with his employment in doing the act, it becomes a question of fact for the jury." See, also, Zaitz v. Drake-Williams-Mount Co., 107 Neb. 262, 185 N. W. 424.

Again assuming that this was a master and servant relationship it cannot well be said as a matter of law on the record presented that at the time and under the circumstances Dusek was engaged upon a purpose of his own not connected with his employment. Certainly if this question was issuable in this case there was sufficient evidence to justify a reasonable inference that Dusek was not at the time engaged upon some purpose of his own but upon acts incidental to his employment. This being true the question was one for a jury and the court erred in withdrawing it by the instruction complained of.

The theory as to how and why any doctrine of master and servant is applicable to this situation has not been pointed out and we have on our own account found no reasonably applicable theory. Dusek and Kuusisto were in no true sense according to any evidence adduced employees of a master but were by reasonable inferences in the status of persons engaged by contract to stage athletic or sporting events. It became the duty of the court to thus instruct and to refrain from instructing in anywise under the master and servant doctrine.

The only other complaints in the assignments of error that the court did not properly instruct as to those engaged in the staging of an athletic event are those contained in the exceptions to instructions Nos. 15 and 18.

Plaintiff urges that the court failed in instruction No. 15 to define the duty that the defendants Adam Krieger and the Fair Board owed to the plaintiff. The contention is without merit. It is true that this duty was not defined in the particular instruction but it was defined fully and properly in instruction No. 6 and in substance as requested by plaintiff in No. 1 of his tendered instructions.

The giving of instruction No. 18 was erroneous for the same reason as the giving of instruction No. 14. The main difference between the two is that No. 14 has a limited application whereas No. 18 applies the master and servant doctrine to additional parties.

Since there was no evidence to support a charge of contributory negligence on the part of plaintiff or one that he assumed the risk of the position in which he found himself and none upon which to justify in any disclosed situation the submission of any instruction under the master and servant doctrine, the trial court should have limited its instructions to the principles embodied in the following from Welsh v. Jefferson County Agricultural Society, 121 Neb. 166, 236 N. W. 331: "One who operates a place of public amusement or entertainment is held to a stricter accountability for injuries

to patrons than owners of private premises generally; he is not the insurer of the safety of patrons, but owes to them only what, under the particular circumstances, amounts to ordinary and reasonable care." See, also, Emery v. Midwest Amusement & Realty Co., 125 Neb. 54, 248 N. W. 804; Tite v. Omaha Coliseum Corporation, *supra;* Annotation, 149 A. L. R., p. 1174; 52 Am. Jur., Theaters, Shows, Exhibitions, Etc., § 62 et seq., p. 306.

Plaintiff charges that the action was erroneously dismissed at the conclusion of the evidence as to the defendant Max Clayton. This assignment is without merit. There is no word of evidence connecting him with the promotion or conduct of the events of the day in question. The services of Dusek were contracted for through him. Dusek was in nowise in his employ or under his control.

In any event the motion for new trial as to him came too late. The motion was not filed until January 10, 1948. The effective statute required that the motion be filed within ten days after November 17, 1947. § 25-1143, R. S. Supp., 1947.

The remaining assignments of error are without substantial merit, therefore they will not be discussed.

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.

WESTERN SMELTING & REFINING CO., APPELLEE, V. FIRST NATIONAL BANK OF OMAHA, APPELLANT.
35 N. W. 2d 116

Filed December 3, 1948. No. 32368.

1. **Appeal and Error.** A judgment rendered or final order made by the district court may be reversed, vacated, or modified by this court for errors appearing in the record.
2. ———. An order affecting a substantial right made in a special proceeding is a final order which may be so reversed,

vacated, or modified, even though it does not terminate the action nor constitute a final disposition of the case.

3. Garnishment. An action prosecuted under the provisions of sections 25-1030 and 25-1031, R. S. 1943, which direct the procedure to be followed in order to obtain ultimate relief in attachment and garnishment, is a special proceeding.
4. Appeal and Error. A substantial right within the meaning of section 25-1902, R. S. 1943, is an essential legal right as distinguished from a mere technical one.
5. ———. An order of the court which determines the rights of the parties and leaves no further questions to be decided by the court rendering it, except such as are necessary to be determined in carrying it into effect, is a final order affecting a substantial right.
6. ———. Generally, an appealable interest in the subject matter of litigation exists whenever the interest of the party may be enlarged or diminished, or his rights or liability affected by the result of the appeal, and if a party has sufficient interest to make him a party to an action, he has sufficient interest to appeal from any final order entered against him.
7. Garnishment. In an action under sections 25-1030 and 25-1031, R. S. 1943, failure of plaintiff to prove that the original answer of the garnishee was incomplete or false, will not defeat the action against him if he has money or property of defendant in attachment in his possession, but does relieve him of liability for costs.
8. ———. A garnishee owes the duty to act in good faith and answer fully and truthfully all proper questions or interrogatories propounded to him, or to in some appropriate manner make proper disclosure of all relevant facts within his knowledge at the time of making answer concerning his present indebtedness to the debtor or concerning money or property of the debtor then in his possession.
9. ———. In an action under sections 25-1030 and 25-1031, R. S. 1943, the burden of proof is generally determined, as in other civil actions, from the issues presented by the pleadings.
10. ———. When the pleadings disclose a traverse of the garnishee's original answer in garnishment, the burden is generally upon plaintiff to prove by a preponderance of the evidence that such answer was false or incomplete, in order to recover costs, and that there was a then-present indebtedness by garnishee to the debtor defendant, and the amount thereof, or that garnishee then had in its possession money, and the amount thereof, or property, and the character thereof, of such debtor to which it would be entitled except for the garnishment, in order to recover upon the merits.

11. Trial: Appeal and Error. In a case tried to the court, whether at law or in equity, the presumption obtains that the trial court, in arriving at decision, considered such evidence only as was competent and relevant, and this court will not reverse a case so tried because other evidence was admitted.
12. Banks and Banking. Whether there was an agreement that a bank should not be a mere agent of the depositor for collection within the first exception contained in section 62-202, R. S. 1943, depends upon the intention of the parties which may be gathered from the form of the endorsements on the paper itself, the right accorded the depositor to draw unrestrictedly upon the funds credited to him in advance of collection, and the general course of dealing between the bank and the depositor.
13. ———. A printed provision on a bank deposit book or deposit slip, stating that all items are accepted for collection only, is not controlling, since such provision is subject to a contrary agreement between the parties as evidenced by their conduct, and being solely for the benefit of the bank, may be waived by it.
14. ———. In any event, under the provisions of section 62-202, R. S. 1943, when any bank allows any revocable credit for an item to be withdrawn, the agency relation of the bank to its depositor continues except that the bank has all the rights of an owner thereof against prior and subsequent parties, to the extent of the amount withdrawn.

APPEAL from the district court for Douglas County: ARTHUR C. THOMSEN, JUDGE. *Reversed and remanded.*

Finlayson, McKie & Kuhns, for appellant.

Kennedy, Holland, DeLacy & Svoboda, Lawrence J. Tierney, and *Leo Eisenstatt,* for appellee.

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

CHAPPELL, J.

Western Smelting & Refining Company filed a prior action, still pending in the district court for Douglas County, against Metal Manufacturing Corporation and the First National Bank of Louisville, Kentucky, to recover damages for alleged breach of contract by Metal Manufacturing Corporation in failing to deliver certain aluminum. Since Metal Manufacturing Corporation was

resident in Kentucky and had no agent in Nebraska, Western Smelting & Refining Company caused a writ of attachment and garnishment to be issued and served upon the First National Bank of Omaha, claiming that it had moneys in its possession belonging to the Metal Manufacturing Corporation.

The First National Bank of Omaha, as garnishee, answered in substance that it had received for collection, in the regular course of business from the First National Bank of Louisville, a certain draft in the sum of $19,374.35, drawn by the Metal Manufacturing Corporation to its own order against the Western Smelting & Refining Company, bearing the blank endorsement of the payee and the endorsement of the Louisville bank "PAY TO THE ORDER OF ANY BANK OR BANKER ALL PRIOR ENDORSEMENTS GUARANTEED"; that the draft had been paid on October 2, 1946, and the proceeds were in possession of garnishee; that the First National Bank of Louisville, being last endorser and having forwarded the draft to the First National Bank of Omaha with instructions to collect the same and remit the proceeds to it, was the party to whom garnishee was indebted for such proceeds; that it had no knowledge of any interest of Metal Manufacturing Corporation; and prayed for dismissal as garnishee and recovery of costs. Thereupon the court entered an order that garnishee held said funds as property of the First National Bank of Louisville.

Plaintiff did not appeal therefrom, but some six months later filed its petition in the present action against defendant, First National Bank of Omaha, under sections 25-1030 and 25-1031, R. S. 1943, alleging that garnishee's aforesaid "disclosures were not satisfactory to the plaintiff," because "in truth, and in fact, the said proceeds of said draft were the property of the Metal Manufacturing Corporation, for the reason that said First National Bank of Louisville, Kentucky was a mere agent of collection for the said Metal Manufacturing Corpora-

tion" and that the answer of defendant in garnishment was accordingly "false and incomplete." Plaintiff prayed judgment against defendant for $19,374.35, and costs.

Defendant's answer to plaintiff's petition, after denying generally, alleged in substance that its original answer in garnishment, attaching copy thereof, was in all respects true and complete, upon the basis of its then knowledge and information; specifically denied that its answer was false and incomplete; and prayed for dismissal and costs.

After a hearing upon the merits, the trial court entered its order, denominated a judgment, finding generally for plaintiff and against defendant, specifically finding that defendant's answer in garnishment was incorrect and incomplete; that defendant had in its possession $19,374.35 belonging to Metal Manufacturing Corporation subject to garnishment in the original action theretofore brought by plaintiff; and that said funds should be so held by defendant until further order of the court pending the outcome of that action. The court by its order then adjudged that defendant "is hereby ordered and directed to hold the sum of $19,374.35, which sum belongs to, and the title of which is hereby determined to be in, the Metal Manufacturing Corporation subject to the garnishment proceedings in the case of Western Smelting & Refining Co. v. Metal Manufacturing Corporation and the First National Bank of Louisville, Kentucky, Docket 399, Page 316, in the District Court of Douglas County, Nebraska, and either to hold and retain said sum of money as garnishee subject to the outcome of said latter separate action in garnishment and attachment and until further order of the District Court of Douglas County, Nebraska, or to pay said sum into Court and thereupon upon such payment be discharged as garnishee."

Defendant's motion for new trial was overruled, and it appealed to this court, assigning substantially that: (1) The trial court erred in the admission of certain

evidence over defendant's objections; and (2) generally that the findings and judgment were contrary to law and not sustained by the evidence. We sustain the last assignment.

Hereinafter, Western Smelting & Refining Company will be designated as plaintiff; the First National Bank of Omaha as defendant; the Metal Manufacturing Corporation as the company; and the First National Bank of Louisville, Kentucky, as the Louisville bank or the bank.

At the outset, we are required to dispose of plaintiff's motion to dismiss the appeal substantially upon the grounds that: (1) Defendant was not the party actually appealing, because the Louisville bank was paying the expense thereof; (2) that being a mere stakeholder, defendant had no appealable interest; and (3) that in any event the findings and adjudication of the trial court was not yet a final order from which an appeal could be taken by reason of section 25-1031, R. S. 1943.

Plaintiff cites no authority sustaining its first contention, and we conclude that it has no merit. As stated in the introductory note, Restatement of the Law, Agency, vol. 2, p. 999: "Correlative with the duties of the agent to serve loyally and obediently are the principal's duties of compensation, indemnity, and protection." Also, in section 417, p. 961, comment c, it is said: "An agent who, within the scope of his authority, has innocently received the possession of or title to goods or other things, and against whom action is brought by a third person claiming rights antagonistic to the principal, may notify the principal and offer him an opportunity to defend; for the effect upon the mutual rights of principal and agent when this is done, see Comment e on section 438." In section 438, comment e, p. 1017, it is said: "If suit is brought against the agent upon a disputed claim as to which he is entitled to indemnity from the principal, he may notify the principal to defend, and if the principal fails to do so, the agent is entitled to expenses thereafter reasonably incurred by him in a defense

made in good faith or in a reasonable compromise of the action."

Concededly, a party to an action against whom no judgment or final order has been rendered, cannot prosecute an appeal, but that situation is not presented in the case at bar. An order entered by the court may affect a substantial right and be subject to review as a final order although it could not or need not be properly denominated a judgment. In that regard, section 25-1911, R. S. 1943, provides: "A judgment rendered or final order made by the district court may be reversed, vacated or modified by the Supreme Court for errors appearing on the record."

Section 25-1902, R. S. 1943, specifically provides: "An order affecting * * * a substantial right made in a special proceeding, * * * is a 'final order' which may be vacated, modified or reversed, as provided in this chapter."

In Levin v. Muser, 107 Neb. 230, 185 N. W. 431, this court construed and applied what is now section 25-1902, R. S. 1943, by use of the following language: "In some jurisdictions, it is true, under somewhat similar statutes, an order made in a 'special proceeding,' before it can be appealable, must not only affect a substantial right but must, also, either have the effect of a final order in that proceeding, or prevent a judgment from which an appeal might be taken (3 C. J. 544, sec. 384), but in this state the statute has been so construed that an order affecting a substantial right, when made in a special proceeding, has been held to be appealable, even though it does not terminate the action, nor constitute a final disposition of the case. O'Brien v. O'Brien, 19 Neb. 584; In re Estate of Broehl, 93 Neb. 166."

As stated in Turpin v. Coates, 12 Neb. 321, 11 N. W. 300: "A special proceeding may be said to include every special statutory remedy which is not in itself an action." The present action is, in character, a provisional remedy created by statute directing the procedure to obtain relief in garnishment proceedings. Early v. Belgrade-Hord

Co., 133 Neb. 884, 277 N. W. 596. Upon that premise, it was concluded by this court that proceedings in garnishment were special proceedings. See, also, Adams County Bank v. Morgan, 26 Neb. 148, 41 N. W. 993. A fortiori, the case at bar was a special proceeding.

We turn then to the question whether or not the order here involved affected a substantial right. We conclude that it did. As a matter of fact, it concluded every factual issue between the parties and completely fixed their rights and liabilities, leaving nothing to be subsequently perfected except taxation of costs and the mere entry of a formal order making effective and enforceable the judgment already entered against defendant, dependent only upon the outcome of plaintiff's original action, the merits of which defendant is not here attempting to review.

In that regard, it was said in Turpin v. Coates, *supra*, and restated in Adams County Bank v. Morgan, *supra*: "Neither is it necessary to wait until final judgment before such order can be reviewed."

As stated in Clarke v. Nebraska Nat. Bank, 49 Neb. 800, 69 N. W. 104: "A substantial right is an essential legal right, not a mere technical one." That opinion also approved a statement appearing in State v. Security Savings & Trust Co., 28 Or. 410, 43 P. 162, to the effect that: "The law, as we understand it, is that an order or decree is final for the purposes of an appeal when it determines the rights of the parties, and no further questions can arise before the court rendering it except such as are necessary to be determined in carrying it into effect: * * *."

Under the evidence appearing in this record, and applicable law, as will hereinafter be observed, defendant was the agent of the Louisville bank, if it owned the proceeds of the draft or had the rights of an owner against prior and subsequent parties, of which plaintiff was one, as provided in section 62-202, R. S. 1943. It was not only authorized to follow the instructions of its

immediate forwarding bank, as provided in the foregoing section, but as agent, it was also charged with the duties inherent in that relationship, and had the right to protect itself against any liability then or thereafter asserted against it by reason of the proceedings and order here involved, which clearly affected a substantial right. First Wisconsin Nat. Bank v. People's Nat. Bank, 136 Va. 276, 118 S. E. 82, 36 A. L. R. 736, discusses at length the duties of a garnishee under circumstances similar to those at bar.

Also, in Restatement of the Law, Agency, § 426, p. 981, it is said: "The duties of an agent who has received goods or money for the principal depend upon the agreement between them. Unless otherwise agreed, the agent has a duty to use care to keep them safely until they are remitted or delivered to the principal, and to deliver them to the principal upon his demand when the amount due him has been ascertained. The agent may also have a duty to use care to notify the principal of the collection, or to remit the goods or money to him within a reasonable time."

Generally, an appealable interest in the subject matter exists whenever the interest of the party may be enlarged or diminished or his rights or liability affected by the result of the appeal, and if a party has sufficient interest to make him a party to an action, he has sufficient interest to appeal should the order or judgment be against him. 4 C. J. S., Appeal and Error, § 177, p. 349; 3 C. J., Appeal and Error, § 481, p. 625. It will be observed that plaintiff made defendant a party to the action, and as such it was legally entitled to a review of the proceedings. 2 Am. Jur., Appeal and Error, § 170, p. 955.

As a matter of fact, in a situation factually similar in many material respects, this court has concluded that it was a garnishee's right and duty to appeal for its own protection. Commercial State Bank of Genoa v. Rowley, 2 Neb. (Unoff.) 645, 89 N. W. 765.

For the reasons heretofore stated, the motion of plain-

tiff to dismiss the appeal should be and hereby is overruled at plaintiff's costs.

As the first premise for discussion of the merits, we turn to Cornish v. Russell, 32 Neb. 397, 49 N. W. 379, which was a cause of action under section 225 of the Civil Code, now section 25-1030, R. S. 1943. Therein, this court said: "This provision certainly means that in such a case, if it appear that the garnishee has money or credits of defendant in attachment in his hands, judgment may be rendered against him for the amount thereof, but he shall not be liable for costs unless his answer was incomplete. In other words, failure, on the part of plaintiff, to show that the answer of garnishee was incomplete, will not defeat the action against him if he has money of defendant in attachment in his possession; but does relieve him of liability for costs. This provision is entirely a nullity if this is not its meaning." Thus, it is apparent that whether or not defendant's original answer in garnishment was false and incomplete is not a jurisdictional element but important only in order to fix liability for costs.

It will be observed that only the answer of the garnishee was admissible in response to the garnishment process in the prior action, and that a judicial order upon such garnishee to turn over money or property of defendant therein could have been made only upon an unqualified admission by garnishee of a then-present indebtedness to such defendant or that it had money or property of the company in its possession, to which the company, as debtor, would be entitled but for the garnishment. Early v. Belgrade-Hord Co., *supra*. Also, when the discovery of money or property of a judgment debtor is sought through evidence from others than the garnishee, the remedy is provided by sections 25-1030 and 25-1031, R. S. 1943. The logic of that conclusion stems from the statute itself and the holding in Orchard & Wilhelm Co. v. North, 125 Neb. 723, 251 N. W. 895.

It was not the form but the substance of defendant's

original answer which plaintiff questioned. In that connection, it is generally the rule that a garnishee owes a duty to act in good faith and answer fully and truthfully all proper questions or interrogatories presented to him, or to in some appropriate manner make proper disclosure of all relevant facts within his knowledge at the time of making answer concerning his then-present indebtedness to the debtor or concerning money or property of the debtor then in his possession. 38 C. J. S., Garnishment, § 209, p. 447; 28 C. J., Garnishment, § 420, p. 287; Work v. Brown, 38 Neb. 498, 56 N. W. 1082. The record discloses that defendant performed that duty in every respect. Therefore, the trial court erred in finding that its answer was false and incomplete.

In an action such as that at bar, as in other civil cases, the burden of proof is generally to be determined from the issues presented by the pleadings, and such burden usually rests upon plaintiff and not upon the garnishee. In other words, the burden generally rests upon plaintiff to establish the facts essential to the liability of the garnishee. "Thus the burden rests on plaintiff to show a garnishable debt, the amount of the garnishee's indebtedness to defendant, and funds or property of the debtor in the garnishee's hands." In other words, "On a traverse of the garnishee's answer the burden rests on the plaintiff to show the falsity of the answer and to prove the indebtedness of the garnishee to the principal debtor and the garnishee's possession of funds or property of such debtor in contravention of the garnishee's denial of such matters." 38 C. J. S., Garnishment, § 228, p. 474. See, also, 28 C. J., Garnishment, § 465, p. 308, and § 466, p. 309. Plaintiff failed to meet that burden.

At the outset with reference to the first assignment, it should be said that in a case tried to the court, whether at law or in equity, the presumption obtains that the trial court, in arriving at a decision, considered such evidence only as was competent and relevant, and this court will not reverse a case so tried because other evi-

dence was admitted. See, Nelson v. Nelson, 133 Neb. 458, 275 N. W. 829, and Coffin v. Maitland, 146 Neb. 477, 20 N. W. 2d 310. In that regard, the general rules governing admissibility of evidence in civil cases control in cases such as that at bar, since, as provided in section 25-1030, R. S. 1943, pleadings are filed "as in other cases" and "such proceedings may be had as in other actions" except as specifically limited by section 25-1031, R. S. 1943.

In the light of the foregoing, we deem that specific separate discussion of the admissibility or inadmissibility of particular evidence assigned as erroneously admitted will not be necessary. Rather, in arriving at decision, we will give consideration only to such evidence as was competent and relevant to material elements hereinafter discussed.

It will be observed that this is not an action between the parties to the instrument for the purpose of determining ownership of the draft or its proceeds for any reason arising out of the transaction itself. Plaintiff here does not claim to be owner of the fund because of any lack of consideration or any defect in the transaction which gave rise to the draft or its proceeds. Plaintiff is not defending against the draft; the draft was paid by it. Plaintiff's cause of action was to impound the funds so paid as belonging to the company to satisfy an alleged claim against it arising out of an entirely different transaction. The company has not and does not now claim to own the proceeds. The validity of plaintiff's contentions depends entirely upon its ownership by the company. Defendant does not claim the proceeds as its own but seeks only protection of law in its ultimate disposition.

The trial court doubtless premised its conclusion that the company was owner of the proceeds in conformity with plaintiff's contentions that the draft was simply an item deposited with or received by the Louisville bank for collection, and that, as provided in the Bank Collection Code, section 62-202, R. S. 1943, such bank was not

the owner, but only agent of the depositor company for whom defendant was the subagent. In the ordinary case, not coming within any specific exceptions provided for in the statute, that conclusion would doubtless have merit. See State ex rel. Sorensen v. South Omaha State Bank, 129 Neb. 43, 260 N. W. 815. However, as will be hereinafter observed, the case at bar comes squarely within both the first and last exceptions contained in the statute, and upon either horn of the dilemma plaintiff cannot prevail.

Section 62-202, R. S. 1943, provides: *"Except as otherwise provided by agreement,* and except as to subsequent holders of a negotiable instrument payable to bearer or endorsed specially or in blank, where an item is deposited or received for collection, the bank of deposit shall be agent of the depositor for its collection, and each subsequent collecting bank shall be subagent of the depositor *but shall be authorized to follow the instructions of its immediate forwarding bank;* and any credit given by any such agent or subagent bank therefor shall be revocable until such time as the proceeds are received in actual money or unconditioned credit given on the books of another bank, which such agent has requested or accepted. *Where any such bank allows any revocable credit for an item to be withdrawn, such agency relation shall nevertheless continue, except the bank shall have all the rights of an owner thereof against prior and subsequent parties to the extent of the amount withdrawn."* (Italics supplied reflect the applicable provision).

Under circumstances having a similarity in many material respects with the case at bar, the opinion in Martin v. Huber, 68 N. Y. S. 2d 53, recently said, in discussing the first exception appearing in the statute: "Plaintiff urges, however, that the bank became merely an agent for collection under the provisions of the Bank Collection Code. Rem. Rev. Stat. Wash. § 3292-2; see also N. Y. Negotiable Instruments Law, § 350-a. This statute states that 'except as otherwise provided by

agreement * * * where an item is deposited or received for collection, the bank of deposit shall be agent of the depositor for collection * * *.'

"Since the statute does not indicate any test of what facts will evidence an agreement to the contrary, the provision is subject to conflicting interpretations. See Lawton v. Lower Main Street Bank, 170 S. C. 334, 170 S. E. 469, and Farmers' Exchange Bank v. Farm & Home Sav. & Loan Ass'n, 332 Mo. 1041, 61 S. W. 2d 717. Hence, to determine whether there was an agreement that the bank should not be a mere agent for collection, we must look to the intention of the parties, which may be gathered from the form of indorsement on the paper itself, the right accorded to the depositor to draw unrestrictedly upon the funds credited to him in advance of collection, and the general course of dealing between the bank and the depositor (Wickens v. Scheuer, 118 Wash. 614, 204 P. 780; First Trust & Sav. Bank v. Kent, 6 Cir., 119 F. 2d 151).

"A printed provision on the back of the deposit slip stating that all items are accepted for collection only is not controlling. Such a provision is subject to a contrary agreement between the parties as evidenced by their conduct, and as it is a rule adopted solely for the benefit of the bank, it may be waived by honoring checks against uncollected deposits (Pearson v. Brennan, 1 Cir., 75 F. 2d 958; Colorado National Bank of Denver v. Newton, 10 Cir., 80 F. 2d 696)."

The last exception provided in section 62-202, R. S. 1943, is clear and unambiguous, requiring but a factual application thereto. Its application was discussed at length in Farmers' Exchange Bank v. Farm & Home Sav. & Loan Assn., 332 Mo. 1041, 61 S. W. 2d 717.

In the light of the foregoing rules, we will briefly summarize the material evidence which is either admitted or uncontradicted, except by inference upon inference, or mere guess, speculation, and conjecture.

Under date of September 20, 1946, the company drew a

sight draft for $19,374.35, payable to itself upon the account of plaintiff. Attached thereto was an invoice dated September 21, 1946, in the same amount, for a carload of aluminum sheets sold and shipped by the company to plaintiff, terms sight draft, together with a bill of lading covering the shipment. On September 23, 1946, the sight draft was endorsed in blank, "Metal Manuf Corp Wm Zoe President," and delivered to the Louisville bank, together with the invoice and bill of lading attached thereto.

Uncontradicted oral evidence, conclusively supported by the Louisville bank records and other credible documentary evidence, some of which was offered by plaintiff, show that the draft was thus presented to and received by that bank on September 23, 1946, not as a deposit in the regular course of business, but as owner, through its discount department, and that unconditional credit for $19,374.35 passed to the company upon a form in general use in that department of the bank. The credit was on the same day transferred to the ledger sheet of the company's account as an unconditional credit not subject to the conditions appearing in the front of the company's regular deposit book, on which checks or drafts were ordinarily received for deposit by the bank in the usual course of business. At the same time, upon receipt in like manner of the company's demand due note, dated September 23, 1946, evidently secured by a sight draft dated September 20, 1946, with invoice and bill of lading attached for the sum of $13,690.57, credit was also given the company for that amount, and such draft, with invoice and bill of lading attached, was also forwarded by the Louisville bank to defendant for collection. It will be noted that the sum of $19,374.35, plus $13,690.57, total exactly $33,064.92. Thereupon, as requested, the Louisville bank gave to the company in exchange therefor, its cashier check for that total sum of $33,064.92, payable to the Reynolds Metal Company, a creditor of the company.

A photostatic copy of the cashier's check appears in the record, dated September 23, 1946, bearing Reynolds Metals Company's endorsement, and marked "Paid 9.27.46."

The draft for $13,690.57 was paid by plaintiff on September 30, 1946, and remitted to the Louisville bank by defendant before the garnishment proceedings were instituted, and on October 2, 1946, the bank by letter, among other things, credited the company's account therefor, and at the same time charged the same back in payment of the company's demand due note dated September 23, 1946, and cancelled and returned it to the company. Another demand due note and draft for $9,817.67, with invoice and bill of lading attached, all dated September 24, 1946, on which date the company received credit therefor, was also handled, collected, remitted, and ultimately credited and charged back in like manner.

It will be observed, contrary to plaintiff's contentions, that the items heretofore and hereinafter discussed were not merely bookkeeping transactions. The Louisville bank's ledger sheet shows, without dispute, that at the close of business on September 21, 1946, the company had a balance of $61,846.23, and that on September 23, 1946, after crediting the company with $19,374.35 and $13,690.57, it had a total credit of those three amounts, or $94,911.15. The ledger reflects that on September 23, 1946, the sum of $101,505.13 was withdrawn, which, on that date, left an overdraft of $6,593.98. It therefore appears, without question, that the entire credit of $19,374.35 was withdrawn on that date, and, as provided in section 62-202, R. S. 1943, the Louisville bank had "all the rights of an owner thereof" against plaintiff.

We find no mathematical flaw or other indication that there was any fabrication of the bank's ledger in any manner, or that the company's account was ever

charged back with the proceeds here involved. Admittedly it was not.

It is conceded that on October 9, 1946, William Zoe, individually, and not as an officer of the company, delivered collateral to the Louisville bank upon condition that it be held to protect such bank against loss of the proceeds of the draft if they should be lost, by reason of the attachment and garnishment in the prior case entitled Western Smelting & Refining Company v. Metal Manufacturing Corporation and the First National Bank of Louisville, Kentucky. However, since the company endorsed the draft in blank as payee, and as such was considered liable thereon as endorser at all times in any event, we deem the foregoing of little consequence in controlling decision.

Admittedly, on September 23, 1946, the Louisville bank endorsed the draft "PAY TO THE ORDER OF ANY BANK OR BANKER ALL PRIOR ENDORSEMENTS GUARANTEED," and forwarded it, with invoice and bill of lading attached to defendant, with printed instructions, the original of which recited, among other things: "WE ENCLOSE FOR COLLECTION AND RETURNS ONLY WHEN PAID NO PROTEST UNLESS OTHERWISE INSTRUCTED * * * DELIVER DOCUMENTS ONLY ON PAYMENT OF DRAFT ATTACHED. DO NOT HOLD FOR CONVENIENCE OF PARTIES UNLESS OTHERWISE INSTRUCTED. IF UNPAID RETURN AT ONCE STATING REASON FOR NON-PAYMENT." Also, across the face, in the upper left-hand corner, appeared the typewritten notation: "Notify Disc. Dept." Also, like instructions were sent to defendant with both the $13,690.57 draft and the $9,817.67 draft, except that across the face of the first original appeared the typewritten notation: "Notify Disc. Dept.", and across the face of the last original appeared the typewritten notation: "Give chk. to Disc. Dept." Such typewritten

words were all generally overlooked by counsel for plaintiff in brief and argument.

The draft here involved was not paid upon presentation, but on October 2, 1946, after deduction of a freight item by telegraphic permission of the Louisville bank, which resulted from negotiations between plaintiff, the company, defendant, and the Louisville bank, plaintiff paid the draft, whereupon it immediately attached the proceeds paid by it before remittance thereof could be made to the Louisville bank.

In the light of the foregoing evidence, and under the law heretofore set forth, we conclude that the order and judgment of the trial court was not sustained by any competent evidence; and that being clearly wrong, it should be and hereby is reversed and the cause remanded at plaintiff's costs.

REVERSED AND REMANDED.

LESLIE CLARK, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.
34 N. W. 2d 877

Filed December 10, 1948. No. 32513.

1. **Criminal Law.** A plea of guilty to a criminal complaint admits that the offense was committed, the time and place of its commission, and the identity of the person committing it, as charged; it is an admission of record of the truth of the charges made; it renders unnecessary the proof of the facts alleged; and it supports a finding of guilt made thereon.
2. **Appeal and Error.** The jurisdiction of the district court in an error proceeding brought under the provisions of section 29-617, R. S. 1943, extends only to reviewing the record made in the trial court, and affirming or reversing in whole or in part the judgment of the trial court or ordering that the accused be discharged upon the record there made.
3. ———. In an error proceeding brought under the provisions of section 29-617, R. S. 1943, original evidence cannot be received in the district court to support or defeat the judgment of the trial court.

ERROR to the district court for Otoe County: THOMAS E. DUNBAR, JUDGE. *Affirmed.*

Lloyd E. Peterson and *Betty Jean Peterson Sharp,* for plaintiff in error.

Walter R. Johnson, Attorney General, and *Clarence S. Beck,* for defendant in error.

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

SIMMONS, C. J.

This case presents the question as to whether or not, after a plea of guilty to a misdemeanor in county court, and on petition in error to the district court under section 29-617, R. S. 1943, the district court should admit and consider evidence that the offenses charged were in fact committed in a county other than where charged. The district court refused to admit the evidence. We affirm the judgment of the district court.

The record recites that complaint was filed in the county court of Otoe County charging in three counts that plaintiff in error (hereinafter referred to as plaintiff) on or about March 5, 1946, operated a motor vehicle while under the influence of alcoholic liquor, refused and failed to obey the lawful order of a member of the Nebraska Safety Patrol, and drove a motor vehicle upon the streets and highways with a willful and wanton disregard for the safety of persons or property; that all three counts charged that said acts were done within the county of Otoe; that on March 5, 1946, plaintiff appeared in court, the complaint was read to him, he was advised of his constitutional rights by the court, and he entered a plea of guilty to each of the three counts; and that the court found the plaintiff guilty on each of the three counts and adjudged the penalties as to each count.

On March 6, 1946, plaintiff filed his petition in error in the district court for Otoe County under the provi-

sions of section 29-617, R. S. 1943. A transcript of the proceedings in the county court was filed in the district court. Plaintiff charged that there were errors appearing "from the face of the record" in the following particulars: The sentence was excessive; he was not advised of his rights—nor of the penalty for the crimes charged; he was ignorant of the law and was not guilty of the crimes charged; and he was being deprived of liberty without due process of law, in violation of article I, section 3, of the Constitution.

On March 23, 1946, the defendant in error by the county attorney of Otoe County answered, joining issue.

On January 22, 1947, our decision in Kissinger v. State, 147 Neb. 983, 25 N. W. 2d 829, was filed.

On November 14, 1947, the petition in error was set for trial. On December 15, 1947, plaintiff was given leave to amend his petition. He thereupon filed an amendment to his petition in error, in which he alleged that the offenses charged in the three counts of the information were committed in Nemaha County, and that by reason thereof the county court of Otoe County was without jurisdiction to hear, try, or determine the issues. Defendant in error denied the allegations of the amended petition.

On January 22, 1948, hearing was had. Plaintiff moved to withdraw his plea of guilty entered in the county court, and upon objection the motion was denied. Plaintiff then introduced the original records of the county court, being the complaint and the findings and judgment of the court.

Plaintiff then offered himself as a witness and offered to testify that any offense or offenses upon which the charges were made were committed in Nemaha County and not in Otoe County. Objection was made to the introduction of this evidence and sustained by the court.

At the conclusion of the proceedings the trial court dismissed the petition in error and directed the county court to cause its sentence and judgment to be executed.

Motion for a new trial was made and overruled.

Plaintiff brings the cause here by petition in error. His assignments of error are that the district court erred in refusing to admit evidence that the alleged offenses were committed outside of Otoe County; that the court erred in refusing to consider venue as a jurisdictional fact, and in refusing to consider the law that "All criminal cases shall be tried in the county where the offense was committed unless it shall appear to the court by affidavits that a fair and impartial trial cannot be had therein; in which case the court may direct the person accused to be tried in some adjoining county." § 29-1301, R. S. 1943.

The complaint filed in the county court charged as to each count the commission of an offense by plaintiff in Otoe County. To this complaint plaintiff pleaded guilty. A plea of guilty to a criminal complaint admits that the offense was committed, the time and place of its commission, and the identity of the person committing it, as charged; it is an admission of record of the truth of the charges made; it renders unnecessary the proof of the facts alleged; and it supports a finding of guilt made thereon. Leiby v. State, 79 Neb. 485, 113 N. W. 125; Ex parte Dusenberg, 325 Mo. 881, 30 S. W. 2d 94; People v. Bellon, 180 Cal. 706, 182 P. 420; State v. Brown, 60 Wyo. 379, 151 P. 2d 950.

It follows that plaintiff presented to the district court a petition in error containing an adjudication that certain offenses were committed and that he had committed the offenses at the time charged and in Otoe County. Plaintiff by the tender of the rejected evidence sought to retry the issue of fact as to the venue of the offenses. He, therefore, undertook by the introduction of evidence outside the record to secure a new trial on an adjudicated issue of fact by error proceedings rather than by appeal.

Section 29-621, R. S. 1943, provides: "Upon hearing of a petition in error, the court may affirm the judgment

or reverse it in whole or in part, and order the accused to be discharged."

Under a similar statute involving an error proceeding in a civil case, we held that the jurisdiction of an appellate court extends only to reviewing the record made in the trial court, and affirming, reversing, vacating, or modifying the judgment of the trial court upon the record there made. Original evidence cannot be received in the appellate court to support or defeat the judgment of the trial court. McDonald v. Bowman, 40 Neb. 269, 58 N. W. 704. The same rule under the provisions of section 29-621, R. S. 1943, is applicable here. We applied it in effect in Steiner v. State, 78 Neb. 147, 110 N. W. 723. See, also, Ingraham v. State, 82 Neb. 553, 118 N. W. 320; Lee v. State, 124 Neb. 165, 245 N. W. 445.

By brief and in argument here plaintiff relies upon Ex parte Carr, 22 Neb. 535, 35 N. W. 409. That was an original action filed here for a writ of habeas corpus. Carr was indicted, tried, convicted, and sentenced for murder in Cheyenne County. The records of Cheyenne County failed to show the original or any copy of the indictment. We accepted secondary evidence as to the county in which the offense was charged to have been committed—not to contradict, but to prove the record. The record being established, we held that the trial court was without jurisdiction. The case has no application to the situation here.

The judgment of the district court is affirmed.

AFFIRMED.

ED KRICHAU, APPELLANT, V. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, APPELLEE.
34 N. W. 2d 899

Filed December 10, 1948. No. 32429.

1. **Trial.** A motion for a directed verdict must, for the purpose of a decision thereon, be treated as an admission of the truth.

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

2. Waters: Negligence. In an action for damages to land and growing crops by floodwaters of a stream, subject to overflow from natural causes, and which it is alleged were thrown upon the plaintiff's land by the negligent and improper construction of a railroad near by and adjacent thereto, the burden of proof is on the plaintiff to show that the construction complained of either caused such overflow or increased the same, or in some manner contributed thereto.
3. ———: ———. An act of God is such an unusual and extraordinary manifestation of the forces of nature that it could not under normal conditions have been reasonably anticipated or expected.
4. Trial. If the evidence essential to a recovery by plaintiff is clearly disproved by the physical facts and conditions, the trial court should direct a verdict against him.
5. ———. In every case, before the evidence is submitted to the jury, there is a preliminary question for the court to decide, when properly raised, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the burden of proof is imposed.

APPEAL from the district court for Buffalo County: ELDRIDGE G. REED, JUDGE. *Affirmed.*

Blackledge & Sidner, for appellant.

W. P. Loomis, Everett L. Randall, and *J. W. Weingarten,* for appellee.

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

MESSMORE, J.

This is an action at law to recover a money judgment for damage to plaintiff's land and crops which he claims was caused by the negligence of the defendant. At the conclusion of all of the evidence the defendant moved for a directed verdict. The trial court sustained the motion and dismissed the plaintiff's petition. Upon the over-

ruling of a motion for new trial, plaintiff perfected this appeal.

The case was tried and determined upon the sufficiency of the plaintiff's evidence to establish negligence on the part of the defendant as constituting the proximate cause of damage sustained by the plaintiff.

The plaintiff predicates error on the part of the trial court in sustaining the defendant's motion for a directed verdict, contending the evidence was sufficient to warrant the trial court in submitting the case to the jury.

For convenience, the appellant will be referred to as the plaintiff as originally designated, and the appellee as the defendant.

This jurisdiction is committed to the rule: "A motion for a directed verdict must, for the purpose of a decision thereon, be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed, and said party is entitled to have every controverted fact resolved in his favor, and to have the benefit of every inference that can reasonably be deduced from the facts in evidence." Halliday v. Raymond, 147 Neb. 179, 22 N. W. 2d 614.

With the foregoing rule in mind, we review the evidence to determine whether or not the trial court erred, as contended for by the plaintiff.

The record shows that the plaintiff, for more than three years, has been the owner and in possession of the northeast quarter and that part of the southeast quarter lying north of the defendant's right-of-way, and that part of the west half of Section 7 lying north of the defendant's right-of-way, all in Section 7, Township 12 North, Range 14, in Buffalo County. The plaintiff has been familiar with the land in question for 30 years. The south boundary of the land is the defendant's railroad and the west boundary is Muddy Creek or Beaver Creek; both names refer to the same stream. Muddy Creek extends from its mouth, located about

three miles below Section 7, in a northwesterly direction about 60 miles to a point beyond Broken Bow, Nebraska, with several tributary streams.

At the southwest corner of the plaintiff's land there is a railroad bridge across Muddy Creek which, prior to June 21 or 22, 1947, consisted of a steel girder 75 feet in length spanning the channel of the stream. This bridge was supported by piers at each end with three concrete slab approach spans, each 16 feet in length, at each end of the girder, supported by concrete piling, giving an over-all length of 170 feet, with a clearance of 16 feet from the bottom of the girder to the surface of the water at low stage. This bridge runs in a northwest and southeast direction. The width of the channel immediately adjacent to the bridge is about 50 feet. The channel is 15 to 18 feet deep on both sides of the bridge and runs northeast under the bridge.

According to the plaintiff's testimony Muddy Creek runs on both sides of his land and follows a regularly defined course. The depth of the water in ordinary times is from two to two and a half feet. Muddy Creek flows under the railroad bridge in a northeasterly direction, and crosses the plaintiff's land in a northeasterly direction up to a point where a draw from the north enters such land; from there it flows southwest and a little to the west; then proceeds east and again northeast making what is called a horseshoe loop; then proceeds again to the railroad near the east line of the plaintiff's land and leaves his land. The 15 acres of land involved in this litigation is in the extreme southwest corner of the plaintiff's farm, and prior to June 21, 1947, was black sandy loam and under cultivation. It is located on the downstream side and northeast of the railroad bridge. About one mile west of this land is a sand deposit.

Half a mile west of plaintiff's land is a channel which is referred to as an "abandoned" channel, nearly a mile in length. In closing the abandoned channel, the culverts were left in. It appears from exhibit No. 18, which is

a map drawn to scale by a civil engineer, that the stream formerly flowed north across the location of the railroad, then east, then south, then southwest recrossing the railroad, and then west to the present channel.

In 1886, the defendant constructed its line of railroad from Ravenna west approximately 50 miles, in the valley of Muddy Creek on a right-of-way 100 feet in width in Section 7 heretofore referred to. Ravenna is in the immediate vicinity of the plaintiff's land.

The total drainage area of Muddy Creek from the headwaters to where it empties into the Loup River, is approximately 755 square miles. The creek meanders from north to south across the valley practically all the distance, and has a crooked, winding channel with the banks of the creek heavily overgrown with brush and trees. The valley varies in width from 1,000 feet in some places to three-quarters of a mile in others. The general direction downstream is from northwest to southeast. About 12 miles west of Section 7, Clear Creek, a tributary, enters into Muddy Creek from a northwesterly direction. The average width of the natural channel of the stream is approximately 70 feet, with an average depth of 18 feet.

In times of high water, the waters were naturally inclined to follow the old channel, or what has been referred to as the abandoned channel, and the drainage from the northwest, constituting a 1,400-acre drainage area, was inclined to stop or back-water on the north side of the defendant's right-of-way substantially in the same area as outlined by the original channel. This constituted a continuing threat against the defendant's right-of-way, the seepage and drainage being towards the right-of-way.

Following a heavy storm in 1924 resulting in a washout of the railroad by water draining into the abandoned channel, the defendant, in 1925, in order to provide additional drainage from the abandoned channel and the area tributary thereto lying to the west and north of

Section 7, acquired an additional strip of land 50 feet wide adjacent to the north side of its right-of-way across the northwest quarter of Section 7, and constructed a drainage ditch extending from the abandoned channel of Muddy Creek to the live channel of the stream immediately north of the railroad bridge designated No. 129-39 and heretofore described. This ditch is 2,100 feet in length from the western terminus on the west section line of Section 7 down to the west line of the creek, 30 feet in width at the top, 10 feet in width at the bottom thereof, and 7½ feet deep, extending in a general easterly direction. This ditch was for the purpose of providing such drainage, and would carry a capacity of 150 square feet of water. The fall of the ditch from the west to its entry into Muddy Creek at the eastern end is 8 feet. The ground north of this ditch has a swale 900 to 1,000 feet in width which runs in a southeasterly direction parallel to the ditch and the track, the bottom of which is 400 or 500 feet north of the ditch about midway between the ditch from the old channel to the present channel of the creek. The land along this swale is 6 feet lower at the east end than at the west end. This swale is a flood channel which carried water to a depth of 3 feet at the time of the flood, June 21 and 22, 1947. The ditch was entirely submerged.

The defendant's track supervisor testified that rocks were placed at a location near the bridge to fill a hole that had washed out at the west end thereof, referred to as a cut-back, which was washed out prior to 1944. In 1944, and twice in 1945, seven and a half or eight carloads of rock were dumped on the west bank near the bridge, and were hand-placed, with a few rocks at the foot of the watercourse which rolled into it. The fill at the end of the bridge extends down like the original banks of the creek, so that the dirt and the abutment at the end of the bridge extend to the water line. This rock is referred to as "riprap," and was imported by the defendant.

The plaintiff testified that the rocks were laid from the west end of the bridge across to the east side of the creek, with a bed of rock in the creek for the water to flow over; sloped gradually a distance of 40 feet; and that there were rocks in the stream itself which tended to throw the flow of the stream to the east and crowd the bank.

A witness for the plaintiff testified that 40 feet from the west end of the bridge there was a large pile of rocks on the south side of the railroad, practically as high as the railroad, the rocks tapering off toward the southeast across the channel, and the water was flowing over rocks; that when the bridge was first constructed there was 8 to 10 feet of clearance, and when the rocks were dumped in this caused a shutting-up of the space and permitted less water to go through when high water came; that it did not change the course of the stream much, but crowded it a little to the east, more so when there was high water. He further testified that in 1946 some trees, within a couple of feet of the east bank directly opposite the rocks, were cut out and a channel about 3 feet wide and 1 foot deep dug. This channel ran northeast and southwest about 3 feet from the edge of the water and about 6 inches above the bank, and was 10 or 12 feet in length. Prior to the placing of the riprap, the stream was washing out the bank at the west end of the bridge.

The plaintiff testified that on the night of June 21, 1947, there was a substantial amount of rainfall in this community and to the west. Plaintiff further testified that there was water on the land at flood stage and upon investigation a few days after the storm he found rocks and sand; and that the east bank of the stream at the southwest corner of the land was cut out and formed a hole at the east end of the railroad bridge possibly 150 feet square, as much on the north side as on the south side of the bridge. The land was covered with

sand and rock to a depth of from 6 inches at the east end to about 3 feet at the west end.

On June 21 and 22, 1947, there was a storm which produced floods generally, and on Muddy Creek produced a flood which inundated the valley between Litchfield and Ravenna with several feet of water from foothill to foothill. Between these points the normal channel of the stream was unable to carry the water. As a consequence, the valley between the hills on each side was flooded, washing away buildings, fences, railroad and highway bridges and embankments, and damaging property located in its path. Half a mile west of the plaintiff's land where the railroad crosses and cuts off the abandoned channel, part of the flood followed the course of this channel running over and washing the track off the embankment to the north at the west crossing, and to the south at the east crossing for about 1,000 feet at each place, and washing many holes of 30 feet or more in length in the 8-foot embankment on which the track was laid. At 6 a. m. June 22nd the flood arrived at a point 6 miles west of the plaintiff's land and had overflowed the defendant's track 3 feet deep. The valley at this point was flooded from foothill to foothill. At 9 a. m. the flood had reached a point 3 miles west of the plaintiff's land where the water was over the highway and track. At 3 p. m. the water was over the track 1,500 feet west of plaintiff's land and flowing down the track up to the ballast on both sides, and was up to the steel girder of the bridge. The plaintiff's land north of the track was under water. The railroad embankment, which consisted of sand, gravel, ballast, and some rock, was washed out and carried to the northeast.

The plaintiff and one of his witnesses testified that when there was more water than would flow in the channel of the creek, plaintiff's land was subject to overflow. The south half of his farm was overflowed; and the land on which the damage was claimed was flooded to a depth of from 4 to 8 feet. The water was 2 feet deep

in his barn which is approximately 1,800 feet from the railroad bridge. Plaintiff testified that as near as he could remember it was the highest water that he had ever seen in the vicinity. One of the plaintiff's witnesses who had been a resident of Ravenna for 52 years, testified that it was the highest water he had ever seen in the valley. This flood was the highest of any that the defendant had a record of since the construction of its railroad line in the Muddy Creek valley in 1886. It ranged 3 to 8 feet higher than any previous flood.

An engineer testified for the defendant as to the intensity of the storm, its course, and that it was statewide; that the channel of Muddy Creek, as shown by exhibit No. 18, is a winding, bending, turning, and tortuous channel; that when the water exceeds the capacity of the channel it goes out of its banks; and that where the channel turns and goes upstream in its direction, it comes in conflict with the water going down out of its banks which nullifies the efficiency of the channel, and that was true at the railroad bridge. At the railroad bridge the water was going in a northwesterly direction, the flood was proceeding from the other way, which made a piling up of the waters according to the flood levels, so it could not be said that the water was proceeding downstream; it had to go down and come back at the same time.

It is the plaintiff's contention that the defendant was negligent under the foregoing facts in the following particulars: That defendant caused the waters of Muddy Creek and the flood and surface waters to be diverted from their natural course and direction, obstructed the natural flow of the water in Muddy Creek, and caused the waters thereof to be thrown against and upon the land of the plaintiff; that the defendant caused and permitted the water in its drainage ditch to re-enter the natural channel at right angles and in such amounts and with such violence that the same washed away the natural bank of the stream and it overflowed on plaintiff's

land; and that the defendant failed to construct a retaining wall or other structure to withstand, control, and direct the flow of water so artificially diverted from the natural course.

The undisputed evidence discloses that the plaintiff's land was located in the direct flood channel of the stream, and the damage which he sustained was the result of an unprecedented flood. There is no evidence that either the riprap or the rock at the west end of the defendant's bridge, or the drainage ditch on defendant's land, or both of them combined, in any way caused or contributed to the damage of which the plaintiff complains.

From an examination of the record the following authorities are applicable.

In Goodhart v. Chicago, B. & Q. R. R. Co., 146 Neb. 290, 19 N. W. 2d 549, this court said: "In an action for damages to land and growing crops by floodwaters of a stream, subject to overflow from natural causes, and which it is alleged were thrown upon the plaintiff's land by the negligent and improper construction of a railroad near by and adjacent thereto, the burden of proof is on the plaintiff to show that the construction complained of either caused such overflow or increased the same, or in some manner contributed thereto, * * *."

"An act of God is such an unusual and extraordinary manifestation of the forces of nature that it could not under normal conditions have been reasonably anticipated or expected." Fairmont Creamery Co. v. Thompson, 139 Neb. 677, 298 N. W. 551.

"If the evidence essential to a recovery by plaintiff is clearly disproved by the physical facts and conditions, the trial court should direct a verdict against him." Hessler v. Bellamy, 128 Neb. 571, 259 N. W. 514.

"In every case, before the evidence is submitted to the jury, there is a preliminary question for the court to decide, when properly raised, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for

the party producing it, upon whom the burden of proof is imposed." Fairmont Creamery Co. v. Thompson, *supra*.

In view of the record and the afore-cited authorities, we conclude the trial court did not err in directing a verdict for the defendant.

AFFIRMED.

JOHN L. KOUTSKY, APPELLANT, V. HERMAN J. GRABOWSKI ET AL., APPELLEES.
34 N. W. 2d 893

Filed December 10, 1948. No. 32479.

1. **Highways.** Within the contemplation of section 39-741, R. S. 1943, the term "highway" includes every way or place of whatever nature, open to the use of the public as a matter of right, for the purposes of vehicular travel.
2. ———. Where a public highway joins a dirt road which leads to another highway, the place where the same join constitutes an intersection within the meaning of section 39-741, R. S. 1943.
3. **Automobiles: Evidence.** Where there is other evidence in the record sufficient to sustain the finding by a jury of excessive speed, it is ordinarily not error to permit an eyewitness to estimate the speed of an automobile, although the usual foundational requirements have not been met in all respects.
4. ———: ———. Speed of an automobile is not a matter of exclusive knowledge or skill, but anyone with a knowledge of time and distance is a competent witness to give an estimate. The opportunity and extent of his observation goes to the weight of the testimony.
5. ———: ———. A witness who has shown himself qualified to give an opinion as to the speed of a moving automobile may express an opinion as to the speed a car is moving, although the same be coming directly toward him, such fact not affecting the competency of his testimony but rather the weight to be given the same.

APPEAL from the district court for Gage County: CLOYDE B. ELLIS, JUDGE. *Affirmed.*

Pilcher & Haney and *Hevelone & McCown*, for appellant.

Hubka & Hubka, for appellees.

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

MESSMORE, J.

This is an action at law to recover damages for personal injuries sustained by the plaintiff and property damage to his automobile, arising out of a collision on a highway between such automobile and a truck.

At the time of the accident which occurred about 9:15 a. m., on October 11, 1947, the plaintiff was the owner of a 1946 Oldsmobile sedan. The defendant Herman J. Grabowski was the owner of a 1947 Dodge ton-and-one-half truck with a standard body about 13 feet in length, an over-all measurement from front bumper to the rear end of 23 feet, and equipped with an endgate. His son, Howard L. Grabowski, age 18 years, was driving the truck with his father's permission. The truck was loaded with ensilage, making the total weight of the truck and its contents eight tons.

The plaintiff's petition, insofar as it need be considered in this appeal, alleged that on the day in question he was driving west on highway No. 3, which is an oil mat, south and west of Beatrice, Nebraska, between that city and Fairbury, Nebraska. While proceeding in such manner and endeavoring to pass the defendant's truck which was going in the same direction, the truck driver, without warning or signaling, swerved from the right, or north, side of the highway to the south side thereof and into the plaintiff's automobile causing injuries to the plaintiff and damage to the automobile. The petition further set forth acts of negligence on the part of the truck driver in maneuvering the truck as hereinbefore described, which need not be detailed.

The answer of the defendants was in effect a general denial of any negligence on the part of the truck driver. The answer further set forth certain alleged acts of negligence on the part of the plaintiff which constituted the

direct and proximate cause of the accident and damages to the defendant's truck. Defendants, by their cross-petitions, set forth that the plaintiff's negligence caused personal injuries to the truck driver and damage to the truck.

The plaintiff's reply to the defendants' answer was a general denial, and his answer to the defendants' cross-petitions was, in effect, also a general denial.

The case was submitted to a jury, resulting in a verdict for the defendants and a judgment in favor of the defendant owner of the truck for damages thereto. Upon the overruling of the motion for new trial, plaintiff appeals.

For convenience, the appellant will be referred to as the plaintiff, and the appellees as defendants; the defendant Howard L. Grabowski will be referred to as the truck driver when occasion requires.

The plaintiff's testimony is to the effect that he and a companion arrived in Beatrice about 8 a. m., to transact business. After completing their mission they left for Fairbury about 9 a. m. After rounding a curve and before getting onto a straightaway on highway No. 3, the plaintiff drove up behind the defendant's truck and followed it a distance of approximately 200 feet at a rate of speed of 25 miles per hour. He then pulled over to the left, or south side of the highway, so that his vision would not be obscured by the truck, and saw no cars approaching from the opposite direction. He stepped on the gas increasing his speed to about 40 miles per hour, and sounded his horn to pass the truck. At this time the front end of his car was about two car lengths behind the truck, or a distance of approximately 34 feet. The truck was still proceeding west on the north side of the highway. The first the plaintiff knew about the accident was when the truck pulled from the north side of the highway across the center and into the south side thereof and struck his automobile. He did not apply his brakes at any time, and observed no signaling on the part of the

truck driver indicating a left turn. The impact caused his car to be knocked to the south, off the highway and against an embankment near a railroad track running east and west, the car facing in a southwest direction. He observed no lane or road running to the south in that locality. The accident, according to his version, occurred 30 or 40 feet east of a dirt road.

It might be said at this time that there is a dirt road running south from highway No. 3 to a county graveled road, and through the farm of one Claassen, which the defendants take to get to their home. This is the road that is in question in this litigation.

The plaintiff's companion corroborated this evidence in detail, and further testified that the truck driver was asked why he failed to signal to indicate a left turn, and that the truck driver indicated that rear-vision mirrors of the kind on the truck were not much account. The truck driver denied making any such statement.

The truck driver testified that he had been driving trucks four or five years; that the truck in question was equipped with a rear-vision mirror 4 inches in diameter extending from the left side of the left door several inches; and that the truck had an endgate which was not more than an inch wider on each side than the body of the truck, which was 8 feet in width. The plaintiff's testimony was to the effect that this was a home-made endgate which protruded beyond the body of the truck 2 inches on each side thereof and which obscured his vision so that he could not have observed a signal indicating a turn to the left.

The truck driver testified that he proceeded west on highway No. 3 after getting a load of ensilage, at a speed of from 20 to 25 miles per hour, for the purpose of taking the load to his father's farm. About 100 feet east of the point of collision, which is claimed by the truck driver to be where he turned the truck south with the front end thereof over the pavement as distinguished from where the plaintiff claimed the collision occurred, which was

30 or 40 feet to the east of the dirt road hereinbefore described, he signaled a left turn, sliding over to the left door of the truck to make the signal, and that 8 or 10 inches of his left hand extended beyond the box of the truck. He kept his hand in this position until immediately before the collision occurred. When 30 or 40 feet east of the dirt road, he shifted the truck into low gear attempting to negotiate the turn to the left at a speed of from five to seven miles per hour, making the shift in gears to more efficiently carry the load over a grade which proceeds over the railroad tracks south of the dirt road. When he was 100 feet east of the dirt road he could see through the rear-vision mirror a distance of 300 feet in that direction. He testified that he watched at all times and saw no cars in sight, made the hand signal indicating a left turn, and kept the truck gradually moving to the left, or south. When he first saw the plaintiff's car the truck was just ready to go off the south edge of the pavement onto the dirt road. Plaintiff's car at that time was 50 to 60 feet east of the dirt road on the south side of the highway. As the truck driver looked through the rear-vision mirror, according to his testimony, for a period of two seconds he observed the plaintiff's car approaching from the east, and estimated its speed at 70 miles per hour just before and at the time the collision occurred.

It appears from the record that the front end of the plaintiff's car was caved in sideways, the grille and the fender on the right side were damaged, and that the left side of the box of the truck struck the doorpost on the right side of the plaintiff's car, indicating the point of contact between the vehicles. The left side of the truck was damaged, that is, the fender. Apparently the front part of the truck was not damaged by the collision. The amount of damage to both vehicles is testified to and indicated by exhibits in evidence, which need not be set forth.

The sheriff arrived shortly after the accident, and testi-

fied that he found the plaintiff's car on the south side of the highway headed west at an angle, off of the pavement; the truck was across the ditch to the north, off the pavement headed northwest, and against a fence post. The truck, after the collision occurred, was standing a distance of 105 feet from the center of the dirt road leading south. The plaintiff's car was 45 feet southwest of such point. This testimony is corroborated by the truck driver and by the witness Claassen who lives north of the highway at this point and owns land south thereof through which the dirt road runs to the graveled county road south.

The testimony discloses that for more than 13 or 14 years, before and after highway No. 3 was constructed, the dirt road to the south had been used by the defendants, by neighbors, by mailmen, milkmen, and gravel trucks and, in fact, by anyone who desired to use it for vehicular travel.

Certain tests were made by the sheriff and observed by the plaintiff, as to whether or not the truck driver's hand or arm could be seen in indicating a left turn, due to the width of the endgate which is a part of the truck. This test and observation varies as to how much of the truck driver's hand and arm could be seen; the sheriff testified 8 to 10 inches to the wrist and the plaintiff testified not more than 4 or 5 inches, or the palm of the hand.

We deem a recitation of other facts unnecessary in the determination of this appeal.

The foregoing constitutes the relevant and material evidence submitted to the jury.

The plaintiff contends the court committed prejudicial error in instructing the jury that the roadway to the south was a highway and that the place where it formed a junction with highway No. 3, on which the parties were traveling, constituted an intersection within the meaning of the law.

Section 39-741, R. S. 1943, provides in part as follows: "(5) The term 'highway' includes every way or place

of whatever nature open to the use of the public, as a matter of right, for the purposes of vehicular travel, but shall not be deemed to include a roadway or driveway upon grounds owned by private persons, colleges, universities or other institutions. (6) The term 'private road or driveway' includes every road or driveway not open to the use of the public for purposes of vehicular travel. (7) The term 'intersection' includes the area embraced within the prolongation of the lateral curb lines or, if none, then the lateral boundary lines of two or more highways which join one another at an angle, whether or not one such highway crosses the other."

In Nygaard v. Stull, 146 Neb. 736, 21 N. W. 2d 595, this court said: "The rules of the road fixed by section 39-741, R. S. 1943, extend to all public highways, however created, and to all roads not public highways if used for travel by the public."

In view of the holding in the cited case, the court did not err in instructing the jury on this phase of the case. The joinder of the dirt road with highway No. 3 and the graveled road to the south constitutes an intersection within the meaning of section 39-741, R. S. 1943. Nygaard v. Stull, *supra*.

The plaintiff contends that the court committed prejudicial error in permitting the defendant Howard L. Grabowski to give his opinion as to the speed of the plaintiff's automobile, citing in support of this contention Bergendahl v. Rabeler, 133 Neb. 699, 276 N. W. 673; Knoche v. Pease Grain & Seed Co., 134 Neb. 130, 277 N. W. 798; Mierendorf v. Saalfeld, 138 Neb. 876, 295 N. W. 901; Tews v. Bamrick, 148 Neb. 59, 26 N. W. 2d 499; and Fairman v. Cook, 142 Neb. 893, 8 N. W. 2d 315.

The foregoing cases have held evidence of speed to be inadmissible where the witness had no reasonable time, means, distance, or opportunity to formulate a basis for an opinion as to the speed of a car. In the instant case the record discloses the manner in which the driver of the truck looked through the rear-vision mirror and at

what distance he looked and estimated the speed of the plaintiff's car at 70 miles per hour when it was within 50 feet of the truck. It is the plaintiff's contention that the driver of the truck had made a turn to the south in such manner that his vision in the rear-vision mirror would not reflect the oncoming car at that time, and that he was not in a position to testify as to its speed. There is evidence that he angled to the south to enter the dirt road. The damage to the plaintiff's automobile, as shown by the exhibits, the part of the automobile that came into contact with the truck, the testimony with reference to the size, weight, and load of the truck and the manner in which it was pushed across the highway in a northwesterly direction, are all matters to be taken into consideration with reference to the speed of the oncoming car.

In Carnes v. DeKlotz, 137 Neb. 787, 291 N. W. 490, this court said: "Where there is other evidence in the record sufficient to sustain the finding by the jury of excessive speed, it is ordinarily not error to permit an eyewitness to estimate the speed of an automobile, although the usual foundational requirements have not been in all respects met."

While it may be that the driver of the truck had no reasonable time, means, distance, or opportunity to formulate a basis for an accurate opinion as to the speed of the plaintiff's car, yet describing what he saw as the car and truck came together would require a cursory estimate of the speed even if no opportunity to accurately estimate it existed. The truck driver in the instant case saw the plaintiff's car coming toward him at a distance of 50 feet, and then felt the force of the impact.

Various factors, such as skid marks, distance traveled after impact, and force of impact, constitute pertinent evidence in arriving at an estimate of the rate of speed of an automobile, either by those involved in an accident or those in authority investigating the accident immedi-

ately thereafter. See 5 Am. Jur., Automobiles, § 630, p. 850.

"A witness who has shown himself qualified to give an opinion as to the speed of a moving automobile may express an opinion as to the speed a car is moving, although the same be coming directly toward him, such fact not affecting the competency of his testimony but rather the weight to be given the same." Lewis v. Miller, 119 Neb. 765, 230 N. W. 769, 70 A. L. R. 532.

The accuracy of such an estimate or opinion is open to question but, being admissible as evidence, the determination is for the jury and not the court.

In the final analysis, this evidence resolves itself into the sufficiency thereof to sustain a verdict, rather than the competency of the witness to testify. We believe that, in view of the testimony with reference to speed and the physical facts as testified to by the witnesses, the trial court did not err in submitting this issue to the jury. The factual situations in the cases cited by the plaintiff with reference to speed are distinguishable, and need no further discussion.

Other assignments of error are without merit and need not be discussed.

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

AFFIRMED.

FRANK VACA, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.
34 N. W. 2d 873

Filed December 10, 1948. No. 32435.

1. **Indictments and Informations.** Section 29-1512, R. S. 1943, which prescribes a short form information for charging the crime of manslaughter, is constitutional, and an information drawn in the language of such statute is sufficient to properly charge the crime.

2. **Automobiles: Homicide.** When one drives a motor vehicle in violation of law pertaining to the operation of such vehicles on the public highway, and, in so doing, as a result of the violation of law, causes death to another, he is guilty of manslaughter, and neither contributory negligence of deceased nor the driver of the car in which deceased was riding when killed, can be invoked to relieve the former of criminal responsibility.
3. **Evidence: Criminal Law.** A photograph proved to be a true representation of the person, place, or thing which it purports to represent, is competent evidence of anything of which it is competent and relevant for a witness to give a verbal description.
4. ———: ———. Where a photograph illustrates or makes clear some controverted issue in the case, a proper foundation having otherwise been laid for its reception in evidence, it may properly be received, even though it may present a gruesome spectacle.
5. ———: ———. Photographs of the person or body of a deceased, proper foundation having been laid, may ordinarily be received in evidence for purposes of identification, or to show the condition of the body, or to indicate the nature or extent of wounds or injuries thereon.
6. **Criminal Law.** This court, in a criminal action, will not interfere with a verdict of guilty, based upon conflicting evidence, unless it is so lacking in probative force that we can say, as a matter of law, that it is insufficient to support a finding of guilt beyond a reasonable doubt.

ERROR to the district court for Saunders County: H. EMERSON KOKJER, JUDGE. *Affirmed.*

Clyde R. Worrall and *H. A. Bryant,* for plaintiff in error.

Walter R. Johnson, Attorney General, and *Bert L. Overcash,* for defendant in error.

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

CHAPPELL, J.

An information filed in the district court for Saunders County charged that "on or about the 29th day of November, 1946, Frank Vaca, defendant, then and there being, in said county and state, did, then and there, one Elizabeth N. Knowles, then and there being, unlawfully and feloniously, kill and slay, contrary to the form of the

statutes in such cases made and provided and against the peace and dignity of the people of the state of Nebraska."

Upon arraignment, defendant pleaded not guilty, but after trial to a jury, he was found "guilty of manslaughter in the manner and form as he stands charged in the Information." His motion for new trial was overruled, and judgment was entered sentencing defendant to imprisonment "in the State Penitentiary at Lincoln, Nebraska, for the period of not less than two nor more than two and one-half years at hard labor, Sundays and holidays excepted; and he shall pay the costs of this prosecution * * *."

Thereafter, defendant prosecuted error to this court, assigning some 12 alleged errors, which may be briefly summarized as contending that: (1) The information was insufficient; (2) certain evidence was erroneously admitted over defendant's objections; (3) the evidence was insufficient to sustain the verdict and judgment; and (4) the trial court erred in giving instructions Nos. 2, 4, and 11, and the refusal to give defendant's proferred instruction No. B. We conclude that the assignments have no merit.

Section 28-403, R. S. 1943, insofar as applicable here, provides: "Whoever shall unlawfully kill another without malice, * * * unintentionally, while the slayer is in the commission of some unlawful act, shall be deemed guilty of manslaughter; and upon conviction thereof shall be imprisoned in the penitentiary not more than ten years nor less than one year."

In that connection, section 29-1512, R. S. 1943, provides: "In any indictment for manslaughter, it shall not be necessary to set forth the manner in which, or the means by which, the death was caused; but it shall be sufficient to charge that the defendant did unlawfully kill and slay the deceased."

It will be observed that the information herein was drawn substantially in the words of the foregoing statute.

In Cowan v. State, 140 Neb. 837, 2 N. W. 2d 111, followed by Puckett v. State, 144 Neb. 876, 15 N. W. 2d 63, this court concluded that section 29-1512, R. S. 1943, which prescribes a short form information for charging the crime of manslaughter, was constitutional, and that an information drawn in the language of such statute was sufficient to properly charge the crime of manslaughter. To repeat the reasoning therein would serve no purpose. It is sufficient to say that the informations therein questioned were identical in all material respects with that at bar. We therefore conclude that the information against defendant met all of the requirements of a valid charge of manslaughter.

Recently, it was said in Anderson v. State, *ante* p. 116, 33 N. W. 2d 362: "The manslaughter statute, section 28-403, R. S. 1943, does not make the time and place of the death an essential element of the crime; and section 29-1512, R. S. 1943, says it is not necessary to set forth the manner or means by which the death was caused. If it informs the defendant of the charge against him, in order that he may plead the judgment as a bar to any subsequent prosecution for the same offense, it is sufficient. See Puckett v. State, 144 Neb. 876, 15 N. W. 2d 63; Benton v. State, 124 Neb. 485, 247 N. W. 21." Viewed in that light, and under the circumstances presented herein, the state was not required to either specifically charge in the information or thereafter elect, as moved and argued by defendant, upon what violation of law the prosecution was based or it sought to obtain a conviction.

In Severin v. State, 146 Neb. 506, 20 N. W. 2d 377, it was said: " 'This court, in a criminal action, will not interfere with a verdict of guilty, based upon conflicting evidence, unless it is so lacking in probative force that we can say, as a matter of law, that it is insufficient to support a finding of guilt beyond a reasonable doubt.' Williams v. State, 115 Neb. 277, 212 N. W. 606; Buckley v. State, 131 Neb. 752, 269 N. W. 892."

In the light thereof, we will briefly summarize the state's material evidence from which the jury could have concluded as follows: Defendant was on November 29, 1946, an operator, within the meaning of section 60-501 (7), R. S. Supp., 1945, of a grain truck and trailer, loaded with 26,000 pounds of shelled corn, over highway No. 30A toward the east, while he was intoxicated, in violation of section 39-727, R. S. 1943. Sometime during the early morning hours he stopped and parked the truck, in violation of section 39-757, R. S. 1943, wholly upon the right, main-traveled portion of the level pavement, just south of the center thereof, at a point two and one-half to three miles west of Wahoo, in Saunders County, Nebraska, where there was plenty of room and it was practical to have parked it on the shoulder of the highway. Although it was still dark at about 6:30 a. m., the truck had been so parked by defendant for sometime without any lighted front or rear lamps thereon, in violation of section 39-778, R. S. 1943, and without any lighted burning flares placed either at the side or to the front or rear of such vehicle, in violation of section 39-7,118, R. S. 1943. While defendant's truck was so unlawfully parked, at or about 6:30 a. m., a Buick sedan coming from the west at more than 40 miles an hour, crashed into and under the left rear of the truck, almost instantly killing both the driver thereof, Major Knowles, and Elizabeth N. Knowles, his wife, who was riding with him. They were both found dead, in the almost totally wrecked car, within a few moments after the accident. Defendant himself did not testify, and there was little if any direct evidence in contradiction of the foregoing.

The body of Major Knowles was readily removed from the car. However, his wife's body was, without dispute, so crushed, wedged, and lodged in the wreckage, between the front seat and dashboard or front of the car, that it was not possible to remove her body except by mechanical means, which took some two hours of

labor, after which it was removed to a mortuary sometime just before 10 a. m. Photographs of the highway, the truck, and the car, taken soon after the accident, appear in the record. One photograph of the car was taken before Elizabeth N. Knowles' body was finally extricated therefrom.

Without doubt, the accident was the proximate cause of her death, and we conclude that there was ample evidence from which the jury could have found, beyond a reasonable doubt, that, but for the unlawful operation of the truck by defendant, there would have been no accident, and that defendant's unlawful acts proximately caused her death.

Defendant complained that over objection the funeral director was permitted to testify in substance, without appropriate foundation, that the condition of Elizabeth N. Knowles' body, when brought into his establishment, indicated that she had been dead three or four hours. True, the foundation for the answer was not as complete as ordinarily required, but, as heretofore observed, the truth of his answer was conclusively supported by undisputed competent evidence otherwise adduced, without objection, and its admission could not have been prejudicial to defendant. Hickman v. Layne, 47 Neb. 177, 66 N. W. 298. Without dispute, she was dead a few moments after the accident, and, in any event, the primary and material question was whether or not her death was proximately caused by unlawful acts of defendant.

Exhibit No. 1, offered by the state, and received in evidence over defendant's objection, was a photograph of portions of the body of deceased, identifying her, and indicating the location, nature, and extent of her fatal wounds and injuries received in the accident, particularly upon her head, right arm, and thigh. Defendant complained of its admission upon the ground that it was introduced "merely for the purpose of arousing the pas-

sion and prejudices of the jury and serves in no way to prove any issue in this case."

With regard thereto, in King v. State, 108 Neb. 428, 187 N. W. 934, this court approved a statement appearing in 16 C. J., Criminal Law § 1528, p. 744, to the effect that: " 'A photograph proved to be a true representation of the person, place, or thing which it purports to represent is competent evidence of anything, of which it is competent and relevant for a witness to give a verbal description.' " See, also, 23 C. J. S., Criminal Law, § 852, p. 51. Similar photographs were involved in that case. In the opinion it was said: "But, so far as the objection may apply to the facts before us, it must be borne in mind that, defendant having pleaded 'not guilty,' every issue in the case was thereby controverted and it was then incumbent on the state to introduce the best evidence within its power to controvert the plea and prove defendant's guilt. The state did nothing more than that. The pictures are not inflammatory. They are mere silent witnesses which show at a glance the location of the wounds. People v. Elmore, 167 Cal. 205; Franklin v. State, 69 Ga. 36; People v. Lee Nam Chin, 166 Cal. 570." That statement has similar application here.

Likewise, in MacAvoy v. State, 144 Neb. 827, 15 N. W. 2d 45, certiorari denied in 323 U. S. 804, 65 S. Ct. 559, 89 L. Ed. 642, it was said: "Where a photograph illustrates or makes clear some controverted issue in the case, a proper foundation having otherwise been laid for its reception in evidence, it may properly be received, even though it may present a gruesome spectacle. Blazka v. State, 105 Neb. 13, 178 N. W. 832; Bassinger v. State, 142 Neb. 93, 5 N. W. 2d 222."

As stated also in 23 C. J. S., Criminal Law, § 852, p. 54: "Photographs of a person deceased or of a body have been held admissible for purposes of identification, or to show the condition of a victim's body, or to indicate the nature or extent of wounds or injuries."

In the light of the foregoing rules and the record

before us, we conclude that defendant's contention has no merit. In doing so, we are not unmindful of Lee v. State, 147 Neb. 333, 23 N. W. 2d 316, relied upon by defendant, wherein it was held: "When pictures have no tendency to establish the guilt or innocence of the accused and are effective only to inflame the passions of the jury, they should not be received in evidence." However, a mere reading of the opinion discloses that Lee v. State, *supra,* is clearly distinguishable from the case at bar both upon the facts and the law heretofore set forth.

In Puckett v. State, *supra,* it was held that: " 'When one drives an automobile in violation of law pertaining to the operation of such vehicles on the public highway and in so doing, as a result of the violation of law causes death to another, he is guilty of manslaughter.' See, also, Schultz v. State, 89 Neb. 34, 130 N. W. 972; Crawford v. State, 116 Neb. 125, 216 N. W. 294; Cowan v. State, *supra;* Annotation, 30 A. L. R. 66." See, also, Benton v. State, 124 Neb. 485, 247 N. W. 21.

It is also well established that where a person drives a motor vehicle upon the public highways in violation of law and thereby causes death to another, contributory negligence of the deceased or the driver of the car in which deceased was riding when killed, cannot be invoked to relieve the former of criminal responsibility. Schultz v. State, 89 Neb. 34, 130 N. W. 972, 33 L. R. A. N. S. 403, Ann Cas. 1912C 495; Benton v. State, *supra.*

Instruction No. 11, given by the trial court, clearly and correctly stated and applied the rule just heretofore stated, but instruction No. B, proffered by defendant and refused by the trial court, did not. Therefore, the trial court did not err in giving instruction No. 11 or in refusing to give defendant's proffered instruction No. B.

At this point, also, it should be said that instruction No. 2, given by the trial court, correctly set forth the material elements which the state was required to prove beyond a reasonable doubt before defendant could be

found guilty of the crime charged. Thereafter, instruction No. 4, given by the trial court, simply set forth clearly, correctly, and at length the applicable provisions of the statutes which defendant was required to observe as operator of the truck, and it appears that there was competent evidence in the record to sustain a finding that defendant had violated each and all of them. A fortiori, no error prejudicial to defendant resulted from the giving of instructions Nos. 2 and 4.

We find no error in the record prejudicial to defendant. Therefore, the judgment of the district court should be and hereby is affirmed.

AFFIRMED.

SIMMONS, C. J., participating on briefs.

LOUIS HOFFMAN CO., A CORPORATION, APPELLEE, V. WESTERN SMELTING & REFINING CO., A CORPORATION, APPELLANT.
34 N. W. 2d 889

Filed December 10, 1948. No. 32445.

1. **Set-off and Counterclaim.** The adjustment of defendant's demands by cross-claim in plaintiff's action rather than by independent suit is favored and encouraged by law.
2. **Pleading.** The law of amendments should be liberally construed in order to prevent a failure of justice.
3. ———. When defendant offers in court an amended answer or an amended answer and cross-claim which is proper in form and in furtherance of justice, the court should ordinarily permit the same to be filed under section 25-852, R. S. 1943, upon such terms and conditions as are reasonable and just.
4. ———. Except as otherwise provided by statute or rule of court, a party seeking to amend a pleading is not required to do so in any particular form or manner, nor to support his application therefor by affidavit, if the court is in some appropriate manner informed of the nature and purpose of the proposed amendment.
5. ———. In that connection, Western Assurance Co. v. Kilpatrick-Koch Dry Goods Co., 54 Neb. 241, 74 N. W. 592, is overruled insofar as it presumes to hold the contrary.

APPEAL from the district court for Douglas County: FRANK M. DINEEN, JUDGE. *Reversed and remanded.*

Jack W. Marer, for appellant.

Swarr, May, Royce, Smith & Story and *Robert Saxton,* for appellee.

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

CHAPPELL, J.

On December 31, 1946, plaintiff, a corporation with its principal place of business in Milwaukee, Wisconsin, brought this action in the district court for Douglas County, Nebraska, against defendant, a corporation with its principal place of business in Omaha, to recover $1,923.97, representing an alleged net weight shortage in a carload shipment of aluminum purchased from defendant, and an alleged overcharge of freight thereon, both of which items had been paid by plaintiff.

On February 21, 1947, defendant filed its answer in the nature of a general denial. The case was set for trial on December 15, 1947. On December 11, 1947, defendant lodged with the clerk, for requested filing, an amended answer and counterclaim, denying generally, but admitting that plaintiff purchased from it a carload of aluminum, and for its counterclaim alleged that at the same time and as a part of the same agreement, plaintiff agreed to purchase and defendant agreed to sell plaintiff two additional cars at the same price, upon the same terms set forth at length therein. It alleged that defendant performed, relying thereon, but that plaintiff wholly refused and neglected to purchase the two additional cars, and, in violation of the agreement, purchased in excess thereof from other sources, whereby defendant was damaged in the sum of $15,000, for which amount and costs it prayed judgment.

A copy of defendant's proposed amended answer and

counterclaim was delivered to plaintiff's attorney on December 11, 1947, at about 4 p. m. The record discloses that on December 15, 1947, just prior to trial, defendant's attorney, orally in open court, asked leave to file the same, and plaintiff filed a written motion to deny defendant leave to file the amended answer and counterclaim and to strike same from the files. Thereupon, the trial court denied defendant's request and sustained plaintiff's motion; and, as required, the case proceeded to trial upon plaintiff's petition and defendant's original answer, with an amendment thereto not important here.

The jury returned a verdict for plaintiff, upon which judgment was entered, and defendant's motion for new trial, appropriately raising the question now before us, was overruled. Defendant appealed to this court, assigning substantially that the trial court erred in refusing to permit the filing of defendant's amended answer and counterclaim, and in sustaining plaintiff's motion. We sustain the assignment.

Plaintiff's motion, designated as "Objection to Filing Amended Answer and Counterclaim and Motion to Strike Same From Files" substantially recited the history of the litigation, and its stipulation for trial; that no counterclaim had been previously filed; that no leave of court had been theretofore obtained for its filing; that it was untimely offered and filed; and that the vice president of plaintiff corporation, a witness in the case, had come from Milwaukee, and was then present for the trial. At this point, it should be said the record discloses that he was general manager of plaintiff corporation, the only person with whom defendant dealt, and the very person who entered into the alleged contract out of which defendant's counterclaim arose.

It will be noted that plaintiff's motion made no attack upon the sufficiency of the answer and counterclaim. It contained no allegation of surprise, doubtless because its counsel had already been served with a copy of the proposed amended answer and counterclaim at least four

days before the trial. There was no allegation that the plaintiff was unprepared to meet the counterclaim. The record discloses the contrary. There was no allegation that plaintiff needed additional time to prepare a defense thereto, or would be prejudiced by the filing thereof. The record discloses that it would not have been. Plaintiff made no request for continuance, nor that the court should impose any proper terms or conditions upon defendant, should the filing be permitted.

Section 25-812, R. S. 1943, provides: "The defendant may set forth in his answer as many grounds of defense, counterclaim, and set-off as he may have." Section 25-813, R. S. 1943, provides: "The counterclaim mentioned in section 25-812 must be one existing in favor of a defendant and against a plaintiff between whom a several judgment might be had in the action, and arising out of the contract or transaction set forth in the petition as the foundation of the plaintiff's claim, or connected with the subject of the action."

The first section above quoted gave defendant the right to make the counterclaim a part of its answer, and defendant's amended answer and counterclaim, presented to the court for filing and appearing in the record, met all the requirements of the last-quoted section.

In Indiana Harbor Belt R. R. Co. v. Alpirn, 139 Neb. 14, 296 N. W. 158, this court said: "The adjustment of defendant's demand by cross-claim in plaintiff's action, rather than by independent suit, is favored and encouraged by law. Such practice serves to avoid circuity of action, multiplicity of suits, inconvenience, expense, unwarranted consumption of the court's time, and injustice."

Section 25-852, R. S. 1943, provides: "The court may, either before or after judgment, in furtherance of justice, and on such terms as may be proper, amend any pleading, process or proceeding, by adding or striking out the name of any party or by correcting a mistake in the name of the party, or a mistake in any other respect, or by in-

serting other allegations material to the case, or, when the amendment does not change substantially the claim or defense, by conforming the pleading or proceeding to the facts proved. Whenever any proceeding taken by a party fails to conform, in any respect, to the provisions of this code, the court may permit the same to be made conformable thereto by amendment."

With reference thereto, this court said in Curren v. Certain Parcel of Land, 149 Neb. 477, 31 N. W. 2d 405: "The plaintiff urges that the plain intent of this statute is to determine in one action all conflicting claims of the parties, citing Hanson v. Hanson, 78 Neb. 584, 111 N. W. 368; Draper v. Taylor, 58 Neb. 787, 79 N. W. 709; that in all cases an amendment should be allowed if it is in furtherance of justice (Zancanella v. Omaha & C. B. Street Ry. Co., 96 Neb. 596, 148 N. W. 158); and should be allowed even after the close of the evidence if the adverse party is not prejudiced (Blondel v. Bolander, 80 Neb. 531, 114 N. W. 574). With this contention we are in accord, * * *."

As early as Berrer v. Moorhead, 22 Neb. 687, 36 N. W. 118, this court held: "The law of amendments should be liberally construed in order to prevent a failure of justice." The progressive evolution of procedure in our courts has not changed that rule, but has demonstrated the necessity of its continuing judicial application.

In Dunn v. Bozarth, 59 Neb. 244, 80 N. W. 811, it was held: "It is within the discretion of the court to permit a defendant, during the course of the trial, to amend his answer so as to present a new defense.

"In such case, the plaintiff, if not prepared to meet the new issue, may have a continuance of the cause, upon such terms as the court may deem just."

In Zancanella v. Omaha & C. B. St. Ry. Co., 96 Neb. 596, 148 N. W. 158, it was held: "Amendment of a pleading should be allowed when it is in 'furtherance of justice.' Such terms should be imposed as are reasonable and just."

Likewise, it was held in Westrope v. Anderson, 98 Neb. 57, 151 N. W. 955: "Amendments of pleading should be allowed whenever such amendments appear to be 'in furtherance of justice.' When such amendments make a continuance necessary, or otherwise increase the costs, such terms should be imposed as are just under the circumstances."

In Butke v. Nachschoen, 132 Neb. 514, 272 N. W. 326, it was held: "When the defendant offers in court an amended answer, which is proper in form and in furtherance of justice, the court should permit said amended answer to be filed under section 20-852, Comp. St. 1929, (now section 25-852, R. S. 1943), under such terms and upon such conditions as the court may provide."

We have not overlooked the statement in First Nat. Bank of Wymore v. Myers, 44 Neb. 306, 62 N. W. 459, relied upon by plaintiff, to the effect that: "The Code permits amendments in furtherance of justice. In construing this provision the rights of the party seeking to amend are not alone to be considered. The court in permitting amendments must be careful not to sacrifice the rights of the other party. To do so would not be in furtherance of justice." In the light of the record before us, we have simply observed and applied it.

First Nat. Bank of Wymore v. Myers, *supra,* was a case wherein plaintiff requested permission to amend after judgment. In the case at bar, the record does not disclose that plaintiff's rights would have been prejudiced in any manner by permitting defendant to amend as requested. Assuming otherwise, however, it had a remedy, since the court in permitting the amendment had the power and duty to impose such terms and conditions upon defendant as were reasonable and just to protect plaintiff's rights. On the other hand, the refusal to permit the amendments arbitrarily deprived defendant of a substantial right to prosecute its counterclaim and defense, and left it without a remedy, except appeal on the merits or the prosecution of a separate action in a foreign

jurisdiction at great inconvenience and expense.

We cannot agree with plaintiff's contention that since the jury permitted a recovery upon its theory of what the terms of the contract were with reference to the one car involved in its petition, then defendant was not prejudiced because "obviously the defendant would have been unsuccessful on its counterclaim had it been permitted to file it." Whether or not, at the same time, plaintiff purchased from defendant two other cars upon the same terms and thereafter violated its agreement to do so, was never presented as an issue to the jury for its determination. From the record before us, we cannot conclude that defendant offered its amended answer and counterclaim solely for the purpose and in "an attempt to delay the prosecution of plaintiff's action or to confuse the jury by multiplying the issues," as argued by plaintiff. The issues were simple, and if supported by competent evidence, defendant had a right to have its theory submitted to the jury for its determination.

Fidler v. Adair, 109 Neb. 404, 191 N. W. 683, relied upon by plaintiff, is distinguishable on the facts. In that case, the trial court was never in any manner informed of the nature and purpose of the proposed amendment, and the record could not have shown that the ruling of the court was an abuse of discretion. The record discloses that the trial court, in the case at bar, was informed of the nature and purpose of the proposed amendments presented to it for filing by defendant, and the record does disclose an abuse of discretion.

Western Assurance Co. v. Kilpatrick-Koch Dry Goods Co., 54 Neb. 241, 74 N. W. 592, relied upon by plaintiff, is also distinguishable upon the facts. In that case, the proffered amendments presented an entirely new defense, of which amendments the opinion said: "* * * it does not appear that it (plaintiff) had any actual notice of them before the day of the trial." Concededly herein, plaintiff had such actual notice four days before the trial. Under the circumstances appearing in the fore-

going case, this court simply concluded that the action of the trial court in denying permission to thus amend was not an abuse of discretion.

The opinion therein quoted from 1 Enc. Pl. & Pr. 637, as follows: " 'It is in all cases proper to require from the party asking leave to amend some reasonable excuse for the defect in the pleading which it is sought to correct. The grounds for the motion must ordinarily be shown by affidavit.' " In the case at bar the trial court did not require defendant to show any such excuse. Further, the cases from this jurisdiction cited therein to sustain the rule that "The grounds for the motion must ordinarily be shown by affidavit," do not sustain that statement. One of such cases, Omaha & R. V. R. R. Co. v. Moschel, 38 Neb. 281, 56 N. W. 875, did state the correct and applicable rule as follows: "In all such cases, if a party claims himself prejudiced by the refusal of a trial court to permit an amendment, such prejudice must appear from the record; and if amendments are permitted by the trial judge during the progress of a trial before verdict or decision, and a party is prejudiced by such amendment in the making of his case or defense, he should make such prejudice appear by affidavit or otherwise to the trial judge, and then it would be his duty, on such terms as were reasonable, to either set aside the trial proceedings already had, and continue the case to a future time, or suspend the trial until such time as the party claiming to be prejudiced might, by the exercise of reasonable diligence, be prepared to make his defense or case."

Neither the statute nor any rule of court called to our attention requires a party seeking to amend a pleading to do so in any particular form or manner, nor to support his application therefor by affidavit, if the record discloses that the trial court was in some appropriate manner informed of the nature and purpose of the proposed amendment. In that connection, Western Assurance Co. v. Kilpatrick-Koch Dry Goods Co., *supra,* is overruled

insofar as it presumes to hold the contrary.

Chamberlain v. Vanderhoof, 114 Neb. 47, 206 N. W. 10, relied upon by plaintiff, was a suit upon a foreign judgment, complete and regular on its face, and prima facie valid. It appears that after defendant Christian had filed a general denial, he requested permission at the beginning of the trial to amend his answer by pleading that "no service of summons had been had upon him in the original action, and that the court in that action was without jurisdiction to render a judgment against him." The trial court sustained plaintiff's objection that the proposed amendment came too late and that it would be prejudiced by a change of issue at that time. The opinion discloses that: "Notwithstanding the ruling of the court denying the defendant leave to amend his answer in the manner above referred to, the defendant testified, without objection, that he was never served with process in the case in Colorado, and that he never authorized any one to appear for him in that court. He admitted, however, that he was present at the trial and testified as a witness on behalf of Vanderhoof." Under such circumstances, the trial court, jury having been waived, found in favor of plaintiff, and we not only affirmed the judgment but also concluded that the record failed to disclose that the trial court abused its discretion in refusing to permit the amendment. The situation presented in the case at bar is not one having any similarity therewith.

For the reasons heretofore stated, we conclude that the trial court abused its discretion, thereby depriving defendant of a substantial right, and thus erred in refusing to permit defendant to file its amended answer and counterclaim, and in sustaining plaintiff's motion to strike it from the files. A fortiori, the judgment of the trial court should be and hereby is reversed and the cause remanded.

REVERSED AND REMANDED.

SIMMONS, C. J., participating on briefs.