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REPORTS OF CASES

DECIDED BETWEEN
MARCH 3, 1951 AND NOVEMBER 30, 1951

IN THE

Supreme Court of Nebraska

JANUARY AND SEPTEMBER TERMS 1951

VOLUME CLIV

WALTER D. JAMES
OFFICIAL REPORTER

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By WALTER D. JAMES, REPORTER OF THE SUPREME COURT

For the benefit of the State of Nebraska

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CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

JANUARY TERM, 1951

ANTONIE CERVENY, APPELLEE, V. VIRGINIA CERVENY ET AL., APPELLANTS.

46 N. W. 2d 632

Filed March 9, 1951. No. 32843.

1. **Appeal and Error.** The court will, in determining the weight of the evidence where there is an irreconcilable conflict on a material issue, consider the fact that the trial court observed the witnesses and their manner of testifying.
2. **Deeds.** The possession of a deed by the grantee, in the absence of opposing circumstances, is prima facie evidence of delivery, and the burden of proof is on him who disputes this presumption.
3. ———. A deed, delivered to grantee in grantor's lifetime, is operative, though enjoyment of estate conveyed is postponed until grantor's death, as present estate or interest is transferred by such delivery.
4. ———. In suit to set aside deed to defendant for want of delivery plaintiffs have the burden of proving nondelivery of deed and producing evidence to overcome presumption of delivery due to defendant's possession of deed.
5. ———. This presumption is not conclusive but it raises a strong implication which can only be overcome by clear and satisfactory proof.
6. ———. This court has, from an early date, consistently held that delivery is largely a question of intent to be determined from the facts and circumstances of the given case.
7. ———. No particular act or form of words is necessary to

constitute a delivery of a deed. Anything done by the grantor from which it is apparent that a delivery was intended, either by words or acts, or both combined, is sufficient.

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

Fischer, Fischer & Fischer, and *Ben F. Shrier,* for appellants.

Thomas Zacek and *William R. Patrick,* for appellee.

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

WENKE, J.

Antonie Cerveny brought this action in the district court for Douglas County against Virginia Cerveny and Virginia Cerveny, executrix under the last will and testament of Charles J. Cerveny, deceased. The purpose of the action is to have a certain warranty deed declared void because of the nondelivery thereof, to have the recording thereof canceled, and to have the title to the property described therein quieted in the plaintiff. The trial court found generally for the plaintiff and decreed the deed to be void, ordered the record thereof in the office of the register of deeds be expunged, and quieted title of the premises described in the deed in the plaintiff. Defendants filed a motion for new trial and, from the overruling thereof, have appealed.

The description of the property involved is the west 90 feet of Lot 24, Block 12, Brown Park, an addition to the city of South Omaha, now the city of Omaha, as surveyed, platted, and recorded in Douglas County, Nebraska.

This action being equitable in its nature is reviewable here de novo. See section 25-1925, R. R. S. 1943. However, "* * * the court will, in determining the weight of the evidence, where there is an irreconcilable conflict on a material issue, consider the fact that the

trial court observed the witnesses and their manner of testifying." W. L. Phillips Sons v. Northwest Realty Co., 152 Neb. 808, 43 N. W. 2d 6.

For convenience we will refer to appellee as Antonie and to appellant Virginia Cerveny as Virginia.

John and Antonie Cerveny were husband and wife. Some time prior to his death on May 29, 1922, he had become the owner of Lots 23 and 24, in Block 12, in Brown Park Addition to the city of South Omaha, now the city of Omaha, as surveyed, platted, and recorded in Douglas County, Nebraska. On these two lots are two houses and a frame business building, the latter with two street addresses. The address of the house which is located on the east 40 feet of Lots 23 and 24 is 1911 Q Street; that of the house which is located on the west 90 feet of Lot 23 is 5205 South 20th Street; and the addresses for the frame business building which is located on the west 90 feet of Lot 24 are 5201 and 5203 South 20th Street. By warranty deed dated February 3, 1921, John conveyed this property to his wife, Antonie.

Up to the time of his death John Cerveny operated a tavern in the business building. After his death Antonie continued to operate this business for about a year. Then she quit the business and rented all the properties except the house located at 5205 South 20th Street. That is where the family lived. The family, at the time of John Cerveny's death, consisted of Antonie and six living children. The children were Frank, Charles, Sylvia, Joe, Mary, and Anna. Frank was married and not living at home. The other five children were living at home. Of the five children living at home, Charles, who is also referred to as Charley, Charles J., and Karl, was the oldest, being then 22 years of age. He was working and helped support the family. He continued to live at home and help support the family until July 1935 when he was married.

After he married Charles established his own home.

For some years he lived in the house located at 1911 Q Street, but in 1942 he and his family moved to 4811 South 13th Street where they lived until Charles died on February 24, 1949, at the age of 49 years. He left surviving him his wife, Virginia, and four children ranging between the ages of 4 and 12 years. Antonie, the mother of Charles, was, at the time of the trial, 75 years of age.

Charles, during his lifetime, operated a tavern at 5201 South 20th Street and rented the property from his mother for that purpose. After his death his wife, Virginia, continued to operate the tavern business and, on March 14, 1949, entered into a lease with Antonie leasing this same business property at 5201 South 20th Street for the period from April 2, 1949, to April 2, 1954, for that purpose.

It is apparent that during his entire lifetime the relationship between Charles and his mother was close and on a very congenial basis. From the time of the father's death until in July 1935, when he was married, Charles lived at home with his mother and helped support the family. While he no longer lived in the home of his mother after his marriage he had his business nearby and was an almost daily visitor in her home.

On August 24, 1934, Antonie executed warranty deeds to the properties hereinbefore referred to. When she did so Charles went with her to the office of the notary public who had prepared the deeds. He saw her sign the deeds. She then took the deeds home and put them in a safe. This safe she always kept in her bedroom. No one knew the combination to this safe besides herself except possibly Charles. Charles had been present when the combination thereof had to be fixed shortly after the father's death. He, at that time, heard the combination explained to his mother.

Antonie testified she never delivered these deeds to the grantees named therein nor to anyone for them; that she did not intend that the deeds should be theirs in her

lifetime; and that shortly after Charles died she went to the safe to look for the deeds but the ones to Charles and Anna were not there, although she had never, prior to that time, looked for the deeds since placing them in the safe on August 24, 1934.

The three deeds she executed were as follows: To Charles the property at 5201-5203 South 20th Street; to Anna Kutilek the property at 1911 Q Street; and to the other four children the property at 5205 South 20th Street.

On March 24, 1937, Antonie wrote out a statement in the Czech language which was apparently intended for Charles and, after his death, found among his papers. While there is a sharp dispute as to the correct translation of this statement, particularly one sentence thereof, we think the translation thereof made by the court appointed interpreter to be correct. Insofar as here material, this statement contains the following:

"I also gave Charles two recommendations (or could mean, gave Charles two instructions) in the event of my death

"One (1.) deed was for Charles Cerveny and the other was for Anna Kutilek so that each would put his on record after my death so t[illegible] there would be no misunderstanding about it the other children have their share. Three (3) deeds here in the residence 5205 So 20 str in the safe

Mother
Antonie Cerveny

they are Frank. Joseph. Marie. Silvy."

Sometime after this statement was written the deed therein mentioned for Charles Cerveny was seen in his possession. Several witnesses testify to seeing it, one as early as either late in 1937 or the early part of 1938. It was found among his papers after his death as was also the deed to Anna Kutilek.

"The possession of a deed by the grantee, in the absence of opposing circumstances, is prima facie evidence

of delivery, and the burden of proof is on him who disputes this presumption." Kellner v. Whaley, 148 Neb. 259, 27 N. W. 2d 183.

"* * * if a deed fully executed is found in the possession of the grantee, it is presumed to have been delivered by the grantor, and accepted by the grantee, at the date of its execution." Colbert v. Miller, 149 Neb. 749, 32 N. W. 2d 500.

Charles did not during his lifetime, and Virginia does not now, raise any question as to Antonie's right to the use and enjoyment of the property during her lifetime.

"A deed, delivered to grantee in grantor's lifetime, is operative, though enjoyment of estate conveyed is postponed until grantor's death, as present estate or interest is transferred by such delivery." Colbert v. Miller, *supra*. See, also, Kellner v. Whaley, *supra*.

In view of the foregoing the payment of taxes, insurance, and repairs on the premises by Antonie, although it is evident Charles provided some of the money for this purpose, together with the leases entered into by her with Charles and Virginia were in no way inconsistent with the delivery of the deed.

"In suit to set aside deed to defendant for want of delivery, plaintiffs have the burden of proving nondelivery of deed and producing evidence to overcome presumption of delivery due to defendant's possession of deed." Colbert v. Miller, *supra*.

As quoted from McGee v. Allison, 94 Iowa 527, 63 N. W. 322, in Kellner v. Whaley, *supra:* "'* * * This presumption is not conclusive, but it raises a strong implication, which can only be overcome by clear and satisfactory proof. Tunison v. Chamberlain, 88 Ill. 379. Such a rule is necessary to the security of titles. Any other would render all holdings uncertain, and would be disastrous in the extreme. * * *'"

In Kellner v. Whaley, *supra*, we said: "This court has, from an early date, consistently held that delivery is largely a question of intent to be determined from

the facts and circumstances of the given case.

"In the case of Brittain v. Work, 13 Neb. 347, 14 N. W. 421, it was stated: 'No particular act or form of words is necessary to constitute a delivery of a deed. Anything done by the grantor from which it is apparent that a delivery was intended, either by words or acts, or both combined, is sufficient.' "

After Antonie executed the deeds she took them home and put them in her safe. She then voluntarily wrote the statement of March 24, 1937, to clarify the situation in regard thereto. In this statement she recognized the deed as being his (Charles) but instructed him not to put it of record until after her death. This was entirely proper and consistent with delivery. Much is made of the fact that the statement indicates she then had all three deeds in the safe at that time. Even so, they could have rightfully come into the possession of Charles subsequent thereto. In fact, they were in his possession shortly thereafter. The rights arising by reason of his possession are not overcome by the possibility that Charles could have taken the deeds out of the safe, since he probably knew the combination thereof. Such possibility is pure speculation and not proof of how he actually came into possession of the deed. We do not find the evidence offered by Antonie to be of such clear and satisfactory quality as to overcome the presumption that grantor delivered the deed to the grantee since it was shown to have been in his possession for many years. In fact, we think the circumstances relating thereto, outside of Antonie's testimony, indicate that she intended to and did complete the transfer of this property to her son during his lifetime subject to her life use thereof, but sought to defer the recording of the deed.

When Charles died he left a last will and testament which has been admitted and allowed to probate by the county court of Douglas County. By this will he gave Virginia all his property and she is the sole owner of

whatever interest he had in this property at the time of his death.

Having come to the conclusion that the decree of the trial court is wrong it is reversed with directions to the trial court to enter a decree in favor of Virginia quieting in her the title to the property described in the deed from Antonie to Charles, dated August 24, 1934, but subject to the right of Antonie to have the use thereof during her lifetime.

REVERSED AND REMANDED WITH DIRECTIONS.

CARL EIRICH ET AL., APPELLANTS, V. HENRY OSWALD ET AL., APPELLEES.
46 N. W. 2d 686

Filed March 9, 1951. No. 32873.

1. **Adverse Possession.** Where land belonging to a party is used and claimed by another as his own and he has had actual and uninterrupted possession for ten years title will be quieted in him in an appropriate action.
2. **Appeal and Error.** In actions in equity wherein findings of fact are brought to the Supreme Court for review the issues of fact are triable de novo and it is the duty of the court to reach an independent conclusion thereon without reference to the conclusion reached by the district court.

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

Littrell & Patz, for appellants.

Towle, Young & Mattson, for appellees.

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

YEAGER, J.

This is an action by Carl Eirich and Katherine Eirich, plaintiffs and appellants, against Henry Ostwald and

Katherine Ostwald, defendants and appellees, to have title quieted in them to an easement over a narrow strip of ground along the west side of the east half of Lot 21, Block 5, Cahn, Metcalf, and Farwell's Subdivision in Lincoln, Lancaster County, Nebraska. This will for convenience be referred to as 820 New Hampshire Street or 820.

The relief prayed by plaintiffs was denied by decree of the district court. Motion for new trial was filed and overruled. From the decree and the order overruling the motion for new trial the plaintiffs have appealed.

The background of the controversy is that in January 1929 the plaintiffs as joint tenants became the owners of the west half of Lot 21, Block 5, Cahn, Metcalf, and Farwell's Subdivision in Lincoln, Lancaster County, Nebraska. This will be referred to as 814 New Hampshire Street or 814. The defendants at the time of commencement of the action and at the time of trial were the owners of 820. Lot 21 is 50 feet in width. The deed by which plaintiffs obtained title to 814 described the west half of Lot 21. No survey was made at the time and no dividing line was marked or otherwise designated. Soon after they acquired title the plaintiffs moved into the house which was on the half lot purchased by them. They have occupied the premises continuously since that time. At the rear or north of 814 is a garage. Its east side extends from 0.2 to 0.5 of a foot over onto 820. When this garage was so placed does not clearly appear but it is clear that it has been so located for more than 15 years. At some time there was a fence extending south from the vicinity of the southeast corner of the garage to the street. This fence seems to have been regarded by the parties as the line between the two properties. This fence from the sidewalk in front of the properties to a tree about 34.8 feet north was removed by or before 1933. The remainder of the fence was removed in 1948. The plaintiffs used

the space between their house and the fence from the tree northward to their garage as a driveway. They claim substantially that the fence extended in a line from a point 8 to 20 inches east of the corner of the garage which corner was about 6 inches over on 820 to a tree which was approximately 3 feet east of the surveyed line of the properties. From the sidewalk back to the tree they claim that they used a space from 8 to 9 feet east of their house. This width would extend their use over this distance about 3 feet onto 820 beyond the surveyed line.

The action here is by plaintiffs to have title quieted in them to the strip of land described east of the surveyed line between 814 and 820.

The defendants admit by their answer that plaintiffs are entitled to have title quieted in them to a strip along the east side of the surveyed line of the width of 4 inches.

The legal principles involved in this action are simple. This case is controlled in the main by the proposition that where land belonging to a party is used and claimed by another party as his own and he has actual and uninterrupted possession for ten years title will, at his behest in a proper action, be quieted in him. Hallowell v. Borchers, 150 Neb. 322, 34 N. W. 2d 404.

Defendants concede this principle. They also concede that the plaintiffs, on the theory on which they present their cause, are entitled to have title quieted in them to a certain amount of land from 820 as surveyed. They disagree only as to the amount. The question therefore for determination is one of fact and not one of law.

This being an equity action it becomes necessary for this court to determine this question of fact de novo on the record. See, section 25-1925, R. R. S. 1943; Maddox v. Maddox, 151 Neb. 626, 38 N. W. 2d 547; Peterson v. Peterson, 152 Neb. 571, 41 N. W. 2d 847; Nickerson v. Nickerson, 152 Neb. 799, 42 N. W. 2d 861.

The evidence leaves much to be desired from the

standpoint of clarity and certainty on the questions involved. Evidence of certain measurements which would be of assistance in ascertaining the ultimate facts in this case are notably absent.

The evidence of the width of the ground used by plaintiffs to the east of the surveyed line is but an estimate as is also the location of the fence to the east of this line. The distance of the fence at the north end from the corner of the garage was stated in plaintiffs' evidence to be either the width of one or two railroad ties and that railroad ties were 8 to 10 inches square. It was stated that at that point the fence was attached to two railroad ties but it is not ascertainable whether these ties were in proximity east and west or north and south. In plaintiffs' evidence it was stated that the fence extended from the north to the tree which has been mentioned. Whether it was on a line with the center or the west side of the tree is not ascertainable. The only evidence of the distance of the tree is a plat which was introduced in evidence on which is indicated certain distances. There is no explanation of the plat except that which appears on its face. It appears from the plat that the center of the tree is about 3.5 feet east of the surveyed line.

Therefore the evidence of the plaintiffs is in proof of a use from the garage to the tree east of the surveyed line beginning at a point approximately 14 inches east of the surveyed line at the garage and extending in a straight line to the west side of the tree which is probably 3 feet east of the surveyed line. From the tree to the street the claim is to an extension of the line from the tree to the street parallel with the surveyed line. This is the claim with regard to the extension from the tree to the street since the plaintiff Carl Eirich said his use from the front line of the property of defendants to the tree was of no greater width than from the tree on back to the garage.

On the part of the defendants the evidence shows

that the fence started at the corner of the garage and not east of it and extended in a line through to a point 2 feet and 10 inches west of the tree. A witness for the defendants testified that he planted the tree and that on planting by actual measurement he placed it this distance from the fence. The evidence in this respect is positive and unequivocal. The evidence of the defendants as to the point of commencement of the fence at the garage in context is as much lacking in certainty as that of plaintiffs.

Our conclusion from all of the evidence is that the evidence of defendants as to the location of the fence at the tree is of equal weight if not greater than that of plaintiffs and that it becomes necessary to say that the line was 2 feet and 10 inches west of the center of the tree.

On the other hand our conclusion is that the fence started at the garage the width of a railroad tie or about 8 inches east of the garage. This appears to be the reasonable view to take of the evidence. It would not be reasonably supposed that one in building a fence would set the corner post in front of a garage on his neighbor's property. Added to this supposition is evidence that the plaintiffs had a flower bed in this vicinity about this distance to the east.

These conclusions lead to the ultimate conclusion that under the evidence in this case the plaintiffs have sustained a right to have quieted in them title to a strip of ground from what has been referred to herein as 820 west of a straight line thereon beginning at a point 8 inches east of the southeast corner of the garage on 814 and extending through a point 2 feet and 10 inches west of the center line of the tree described herein thence to the lot line of New Hampshire Street.

This conclusion effectually disposes of all assignments of error save two, which two relate to a view of the premises by the trial court on Sunday and out of the presence of the parties or their attorneys.

Whatever merit these contentions may have in a proper case they have none here. There is nothing in the record which would or could permit this court to be influenced by the observations made by the trial court. The determining factor is the use of this property over the period of years contemplated by the cause of action presented by the pleadings and the evidence. Only present use could be ascertained by a view. Had there been evidence that the physical characteristics were the same at the time of the commencement of the action and at the time of trial as they had been for 10 years or more then the contention would have merit. The fact is that all monuments or fixed objects to which reference was had at the time of trial had been removed or destroyed except the tree, the garage, and a curb cut in front of these properties on New Hampshire Street and concerning the location of these there is no dispute.

In this court this case has been considered de novo on the record made, agreeable to the provisions of section 25-1925, R. R. S. 1943, and without regard to what may or may not have been observed by the trial court on a view of the premises.

The decree of the district court is reversed and the cause remanded with directions to enter a decree quieting title in the plaintiffs to that portion of the east half of Lot 21, Block 5, Cahn, Metcalf, and Farwell's Subdivision in Lincoln, Lancaster County, Nebraska, lying west of a straight line starting 8 inches east of the southeast corner of the garage on the west half of said lot and extending southward to a point 2 feet and 10 inches west of the center of the tree on the east half of said lot, which tree has been described and referred to herein, thence due south to the lot line and the street, and also that portion of the east half on which is located a part of the garage of the plaintiffs.

REVERSED AND REMANDED WITH DIRECTIONS.

MESSMORE, J., participating on briefs.

EMMETT H. HAULMAN, APPELLANT, V. EUNICE BOWMAN, SPECIAL ADMINISTRATRIX OF THE ESTATE OF DOROTHY MARTIN, DECEASED, ET AL., APPELLEES.

46 N. W. 2d 689

Filed March 9, 1951. No. 32906.

1. **Judgments: Equity.** Where the circumstances call for equitable relief, a decree may, upon petition in equity, be set aside by a court of equity having jurisdiction of the parties and of the subject matter of the suit, after expiration of the term at which it was rendered.
2. **Divorce: Equity.** In order to maintain an action such as is involved here, the court must have jurisdiction of the parties and of the subject matter to the same extent as when the original judgment was entered.

APPEAL from the district court for Douglas County: JAMES M. PATTON, JUDGE. *Affirmed.*

Frost, Peasinger & Meyers, for appellant.

Donovan, Frohm & Bolus, for appellees.

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

SIMMONS, C. J.

This is an action in equity brought by plaintiff against the administratrix, legatees, and devisees of the will of Dorothy Martin, deceased.

Plaintiff and Dorothy Martin were husband and wife. In June 1948, Dorothy Martin, as Dorothy Haulman, sued plaintiff for a divorce. Plaintiff was served with summons and appeared in the action by motion, did not answer, and on August 27, 1948, a decree of divorce was entered, by which the maiden name of Dorothy Martin was restored to Dorothy Haulman. There was no reference in the divorce action or decree to property.

In November 1948, the parties rented a small furnished apartment in Omaha, and thereafter resided there until the death of Dorothy Martin in May 1949. Neither party advised the court of this situation. No further proceed-

ing was taken in the divorce action. By the terms of the statute then in force, the decree became final at the expiration of six months without further action of the court. § 42-340, R. S. 1943.

Plaintiff then brought this action on June 11, 1949, in which he alleged a reconciliation; the belief of the parties that it automatically set aside the decree of divorce; that the failure of either of the parties to notify the court of the reconciliation constituted a fraud on the court; that had the court been so notified it would have set aside the decree; and that plaintiff was in fact the legal spouse of the deceased at the time of her death and entitled as such to share in her estate. In this case there is neither allegation nor proof that Dorothy Martin had an estate derived from this plaintiff, or otherwise. Plaintiff prayed for a decree setting aside the decree of divorce and for a determination that he is entitled as surviving spouse to share in her estate. Issues were made and trial was had. Defendants demurred ore tenus at the beginning of the trial and at the close of the trial. They moved for dismissal at the close of the trial. The court found for the defendants and dismissed plaintiff's action. Plaintiff appeals. We affirm the judgment of the trial court.

Plaintiff relies here upon our decision in Shinn v. Shinn, 148 Neb. 832, 29 N. W. 2d 629, 174 A. L. R. 510.

At the threshold of this case plaintiff is confronted with the inescapable fact that Dorothy Martin is dead. That fact constitutes a material distinction from the Shinn case where the parties to the original action for divorce were before the court.

Citing Pavlik v. Burns, 134 Neb. 175, 278 N. W. 149, we, in the Shinn case, followed the rule that " 'Where the circumstances call for equitable relief, a decree may, upon petition in equity, be set aside by a court of equity having jurisdiction of the parties and of the subject-matter of the suit, after expiration of the term at which it was rendered.' " Here the court has before it only

those who represent and are interested in the estate of Dorothy Martin. Here the court does not have and cannot have jurisdiction of the parties, for Dorothy Martin, one of the parties in the divorce action, is dead.

In Carpenter v. Carpenter, 146 Neb. 140, 18 N. W. 2d 737, with reference to setting aside a decree within the six months' period, we held: "The application to set aside a decree must be made within six months following rendition of the decree. It is not to be granted *ex parte*. Notice and a reasonable opportunity must be given to the other party to be heard."

In Carmony v. Carmony, 112 Neb. 651, 200 N. W. 830, we held: "After the term at which an order setting aside a divorce decree has been made, such order can only be set aside or modified in the same manner and upon the same notice as in other cases where it is sought to set aside a judgment or order after the term at which it was rendered.

"An order setting aside an order made at a previous term and reinstating a decree formerly set aside, if made without notice to, or appearance by, the adverse party, is void for want of jurisdiction."

As our decisions now stand, not only must the parties to the divorce action be before the court in this sort of a proceeding, but notice to them is required. Obviously such notice cannot here be given.

In Holmberg v. Holmberg, 106 Neb. 717, 184 N. W. 134, a divorce had been granted, an alimony award made and paid, and one of the parties died within the six months' period. Within the period the other party filed a petition to vacate the decree and dismiss the action. We affirmed a judgment refusing to vacate the decree or dismiss the action, holding that "An action for divorce does not survive. The purpose of the action being to dissolve the marriage relation, and that relation being dissolved by death, the proceedings after the death of one of the parties would be useless and of no avail. Where, however, property rights are involved

and a judgment for alimony or determining the separate property rights between the parties has been had in the case, the cause generally will survive as to such matters." As we said in Sovereign Camp, W. O. W. v. Billings, 107 Neb. 218, 185 N. W. 426, the subject matter which formed the basis of the action was destroyed. In Williams v. Williams, 146 Neb. 383, 19 N. W. 2d 630, we cited with approval the following from the Billings case: " '* * * A divorce action differs in character from every other. It is not based upon a claim for a money recovery, nor is it a proceeding for the establishment of property rights. Such other actions may ordinarily be as fully litigated, in favor of or against the estate of one of the parties, after the death of such party as before. There are salutary reasons why pending actions of that nature should not abate. But in a divorce action the money and property interests involved are only incidental to the principal object of the suit. Whether the object sought is a limited or an absolute divorce, the primary and underlying purpose of such action is a modification or dissolution of the marriage relation. * * *' "

In Kelkenney v. Getsey, 137 Neb. 416, 289 N. W. 795, we had this situation. A decree of divorce in favor of a husband had become final. Alimony was not mentioned; no issue as to it was tried or adjudicated. Every issue in the divorce case had been adjudicated. The husband died. The wife, in the divorce action, undertook to substitute the special administratrix and to revive the action for the purpose of determining the liability of the estate for alimony under an oral unadjudicated agreement by the husband to pay it. The special administratrix entered a special appearance which was sustained by the trial court and on appeal the judgment was affirmed. We held that neither the special administratrix, nor the executor or administrator had they been "pursued," was a proper party defendant, and that that issue could not be adjudicated in the divorce case. It would seem to

follow that if the representative of an estate cannot be substituted for the deceased party under the circumstances of this case that of necessity the representative of the estate and the beneficiaries of a will of a deceased party cannot be substituted to defend an action to set aside the divorce decree itself.

Other courts have dealt with this specific problem.

Kirschner v. Dietrich, 110 Cal. 502, 42 P. 1064, was a divorce action by a wife against a husband. Service was had by publication. A judgment of divorce was entered. The plaintiff died. The defendant moved that the administrator be substituted as plaintiff. Upon notice to the administrator, the defendant moved to vacate the judgment and to be allowed to answer upon the ground that the summons had not been personally served, and that the judgment was void as having been procured by false testimony. The trial court denied the motion and the Supreme Court affirmed. It held: "It is difficult to understand upon what principle the court made the order substituting the administrator of the plaintiff in the place of his intestate, or directed a continuance of the action in his name after the death of the original plaintiff. But, as the respondent does not appear to have objected thereto, we are not required to determine the correctness of the order. The court, however, properly denied the defendant's motion to vacate the judgment, and allow him to answer the complaint. The action was solely for the purpose of procuring a judgment of divorce between the parties—a purely personal action which would not survive the death of either party, and which, upon the death of the plaintiff, could not be further prosecuted or defended, whether her death was before or after judgment. If she had died prior to the entry of judgment, there could have been no judgment in the case, and her death subsequent to the entry of judgment deprived the court of all power to review its action, and determine her right to a divorce. The action having been brought to change

the personal status of the plaintiff in her relations toward the defendant, it is evident that, upon the termination of her life, there was no personal status which a judgment could change." The court then referred to a statute which authorized the court to allow a defendant not personally served to answer to the merits. It said the statute implied that at the time of the application there shall be an action still pending, to the merits of which there can be an answer, and has no application to a case in which, by the death of a plaintiff, the action has abated and all opportunity to controvert its merits has been removed, and "The primary and substantive subject of litigation in a suit for divorce is the personal relation of the parties, and their rights to the community property is but incidental thereto." The court further held: "If, before a decision upon that question is made, one of the parties dies, the action cannot be continued for the purpose of determining the rights of property; and, if there was originally no issue upon the subject, it cannot be revived in case of death after judgment for the purpose of having this question adjudicated." See, also, Dwyer v. Nolan, 40 Wash. 459, 82 P. 746, 111 Am. S. R. 919, 1 L. R. A. N. S. 551; Crockett v. Crockett, 27 Wash. 2d 877, 181 P. 2d 180; Blain v. Broussard (Tex. Civ. App.), 99 S. W. 2d 993; Annotations, 30 A. L. R. 1466 and 40 A. L. R. 1118.

In accord with these authorities we hold that in order to maintain an action such as is involved here, the court must have jurisdiction of the parties and of the subject matter to the same extent as when the original judgment was entered. Neither of the two elements exists here.

The judgment of the trial court is affirmed.

AFFIRMED.

MESSMORE, J., participating on briefs.

IN RE APPLICATION OF THE FRENCHMAN-CAMBRIDGE IRRIGATION DISTRICT FOR APPROVAL OF ITS ORGANIZATION AND A CONTRACT BETWEEN SAID DISTRICT AND THE UNITED STATES OF AMERICA. FRENCHMAN-CAMBRIDGE IRRIGATION DISTRICT, APPELLANT, V. MYRTLE L. FERGUSON ET AL., OBJECTORS, APPELLEES.

46 N. W. 2d 692

Filed March 9, 1951. No. 32932.

1. **Irrigation: Judgments.** A confirmatory action prosecuted under the provisions of section 46-1,151, R. S. 1943, is a special proceeding in rem wherein, upon proper legal notice, jurisdiction is given the district court to render a valid judgment upon the issues appropriately involved in the particular case presented.
2. **New Trial.** As provided by section 25-1143, R. R. S. 1943, an application for new trial must be made within ten days, either within or without the term, after the verdict, report, or decision is rendered, except (1) where unavoidably prevented, or (2) for the cause of newly discovered evidence material for the party applying, which he could not with reasonable diligence have discovered and produced at the trial.
3. ———. A motion for a new trial which is not filed within the time specified by statute is a nullity and of no force and effect.
4. **Appeal and Error.** This court is without jurisdiction to entertain an appeal from the district court unless, as provided by section 25-1912, R. R. S. 1943, notice of appeal is filed in the office of the clerk of the district court and the docket fee is deposited with such clerk within one month after rendition of the judgment or decree, or within one month from the overruling of a motion for new trial timely filed in the cause.

APPEAL from the district court for Red Willow County: VICTOR WESTERMARK, JUDGE. *Appeal dismissed.*

Frank B. Morrison, for appellant.

Monsky, Grodinsky, Good & Cohen, and *Butler & Eisenhart,* for appellees.

Edward W. Fisher and *Clarence Eynon,* amici curiae.

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

CHAPPELL, J.

Having entered into a contract with the United States, as provided in sections 46-1,147 to 46-1,150, R. S. 1943, the Frenchman-Cambridge Irrigation District, hereinafter designated as the district, filed this proceeding under the provisions of sections 46-1,151 and 46-1,152, R. S. 1943, seeking judicial approval and confirmation of: (1) The organization of the district; (2) the proceedings of the board of directors thereof leading up to and including the making of said contract; and (3) the validity of the terms thereof.

Thereto objections were filed by Myrtle L. Ferguson, an owner of land in the district with allegedly long prior adjudicated water appropriation rights appurtenant thereto from the "C. H. Meeker Canal," one of the water facilities of which, by condemnation, the United States had taken possession and control for the purpose of supplying water to lands of objectors and others having similar prior water appropriation rights, to be operated as a part of the Frenchman-Cambridge Irrigation District under the proposed contract.

A hearing was had upon the issues thus made, whereat evidence was adduced, and on July 19, 1950, the trial court entered its decree approving and confirming legality of the organization of the district and the proceedings of the board of directors thereof leading up to and including the making of the contract. However, with reference to validity of the terms of the contract, it found and adjudged that Article 11, section c, Article 32, Article 33, section e, and Article 35 thereof, to which objections had been made, were invalid and unenforceable in any event, and also that Article 34, section b, and Article 33, section g thereof, to which objection had been made, were inapplicable and unenforceable insofar as applicable to objector's lands and other lands in the district having prior valid existing water appropriations under the "C. H. Meeker Canal." In all other

respects the contract was approved, confirmed, and ratified.

Thereafter, on August 29, 1950, more than 40 days after rendition of the decree, instead of within 10 days as required by section 25-1143, R. R. S. 1943, the district filed a motion to set aside the decree. Having theretofore been argued and submitted, such motion was overruled on September 11, 1950, as being in the nature of a motion for new trial not filed within the time required by law.

Subsequently, on September 21, 1950, more than two months after entry of the decree instead of within one month as required by section 25-1912, R. R. S. 1943, the district filed a notice of appeal from the decree and the overruling of its motion to set it aside and give the district a new trial.

In its brief filed in this court the district assigned some 15 alleged errors, but in view of controlling jurisdictional questions raised by appellees and hereinafter discussed, there is but one requiring any discussion or decision. In that connection, the district argued that the decree of July 19, 1950, was a void judgment, assailable at any time in this proceeding or collaterally. We conclude, as hereinafter observed, that the judgment was not void.

Section 46-1,151, R. S. 1943, provides: "The board of directors of any irrigation district heretofore or hereafter organized, may, in its discretion, before or after the making of any contract with the United States or others, the levying of any assessment or the taking of any particular steps or action, commence a special proceeding in the district court of the state, in and by which the proceedings of such board and of such district leading up to or including the making of any such contract, and the validity of any of the terms thereof, the levying of any assessment or the taking of any particular steps or action, shall be judicially examined, approved and confirmed, or disapproved and disaffirmed."

It will be observed that the very provisions of the statute itself gave the district court jurisdiction, power, and authority to decide the issues presented in such a proceeding, which the district by its own petition identically prayed that it should do.

Only recently this court recited the legal history, attested the constitutionality of similar confirmatory proceedings, and called attention to the fact that they were special proceedings in rem, wherein, upon proper legal notice, jurisdiction was given the district court to render a valid judgment upon the issues appropriately involved in the particular case presented. Nebraska Mid-State Reclamation District v. Hall County, 152 Neb. 410, 41 N. W. 2d 397.

Since the district court had jurisdiction, power, and authority to enter the decree, it follows that petitioner's motion to set it aside was simply in effect a motion for new trial filed after the time required by section 25-1143, R. R. S. 1943, and not within any exception contained therein. That section provides: "The application for a new trial must be made, within ten days, either within or without the term, after the verdict, report or decision was rendered, except (1) where unavoidably prevented, or (2) for the cause of newly discovered evidence, material for the party applying, which he could not, with reasonable diligence, have discovered and produced at the trial."

As stated in Heeter v. Nisi, 134 Neb. 209, 278 N. W. 271, cited with approval in Ehlers v. Neal, 148 Neb. 697, 28 N. W. 2d 558: "A motion for a new trial that is not filed within the time specified by statute is a nullity and of no force and effect."

Since such motion of the district was a nullity and of no force and effect, it was obligated to file in the office of the clerk of the district court a notice of appeal from the decree of July 19, 1950, and deposit the docket fee with such clerk "within one month after the rendition thereof" as prescribed by section 25-1912, R. R. S. 1943,

in order to confer any appellate jurisdiction upon this court.

The district not having complied with either statute, the applicable rule is that the Supreme Court is without jurisdiction to entertain an appeal from the district court unless notice of appeal is filed in the office of the clerk of the district court and the docket fee is deposited with such clerk within one month after the rendition of the judgment or decree, or within one month from the overruling of a motion for a new trial timely filed in the cause. Ehlers v. Neal, *supra.*

For the reasons heretofore stated, we conclude that this court is without any jurisdiction to hear the appeal. Therefore, the motion of appellees to dismiss the same should be and hereby is sustained, and the appeal is dismissed with costs taxed to the district.

APPEAL DISMISSED.

MESSMORE, J., participating on briefs.

FRANK J. MAGNUSON, ALSO KNOWN AS F. J. MAGNUSON, ET AL., APPELLEES, V. LEO LLOYD COBURN ET AL., APPELLANTS.
46 N. W. 2d 775

Filed March 16, 1951. No. 32898.

1. **Easements.** One who purchases land burdened with an open and visible easement is ordinarily charged with notice that he is purchasing a servient estate.
2. **Licenses.** It is an ancient and well-settled doctrine of the common law that a mere license, whether by deed or by parol, is revocable at pleasure. However, to this rule we have recognized an exception when, by reason of expenditures by the licensee on the strength of the license, it would be inequitable to permit the licensor to effect a revocation.

APPEAL from the district court for Phelps County: FRANK J. MUNDAY, JUDGE. *Affirmed.*

Anderson, Storms & Anderson, for appellants.

Richard E. Person, for appellees.

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

WENKE, J.

Frank J. Magnuson and Sarah F. Magnuson brought this action in the district court for Phelps County against Leo Lloyd Coburn and Theresa Coburn. The purpose of the action is to establish plaintiffs' right to a road across defendants' premises and to permanently enjoin the defendants from interfering with plaintiffs' use thereof. The trial court found generally for the plaintiffs, quieted in them an easement for the use of a road across defendants' property, and permanently enjoined the defendants from interfering with the plaintiffs' use thereof. Defendants filed a motion for new trial and, from the overruling thereof, appealed.

This action being equitable in its nature the record will be considered de novo. § 25-1925, R. R. S. 1943. See Eirich v. Ostwald, *ante* p. 8, 46 N. W. 2d 686.

The road sought by appellees is across Lot 5 in Block 7, Fourth Addition to Holdrege, Phelps County, Nebraska. Lot 5 is owned by the appellants. The road across Lot 5 is definitely fixed by the decree of the trial court as to location, size, right to maintain, and use. If the appellees are entitled to the road, we find the trial court's decree correctly defines its location and size, together with the extent of the appellees' right to maintain and use it.

Lot 5 is a part of the west half of Block 7, Fourth Addition to Holdrege. The west half of Block 7 consists of six lots which run numerically from north to south and face west on Sheridan Street. They are numbered from 1 to 6, inclusive, and each lot is 140 feet long and 50 feet wide. To the north is Fifth Avenue, to the south is Fourth Avenue, to the west is Sheridan Street, and to the east is an unimproved alley 20 feet wide. Fourth Avenue, Sheridan Street, and Fifth Ave-

nue are all paved. Fourth Avenue is also U. S. Highway Nos. 6, 34, 183, and 383. The road involved crosses the east part of Lot 6 from Fourth Avenue. It then runs north across Lot 5 and onto and over Lots 4, 3, 2, and 1. Located to the west thereof on Lot 6 is a filling station. It was erected in 1926. Located on Lots 1, 2, 3, and 4 is a cabin or tourist camp owned by appellees. This camp consists of 11 modern cabin units and 13 trailer spaces. It is adaptable for and operated on a year-round basis.

This cabin camp and the road had its origin sometime shortly prior to January 8, 1926, when the appellee Frank J. Magnuson, hereinafter referred to as Magnuson, met Mr. and Mrs. Walter E. Brown in Lexington, Nebraska. Walter E. Brown, who will hereinafter be referred to as Brown, is a nephew of Magnuson. This meeting resulted in a tentative agreement to operate a cabin or tourist camp and a plan to form a partnership for that purpose. As a result of this meeting Brown bought Lot 5 and the appellees bought Lots 3 and 4, all in Block 7. Both deeds are dated January 8, 1926. All of the west half of Block 7 was then a pasture. Appellees, who were then living in Dawson County, had a sale and, on February 15, 1926, moved to Holdrege.

Magnuson and the Browns then agreed to the location of the camp and road, which road is now located in the same place as then agreed upon. However, Brown discovered he did not have enough money to go into the cabin or tourist camp business and consequently the partnership was never actually formed. Brown proceeded to put a garage on his lot. It was placed on the northeast corner thereof. He, being a mechanic, operated a car repair shop therein for some years. He also built his home on the west end of his lot and a small store building on about the south center thereof. These improvements were all made in 1926. The road across Lot 5 is located between the garage and the store and is in the shape of a Y. Magnuson immediately started building a cabin camp on Lots 3 and 4. Without

further consulting Brown he laid out a road across Lot 5 and on his lots. This was done in 1926. The road was put where the parties had agreed it should be. The Browns made no objection to his putting it there. Later, in 1936, Magnuson became the owner of Lots 1 and 2. He then extended both the road and camp onto these lots.

Brown operated the garage for some years but moved away in 1933. Thereafter he rented his property. Appellants rented it in 1938 and moved there in February of that year. Later, on February 16, 1944, they bought it. They have lived there ever since moving into the property in February 1938.

As already stated, Magnuson originally laid out this road across Lot 5 where it had been agreed upon by himself and the Browns it should be located. When he laid out the road he did so with a grader. He laid it out clear across Lot 5. The Browns made no objections to his doing so. He graded it part way, making a ditch along the edge with the grader and leveled off the balance. Since then he has improved and maintained it. At the present time it is graveled. All this he did at his own expense. The road has always been used in connection with the tourist camp and is the main entrance thereto. Magnuson built up his camp in relation to this road. He has invested some $18,000 therein. It is now reasonably worth about $25,000.

While there are other ways of ingress and egress to his camp, one being from Sheridan Street onto the southwest corner of Lot 4, another being from Fifth Avenue through the alley onto the east side of Lots 1 and 2, and possibly a third from Fifth Avenue onto the north side of Lot 1, however, the main and only practical way into and out of the camp is the road over and across Lot 5.

The appellees' use of this roadway continued without interference or interruption by anyone from the time it was laid out and opened for use in 1926 until April 11, 1950. On that date the appellants put a fence along

the north line of their property. This fence completely shut off the appellees' use of the road. Under the circumstances, as herein set out, can the appellants now revoke the license or permit which their predecessors in title had agreed to?

It should here be stated that the appellees claim the right to use this road by virtue of the original agreement with the Browns. There is nothing in the record to show that in their original agreement the parties thereto came to any understanding as to how long the appellees should have the right to use this road. It was apparently never discussed.

Admittedly the use of this road by appellees was at all times known to appellants as it was open and visible. In fact, Mrs. Coburn operated the camp in 1946 when the road was in use. We held in Arterburn v. Beard, 86 Neb. 733, 126 N. W. 379, as follows: "One who purchases land burdened with an open and visible easement is ordinarily charged with notice that he is purchasing a servient estate." And as stated in Moll v. Hagerbaumer, 98 Neb. 555, 153 N. W. 560: "If plaintiff had an easement, it was open and visible to defendants when they purchased the servient estate. They were, therefore, chargeable with notice of plaintiff's roadway right, if any. Arterburn v. Beard, 86 Neb. 733."

While this road is not the only possible way of getting into and out of the camp it is apparent, from the record, that the business will be seriously damaged, if not destroyed, if the road is completely closed. It is necessary to the successful operation of the camp. In this respect what we said in Agnew v. City of Pawnee City, 79 Neb. 603, 113 N. W. 236, is particularly applicable here. Therein we said: "Neither can it be claimed that the easement was not necessary to the enjoyment of the estate. The back stairway did not provide sufficient ingress and egress to the second story. After the stairway in controversy was removed, the owners of the building were unable, for this reason, to rent the rooms

on the second floor, and it is clear that a stairway leading from the second story to the main street was necessary to the proper enjoyment of the estate. See Simmons v. Cloonan, 81 N. Y. 557; Charleston, C. & C. R. Co. v. Leech, 33 S. Car. 175, 26 Am. St. Rep. 668."

Here the road was laid out, maintained, and improved at the sole expense of appellees in reliance on the agreement had with the Browns. In addition thereto appellees spent large sums of money building a tourist or cabin camp in reliance thereon to which this road is the only practical means of access. Without this road appellees' investment will be seriously impaired, if not totally lost. We think the question herein involved has been settled by this court by the case of Fitzsimmons v. Gilmore, 134 Neb. 200, 278 N. W. 262.

The issue therein is stated as follows: "This is a suit in equity to enjoin defendants from removing certain water and sewer pipes, which, in 1906, had been installed by plaintiff's predecessors in title in and across the church grounds of defendants, and which, in 1936, under the authority and direction of such defendants, had been in part removed and in part destroyed."

The court therein went on to say: " 'It is an ancient and well-settled doctrine of the common law that a mere license, whether by deed or by parol, is revocable at pleasure.' 17 R. C. L. 576, sec. 89. But, to this rule there always has been two recognized exceptions, viz.: Where the license is executed, and where by reason of the expenditures by the licensee on the strength of the license, it would otherwise be inequitable to permit the licensor to effect a revocation. 17 R. C. L. 576, sec. 89."

We therein held: "From these authorities, so discussed by defendants, we deduce the conclusion that, even if the original license granted by defendant church to plaintiff's predecessors rested wholly in parol, the open entry on the church premises by the licensee (pursuant to and in conformity with the terms of such license and with actual knowledge of the licensor), the constructing of

the improvement here in suit, substantial in material and permanent in plan, at the sole cost of the licensee, followed by thirty years undisturbed use, under the facts disclosed by this record, render such license wholly irrevocable. Arterburn v. Beard, 86 Neb. 733, 126 N. W. 379; Gilmore v. Armstrong, 48 Neb. 92, 66 N. W. 998; Johnson v. Sherman County Irrigation, Water Power and Improvement Co., 71 Neb. 452, 98 N. W. 1096; Severson v. McKenzie, 122 Neb. 827, 241 N. W. 774; 2 Tiffany, Real Property (2d ed.) p. 1208." See, also, Majerus v. Barton, 92 Neb. 685, 139 N. W. 208.

The basis for this rule is stated in 3 Tiffany, Real Property (3d ed.), c. 15, § 834, p. 416, as follows: "Accordingly, the decisions that a license cannot be revoked after the making of improvements on the faith thereof appear properly to involve merely the assertion of a rule of construction, that an oral permission to make a particular use of land, which use is such that it will be necessary or desirable to make expenditures in order to avail oneself of the permission, is to be construed as an attempt orally to grant an easement in the land, which is absolutely invalid as a grant, but operates by way of equitable estoppel in favor of the intended grantee if he subsequently makes expenditures on the assumption that he acquired an easement thereby, although, as a matter of fact, he originally acquired, by reason of the invalidity of the grant, merely a license."

Having come to the conclusion that the appellees are entitled to the relief they seek we affirm the decree of the trial court.

AFFIRMED.

MESSMORE, J., participating on briefs.

IN RE ESTATE OF ANNA L. HALSTEAD, DECEASED. WOMAN'S DIVISION OF CHRISTIAN SERVICE OF THE BOARD OF MISSIONS AND CHURCH EXTENSION OF THE METHODIST CHURCH, APPELLANT, V. BUFFALO COUNTY, NEBRASKA, ET AL., APPELLEES.

46 N. W. 2d 779

Filed March 16, 1951. No. 32900.

1. **Pleading.** A general demurrer admits all allegations of fact in the pleading to which it is addressed, which are issuable, relevant, material, and well pleaded; but does not admit the pleader's conclusions of law or fact.
2. ———. A general demurrer tests the substantive legal rights of parties upon admitted facts, including proper and reasonable inferences of law and fact which may be drawn from facts which are well pleaded. If the petition states facts which entitle the plaintiff to relief, whether legal or equitable, it is not demurrable upon the ground that it does not state facts sufficient to constitute a cause of action.
3. **Statutes: Charities.** It is a well-accepted rule of construction that a legislative act granting powers, privileges, or immunities to corporations must be held to apply only to corporations created under the authority of that state over which such state has the power of visitation and control, unless a contrary intent is plainly expressed in the terms of such legislation.
4. **Taxation.** Statutes exempting certain bequests, legacies, devises, or gifts from inheritance taxes should be strictly construed. To be exempt from inheritance taxes they must come within the strict letter of the statutory exemption.
5. **Charities.** A gift to an exclusively charitable corporation, organization, association, or foundation eo nominee, without more, is a gift in trust for the objects and purposes of the institution and ex vi termini is a donation to charity.
6. ———. A devise or bequest, although in form an outright gift, yet when made to an institution whose sole reason for existence and whose entire activity is charitable, is in purpose and practical effect a charitable trust. In such cases, the recipient takes not beneficially but as trustee to use the funds in furtherance of its charitable objects and purposes.
7. **Charities: Taxation.** The fact that charitable bequests or devises are exempt from inheritance taxes does not modify the rule that such bequests or devises for charity should be construed liberally for the purpose of upholding them whenever possible.
8. **Charities: Equity.** Ordinarily a court of equity will not permit

a gift, devise, or bequest for charitable uses or purposes, otherwise valid, to fail for want of a trustee competent to take charge of it, but will in appropriate proceedings appoint a competent trustee to administer it.

9. **Charities: Taxation.** By virtue of section 77-2007, R. S. Supp., 1947, a gift, devise, or bequest in the nature of a trust to a corporation, organization, association, or foundation in this state for expenditure by it within the state for exclusively charitable purposes and uses, is exempt from payment of inheritance taxes.

APPEAL from the district court for Buffalo County: ELDRIDGE G. REED, JUDGE. *Reversed and remanded with directions.*

Dryden, Jensen & Dier, for appellant.

R. L. Haines, John M. Neff, and *Cook & Ross,* for appellees.

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

CHAPPELL, J.

The primary question in this case is whether a testamentary bequest or devise to Mothers' Jewels Home of York, Nebraska, an exclusively charitable institution or foundation caring for orphans and dependent children at York, Nebraska, was subject to inheritance taxes or exempt therefrom by virtue of Laws of Nebraska, 1947, c. 262, § 3, p. 852, designated as section 77-2007, R. S. Supp., 1947. We conclude that it was exempt from inheritance taxes.

Since Laws of Nebraska, 1949, c. 241, § 3, p. 655, effective March 16, 1949, now section 77-2007.04, R. R. S. 1943, is not applicable, its provisions will not be discussed.

In a proceeding in rem upon issues appropriately presenting the question, the county court assessed an inheritance tax for Dawson County of $2,588.59 and for Buffalo County of $4,187.83. The amount of such taxes is not in dispute if legally assessable. Upon appeal therefrom, the district court entered an order sustaining re-

spective general demurrers interposed by each of the counties to appellant's amended and supplemental petition on appeal, and upon its refusal to plead further, entered a judgment dismissing such petition at appellant's cost and overruling its motion for new trial. Therefrom an appeal was taken to this court, contending that the order and judgment were contrary to law. We sustain that contention.

At the outset it should be stated that a general demurrer admits all allegations of fact in the pleading to which it is addressed, which are issuable, relevant, material, and well pleaded; but does not admit the pleader's conclusions of law or fact. Johnson v. Marsh, 146 Neb. 257, 19 N. W. 2d 366.

In that connection, a general demurrer tests the substantive legal rights of parties upon admitted facts, including proper and reasonable inferences of law and fact which may be drawn from facts which are well pleaded. If the petition states facts which entitle the plaintiff to relief, whether legal or equitable, it is not demurrable upon the ground that it does not state facts sufficient to constitute a cause of action. Central Nebraska Public Power & Irrigation Dist. v. Walston, 140 Neb. 190, 299 N. W. 609; 1 Bancroft, Code Pleading, § 183, p. 313.

In the light thereof, we have examined appellant's petition. The will of testatrix attached to and made a part thereof, directed the named executor to pay all of her just debts and expenses, and further provided that in the event her personal assets should be insufficient to meet all of such expenses and pay the cash bequests, the same should be a charge upon the real estate thereafter devised, to be divided in such proportions against such real estate as her executor might direct. Among other things, she provided: "I give, devise and bequeath to Mothers Jewels Home at York, Nebraska" certain described real property in Dawson County. She then directed the executor to sell certain described real

property in Buffalo County, the proceeds to be used in paying bequests and expenses under the terms of her will, and after certain cash bequests to other individuals, it provided: "All the rest and residue of my estate, I give, devise and bequeath to Mothers Jewels Home of York, Nebraska." The will then appointed George A. Munro of Kearney, Nebraska, executor of the estate and gave and granted to him full power and authority to sell and transfer any part or portion of her estate, including real estate, if necessary to carry out the provisions of the will without any order having been first obtained from the district court. In conformity therewith, the property was sold by the executor.

Concededly, as admitted by the demurrers, Mothers' Jewels Home, a Nebraska charitable institution, was established in York, Nebraska, in 1889 for exclusively religious, charitable, and educational purposes in caring for orphans and dependent children. The institution or foundation has been supported entirely by gifts and bequests from individuals and organizations interested in such a charitable project, all of which gifts and contributions are used exclusively for such objects and purposes in the State of Nebraska. No part of such gifts or contributions are ever owned or used for the financial gain or profit of anyone or inure to the benefit of any private stockholder or individual. The property of Mothers' Jewels Home is owned and generally controlled by appellant, a New York religious, philanthropic, and educational corporation domesticated in this state, but Mothers' Jewels Home itself, although not separately incorporated, is an institution or foundation operated by a superintendent, resident in Nebraska, who supervises and controls the expenditure of all moneys received by the institution for the local charitable uses and purposes aforesaid.

The petition alleged, and appellant argued, that the bequest and devise of testatrix to Mothers' Jewels Home, a Nebraska charity, was, in effect, as intended by her,

the gift of a charitable trust fund to be administered by it exclusively for the care and support of orphans in Nebraska, the charitable objects and purposes for which the institution was established and continued to exist. In view of the fact that appellant was a foreign corporation and Mothers' Jewels Home was not a separately incorporated entity, and neither was capable of acting as trustee, it was alleged that the court having original and concurrent jurisdiction could appoint a suitable trustee to administer the trust. It prayed that the judgment assessing the taxes should be reversed and the taxes assessed be cancelled. We sustain that contention.

As a matter of course, neither the district court nor the county court would have any authority to appoint a trustee in this proceeding, but, as hereinafter observed, the district court would have such authority in an appropriate proceeding brought for that purpose.

With relation to inheritance taxes, section 77-2007, R. S. Supp., 1947, provides: "(1) All bequests, legacies, devises or gifts, to or for the use of any corporation, organization, association or foundation organized and operated exclusively for religious, charitable or educational purposes, no part of which is owned or used for financial gain or profit to either the owner or user or inures to the benefit of any private stockholder or individual, or to a trustee or trustees exclusively for such religious, charitable or educational purposes, shall not be subject to any tax. * * *"

In In re Estate of Robinson, 138 Neb. 101, 292 N. W. 48, this court held, in construing and applying such provisions: "It is a well-accepted rule of construction that a legislative act granting powers, privileges or immunities to corporations must be held to apply only to corporations created under the authority of that state over which such state has the power of visitation and control, unless a contrary intent is plainly expressed in the terms of such legislation.

" 'Statutes exempting certain legacies from an inheritance tax should be strictly construed. To be exempt from an inheritance tax, a legacy must come within the strict letter of the statutory exemption.' "

It will be noted, however, in such case that the bequest was " 'to Yale University, of New Haven, Connecticut, to be its absolutely,' " a foreign educational corporation located in another state, which neither rendered nor was required by the will to render any services to or in this state. Thus this court concluded that it could not claim any right of exemption from inheritance taxes.

In re Estate of Sautter, 142 Neb. 42, 5 N. W. 2d 263, substantially reaffirmed and applied the foregoing rules. It will be noted, however, that the devisees and legatees specifically named as taking property or money upon which inheritance taxes had been assessed therein were all foreign corporations or associations as distinguished from Nebraska corporations, organizations, associations, or foundations.

They are distinguishable from the case at bar wherein the bequest and devise was given to a Nebraska institution, foundation, or organization established and existing in this state, for exclusively charitable uses and purposes in this state. Mothers' Jewels Home, the donee, was not such a legal entity as could take the title or act as trustee, but the gift was not to or for the Woman's Division of Christian Service of the Board of Missions and Church Extension of the Methodist Church. It was nowhere mentioned in the will. Neither was it given any power or authority therein to take the bequest or devise out of the jurisdiction of this state or expend it for any other than the local charitable objects and purposes for which Mothers' Jewels Home was organized and established.

As stated in Zollmann, Charities, § 370, p. 251: "What induces testators to execute gifts in favor of unincorporated charitable associations is unquestionably the char-

itable nature of the work which they are doing. There is every reason, therefore, why the court should hold such gifts, though they are absolute in form, to be charitable in fact. Extrinsic evidence may establish the charitable nature of such donations and is admissible to identify the legatee, and the identification of certain legatees necessarily characterizes legacies as charitable. The very name of certain organizations indicates clearly that their general purposes are charitable. Where the purposes of such societies under their present mode of existence give them no power to devote property to other than charitable uses, it is impossible for them, while they continue to be what they are, to expend their property for any other than charitable purposes. It follows that an absolute gift to them constitutes a charity. It is the design of the donor to consecrate his gift to the legitimate purposes of the society. His intent is as clearly manifested as it would be had he expressly declared that it should be applied to the very uses for which the association exists. A gift to a charitable or religious organization, without more, is, therefore, in trust for the purposes of the organization and ex vi termini is a donation to charity." In re Estate of Douglass, 94 Neb. 280, 143 N. W. 299, Ann. Cas. 1914D 447, is cited in the note as authority for the statement. By analogy, the rule would have application to an orphans' home, such as Mothers' Jewels Home.

See, also, Zollmann, Charities, § 140, p. 93, wherein it was said: "Courts * * * will look to the conveyance which the donor has made, the objects which they are fitted to accomplish, and the agencies whose employment he has directed, and will endeavor to frame them into a consistent and harmonious plan in accordance with his leading intention. They will exercise great vigilance to see that no change is made, either in the application of the charity, or in its management that would be in conflict with his declared intention." See, also, Hobbs v. Board of Education, 126 Neb. 416, 253

N. W. 627; In re Estate of Harrington, 151 Neb. 81, 36 N. W. 2d 577; 14 C. J. S., Charities, § 11, p. 437; 11 C. J., Charities, § 11, p. 307.

In In re Estate of Peterson, 202 Minn. 31, 277 N. W. 529, it was held: "A devise or bequest, although in form an outright gift, yet when made to an institution whose sole reason for existence and whose entire activity is charitable, is in purpose and practical effect a charitable trust."

As stated in the opinion: "In form these are direct gifts to named beneficiaries, each of which is a charitable activity, an institution established and functioning solely for such purposes. In consequence, we hold, in line with many courts, that a devise or bequest, although in form an outright gift, yet when made to an institution whose sole reason for existence and whose entire activity is charitable, is in purpose and practical effect a charitable trust. In such cases the recipient * * * takes, not beneficially, but as trustee, to use the funds in furtherance of these charitable purposes."

As stated in 10 Am. Jur., Charities, § 102, p. 659: "The fact that charitable bequests are exempt from inheritance taxes does not modify the common-law rule that bequests for charity should be construed liberally for the purpose of upholding them whenever possible."

We conclude that the gift in the case at bar was a devise or bequest to an institution or foundation established in Nebraska as trustee exclusively for charitable purposes or uses within this state, as provided in section 77-2007, R. S. Supp., 1947. In other words, it was in the nature of a charitable trust ineffectual for want of a trustee competent to take and administer it, but in such cases a court of equity in appropriate proceedings for that purpose will give its aid and appoint a trustee who can administer it. Gould v. Board of Home Missions, 102 Neb. 526, 167 N. W. 776. As stated in that opinion: "If, on the other hand, it is a charitable trust and ineffectual for want of a trustee competent to

take and administer it, a court of equity will give its aid and appoint a trustee, if need be, who can administer it." See, also, 14 C. J. S., Charities, § 6, p. 427, citing Nebraska cases.

In that connection, section 30-239, R. R. S. 1943, specifically provides: "No gift, grant, bequest or devise to religious, educational, charitable or benevolent uses which shall in other respects be valid under the laws of this state, shall be invalid by reason of the indefiniteness or uncertainty of the persons designated as the beneficiaries thereunder in the instrument creating the same. If in the instrument creating such gift, grant, bequest or devise, there is a trustee named to execute the same, the legal title to the lands or property given, granted, devised or bequeathed for such purposes, shall vest in such trustee. If no trustee shall be named in such instrument, or if a vacancy occurs in the trusteeship, then the trust shall vest in the district court for the proper county, and shall be executed by some trustee appointed for that purpose by or under the direction of the court; and the court may make such orders or decrees as may be necessary to vest the title to such lands or property in the trustee so appointed."

In Stork v. Evangelical Lutheran Synod, 129 Neb. 311, 261 N. W. 552, it was said: "So it is a rule of this court, as well as the majority of other state courts, that a charitable trust will not fail because the trustee is incompetent to take charge of it." It was further said: "The supreme court of Iowa has taken the same view. In In re Estate of Crawford, 148 Ia. 60 (126 N. W. 774), there was a gift for the Salvation Army. That body was given no power or authority to take it out of the state and the trustee named was the Burlington, Iowa, branch of the Salvation Army."

In re Estate of Crawford, 148 Iowa 60, 126 N. W. 774, Ann. Cas. 1912B 992, so cited with approval by this court, affirmed the trial court's judgment that the bequest was exempt from inheritance taxes. That case

was in all material respects identical with the case at bar, and we adopt its logic. Therein a bequest was made to the Burlington, Iowa, branch of the Salvation Army, a New York corporation. Here it was given to Mothers' Jewels Home of York, Nebraska, a branch of the Woman's Division of Christian Service of the Board of Missions and Church Extension of the Methodist Church, a New York corporation. Therein the state claimed that an inheritance tax should be assessed under a statute comparable with our own, contending that the exemption therein could not be applied to a gift or bequest to a corporation not organized under the laws of that state. Such a contention is here made by the appellees.

In that opinion it was said: "It must be admitted, we think, that a legacy to or for the Salvation Army or other religious or charitable institution organized under the corporation laws of another state is not exempted from the inheritance tax. Such seems to be the express language of the act itself, and such is the holding of courts in other jurisdictions where like questions have arisen. In re Prime's Estate, 136 N. Y. 347, (32 N. E. 1091, 18 L. R. A. 713); Humphreys v. State, 70 Ohio St. 67, (70 N. E. 957, 65 L. R. A. 776, 101 Am. St. Rep. 888); People v. Society, 87 Ill. 246." It could as well also have cited In re Estate of Robinson, *supra,* and In re Estate of Sautter, *supra.*

In that connection, the opinion also said: "In none of these cases upon which appellant relies to sustain its contention in the case at bar has the court been called upon to say whether a gift or bequest in the nature of a trust to be expended within the state for purely local benefit and local purposes may be held exempt. * * *

"If, as we are inclined to hold, the deduction here suggested is sound, the bequest made by Mrs. Crawford may in our judgment be fairly held to come within the exemption. The gift is not to or for the Salvation Army. That body is given no power or authority to take it out

of the jurisdiction of the state or to expend it for any other than the local purposes mentioned in the will. The trustee named for this purpose is not the Salvation Army, but the Burlington, Iowa, branch thereof. Whether such local branch has a distinct organization with any independent or autonomous functions is not shown in the record; but this is not a material inquiry, for, if the gift be construed as intended to aid the work of a definite local charity, the fact that the trustee named in the will has no legal existence or is without power to accept or administer the trust is immaterial, for the court will not permit the trust to fail for want of a qualified trustee and will itself name one if it becomes necessary. The distinction between a gift made generally to or for a charitable society organized in another state, and a gift made to aid the work of a strictly local charity with which the foreign society may be associated, is not a violent one, and promotes the apparent intention of the Legislature to relieve from the burden of this tax moneys and property kept within the jurisdiction of the state and devoted to the amelioration of the condition of its own people. * * * The state has no interest in crippling or burdening enterprises conceived, fostered and promoted solely for the relief of its needy or the advancement of the moral, social and religious interests of its people. We find no precedent inconsistent with the conclusion here indicated."

Other questions have been argued and presented, but as we view it, they require no discussion.

For the reasons heretofore stated, the judgment should be and hereby is reversed and the cause is remanded, with directions to enter a decree in conformity with this opinion, finding and adjudging that the bequest and devise were exempt from inheritance taxes in both counties, and cancelling assessment of the same.

REVERSED AND REMANDED WITH DIRECTIONS.

EDITH JANE WAX, ADMINISTRATRIX OF THE ESTATE OF DALLAS E. WAX, DECEASED, APPELLANT, V. THE CO-OPERATIVE REFINERY ASSOCIATION, A CORPORATION, ET AL., APPELLEES.

46 N. W. 2d 769

Filed March 16, 1951. No. 32930.

1. **Negligence.** Negligence to be the basis of an action for damages must have proximately caused or contributed to the injury for which recovery is sought.
2. ———. Where, in an action of tort, it is shown that, subsequent to the negligent act, a new and independent cause intervened, sufficient of itself to stand for the cause of injury, the former is too remote to be made the basis of recovery.
3. ———. If original negligence is of a character which, according to the usual experience of mankind, is liable to invite or induce intervention of some subsequent cause, the intervening cause will not excuse it and the subsequent mischief will be held to be the result of the original negligence.
4. ———. A party is only answerable for the natural, probable, reasonable, and proximate consequences of his acts; and where some new efficient cause intervenes, not set in motion by him, and not connected with but independent of his acts and not flowing therefrom, and not reasonably in the nature of things to be contemplated or foreseen by him, and produced the injury, it is the dominant cause.
5. **Negligence: Trial.** In an action based on negligence the question of whether or not there was an intervening cause which removed the negligence of the defendant as the proximate cause is usually one for a jury.
6. ———: ———. If however the evidence on the question of whether or not there was an intervening cause is not conflicting and is such that reasonable minds cannot differ as to the conclusion to be derived therefrom, the question is one to be decided as a matter of law by the court.
7. **Trial: Appeal and Error.** Under Nebraska practice a motion of the defendant to dismiss at the close of plaintiff's evidence or at the close of all evidence on the ground that the evidence is insufficient to sustain a cause of action has the same purpose and is to be treated the same as a motion for directed verdict both in the district court and in this court on appeal.
8. **Appeal and Error.** In an appeal to review the ruling of the district court on a motion for new trial the Supreme Court may order and direct judgment to be entered in favor of the party entitled thereto.

APPEAL from the district court for Box Butte County: EARL L. MEYER, JUDGE. *Affirmed in part, reversed in part, and remanded with directions.*

Charles A. Fisher, for appellant.

Edwin D. Crites, for appellees.

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

YEAGER, J.

This is a companion case to Fentress v. Co-Operative Refinery Assn., 149 Neb. 355, 31 N. W. 2d 225. The incidents which furnished the basis for each action are identical. The two actions grow out of a fire which occurred in Hemingford, Nebraska, on July 30, 1943. Fentress, a member of the volunteer fire department of the village of Hemingford, Nebraska, was injured in the fire and his action was to recover damages on account of alleged negligence of the Co-Operative Refinery Association. Dallas E. Wax, not a member of the volunteer fire department of the village of Hemingford, Nebraska, was also injured in that fire from which injuries he died on August 8, 1943.

The action here is by Edith Jane Wax, now Edith Jane Planansky, administratrix of the estate of Dallas E. Wax, plaintiff and appellant, against the Co-Operative Refinery Association, a corporation, defendant and appellee, to recover damages on the theory that the death of Dallas E. Wax was caused by the negligence of the defendant and appellee. The village of Hemingford was named in the pleadings as a defendant but there is nothing in the record to indicate that it was in fact made a party. Therefore the Co-Operative Refinery Association will be treated herein as the sole defendant.

The case was tried to a jury and a verdict was returned in favor of the plaintiff. Following the verdict and in due time a motion was filed for judgment notwithstanding the verdict as was also a motion for new

trial. The motion for judgment notwithstanding the verdict was overruled but the motion for new trial was sustained. From the order sustaining the motion for new trial the plaintiff has appealed. There is no cross-appeal from the order overruling the motion for judgment notwithstanding the verdict.

The facts in the Fentress case as reflected by the opinion very closely parallel the facts in this case as they appear in the bill of exceptions. However because of certain small but important details which are peculiar to this case it appears advisable to set forth all of the pertinent facts anew herein.

On July 30, 1943, during the noon hour the defendant undertook to make delivery of 2,500 gallons of tractor fuel and 1,500 gallons of gasoline to the Farmers Union Co-Operative Oil Association and to place it in bulk receiving tanks at Hemingford, Nebraska. This association will hereinafter be referred to as the Farmers Association. The tractor fuel tanks were above ground and delivery into them was accomplished by pumping. The gasoline tank was below ground and delivery to it was by gravity. Delivery to the premises was made by tractor and trailer. On the trailer was a tank containing three compartments. One contained 1,500 gallons of gasoline and the other two 2,500 gallons of tractor fuel. On the tractor were three tanks containing fuel for the tractor. One was the regular and the other two were auxiliary tanks. The auxiliary tanks were mounted behind the cab and the regular tank was on the left side of the cab.

On arrival the delivery unit was placed so that the gasoline and tractor fuel could be emptied into tanks at one time. A hose from the tractor fuel compartment was connected with a pump and the flow of oil was started into the tanks. A standard hose for gasoline delivery connected with the gasoline compartment was placed in an intake pipe of the gasoline receiving tank. The hose at its outer end was equipped with a brass

connection or fitting. A metal extension which had an angle of 90 degrees was attached to the brass fitting and this extension was placed in the opening leading to the gasoline tank. The opinion in the Fentress case indicates that no gasket was used where the hose was connected to the valve on the gasoline compartment. In this case that is a matter which is in dispute. There was a leak and leaking gasoline was caught in a bucket. According to the defendant's driver this leaking was stopped by tightening the connection with a pipe wrench. There was an air vent from the underground gasoline storage tank a short distance from the inlet thereto. The hoses from the gasoline and tractor fuel tanks were crossed on their way from the transportation unit tanks to the storage inlets.

Within two or three minutes after the flow of tractor fuel and gasoline was started an employee of the Farmers Association stepped across the hose. There is some indication that he made contact with the hose, possibly stumbled. An explosion occurred. It appears to have been felt by him rather than seen. Immediately thereafter fire was discovered first at the air vent of the tank and then at the gasoline inlet. It appeared somewhat as a flame from a torch. What caused the fire is not known. The fire started to ascend one or both of the hoses. An attempt was made to extinguish the fire which was unsuccessful.

The employee of the Farmers Association directed defendant's employee to drive the transport away. The Farmers Association employee closed the valve to the gasoline compartment but was unable to close the one to the tractor fuel compartment. The tractor fuel hose was pulled apart or broken as the transport unit was pulled away. This caused tractor fuel to flow out. The oil was immediately ignited. The transport unit was removed a distance of about 275 feet and over this distance tractor fuel continued to flow. The fire followed the oil the distance that the unit traveled and the unit

became enveloped in flames from which clouds of smoke billowed which could be seen up into the town of Hemingford.

A fire alarm was sounded and the attention of plaintiff's decedent was attracted. Though not a member of the fire department plaintiff's decedent rushed to the scene where probably 20 members of the department had gathered to combat the fire. When he arrived a number of firemen were manning a nozzle of a fire hose. They were an uncertain distance, probably 40 to 80 feet, in front of the transport unit.

At the time plaintiff's decedent came onto the scene his brother, who was a member of the fire department, was attempting to carry a grain door to the vicinity where the firemen were manning the hose. At his request plaintiff's decedent helped carry the grain door and helped to stand it up between these firemen and the transport unit presumably to protect them from the fire at the unit. As near as can be determined he was holding up this screen when he received the injuries which caused his death.

Almost immediately after this screen was placed an explosion of one of the fuel tanks of the tractor occurred. The explosion was in the direction of these men. It was deflected upward over the fender and fell with devastating force upon these men including plaintiff's decedent.

On these facts plaintiff's cause of action is based. The petition on which the case was tried charges negligence and gross and wanton negligence on the part of the defendant. The negligence charged, stated briefly, is that the driver of the truck violated chapter 2, article VI, section 1, of the municipal code of the village of Hemingford, Nebraska, in effect on July 30, 1943, which provision included by reference laws, rules, and regulations compiled by the State Fire Marshal in 1945 and particularly sections 2 and 10 of such laws, rules, and regulations; that the driver was guilty of reckless driv-

ing in violation of chapter 9, article VI, section 2, of the municipal code of the village of Hemingford; that the driver was guilty of unlawfully stopping and parking in violation of chapter 9, article VI, section 5, of the municipal code of the village of Hemingford; that the equipment of the truck was defective and that in this respect the defendant was grossly, willfully, and wantonly negligent; that the defendant failed to shut off the fuel lines and failed to extinguish the flames; that the defendant operated the truck wantonly, carelessly, and negligently and in such manner as to endanger life, limb, and property; that the defendant placed the truck in a position to endanger life, limb, and property; that the defendant operated the truck without static arresters or a drag chain; that the truck carried no fire extinguishers; and that the tanks on said truck were not properly ventilated so as to prevent explosion.

By its verdict the jury found the defendant guilty of some or all of these charges.

The effect of the order sustaining the motion for new trial was to say that no actionable negligence was proved against the defendant. This was the theory on which the motion was presented and from a memorandum appearing in the transcript it becomes clear that this is the theory on which the ruling of the district court was made.

The case was tried on an amended petition which was filed on May 28, 1948, which was nearly five years from the date of the occurrence out of which this action grew. The defendant urged in the district court and urges here that at least in part this amended petition sets up a new cause of action and to that extent it is barred by the appropriate statute of limitation. In the view taken of the case it does not appear necessary to consider this question.

It is fundamental that negligence to be the basis of an action for damages must have proximately caused or contributed to the injury for which recompense is

sought. Brotherton v. Manhattan Beach Improvement Co., 48 Neb. 563, 67 N. W. 479, 58 Am. S. R. 709, 33 L. R. A. 598; Davis v. Union Pacific R. R. Co., 99 Neb. 769, 157 N. W. 964; Steenbock v. Omaha Country Club, 110 Neb. 794, 195 N. W. 117; Johnson v. Mallory, 123 Neb. 706, 243 N. W. 872; Wagner v. Watson Bros. Transfer Co., 128 Neb. 535, 259 N. W. 373; Anderson v. Byrd, 133 Neb. 483, 275 N. W. 825; Bixby v. Ayers, 139 Neb. 652, 298 N. W. 533; Tews v. Bamrick, 148 Neb. 59, 26 N. W. 2d 499; Simcho v. Omaha & C. B. St. Ry. Co., 150 Neb. 634, 35 N. W. 2d 501.

Also where, in an action of tort, it is shown that, subsequent to the alleged negligent act, a new and independent cause had intervened, sufficient of itself to stand for the cause of injury, the former is too remote to be made the basis of recovery. St. Joseph & G. I. R. R. Co. v. Hedge, 44 Neb. 448, 62 N. W. 887; Kitchen v. Carter, 47 Neb. 776, 66 N. W. 855; Moses v. Mitchell, 139 Neb. 606, 298 N. W. 338; Greco v. Shaver, 141 Neb. 1, 2 N. W. 2d 526.

If original negligence is of a character which, according to the usual experience of mankind, is liable to invite or induce the intervention of some subsequent cause, the intervening cause will not excuse it and the subsequent mischief will be held to be the result of the original negligence. McClelland v. Interstate Transit Lines, 142 Neb. 439, 6 N. W. 2d 384.

A party is only answerable for the natural, probable, reasonable, and proximate consequences of his acts; and where some new efficient cause intervenes, not set in motion by him, and not connected with but independent of his acts and not flowing therefrom, and not reasonably in the nature of things to be contemplated or foreseen by him, and produced the injury, it is the dominant cause. Kitchen v. Carter, *supra.*

Under the principles announced the district court concluded that there was no evidence upon which a finding could be based that the defendant was guilty of negli-

gence which was the proximate cause of the injuries and death of plaintiff's decedent.

If the defendant was negligent it is certain that no negligence of which it was guilty was active at the time plaintiff's decedent was injured. What the defendant had done which contributed to or caused the fire had been done before plaintiff's decedent came upon the scene. The fire was in progress as was observable by all. The only thing suggested by the pleadings or evidence which could be regarded as active negligence at that time was failure to have the gasoline tank which exploded and caused the injuries properly vented. The only evidence of probative value on this subject was furnished by the employee of the defendant, and he testified that the cap to the tank contained the ordinary vent.

If then there was evidence that it was guilty of any negligence at all, and we think there was, it becomes necessary to say whether or not that negligence was too remote to be made the basis of a recovery in the action. We think on the evidence as it appears in the bill of exceptions the pertinent parts of which are summarized herein that it was too remote.

The negligent acts of the defendant were in the past and what remained was a condition of danger obviously observed, but of course not fully appreciated, by and known to plaintiff's decedent into which he projected himself, laudably of course. He acted for the clear voluntary purpose of protecting life and property from, not an act at the time, but a condition known by him to exist.

It is difficult to see how it may be said that the projection of plaintiff's decedent as he did into this happening could be regarded as a natural, probable, reasonable, and proximate consequence of the start of the fire, whatever its cause, or the removal of the truck from the Farmers Association plant. It appears reasonable to say that here were new and efficient acts of intervention

independent of the acts of the defendant, not connected with the acts of the defendant, and not reasonably in the nature of things to be contemplated or foreseen.

If this is the proper attitude to be taken, and we think it is, it must be said that whatever, if any, negligence of which the defendant was guilty was not the proximate cause of the injury and death which is the basis of this cause of action, and in consequence it must be said, subject to the conclusion upon the proposition which follows, that the district court properly sustained the motion for new trial.

It is interpolated here that it is in the light of this conclusion that the complaint of the defendant that the amended petition sets up a new cause of action which is barred by the statute of limitation loses its importance. If the plaintiff may not recover because of failure to prove negligence which was the proximate cause of the occurrence it is of no consequence whether the petition was properly or improperly amended.

The plaintiff contends that the question of whether or not there was an intervening cause which removed the negligence of the defendant as the proximate cause of the death of plaintiff's decedent was one for the jury. Such was the pronouncement of this court in the following cases: St. Joseph & G. I. R. R. Co. v. Hedge, *supra;* Omaha St. Ry. Co. v. Larson, 70 Neb. 591, 97 N. W. 824; Amend v. Lincoln & N. W. R. R. Co., 91 Neb. 1, 135 N. W. 235.

In the opinion in St. Joseph & G. I. R. R. Co. v. Hedge, *supra,* it was said: "Whether the natural connection of events is maintained or broken by the intervention of a new and independent cause is, according to the authorities cited, a question of fact."

In the syllabus it is said: "Whether the natural connection of events is maintained or interrupted by the introduction of a new and independent cause is usually a question of fact and not of law."

In Omaha St. Ry. Co. v. Larson, *supra,* it is said: "The

petition is framed in accordance with this doctrine and, in our view, states a good cause of action, and whether or not the failure to use diligence in stopping the car after the collision was the direct cause of the injury, was a question of fact to be determined by the jury."

The opinion in Amend v. Lincoln & N. W. R. R. Co., *supra,* quotes with approval what has been quoted herein from St. Joseph & G. I. R. R. Co. v. Hedge, *supra.*

We have no hesitancy in accepting these pronouncements as controlling where the facts in such situations as this are sufficiently in dispute to permit of a difference of opinion in the minds of men possessed of ordinary understanding, but we are unwilling to accept them in cases where the factual situation is so clear that reasonable minds may not differ thereon.

In situations such as this as in other situations where it has been announced, we think the following rule should apply: "Where the evidence on the trial in the district court is not conflicting, and reasonable minds cannot differ as to the conclusion to be derived therefrom, it is the duty of the court, when requested, to direct a verdict in accordance with such conclusion." Nebraska Transfer Co. v. Chicago, B. & Q. R. R. Co., 90 Neb. 488, 134 N. W. 163. See, also, Swanback v. Sovereign Camp, W. O. W., 103 Neb. 34, 170 N. W. 354.

It is true that a motion for directed verdict was not made but a motion for dismissal was made on the ground that the evidence did not sustain a cause of action. This brings the case within section 25-1315.02, R. R. S. 1943.

A motion to dismiss on the ground that the evidence does not sustain a cause of action for all practical purposes is the same as a motion for directed verdict and this court has uniformly so treated it. Meyer v. Platt, 137 Neb. 714, 291 N. W. 86; Robinson v. Central Neb. Public Power & Irrigation District, 146 Neb. 534, 20 N. W. 2d 509; Fentress v. Co-Operative Refinery Assn., *supra;* Roby v. Auker, 149 Neb. 734, 32 N. W. 2d 491;

Armer v. Omaha & C. B. St. Ry. Co., 151 Neb. 431, 37 N. W. 2d 607.

We conclude under this reasoning that the motion to dismiss should have been sustained the same as if a motion for a directed verdict had been made agreeable to the terms of section 25-1315.02, R. R. S. 1943.

It follows that the court did not err in setting aside the verdict but it did err in granting the defendant a new trial.

To the extent of the error the order of the district court is reversed. It is otherwise affirmed.

Pursuant therefore to section 25-1315.03, R. R. S. 1943, which provides in part as follows: "The Supreme Court on appeal from an order granting a new trial, or upon a review of an order denying a new trial in the action in which such motion was made, or on appeal from the judgment, may order and direct judgment to be entered in favor of the party who was entitled to such judgment," this cause is remanded with directions to render judgment notwithstanding the verdict in favor of the defendant.

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

CHAPPELL, J., concurs in the result.

MESSMORE, J., participating on briefs.

IN RE CANCELLATION OF PART OF THE WATER APPROPRIATION UNDER DOCKET 646, KNOWN AS THE BIRDWOOD IRRIGATION DISTRICT, BIRDWOOD CREEK, WATER DIVISION NO. 1-A. STATE OF NEBRASKA ET AL., APPELLEES, V. BIRDWOOD IRRIGATION DISTRICT ET AL., APPELLANTS.

46 N. W. 2d 884

Filed March 23, 1951. No. 32818.

1. **Waters.** An adjudicated appropriation of the waters of a stream for irrigation purposes is a vested property right which is subject only to the law in existence at the time the right was acquired

and to such reasonable regulations subsequently adopted by virtue of the police power of the state.

2. ———. A use of water for irrigation purposes in this state under an appropriation made prior to 1895 is not limited in quantity except that it must be within the limits of the adjudicated appropriation, that it must be for some useful and beneficial purpose, and that it must not exceed the least amount of water that experience indicates is necessary in the exercise of good husbandry for the production of crops.

3. ———. The state may regulate and control the use of its public waters for irrigation by virtue of its police power to prevent waste, to protect against unlawful diversions, and to enforce all adjudicated water rights in accordance with their terms.

4. ———. It is a fundamental principle of common law that one may not divert more water even under a valid appropriation than he can put to a beneficial use, and when the appropriator ceases to use it for such purpose the right ceases. The irrigation laws of this state, including the Raynor Act of 1889, are declaratory of this principle of the common law.

5. ———. A statute providing for the forfeiture of a water right, after notice and hearing, where it appears that the water appropriation has not been used for some useful or beneficial purpose, or having been so used, has ceased to be used for such purpose for three years or more, constitutes a valid exercise of the police power of the state. As such it is valid as to past as well as to future appropriations.

6. ———. The application of water to a beneficial use operates as a condition subsequent which in fact fixes the extent of the right originally acquired.

7. ———. The power of the state to cancel the whole of an appropriation for irrigation purposes for nonuser carries with it the right to cancel a part thereof for nonuser.

8. ———. Where an adjudicated appropriation describes the lands to which the water is to be applied, lands not included within such description have no rights thereunder.

9. ———. Where an irrigation district acquires an appropriation for the purpose of serving particular lands, lands outside such district can gain no right to water under the appropriation except in the manner provided by statute.

10. ———. The method provided by statute for bringing lands within an irrigation district is exclusive.

11. ———. A change in locational use of appropriated waters for irrigation purposes can be made only in the manner provided for by statute for obtaining the approval of the Department of Roads and Irrigation.

12. ———. The purpose of an irrigation district is to furnish water for irrigation purposes to be usefully and beneficially applied to lands within the district. The appropriation of the district is dedicated to the lands within the district to which water has been beneficially applied and which have not come within the provisions of the nonuser statute.
13. ———. An irrigation district may not therefore deprive landowners in the district of the continuing benefit of its dedicated use without the consent of the landowner and the approval of the Department of Roads and Irrigation.
14. ———. Nor may a landowner outside the district gain a right to use the irrigation waters of the district for irrigation purposes unless he be brought into the district in the manner provided by statute.
15. **Evidence: Appeal and Error.** Records, letters, or other documents not put in evidence at a hearing before the Department of Roads and Irrigation are no part of the record and may not be properly included in the bill of exceptions.

APPEAL from the Department of Roads and Irrigation: *Modified and affirmed.*

Edward E. Carr, and *Baskins & Baskins,* for appellants.

Clarence S. Beck, Attorney General, *Bert L. Overcash,* and *Henry M. Grether,* for appellees.

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

CARTER, J.

This is a proceeding commenced by the Department of Roads and Irrigation to cancel a part of the water appropriation of the Birdwood Irrigation District. After notice and hearing, the department determined that a beneficial use of water had not been made upon 6,762.78 acres of land within the district, and canceled the appropriation of water for such lands. The district and a number of landowners within the district appeal.

The appropriation of water from Birdwood Creek for irrigation purposes which is now owned by the Birdwood Irrigation District was adjudicated on August 12, 1898. The department determined the date of priority to be October 21, 1893. The order described approxi-

mately 12,000 acres of land to which the appropriation was to apply and determined that the amount of the appropriation was not to exceed 100 cubic feet per second of time. The department further limited the appropriation to the capacity of the ditch and the least amount of water that experience may hereafter indicate as necessary for the production of crops in the exercise of good husbandry. The time for completing the application of water to the beneficial use indicated was fixed as of September 1, 1902. No appeal was taken from this order.

The appropriation here involved was given a priority date as of October 21, 1893. The adjudication of the water right gave to the Birdwood Irrigation District and its predecessors in interest a vested right to the use of the waters appropriated, subject to the law at the time the vested interest was acquired and such reasonable regulations subsequently adopted by virtue of the police power of the state. Enterprise Irrigation District v. Willis, 135 Neb. 827, 284 N. W. 326; State ex rel. Cary v. Cochran, 138 Neb. 163, 292 N. W. 239.

The Constitution declares the necessity of water for domestic use and for irrigation purposes in this state to be a natural want. Art. XV, § 4, Nebraska Constitution. Our statutory law on the subject of irrigation and the decisions of this court dealing therewith show a clear intention to enforce and maintain a rigid economy in the use of public waters of the state. It is the policy of the law in all the arid states to compel an economical use of the waters of natural streams. One of the very purposes of the state in the administration of public waters is to avoid waste and to secure the greatest benefit possible from the waters available for appropriation for irrigation purposes. Farmers Canal Co. v. Frank, 72 Neb. 136, 100 N. W. 286.

The appropriation for irrigation purposes here involved is clearly subject to the law existing as of its adjudicated priority date. It is a fundamental principle

of the common law that one may not divert more water, even under a valid appropriation, than he can put to a beneficial use. The Raynor Irrigation Law of 1889 provided in part: "The appropriation must be for some useful or beneficial purpose, and when the appropriator or his successor in interest ceases to use it for such a purpose, the right ceases." Laws 1889, c. 68, art. 1, § 2, p. 504. This statute was in force on the adjudicated priority date. It is declaratory of the common law rule and sustains the contention of the department that so-called vested appropriations of water for irrigation purposes may be lost by nonuser or abandonment. The intent of the 1889 act is made clear when it declares: "No person entitled to the use of water from any such ditch or canal, must under any circumstances use more water than good husbandry requires for the crop or crops that he cultivates * * *." Laws 1889, c. 68, art. 2, § 14, p. 515. These principles were the law of this state when the adjudication of the water right before us was made. They still remain in our irrigation statutes and have become the fixed policy of the state. § 46-229, R. S. Supp., 1949. The application of water to a beneficial use operates as a condition subsequent which in fact fixes the extent of the right originally acquired.

The appellants contend that, regardless of nonuser or failure to irrigate a large portion of the lands under an appropriation, the department is without authority to cancel the water right on lands not so used. Such a construction of the powers of the department would defeat a major purpose of the department and render the nonuser and abandonment provisions of the irrigation law nugatory. The department is expressly authorized by statute, after notice and hearing, to forfeit a water right where it appears that the water appropriation has not been used for some beneficial or useful purpose, or having been so used at one time has ceased to be used for such purpose for more than three years. § 46-229.02, R. S. Supp., 1949. The constitutionality of the fore-

going statute was upheld by this court in Kersenbrock v. Boyes, 95 Neb. 407, 145 N. W. 837, and Dawson County Irrigation Co. v. McMullen, 120 Neb. 245, 231 N. W. 840. In the Kersenbrock case it was held also that the act was not invalid because it applies to both past and future appropriations. We deem these propositions as settled in this state. Consequently, where it appears that irrigation water has not been applied to lands described in an adjudicated appropriation for the statutory period of three years, such nonuser will result in the loss of the right, although the right is one that is termed a vested, adjudicated right. The policy of the law is to require a continued beneficial use of appropriated waters to avert their loss under the nonuser provisions of the irrigation statutes.

It is urged, however, that even if the department has the authority to cancel an appropriation for nonuser, it has no right to cancel a part of an appropriation for the reason that only a part of the acreage described in the adjudication has been irrigated. We do not think the position assumed by the appellants on this question is the correct one. In Smith v. Hawkins, 120 Cal. 86, 52 P. 139, it was said: "If plaintiffs could forfeit their entire right of appropriation by nonuser, equally will they be held to forfeit less than the whole by like failure. In other words, the necessary result of the principles declared on that appeal is that, no matter how great in extent the original quantity may have been, an appropriator can hold, as against one subsequent in right, only the maximum quantity of water which he shall have devoted to a beneficial use at some time within the period by which his right would otherwise be barred for nonuser. And this principle has been more explicitly declared in the recent case of Senior v. Anderson, 115 Cal. 496, where it is held that an appropriation of water by the owner of land by means of a ditch is not measured by the capacity of the ditch through which the appropriation is made, but is limited to such quantity, not ex-

ceeding the capacity of the ditch, as the appropriator may put to a useful purpose." See, also, Hewitt v. Story, 64 F. 510, 30 L. R. A. 265; Rocky Ford Irrigation Co. v. Kents Lake Reservoir Co., 104 Utah 202, 135 P. 2d 108. The fact that many provisions of our irrigation statute came from California makes the interpretations of the California statute by the courts of that state of particular application here. Magner v. Kinney, 141 Neb. 122, 2 N. W. 2d 689. We conclude that the power to cancel the whole of an appropriation for irrigation purposes for nonuser carries with it the right to cancel a part. United States v. Tennessee & Coosa R. R. Co., 176 U. S. 242, 20 S. Ct. 370, 44 L. Ed. 452.

The foregoing is consistent with the Raynor Irrigation Law of 1889, as well as the irrigation statutes passed subsequent thereto. It integrates itself into the public policy of the state with reference to the appropriation of public waters. It is consistent also with the provisions of the appropriation as it was adjudicated in 1898. It gives effect to the constitutional provision that the necessity of water for irrigation is a public want. It in no manner changes a substantive right. It merely sustains the procedural remedy provided by the Legislature for enforcing a condition inherently in the appropriation to the effect that the rights attained thereby could be lost by nonuser. It is consistent with the theory that water may not be wasted. An appropriator will not be permitted to retain an interest in public waters, to which he has a valid appropriation, which are not put to a beneficial use. Such a rule would be contrary to the policy of the state that the necessity for water for irrigation is a public want and that the public waters of the state, available for appropriation for irrigation purposes, should be administered to secure the greatest benefit possible therefrom. An appropriator will not be permitted to retain an interest in the use of public waters which he has never put to a beneficial use, or having been once put to a beneficial use has failed for

the statutory period to continue such beneficial use. It is the express duty of the department to determine the appropriations, or parts thereof, which are subject to forfeiture for nonuser and make the waters covered thereby available to junior appropriators or new applicants. It is the duty of the department to protect the rights of any and all the appropriators of public waters. It is its duty also to see to it that the maximum amount of water may be subject to appropriation. It is enjoined to perform such duties in the fulfillment of the policy of the state with reference to its public waters as evidenced by constitutional and statutory provisions, and the interpretations of the courts of this state with reference thereto.

The record shows that the water appropriation for lands falling into several different groups was canceled. We shall deal briefly with each group. (a) There were some lands described in the adjudicated appropriation which were not within the Birdwood Irrigation District. The evidence shows that water had never been applied to these lands and consequently the water appropriation for them was properly canceled. (b) There were some lands not included in the adjudicated appropriation that were below the Birdwood Irrigation District canal which were alleged to be within the district. The record shows that these lands were not included in the lands described in the adjudicated appropriation, nor were they subsequently brought into the district in the manner provided by statute. None of the waters included in the appropriation of the Birdwood Irrigation District therefore were available to such lands. Such lands may not be properly considered in determining the acreage entitled to water under the appropriation of the Birdwood Irrigation District. (c) There are lands lying above the canal of the Birdwood Irrigation District which were not described or otherwise included in the adjudicated appropriation, nor subsequently brought into the district. The evidence

shows they were irrigated for a number of years last past by pumping from the canal of the irrigation district. The department correctly determined that none of the waters included in the adjudicated appropriation were for these lands and could not therefore be included in determining the acreage to which the adjudicated appropriation applied that had been put to a beneficial use and had not been lost by nonuser. (d) There were lands included in the adjudicated appropriation which are outside the district for which water is claimed. The record shows that this land was not irrigated prior to 1944, but that it had been irrigated about two years prior to the hearing. The record shows further that the owner made application to the department to include these lands within the district, but the application was denied. This was a final determination by the department from which an appeal should have been taken if the owner felt that the department was in error. The land was not within the district and any claim to water by virtue of the adjudicated appropriation was lost thereby. The order of the department with reference thereto appears to be correct.

The order made by the department cancels the appropriation for approximately 200 acres belonging to Harry Brodbeck. This land lies within the Birdwood Irrigation District and was included in the adjudicated appropriation now belonging to the Birdwood Irrigation District. The record shows that the only issue here is whether the department correctly canceled the water rights to that part of the Brodbeck lands described as Lots 1 and 2 in the north half of the northwest quarter of Section 9, Township 14 North, Range 31 West of the 6th P. M., and Lots 1, 2, 3, and 4 in Section 8, Township 14 North, Range 31 West of the 6th P. M. The lands in Section 9 were excluded because a beneficial use of water had not been made upon them. Those in Section 8 were excluded because it is shown by the evidence that the lands had not been irrigated for three

years. That the lands in question in Section 8 are irrigable lands was judicially determined in Birdwood Irrigation District v. Brodbeck, 148 Neb. 824, 29 N. W. 2d 621. The evidence of the appellant Brodbeck is that the lands in Section 9 are irrigable and that waters in the adjudicated appropriation have been put to a beneficial use on this land. The burden of proof to establish nonuser is upon the department. We find no evidence properly in the record to sustain the department's order with respect thereto. There are records and letters in the bill of exceptions, tending to sustain the department's action, which were not put in evidence at the hearing. They are not properly a part of the bill of exceptions, and the motion of appellants to strike them from the bill of exceptions should have been sustained. A bill of exceptions properly includes all the evidence offered at the hearing. Evidence not so offered has no place in the bill of exceptions. § 46-210, R. S. 1943.

It appears, therefore, that the evidence will not sustain the department in canceling the water right appurtenant to Lots 1 and 2 in Section 9. As to Lots 1, 2, 3, and 4, in Section 8, the appellant Brodbeck offered no evidence that it had been irrigated within three years prior to the hearing. The report of the department engineer appearing in the record indicates that it had not been so used. We think the action of the department was correct under the provisions of section 46-229.04, R. S. Supp., 1949, providing: "At such hearing the verified report of the district superintendent, water commissioner or engineers of the department shall be prima facie evidence for the forfeiture and annulment of such water appropriation. If no one appears at the hearing, such water appropriation shall be declared forfeited and annulled. If some one interested appears and contests the same, the department shall hear evidence, and if it appears that such water has not been put to a beneficial use, or has ceased to be used for such purpose for more than three years, the same shall be declared canceled

and annulled." No contest having been made as to the lands in Section 8, the department was warranted in canceling the water right to such lands.

As to the appellant Brodbeck, we hold that the order canceling the water right to his lands in Section 9, consisting of approximately 50 acres, is not sustained by the evidence. The order of the department as to the lands in Section 8 is correct.

Certain of the appellants contend that they have been taking water from the Birdwood Irrigation District canal and for many years have applied it on lands not included in those described in the original appropriation. It is asserted that such persons have thereby obtained a right to continue to use such waters. While it is true that prior to the Irrigation Act of 1895 a freedom to change the location of the use apparently existed, no such right now exists except by permission of the Department of Roads and Irrigation. Such requirement does not divest the right. It is a valid exercise of the police power of the state in the regulation of its public waters to insure an orderly administration of such waters, to eliminate waste, and to secure the greatest benefit possible from waters available for irrigation purposes. But any such right of change in locational use, with the approval of the Department of Roads and Irrigation, has always been subject to qualification in the case of a canal company organized to carry and distribute irrigation water which has acquired an appropriation for the purpose of serving particular lands. In such a situation the rights of the canal company, which is in the nature of a public service corporation, with respect to the waters appropriated even though acquired prior to 1895, have become dedicated to the use of the lands which the canal was constructed to serve and to which such waters have been applied. The canal company cannot, therefore, deprive landowners of the continuing benefit of this dedicated use without their express consent and the approval of irrigation

authorities of the state. United States v. Tilley, 124 F. 2d 850; Farmers & Merchants Irrigation Co. v. Gothenburg Water Power & Irrigation Co., 73 Neb. 223, 102 N. W. 487. The purpose of an irrigation district or canal company is to furnish water for irrigation purposes to be usefully and beneficially applied to land within the district. Lincoln & Dawson County Irrigation Dist. v. McNeal, 60 Neb. 613, 83 N. W. 847; Platte Valley Public Power & Irrigation Dist. v. County of Lincoln, 144 Neb. 584, 14 N. W. 2d 202, 155 A. L. R. 412. We hold, therefore, that one can gain no right to the use of waters of an irrigation district or canal company merely by using such waters for irrigation purposes for a period of time. The Raynor Irrigation Act of 1889 provided that the place of intended use be specified in an appropriation. Laws 1889, c. 68, art. 1, § 8, p. 505. To gain a right, one whose lands were not described as being a beneficiary of the use can gain such a right only in the manner provided by Chapter 46, R. S. 1943, and amendments thereto. No action having been taken to bring such lands within the district, the claims of persons outside the district based on the fact that they have used waters within the district's appropriation are without merit. The statute providing the method for bringing lands within the district for the purpose of sharing in its appropriation of water for irrigation purposes is exclusive.

The original appropriation was for an amount of water not exceeding 100 second-feet which was necessary for the production of crops in the exercise of good husbandry on the 12,000 acres described in the application. The department reduced the amount of the appropriation in proportion that the amount of the acreage lost bore to the total acreage included in the adjudicated appropriation. No objection was made to this method of determining the quantity of water to which the Birdwood Irrigation District was entitled after the acreage cancellations for nonuser were made. Consequently,

there is no issue before the court on this point. The number of acres in the district to which water had been beneficially applied was determined to be 5,237.22. To this the 50 acres in Section 9, as hereinbefore determined, should be added, thereby increasing the amount to 5,287.22 acres. The appropriation of the Birdwood Irrigation District from Birdwood Creek in the amount of 43.64 second-feet, with priority of October 21, 1893, should be revised upward to include water for the Brodbeck lands in Section 9. The order of the department is affirmed as so modified.

MODIFIED AND AFFIRMED.

A. RUDYARD NELSON, APPELLANT, V. ESTHER B. ROBINSON, ALSO KNOWN AS ESTHER B. NELSON, APPELLEE.

46 N. W. 2d 892

Filed March 23, 1951. No. 32919.

1. **Marriage.** When a marriage is supposed to be void, or the validity thereof is doubted, either party may file a petition in the district court of the county where the parties, or one of them, reside, for annulling the same.
2. **Marriage: Divorce.** Such petition or bill shall be filed, and proceedings shall be had thereon, as in the case of a petition or bill filed in said court for divorce; and upon due proof thereof it shall be declared void by a decree or sentence of nullity.
3. **Process.** Where a statute authorizes personal service on a nonresident then out of the state, and prescribes the manner in which the service shall be made, the service must be made by the person or officer designated.
4. ———. Service outside of the state by a sheriff, deputy sheriff, or other person of a foreign jurisdiction, without appointment by the sheriff of the county in which the suit was brought, as required by statute, is insufficient and invalid.
5. ———. Statutes prescribing the manner of service of summons are mandatory and must be strictly pursued.
6. **Attorney and Client.** A reasonable attorney's fee may be allowed for the services of a person's attorney in defending against a suit for annulment of marriage in the Supreme Court.

APPEAL from the district court for Scotts Bluff County: CLAIBOURNE G. PERRY, JUDGE. *Reversed and remanded with directions.*

F. J. Reed, for appellant.

Atkins, Lyman & Ferguson, for appellee.

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

MESSMORE, J.

The plaintiff, A. Rudyard Nelson, instituted this action in the district court for Scotts Bluff County against Esther B. Robinson, also known as Esther B. Nelson, to have the court declare and adjudge the marriage between the plaintiff and defendant to be null and void and of no legal effect.

We will hereafter refer to the parties as designated in the district court.

The record discloses that the plaintiff and defendant were married at Bridgeport, Nebraska, on January 7, 1948. They lived together on a ranch and farm owned by the plaintiff's parents until March 22, 1949. No children were born to this union. The plaintiff, through some source not apparent in the record, obtained information to the effect that his marriage to the defendant was illegal in that she had not obtained a legal divorce from her previous husband, Joseph E. Robinson, who was still living.

Pursuant to section 42-119, R. S. 1943, the plaintiff brought this action for the purpose of having his marriage to the defendant adjudged to be null and void and of no legal effect. This section of the statutes provides that when a marriage is supposed to be void, or the validity thereof is doubted, either party may file a petition in the district court of the county where the parties, or one of them, reside, for annulling the same, and such petition or bill shall be filed, and proceedings shall be had thereon, as in the case of a petition or bill

filed in said court for divorce; and upon due proof thereof it shall be declared void by a decree or sentence of nullity.

The record further discloses that the defendant Esther B. Robinson was married to Joseph E. Robinson at Ventura, California, on December 21, 1944. On August 21, 1946, Esther B. Robinson filed suit for divorce in the district court for Scotts Bluff County, Nebraska, against Joseph E. Robinson. The defendant, Joseph E. Robinson, did not waive the issuance and service of summons, or enter his voluntary appearance in this action.

On March 12, 1947, Esther B. Robinson filed an affidavit in conformity with section 42-305, R. S. 1943. This section provides in part as follows: "* * * personal service out of the state as herein provided for shall not be had without the plaintiff or his or her attorney filing an affidavit showing that the defendant is a nonresident of this state, and that personal service cannot be had on the defendant in this state." While the plaintiff contends that this affidavit is legally insufficient, we conclude from an examination of the same that it meets the requirements of the statute.

The out-state summons is as follows:

"SHERIFF'S OFFICE
LOS ANGELES COUNTY CAL.
1947 MAR 15 AM 10 41
CIVIL DIVISION

"STATE OF NEBRASKA)
) ss
SCOTTS BLUFF COUNTY)

THE STATE OF NEBRASKA

TO THE SHERIFF OF SAID COUNTY, GREETING:

You are hereby commanded to notify Joseph E. Robinson Defendant, that he has been sued by Esther B. Robinson Plaintiff, in the District Court of the Seventeenth Judicial District in and for the County of Scotts Bluff and that unless he answer on or before the 14th day of

April, A. D., 1947, the petition of said Plaintiff filed against him in the Clerk's office of said Court, such petition will be taken as true, and judgment rendered accordingly. You will make due return of this summons on or before Monday, the 24th day of March, A. D., 1947.

Witness my hand and seal of said Court at Gering, Nebraska, this 12th day of March, A. D., 1947.

/s/ C. R. Barton
Clerk of the District Court
By 021348
Deputy

"STATE OF NEBRASKA)
) ss
SCOTTS BLUFF COUNTY)

I, Mahlon C. Morgan, sheriff in and for said County, and State of Nebraska, do hereby appoint _____ of Los Angeles County, State of California, my agent to serve this writ.

/s/ Mahlon C. Morgan
Sheriff

STATE OF CALIFORNIA)
) ss
COUNTY OF LOS ANGELES)

H. E. Rodenmayer being first duly sworn deposes and says that he is the identical person who was appointed agent by the sheriff of Scotts Bluff County, State of Nebraska, to serve the within summons, that he served the same upon the within named Joseph E. Robinson on the 23rd day of March, 1947, by delivering to him personally in Los Angeles County, State of California, a true and certified copy of this writ with all endorsements thereon.

/s/ H. E. Rodenmayer"

This was sworn to before a notary public on March 28, 1947.

On April 17, 1947, by judgment and decree filed April

19, 1947, Esther B. Robinson was granted an absolute divorce from Joseph E. Robinson and the custody of the two minor children of the parties by the district court for Scotts Bluff County. There was no appearance made by the defendant.

In the instant case hearing was had before the trial court on March 22, 1950, on the petition of the plaintiff, the answer and cross-petition of the defendant wherein the defendant charged the plaintiff with extreme cruelty and prayed for a divorce, alimony, support money for herself and children, attorney fees, and costs, and on the plaintiff's reply. The only evidence offered and received was in behalf of the plaintiff. No evidence was offered by the defendant. The trial court, making reference to the summons outside of the state and return made thereon in the case of Esther B. Robinson v. Joseph E. Robinson, made the following findings: That there was a lack of appointment and authorization, by name or other designation endorsed on the writ, by the sheriff of Scotts Bluff County, Nebraska, of any person as his agent to serve the same; that said H. E. Rodenmayer, the person making the return on the summons, not having been lawfully appointed so to do, was wholly without power or authority to make a valid service of the summons; that the service as made by him so without authority and on Sunday was and is a nullity, and the court did not acquire jurisdiction to make and enter the decree of divorce in the case of Esther B. Robinson v. Joseph E. Robinson; and decreed that the marriage between the plaintiff, A. Rudyard Nelson, and Esther B. Robinson be declared null and void and to have no legal force or effect.

On March 27, 1950, the trial court made an order to the effect that the same being one of the days of the regular January 30, 1950, term of the court, the court, on its own motion, set aside the order of March 22, 1950, and continued the cause for further hearing. On July 12, 1950, the matter came on for further hearing. No

evidence was taken. The trial court dismissed the plaintiff's petition, granted the defendant an absolute divorce on her cross-petition, made certain allowances for support of the defendant, and entered a judgment for unpaid support money to the date of June 21, 1950, and an allowance for additional attorney fees.

Upon the overruling of the plaintiff's motion for new trial, the plaintiff appeals.

The plaintiff contends the trial court erred in holding and adjudging that the summons served by H. E. Rodenmayer, a person not appointed to serve the same by the sheriff of Scotts Bluff County, Nebraska, as his agent, upon the defendant Joseph E. Robinson in the State of California, was valid.

Section 25-507, R. R. S. 1943, provides: "The summons shall be served by the officer to whom it is directed, who shall endorse on the original writ the time and manner of service. It may also be served by any person not a party to the action, appointed by the officer to whom it is directed. The authority of such person shall be endorsed on the writ. When the writ is served by a person appointed by the officer to whom it is directed, or when the service is made out of this state, the return shall be verified by oath or affirmation."

Section 25-521, R. R. S. 1943, provides: "In all cases where service may be made by publication, and in all other cases where the defendants are nonresidents, and the cause of action arose in the state, suit may be brought in the county where the cause of action arose, and personal service of the summons may be made out of the state by the sheriff or some person appointed by him for that purpose. In all cases where service of a summons is made on a person without the state, proof of such service must be made by affidavit, stating the time and manner of service. Such service shall be made in the same manner as summonses are served on parties residing within this state."

In the case of Republican Valley R. R. Co. v. Sayer,

13 Neb. 280, 13 N. W. 404, the court, in making reference to section 68 of the code which is analogous to section 25-507, R. R. S. 1943, said: "Where a summons in error is directed to the sheriff of a particular county, it cannot be served by a private person unless appointed for that purpose by such sheriff."

In the instant case it will be observed that the sheriff of Scotts Bluff County did not make an appointment of any person in Los Angeles County, State of California, as his agent to serve the writ. The return made by H. E. Rodenmayer discloses that he was not appointed agent by the sheriff of Scotts Bluff County to serve the summons. It is not apparent on the return of the summons whether he is a deputy sheriff in the office of the sheriff of Los Angeles County, California, a private person, or the sheriff.

The instant case is not analogous to the case of Reed v. Good, 114 Neb. 777, 209 N. W. 619. In that case the appointing sheriff in Nebraska appointed the sheriff of Woodbury County, or any deputy sheriff of Woodbury County, of the State of Iowa. This court held that when served by a deputy personally, upon a party to the action, the service was sufficient to meet the requirements of the law. In the instant case such is not the fact.

Statutes authorizing personal service on nonresident defendants out of the state usually provide by whom such service may be made, and service, to be valid, must be made by the person or officer designated. Service outside of the state by a sheriff of a foreign jurisdiction, without appointment by the sheriff of the county in which the suit was brought, as required by statute, is insufficient. See 50 C. J., Process, § 216, p. 544.

Statutes prescribing the manner of service of summons are mandatory and must be strictly pursued. See, Sanford v. Edwards, 19 Mont. 56, 47 P. 212, 61 Am. S. R. 482; Nelson v. Chittenden, 53 Colo. 30, 123 P. 656, Ann. Cas. 1914A 1198; Simonson v. Typer, 285 F. 240; Darling & Co. v. Burchard, 69 N. D. 212, 284 N. W. 856; 50 C. J.,

Process, § 76, p. 482; 21 R. C. L., Process, § 16, p. 1274; 42 Am. Jur., Process, § 46, p. 38.

This state has prescribed the manner of service of process by explicit statutory provisions. These provisions are mandatory and must be complied with. The district court for Scotts Bluff County could not, and did not, obtain jurisdiction until the defendant Joseph E. Robinson received notice of the action by the means of process of the kind, and served in the manner, the laws of this state prescribe.

We hold that the service of the summons upon the nonresident defendant, Joseph E. Robinson, did not meet the requirements of the statutes of this state, and was insufficient to confer jurisdiction upon the trial court. The judgment of the trial court in dismissing the plaintiff's petition for the annulment of the marriage between the plaintiff and defendant is reversed, and the cause is remanded with directions to the trial court to enter judgment in conformity with this opinion.

In Willits v. Willits, 76 Neb. 228, 107 N. W. 379, 5 L. R. A. N. S. 767, the court held that in an action to annul a marriage brought by the husband, the wife is entitled to alimony pendente lite and counsel fees, that the marriage was valid until annulled by the court, and that until such time the husband was liable for the expenses of his family. The court also allowed a reasonable attorney's fee for the services of the defendant's attorneys in the Supreme Court. On the authority of the above-cited case, the defendant is entitled to a reasonable allowance for attorney's fees for the services of her attorneys in this court in the amount of $150, to be taxed as costs.

Other assignments of error need not be discussed.

REVERSED AND REMANDED WITH DIRECTIONS.

CHAPPELL, J., dissenting.

YEAGER, J., participating on briefs.

ARTHUR JENNINGS HANSON ET AL., APPELLANTS, V. CITY OF OMAHA ET AL., APPELLEES.
46 N. W. 2d 896

Filed March 23, 1951. No. 32920.

1. **Municipal Corporations.** It is the general rule that the streets of a city, whether acquired by condemnation or dedication, are subject to the power of vacation.
2. **Taxation.** Taxable property means property that may be legally taxed, or, stated otherwise, property which is not exempt from taxation.
3. **Municipal Corporations.** The provision found in section 14-375, R. S. 1943, set out in the opinion, includes any owner or party interested in property who may suffer recoverable damage by the proposed vacation of a street or alley.
4. ———. Compliance with the provision set out in the opinion, found in section 14-375, R. S. 1943, is an essential act to the valid enactment of an ordinance vacating a street or alley.

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

Swenson, Viren & Turner, for appellants.

Wells, Martin & Lane, Edward F. Fogarty, Edward Sklenicka, James M. Paxson, and *Herbert M. Fitle,* for appellees.

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

SIMMONS, C. J.

This is an action challenging the power of the city of Omaha to vacate certain streets and alleys by ordinance and to enjoin enforcement. The trial court denied relief. We reverse the judgment of the trial court and remand the cause.

The parties plaintiff to this action allege that they are citizens and residents of Omaha, fee owners of real estate in the city, and users of its streets and alleys, and that they have a particular interest in the streets purported to be vacated and their property will be ad-

versely affected. They sue for themselves and all others similarly situated.

The defendants in effect are two: The city of Omaha, hereinafter called Omaha, and the Home of the Good Shepherd of Omaha, Inc., hereinafter called the Home.

The charter provisions involved are sections 14-324 and 14-375, R. S. 1943. Claiming to act pursuant to either or both of those provisions, Omaha enacted ordinance No. 16354, vacating certain parts of two streets and an alley. Plaintiffs challenge the validity of this ordinance and seek to enjoin its enforcement.

It is admitted by the pleadings that the streets and alley involved in this vacation ordinance were originally a part of West Omaha. The plat and survey of West Omaha were recorded on July 5, 1866, and as of that date the owner dedicated "to the Public the Streets laid down and marked on said plat." West Omaha became a part of Omaha by ordinance in 1887 and 1897.

The first contention here is that these streets and alleys having been dedicated prior to statehood and prior to the enactment of the statutes and home rule charter here involved, the dedication constituted a contract between the donors and Omaha, and Omaha is without power to change the dedication.

We deem it necessary only to point out that the Territorial Legislature provided for the platting of property into lots, streets, etc., defined the effect of said platting, and provided that any such plat could be vacated in whole or in part under procedures there outlined. See Territorial Laws 1855 (2d Session), Part 1, c. V, p. 43, approved January 23, 1856. These provisions were reenacted with minor amendments in 1866, effective July 1, 1866. C. LIII, §§ 42-50, R. S. 1866.

It is the general rule that the streets of a city, whether acquired by condemnation or dedication, are subject to the power of vacation. 64 C. J. S., Municipal Corporations, § 1666, p. 38; 44 C. J., Municipal Corporations, § 3620, p. 895; 25 Am. Jur., Highways, § 118, p. 415; Lindsay v.

Omaha, 30 Neb. 512, 46 N. W. 627, 27 Am. S. R. 415. It is quite apparent that power to vacate existed when the plat and dedication were made. It is also apparent that the power exists now.

The question then comes as to whether or not Omaha has proceeded properly in the exercise of its power to vacate.

Section 14-324, R. S. 1943, is as follows: "The council is authorized to vacate or narrow any street, alley or thoroughfare, but such vacation thereof shall not be ordered except upon a petition of the owners of seventy-five per cent of the taxable foot frontage abutting upon the street proposed to be vacated and asking for such vacation. The council, upon the recommendation of the city planning commission, may, without any petition being filed therefor, by ordinance or resolution vacate any street or alley in the city. Whenever a street is vacated or narrowed the part so vacated shall revert to the abutting owners on the respective sides thereof."

It is admitted that the Home is a religious, educational, and eleemosynary corporation; that its properties are exempt from taxation; and that it is the owner of all the property abutting on the streets and alley affected by the challenged ordinance. It petitioned for the vacation of the streets and alley.

Omaha recited in the whereas of the ordinance that the owners of 100 percent of the taxable foot frontage abutting the streets and alley had petitioned for such vacation. The next question presented is: Is the Home the owner of the "taxable foot frontage" so as to validate this ordinance under the provisions of the above section? That turns upon the meaning of the word "taxable" as there used.

The constitutional provision is: "The property of the state and its governmental subdivisions shall be exempt from taxation. The Legislature by general law may exempt property owned by and used exclusively for agricultural and horticultural societies, and property

owned and used exclusively for educational, religious, charitable or cemetery purposes, when such property is not owned or used for financial gain or profit to either the owner or user. Household goods of the value of two hundred ($200.00) dollars to each family shall be exempt from taxation. The Legislature by general law may provide that the increased value of land by reason of shade and ornamental trees planted along the highway shall not be taken into account in the assessment of such land. No property shall be exempt from taxation except as provided in this section." Constitution, Art. VIII, § 2.

The statutory provision is: "The following property shall be exempt from taxes: (1) The property of the state and its governmental subdivisions; (2) Property owned by and used exclusively for agricultural and horticultural societies; (3) Property owned and used exclusively for educational, religious, charitable or cemetery purposes, when such property is not owned or used for financial gain or profit to either the owner or user; and (4) Household goods of the value of two hundred dollars to each family. The increased value of land by reason of shade and ornamental trees planted along the highway shall not be taken into account in the assessment of such land." § 77-202, R. R. S. 1943.

Exemption of property from taxation in the above classes then rests either on direct constitutional provision or legislative act on constitutional authority.

The plaintiffs argue here that, to be taxable, property must be subject to general taxation. The Home argues here that property cannot be exempt from taxation unless it is first taxable; that the Home's property is taxable but exempt from taxation by statute; and that in the case of the Home, its exemption comes not from ownership but from use.

There are provisions of our statutes that give indication of the legislative meaning: Section 77-1301, R. R. S. 1943, "All real property in this state *subject to taxation*

shall be assessed * * *"; section 77-1306, R. R. S. 1943, "Each county assessor * * * shall * * * take a list of all real property that shall have become *subject to taxation* * * *"; section 77-1317, R. R. S. 1943, "It shall be the duty of county assessors to cause all lands * * * that, for any reason, have not been assessed or have escaped taxation * * * when the same were *liable to taxation* * * *"; and section 77-1319, R. R. S. 1943, "A list of lands becoming *taxable* for the first time * * *." (Emphasis supplied.)

The Legislature obviously used the words "liable to taxation," "subject to taxation," and "taxable" as generally meaning one and the same thing.

Webster's New International Dictionary, Second Edition, defines "taxable" as "Capable of being taxed; liable by law to the assessment of taxes." By the same authority "exempt" means "not subject to."

We have not been cited to any of our decisions dealing directly with this question, although the Home cites our decision in Eddy v. City of Omaha, 72 Neb. 550, 101 N. W. 25, on rehearing, 72 Neb. 559, 102 N. W. 70, on second rehearing, 72 Neb. 561, 103 N. W. 692, wherein it appears that the property of a school district was included in counting the "taxable front feet" in an improvement district. The question there determined was whether or not the signature of the board by its president was sufficient to bind the district.

The courts of other jurisdictions have considered and decided the question. Their decisions support the rule that taxable property means property that may be legally taxed, or, stated otherwise, property which is not exempt from taxation. McKinney v. McClure, 206 Iowa 285, 220 N. W. 354; City of Buffalo v. Le Couteulx, 15 N. Y. 451; Steel v. Fell, 29 Or. 272, 45 P. 794; Custer County v. Yellowstone County, 6 Mont. 39, 9 P. 586; Williams v. School District No. 32, 56 Wyo. 1, 102 P. 2d 48; State v. Birmingham Southern Ry. Co., 182 Ala. 475, 62 So. 77, Ann. Cas. 1915D 436; Pullman Car &

Mfg. Corporation v. Hamilton, 229 Ala. 184, 155 So. 616; State ex rel. Harrington v. City of Pompano, 136 Fla. 730, 188 So. 610. We follow that rule as consistent with our constitutional and legislative provisions. It follows that the ordinance here assailed cannot be sustained under the "petition of the owners of seventy-five per cent of the taxable foot frontage abutting upon the street" provision of section 14-324, R. S. 1943.

This brings us to the third contention of plaintiffs.

While Omaha and the Home contend here that the ordinance was initiated and is valid under the provisions of section 14-324, R. S. 1943, nevertheless they contend also that it is valid under the provisions of section 14-375, R. S. 1943. That section is: "Upon the recommendation of the city planning commission, the city council may, by ordinance or resolution, vacate any street or alley within any such city, without any petition being filed therefor. *Before any such street or alley shall be vacated, the council shall appoint a committee of at least three members thereof, who shall faithfully and impartially and after reasonable notice to the owners and parties interested in property affected by such vacation, assess the damages, if any, to such owners and parties affected.* They shall take into consideration the amount of special benefits, if any, arising from such vacation and shall file their report in writing with the city clerk. Any owner or party interested in property affected by such vacation, who shall file a written protest with such committee, may appeal from the adoption by the council of such appraisers' report in the manner provided in section 14-379, but such appeal shall not stay the passage of the ordinance or resolution vacating such street or alley. The award of appraisers shall be final and conclusive as the order of a court of general jurisdiction, unless appealed from."

Plaintiffs attack the ordinance under the section also because of the failure of Omaha to comply with that part of the statute emphasized above.

The ordinance purports to vacate 39th Street from Jones Street to Jackson Street and approximately halfway to Dewey Avenue, Jackson Street for approximately half a block east of 39th Street, and an alley for approximately half a block east of 39th Street between Jones and Jackson Streets. Stated otherwise, it leaves 39th Street as a dead end street for half a block south of Dewey; it leaves Jackson Street a dead end street for half a block west of 38th Avenue; and it changes an alley in the block between Jackson Street and Jones Street east of 39th Street from a T shape with openings on Jackson Street, 38th Avenue, and 39th Street, to an L shape with openings only on Jackson Street and 38th Avenue.

Some of the plaintiffs own property or have rights of use in property abutting on the dead end streets and that part of the alley not closed under the ordinance. They testify that it affects ingress and egress to their garages and damages their property otherwise. There is evidence that 39th Street has a better grade than other streets left open, and that its availability is necessary for heavy loads and for use in icy and snowy weather in reaching their property. Businessmen on Leavenworth Street, to the south of Jones Street, testify that the closing of 39th Street will detrimentally affect traffic from and to their business locations.

It is not disputed that the Home is the owner of all abutting property on the parts of the streets and alley proposed to be vacated and that the Home has waived all damages by reason of the vacating of the streets. Omaha and the Home take the position that "owners and parties interested in property affected by such vacation" means abutting property owners, and "property affected" means abutting property, and that since the abutting property owners (the Home) have waived all damages and since by the law, as they construe it, no one can be entitled to damages, it would be a useless thing, not required by the law, to comply with this

provision. They rely upon our decisions in Kittle v. Fremont, 1 Neb. 329; Enders v. Friday, 78 Neb. 510, 111 N. W. 140; Lee v. City of McCook, 82 Neb. 26, 116 N. W. 955; Van Valkenberg v. Rutherford, 92 Neb. 803, 139 N. W. 652; Burkley v. City of Omaha, 102 Neb. 308, 167 N. W. 72; Karlin v. Franciscan Sisterhood, 109 Neb. 711, 192 N. W. 122.

Plaintiffs rely upon our decisions in Steck v. Platte Valley Public Power & Irrigation Dist., 132 Neb. 822, 273 N. W. 268; Lowell v. Buffalo County, 119 Neb. 776, 230 N. W. 842; and Jones v. City of Aurora, 97 Neb. 825, 151 N. W. 958.

We are not here presented with the question of whether or not the plaintiffs, or any of them, are entitled to damages, but with the question of whether or not they are entitled to be heard on that question by a committee of the council "before" any streets or alleys "shall be vacated."

The provision here is not limited to "owners" of "abutting" property as it was in section 14-324, R. S. 1943. Here the provision is "owners *and* parties interested." Here the provision is property affected by such vacation, with no limitation to abutting property. Here the provision is obviously much broader than the one in section 14-324, R. S. 1943. It includes any owner or party interested in property who may suffer recoverable damage by the proposed vacation; it contemplates a notice, a hearing before the committee of the council, and a determination of his damages, if any, and a written finding of that fact. The section gives him a right of appeal which shall not stay the passage of the ordinance. All these steps, including the filing of the written report of the committee, are to be taken before the passage of the ordinance vacating the street. Compliance with the provision is an essential act to the valid enactment of the ordinance. That essential step was not taken here. It accordingly follows that the ordinance is invalid.

Plaintiffs are entitled to the injunction which they

seek. The judgment of the district court is reversed and the cause remanded with directions to enter a decree in accord with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

MESSMORE, J., participating on briefs.

EFFIE FRANKENBERGER, APPELLEE, V. LAURA IRENE HOLM ET AL., APPELLANTS.

46 N. W. 2d 901

Filed March 23, 1951. No. 32934.

1. **Appeal and Error.** On appeal from a decree in an action in equity the Supreme Court must retry the issues of fact, and on a trial de novo reach independent conclusions without regard to the conclusions reached by the district court.
2. **Partition.** In an action for partition it is the duty of the parties appearing, whether as plaintiff or defendant, to exhibit documentary proof of title, if any they have, and if they have no documentary evidence of title, to adduce other satisfactory and sufficient evidence in proof of their interest in the real estate in question.

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

W. G. Whitford and *James F. Brogan,* for appellants.

Elmer C. Rakow, for appellee.

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

YEAGER, J.

This is an action by Effie Frankenberger, plaintiff and appellee, against Laura Irene Holm and others, appellants, for the partition of 400 acres of land in Antelope County, Nebraska.

A decree was entered allowing partition in accordance with the prayer of the petition. From this decree and an order overruling a motion for new trial which was duly filed the defendants have appealed.

In order to understand what is before the court it becomes necessary to set forth the pertinent substance of the petition. This substance will be set forth by reference to the paragraphs for reasons which will become apparent later herein.

In paragraph 1 it is declared that on September 6, 1948, Frank Bergren died testate and at the time of his death he was the fee simple owner of the 400 acres of land in question.

In paragraph 2 it is declared that the will of Frank Bergren was duly admitted to probate and Charles Frankenberger was appointed and has qualified as executor; that the time for filing claims against the estate has expired and an order barring claims has been entered; and that the personal property in the possession of the executor is ample to pay debts, costs, and expenses of administration.

In paragraph 3 it is declared that Frank Bergren had no children but that he left surviving his widow, Josephine Bergren; that he also left surviving a niece, six nephews, a sister-in-law, and three stepdaughters who were residuary legatees and devisees under his will; that the widow renounced the will and filed her election to take under the statutes and thus became the owner of one-half of the land in question, and that the remaining one-half became the property of the residuary legatees under the terms of the will.

In paragraph 4 it is declared that the widow, Josephine Bergren, died intestate on January 29, 1949, leaving as her sole and only heirs-at-law three children, Lillian Owen, Effie Frankenberger, and Perna Hill, which three children on the death of Josephine Bergren became the owners, share and share alike, of the one-half of the estate of Frank Bergren which came to Josephine Bergren by reason of her renunciation and election; and that Charles Frankenberger is the administrator of the estate.

Paragraph 5 requires no mention here.

Paragraph 6 declares what plaintiff contends are the respective interests of the parties in the lands. The effect of it is to say that Lillian Owen, Effie Frankenberger, and Perna Hill are the owners, share and share alike, of one-half and that these three as residuary legatees together with the other legatees are the owners of the other half.

There is an amendment to the petition the substance of which declares that on June 23, 1950, a decree was entered by the district court determining heirship and the right of descent of property in the estate of Frank Bergren; that the action in the district court in which the decree was entered was an appeal from the county court; and that in the action no supersedeas bond had been filed and that this decree is res judicata.

The prayer is the usual one in partition actions.

To the extent necessary to set it forth here the answer and cross-petition which is a single and unseparated document admits paragraphs 1 and 2 of the petition. It denies that Josephine Bergren renounced the provisions of the will of Frank Bergren and filed an election to take under the statutes.

It declares that the purported renunciation and election was not the voluntary act of Josephine Bergren; that she was mentally incompetent to make such a renunciation and election; and that the instrument of renunciation and election was procured by undue influence.

It declares that there was a valid and binding antenuptial agreement between Frank Bergren and Josephine Bergren whereby Frank Bergren was entitled to dispose of his estate as he chose by will.

It admits paragraph 4 of the petition. It denies paragraph 6.

The prayer is for partition of the estate as the parties would be entitled in the absence of renunciation and election by Josephine Bergren.

There is a reply which to the extent necessary to refer to it denies the allegations of the answer and

cross-petition to the extent that they are inconsistent with or contradict the petition.

The case came on for trial. No witness was called on behalf of plaintiff. The only evidence offered to sustain the cause of action pleaded in her petition was a decree of the district court described only as "Exhibit '1' " and as "the decree in the appeal of the estate matter, the matter of the Estate of Frank Bergren, Deceased." No foundation whatever was laid for the offer.

The exhibit was admitted over objection that it was irrelevant and immaterial. Following the admission of this exhibit the plaintiff rested.

On their behalf to support the allegations of their answer and cross-petition the defendants by their attorney stipulated as follows: "Mr. Whitford: You will stipulate, subject to its being material, that the petition for determination of heirship was filed in the County Court of Antelope County, on the 5th day of April, 1949, one of the petitioners being Effie Frankenberger, the plaintiff in this partition action; that the decree which has been offered in evidence as Exhibit '1' is the decree that was rendered in this Court on appeal from the decree of the County Court on the aforementioned petition. Mr. Rakow: That's right. Mr. Whitford: That the petition of plaintiff in the case on trial was filed on March 4, 1949; that in the aforementioned case, in which the decree which is here offered in evidence as Exhibit '1' was rendered, a supplemental motion for new trial was filed on August 23rd, 1950, which motion has not at this time been ruled on. Mr. Rakow: And I would like to offer the stipulation here that the decree entered in the appeal case No. 7947 in the matter of the Estate of Frank Bergren, Deceased, was entered on June 23rd, 1950, Motion for New Trial was filed therein and the same was overruled by this Court on the 11th day of August, 1950, and no supersedeas bond has been filed in said case. Mr. Whitford: No objection to that stipulation. Mr. Rakow: You agree to the stipulation that

I dictated? Mr. Whitford: Yes. I don't agree to the materiality of it; but it states facts."

On the pleadings which have been summarized and evidence which is fully reflected herein the district court decreed partition in substantial conformity with the prayer of the petition. The appellants ask this court to reverse the decree and direct decree of partition in conformity with the prayer of their answer and cross-petition.

This case comes here for trial de novo on the record presented. § 25-1925, R. R. S. 1943.

From an examination of the record in this light it is clear that all there is to sustain the cause of action pleaded by plaintiff is the decree in the estate of Frank Bergren, deceased, and the admissions contained in the answer and cross-petition of the appellants.

There are no admissions in the answer and cross-petition which may be said to sustain the cause of action pleaded by the plaintiff except as to the death of Frank Bergren; his testacy at the time of death; his ownership of the land at the time; that he had no children; that his estate was probated; and that on the death of Frank Bergren, Lillian Owen, Effie Frankenberger, and Perna Hill were the children of Josephine Bergren, his widow.

The following are other admissions of the answer but they do not in anywise tend to prove plaintiff's cause of action: It admits that Josephine Bergren died intestate on January 29, 1949, leaving as her sole and only heirs-at-law Lillian Owen, Effie Frankenberger, and Perna Hill. It also generally admits Josephine Bergren by her renunciation and election became the owner of one-half of the land in question and that the three named heirs succeeded to her interest. Elsewhere the appellants deny specifically and in detail that Josephine Bergren validly renounced the will and that her three named heirs succeeded to her interest in the land. The appellants, we think, should have the benefit of

its specifically pleaded denial and should not be bound by the general admission.

Assuming that exhibit 1 was sufficiently identified and properly admitted it was on its face proof only of interests in this land which came into being by the death of Frank Bergren, testate, and the renunciation and election of Josephine Bergren. This exhibit purported to fix the status of this land and of the then interested parties as of the date of the renunciation and election and not beyond. The record here is devoid of evidence, either by decree of heirship of the county court in the matter of the estate of Josephine Bergren, deceased, or otherwise, showing title in any person or persons to this land beyond the showing in exhibit 1.

With regard to partition, section 25-2177, R. R. S. 1943, provides: "Each of the parties appearing, whether as plaintiff or defendant, must exhibit his documentary proof of title, if he has any, and must file the same, or copies thereof, with the clerk."

It is pointed out in Kazebeer v. Nunemaker, 82 Neb. 732, 118 N. W. 646, that this is not jurisdictional but no case has gone so far as to say that proof of title or interest in real estate is not an essential element of proof in an action for partition.

It must be said that the evidence is insufficient to sustain plaintiff's action for partition.

The evidence is in like manner insufficient to sustain the cross-action of the appellants for partition. The other phases of the cross-action find no support whatever in the evidence.

The decree of the district court is reversed and the cause remanded.

REVERSED AND REMANDED.

MESSMORE, J., participating on briefs.

MELVIN D. HUGHES, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.

46 N. W. 2d 904

Filed March 23, 1951. No. 32960.

1. **Rape.** No force on the part of the defendant, or resistance on the part of the female, is essential to constitute the crime of rape, or of an assault with intent to commit that offense, when it is alleged and proved that the female is under the statutory age of consent and the defendant is at least 18 years old.
2. **Indictments and Informations.** Where a statute makes either of two or more distinct acts connected with the same general offense, and subject to the same measure and kind of punishment, indictable separately and as distinct crimes when committed by different persons, or at different times, they may, when committed by the same person at the same time, be coupled in one count as constituting one offense.
3. **Rape.** In a prosecution for assault with intent to commit rape, it is not essential to a conviction that the prosecutrix should be corroborated by the testimony of other witnesses as to the particular act constituting the offense. It is sufficient if she be corroborated as to material facts and circumstances which tend to support her testimony, and from which, together with her testimony as to the principal fact, the inference of guilt may be drawn.

ERROR to the district court for Gage County: CLOYDE B. ELLIS, JUDGE. *Affirmed.*

William N. Jamieson and *Francis R. Pane,* for plaintiff in error.

Clarence S. Beck, Attorney General, and *Clarence A. H. Meyer,* for defendant in error.

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

SIMMONS, C. J.

Stated generally, plaintiff in error, herein called defendant, was charged with assault with intent to commit rape. Trial was had resulting in a verdict of guilty. Motion for a new trial was made and overruled. Defendant was sentenced. He brings the cause here by

petition in error. We affirm the judgment of the trial court.

In many matters the evidence presents no dispute as to the facts.

The complaining witness, hereinafter called the witness, was at the time here involved past 13 and not 14 years of age, and living at home with her father and mother a few blocks west and a block south of 6th and Court Streets in Beatrice, Nebraska. The defendant was a married man 35 years of age, and lived with his wife and two children in the northeast part of Beatrice on 13th Street, 7 blocks east and 11 blocks north of 6th and Court Streets.

The witness weighed 105 pounds and was 5 feet 4½ inches tall. The defendant weighed 170 pounds and was 6 feet tall.

The defendant, on direct examination as a witness in his own behalf, testified that he had been thrice convicted of a felony.

The witness had worked as a baby sitter caring for children during the temporary absence of parents. On one occasion prior to the events here involved, she had cared for defendant's children and another's children. That is the only acquaintance of the witness and the defendant.

On August 26, 1950, the witness was engaged as a baby sitter for that evening and went with defendant to his home. Defendant and his wife returned home between 9:30 and 10 p. m. Defendant then started to take the witness home in an automobile. They went south 11 blocks, thence west 7 blocks on Court Street toward the witness' home. At 6th and Court Streets, a principal intersection in the business area, the car turned and went south 2 to 4 miles, turned west on a side road, and stopped with lights out. The defendant states that he took witness away from the direct route home and followed a route at her suggestion, and stopped the car at her request. They remained there for 30

minutes according to the defendant. They then returned in part by the route they had followed on the trip out and reached the witness' home about 11 p. m.

There is dispute as to what happened. The witness states the defendant began making advances early on the trip out. The defendant testifies that the witness made advances to him. The witness testified in detail and without substantial variation to the facts that defendant, after the car was stopped in the country, forcibly removed all her clothing except her T shirt, handled parts of her body, exposed his own person, and undertook to have intercourse, first while she was being held down, and later holding her on his lap when he succeeded in penetration. She testified that she resisted throughout, threatened "trouble," and finally he desisted. Defendant testified that the witness made the advances to the extent of loosening her clothing, getting on his lap, and requesting intercourse, and he resisted throughout, argued with her, and threatened to have her arrested for molesting a married man. The witness admitted that one car passed the parked car in which she and defendant were and she made no outcry because of fear.

On the return home, the witness says she tried to get out at the police station and defendant prevented it. Defendant testified that he wanted to take her to the station and the witness persuaded him not to do so. On the witness stand, the defendant admitted "necking" and "kissing" while they were at the stop in the country. He made similar admissions to police officers.

The State's evidence by the witness' mother is without dispute that when the witness reached home she was nervous, her hair disheveled, her clothing dirty, and she had been crying. She made immediate complaint to her mother. The mother and a physician testify to welts on her body on the inside of both legs near the crotch. The witness testifies that those marks were not there before the events of the evening. The physi-

cian testifies to like welts on her face and to her nervous condition.

Complaint immediately was made to the police and later the next morning the witness confronted the defendant in the presence of officers when he made the admissions above referred to.

Defendant makes 29 assignments of error here. However, he groups them into certain classifications. We undertake to consider them as made in that way.

By information it was charged that defendant, being a male person of the age of 18 years and upwards, to wit, of the age of 35 years, knowingly, unlawfully, and feloniously did make an assault upon the witness, a female child under the age of 15 years, to wit, of the age of 13 years, and did bruise and mistreat the witness with the intent feloniously, forcibly, and against her will to ravish, carnally know, and abuse the witness, contrary to the statute.

Section 28-408, R. R. S. 1943, provides: "Whoever shall have carnal knowledge of any other woman, or female child, than his daughter or sister, as aforesaid, forcibly and against her will; or if any male person, of the age of eighteen years or upwards, shall carnally know or abuse any female child under the age of eighteen years, with her consent, unless such female child so known and abused is over fifteen years of age and previously unchaste, shall be deemed guilty of rape, and shall be imprisoned in the penitentiary not more than twenty nor less than three years."

Section 28-409, R. R. S. 1943, provides: "Whoever assaults another with intent to commit a murder, rape, sodomy or robbery upon the person so assaulted, shall be imprisoned in the penitentiary not more than fifteen nor less than two years."

The trial court instructed the jury as to the elements that must be proved by the State to establish the offense of assault with intent to rape forcibly and against the

will of the female, in which no reference was made to the age of either the defendant or the witness.

The court further instructed the jury in substance that if the jury found that the State had failed to prove an assault with force and against the will of the witness, and "* * * if you find from the evidence beyond a reasonable doubt that an assault was made by the defendant upon (the witness) at the time and place as charged by the State, even though not forcibly and against her will or even with her consent, with the intent on the part of the defendant, then and there, to ravish and carnally know her, and you further find from the evidence beyond a reasonable doubt that at the time of said assault the defendant was of the age of 18 years or upwards and the said (witness) was under the age of 15 years, then you should find the defendant guilty of an assault with intent to commit a rape but without force.

"If you do not find the elments herein stated and each of them to be true beyond a reasonable doubt, then you should find the defendant not guilty of the charge of assault with intent to commit rape."

The jury found the defendant guilty of assault with intent to commit rape "but without force."

Defendant first charges that there being no common law crimes in this state, there is under these statutes no crime of assault with intent to commit rape without force; that a charge of assault with intent to commit rape with force does not include the offense of assault with intent to commit rape without force; and that accordingly the court erred in submitting to the jury the issue of assault with intent to commit rape but without force.

The first contention was definitely answered in Hall v. State, 40 Neb. 320, 58 N. W. 929, wherein we held: "* * * no force on the part of the defendant, or resistance on the part of the female, is essential to constitute the crime of rape, or of an assault with intent to commit that offense, when it is alleged and proved that the

female is under the statutory age of consent and the defendant is at least eighteen years old." See, also, Wood v. State, 46 Neb. 58, 64 N. W. 355; Edwards v. State, 69 Neb. 386, 95 N. W. 1038; Liebscher v. State, 69 Neb. 395, 95 N. W. 870.

The second contention, as well as the first, is answered in Hubert v. State, 74 Neb. 220, 104 N. W. 276, on rehearing, 74 Neb. 226, 106 N. W. 774; Baxter v. State, 80 Neb. 840, 115 N. W. 534; and Cook v. State, 111 Neb. 590, 197 N. W. 421, wherein we held: " 'Where a statute makes either of two or more distinct acts connected with the same general offense, and subject to the same measure and kind of punishment, indictable separately and as distinct crimes when committeed by different persons, or at different times, they may, when committed by the same person at the same time, be coupled in one count as constituting one offense.' " See, also, Smith v. State, 127 Neb. 776, 257 N. W. 59. It is noted that in the Baxter and Cook cases the question was presented by an attack on instructions. In the Cook case we said: "The information and evidence were sufficient to sustain a conviction under either provision of the criminal law. Only one act of carnal knowledge was charged or proved. The time, place and parties were the same, no matter how the carnal act was committed. In any event there could only be one conviction and one punishment. One trial should be sufficient, if defendant violated the law in either of the ways condemned by statute."

The rules applicable to a charge of rape in this regard apply to a charge of assault with intent to commit rape. We see no merit in this group of assignments.

At the close of the State's case-in-chief and again at the close of all the evidence defendant moved that the jury be instructed to return a verdict of not guilty on the ground that the evidence was not sufficient to sustain a conviction, and in particular that there was not sufficient corroboration. By groups of assignments of error

here defendant contends that there is not sufficient evidence of intent or of corroboration, and that the evidence of the State is consistent with a hypothesis of innocence.

The rule is: "In a prosecution for rape, it is not essential to a conviction that the prosecutrix should be corroborated by the testimony of other witnesses as to the particular act constituting the offense. It is sufficient if she be corroborated as to material facts and circumstances which tend to support her testimony, and from which, together with her testimony as to the principal fact, the inference of guilt may be drawn." Fager v. State, 22 Neb. 332, 35 N. W. 195. This rule has been repeatedly followed down to and as late as Prokop v. State, 148 Neb. 582, 28 N. W. 2d 200, 172 A. L. R. 916. The rule applies to cases involving assault with intent to commit rape. Wheeler v. State, 106 Neb. 808, 184 N. W. 883; Beer v. State, 129 Neb. 366, 261 N. W. 824; Haynes v. State, 137 Neb. 69, 288 N. W. 382. See, also, Aller v. State, 114 Neb. 59, 205 N. W. 939; Frank v. State, 150 Neb. 745, 35 N. W. 2d 816.

In the light of the fact that the larger part of defendant's brief is devoted to these questions, we have heretofore summarized the evidence as to those matters upon which the witnesses agree or about which there is no dispute and as to those matters about which the witnesses disagree.

Under these rules and weighing the evidence either as it was at the close of the State's case-in-chief or at the close of all the evidence, we find it ample to sustain the submission of the case to the jury and to sustain the jury's verdict. We find no merit in defendant's assignments above discussed. There is no merit in defendant's contention that the verdict should be set aside because of insufficient evidence to sustain it.

The judgment of the trial court is affirmed.

AFFIRMED.

CARL SMITH, APPELLEE, V. JOHN BROOKS, APPELLANT, THOMAS COUNTY BANK, INTERVENER-APPELLANT.

47 N. W. 2d 389

Filed March 30, 1951. No. 32848.

1. **Pleading: Appeal and Error.** Where a party relies upon a variance between the pleadings and the proof to defeat a recovery, that question should be raised at some time during the progress of the trial, and, unless it is so raised and suggested to the trial court, it will not be considered on appeal in this court.
2. **Mortgages.** The mortgagee's burden of proving that the mortgage was properly recorded, or the burden of proving, by one who asserts it, that the recordation was invalid, may be sustained by any competent evidence sufficient to establish the necessary facts.
3. **Garnishment.** A garnishing creditor acquires no greater rights by garnishment than had his debtor.
4. **Evidence.** By the Uniform Judicial Notice of Foreign Law Act, the courts of this state are required to take judicial notice of the common law and statutes of every state, territory, and other jurisdiction of the United States.
5. **Pleading.** In order for a litigant to invoke the benefits of such foreign law it is required that he give reasonable notice in the pleadings or otherwise to the adverse party of his intention so to do, such notice being a prerequisite to offering proof of such foreign law or asking the court to take judicial notice thereof.
6. **Chattel Mortgages.** Where a mortgagor removes property from another state into this state, which has been encumbered by a mortgage duly recorded and valid under the laws of the former state, such removal does not invalidate the recording of such mortgage, nor necessitate the recording of it again in the county in this state to which the mortgagor has removed with the property.
7. ———. The constructive notice imparted by the recording of such mortgage, by the law of comity between the different states, is not confined to the county or state where the mortgage was executed and the property then was.
8. ———. A chattel mortgage duly executed in the state where the chattels were located at the time of its execution and recordation creates a lien that is not lost when the chattels are moved into this state and consigned to a commission company to be sold on the public market with the consent of the mortgagee conditioned on an agreement that the proceeds of the sale will be remitted to the mortgagee to apply on the mortgage debt.
9. **Case Overruled.** Pennington County Bank v. Bauman, 87 Neb.

25, 126 N. W. 654, is overruled insofar as it conflicts with this opinion.

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

Finlayson, McKie & Kuhns, for appellants.

Gross, Welch, Vinardi & Kauffman, for appellee.

Kennedy, Holland, DeLacy & Svoboda, amici curiae.

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

MESSMORE, J.

The plaintiff, Carl Smith, instituted this action in the district court for Douglas County against John Brooks, defendant, for breach of a written contract by the terms of which the defendant agreed to sell to the plaintiff certain steers. The plaintiff prayed for damages. When the action was filed an order of attachment was entered and garnishment summons was served on the Johnson Commission Company, a copartnership in Omaha, the cattle having been consigned to it by the defendant to be sold on the market. The commission company filed an answer admitting it received the cattle and sold them on the market, and stated that pursuant to summons in garnishment it had withheld $3,050 out of the proceeds of the sale subject to the order of the court and caused the balance of the proceeds to be forwarded to the Thomas County National Bank for the account of John Brooks; alleged that the said bank had served notice on this answering garnishee that it claimed to be entitled to the sum of $3,050 by reason of a chattel mortgage and that the balance of the indebtedness thereon exceeded that amount; further alleged that for the protection of this answering garnishee an order should be entered setting a time within which the bank might intervene in this action and present to the court its claim to said fund; and prayed that upon compliance with

the orders as might be entered by the court it be discharged as garnishee.

The Thomas County National Bank filed a petition in intervention wherein it claimed the proceeds from the sale of the cattle by virtue of a chattel mortgage held by it covering the cattle in question, executed and recorded as required by the laws of Kansas.

The plaintiff filed an answer to the petition in intervention in the form of a general denial, and a denial of priority of the mortgage as pleaded in the petition in intervention; alleged that the intervener consented to the removal of the cattle from the State of Kansas and that the same be sold in the State of Nebraska; and prayed dismissal of the petition in intervention.

Hearing was had to the court. The court entered judgment that the garnishee held the sum of $3,050 as the property of the defendant. It directed the amount be paid to the clerk of the court to be held pending further order of the court, and upon so doing the garnishee be discharged. It dismissed the petition in intervention.

The intervener bank's motion for new trial was overruled, and the bank appeals.

For convenience we will hereafter refer to Carl Smith as the plaintiff, to John Brooks as the defendant, to the Thomas County National Bank as the bank, to the Johnson Commission Company, a copartnership, as the commission company, and to the United States National Bank of Omaha as the Omaha bank.

The record discloses that on August 8, 1949, the plaintiff and defendant entered into a written agreement whereby the defendant agreed to sell and deliver to the plaintiff 180 or 181 head of steers on August 11, 1949. One thousand dollars was paid down and payment received. This agreement was signed by the defendant. The plaintiff informed the defendant in writing that he would receive the cattle for loading on the Thursday following. The cattle were not delivered.

The bank, on December 13, 1948, loaned the defendant $25,000 evidenced by a promissory note in the same amount executed and delivered on the same date, due June 13, 1949, renewed June 17, 1949. This note was secured by a chattel mortgage dated December 13, 1948, which was recorded May 7, 1949. This chattel mortgage covered the same steers mentioned in the contract between the plaintiff and defendant. The mortgage provided further that "any future advances of money made while this chattel mortgage is in force and effect by the mortgagee or assignee to the mortgagor, not exceeding in the aggregate the sum of $35,000.00, shall be secured by this mortgage equally to the same extent and with the same priority as the amount originally advanced on the security of this mortgage."

Between the dates of December 13, 1948, and the due date of the promissory note, the bank advanced to the defendant certain money, taking notes of the defendant with no additional security other than the chattel mortgage heretofore referred to. On August 15, 1949, the defendant was indebted to the bank in the amount of $37,000.

W. D. Ferguson, president of the bank, testified that he and the defendant had a conversation with reference to shipping the cattle to the Omaha market for sale, and it was agreed that on completion of the sale the proceeds derived therefrom were to be credited to the account of the bank in payment of the mortgage indebtedness owing by the defendant to the bank, through the bank's correspondent bank in Omaha, the United States National Bank. On August 19, 1949, the bank received notice of credit from the Omaha bank, indicating that the commission company had passed to the credit of the bank the sum of $29,216.92. Prior to receiving the credit, defendant's account with the bank was overdrawn $108.

On August 20, 1949, the defendant contacted the bank

with reference to making arrangements to take care of the indebtedness owing by him to it. This was done by applying $26,500 on the indebtedness, leaving a balance in the account of the defendant of approximately $2,500, and a balance owing the bank of $12,000.

The bank over a period of 15 years had loaned money to the defendant, a farmer and cattle raiser, so that he could purchase cattle and feed to fatten them, then sell them and pay off the mortgage or mortgages wherein the cattle were given as security with the proceeds of the sales.

Defendant testified that he instructed the commission company to send the proceeds of the sale of the cattle directly to the bank to be applied on the mortgage. Defendant knew that the bank had received the proceeds of the sale, exclusive of the amount attached and garnished, and that the money was credited to his account. For the balance of the indebtedness, after the arrangement for payment of the same was made, he gave the bank a note in the amount of $12,000.

The bank had no notice or knowledge of the agreement between the defendant and the plaintiff whereby defendant agreed to sell the steers to plaintiff, until defendant informed the bank that the commission company, by garnishee process, withheld the amount of $3,050 from the proceeds of the sale.

Plaintiff testified that he had no knowledge of the mortgage on the steers in question until he was called by counsel in Omaha, and suit was brought in his behalf against defendant.

The plaintiff is a resident of Kansas, and at times resides in Denver, Colorado. He is engaged in farming and the selling of livestock. The defendant is a resident of Kansas, and is engaged in farming and the selling of livestock. The Thomas County National Bank of Colby, Kansas, is a banking corporation doing business in the State of Kansas. The chattel mortgage in question was recorded in the State of Kansas.

The intervener bank assigns as error the following: (1) The trial court erred in finding that the proceeds of the sale of the livestock in the hands of the garnishee were the property of the defendant. (2) The court erred in finding that the rights of the plaintiff as a garnishing creditor were superior to the rights of the intervener bank as a chattel mortgagee. (3) The trial court erred in dismissing the petition in intervention and in failing to direct the garnishee to pay the amount of $3,050 to the intervener.

The plaintiff contends that the burden of proof is on the intervener bank to prove by a preponderance of the evidence the validity of the mortgage and its recordation, and intervener's title to the fund in question. This contention is based on the following: The petition in intervention alleged that the chattel mortgage in question was duly recorded in Sherman County, Kansas, while the evidence shows it was recorded in Thomas County, Kansas; further, that there is no evidence as to the defendant's residence either in Sherman County or Thomas County, Kansas. The defendant testified he resided in Brewster, Kansas. In addition, the intervener did not seek to amend its petition so as to allege the residence of the defendant in Thomas County, and the recording of the mortgage there.

Reference is made to section 58-301, General Statutes of Kansas, 1935, on recordation of chattel mortgages, also section 36-301, R. S. 1943, of the Nebraska statutes on the same subject, as the same might apply with reference to this assignment of error.

Section 25-12,101, R. R. S. 1943, provides: "Every court of this state shall take judicial notice of the common law and statutes of every state, territory and other jurisdiction of the United States."

Section 25-12,104, R. R. S. 1943, provides: "Any party may also present to the trial court any admissible evidence of such laws, but, to enable a party to offer evidence of the law in another jurisdiction or to ask

that judicial notice be taken thereof, reasonable notice shall be given to the adverse parties either in the pleadings or otherwise." The foregoing cited sections of the statute are with reference to the Uniform Judicial Notice of Foreign Law Act.

In the case of Prudential Ins. Co. v. Shumaker, 178 Md. 189, 12 A. 2d 618, in interpreting a like section as section 25-12,104, R. R. S. 1943, contained in the Maryland statutes, the court said: "* * * in order for a litigant to invoke the benefits of such foreign law it required * * * that he give reasonable notice in the pleadings or otherwise to the adverse party of his intention so to do, such notice being a prerequisite to offering proof of such foreign law or asking the court to take judicial notice thereof. In the present case, the question of what constitutes reasonable notice under the statute does not arise, for the reason that the record is entirely devoid of anything tending to show that the privileges accorded by the statute were invoked by appellant, and this we cannot assume. It follows from what we have said that the rights of the parties in the present case must be determined by the law of Maryland." See, also, The Maccabees v. Lipp, 182 Md. 190, 34 A. 2d 424; Fardy v. Mayerstein, 221 Ind. 339, 47 N. E. 2d 315.

In interpreting the Uniform Judicial Notice of Foreign Law Act, this court held that in the absence of the common law or statutes of any other jurisdiction in the United States being pleaded and presented we will presume the common law or statutes of such other jurisdiction to be the same as ours. See Scott v. Scott, 153 Neb. 906, 46 N. W. 2d 627. It is apparent that the law applicable in the instant case is the law of Nebraska.

No objection was made to the offer of proof of the recording of the mortgage in Thomas County. No motion was made to dismiss on the ground that the proof varied from the pleadings, or on the ground that there was failure to establish residence of the defendant in the county where the mortgage was recorded. It appears

from the record that the matter was not presented to the trial court during the progress of the trial or on the motion for new trial. On this phase of the case the following authorities are applicable.

Where a party relies upon a variance between the pleadings and the proof to defeat a recovery, that question should be raised at some time during the progress of the trial, and unless it is so raised and suggested to the trial court, it will not be considered on appeal in this court. See Spencer v. Wilson, 74 Neb. 459, 104 N. W. 930. See, also, Westing v. Chicago, B. & Q. R. R. Co., 87 Neb. 655, 127 N. W. 1076.

The proof of the recording of the mortgage and the residence of the defendant in the county where the mortgage was recorded was sufficient. The mortgagee's burden of proving that the mortgage was properly recorded, or the burden of proving, by one who asserts it, that the recordation was invalid, may be sustained by any competent evidence sufficent to establish the necessary facts. See Green Finance Co. v. Becker, 151 Neb. 479, 37 N. W. 2d 794.

In the instant case the plaintiff's claim to the proceeds of the sale rests on his status as a garnishing creditor. As such, he steps into defendant's position, and if the intervener bank is entitled to claim the proceeds of the sale as against the defendant, it is equally entitled to claim the proceeds of the sale as against the plaintiff.

It is a fundamental rule that the claim of a judgment creditor against the garnishee in a garnishment proceeding can rise no higher than that of the defendant as the principal debtor. See, Cahn, Wampold & Co. v. Carpless, 61 Neb. 512, 85 N. W. 538; Royal Tire Service v. Geo. W. Bell Co., 139 Neb. 238, 297 N. W. 88; Scurry v. Quaker Oats Co., 201 Iowa 1171, 208 N. W. 860. This rule also applies to a garnishing creditor.

It is the intervener bank's contention that where the facts show it had a valid, recorded chattel mortgage cov-

ering the steers in question as security for indebtedness owing by the defendant (mortgagor) to the bank, and by agreement between the bank and the mortgagor the steers were to be consigned to a commission company in Omaha, sold on the market, the commission company to be instructed to remit the proceeds of the sale to the mortgagee to be applied on the mortgage debt, under this state of facts the following rule is applicable: "It has been quite generally held that where the consent of the mortgagee to the sale of the mortgaged chattels by the mortgagor is conditioned upon the latter's agreement to apply the proceeds of the sale upon the mortgage debt, the mortgagee does not lose his right to the proceeds by such consent." Annotation, 36 A. L. R. 1384.

This rule was based on the holding in Farmers State Bank v. Anderson, 112 Neb. 413, 199 N. W. 728, 36 A. L. R. 1374. In that case the Farmers State Bank of Petersburg sued the Newman Grove State Bank to recover the proceeds of a sale of 20 head of steers upon which the plaintiff held a chattel mortgage securing a note of one Tom Anderson. The Newman Grove State Bank also held a note and mortgage of Tom Anderson. An arrangement was made between the plaintiff and Anderson that Anderson would ship the cattle evidenced by plaintiff's mortgage to Omaha to be sold, and apply the proceeds upon the note of the plaintiff. The net proceeds of the sale were deposited by the commission company in the Stock Yards National Bank of South Omaha to the credit of the Newman Grove State Bank. Thereafter Anderson gave his check on the Newman Grove State Bank payable to the plaintiff for the proceeds of the sale. The check was presented to the Newman Grove State Bank and payment was refused for the reason that the latter bank had applied the amount on a note Anderson owed it. The Newman Grove State Bank contended that the mortgagee, by consenting to the sale by the mortgagor, waived its mortgage lien. The court said: "This is undoubtedly good law so far

as any claim of the mortgagee against the chattels is concerned, as was distinctly held in Seymour v. Standard Live Stock Commission Co., 110 Neb. 185, but there is no such question here—the mortgagor had the right to sell and title passed to the purchaser—the present dispute concerns only the proceeds of the sale." The court held: "When a sale by the mortgagor of mortgaged chattels is made with the consent of the mortgagee, the former agreeing to apply the proceeds upon the mortgage debt, the mortgagor becomes the agent of the mortgagee with reference to such proceeds, which may be recovered by the mortgagee from any person having possession thereof not having a lawful claim thereto under or through the mortgagor."

In the cited case the proceeds of the sale actually came into possession of the mortgagor. In the instant case the defendant was at no time in possession of the proceeds of the sale.

In Scurry v. Quaker Oats Co., *supra,* the plaintiff held a chattel mortgage on certain corn. By arrangement between the mortgagor and the mortgagee the corn was sold to the Quaker Oats Company. Prior to a remittance of the proceeds being made by the Quaker Oats Company, a judgment creditor of the mortgagor garnished the company. The court said that the judgment creditor, by virtue of the garnishment, acquired only the right of the mortgagor. The sale was consented to by the mortgagee only on the condition that the proceeds of the same should come to him. The mortgagor was but the agent of the mortgagee to sell the corn and bring the money to him. If the mortgagor had in fact violated his agreement, that fact would have given neither him nor a garnishing creditor of his any right superior to that of the mortgagee. See, also, Acme Feeds, Inc. v. Daniel, 312 Ill. App. 330, 38 N. E. 2d 530; Muse, Spivey & Co. v. Lehman, 30 Kan. 514, 1 P. 804; J. I. Case Threshing Machine Co. v. Rominger, 77 Colo. 595, 238 P. 63.

The intervener bank contends that the lien on a chattel mortgage executed in another state is not lost when the property is brought into the State of Nebraska with the consent of the mortgagee and consigned to a commission house to sell the mortgaged property on the market and apply the proceeds of the sale to the mortgage indebtedness.

Nebraska does not have a statute providing for the refiling of chattel mortgages in this state where property is brought into the state encumbered with a valid chattel mortgage. Since the garnishing creditor was a resident of Kansas and in the state in which he transacted business with the defendant when the contract between him and the defendant was executed, this situation indicates clearly that he had constructive notice of the mortgage.

"A mortgagee is entitled to the proceeds of a sale of the mortgaged property by the mortgagor when the sale is made upon the condition, agreement, or understanding that the proceeds shall be paid to the mortgagee or his representative. This right of the mortgagee is superior to the claims of the mortgagor, the mortgagor's creditors, a purchaser, or other persons whose claims were inferior to the mortgage lien prior to the sale." 14 C. J. S., Chattel Mortgages, § 266, p. 891.

In Handley v. Harris, 48 Kan. 606, 29 P. 1145, 17 L. R. A. 703, 30 Am. S. R. 322, the court held: "Where a mortgagor removes property from another state into this state, which has been incumbered by a mortgage duly recorded and valid under the laws of the former state, such removal does not invalidate the recording of such mortgage, nor necessitate the recording of it again in the county in this state to which the mortgagor has removed with the property. The constructive notice imparted by the recording of such mortgage, by the law of comity between the different states, is not confined to the county or state where the mortgage was executed and the propery then was, but covers the property

wherever it is removed." See, also, Shapard v. Hynes, 104 F. 449, 52 L. R. A. 675; Mercantile Acceptance Co. v. Frank, 203 Cal. 483, 265 P. 190.

The plaintiff relies on the case of Pennington County Bank v. Bauman, 87 Neb. 25, 126 N. W. 654. The facts appear in a previous case (81 Neb. 782, 116 N. W. 669) to which we make reference. One Sigman, a resident of Nebraska, became indebted to a bank in Fremont. Later he moved to Pennington County, South Dakota, where he negotiated a loan with the plaintiff secured by a mortgage on certain livestock he owned. Thereafter, with the consent of the plaintiff, he loaded the livestock in South Dakota and consigned the same to himself at Long Island, New York. The stock was attached in transit in the railroad yards at Fremont by the Fremont bank. The court in the later opinion said: "* * * we are of opinion that where a mortgagee, residing in another state where his mortgage is recorded, permits the mortgagor to bring the property into this state, a bona fide attaching creditor of the mortgagor, without notice, will acquire a lien thereon by virtue of his attachment sued out in this jurisdiction superior to that of the mortgagee." The court cited with approval Snyder v. Yates, 112 Tenn. 309, 79 S. W. 796, 64 L. R. A. 353, 105 Am. S. R. 941, which held as before stated.

In Newsum v. Hoffman, 124 Tenn. 369, 137 S. W. 490, the court disapproved the holding in Snyder v. Yates, *supra,* and adopted the doctrine of comity, recognized in most of the states in the Union. There was no discussion in Snyder v. Yates, *supra,* between removal of mortgaged property with and without the consent of the mortgagee. It was assumed in that case that the property had been removed to Tennessee with the consent of the mortgagee, and it was held that under such facts the case was correctly decided. The holding in Newsum v. Hoffman, *supra,* was followed in Hamblen Motor Co. v. Miller & Harle, 150 Tenn. 602, 266 S. W. 99.

Subsequent to the holding in Newsum v. Hoffman,

supra, this court, in the case of Farmers & Merchants State Bank v. Sutherlin, 93 Neb. 707, 141 N. W. 827, 46 L. R. A. N. S. 95, Ann. Cas. 1914B 1250, cited by plaintiff, recognized a distinction where the mortgaged property was brought into this state from another state with the consent of the mortgagee and without the consent of the mortgagee, and did not follow the reasoning in Snyder v. Yates, *supra,* or Pennington County Bank v. Bauman, *supra,* but did follow Newsum v. Hoffman, *supra,* recognizing the law of comity and the conditions under which comity would be applied by this state.

In Bankers Finance Corp. v. Locke & Massey Motor Co., 170 Tenn. 28, 91 S. W. 2d 297, the court said: "The rule in this state, therefore, now is that the priority of a chattel mortgage validly executed and legally registered in another state, according to the laws of that state wherein the propery was and the mortgagor resided, will be recognized and enforced in this state against the claims of attaching creditors, or innocent purchasers here, unless the mortgagee has consented to the removal of the property into this state, or having knowledge of its removal here, has failed to assert rights under the mortgage within a reasonable time. * * * It is only when the property is kept or used here, that it is likely to become a basis of credit, ensnaring to residents here, who are without any notice, or means of notice of the state of its title."

It will be observed that the later Tennessee decisions repudiated the holding in Snyder v. Yates, *supra,* upon which the decision in Pennington County Bank v. Bauman, *supra,* was based. It is obvious that the holding in the case of Pennington County Bank v. Bauman, *supra,* must be overruled insofar as it conflicts with this opinion.

The plaintiff relies on Robbins v. Bostian, 138 F. 2d 622, wherein the seller sold a rock crusher under a conditional sales contract in Arkansas where such contracts need not be recorded. The buyer resided in Missouri.

The crusher was moved into Nebraska for use on a construction job. The buyer instituted voluntary bankruptcy proceedings. The seller did not record the conditional sales contract in Nebraska, as provided for by law. The controversy was between the seller and the trustee in bankruptcy. There was no evidence that the seller consented to the removal of the rock crusher to Nebraska, however, he learned of such fact five months prior to the bankruptcy proceedings and did nothing to comply with the Nebraska statutes applying to conditional sales contracts. The court said: "The trustee primarily represents the creditors of the bankrupt and although the contract was valid in Arkansas even as against subsequent creditors of the vendee, and was good in Nebraska as between the parties, it may nevertheless be invalid as to creditors becoming such in Nebraska while the property was there located and being operated without actual or constructive notice of appellant's (seller's) claim. Whether or not such creditors acquired rights above those of the vendee must be determined by the law of the situs of the property—in this case, the law of Nebraska." The opinion makes clear the exception is applicable only for the benefit of persons who deal with the purchaser or the property subsequent to its removal.

Other cases cited by the plaintiff have been considered and are readily distinguishable from the instant case.

It is the plaintiff's contention that the intervener waived any rights it may have had to assert with reference to the priority of its chattel mortgage against the garnishing creditor for the reason that the intervener relied upon the personal credit of the defendant and not upon the right of its lien on the proceeds of the sale. The proceeds of the sale of the cattle, less the amount tied up by garnishment process, were credited to the intervener bank by the Omaha bank, but the intervener did not retain that credit, and in turn credited the full amount thereof to the checking account of the defendant

in its bank. When the defendant came into the bank to discuss his indebtedness, the intervener did not require an application of the full amount received from the sale of the cattle. It permitted the defendant to retain a credit of $2,500, which plaintiff states to be $2,700, and to pay only $26,500 of the indebtedness, even though the intervener knew that $3,050 was held by virtue of garnishee process in Omaha and the defendant owed the bank $12,000.

We are not in accord with the plaintiff's contention in such respect for the reason that the lien of the mortgage terminated when the sale proceeds were received by the bank. The acts of the parties could not then constitute a waiver. It is obvious that these transactions did not negative the existence of the agreement or contract. The testimony of Ferguson is that even though the proceeds were credited to the defendant's account on the books of the bank, it still had control of the proceeds of the sale and could have applied the same against the mortgage debt. He further testified that before the bank would honor the defendant's checks there would have to be a new arrangement made. A new arrangement was made subsequent to the receipt of the sale proceeds by the bank. The new arrangement was a normal banking arrangement. We conclude that the intervener did not waive its lien as contended for by the plaintiff.

For the reasons given in this opinion the judgment of the trial court is reversed with directions to the trial court to enter judgment in favor of the intervener and to direct the clerk of the district court to pay to the intervener the amount of $3,050 paid into the office of the clerk of the district court by the garnishee.

REVERSED WITH DIRECTIONS.

IN RE APPLICATION OF RICHLING. W. D. RICHLING, DOING BUSINESS AS RICHLING TRANSPORT SERVICE, APPELLEE, V. TRANSIT, INC., ET AL., APPELLANTS.

47 N. W. 2d 413

Filed March 30, 1951. No. 32890.

1. **Constitutional Law: Public Service Commissions.** The power of the Nebraska State Railway Commission to regulate common carriers is derived from Article IV, section 20, of the Constitution. Such powers are plenary and self-executing in the absence of specific legislation on the subject.
2. ———: ———. Where the Legislature enacts specific legislation implementing Article IV, section 20, of the Constitution, the Nebraska State Railway Commission is subject to and governed by the provisions of such enactment.
3. **Public Service Commissions: Motor Carriers.** The Legislature, by sections 75-228, 75-229, and 75-230, R. R. S. 1943, has prescribed that common carriers by motor vehicle operating over the public highways of this state must have a certificate of convenience and necessity issued by the Nebraska State Railway Commission. Conditions precedent to the issuance of a valid certificate are the filing of a properly verified application in writing; the giving of notice by mail to all interested parties; a finding, after hearing, that applicant is fit, willing, and able to properly perform the proposed service; and that the proposed service, to the extent authorized, is or will be required by the present or future public convenience and necessity.
4. ———: ———. In the absence of specific legislation to the contrary, sections 75-228, 75-229, and 75-230, R. R. S. 1943, provide the exclusive method for obtaining a valid certificate of convenience and necessity.
5. ———: ———. A temporary certificate is subject to the same requirements under the statute as any other certificate of convenience and necessity. The statute makes no distinction between classes or types of certificates.
6. ———: ———. Where the Nebraska State Railway Commission fails to give notice to all interested persons of the filing of an application for a certificate of convenience and necessity, it has no power to issue a valid certificate of convenience and necessity, temporary or otherwise.
7. ———: ———. Section 75-410, R. R. S. 1943, has no relation to an application for a certificate of convenience and necessity by a common carrier in intrastate commerce by motor vehicle upon the public highways of the state.

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

Lawrence W. Moore, Einar Viren, and *R. E. Powell,* for appellants.

Jack Devoe, Harold M. Nelson, and *R. A. Vestecka,* for appellee.

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

CARTER, J.

This is an appeal from an order of the Nebraska State Railway Commission granting a temporary certificate of convenience and necessity.

On May 5, 1950, W. D. Richling, doing business as Richling Transport Service, filed an application with the commission in which he requested temporary authority to transport refined petroleum products in tank trucks as a common carrier in intrastate commerce over irregular routes as described in the application. On May 9, 1950, a temporary certificate of convenience and necessity was granted. On May 26, 1950, Transit, Inc., filed its motion to vacate and set aside the order of May 9, 1950, for the reason that it was void. Other common carriers, holding certificates of convenience and necessity permitting them to transport petroleum products in tank trucks between the points authorized in the temporary certificate granted to Richling, also filed motions to vacate the order of May 9, 1950, on the ground of its invalidity, and asserted their willingness and ability to provide efficient service under the certificates of convenience and necessity which they themselves held. On June 16, 1950, the motions to vacate and set aside the order of May 9, 1950, were overruled by the commission. Motions for a rehearing were duly filed and on June 20 and 23, 1950, they were overruled. Notice of appeal was filed on June 28, 1950.

The record shows that the Richling application was

handled by the commission ex parte, no notice having been given to any person other than the applicant. The primary question before us is whether the commission has the power to grant a temporary certificate of convenience and necessity without giving notice to other certificate holders whose rights are infringed upon by the order.

The order of the railway commission appealed from is an order subject to review by this court. In re Application of Airline Ground Service, Inc., 151 Neb. 837, 39 N. W. 2d 809.

The powers of the railway commission are derived from the Constitution. It is provided in part in Article IV, section 20, Constitution of Nebraska: "The powers and duties of such commission shall include the regulation of rates, service and general control of common carriers as the Legislature may provide by law. But, in the absence of specific legislation, the commission shall exercise the powers and perform the duties enumerated in this provision." In the absence of implementing legislation the powers of the railway commission under this section are plenary in character and self-executing. But when the Legislature acts within the scope of the constitutional provision, the railway commission is subjected to the provisions of such legislation. Rodgers v. Nebraska State Railway Commission, 134 Neb. 832, 279 N. W. 800.

The Legislature has prescribed the method by which the railway commission may issue certificates of convenience and necessity. Such legislative requirements are contained in sections 75-228, 75-229, and 75-230, R. R. S. 1943. These sections of the statute require that a common carrier by motor vehicle operating upon the public highways of this state have a certificate of convenience and necessity issued by the railway commission authorizing such operation. Such certificate may be issued upon application and the service of notice by mail by the commission upon all interested parties.

A hearing at which all interested parties shall have an opportunity to be heard is contemplated. In the present case no notice was served, no opportunity to be heard by those interested was given, and no hearing held except an ex parte hearing before the commission. The appellants contend that this does not meet the requirements of the quoted sections of the statute.

It will be observed that the quoted sections of the statute make no distinction between temporary and permanent certificates of convenience and necessity. The purpose of notice to interested persons is to give opportunity for hearing before certificates of convenience and necessity, which are or may be injurious to the rights of others, are issued. It is evident that a temporary certificate, improvidently issued, may be as injurious as a permanent one. This is particularly true where it appears that the duration of a temporary certificate is not defined and may be kept in force for an indefinite period of time by the commission. The exercise of such powers by the commission is authorized by the cited statutes only after notice and hearing. It is fundamental of course that the form of an order, or the label placed upon it, does not determine its character. It is the substance of the order which is controlling in determining its nature. In re Application of Airline Ground Service, Inc., *supra*. The designation of a certificate of convenience and necessity as temporary makes it no less a certificate of convenience and necessity, as that term is used in the cited sections of the statute. A temporary certificate, without limitations as to duration and kept in force at the whim of the commission, does something more than maintain a temporary status; it in fact grants important rights which, as in the case before us, may conflict with the rights of other certificate holders. The power of the railway commission to issue a certificate of convenience and necessity is grounded on the filing of an application, the giving of notice to

interested persons, and a hearing. Furthermore, the statute requires that the finding that applicant is fit, willing, and able to perform the proposed service, and that such service is or will be required by the present or future public convenience and necessity, must be sustained by evidence showing that the granting of the certificate was not arbitrary or unreasonable. In re Application of Moritz, 153 Neb. 206, 43 N. W. 2d 603; In re Application of Chicago, B. & Q. R. R. Co., 152 Neb. 367, 41 N. W. 2d 165. No evidence was taken in the present case and no bill of exceptions is here presented. Appellants having no notice of the ex parte hearing were, of course, thereby prevented from offering evidence, a right which the statute gives them. We are required to say that the railway commission failed to comply with sections 75-228, 75-229, and 75-230, R. R. S. 1943, and consequently failed to comply with the conditions precedent to the issuance of a valid certificate of convenience and necessity.

It is urged that the order and certificate were valid under the provisions of section 75-410, R. R. S. 1943. A careful reading of this section, when read in conjunction with section 75-409, R. R. S. 1943, to which it refers, shows that it relates to freight rates, tariffs, schedules, rate orders, and circulars. It has no application whatever to the denial or grant of a certificate of convenience and necessity to common carriers by motor vehicle in intrastate commerce upon the public highways of the state. We have previously held that the method of securing a certificate of convenience and necessity is controlled by section 75-229, R. R. S. 1943, unless specific statutory exceptions are made thereto. In re Application of Neylon, 151 Neb. 587, 38 N. W. 2d 552. We find no specific exception thereto and hold that sections 75-228, 75-229, and 75-230, R. R. S. 1943, control in the present case.

We conclude that the order of May 9, 1950, was not

issued in compliance with sections 75-228, 75-229, and 75-230, R. R. S. 1943, and is consequently void.

REVERSED.

MESSMORE, J., participating on briefs.

JOHN F. TREBELHORN, APPELLEE, V. RAY L. BARTLETT ET AL., APPELLANTS.

47 N. W. 2d 374

Filed March 30, 1951. No. 32903.

1. **Juries.** The extent to which examination of jurors may be pursued upon voir dire rests in the sound discretion of the trial court, and its ruling thereon will not be disturbed unless there has been an abuse of discretion to the prejudice of the complaining party.
2. **Conspiracy.** A conspiracy, like other facts, may be proved by direct or circumstantial evidence, and one means of proof is by showing overt acts or representations of the individuals charged with conspiracy. From the fact that different persons at different times by their acts or representations pursued the same object, the jury may, in connection with other facts, infer the existence of a conspiracy to effect that object.
3. ———. In an action for damages based upon a conspiracy to defraud by wrongful acts or false representations, the damages and not the unlawful confederation is the gist of the action, so that if damages are shown to have resulted to plaintiff from such acts or representations of defendants or any of them, then a judgment against such defendants may be sustained without establishing a conspiracy among them all.
4. ———. In such cases the proof of a conspiracy is of no consequence except as bearing upon rules of evidence or to bring within the ambit of liability someone who may have conspired but did not actively participate in the conduct itself.
5. ———. In other words, failure to prove an allegation of conspiracy does not affect the plaintiff's right to recover, there being sufficient independent grounds for recovery, although it limits those against whom recovery may be had to persons actively participating in the conduct complained of, and whose acts, as regards time, substance, and result, in fact united to produce the injury.

6. **Fraud.** Fraud may consist in words, acts, or the suppression of material facts with the intent to mislead or deceive.
7. ———. Where fraud or misrepresentation is material with reference to a transaction subsequently entered into by a person deceived thereby, it is assumed in the absence of facts showing the contrary that it was induced by the fraud or misrepresentation.
8. ———. To maintain an action for damages for false representation, plaintiff must allege and prove what representation was made; that it was false and so known to be by the defendant charged with making it, or was made without knowledge as a positive statement of known fact; that plaintiff believed the representation to be true; that he relied and acted upon it, and was thereby injured.
9. ———. A person is justified in relying upon a representation made to him where the representation is a positive statement of fact and where an investigation would be required to discover the truth.
10. ———. The general rule that fraud is not presumed but must be proved by the party alleging it does not mean that it cannot be otherwise proved than by direct and positive evidence. Fraud in a transaction may be proved by inferences which may reasonably be drawn from intrinsic evidence respecting the transaction itself, such as inadequacy of consideration, or extrinsic circumstances surrounding the transaction.
11. ———. Actionable fraud may not be predicated upon mere expressions of opinion as to value honestly made under circumstances that do not give another the right to rely thereon, but representations of positive facts pertaining to the quality of the thing sold or purchased and relied upon by the purchaser or seller, which are calculated to mislead and deceive, if proved false, constitute actionable fraud.
12. **Fraud: Damages.** The measure of damages recoverable by one who has been induced to sell corporate stock by fraud of the purchaser is the difference between the consideration received by the seller and the actual value of such stock at the time of the transaction, if the latter exceeds the former.
13. **Corporations.** The actual value of corporate stock which has no market value, that is, where it is all common stock, closely held and not listed or actively traded in on any stock exchange, is ordinarily determinable from the then net worth of the corporation divided by the number of bona fide shares issued and outstanding.
14. ———. For the purpose of deciding such net worth, evidence of the many related factors and elements, such as assets, liabili-

ties, and all other matters pertinent to the value of the particular corporation involved, may be admitted and considered.

15. Trial. A motion for directed verdict or for judgment notwithstanding the verdict must, for the purpose of decision thereon, be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed, who 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 evidence.

APPEAL from the district court for Lancaster County: JEFFERSON H. BROADY, JUDGE. *Affirmed.*

Lloyd E. Chapman and *Charles W. Phillips,* for appellants.

Ginsburg & Ginsburg, for appellee.

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

CHAPPELL, J.

Plaintiff brought this action to recover damages from defendants, who allegedly conspired together for the purpose of fraudulently inducing him, and by false and fraudulent representations of each did so induce him to sell his stock in defendant Ace Plumbing & Heating Company, a corporation, for less than its actual value.

Upon issues joined and trial to a jury, it returned a verdict for plaintiff in the amount of $4,000, and judgment was entered thereon. The trial court overruled defendants' motion for judgment notwithstanding the verdict or in the alternative for a new trial, and they appealed, assigning: (1) That the verdict and judgment were not supported by the evidence but contrary thereto; (2) that the court erred in exclusion of certain evidence; (3) erred in the giving and refusal of instructions; and (4) erred in refusing to declare a mistrial because prejudicial questions were asked by counsel for plaintiff upon voir dire. We conclude that the assignments should not be sustained.

Defendants cited no authority to sustain the fourth

or last assignment. In that connection, it is generally the rule that: "Upon the voir dire examination of a proposed juror, each party has the right, within reasonable limits, to put pertinent questions for the purpose of ascertaining whether there exists sufficient grounds for a challenge for cause, and also to aid the party in the exercise of his statutory right of peremptory challenge.

"The extent to which such examination may be carried rests in the sound discretion of the trial court, and its ruling thereon will not be disturbed unless there has been an abuse of discretion to the prejudice of the complaining party." Strong v. State, 106 Neb. 339, 183 N. W. 559. In the light of such rules, we have examined the record, and conclude that the assignment has no merit.

We turn then to the first assignment, decision of which depends upon rules of law applicable to competent evidence appearing in the record.

A conspiracy, like other facts, may be proved by direct or circumstantial evidence, and one means of proof is by showing overt acts or representations of the individuals charged with conspiracy. From the fact that different persons at different times by their acts or representations pursued the same object, the jury may, in connection with other facts, infer the existence of a conspiracy to effect that object. Patton v. Rapp, 133 Neb. 308, 275 N. W. 315.

In an action for damages based upon a conspiracy to defraud, such as that at bar, the damages and not the unlawful confederation is the gist of the action, so that if damages are shown to have resulted to plaintiff from wrongful acts or misrepresentations of defendants or any of them, then a judgment against such defendants may be sustained without establishing a conspiracy among them all. Dunbier v. Mengedoht, 119 Neb. 706, 230 N. W. 669; Harvey v. Harvey, 75 Neb. 557, 106 N. W. 660; Commercial Union Assurance Co. v. Shoemaker,

63 Neb. 173, 88 N. W. 156; Booker v. Puyear, 27 Neb. 346, 43 N. W. 133.

As stated in Annotation, 152 A. L. R. 1147: "It has been frequently pointed out that, speaking broadly, there is no such thing as a civil action for conspiracy, the action being for damages caused by acts committed pursuant to a formed conspiracy, rather than the conspiracy itself, so that, unless something is actually done by one or more of the conspirators which results in damage, no civil action will lie against anyone. See, for example, 11 Am Jur 577, Conspiracy, § 45. Thus, in most cases the gist of such an action is the wrongful conduct resulting in the plaintiff's damage, and proof of a conspiracy is of no consequence except as bearing upon the rules of evidence, * * * or to bring within the ambit of liability someone who may have conspired but who did not actively participate in the conduct itself. In such cases failure to prove an allegation of conspiracy does not affect the plaintiff's right to recover, there being sufficient independent grounds for recovery, although it limits those against whom recovery may be had to persons actively participating in the conduct complained of, and whose acts, as regards time, substance, and result, in fact united to produce the injury."

The case at bar is such a case wherein the cause of action was one independent of conspiracy and not one dependent thereon as distinguished in Annotation, 152 A. L. R. 1154. Reid v. Brechet, 117 Neb. 411, 220 N. W. 590, relied upon by defendants, is clearly distinguishable upon the pleadings and the facts.

Fraud may consist in words, acts, or the suppression of material facts with the intent to mislead or deceive. Faulkner v. Klamp, 16 Neb. 174, 20 N. W. 220; 37 C. J. S., Fraud, § 9, p. 225, § 15, p. 242; 23 Am. Jur., Fraud and Deceit, § 24, p. 776, § 76, p. 850; Restatement, Contracts, § 470, p. 890, § 471, p. 891.

As stated in Restatement, Contracts, § 479, p. 915, approved in George v. Guarantee Mutual Life Co., 144

Neb. 285, 13 N. W. 2d 176: " 'Where fraud or misrepresentation is material with reference to a transaction subsequently entered into by a person deceived thereby, it is assumed in the absence of facts showing the contrary that it was induced by the fraud or misrepresentation.' "

Also, as stated in 37 C. J. S., Fraud, § 22, p. 259: "It is generally held that a fraudulent intent or the equivalent thereof is an essential element of fraud, and that such intent may be established by appropriate inference or presumption from the facts proved."

In Falkner v. Sacks Bros., 149 Neb. 121, 30 N. W. 2d 572, this court held: "To maintain an action for damages for false representation the plaintiff must allege and prove what representation was made; that it was false and so known to be by the defendant charged with making it, or else was made without knowledge as a positive statement of known fact; that the plaintiff believed the representation to be true; and that he relied and acted upon it, and was thereby injured.

"A person is justified in relying upon a representation made to him in all cases where the representation is a positive statement of fact, and where an investigation would be required to discover the truth.

"The general rule that fraud is not presumed, but must be proved by the party who alleges it, does not mean that it cannot be otherwise proved than by direct and positive evidence. Fraud in a transaction may be proved by inferences which may reasonably be drawn from intrinsic evidence respecting the transaction itself, such as inadequacy of consideration, or extrinsic circumstances surrounding the transaction."

In Vavricka v. Mid-Continent Co., 143 Neb. 94, 8 N. W. 2d 674, a case involving the purchase and sale of corporate stock, this court held: "While actionable fraud may not be predicated upon sales talk, puffing, or the expression of a mere opinion as to value honestly made under circumstances that do not give another the right

to rely thereon, representations of positive facts pertaining to the quality of the thing sold and relied upon by the purchaser, which are calculated to mislead and deceive, if proved false, constitute actionable fraud."

The measure of damages recoverable by one who has been induced to sell corporate stock by fraud of the parties acquiring it is the difference between the consideration received by the seller and the actual value of such stock at the time of the transaction if the latter exceeds the former. 24 Am. Jur., Fraud and Deceit, § 235, p. 66; Rothery v. Pounds, 150 Neb. 25, 33 N. W. 2d 347; Annotation, 57 A. L. R. 1153; Annotation, 108 A. L. R. 1066; Helming v. Kashak, 122 Conn. 641, 191 A. 525; McDonough v. Williams, 77 Ark. 261, 92 S. W. 783, 8 L. R. A. N. S. 452.

The actual value of corporate stock which has no market value, that is, where it is all common stock closely held and not listed or actively traded in on any stock exchange, as in the case at bar, is ordinarily determinable from the then net worth of the corporation divided by the number of bona fide shares issued and outstanding. For that purpose, evidence of the factors and elements, such as assets, liabilities, and all other matters pertinent to the value of the particular corporation involved, may be admitted and considered. Rettinger v. Pierpont, 145 Neb. 161, 15 N. W. 2d 393; Zinn v. Ex-Cell-O Corp., 24 Cal. 2d 290, 149 P. 2d 177; Culbreath v. Investors Syndicate, 203 S. C. 213, 26 S. E. 2d 809, 147 A. L. R. 1144; Humphrey v. Baron, 223 Iowa 735, 273 N. W. 856; 31 C. J. S., Evidence, § 183, p. 901; 22 C. J., Evidence, § 146, p. 186.

Finally, it is elementary that a motion for a directed verdict or for judgment notwithstanding the verdict must, for the purpose of decision thereon, be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed, who 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 evidence. Pahl v. Sprague, 152 Neb. 681, 42 N. W. 2d 367.

In the light of the foregoing rules, we have examined the voluminous record. Of necessity we can only summarize the material competent evidence adduced in plaintiff's behalf from which a jury could have reasonably concluded as follows: Prior to September 1947, plaintiff had conducted a small furnace and sheet metal business from his home. He had only a limited education and was without knowledge or experience in bookkeeping, business management, or corporate affairs. Defendants Bartlett and Schumacher, a partnership under the name of Bartlett and Company, had been engaged for some time in the real estate business in Lincoln. Defendant Martin had been a journeyman plumber, working for one of the large plumbing concerns in Lincoln.

After the parties had become acquainted and after preliminary meetings, it was agreed between them to form an association for the general purpose of selling and installing plumbing and heating supplies, material, and equipment. The holding of such meetings was originally fostered by Bartlett, who purportedly had sufficient money to successfully launch a business, together with leads and influence whereby material could be obtained, and who needed a reliable plumber and furnace man to complete his projects then at hand.

The form of the business organization determined upon was a corporation to be known as "Ace Plumbing & Heating Co." with an authorized capital of $15,000, divided into 150 shares of common stock only, each having a par value of $100. A minimum of $5,000 capital was agreed to be paid in before commencement of business. In that regard it was agreed that Bartlett and Schumacher would each invest $1,500 cash in stock, while Martin and plaintiff were each to so invest $1,000, represented by cash, equipment, and supplies, making

a total of 50 shares issued and outstanding. It was further agreed that plaintiff and Martin would each have opportunity, when financially able, to acquire an additional amount of stock, and that no further stock would be issued to any of the parties until all had acquired an equal amount. It was also agreed that monthly reports would be furnished showing the financial condition of the corporation.

In that situation the corporation commenced business on October 1, 1947, with Martin as president and manager, Bartlett as treasurer, Schumacher as secretary, and plaintiff as vice president. It was understood, however, that plaintiff would not have any duties or responsibility with reference to bookkeeping or management, and that all checks would be signed and all financial matters of the corporation would be performed by Bartlett and Schumacher. The office of the corporation was a short time thereafter moved from Bartlett and Company offices to a room in a building on North 11th Street owned by or under their management, for the use of which the corporation paid them $150 a month rental. Martin and plaintiff were employed by the corporation at an hourly rate.

The business of the corporation speedily expanded in volume, a large part of which was done by the corporation in furnishing labor and materials for heating and plumbing installations in remodeling a Bartlett and Schumacher apartment building. The corporation also acquired a substantial inventory of equipment, merchandise, and supplies, in the sale of which it was stipulated that the corporation charged its customers a profit of 30 percent, with an additional 20 percent for overhead. It was also stipulated that it charged an overwrite of 50 cents an hour on all labor supplied, except plumbers, for which it charged an overwrite of 62½ cents an hour. The corporation at times had as many as 27 employees.

During the period from October 1, 1947, to January

1, 1949, plaintiff from time to time made requests of the several defendants for financial reports and information relating to progress of the corporation's affairs. Upon such occasions, Bartlett told plaintiff: " 'I don't know why you want a financial report because we have not got any surplus, we have not made any money, if hadn't been for me loaning the Company money we would have been closed a long time ago'. * * * What do you want a report for? We have made no money." When Martin was asked for a report, he said: "That there wasn't one, didn't have one ready, and so forth, yet." In that situation, plaintiff never was furnished or saw any of the reports, audits, financial statements, bank records, or other memoranda relating to the financial situation of the company.

On or about January 4, 1949, without previous warning, Martin told plaintiff: " 'You are fired'. * * * 'You are not working for the Ace Plumbing Company no more'. * * * 'the stockholders agreed you are not working here any more' * * * 'the stockholders say you are fired'. * * * 'Too many squawks.' " Plaintiff immediately sought an explanation from the other defendants, whereupon Schumacher said: " 'Fired, what do you mean? I don't know nothing about it,' " and Bartlett said: " 'I don't know nothing about it. Martin done it, that is the way it will be.' " Plaintiff then requested of the several defendants the holding of a corporate meeting, which, after several such requests, was held on January 6, 1949, in the corporate offices with all four stockholders present. Then and there plaintiff was told that the decision to discharge him would stand. Plaintiff then said: " 'Well, it looks like I am fired. Now I am fired I suppose I lose my stock.' " Whereupon Bartlett said: " 'No, you don't, no' * * * 'If ever any dividends paid you will get them. It might be five years before none ever paid.' * * * 'You know we ain't made any money. If hadn't been for me loaning this money and throwing this money in we would been closed long ago.' * * *

'Well, we might buy them from you.' * * * 'I don't think they are worth the $1000.00 you got in them because' * * * 'you know we have not made any money, haven't paid any dividends' * * * 'I might give you $800.00.' " Schumacher then said: " 'Well, I think we can give him his $1000.00 for them' " to which the other two defendants agreed, and, as suggested by Bartlett, they offered to add 5 percent interest for one year.

Believing and relying upon the representations heretofore recited, plaintiff agreed to accept such amount, delivered his stock to defendant Schumacher, and after an adjustment of his merchandise account, received a Bartlett and Company check by Schumacher, on January 7, 1949, in the sum of $949.99, as the net amount due him for his stock. In that connection, the record discloses competent evidence from which it could reasonably be concluded that while plaintiff was without knowledge of the financial status of the corporation, the other defendants not only had access to the corporate records and dealt with them in performance of their duties, but also were entirely conversant with the true situation.

In that connection, on September 30, 1948, Bartlett gave a corporate financial statement to Dun & Bradstreet, Inc., a national agency, to be used by its subscribers in making extensions of credit to the corporation. Such statement showed that Ace Plumbing & Heating Co., address 249 North 11th, then had assets of $59,600, with a surplus of $39,600 after deduction of liabilities, with sales of merchandise in the amount of 20 to 25 thousand dollars a month, and that the building account was owned by Bartlett and Schumacher to whom the corporation paid a rental of $150 a month.

Bookkeepers of the corporation, in their submission of balances after closing entries September 30, 1948, showed assets after depreciation in the amount of $55,213.08, with a profit of $3;898.54, a reserve account of $4,000, and a reserve for insurance of $3,000.

Auditors for the company prepared its 1947 income tax return, which showed a net taxable income of $14,777.78, derived after taking full advantage of provisions for depreciation and obsolescence of merchandise predicated upon a valuation of the merchandise inventory, at cost or market, whichever was lower.

An audit was made by an accounting firm covering the corporate affairs from October 1, 1947, to January 6, 1949. It showed sales for that period amounting to $184,709.13, total assets of $59,384.54, and a net worth of $21,347.65, with a net profit of $17,143.30, before provision for income taxes, amounting to $3,795.65, leaving $13,347.65 as surplus and undivided profits upon the basis of $8,000 outstanding capital stock, $3,000 of which had been issued to Bartlett and Schumacher without plaintiff's knowledge or consent. Such computation took into consideration depreciation of trucks and equipment, valued the merchandise inventory at $20,625.27, its then cost or market, whichever was lower, with full provision for obsolescence and depreciation. It showed accounts receivable of $30,047.69, after a reserve for bad debts and deduction of a sales discount of $3,147.68 to the Bartlett and Schumacher partnership upon their own business projects, in spite of an agreement that discounts would be allowed to no one except to employees for work done on their own homes.

In the light of an analysis of the foregoing evidence, expert witnesses for plaintiff testified that the actual value of plaintiff's stock at the time of the sale was more than enough to sustain the verdict and judgment obtained by plaintiff. True, there was a conflict in the evidence upon material issues when the case was finally submitted, but those issues were for the jury. We conclude that the evidence was amply sufficient to sustain the verdict and judgment.

As heretofore stated, the measure of plaintiff's damages was the difference between the actual value of his stock at the time of sale, and the amount he received

for it. In that connection, defendants, without citing any authority, argued that the trial court erred in excluding evidence offered by them to show that the customary practice of retail plumbing and heating establishments in Lincoln was to inventory the merchandise of the business at cost or market, whichever was lower. As a matter of course, such business or bookkeeping usage, custom, or practice would not be conclusive upon the actual value of plaintiff's stock at the time of its sale. Plaintiff's own evidence, as well as other evidence adduced by defendants, had theretofore established that the corporation did so value its merchandise inventory. Therefore, the exclusion of such evidence could not have been prejudicial to defendants.

Defendants also argued that the trial court erred in refusing to permit defendant Martin to testify that it was a general custom or policy of the corporation to allow a 25 percent discount on all large projects for both plumbing and heating work. At the outset it appears that there was no foundation laid to show that plaintiff had any knowledge of such custom if existent. On the other hand, only one such discount was questioned by plaintiff, or shown by the corporation records and audit. That was the one allowed to Bartlett and Schumacher, which plaintiff testified was granted contrary to their agreement and done without his knowledge or consent. The proferred evidence was immaterial under the issues presented, and further, such evidence was contrary to the provisions of a stipulation appearing in the record which has been heretofore discussed. Defendants were bound by their own stipulation in any event.

Instruction No. 2 given by the trial court, about which defendants complained, correctly imposed the burden of proof upon plaintiff. In doing so, we conclude that it correctly stated the law applicable to the issues presented and supported by competent evidence. Defendants' contention that a misrepresentation is action-

able only if made with knowledge of its falsity or if the party uttering it could determine that it was false has no authority in this jurisdiction supporting it. The correctly applied rule is that a misrepresentation for the purpose of inducing reliance is fraudulent and actionable when damages result therefrom, if made with knowledge of its falsity or if made without knowledge as a positive statement of known fact. The representations here involved, if made, were either knowingly false or made without knowledge as positive statements of known fact, as distinguished from mere expressions of opinion. The foregoing discussion also attests the correctness of instruction No. 6 which in no manner conflicted with the rule stated in instruction No. 5, favorable to defendants.

Defendants also argued that in instruction No. 2 the jury should have also been cautioned that false representations made by one or two defendants would not be binding upon the other or others, in the absence of proof of a conspiracy among them, as generally requested by defendants in their proferred instruction No. 1. However, the court did, in instruction No. 4, actually impose the burden upon plaintiff to prove a conspiracy as therein defined by a preponderance of the evidence before he could recover, and we conclude that there was sufficient competent evidence to sustain such a finding.

Defendants argued that instruction No. 7 was palpably erroneous. It told the jury in effect that in fixing the value of the corporation's merchandise inventory for the purpose of determining the worth of its capital stock, it should consider the reasonable market value thereof, after which the instruction correctly defined such market value. Defendants argued that the value of such inventory should have been measured by their bookkeeping and accounting practices, that is, cost or market value, whichever was lower. There is no merit to that contention. In determining the value of the corporate inventory here involved, the proper inquiry would be

what it was then reasonably worth; in other words, its reasonable market value and not its cost or market value, whichever was lower, based upon customary bookkeeping or accounting practices. To have so limited the jury in a determination of its value would substitute a mere custom for a legal principle and benefit the alleged wrongdoers by depriving plaintiff of his right to be fully compensated for his actual loss. Cases heretofore cited sustain that conclusion.

Defendants argued that the trial court erred in refusing to give their requested instruction No. 4. An examination of the instruction discloses that such question has been previously disposed of adversely to defendants in our discussion of instruction No. 2 given by the court.

Defendants' requested instructions Nos. 5, 6, 7, 8, and 9 were not erroneously refused by the court because they simply had no application or relevancy to any issues pleaded, supported by evidence, and submitted by the court, or they erroneously stated applicable principles of law, or, in the light of all the instructions given, their refusal was not prejudicial to defendants. Further discussion would serve no purpose.

Upon consideration of all of the instructions given by the trial court, it appears that they fairly presented the issues to the jury.

Finding no error prejudicial to defendant, we conclude that the judgment should be and hereby is affirmed.

AFFIRMED.

MESSMORE, J., participating on briefs.

GEORGE G. RUNYAN, APPELLANT, V. VILLAGE OF ONG, CLAY COUNTY, NEBRASKA, APPELLEE.

47 N. W. 2d 97

Filed March 30, 1951. No. 32925.

1. **Municipal Corporations.** Where it appears that lands sought to

be removed from within the corporate limits of a village have no unity or community of interest with such village and receive few, if any, benefits by reason thereof, justice and equity require that they be disconnected from the village.

2. **Appeal and Error.** An appeal from a decree of the district court in such a suit is triable de novo in the Supreme Court.

APPEAL from the district court for Clay County: EDMUND P. NUSS, JUDGE. *Reversed and remanded with directions.*

John A. Bottorf, for appellant.

S. W. Moger, for appellee.

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

CARTER, J.

Plaintiff brought this suit in the district court for Clay County to obtain a decree disconnecting certain lands from the village of Ong. The trial court found for the village and the plaintiff appeals.

The plaintiff is the owner of a tract of land lying in the southeast corner of the village, containing 11.97 acres. The suit was commenced under the provisions of section 17-414, R. S. Supp., 1949, which provides that if justice and equity require that such territory, or any part thereof, be disconnected from such village, the court shall enter a decree accordingly. The case is for trial de novo in this court. Kuebler v. City of Kearney, 151 Neb. 698, 39 N. W. 2d 415; Davidson v. City of Ravenna, 153 Neb. 652, 45 N. W. 2d 741.

The evidence shows that plaintiff's land lies south of and adjoins the Burlington railroad right-of-way on the north. The east and south boundaries constitute the corporate limits of the village in that area. The plaintiff's land is bounded on the west by a highway which is the main street of the village extended to the south. The buildings on the property are on the southeast corner of the tract, at least 1,000 feet distant from any

building in the direction of the village of Ong. The land not occupied by the buildings is used exclusively for pasture. It has never been platted or subdivided. It has always been used for purely agricultural purposes. The business section of the village is north of the railroad. There are no business places south of the railroad right-of-way. There are only three residences south of the railroad right-of-way that are within the village limits and all are along the east and west road almost a quarter of a mile south of the railroad right-of-way. The record shows that the population of the village is approximately 190, and that no reason can be foreseen for any extended growth. There is no tendency toward business or residential development south of the railroad. There are many vacant lots in the business section of the village and ample space for any contemplated residential needs.

There is evidence that the village has maintained the roads on the west and south of plaintiff's tract in conjunction with the township. There is a street light near the southwest corner of plaintiff's tract and another near the northwest corner. Electric energy is supplied to plaintiff's residence by the Consumers Public Power District. The village maintains a volunteer fire department and a part-time village marshal. The police and fire protection afforded is negligible. It is plain from the record that plaintiff's land receives no more benefits from them than do adjoining agricultural lands not within the corporate limits of the village. The village has no water or sewer systems. No sidewalks have been built south of the railroad right-of-way. The real estate taxes on the tract for the current year were $9.08. The personal taxes paid are not shown by the record.

We think the evidence shows that the plaintiff's tract is rural in character and that its location makes it unfavorable for development as an integral part of the village. The evidence clearly shows that there is no

unity or community of interest between the property and the village. We fail to find any evidence of any material benefit accruing to this land by reason of its being within the village. Consequently we conclude that justice and equity require that it be disconnected from the village. The result is controlled by that part of the opinion dealing with the Hughes tract in the case of Davidson v. City of Ravenna, *supra.*

Where it is shown that the lands sought to be disconnected from a village have no unity or community of interest with the village and receive few, if any, benefits therefrom, justice and equity require their disconnection from such village. Kuebler v. City of Kearney, *supra;* Davidson v. City of Ravenna, *supra.* The fact that the land involved is benefited in no other or different way from other farm lands in close proximity to such village is a pertinent fact to be considered. Edgecombe v. City of Rulo, 109 Neb. 843, 192 N. W. 499. It is fundamental, also, that a municipality may not retain strictly farm lands within its boundaries solely for revenue purposes. Hustead v. Village of Phillips, 131 Neb. 303, 267 N. W. 919.

We conclude that a proper application of the foregoing principles to the facts shown by the record requires a finding that plaintiff is entitled to the relief sought. The judgment is reversed and the cause remanded to the district court with directions to disconnect plaintiff's lands, as described in the petition, from the village of Ong, in the manner provided for by section 17-414, R. S. Supp., 1949.

REVERSED AND REMANDED WITH DIRECTIONS.

MESSMORE, J., participating on briefs.

HENRY PRIGGE, APPELLANT, V. HENRY OLSON, APPELLEE.
47 N. W. 2d 344

Filed March 30, 1951. No. 32946.

1. **Appeal and Error.** Conflicting evidence will not be weighed on review in an error proceeding.
2. **Frauds, Statute of.** An oral lease for only one year is void, within the meaning of the statute of frauds, if made before the commencement of the term.
3. ———. A lease of land for a term in excess of one year signed by the lessor only is sufficient to satisfy the requirement of the statute of frauds.
4. **Landlord and Tenant.** A provision of a written lease that any agreement modifying it must be in writing and signed by the lessee and lessor will be given effect.
5. **Frauds, Statute of.** A signature on any appropriate writing made, authorized, or adopted by the party to be bound, with intent actual or apparent to give force and effect to the writing, satisfies the requirement of the statute of frauds.
6. ———. The statute of frauds may be complied with by the act of the parties adopting their signatures on an old contract to authenticate a new agreement made by them.
7. ———. The adoption by the parties of their prior signatures on a lease of real estate after an alteration or change had been inserted in the lease with intent to be bound by the altered instrument is a compliance with the statute of frauds.
8. ———. A written lease, signed by the parties to it, delivered to lessor by the tenant to obtain an extension of the term of the tenancy, the insertion therein by the lessor of extension phraseology for such purpose, and the redelivery of the lease with the added provision to the tenant, is sufficient to satisfy the statute of frauds though no formal words expressing intent to recognize and republish the signatures were used.

APPEAL from the district court for Polk County: H. EMERSON KOKJER, JUDGE. *Affirmed.*

Harry I. Hylton, and *Perry & Ginsburg,* for appellant.

W. W. Norton, for appellee.

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

BOSLAUGH, J.

This action was instituted in the county court of Polk

County to recover from appellee the possession of land owned by appellant. The county court found for appellee and dismissed the case. Appellant filed and prosecuted a proceeding in error to the district court. It affirmed the judgment of the county court. Motion of appellant for a new trial was denied and he has appealed.

The assignments of error are that the findings and judgment of the district court are not sustained by the evidence and are contrary to law. If the evidence and permissible inferences therefrom, when viewed favorably to appellee, are sufficient to sustain the findings of the trial court, in the absence of an error of law, the judgment may not be disturbed. Conflicting evidence will not be weighed on review in an error proceeding. Willits & Co. v. Arena Fruit Co., 58 Neb. 659, 79 N. W. 624.

The land, the subject of this proceeding, was leased to appellee by a written contract dated November 12, 1946, for a term from the first day of March 1947, to the first day of March 1948. Appellee about July of 1947, solicited appellant for a lease of the land for the next crop year. He had an F.S.A. loan and that organization desired him to have a written lease for the following year. Appellant stated that it was not necessary to have a written lease, but that they could extend the term of the existing lease. He, in the presence and with the acquiescence of appellee, drew a line through the figures "1947" and "1948" in the provision designating the term in the duplicate lease belonging to appellee, and in place thereof inserted "1948" and "1949". This clause then read "from the first day of March, 1947, to the first day of March, 1948." This was done to "make it run another year." The lease was then returned to appellee by appellant.

Appellee about June 1948 talked with appellant concerning a lease of the land for the next crop year. Appellant said they could change the lease to extend it for the year 1949, and he changed the duplicate lease

belonging to appellee in his presence and with his approval in the same manner as was done in the previous year, but so as to express a term of one year later. Concerning this, appellant testified: "In about June of 1948 I rented the farm to Olson for the next year when he asked me for it." The changes made in the lease were "to extend it for the year 1949." The lease as modified was returned to and was taken and retained by appellee.

Appellee on June 20, 1949, went to the farm of appellant; he took with him his duplicate of the lease; he asked appellant about renting the farm for the next year, and appellant replied he would rent it for the crop year of 1950; he asked appellee if he had his copy of the lease with him; appellee produced it; appellant suggested they go into the house "where he had a pencil"; they entered the house and appellant in the presence and with the approval of appellee marked out the years 1949 and 1950 in the part of the copy of the lease belonging to appellee specifying the term thereof and inserted 1950 and 1951; and he then returned the lease to appellee.

The modifications of the lease as indicated above were done in each instance by appellant. Appellant believed that the lease contained a provision that in the event he sold the land the lease would be void. He testified: "I thought all the time that it was subject to sale, or I would not have rented it to him." An incompleted provision of the lease was: "This lease is subject to sale of the premises and in case of sale prior to the —— day of ——————, 19——, this lease shall be void * * *." Appellant entered into a contract on July 1, 1949, with a Mr. Powers for the sale of the land. He served written notice on appellee on July 18, 1949, in an attempt to terminate his tenancy and demanded possession of the premises on March 1, 1950.

On the cardinal question there is no dispute. The very narrow and restricted problem in this case is whether or not the original lease including the modifi-

cation thereof made on June 20, 1949, after it was signed and delivered, constitutes a written contract of lease within the demands of the statute. § 36-105, R. S. 1943.

The theory of the case as made and presented by appellant is that he rented the land involved by contract in writing to appellee for the term from March 1, 1947, to March 1, 1948; that appellee with the consent of appellant continued in possession beyond the term of his tenancy, which expired on March 1, 1948, and used the land for the years 1948 and 1949, as a tenant from year to year; that appellant on July 18, 1949, by a writing duly served by him on appellee, terminated his tenancy and demanded his surrender of occupancy and use of the premises as of March 1, 1950; and that the conversation of the parties and the change in the date of the expiration of the written lease as had and made on June 20, 1949, were ineffective to extend the term of the lease or to constitute a written lease of the land terminating on March 1, 1951.

If what the parties said and did on June 20, 1949, as recited above, was not sufficient to satisfy the statute of frauds, the appellee wrongfully prevailed in the trial court. An oral lease for only one year is void, within the meaning of the statute, if entered into prior to the beginning of the term. § 36-105, R. S. 1943; Schmidt v. Henderson, 148 Neb. 343, 27 N. W. 2d 396. A written lease signed by appellant would have been sufficient to obey the statute. Horn v. Stuckey, 146 Neb. 625, 20 N. W. 2d 692. But the written lease of the parties prohibits its extension or any use of the land by appellee beyond March 1, 1948, unless otherwise provided by writing signed by both of the parties. This is a legitimate subject of contract. The intention of the parties to a lease that a modifying agreement shall not become binding unless it is in writing signed by the parties will be given effect. Clinton Film Service Co. v. Conan, 140 Minn. 94, 167 N. W. 289. See, also, Hagan v. Moch,

249 Mich. 511, 229 N. W. 629; Green Ridge Fuel Co. v. Littlejohn, 141 Iowa 221, 119 N. W. 698; 35 C. J., Landlord and Tenant, § 449, p. 1171; 51 C. J. S., Landlord and Tenant, § 217b, p. 821.

The written lease was signed by the parties. Their adoption of their signatures thereon with intent, actual or apparent, to authenticate the lease as a new contract after the modification or change was made on June 20, 1949, would satisfy the demand of the statute. A signature to satisfy the statute of frauds may be on any appropriate writing placed there by the party to be bound or authorized, adopted, or appropriated by him with the intent, actual or apparent, to give force and effect to the writing. Mesibov, Glinert & Levy, Inc. v. Cohen Bros. Mfg. Co., Inc., 245 N. Y. 305, 157 N. E. 148; Drury v. Young, 58 Md. 546, 42 Am. R. 343; Wright v. Seattle Grocery Co., 105 Wash. 383, 177 P. 818; Knox v. Allard, 90 N. H. 157, 5 A. 2d 716; Restatement, Contracts, § 210, p. 287; 49 Am. Jur., Statute of Frauds, §§ 380, 381, pp. 683, 684.

The statute of frauds may be satisfied by the parties to be bound in adopting their signatures on an old contract to authenticate a new agreement. 49 Am. Jur., Statute of Frauds, § 377, p. 680.

Weber v. De Cecco, 1 N. J. Super. 353, 61 A. 2d 651, concerned a written lease signed by the parties thereto for a term of five years terminating on September 1, 1944. One of the lessees before that date asked the lessor to renew the lease. He refused. Shortly after September 1, 1944, he requested the lessees to produce and deliver to him the original lease. They complied with his request. The lessor inserted in the body of the lease the words "'renewed for sixty months (60) from the first day of September, 1944.'" He then returned the lease to the lessees and they received and retained it and remained in the use of the premises. When he was asked why he had inserted the quoted phraseology and redelivered the lease to the lessees, he

said it was the "result of their plaguing him for a renewal; * * * and that he thought this renewed the lease." Thereafter the lessor made varied and various unsuccessful attempts, including actions in court, to oust lessees from the possession of the premises. The court in deciding the case said: "It therefore follows that the question of whether the insertion of the phaseology extending the term of a written lease originally signed by the parties but not thereafter re-signed is a compliance with the Statute of Frauds, turns upon the intention of the parties. It revolves about whether they intended to adopt the original signatures. Under the facts, it seems clear that the lease was delivered to the defendant with the intention of obtaining a renewal thereof; that the defendant inserted the phraseology for this purpose, and by his re-delivery to plaintiffs signified his willingness to adopt the original signature and so to be bound. Although there were no formal words used expressing this intent, the acts and conduct of the parties lead only to one conclusion, and that is that it was their intent. The desire to recognize the prior signatures was inartistically expressed but the conversation and conduct is demonstrative of an intention to recognize and republish the original signatures. The lease above referred to is, therefore, considered as complying with the pertinent section of the Statute of Frauds, * * *."

Pontrich v. Neimann, 208 Ky. 715, 271 S. W. 1049, involved the sufficiency of a modified written contract of lease to satisfy the requirements of the statute of frauds. The tenant had occupied the premises for a term of four years by virtue of a written lease. About the time it expired he solicited a renewal of the lease and his landlord stated that he might have the premises for ten years upon the terms of the original lease. The tenant inquired if that fact could be written into the old contract, a copy of which he had with him. The landlord agreed it could. The tenant in the presence of the

landlord added at the bottom of the old contract above their signatures the words: " 'Extended ten years from September 21, 1915.' " The court said: "The signature to a writing is placed there for the purpose of authenticating it and for the purpose and with the intent of the signor becoming and being bound thereby. Such a signature, one purposely made by the party on a previous occasion, may be adopted for a new writing then made, with the same effect as if made anew. This is a sufficient compliance with the requirements of the statute of frauds."

Vidvard v. Cushman, 35 Hun (N. Y.) 18, considered a situation similar to the present case and concluded: "The original lease, and the lease as modified, being for terms longer than a year, were required by the statute of frauds to be in writing and signed by the lessors. The original lease was in writing and so was the modified lease. It is urged that the new lease is not binding, because it was not re-signed by the lessors and re-delivered. The added stipulation was written in the lease by one of the lessors in the presence, and with the assent of the lesee (lessee). The signatures of the contracting parties were then upon the lease. This was a good execution of the new or modified lease. * * * The transaction between the parties, as found by the court, amounts to a re-execution and re-delivery of the lease in its modified form, and it became as binding in that form as though it had been re-drafted and re-signed." See, also, Winslow v. Jones, 88 Ala. 496, 7 So. 262.

It is certain that there was a verbal lease of the land by the owner to the tenant for the year ending March 1, 1951. Appellee asked for it and appellant agreed he would rent it to him for the crop year 1950. They did more. They modified the written lease to include and evidence their oral agreement in this regard. The writing as changed was delivered by the appellant to the appellee. The time was getting late in relation to the harvest period and the time of prepara-

tion of the land for fall planting. The consummation of a contract for the ensuing year was mutually advantageous. Appellee would not have to surrender the possession and use of the land and appellant would retain a good tenant. Appellant, as he understood the contract, was not subjecting himself to any hazard by putting the agreement in writing and making it a part of the lease. If he did not sell the farm he had a satisfactory tenant, and if he did, he could escape, as he thought, by the escalator clause to the effect that the lease should be void in the event of a sale of the land. There is no doubt the parties mutually and firmly desired and intended to make the written lease as modified binding and effective for the year ending March 1, 1951. The mistake of appellant was in thinking the provision for avoiding the lease in event of sale was complete and operative. It is true the parties did not again sign the lease after the additional provision was placed on it. Neither did they state that they were adopting their original signatures. But in view of the circumstances of this case either of these would have been an idle ceremony or formality. Either or both would not have more effectually shown the adoption of their signatures already appended than making the change in the presence of each other and with their consent. The district court was correct in finding that there was a contract of lease in writing between the parties for the premises for the term from March 1, 1950, to March 1, 1951.

The judgment should be, and is affirmed.

AFFIRMED.

HENRY C. BOHY, APPELLANT, V. CHARLES B. ABBOTT ET AL., DOING BUSINESS AS ABBOTT & SONS, APPELLEES.

47 N. W. 2d 95

Filed April 6, 1951. No. 32872.

1. **Evidence.** State courts will take judicial notice of general rules and regulations established and published by federal agencies under authority of law.
2. **Contracts.** Agreements made that are in violation of the orders and regulations of the Price Administrator in force at the time, which orders and regulations have been promulgated pursuant to the Price Administrator's authority under the Emergency Price Control Act of 1942 as extended, are illegal and unenenforcible.

APPEAL from the district court for Garfield County: ERNEST G. KROGER, JUDGE. *Affirmed.*

Rose & Clinch, for appellant.

Guy Laverty and *A. F. Alder,* for appellees.

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

WENKE, J.

Henry C. Bohy brought this action in the district court for Garfield County against Charles B. Abbott, Claude Abbott, and Clair Abbott, doing business as Abbott & Sons. The purpose of the action is to recover a balance claimed due for corn sold and delivered to defendants. At the close of the trial defendants moved for a directed verdict. This motion the court sustained. Plaintiff thereupon filed a motion for new trial and appeals from the overruling thereof.

Appellant testified that on April 2, 1946, he sold 330 bushels of corn to the defendants on condition that he could pick the price thereof by selecting the market price on some future date. The corn consisted of six loads. It was delivered to appellees one load at a time on the following dates: April 2, April 11, April 20, May 4, May 20, and June 5, 1946. Each load was paid

for on delivery at the then ceiling price. Appellant selected the market on July 2, 1946, to establish his price. The market price on July 2, 1946, was $2.00 a bushel. This was higher than the ceiling price paid at the different times the corn was delivered. It is this difference appellant seeks to recover.

The question is, was it illegal on April 2, 1946, under the orders and regulations of the Price Administrator then in force, to enter into a contract for the sale and immediate delivery of corn but reserve to the seller the right to fix the price thereof by picking the market price on some future date?

"State courts will take judicial notice of general rules and regulations established and published by federal agencies under authority of law." Keyser v. Allen, 149 Neb. 449, 31 N. W. 2d 309. See, also, Powell v. Anderson, 147 Neb. 872, 25 N. W. 2d 401.

Congress enacted the Emergency Price Control Act of 1942. 50 U. S. C A., §§ 901-946, pp. 313-449. This act created the Office of Price Administration. It also established the position of Price Administrator. It authorized the Price Administrator, by regulation or order, to establish maximum or ceiling prices on any commodity or commodities whenever, in his judgment, it was necessary to do so in order to carry out the purposes of the act.

Section 904 of the foregoing act, so far as here material, provided: "(a) It shall be unlawful, regardless of any contract, agreement, * * * or other obligation heretofore or hereafter entered into, for any person to sell or deliver any commodity, or in the course of trade or business to buy or receive any commodity, * * * or otherwise to do or omit to do any act, in violation of any regulation or order under section 2 [section 902 of this Appendix], or of any price schedule effective in accordance with the provisions of section 206 [section 926 of this Appendix], or of any regulation, order, or requirement under section 202 (b) or section 205 (f) [sections

922 (b) or 925 (f) of this Appendix], or to offer, solicit, attempt, or agree to do any of the foregoing."

This act was extended to remain in force until June 30, 1946, by amendment thereto enacted by Congress on June 30, 1945. See 59 U. S. Stat. at Large 306.

Pursuant to this authority the administrator, effective July 26, 1944, promulgated Part 1351, Federal Price Regulation 2, affecting food and food products. 9 Federal Register 8304. This regulation by section 1.2 (b) provides, so far as here material, as follows: "(b) *Adjustable pricing.* Any person may agree to sell at a price which can be increased up to the maximum price in effect at the time of delivery; * * *."

By Supplement 4 to Part 1351, Federal Price Regulation 2, effective February 26, 1945, dealing specifically with corn, the administrator fixed maximum or ceiling prices of this product. 10 Federal Register 2083. This regulation was in effect during the months of April, May, and June, 1946.

Supplement 4 contains the following provisions:

"Sec. 2. *Sales at other than maximum prices.* Regardless of any contract or obligation, no person shall sell or deliver, and no person shall in the course of trade or business buy or receive any corn covered by this supplement at a price above the maximum price established by this supplement, nor shall any person agree, solicit, offer or attempt to do any of the foregoing: * * *

"Sec. 3. *Evasion.* The price limitations set forth in this supplement shall not be evaded whether by direct or indirect methods, in connection with any offer, solicitation, agreement, sale, delivery, purchase, or receipt of, or relating to corn, alone or in conjunction with any other commodity, or by way of commission, service, transportation or other charge, or discount, premium or other privilege, or by tying agreement, or other trade understanding, or by any other means."

The term "deliver" as used in these regulations means a transfer of possession. See, Bowles v. Beucher, 53 F.

Supp. 984; United States v. Lutz, 142 F. 2d 985.

We find the agreement appellant claims he made to be in violation of these regulations of the Price Administrator and therefore not enforcible. In view thereof the holding of the trial court was correct and its decision is affirmed.

AFFIRMED.

MESSMORE, J., participating on briefs.

HAROLD C. BESACK ET AL., APPELLANTS, V. THE CITY OF BEATRICE, NEBRASKA, A MUNICIPAL CORPORATION, APPELLEE.
47 N. W. 2d 356

Filed April 6, 1951. No. 32908.

1. **Municipal Corporations.** The power and authority to make public improvements does not of itself confer power and authority to levy and collect special taxes or assessments to defray the cost of such improvements.
2. ———. The legislative power and authority delegated to a city to construct local improvements and levy assessments for payment thereof is to be strictly construed and every reasonable doubt as to the extent or limitation of such power and authority is resolved against the city and in favor of the taxpayer.
3. ———. A city of the first class has no statutory jurisdiction or authority to levy special assessments upon real estate located within the boundaries of one lawfully created sewer district to defray the cost of any portion of a sewer constructed or reconstructed and situated outside the boundaries thereof and within the boundaries of another such created district.
4. ———. The methods prescribed by statute for levying special assessments to defray the cost of sewer construction are mandatory and jurisdictional, and any such assessments otherwise imposed are void, in which case estoppel has no application.
5. ———. Where special assessments for such improvements are made without compliance with jurisdictional requirements, they are void as distinguished from irregular, and may be assailed collaterally.
6. ———. As provided by section 16-672, R. S. 1943, when sewers are constructed and any assessment to defray the costs thereof is declared void, the mayor and council are authorized and empowered for the purpose of paying the cost of such improve-

ment, to make a reassessment of such costs on real estate lying and being within the sewerage district in which such sewer may be situated, to the extent of the benefits to such property by reason of such improvement.

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

Hevelone & McCown, for appellants.

Walter Vasey, for appellee.

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

CHAPPELL, J.

This action in equity was brought by plaintiffs for themselves and all others similarly situated to have a special assessment upon their real estate in sewer district No. 60 declared void; to enjoin defendant city from enforcing or attempting to enforce the assessment; to require it to reassess the cost of construction and eliminate therefrom all costs and expenses of construction of any portion of said sewer situated in sewer district No. 28 and outside the boundaries of sewer district No. 60; and for general equitable relief.

Plaintiffs' petition, defendant's answer, and plaintiffs' reply thereto perfected the issues, which were submitted to the trial court upon the pleadings, other documentary evidence, and a stipulation of facts, without any oral testimony.

Thereupon the trial court entered a decree finding and adjudging substantially that defendant city had the power to create sewer district No. 60 and provide for the construction of a sewer therein; that the construction and cost of portions of the sewer situated outside the boundaries of district No. 60 were necessary to make a practical connection between said district and district No. 28, thus properly assessable against the property in district No. 60; and that plaintiffs, having failed to

appear before the board of equalization to protest and appeal from the assessments, could not collaterally attack the same. Upon such hypotheses, plaintiffs' petition was dismissed. Their timely motion for new trial was subsequently overruled, and they appealed, assigning substantially that the judgment was contrary to law. We sustain the assignment.

The facts are not in dispute. In August 1947, plaintiffs and other owners of property abutting upon Elk and Ella Streets in the city of Beatrice filed a petition with the mayor and city council requesting the city to create a sewer district and to construct a sewer in Wittenberg's Addition, between Ella and Elk Streets, 19th to 22d Streets, and assess the entire cost thereof against the private property in said district in the manner provided by law. Thereafter the city by ordinance created sewer district No. 60 composed of Blocks 19, 20, and 21, Wittenberg's Addition to Beatrice. The western boundary of such district was 19th Street. The area west of 19th, a north and south street, was already a part of sewer district No. 28, wherein a shallow sewer had been theretofore laid in an alley, not abutting upon plaintiffs' property, for the entire distance west of 19th Street.

In that situation, the council decided to build the new sewer in district No. 60 at a depth varying from 4.5 to 12.4 feet, and uniformly in a manner to connect it with the existing sewer at a point 300 feet west of 19th Street, such 300 feet to be in the same location as the preexisting sewer. The ordinance therefore located the sewer to be constructed in such manner that, in addition to that portion inside the boundary of district No. 60, it was also to run approximately 300 feet in the alley west of 19th Street, all of which was outside district No. 60 and in district No. 28. Thereafter the work was advertised for bids.

The engineer's estimate of such cost was $4,650.10 for labor and materials, and $5,022.10 for total expense. A contract for such construction was let in the sum of

$4,599, and construction commenced. While it was under construction the city decided to lower the sewer about 12 inches more, and extend it a distance of 452 feet west of 19th Street rather than 300 feet. The city itself paid that part of the cost of lowering the sewer an additional 12 inches. Upon completion of the work, the city drew warrants for the construction in the total amount of $5,503.80, which did not include the extra cost aforesaid paid by the city.

Thereafter the city council gave notice by publication, and on August 9, 1948, sat as a board of equalization, at which time it assessed the entire sum of $5,503.80 uniformly upon the respective properties in district No. 60.

The cost of the 452 feet of sewer west of 19th Street and outside the boundaries of district No. 60 was $1,574.50, which included $532.80, the cost of the 152 feet of sewer added during construction. Such total amount of $1,574.50, which did not include the cost of lowering the sewer another 12 inches voluntarily paid by the city, was included in the assessment against the property in district No. 60. Thereafter plaintiffs commenced this action.

Well-established rules of law are applicable to the situation presented. It is generally held that the power and authority delegated to a city to construct local improvements and levy assessments for payment thereof is to be strictly construed, and every reasonable doubt as to the extent or limitation of such power and authority is resolved against the city and in favor of the taxpayer. State ex rel. Todd v. Thomas, 127 Neb. 891, 257 N. W. 265, 96 A. L. R. 1470; Futscher v. City of Rulo, 107 Neb. 521, 186 N. W. 536; Batty v. City of Hastings, 63 Neb. 26, 88 N. W. 139; Harmon v. City of Omaha, 53 Neb. 164, 73 N. W. 671; 44 C. J., Municipal Corporations, § 2823, p. 493; 1 Page and Jones, Taxation by Assessment, § 234, p. 360.

As stated in 5 McQuillin, Municipal Corporations (2d Ed. Rev.), § 2171, p. 740: "Power to make public im-

provements does not of itself confer the power to levy and collect special taxes or assessments to defray the cost of such improvements. Moreover, as a municipal corporation has no inherent power to levy and collect such charges, and as the exercise of such power is in derogation of the right of private property, the law involved should be strictly construed, in determining whether the power exists, and in case of any fair and reasonable doubt, the doubt should be resolved against the existence of the power and the power denied. * * * The nature and extent of such power must be determined from the express grant, and municipal authorities must adhere strictly to its terms, for any material departure therefrom especially of a jurisdictional nature, is fatal to the validity of the assessment. This is to say that, in levying special assessments or taxes due observance of all mandatory and jurisdictional provisions of the applicable law is indispensable. All limitations expressed or implied therein must be strictly observed. If the applicable law prescribes the mode of exercising the power, the mode prescribed must be followed, or the assessment will be void; * * *. Finally, all laws relating to the subject should be construed together and in harmony if this can be done." See, also, 1 Page and Jones, Taxation by Assessment, § 231, p. 358.

Section 16-667, R. S. 1943, provides: "The city may, by ordinance, lay off the city into suitable districts for the purpose of establishing therein a system of sewerage * * * service; to provide such systems and regulate the construction, repair, and use of the same; to compel all proper connections therewith and branches from other streets, avenues, and alleys, and from private property; * * *."

Contrary to defendant's contention, however, the authority of defendant city to create sewer districts and construct or repair sewers is not involved in this case. Rather, the question is whether or not the city had the jurisdiction, power, and authority to levy special assess-

ments upon plaintiffs' property located within the boundaries of one such created sewer district for portions of a sewer, call it outlet, practical connection, or what you may, constructed or reconstructed and situated outside the boundaries thereof, and within the boundaries of another such created sewer district, all within the city. We conclude that it had no such jurisdiction or authority.

Section 16-668, R. S. 1943, provides in part: "Unless the owners of lots and lands abutting upon any street, avenue or alley, or part thereof, *within said sewerage * * * district,* representing not less than two-thirds of the feet front abutting upon said street, avenue or alley, or part thereof, shall petition the mayor and council *to lay a sewer main * * * therein,* and assess the cost thereof to the abutting lands and lots, such improvements shall not be made until not less than three-fourths of all the members of the city council shall, by vote, assent to the making of the same, without cost to the city; whereupon, upon such petition or such vote by the council, the mayor and council shall order *such sewer main * * ** laid and assess the cost thereof against the property *abutting upon such street, avenue or alley, or part thereof, within which any such sewer main * * * has been so placed.*" (Italics supplied.)

In that connection, plaintiffs' property did not abut upon any street, avenue, or alley or part thereof within sewer district No. 28 where that portion of the sewer here involved was placed.

Section 16-672, R. S. 1943, provides: "Special taxes may be levied by the mayor and council for the purpose of paying the cost of constructing sewers or drains within the city. Such tax shall be levied *on the real estate lying and being within the sewerage district in which such sewers or drains may be situated* to the extent of benefits to such property by reason of such improvement." (Italics supplied.) That section also provides: "And where sewers are constructed and any assessment to

cover the costs thereof shall be declared void, * * * the mayor and council, for the purpose of paying the cost of such improvement, are hereby authorized and empowered to make a reassessment of such costs on lots and real estate lying and being within the sewerage district in which such sewer may be situated, to the extent of the benefits to such property by reason of such improvement."

Under the statutes aforesaid, it is conclusive that property located in a local improvement sewer district in a city of the first class cannot be lawfully assessed for the cost of a sewer physically constructed or reconstructed and situated outside of the district and within the boundaries of another district. In other words, defendant had no jurisdiction, power, or authority to levy an assessment upon the property in district No. 60 for the cost of that portion of the sewer constructed and situated entirely outside said district and in district No. 28.

The Kansas court, in City of Fort Scott v. Kaufman, 44 Kan. 137, 24 P. 64, so construed and applied a statute identical in all material respects with section 16-672, R. S. 1943. As stated in 1 Page and Jones, Taxation by Assessment, § 447, p. 683: "However, if the statute provides that the cost and expense of constructing a sewer shall be assessed against the lots or pieces of ground contained in the district in which the same is situated, an assessment cannot be levied for a discharging sewer situated outside of the district upon which the assessment is levied." See, also, 44 C. J., Municipal Corporations, § 2930, p. 554.

City of Bartlesville v. Keeler, 107 Okl. 14, 229 P. 450, relied upon by defendant, is entirely distinguishable upon the facts and all-inclusive statutes involved. In that connection it will be noted that such case was distinguished in Boswell v. Chambless, 189 Okl. 112, 113 P. 2d 832, by reason of a subsequent statutory amendment.

This court has consistently adhered to the rule that where a statute or charter expressly designates the location of property which may be assessed for local improvements, such assessments cannot be levied upon property not so located even though such property might have been benefited by the improvement. City of Scottsbluff v. Acton, 135 Neb. 636, 283 N. W. 374; Hurd v. Sanitary Sewer District, 109 Neb. 384, 191 N. W. 438. In the latter case it was said: "When extensions of the sewer are made will be time enough to charge the property thereby benefited. 'The improvement district is the foundation of all other proceedings'; and no taxes can be levied outside the district. McCaffrey v. City of Omaha, 91 Neb. 184." In other words, the primary purpose of creating a sewer district is to determine what property shall be assessed for construction therein. See, also, 63 C. J. S., Municipal Corporations, § 1347, p. 1084, § 1356, p. 1094. As stated in the latter section: "The location of land that may be assessed for sewer construction may be specifically designated by statute, and an attempted assessment against property not so located is invalid."

We conclude that the methods prescribed by the foregoing statutes granting to cities of the first class authority to levy special assessments to pay for the construction of sewers or drains within the city is fundamentally mandatory and jurisdictional, and that any assessments otherwise imposed are void. In that regard, as applicable here, the general rule is that special assessments made upon property without compliance with jurisdictional requirements are void as distinguished from irregular, and the owner of such property is not estopped to deny validity of the assessment. In such cases the doctrine of estoppel has no application. 44 C. J., Municipal Corporations, § 3160, p. 687; 63 C. J. S., Municipal Corporations, § 1462, p. 1253; 5 McQuillin, Municipal Corporations (2d Ed. Rev.), § 2273, p. 1067; Cullingham v. City of Omaha, 143 Neb. 744, 10 N. W. 2d

615; City of McCook v. Red Willow County, 133 Neb. 380, 275 N. W. 396; Musser v. Village of Rushville, 122 Neb. 128, 239 N. W. 642.

The rule in such a situation is that: "Where a special assessment for such improvement is made without a compliance with such jurisdictional requirements, such assessment is void, and may be assailed collaterally." Wiese v. City of South Omaha, 85 Neb. 844, 124 N. W. 470. See, also, Power v. Jones, 126 Neb. 529, 253 N. W. 867.

For the reasons heretofore stated, we conclude that insofar as the assessments here involved uniformly included the cost of construction of that part of the sewer situated outside the boundaries of district No. 60, that is, the cost thereof amounting to $1,574.50, was and is void, and as such should be uniformly excluded from the assessments. Therefore, a decree should have been entered awarding plaintiffs the relief sought by them.

Other questions were presented, but as we view it, a discussion thereof is not necessary to arrive at a decision of the primary issues.

The judgment of the trial court should be and hereby is reversed with directions to enter a judgment for plaintiffs as prayed by them in conformity with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

IRENE GUNN, ADMINISTRATRIX OF THE ESTATE OF BURDETTE G. GUNN, DECEASED, APPELLANT, V. COCA-COLA BOTTLING COMPANY OF LINCOLN, ET AL., APPELLEES.

47 N. W. 2d 397

Filed April 6, 1951. No. 32916.

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. ———. In an action where there is any evidence which will support a finding for a party having the burden of proof, the trial court cannot disregard it and direct a verdict against him.
3. ———. In a law action, it is error for the trial court to direct a verdict for either of the parties on an issue of fact on which the evidence is conflicting. Such issue should be submitted to the jury for its determination.
4. **Master and Servant.** For all acts done by a servant in obedience to the express orders or directions of the master, or in the execution of the master's business, within the scope of his employment, and for acts in any sense warranted by the expressed or implied authority conferred upon him, considering the nature of the services required, the instructions given, and the circumstances under which the act is done, the master is responsible; for acts which are not within these conditions the servant alone is responsible.
5. **Principal and Agent.** The extent of the authority conferred upon an agent may be a question of fact but the question of whether there is any evidence to prove it is one of law.
6. **Automobiles: Master and Servant.** The general rule is that an employee using an automobile in his employer's business has no implied or apparent authority to invite others to ride with him, and that, if a passenger who accepts the unauthorized invitation of the employee is injured, the employer is not liable, for the reason that the passenger is not a guest of his but merely a guest of his employee.
7. **Trial.** In an action where the evidence produced by the plaintiff is not sufficient to support a verdict in his favor, it is the duty of the trial court to direct a verdict for the defendant.
8. **New Trial.** Where a verdict is returned against a plaintiff and in favor of several defendants, on different, distinct, and separate defenses pleaded separately by them, a single joint motion for a new trial against them all is insufficient, and it should be overruled if the verdict is good as to any one of the defendants.

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

Mockett, Davies, Pace & Perkins, for appellant.

Davis, Stubbs & Healey, Chambers, Holland & Groth, and *Towle, Young & Mattson,* for appellees.

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

WENKE, J.

Irene Gunn, as administratrix of the estate of Burdette G. Gunn, deceased, commenced this action in the district court for Lancaster County against Coca-Cola Bottling Company of Lincoln, a corporation, DeRoyce Lusher, Jack Beard, and Margaret Beard. The purpose of the action is to recover damages resulting from the wrongful death of Burdette G. Gunn in an automobile accident. Trial was had and after all parties had rested, only the plaintiff having introduced evidence, the trial court sustained the separate motions for a directed verdict of the defendants Coca-Cola Bottling Company of Lincoln, a corporation, and DeRoyce Lusher. Plaintiff thereupon filed a motion for new trial and from the overruling thereof appeals.

Jack Beard and Margaret Beard, who are doing business as a partnership under the name of Nehi Bottling Company, were made parties defendant because, as the employers of Burdette G. Gunn, deceased, they made payments to the plaintiff pursuant to the provisions of the Workmen's Compensation Act. To the extent of these payments they seek to be subrogated to the rights of the plaintiff herein. However, their rights to subrogation are in no way involved in this appeal so no further mention will be made herein of these parties.

For convenience we shall herein refer to the appellant as such; to the deceased Burdette G. Gunn as Gunn; to the deceased Edward Smetter as Smetter; to the Nehi Bottling Company as Nehi; to the appellee Coca-Cola Bottling Company of Lincoln, a corporation, as Coca-Cola; and to the appellee DeRoyce Lusher as Lusher.

In view of the proceedings had in the trial court we shall consider the record in accordance with the following principles:

"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." Roby v. Auker, 149 Neb. 734, 32 N. W. 2d 491.

"In an action where there is any evidence which will support a finding for a party having the burden of proof, the trial court cannot disregard it and direct a verdict against him." Hamilton v. Omaha & Council Bluffs St. Ry. Co., 152 Neb. 328, 41 N. W. 2d 139.

"In a law action, it is error for the trial court to direct a verdict for either of the parties on an issue of fact on which the evidence is conflicting. Such issue should be submitted to the jury for its determination." Umberger v. Sankey, 151 Neb. 488, 38 N. W. 2d 21.

Appellant seeks recovery against Lusher on the theory that he was negligent in the operation of his automobile and that such negligence was a proximate cause of the accident which resulted in Gunn's death, and against Coca-Cola on the grounds that Gunn, pursuant to an invitation from Smetter while Smetter was acting within the scope of his employment, was a passenger in Smetter's car for the benefit of and in furtherance of the business of Coca-Cola. Appellant also alleged that Smetter was negligent in operating his car.

The accident, which resulted in the death of Gunn and Smetter, occurred on February 21, 1948, at about 11:22 p. m. on U. S. Highway No. 6 at a point about one-fourth mile east of the village of Emerald in Lancaster County. At the place of the accident U. S. Highway No. 6 is a paved three-lane highway. The lanes from north to south are respectively 13, 13, and 11 feet wide, making a total traveling surface 37 feet wide. The shoulders are each 8 feet wide. The highway at this place runs

east and west and, for a considerable distance in both directions, is level. The night was cold and the pavement was clean and dry. Visibility was good. The accident occurred at about the center of the center lane. It resulted when the 1946 Chevrolet sedan, owned and driven by Smetter, ran head on into the 1936 Oldsmobile convertible coupe, owned and driven by Lusher. Riding in the car with Smetter was Gunn. Riding in the car with Lusher were his brother Eldon and two other people. At the time of the accident the Smetter car was traveling west and the Lusher car east. Neither car was turned over as a result of the accident. After the impact the Smetter car proceeded down the highway about 25 feet. It stopped on the highway facing west. Its location was partly on the north and partly on the center lane. The impact drove the Lusher car some 4 to 5 feet back toward the southwest. It was on the highway facing northeast when it stopped. It was mostly across the south lane but did extend over and onto the center lane. As has already been stated Gunn and Smetter were killed instantly. None of the people in the Lusher car were killed.

We shall first consider the question of whether the evidence presents any issue of fact for the jury as to any liability on the part of Coca-Cola.

Gunn was a route salesman for Nehi. Nehi's products included Upper 10. Gunn's route included the Sunset Party House at Emerald. The Sunset Party House is a dance place in Emerald owned and operated by Harry E. Nourse and J. L. Stroud. In the winter of 1947-1948 dances were held there every Saturday night. When dances were held soft drinks were sold.

Smetter was a route salesman for Coca-Cola. Coca-Cola had an exclusive franchise to sell bottled Coca Cola in an area which included Lincoln and Emerald. It had a plant in Lincoln located at 2120 G Street which served this area. Smetter's route was in Lincoln. His duties were to deliver bottled Coca Cola to the customers

on his route, collect empties, and collect for the deliveries except when the customer had made arrangement for credit. Trucks were furnished by Coca-Cola for this purpose. While the Sunset Party House in Emerald, which was a regular customer, was not on Smetter's route, the evidence shows the salesmen for Coca-Cola were directed and expected to take care of Coca-Cola's regular customers, whether on their respective routes or not, whenever they found a customer who needed Coca Cola, provided it was reasonably convenient for them to do so. This, even though it was outside of their regular hours of duty. These salesmen were given to understand it was part of their duties to build good relations with Coca-Cola's customers. The salesmen all had keys to the plant and were authorized to use the trucks of Coca-Cola for this purpose. It was also understood by Coca-Cola that if the amount to be hauled was small the salesmen could use their own cars for that purpose, although not encouraged to do so. The record shows that on occasions salesmen had used their own cars. However, they were given directions never to haul products of a competitor nor to take any riders with them.

On Saturday evening February 21, 1948, about 9 or 9:15 p. m., Mr. and Mrs. Burdette G. Gunn came to the Sunset Party House for a social evening. They were accompanied by their friends Mr. and Mrs. Leo Hugelman, having come out in the latter's car. They were given a booth. There was a large crowd and the supply of soft drinks was getting low. Shortly after he arrived Gunn talked to Harry E. Nourse, one of the men who was operating the place, about it. Nourse was acquainted with both Gunn and Smetter and knew they were salesmen for Nehi and Coca-Cola respectively.

About 10 p. m. Nourse came to the booth where Gunn and his party were seated to talk to Gunn. Gunn had previously told Nourse he would not let him run out of pop. Nourse told Gunn he would have to go and get

some pop and to bring back ten cases. Mr. and Mrs. Smetter, who were out to the Sunset Party House for a social evening, had come to the Gunn booth in the meantime and were present. Gunn then told Nourse that Smetter was going in with him. Nourse then told Gunn to split the order, and have Smetter bring five cases of Coca Cola and for Gunn to bring five cases of Upper 10.

Gunn and Smetter left the Sunset Party House shortly thereafter in Smetter's car, Gunn not having a car of his own. They obtained the Coca Cola from the Coca-Cola plant and the Upper 10 from the Nehi plant. It was on their return to the Sunset Party House with this load that the accident happened.

As to Coca-Cola the burden was on the appellant to show that the wrongful death of Gunn was caused by Smetter's negligence and that Coca-Cola was responsible therefor.

"For all acts done by a servant in obedience to the express orders or directions of the master, or in the execution of the master's business, within the scope of his employment, and for acts in any sense warranted by the express or implied authority conferred upon him, considering the nature of the services required, the instructions given, and the circumstances under which the act is done, the master is responsible; for acts which are not within these conditions the servant alone is responsible." Dafoe v. Grantski, 143 Neb. 344, 9 N. W. 2d 488.

From the foregoing factual statement of what the record discloses a jury would be fully supported in finding that at the time of the accident Smetter was acting within his authority as a salesman for Coca-Cola in delivering its products to a regular customer although after hours, outside of his route, and in his own car. But from that fact alone it could not reasonably be inferred that Gunn was a passenger in Smetter's car for

the benefit of and in furtherance of the business of Smetter's employer Coca-Cola.

In Van Auker v. Steckley's Hybrid Seed Corn Co., 143 Neb. 24, 8 N. W. 2d 451, we said: "* * * we conclude that a person riding in a motor vehicle is a guest if his carriage confers only a benefit upon himself and no benefit upon the owner or operator except such as is incidental to hospitality, social relations, companionship, or the like, as a mere gratuity, and no recovery can be had under our statute except for gross negligence. However, if his carriage contributes such tangible and substantial benefits as to promote the mutual interests of both the passenger and the owner or operator, or is primarily for the attainment of some tangible and substantial objective or business purpose of the owner or operator, he is not a guest. If the latter rule be applicable to the present case, plaintiff could recover for ordinary negligence * * *. See 4 Blashfield, Cyclopedia of Automobile Law, sec. 2292; Annotations, 82 A. L. R. 1365, 95 A. L. R. 1180; Doherty v. Edwards, 227 Ia. 1264, 290 N. W. 672." The latter would be true if the evidence would sustain such a finding, whether under express or implied authority, but whether there is any evidence to sustain such a finding is a question of law.

The extent of the authority conferred upon an agent may be a question of fact but the question of whether there is any evidence to prove it is one of law.

The evidence, without dispute, shows that Gunn had, in effect, solicited the business of the Sunset Party House from Nourse and had received it, and that Smetter had agreed to go with him to Lincoln to get it, Gunn not having a car, before Smetter ever knew he was to bring out any of his employer's products. It was only after Nourse told Gunn to bring ten cases and Gunn told Nourse that Smetter was going to Lincoln with him for the purpose of bringing it out that a change was made in the order. No request to Nourse was made by either Gunn or Smetter to do so but apparently he did so of his

own accord. Up to this point whatever Smetter had agreed to do for Gunn was a friendly accommodation and on a social basis. It had absolutely nothing to do with Coca-Cola. Nothing happened thereafter to change this relationship. The evidence will sustain no other finding than that Gunn was a guest of Smetter, the latter having taken him as a friendly accommodation.

It was Smetter's privilege to invite whomever he wanted to ride in his car as his guest and to transport them as a friendly act of accommodation. But that fact alone would not make Smetter's employer liable because thereof. If there was evidence from which it could be found that in order to get any part of the order for Coca-Cola Smetter agreed to haul Gunn that might present another question, but such is not the situation here.

What the court said of plaintiff in Bushouse v. Brom, 297 Mich. 616, 298 N. W. 303, is here applicable to Gunn. There the court said: "In the instant case it was clearly the friendship and social relation of these parties which resulted in plaintiff going on the trip with defendant. It was not a commercial arrangement or one in which the owner or driver of the automobile was induced to transport a passenger for an agreed consideration."

"* * * the general rule (is) that an employee using an automobile in his employer's business has no implied or apparent authority to invite others to ride with him, and that, if a passenger who accepts the unauthorized invitation of the employee is injured, the employer is not liable, for the reason that the passenger is not a guest of his but merely a guest of his employee. Liggett & Myers Tobacco Co. v. De Parcq, 8 Cir., 66 F. 2d 678, 685, citing: White v. Brainerd Service Motor Co., 181 Minn. 366, 232 N. W. 626, 627; Dearborn v. Fuller, 79 N. H. 217, 107 A. 607; Higbee Co. v. Jackson, 101 Ohio St. 75, 128 N. E. 61, 14 A. L. R. 131; Union Gas & Electric Co. v. Crouch, 123 Ohio St. 81, 174 N. E. 6, 74 A. L. R. 160; Chajnacki v. Dougherty, 254 Mich. 296, 236 N. W. 789;

Rolfe v. Hewitt, 227 N. Y. 486, 125 N. E. 804, 14 A. L. R. 125; Psota v. Long Island R. Co., 246 N. Y. 388, 159 N. E. 180, 62 A. L. R. 1163; Monnet v. Ullman, 129 Or. 44, 276 P. 244; Hughes v. Murdoch Storage & Transfer Co., 269 Pa. 222, 112 A. 111; Wing v. Martin, 101 Vt. 108, 141 A. 602. See, also, 5 Am. Jur. pp. 728-729, §§ 393, 394, and Annotations to Psota v. Long Island R. Co., N. Y., supra, 62 A. L. R. 1163, 1168." Metropolitan Life Ins. Co. v. Gosney, 101 F. 2d 167.

In fact, appellant admits that the evidence submitted does not establish facts from which it could be found that Smetter had either express or implied authority to transport social guests at the risk of his employer.

"In an action where the evidence produced by the plaintiff is not sufficient to support a verdict in his favor, it is the duty of the trial court to direct a verdict for the defendant." Hamilton v. Omaha & Council Bluffs St. Ry. Co., *supra.*

Appellant complains of the court's exclusion, on objection made thereto, of the pretrial deposition taken of Jefferson Davis Martin. She also complains of the exclusion of separate questions and answers offered therefrom. She claims they are admissions against interest and admissible as such. Martin was the president, sole owner of all common stock, and in active management and control of Coca-Cola. We have very recently set out the principles here applicable in Loyal's Auto Exchange, Inc. v. Munch, 153 Neb. 628, 45 N. W. 2d 913. It would serve no useful purpose to repeat them here.

Martin testified at the trial of this case. We have analyzed and compared his testimony there given and that found in the deposition. It is for all practical purposes the same. To have admitted it would have been cumulative only of what had already been admitted. But, for the sake of argument only, let us assume that it should have been admitted. To do so will not help the appellant for it would add nothing to the case she has already made. It would leave the factual situation

in the same status, that is, insufficient to support a verdict against Coca-Cola.

Having come to the conclusion that appellant did not make a case against Coca-Cola we are next confronted with the contention of both Lusher and Coca-Cola that the following principle is then controlling:

" 'Where a verdict is returned against a plaintiff and in favor of several defendants, on different, distinct and separate defenses pleaded separately by them, a single joint motion for a new trial against them all is insufficient, and it should be overruled if the verdict is good as to any one of the defendants.' Lydick v. Gill, 68 Neb. 273. See, also, Davy v. Aevermann, 110 Neb. 62." Koehler v. Farmers State Bank, 112 Neb. 590, 200 N. W. 52. See, also, Long & Smith v. Clapp, 15 Neb. 417, 19 N. W. 467; Dorsey v. McGee, 30 Neb. 657, 46 N. W. 1018; Scott v. Chope, 33 Neb. 41, 49 N. W. 940; Thomas v. Fundum, 135 Neb. 728, 283 N. W. 839; Washington v. Beselin, 141 Neb. 638, 4 N. W. 2d 753. If error assigned in such motion for new trial is not good as to all it is not good as to any.

That appellant sought recovery against Coca-Cola and Lusher on separate grounds has already been set forth herein. Both Coca-Cola and Lusher filed separate answers, had different counsel, made separate defenses, and made separate motions for directed verdicts. The court sustained each of said motions and directed verdicts accordingly. Thereupon appellant filed a motion for new trial in the following language: "Comes now the plaintiff and moves the court to set aside and vacate the judgment entered in the above entitled matter and to grant the plaintiff a new trial against the defendants Coca-Cola Bottling Co. of Lincoln, a Corporation, and DeRoyce Lusher, for the following reasons:"

We find this motion, as made, is subject to the foregoing rule. Since the trial court's overruling thereof was correct as to Coca-Cola it must also be sustained

as to Lusher as the questions raised by appellant as to Lusher are not here for our consideration.

In view of the foregoing we sustain the judgment of the trial court overruling appellant's motion for a new trial.

AFFIRMED.

MICHAEL F. EGAN, APPELLANT, V. ELIZABETH NIEMANN ET AL., APPELLEES.
47 N. W. 2d 404

Filed April 6, 1951. No. 32945.

Executors and Administrators. Under the law of this state the administrator takes no title to the real estate of the decedent and is without authority to maintain an action to quiet title to such real estate.

APPEAL from the district court for Dawes County: EARL L. MEYER, JUDGE. *Appeal dismissed.*

Lee Card, for appellant.

Edwin D. Crites, for appellees.

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

YEAGER, J.

This action as it was tried in the district court was by Michael F. Egan, plaintiff, against Elizabeth Niemann, Theodore Clauson, Jane Clauson, and other unknown persons, defendants, to quiet title to 320 acres of land in Dawes County, Nebraska.

The action was tried to the court. At the conclusion of the evidence of the plaintiff the cause was dismissed for the reason that the evidence of plaintiff was insufficient to sustain a cause of action. The order of dismissal was entered March 11, 1950. On the same day a motion for new trial was filed.

By showing appearing in the transcript it is disclosed that Michael F. Egan died intestate on March 25, 1950, and that Walter D. Egan was appointed administrator of his estate.

On September 18, 1950, Walter D. Egan, as administrator of the estate of Michael F. Egan, deceased, made application to have the action revived in his name as administrator. After due notice an order was entered by the district court reviving the action in the manner and form requested.

On the same day the motion for new trial was overruled. Thereafter an appeal was taken to this court by Walter D. Egan, the administrator, in whom the action was revived. However it is being prosecuted in the name of the deceased Michael F. Egan.

In their brief the appellees have moved for a dismissal of the appeal on the ground that Walter D. Egan, as administrator, is not the real party or parties in interest and therefore may not maintain the action.

This position of the appellees finds uniform support in the appropriate statute and the decisions of this court.

Section 25-1410, R. R. S. 1943, provides: "Upon the death of the plaintiff in an action, it may be revived in the names of his representatives, to whom his right has passed. Where his right has passed to his personal representative, the revivor shall be in his name; where it has passed to his heirs or devisees, who could support the action if brought anew, the revivor may be in their names."

In Youngson v. Bond, 64 Neb. 615, 90 N. W. 556, it is said: "The right of the administrator to maintain this suit as one to quiet title to the premises must be sustained, if at all, under the provisions of section 57, chapter 73, Compiled Statutes, 1899, which reads as follows: 'That an action may be brought and prosecuted to final decree, judgment, or order, by any person or persons, whether in actual possession or not, claiming title to real estate, against any person or persons, who

claim an adverse estate or interest therein, for the purpose of determining such estate or interest, and quieting the title to said real estate.' Under the decedents' law of this state, the right of an administrator to the lands of his decedent is possessory only; and it is readily apparent from the section of the statute quoted that an administrator does not have title within the meaning of that section so as to authorize him to maintain a suit to quiet title to real estate." The statute quoted in this opinion is in substance the same as section 25-21,112, R. R. S. 1943. See, also, Eayrs v. Nason, 54 Neb. 143, 74 N. W. 408; Urlau v. Ruhe, 63 Neb. 883, 89 N. W. 427; Vogt v. Binder, 76 Neb. 361, 107 N. W. 383; Vybiral v. Schildhauer, 144 Neb. 114, 12 N. W. 2d 660, 150 A. L. R. 497.

The motion of appellees to dismiss the appeal is sustained and the appeal is dismissed.

APPEAL DISMISSED.

MARY R. MOLCZYK, APPELLEE, V. CHARLES MOLCZYK, APPELLANT.

47 N. W. 2d 405

Filed April 6, 1951. No. 32956.

1. **New Trial.** The time for filing a motion for new trial begins to run from the time the decision was rendered, and not from the date it was filed or entered on the journal of the court.
2. ———. Such requirement is not directory merely but wholly mandatory, and only the date the decision was rendered is to be considered in determining the time within which a motion for new trial must be filed, except as provided by section 25-1143, R. R. S. 1943.
3. **Appeal and Error.** This court is without jurisdiction to entertain an appeal from the district court unless, as provided by section 25-1912, R. R. S. 1943, notice of appeal is filed in the office of the clerk of the district court and the docket fee is deposited with such clerk within one month after rendition of the judgment or decree or within one month from the overruling of a motion for new trial timely filed in the cause.

APPEAL from the district court for Wheeler County: ERNEST G. KROGER, JUDGE. *Appeal dismissed.*

William Keeshan, for appellant.

Stanley J. Oliverius, for appellee.

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

CHAPPELL, J.

On July 17, 1948, plaintiff brought this action to secure a divorce from bed and board because of specific alleged extreme cruelty of defendant. Issues were framed thereon by defendant's answer and plaintiff's reply. After trial on November 16, 1948, the trial court rendered its judgment, finding and adjudging the issues generally in favor of plaintiff and against defendant. The decree rendered on that date, but not filed and entered on the journal until December 11, 1948, awarded plaintiff a divorce from bed and board, gave her the custody of their five minor children, the youngest of whom was then 13 years of age, and made a property settlement between the parties, the provisions of which are unimportant in making decision herein.

On November 30, 1948, more than 10 days after the decision was rendered, instead of within 10 days thereafter as required by section 25-1143, R. R. S. 1943, with no exception therein having application, defendant filed a motion for new trial which was overruled on November 1, 1950.

In that connection, the record affirmatively discloses that the judgment was rendered on November 16, 1948, and defendant's motion for new trial not having been filed within the time required by statute was a nullity and of no force and effect. Ehlers v. Neal, 148 Neb. 697, 28 N. W. 2d 558; Heeter v. Nisi, 134 Neb. 209, 278 N. W. 271.

In other words, the time for filing a motion for new trial begins to run from the time the "decision was ren-

dered" and not from the time it was filed or entered on the journal of the court. Such requirement is not directory merely but wholly mandatory, and only the date the decision was rendered is to be considered in determining the time within which a motion for new trial must be filed, except as provided by section 25-1143, R. R. S. 1943. Power v. Federal Land Bank, 141 Neb. 139, 2 N. W. 2d 924.

On the other hand, however, the right to perfect an appeal to this court in equity cases, such as that at bar, does not depend upon the timely filing of a motion for new trial, if notice of appeal is filed in the office of the clerk of the district court and the docket fee is deposited with such clerk "within one month after the rendition of such judgment or decree" as required by section 25-1912, R. R. S. 1943. In such event, this court has jurisdiction and authority to try the case de novo on its merits in the manner provided by section 25-1925, R. R. S. 1943, but in the absence of a motion for new trial timely filed, it cannot review, consider, or pass upon errors of law which occurred during the trial. Nemetz v. Nemetz, 147 Neb. 187, 22 N. W. 2d 619; Oertle v. Oertle, 146 Neb. 746, 21 N. W. 2d 447; Ash v. City of Omaha, 152 Neb. 699, 42 N. W. 2d 648, supplemental to 152 Neb. 393, 41 N. W. 2d 386.

However, in the case at bar defendant's motion for new trial was a nullity and of no force and effect because filed out of time, and his notice of appeal was not filed with the clerk of the district court and the docket fee was not deposited with such clerk until November 10, 1950, almost two years after rendition of the judgment or decree on November 16, 1948.

In such a situation the applicable and controlling rule is that this court is without jurisdiction to entertain an appeal from the district court unless, as provided by section 25-1912, R. R. S. 1943, notice of appeal is filed in the office of the clerk of the district court and the docket fee is deposited with such clerk within one month

after rendition of the judgment or decree, or within one month from the overruling of a motion for new trial timely filed in the cause. Ehlers v. Neal, *supra*.

Such rule is fundamental and mandatory, and this court takes judicial notice of its application in this and other similar cases wherein it has no jurisdiction or authority whatever to review and decide the issues originally presented to the trial court or argued in this court.

We therefore conclude that this court has no jurisdiction or authority to hear the appeal, and it should be and hereby is dismissed at defendant's cost.

APPEAL DISMISSED.

GERTRUDE IRENE FISHER, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.

47 N. W. 2d 349

Filed April 12, 1951. No. 32875.

1. **Juries.** Opportunity for prejudice or disqualification of jurors is not sufficient to raise a presumption that they exist.
2. **Appeal and Error: New Trial.** Errors, occurring during the trial of a criminal case, cannot be reviewed in this court unless they have been assigned in and presented to the trial court by a motion for new trial.
3. **Trial: Witnesses.** The rule that if a person is employed to produce evidence against the accused and he testifies against the accused, the defendant is entitled to an instruction to the jury that in weighing the testimony of the witness greater care and closer scrutiny should be exercised than in considering the testimony of witnesses who are disinterested, is generally not applicable to public officers who are witnesses.
4. **Trial.** It is not obligatory upon the court, in the absence of a request, to give a cautionary instruction.
5. ———. It is not error to refuse a requested instruction when the substance of it is included by the court in its charge to the jury.
6. **Evidence: Criminal Law.** Evidence of good character of the defendant in a criminal case should be considered by the jury not by itself but in connection with all the evidence in the case.

7. **Trial: Criminal Law.** The inclusion in an instruction on that subject of a statement that when, after giving evidence of good character due weight, the proof still shows the accused to be guilty beyond a reasonable doubt, such evidence of good character is unavailing, is proper.
8. **Criminal Law.** The law recognizes no form of insanity or uncontrolled impulse, even though the mental faculties are disordered or deranged, which provides immunity from punishment for a criminal act, if the person committing the act has capacity to know what he is doing and to understand that his act is wrong.
9. **Evidence: Criminal Law.** Admission of defendant of facts tending to establish a criminal charge against him is generally considered direct and not circumstantial evidence.
10. **Trial: Criminal Law.** Absence of any direct, incriminatory evidence is ordinarily made the test of the obligation of the trial court to instruct as to the probative value and manner of considering circumstantial evidence in a criminal case, and, if there is direct incriminatory evidence of the principal facts essential to guilt, the failure to instruct in this regard is not error.
11. **Evidence: Criminal Law.** Extrajudicial admissions or a voluntary confession is insufficient to prove that a crime has been committed, but either or both are competent evidence of the fact and may, with corroborative evidence or circumstances, establish the corpus delicti and guilty participation of the defendant.
12. **Homicide.** An unintentional killing of a person without malice by an unlawful assault and battery that in itself is not of a character or intended to cause death may result in the assailant being guilty of manslaughter.
13. **Parent and Child.** A parent is not liable criminally for moderately or reasonably correcting a child, but it is otherwise if the correction is immoderate and unreasonable.
14. **Trial: Criminal Law.** The credibility of witnesses and the weight of their testimony are for the jury to determine in a criminal case, and the conclusion of the jury cannot be disturbed unless it is clearly wrong.

ERROR to the district court for Lincoln County: ISAAC J. NISLEY, JUDGE. *Affirmed as modified.*

Edward E. Carr, for plaintiff in error.

Clarence S. Beck, Attorney General, and *Dean G. Kratz,* for defendant in error.

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

BOSLAUGH, J.

Plaintiff in error was charged with, tried for, and convicted of the crime of manslaughter. She was adjudged to be confined in the State Reformatory for Women. A motion for a new trial was denied and she has brought the record of her conviction and sentence to this court for review.

The information alleges that Gertrude Irene Fisher, defendant and plaintiff in error, frequently and unlawfully from about February 1, 1949, to and including February 4, 1950, struck and whipped Hilbert Eugene Fisher with a wood ruler and stick and thereby caused his death on February 8, 1950.

It is said that there was error in not sustaining a motion of defendant made before the commencement of the trial to quash the jury panel. The basis of the motion was that after the members of the jury panel were in North Platte attending court and shortly before the commencement of the trial there was published in a daily paper of that city a statement made by the county attorney of the county and read by the jurors when they knew the trial of the case was about to begin to the effect that: "A coroner's jury * * * rendered the decision that 'Hilbert Eugene Fisher came to his death as the result of most inhuman beating administered by his mother, Bertrude (Gertrude) I. Fisher, during the past several months, hastened by malnutrition' "; that a similar statement was published in an Omaha daily paper circulated in North Platte the day before the trial began; that there were many other partly untrue, misleading, inflaming, sensational, and prejudicial statements published in a North Platte daily paper and circulated throughout Lincoln County during more than a month before the trial; and that they contained statements said to be facts indicating the guilt of the de-

fendant of causing the death of her child by inhuman beating and starvation. Many of the publications complained of were offered in support of the motion and appear in the record.

There is no proof that any juror read, knew the contents of, was influenced by, or prejudiced against the defendant because of any of these publications. The claim of error is predicated on an assumption that the jurors read the matters published and were influenced, prejudiced, and disqualified thereby. This assignment is wholly unsupported. Opportunity for prejudice or disqualification is not sufficient to raise a presumption that they exist. § 29-2006, R. R. S. 1943; Ringer v. State, 114 Neb. 404, 207 N. W. 928; Holt v. United States, 218 U. S. 245, 54 L. Ed. 1021, 31 S. Ct. 2.

The reception in evidence against objection of defendant of pictures of the body of the deceased taken after death and their reproduction on a screen during the trial in the presence of the jury are discussed in the brief of defendant as reason for reversal of her conviction. It is claimed they had no tendency to establish guilt or innocence, and that they were unusually ghastly and gruesome and were effective only to incite the emotions and inflame the passions of the jury to the prejudice of the defendant. This contention cannot be examined and determined because of the absence of objection to the ruling of the trial court in this regard in either the motion for a new trial, the petition in error, or the assignments of error in the brief of defendant. Luster v. State, 142 Neb. 253, 5 N. W. 2d 705; Scavio v. State, 144 Neb. 881, 15 N. W. 2d 50; Green v. State, 116 Neb. 635, 218 N. W. 432.

The sheriff and the deputy sheriff of Lincoln County and a member of the Nebraska Safety Patrol testified on the trial as witnesses for the State. Defendant complains that the court did not inform the jury of the rule of law that when any person employed to procure evidence against the accused testifies for the State, the

jury should be instructed that in weighing the testimony of such witness it should exercise greater care and subject his testimony to closer scrutiny than in a case of a witness who is wholly disinterested. Sandage v. State, 61 Neb. 240, 85 N. W. 35, 87 Am. S. R. 457. Public officers are not generally within the class of persons to whom this rule is applicable. Barnes v. State, 124 Neb. 826, 248 N. W. 381. Defendant did not request such an instruction. It is not obligatory upon the court, in the absence of a request, to give a cautionary instruction of this character. Clark v. State, 151 Neb. 348, 37 N. W. 2d 601.

Defendant put in issue her character by evidence of witnesses examined on her behalf that she was and had been a person of good reputation. The State did not attempt to dispute the proof in this particular. An instruction on this subject tendered by defendant was refused by the court, but the substance thereof, to the extent it was a correct statement of law, was included in the charge to the jury. This was permissible procedure. Smith v. State, 153 Neb. 308, 44 N. W. 2d 497. The part of the instruction earnestly condemned by counsel for defendant is the following: "* * * when, after giving evidence of good character due weight, the proof still shows the accused to be guilty beyond a reasonable doubt, such evidence of good character is unavailing." The instruction of the court in reference to the consideration the jury should give to evidence of good character of the defendant has been in all essential respects approved by this court (McDougal v. State, 105 Neb. 553, 181 N. W. 519) and by the courts of many other jurisdictions. Annotation, 68 A. L. R. 1068. A fault of the tendered instruction was the singling out and over-emphasis of the evidence of good character and the implication that it might, when considered by itself, be sufficient to create a reasonable doubt that would not otherwise exist. Evidence of good character should be considered by the jury, not by itself, but in con-

nection with all the evidence in the case. Sweet v. State, 75 Neb. 263, 106 N. W. 31; State v. Dowell, 47 Idaho 457, 276 P. 39, 68 A. L. R. 1061. The court did not err in refusing the requested instruction. It properly instructed the jury in this regard.

Complaint is made of the failure of the trial court to instruct the jury as to the mental status of the defendant to the effect that if at the time of the act charged against her she was suffering an aberration of mind of a nature and to a degree that she was not conscious of her act and because thereof was unable to know whether the act charged against her was right or wrong, the jury should find her not guilty. It is said in her brief that it is not contended she was insane.

The law recognizes no form of insanity or uncontrolled impulse or temper, even though the mental faculties are disordered or deranged, which provides immunity from punishment for a criminal act, so long as the person committing the act has capacity to know what he is doing and to understand that his act is wrong. One who has capacity to distinguish between right and wrong with respect to a criminal act at the time of committing it is legally sane. Shannon v. State, 111 Neb. 457, 196 N. W. 635; Williams v. State, 115 Neb. 277, 212 N. W. 606. There is a legal presumption of sanity. There was no attempt by defendant to deny the applicability of the presumption to her. There is no evidence that she could not distinguish between right or wrong. There was no issue of unsoundness of mind of defendant in this case. An instruction on the subject was not tendered. The suggested instruction is contained in the assignment of errors in the brief. Cate v. State, 80 Neb. 611, 114 N. W. 942. This complaint has no merit.

Defendant proposed instructions on the subject of circumstantial evidence. They were rejected. The charge of the court did not advise the jury of the probative value or the manner of measuring or applying this character of evidence. Prejudice is claimed be-

cause of this. The record shows direct and positive evidence on the matters claimed by the State tending to show the guilt of the accused, and she produced the same class of proof to convince the jury of her innocence. "When the existence of any fact is attested by witnesses, as having come under the cognizance of their senses, * * * the evidence of that fact is said to be direct or positive. When, on the contrary, the existence of the principal fact is only inferred from one or more circumstances which have been established directly, the evidence is said to be circumstantial." Black's Law Dictionary, Circumstantial Evidence, p. 328. See, also, 20 Am. Jur., Evidence, § 270, p. 258. It is conservative to say that the greater portion of the evidence of the main facts is direct and not circumstantial.

There is evidence of the State of several admissions of the defendant. Some of these were confirmed, and others were denied by her. Admissions of defendant of facts tending to establish a criminal charge against him are generally considered direct and not circumstantial evidence. The People v. Costello, 320 Ill. 79, 150 N. E. 712; State v. Huff, 353 Mo. 791, 184 S. W. 2d 447; State v. Nortin, 170 Or. 296, 133 P. 2d 252; Annotation, 40 A. L. R. 571.

The absence of any direct or positive incriminating evidence is ordinarily made the test of the obligation of the trial court to give a charge as to the probative value and manner of considering circumstantial evidence in a criminal case. If there is direct incriminatory evidence of the principal facts essential to guilt, the failure to instruct the jury as to this kind of evidence is not error. State v. Shepard, 334 Mo. 423, 67 S. W. 2d 91; Wilson v. State (Tex. Cr.), 225 S. W. 2d 173; State v. Holbrook, 98 Or. 43, 188 P. 947; State v. Quartier, 118 Or. 637, 247 P. 783; Annotation, 15 A. L. R. 1049. The court properly refrained from instructing the jury in this case on the law relative to circumstantial evidence.

The sufficiency of the evidence in chief of the State to justify a submission of the case to the jury was tested by a request of defendant that the court order her acquittal of the charge on trial. The motion was denied. Defendant presents this ruling for review.

The only unlawful act charged against defendant was that she struck and whipped the deceased and thereby caused his death. Defendant says the only evidence that she administered punishment to her child, the deceased, by whipping him, was her alleged admissions to the sheriff after she was arrested and while in his custody, and that the body of the crime charged could not be proven by her extrajudicial admissions. If her premise is correct, the conclusion is well established. A conviction for felony may not be had and will not be sustained when the only evidence of guilt is extrajudicial admissions or a confession of the defendant. Gallegos v. State, 152 Neb. 831, 43 N. W. 2d 1.

The evidence of the State, at the time the ruling was made which is now being considered, was in substance that defendant said to the sheriff that she had whipped the deceased during the period of about a year before his death on an average of about twice a week —"once or twice a week" with a "ruler and a stick" on the seat of his pants during the early months, and thereafter from three to six months by hitting his hands and about his body and face. The stick was a small piece of an orange crate. (The ruler is not in any way described.) The child was disobedient. Talking to him had no effect, and that is why she used a stick. The last time she corrected him was four or five days before his death, as he would not handle his food while he was eating as he should, and she tapped him on the head with a bowl and spoon. She said she would lose her temper on these occasions and would afterwards realize what she had done. At another time the sheriff said he was talking with defendant about employing or selecting an attorney, and she said, "I

told you I was guilty"—"I did this." He asked if she knew it was a manslaughter case, explained it to her three or four times, and told her she had better have a lawyer, and she said, "I told you I was guilty and that I done that."

The sheriff was corroborated as to his version of what was said about the fact and manner of punishment of the boy by the deputy sheriff and a member of the Nebraska Safety Patrol. The sheriff saw the body of the deceased the day of his death, and observed bruises on the body and marks on his hands and face.

A doctor examined the deceased at the hospital the day of his death, about two hours after death, and found abrasions, contusions, and lacerations on the face, neck, arms, chest, and scalp. They were in his judgment of recent origin. He found evidence that deceased had not been healthy, was an extreme case of malnutrition, was emaciated, might have had rickets and been a marasmic, his eyes were sunken, and his stomach protruded.

He was corroborated by the testimony of a doctor who examined the body a few days later, and he told of finding additional injuries on the body. He said the body was about half the size that it should have been for a boy the age of the deceased; that it would have been impossible for him to have fallen and sustained injuries in the places where they were; that external violence was the only logical cause; and he expressed an opinion that repeated whippings of a child may cause an emaciated condition by virtue of nervous reaction and a tendency to prevent the child from eating and enjoying proper digestion. The cause of death, as he believed, was repeated whippings that lowered and destroyed the vitality of deceased.

A pathologist performed a post mortem on the body of deceased on the day after death. He stated that the boy was four years of age, markedly emaciated, weighed 19¼ pounds, when an average weight for

him would have been 40 pounds; he found recent lacerations and cuts on the arms, forearms, and at different places over the dorsal surface, abrasions on the face, buttocks, and scalp, scars over the entire scalp, and marks on the backs of the hands; evidence of extravasation of blood in the tissues of the back of the hands and forearms, and ridging of the fingernails; and some of the fingers showed recent hemorrhage beneath the nail beds. He thought these injuries resulted from external causes. He found no disease of the organs of the body. The scalp was about twice normal thickness, due to a great deal of scar tissue. It showed both recent and old hemorrhage. The scalp of a child is usually very pliable and loose, but in this instance it was firm and cracked easily as reflection was made. These conditions of the scalp were caused by repeated trauma over a period of months. The recent hemorrhage had occurred within a matter of days. It was his opinion that the cause of the death of deceased was repeated trauma to his head over a period of months; that this was responsible for a serious degree of malnutrition; and the two resulted in his death.

Extrajudicial admissions or a voluntary confession is insufficient to prove that a crime has been committed, but either or both are competent evidence of that fact and may, with corroborative evidence or circumstances, establish the corpus delicti and guilty participation of the defendant. Gallegos v. State, *supra.*

An unintentional killing of a person, without malice, resulting from an unlawful assault and battery that in itself is not of a character or intended to cause death may result in the assailant being guilty of manslaughter. § 28-403, R. R. S. 1943; Schluter v. State, 153 Neb. 317, 44 N. W. 2d 588; Rhea v. State, 63 Neb. 461, 88 N. W. 789; State v. Frazier, 339 Mo. 966, 98 S. W. 2d 707; State v. Cobo, 90 Utah 89, 60 P. 2d 952; 40 C. J. S., Homicide, § 58, p. 922.

The same may be true if death, without malice, is

unintentionally caused by immoderate and excessive punishment, under the circumstances existing, although not such as is manifestly dangerous to life, in the correction of a child by a parent. Clasen v. Pruhs, 69 Neb. 278, 95 N. W. 640, states the doctrine that: "A parent, or one standing in the relation of parent, is not liable either civilly or criminally for moderately and reasonably correcting a child, but it is otherwise if the correction is immoderate and unreasonable. * * * It is a question of fact to be determined by the jury whether or not the punishment inflicted was, under all the circumstances and surroundings, reasonable or excessive." See, also, State v. McDonie, 96 W. Va. 219, 123 S. E. 405, 37 A. L. R. 699; State v. Spiegel, 39 Wyo. 309, 270 P. 1064, 64 A. L. R. 289; Betts v. State, 60 Tex. Cr. 631, 133 S. W. 251; Williams v. State, 57 Ga. 478; People v. Green, 155 Mich. 524, 119 N. W. 1087, 21 L. R. A. N. S. 216; Ackers v. State, 73 Ark. 262, 83 S. W. 909; 26 Am. Jur., Homicide, § 202, p. 292.

The evidence of the State and defendant was in direct conflict. Defendant maintained she punished her children moderately and appropriately when she thought it was deserved and required, and that she chastised the deceased less frequently and severely than the older children because of his age and condition. There is substantial evidence, medical and otherwise, that the punishment he was subjected to did not contribute to his death and that he died from causes beyond human power to produce or prevent. It was the province of the jury in this situation to resolve the facts. The determination of the trial court that the evidence required a submission of the case to the jury to decide the guilt or innocence of the defendant of the charge against her was correct, and the contention of the defendant that proof is lacking to authorize or sustain a verdict of guilty must be denied. The credibility of the witnesses and the weight of their testimony was

for the jury to decide, and the conclusion of the jury cannot be disturbed unless it is clearly wrong. Luster v. State, *supra;* Frank v. State, 150 Neb. 745, 35 N. W. 2d 816; Planck v. State, 151 Neb. 599, 38 N. W. 2d 790; Smith v. State, *supra.* The evidence prevents a conclusion that the verdict of the jury is without adequate proof to justify it.

The sentence imposed on defendant of not less than six nor more than seven years is challenged as inappropriate. It is incorrect. The indeterminate sentence law is not applicable. § 29-2620, R. R. S. 1943; Larson v. State, 125 Neb. 789, 252 N. W. 195. The length of the sentence, under the circumstances of this case, is excessive. § 29-2308, R. R. S. 1943. The defendant is the mother of six children. The deceased was her seventh and her youngest child. It is not disputed that she was of good character and reputation. Her conduct was in no way questioned until this case arose. That she was a good wife and mother was not disputed before this prosecution was instituted. She made and kept as good a home as could be done under comparable circumstances. The living accommodations for the family of nine consisted of three rooms without modern facilities. The income of the husband was not in excess of $35.00 a week. She had no assistance in the home. There was a relationship of love and affection between the members of the family. She and the children were together all the time. These facts were attested by several persons who knew and lived near her. None of them knew of any unkindness or improper act towards the children by their mother. The jury recommended that leniency be shown defendant in imposing sentence upon her.

The judgment of the district court should be, and is modified to provide that Gertrude Irene Fisher be confined in the State Reformatory for Women at York, Nebraska, for one year at hard labor, except Sundays and

holidays, and the judgment as modified should be, and it is affirmed.

AFFIRMED AS MODIFIED.

MESSMORE, J., participating on briefs.

ETHEL LOUISE HODGES, APPELLEE, V. GLEN W. HODGES, APPELLANT.

47 N. W. 2d 361

Filed April 12, 1951. No. 32913.

1. **Divorce.** Divorce cases are triable de novo on appeal to this court in conformity with section 25-1925, R. R. S. 1943, subject, however, to the rule that when the evidence on material questions of fact is in irreconcilable conflict, this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying and must have accepted one version of the facts rather than the opposite.
2. ———. In an action for divorce if the evidence is principally oral and is in irreconcilable conflict, and the determination of the issues depends upon the reliability of the respective witnesses, the conclusion of the trial court as to such reliability will be carefully regarded by this court on review.
3. ———. It is impossible to lay down any general rule as to the degree of corroboration required in a divorce action, as each case must be decided on its own facts and circumstances.
4. ———. Where condonation is relied upon as a defense it should be pleaded, and where a repetition of the wrong condoned is relied upon, it should be pleaded, but the absence of a plea of condonation does not prevent the court from considering that question.
5. ———. Condonation is forgiveness for the past upon condition that the wrongs shall not be repeated. It is dependent upon future good conduct, and the repetition of the offense revives the wrong condoned.
6. ———. Condonation of extreme cruelty may be avoided by abusive language and the use of opprobrious epithets.
7. ———. Conduct of a husband towards his wife which would not alone support a decree of divorce on the ground of extreme cruelty may, nevertheless, be sufficient to avoid a condonation extended to the husband by the wife for such cruelty.

8. ———. One party to the marriage may condone the cruelty of the other but one claiming condonation must establish it by clear and satisfactory proof.
9. **New Trial.** A new trial will not be granted upon the ground of newly discovered evidence, unless it is made to appear that such evidence, if offered and admitted on the trial, would probably have produced a different result.
10. ———. The application for a new trial on the ground of newly discovered evidence is addressed to the sound judicial discretion of the trial court, and its action thereon will not be overruled unless a clear abuse of discretion is shown.
11. **Divorce.** The proper rule in a divorce case, where the custody of minor children is involved, is that the custody of the child is to be determined by the best interests of the child, with due regard for the superior rights of fit, proper, and suitable parents.
12. ———. In awarding the custody of minor children, the court looks to the best interests of such children, and those of tender age are usually awarded to the mother. Other considerations being equal, it is usual to award the custody of children to the innocent spouse.
13. ———. Custody of minor children awarded their mother in a divorce action will not be disturbed unless it is shown that the mother is an unfit person to have their custody, or that their best interests require such action.

APPEAL from the district court for Nemaha County: VIRGIL FALLOON, JUDGE. *Affirmed.*

Dwight Griffiths and *Robert S. Finn,* for appellant.

Armstrong & McKnight, for appellee.

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

CHAPPELL, J.

Plaintiff brought this action seeking an absolute divorce from defendant for specifically alleged extreme cruelty by personal violence and other means. Defendant filed an answer and cross-petition, denying generally and seeking an absolute divorce from plaintiff upon similarly alleged grounds.

After hearing upon and disposition of several preliminary motions and applications, the case was tried upon

its merits for three days, and the parties rested. Thereafter on June 6, 1950, upon application and hearing, defendant was permitted to withdraw his rest, and on June 20, 1950, both parties adduced additional evidence.

The court then rendered its decision, finding and adjudging the issues generally for plaintiff upon her petition, and dismissing defendant's cross-petition. The decree granted plaintiff an absolute divorce, and gave her the household goods and effects plus $300 permanent alimony; it gave her, as a fit and proper person, the care, custody, and control of their four-year-old daughter, and ordered defendant to pay plaintiff $50 a month as child support. It gave defendant the right to visit the child at reasonable times and places, and the right to have her custody on the first and third Sundays of each month. It gave defendant all other property owned by the parties, including a trailer house, possession of which was given plaintiff until September 1, 1950. All costs were taxed to defendant, including an allowance of $250 attorneys' fees for plaintiff's attorneys, in addition to $90 theretofore allowed as temporary attorneys' fees and suit money.

Defendant's motion for new trial was overruled, and he appealed, assigning substantially: (1) That the judgment was not sustained by the evidence but was contrary thereto and contrary to law, primarily because there was insufficient corroboration of plaintiff's testimony or because in any event defendant's alleged acts of cruelty had been condoned; (2) that the trial court erred in refusing to grant defendant a divorce or give him a new trial for newly discovered evidence; (3) erred in limiting defendant's right to have custody of the child only on the first and third Sundays of each month; and (4) that the allowances for alimony, child support, suit money, and attorneys' fees were excessive. We conclude that the assignments should not be sustained.

Divorce cases are triable de novo on appeal to this

court in conformity with section 25-1925, R. R. S. 1943, subject, however, to the rule that when the evidence on material questions of fact is in irreconcilable conflict, this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying and must have accepted one version of the facts rather than the opposite. Brown v. Brown, 146 Neb. 908, 22 N. W. 2d 148; Green v. Green, 148 Neb. 19, 26 N. W. 2d 299.

As late as Stefan v. Stefan, 152 Neb. 23, 39 N. W. 2d 918, this court reaffirmed the rule that: "In an action for divorce if the evidence is principally oral and is in irreconcilable conflict, and the determination of the issues depends upon the reliability of the respective witnesses, the conclusion of the trial court as to such reliability will be carefully regarded by this court on a review." See, also, Trevett v. Trevett, 151 Neb. 517, 38 N. W. 2d 332.

Also, the rule is that: "It is impossible to lay down any general rule as to the degree of corroboration required in a divorce action, as each case must be decided on its own facts and circumstances." Johnsen v. Johnsen, 144 Neb. 208, 12 N. W. 2d 837. See, also, Brown v. Brown, *supra;* Green v. Green, *supra.*

This court recently held that: "Where condonation is relied upon as a defense, it should be pleaded. Where a repetition of the wrong condoned is relied upon, it should be pleaded.

"The absence of a plea of condonation does not prevent the court from considering that question." Wright v. Wright, 153 Neb. 18, 43 N. W. 2d 424.

As early as Heist v. Heist, 48 Neb. 794, 67 N. W. 790, it was held that: "Condonation is forgiveness for the past upon condition that the wrongs shall not be repeated. It is dependent upon future good conduct, and the repetition of the offense revives the wrong condoned.

"Condonation of extreme cruelty may be avoided by abusive language and the use of opprobrious epithets.

"Conduct of a husband towards his wife which would not alone support a decree of divorce on the ground of extreme cruelty may, nevertheless, be sufficient to avoid a condonation extended to the husband by the wife for such cruelty."

In that connection it was held in Wetenkamp v. Wetenkamp, 140 Neb. 392, 299 N. W. 491, that: "Condonation may be applied to acts of cruelty, but it stands upon a somewhat different basis than cohabitation after knowledge of adultery, for cruelty as a ground of divorce is a continuing course of conduct which grievously wounds the mental feelings and destroys the peace of mind so that it nullifies the legitimate ends of matrimony. The effort to endure unkind treatment as long as possible is commendable, but the repetition of the same cruel and harsh conduct, showing a resumption of the former course of conduct, thereby revokes condonation, and the original cause of divorce is revived."

Also, as held in Trevett v. Trevett, *supra*: "One party to the marriage may condone the cruelty of the other but one claiming condonation must establish it by clear and satisfactory proof."

In the light of the foregoing rules, we have examined the evidence. It is voluminous and of necessity will be only briefly summarized.

The following facts are without dispute. The parties met at Chanute Field, Illinois, while defendant was in the army and plaintiff was employed at the post exchange. They were married at Devine, Texas, on April 30, 1944. Thereafter they lived together at various army bases until defendant went overseas in June 1945. Plaintiff, then pregnant, went to live with defendant's parents near Julian. Their daughter was born on February 11, 1946, prior to defendant's return from overseas on February 26, 1946. On leaving the hospital after birth of the child, plaintiff went to live

with defendant's sister and brother-in-law on a farm near Auburn. A short time after defendant's return they purchased a trailer house in which they lived. It was first parked on a farm of defendant's parents west of Julian, then in Julian back of a garage operated by defendant, then in a cabin camp in Auburn. In April 1949 they purchased a new trailer house in which they lived until the separation, and this action was filed on December 29, 1949. Plaintiff's brother, 16 years old at the time of trial, lived with them except from July 1946 to August 1947. All other material questions of fact were generally in irreconcilable conflict.

Plaintiff testified that at various times and places during the last two years before separation, defendant angrily struck her with his fist or open hand, leaving marks of such assaults upon her eyes and face, and on one occasion struck her with such force as to knock her to the floor, stunned or unconscious for a few moments, from which she thereafter suffered headaches and dizziness. She testified that three or four times a week defendant would not come home until midnight or as late as 4 a. m., and then would sleep late, even until noon. He refused any explanation, except that it was none of plaintiff's business, and they quarreled about it, disturbing their neighbors late at night. Defendant threatened plaintiff with physical violence on many occasions; told her to shut her mouth or he would shut it for her; to shut up or he would knock her teeth out; to be quiet or he would hit her. Defendant told her many times that he wanted a divorce and was tired of living with her. The record discloses that such testimony was amply corroborated by plaintiff's brother, who was not unfriendly with defendant, and by neighbors, who testified for plaintiff. In that situation, plaintiff was entitled to a divorce unless barred by condonation.

In that regard, plaintiff testified that about two weeks before their separation, defendant slapped her upon two

occasions, and told her: " 'If you don't get a divorce I will, I simply can't stand you any more.' " As stated by plaintiff's brother, defendant said: "He wanted to know what she would take to settle for a divorce, that he was getting tired of living with her. He told her lots of times before that that he wanted a divorce. When we went back to Illinois on Labor Day he also told my grandmother that they were getting a divorce."

In the light of the foregoing we conclude also that plaintiff's action was not barred by condonation. In other words, if any acts of extreme cruelty aforesaid were ever condoned such condonation was revoked, and they were subsequently revived by defendant's resumption of his former conduct.

The record further discloses that in August 1949, when defendant was recuperating from an illness and not yet employed full time, plaintiff obtained employment in a reputable cafe because they needed the money for their support, to which she subsequently contributed. In such employment plaintiff made from $45 to $47 a week, working at first from 2 p. m. until 10 p. m., and later from 11 a. m. until 8 p. m., which necessitated leaving their daughter with a reputable and proper woman employed by plaintiff for several hours during the afternoon and evening. It was a mile and one-half from plaintiff's trailer house to the place where the child was left, thence to plaintiff's place of employment. Although defendant was a parts man and auto mechanic with more than one, and sometimes as many as four cars of his own, he seldom took plaintiff to work and seldom if ever came to get her at night as he should have done. Rather, upon such occasions she took a taxi at her own expense or rode with others, as did other employees at the place where she worked. Sometimes she rode with employees in their cars and at other times she rode with others who were kind enough to furnish transportation. On several occasions a reputable unmarried businessman, who was a cus-

tomer at the place where plaintiff worked, took plaintiff and other employees home in his car. Upon a few occasions he got plaintiff's child, brought her to the cafe, and took plaintiff and the child home when other employees were not with them. Defendant had knowledge of the foregoing facts, but made little if any protest about them. This same man gave plaintiff a gift at Christmas time, and upon two other holiday occasions, as he likewise did others employed at the place where plaintiff worked. There was no evidence from which it could be concluded that plaintiff had in any manner been unfaithful to her marriage vows.

The foregoing situation was the entire basis of defendant's allegations and contentions that plaintiff had been unduly friendly toward and intimate and familiar with a named man and with other men whose names the defendant did not know, thus causing him great embarrassment and humiliation.

The evidence of a single witness that plaintiff was seen with the named man in a theatre in Nebraska City on April 13, 1950, and the evidence of defendant and two of his relatives that they saw plaintiff with him late at night on February 22, 1950, was entirely refuted not only by evidence adduced by defendant with relation thereto, but also other competent evidence given by numerous reputable witnesses who testified for plaintiff.

We conclude, as the trial court must have done, that the serious charges made against the plaintiff's character were without any substantial foundation and that plaintiff without doubt was not only a good mother and housekeeper but also a woman with character.

In support of his cross-petition, defendant testified that upon five occasions plaintiff became angry and assaulted him. None of these acts were corroborated in any manner save one, and if that event occurred in the manner described by defendant, it was thereafter fully condoned. As a matter of fact, in explanation of such other events, defendant himself admitted that he once slap-

ped plaintiff in the face with the back of his hand, "to quiet her down, and it did just that." Upon other occasions he said: "I restrained her with a slap in the face, and that slap didn't restrain her and I gave her another one * * * sharp * * * stinging * * *" with the "back of my hand." Upon the occasion having any corroboration whatever, he said that plaintiff "bit me in the back * * * completely through the leather jacket," whereupon he "opened the trailer door and pushed her out of the trailer." We conclude that the trial court was right when it refused to grant defendant a divorce.

Defendant's contention that the trial court erred in refusing to grant a new trial for newly discovered evidence, with relation to events allegedly occurring after the trial and rendition of the decree, has no merit. The applicable rule, as stated in Morrill County v. Bliss, 125 Neb. 573, 251 N. W. 106, is that: " 'A new trial will not be granted upon the ground of newly discovered evidence, unless it is made to appear that such evidence, if it had been offered and admitted on the trial, would probably have produced a different result.' Dickinson v. Aldrich, 79 Neb. 198.

"The application for a new trial on the ground of newly discovered evidence is addressed to the sound judicial discretion of the trial court, and its action thereon will not be overruled unless a clear abuse of discretion is shown."

With regard to the care, custody, and control of their small child, it was said in Gorsuch v. Gorsuch, opinion on motion for rehearing, 143 Neb. 578, 11 N. W. 2d 456: "The proper rule in a divorce case, where the custody of minor children is involved, is that the custody of the child is to be determined by the best interests of the child, with due regard for the superior rights of fit, proper, and suitable parents."

In that connection, the care, custody, and control of a small child, particularly a little girl, is almost uniformly awarded to the mother, if she is a fit and proper

person. As held in Bath v. Bath, 150 Neb. 591, 35 N. W. 2d 509: "In awarding the custody of minor children, the court looks * * * to the best interests of such children, and those of tender age are usually awarded to the mother. Other considerations being equal, it is usual to award the custody of children to the innocent spouse.

"Custody of minor children awarded their mother in a divorce action will not be disturbed * * * unless it is shown that the mother is an unfit person to have their custody, or that their best interests require such action."

We conclude, as the trial court did, that the mother was a fit and proper person to have the custody, care, and control of the child and that defendant was fortunate in that the court conceded him the right to have her custody on the first and third Sundays of each month. Whether or not defendant was otherwise a fit and proper person to have her custody we deem it unnecessary to decide.

We come finally to the question of whether or not the allowances were excessive. The record discloses that defendant was capable of earning $250 or more a month. He was receiving in addition a veteran's pension. He owned a garage business at Julian, with merchandise and equipment concededly worth from $800 to $900. He had an equity of about $1,200 in a new trailer. Such property was accumulated by the parties during the marriage and plaintiff contributed thereto. An allowance to plaintiff of the household goods plus $300 as permanent alimony and $50 a month child support, with all other property awarded to defendant, was more than fair and just to him. There were numerous hearings and a long trial on the merits. Defendant took several depositions before and during the trial. In the light of the record, the allowances for attorneys' fees and expense money were not excessive.

For the reasons heretofore stated, we conclude that the

judgment of the trial court should be and hereby is affirmed at defendant's costs, including an allowance of $250 to plaintiff's attorneys for their services in this court.

AFFIRMED.

YEAGER, J., participating on briefs.

JAMES M. YANNEY, ADMINISTRATOR OF THE ESTATE OF WADIA YANNEY, DECEASED, APPELLEE, V. THOMAS NEMER, APPELLANT, ROLAND C. CROSS ET AL., APPELLEES.
47 N. W. 2d 368

Filed April 12, 1951. No. 32926.

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. **Automobiles: Negligence.** As used in the Iowa guest statute, "reckless operation" means proceeding without heed of or concern for consequences. It means more than negligent operation. It may but does not necessarily include willfulness or wantonness. It implies no care coupled with disregard for consequences. Speed alone does not amount to recklessness. Conduct arising from mere inadvertence, thoughtlessness, or error of judgment is not reckless.
3. ———: ———. Under the Iowa guest statute the actions and conduct of the driver and not his mental attitude measure the degree of care and determine whether or not he is proceeding with a heedless disregard for consequences.
4. ———: ———. In order for a guest to establish reckless operation under the Iowa guest statute, it is necessary to show some act of the host that amounts to utter indifference to the safety of the guest.
5. ———: ———. To establish reckless operation under the Iowa guest statute, it is necessary to show that the danger was known to the driver, or was so obvious and apparent that the driver must be held to have known of it; or that there was a danger amounting to an almost certain probability and not a possibility;

and that the driver, with conscious knowledge of such situation, did not exercise the slightest care to avoid injury to his guest.

APPEAL from the district court for Douglas County: ARTHUR C. THOMSEN, JUDGE. *Reversed and remanded with directions.*

Wear & Boland, for appellant.

Beynon, Greenamyre & Hecht, Donovan, Frohm & Bolus, and *Gross, Welch, Vinardi & Kauffman,* for appellees.

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

SIMMONS, C. J.

This is an action for damages. Plaintiff's intestate was injured and died as the result of a collision between a car and a truck. The defendants are Thomas Nemer, owner and driver of the car; the owners of the truck, individually and as members of a firm; and the driver of the truck. Issues were made and trial was had. The jury found for the plaintiff and against the defendant Nemer. The jury found for the other defendants. Defendant Nemer appeals. We reverse the judgment of the trial court and remand the cause with directions to enter judgment for the defendant Nemer.

The accident happened in Iowa. The action is brought under the Iowa guest statute.

The plaintiff's intestate was a sister of the defendant Nemer. She was riding in the Nemer car as a guest of defendant Nemer. We will refer to her as the guest. We refer to defendant Nemer, so far as the testimony is concerned, as Nemer. We will refer to his car as the car. We refer to the vehicle of the other defendants involved in the action as the truck.

At the close of plaintiff's case-in-chief and again at the close of all the evidence, motions were made by defendant Nemer for a directed verdict or a dismissal as to him. These motions were overruled, and the

cause was submitted to the jury with the result above indicated. Defendant Nemer then moved for judgment notwithstanding the verdict and likewise moved for a new trial. These motions were overruled.

The sole question presented here is whether or not the court erred in overruling these motions.

It appears from the record that Nemer testified as a witness at the coroner's inquest involving this accident. His deposition was taken by defendants (other than Nemer) in March 1950. The trial was in May 1950. References were made in the deposition to questions and answers of Nemer at the coroner's inquest. Parts of the deposition were received in evidence for the plaintiff as admissions against interest. Other parts were received when offered as cross-examination by defendant Nemer. Nemer then was called and testified as a witness for the plaintiff. He was not called as a witness for himself or the other defendants.

The evidence is in confusion and conflict. This much is fairly definite. The accident happened about 8 miles west of Oakland, Iowa, and about 35 miles west of Atlantic, Iowa, around 4 p. m., on May 3, 1948, on U. S. Highway No. 6. The highway is paved with asphalt over concrete. It is 18 feet in width with a visible line in the center. On either side are dirt shoulders 8 to 10 or 12 feet wide, not newly made, and beyond that a ditch possibly a foot in depth. The highway runs in an east-west direction and crosses a series of hills. At the point of the collision there is a cut with a steep bank on the south side. Toward the west, at a distance fixed by one witness as 220 yards from the crest of the hill on which the accident occurred, there is a cross road running north and south. Toward the east on the north side of the road and beyond the crest of the hill is a filling station.

It had been raining before the accident. Nemer testified that it rained from Atlantic west. Whether it was raining slightly or at all when the accident hap-

pened is in dispute. It rained more thereafter. In any event, the paved surface was wet and slippery. The shoulders were wet, muddy, and slippery. There is no evidence as to limited visibility.

There is evidence as to mud. A highway patrolman who reached the scene of the accident shortly after it happened testified that the filling station was 600 feet east of the crest of the hill; that cars driving from the station had carried mud out on the pavement west 200 or 300 feet, making a slippery surface on the pavement on the north side; and that he couldn't say that the mud went clear to the crest of the hill. A witness called by the defendants, other than Nemer, testified to spots of mud dropped by cars on the pavement to the west of the crest of the hill, but did not testify more definitely as to number or location.

The Nemer car was a 4-door sedan. The truck was a single unit type with a body 8 feet wide and loaded with more than 5 tons of cargo. There was another car, described in the evidence as a blue car.

Just before the accident the truck was proceeding east and going uphill at an undisputed speed of 20 miles an hour. The blue car was proceeding west at a speed of 20 miles an hour, the driver intending to turn and go south on the cross road.

Nemer testified that when he left Atlantic to go to Omaha the guest was riding in the front seat on his right side. Two brothers were in the rear seat and somewhere in the car there was a young son of the guest. Nemer testified by deposition that he drove 75 to 80 miles an hour from the time he left Atlantic until the accident and that he was in a hurry to get to Omaha; that when they left Atlantic his sister asked, "What are you going so fast for, you never drive that way"; and that he kept going the same speed. On the witness stand he testified on direct examination that when he got to the top of the hill going west, he saw the truck coming toward him and the blue car going

from him; that they were almost side by side, the truck over the center line to the north about a foot and a half and the blue car over the dish of the highway; and that he (Nemer) was then about a block and a half away from them. "I just don't have any way to figure out my way to go through between them because there was no room between them to go through." "I have to use the best knowledge I had to avoid both of them and I pulled out to the left, my left, as much as I can." "Then I seen the south side of the road was more clear to me to go through and avoid the car and the truck both so I pulled out to my left, to my left, because the shoulder there it was wider and I see there is more room for me if I could miss the truck and go on his right I would avoid him." "* * * by the time I got to the truck I wasn't able to clear away from it, he hit me." On cross-examination by his attorney he testified that he did everything in his power to avoid the truck "As soon as I saw it coming up toward me." On cross-examination by the other defendants he testified that the driver of the blue car had his hand out; that he didn't remember whether or not he applied his brakes; "* * * I could see myself I can't go through"; "I was trying to avoid it; I tried to go to my left as much as I can"; that he did not remember hitting a muddy spot in the road; that "The only muddy spot I could tell you about I seen it in the pictures" that were shown to him by the patrolman; that he did not think he lost control of his car; and that he remembered everything until he was hit. He admitted testifying at the coroner's inquest that "As I was coming along as I had been for the last 20 years just hit this spot is all, wet spot, a lot of mud on it I guess"; and further on cross-examination that "I don't remember whether I lost control of the car"; "I had control * * *" but he didn't remember if he had control up to the point of impact; "I lost control but I didn't know when or where"; then he immediately denied loss of control.

He again was asked about a muddy spot, said he didn't remember it, and again referred to what the patrolman showed him.

In his deposition Nemer testified that the first intimation he had that anything was going to happen was when he started down the hill and saw the truck coming toward him; that he tried to avoid it and turned to the left (south) where he had more room and "got into the truck's way," and again, "I started pulling to the south side myself on purpose to avoid the truck." This statement in effect was made repeatedly. As to mud and slipping and loss of control he testified that he reached the top of the hill, hit a muddy spot, and lost control; that there had been no muddy spots before he got to the top of the hill; that he had made no effort to stop his car from Atlantic to the point of impact; that evidently he hit a wet muddy spot; that when he tried to avoid the car he turned to the south and that is where he hit that muddy spot about halfway down the hill; and that he lost control then and that "* * * I lost control of the car after I went into the truck." Throughout this deposition he repeatedly stated that the only thing he knew about mud on the highway was from the pictures shown to him by the patrolmen. As to brakes he testified that he tried to use his brakes; that he started to use them the instant he saw the car ahead of him; that it was hard to use brakes on a muddy or wet road; that "* * * you couldn't push your brakes clear to the bottom * * *" on a highway like that; and that he was asked at the coroner's inquest about the use of brakes and answered, "* * * as usual I drive I never had to depend on my brakes in any way."

We find no evidence as to either track marks or skid marks on the highway. In the deposition Nemer further testified that he saw the driver of the blue car have his hand out; that he could not tell which way

he was pointing to turn and "that is what got me excited."

It is undisputed that the Nemer car got in front of the truck, the impact came, and then the Nemer car passed between the truck and the south embankment. It stopped 30 to 35 feet west of the truck and the truck traveled about half its length after the impact. The right front end of the truck and the right rear door and fender of the Nemer car were the points of initial impact. Both truck and car were badly damaged.

The driver of the blue car and the truck driver testified for the defendants other than Nemer. The driver of the blue car testified that he did not give any signal to turn and that in his rear view mirror he saw a car behind him and seconds thereafter he heard the impact. The drivers of the blue car and of the truck both testify that the truck was on the south half of the paved surface and that they passed each other without difficulty. The truck driver testified that he saw the Nemer car come out from behind the blue car, then go back in behind it, and then out again on the south side of the pavement and it came across in front of him, and that when he saw the Nemer car zigzagging in and out, he turned the truck course off the pavement to the south and the right rear wheel and both front wheels were off the pavement when the impact occurred.

We have stated and weigh the evidence consistent with the established rule that "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." Roby v. Auker, 149 Neb. 734, 32 N. W. 2d 491.

The Iowa guest statute is: "The owner or operator of a motor vehicle shall not be liable for any damages to any passenger or person riding in said motor vehicle as a guest or by invitation and not for hire unless damage is caused as a result of the driver of said motor vehicle being under the influence of intoxicating liquor or because of the reckless operation by him of such motor vehicle." Code of Iowa, 1946, § 321.494. The intoxicating liquor provision is not involved here.

In Siesseger v. Puth, 213 Iowa 164, 239 N. W. 46, the Supreme Court of Iowa defined the term "reckless" in the following language: "In light of the circumstances under which said Chapter 119 was passed, it is apparent, we think that the Legislature intended the word 'reckless' therein to mean 'proceeding without heed of or concern for consequences.' To be 'reckless,' one must be more than 'negligent.' Recklessness may include 'wilfulness' or 'wantonness,' but if the conduct is more than negligent, it may be 'reckless' without being 'wilful' or 'wanton,' but to be reckless in contemplation of the statute under consideration, one must be more than negligent. Recklessness implies 'no care, coupled with disregard for consequences.'" In Hebert v. Allen (Iowa), 41 N. W. 2d 240, the court reaffirmed the rule in the Puth case, and stated that there had been no essential departure from it, and that it had the merit of being abstract, a necessary quality since it must be applied to widely differing facts.

The Iowa guest cases are exhaustively reviewed in Russell v. Turner, 56 F. Supp. 455, and on appeal in 148 F. 2d 562, wherein the court points out the difficulty involved in attempting to reconcile all the decisions of the Supreme Court of that state. We do not attempt to do so.

The Iowa court in applying its definition has given rules that assist in evaluating the sufficiency of the evidence here.

Speed alone does not amount to recklessness. Whether

or not a speed is dangerous depends upon the surrounding and attendant circumstances. Thornbury v. Maley (Iowa), 45 N. W. 2d 576. See Mayer v. Sheetz, 223 Iowa 582, 273 N. W. 138.

To establish reckless operation under the Iowa statute it is necessary to show that the danger was known to the driver, or was so obvious and apparent that the driver must be held to have known of it; or that there was a danger amounting to an almost certain probability and not a possibility; and that the driver, with conscious knowledge of such situation, did not exercise the slightest care to avoid injury to his guest. Roberts v. Koons, 230 Iowa 92, 296 N. W. 811; Peter v. Thomas, 231 Iowa 985, 2 N. W. 2d 643; Long v. Pearce, 233 Iowa 1025, 10 N. W. 2d 50; Russell v. Turner, *supra.*

The actions and conduct of the driver and not his mental attitude measure the degree of care and determine whether or not he is proceeding with a heedless disregard for the rights of others. Hebert v. Allen, *supra.*

The plaintiff must show some act of the driver which would be pronounced as an utter indifference to the safety of the guest in his car. Levinson v. Hagerman, 214 Iowa 1296, 244 N. W. 307; Mescher v. Brogan, 223 Iowa 573, 272 N. W. 645; Long v. Pearce, *supra.*

Conduct arising from mere inadvertence, thoughtlessness, or error of judgment is not reckless. Harvey v. Clark, 232 Iowa 729, 6 N. W. 2d 144, 143 A. L. R. 1141.

For the purposes of this opinion, Nemer's speed from Atlantic, Iowa, must be taken at his estimate of 75 to 80 miles an hour. On this record it stands without dispute that Nemer drove without event or incident 35 miles from Atlantic to the crest of the hill at the same speed, through rain, on wet, slippery pavement, up and down hills, and across the mud along west of the filling station. There were no other material facts and surrounding circumstances shown in connection with the rate of speed. It must follow that there was nothing

in the speed or surroundings or circumstances to bring that driving within the definition of reckless. Certainly he was not proceeding with utter indifference to the safety of his guest.

The question asked by the guest as to why the host was driving so fast, hardly rises above a question as to the why of the speed, not as to excessive speed. But taken as a protest, it was made 35 miles and 30 minutes before the accident. We find no further reference to any statement of concern or alarm thereafter. It is obvious that the guest did not deem the speed to be negligent, much less reckless. She rode that distance without comment or protest so far as this record discloses.

This brings us to the fact that Nemer came to the crest of the hill driving at a high speed and unable to see what was on the slope beyond. Does that convert his operation into a reckless one? It is readily apparent that there always exists the possibility of two cars passing, as were the truck and the blue car here, on a side hill hidden from view, but it does not reach the "almost certain probability" suggested by the court in the cases hereinbefore cited. The driving over the hill, unable to see what was immediately ahead, does not in and of itself constitute reckless operation or show utter indifference to the safety of the guest.

Did Nemer's conduct after he saw the presence of the truck and the blue car ahead constitute reckless operation of his car? Certainly the presence on the pavement of occasional spots of mud was not within the class of an obvious, apparent, or permanent source of danger. The spots were not known to him. Whether he applied or failed to apply his brakes and whether or not he skidded is not material here. The material thing is that when he saw the location of the truck and the blue car a block and a half ahead, he exercised a quick judgment. He had the alternatives of trying to stop, trying to go between the truck and the blue car, passing the blue car on the shoulder to the north, or going

around the truck to the south. The evidence indicated that he considered these alternatives. He repeatedly affirms that he tried, intentionally, to go around the south side of the truck. These are not actions and conduct showing indifference, much less utter indifference, to the safety of his guest. These are actions and conduct showing a high degree of concern for that safety.

Our conclusion, guided by the Iowa decisions, is that plaintiff failed to prove a cause of action under the Iowa law.

Heretofore we have been required to construe and apply the Iowa guest statute. See, Graham v. Higgins, 121 Neb. 211, 236 N. W. 689; Barnard v. Heather, 135 Neb. 513, 282 N. W. 534; Bailey v. Bryant, 127 Neb. 843, 257 N. W. 241; Jennings v. Biurvall, 122 Neb. 551, 240 N. W. 757; Bittner v. Corby, 138 Neb. 738, 295 N. W. 277.

Barnard v. Heather, *supra,* factually is in many respects quite similar to the instant case. We there reviewed and followed the Iowa authorities and reversed a judgment for the plaintiff and dismissed the cause. Many of the authorities cited in the Barnard case are cited and relied upon here. The same determination is made here.

The trial court erred in overruling the motion of defendant for a directed verdict and for judgment notwithstanding the verdict. Pursuant to the authority of section 25-1315.03, R. R. S. 1943, the judgment of the district court is reversed and the cause is remanded with directions to enter judgment for the defendant Nemer.

REVERSED AND REMANDED WITH DIRECTIONS.

YEAGER, J., participating on briefs.

RAY NELSON, DOING BUSINESS AS RAY NELSON CAR COMPANY, APPELLEE, V. THE PENNSYLVANIA FIRE INSURANCE COMPANY, A CORPORATION, APPELLANT.

47 N. W. 2d 432

Filed April 12, 1951. No. 32928.

Master and Servant. If the act causing the injury is within the class of service for the doing of which the servant was employed, the master is bound, even if the servant was forbidden to perform the particular act. But if the act forbidden was outside the class of service which the servant was employed to perform, the doing of the act is outside the scope of his employment.

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

Brown, Crossman, West, Barton & Quinlan, and *Pilcher & Haney,* for appellant.

Fitzgerald & Smith, James W. R. Brown, and *Donald H. Erickson,* for appellee.

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

WENKE, J.

This action was originally commenced in the municipal court of Omaha by Ray Nelson, doing business as Nelson Car Company, against The Pennsylvania Fire Insurance Company, a corporation. It was appealed to the district court for Douglas County. The purpose of the action is to recover for a loss which plaintiff sustained and for which it claims defendant is liable under the terms of an insurance policy which defendant issued to the plaintiff. In the district court a jury was waived and trial was had to the court. The court found generally for the plaintiff and entered a judgment in his favor. Defendant filed a motion for new trial and from the overruling thereof appealed.

In view of the nature of the trial in the district court we apply here the following rule: "When a law action is tried to the court, findings of fact have the

same effect as findings of a jury and will not be set aside unless clearly wrong." Linch v. Berggren, 135 Neb. 530, 282 N. W. 528. However, this rule is of no particular significance here as the facts are undisputed.

Admittedly the policy of automobile insurance was issued by the appellant to the appellee as a used car dealer located at 2503 Farnam Street, Omaha, Nebraska. This policy was in full force and effect at all times herein material. It covered "Loss of or damage to the automobile caused by theft, larceny, robbery or pilferage."

Appellee was a licensed used car dealer having his lot at 2503 Farnam Street in Omaha, Nebraska. On July 21, 1948, he owned and had for sale on his lot a 1947 Ford truck. About 7 p. m. on that date three people, consisting of a man, a woman, and a child, came onto appellee's lot. There they were contacted by Daniel W. Maxwell, one of appellee's salesmen. These parties were strangers to this salesman. Appellee was not on the lot at the time. The man and woman inspected the Ford truck and thought it would meet their needs, they having represented themselves to be truck gardeners from Council Bluffs, Iowa. They asked for a demonstration. Maxwell let them drive the truck off the lot for that purpose. They were unaccompanied when they drove off. Before they drove off Maxwell had given them instructions as to where they should drive. They never returned. Later, about September 28 or 29, 1948, the truck was found in Antelope County. It was returned to appellee. It is for the damages done to the truck while it was out of appellee's possession for which this claim is made.

Maxwell was primarily a salesman and devoted most of his time to that service. He had authority to sell trucks and cars at the prices thereof fixed by the appellee. However, if he could not get the quoted prices he was required to submit any offers received and have them approved by appellee before he had

authority to accept them. In performing this service he was authorized to take cars and trucks off the lot to demonstrate them to prospective buyers. However, both he and the other salesmen, appellee having three salesmen at the time, were instructed not to let any prospective buyer drive a truck or car off the lot unless accompanied by them or some other employee unless appellee gave them express authorization to do so. This consent appellee had been in the habit of giving if he knew the prospect and felt him trustworthy.

Under this situation of fact appellant seeks to avoid liability under the following provision of the policy: "Such Policy does not cover: * * * (d) Under the Theft, Larceny, Robbery or Pilferage Coverage * * * loss suffered by the Insured in case he voluntarily parts with title to or possession of any automobile at risk hereunder, whether or not induced so to do by any fraudulent scheme, trick, device or false pretense or otherwise; * * *."

The policy is an approved standard form used for individuals, partnerships, and corporations. We find the language of the quoted exclusion clause applies whenever insured, or anyone acting for him with express or implied authority to do so, voluntarily parts with possession of a vehicle covered thereby. Maxwell voluntarily parted with possession of the truck. If appellee is bound by Maxwell's act in so doing the exclusion clause would preclude any liability on the part of appellant.

As stated in 2 C. J. S., Agency, § 94, p. 1200: "Authority, the sum total of the powers committed or permitted to the agent by the principal, may be limited in scope and such limitations are themselves a part of the authority; but instructions direct the manner of transacting the authorized business and contemplate only a private rule of guidance to the agent and are independent and distinct in character."

In distinguishing the latter it is therein stated:

"* * * a distinct idea, which is not in its nature a problem of authority and should not be confused therewith, is the concept of private instructions, for there is a difference between authority and instructions which, although difficult to state in such a manner as to make the dividing line clear, is material.

"Leading characteristics which distinguish instructions are: (1) That they relate commonly not to the subject matter with which the agent is empowered to deal or the kind of business or transactions upon which he is commissioned to act but to the manner or mode of his action with respect to matters which in their substance are within the scope of permitted action; and (2) that primarily, if not necessarily, they are intended as directions for the guidance of the agent as to the manner in which he may accomplish a permitted purpose of the agency and as such are not expected to be made known to those with whom the agent deals, in contradistinction to the limits and scope of the subject matter intrusted to the agent's power as to which it is contemplated that the third person may or will be informed by the agent in case of a proposal to transact business beyond that defined subject matter; and these two elements are specified and commented on as differentiating instructions from the limitations which inhere in authority itself in cases which undertake a detailed discussion of them." 2 C. J. S., Agency, § 94, p. 1202.

"Private or secret instructions or limitations imposing qualifications on what would otherwise be the powers of an agent are without significance as against those dealing with the agent with neither knowledge or notice of them, so far as their relations with the principal are concerned." 2 C. J. S., Agency, § 95, p. 1202. See Restatement, Agency, § 230, p. 514.

This is not a case of excepted or limited authority. The record discloses that Maxwell's services primarily related to selling cars and trucks. His duties relating

thereto contemplated and included the demonstrating thereof to prospective buyers. Such demonstrations included authority to drive cars and trucks off appellee's lot. In making a demonstration Maxwell and the other salesmen of appellee had been instructed that they, or some other employee, must always accompany such car or truck if it was driven off the lot unless appellee gave them express permission to let a prospect drive it off by himself. This restriction or limitation related only to the manner of performing such class of service. No question of the appellant having any notice or knowledge of this instruction is raised by the record. It had neither notice nor knowledge thereof.

A comparable factual case decided by the court is Rankin v. Western Union Telegraph Co., 147 Neb. 411, 23 N. W. 2d 676, 166 A. L. R. 873. Therein the employee of Western Union Telegraph Company had been instructed not to use his racing bicycle when delivering messages but he did and the accident occurred while he was using it. Therein we said the principle stated in Rose v. Gisi, 139 Neb. 593, 298 N. W. 333, supported our holding the Western Union Telegraph Company liable. The same is true here in holding that appellee is bound by the acts of his salesman Maxwell. The principle stated in Rose v. Gisi, *supra,* is: "If the act causing the injury is within the class of service for the doing of which the servant was employed, the master is bound, even if the servant was forbidden to perform the particular act. But if the act forbidden was outside the class of service which the servant was employed to perform, the doing of the act is outside the scope of his employment." Therein we went on to quote the following from Stone v. Commonwealth Coal Co., 259 Mass. 360, 156 N. E. 737: " 'It is not enough, in order to establish liability, to show that the master has an interest in what is being done. It must also be made to appear that the servant whose act is in question has authority from the master to perform the class of service

to which the act belongs. If the act is within the class, the master is bound although the servant is forbidden to perform the particular act.' "

In view of the foregoing we have come to the conclusion that appellant, under the provisions of its policy, is not liable to appellee for the damages which his truck suffered and the trial court was wrong in not so holding. We therefore reverse the judgment of the trial court and remand the cause for new trial in accordance herewith.

REVERSED AND REMANDED.

MESSMORE, J., participating on briefs.

STORZ BREWING COMPANY, APPELLANT, V. HOMER M. BROWN, APPELLEE.

47 N. W. 2d 407

Filed April 12, 1951. No. 32942.

1. **Trial.** In every case, before the evidence is submitted to the jury, there is a preliminary question for the court to decide, when properly raised, not whether there is literally no evidence but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the burden of proof is imposed.
2. ———. Where the evidence on the trial in the district court is not conflicting and reasonable minds cannot differ as to the conclusion to be derived therefrom it is the duty of the court, when requested, to direct a verdict in accordance with such conclusion.
3. **Sales.** The letters "f. o. b." are an abbreviation of the words "free on board" and standing alone in a contract of sale they simply mean that the subject of the sale is to be loaded for shipment without expense to the buyer.
4. ———. In a contract of sale, if delivery is made by carrier, the place of shipment is ordinarily deemed the place of delivery, unless a contrary intent appears.
5. ———. Where delivery to a carrier is delivery to the buyer and passes title to him at the place of shipment, the risk of loss or injury after such delivery is on the buyer.
6. ———. The carrier is the bailee of the purchaser for the pur-

pose of accepting delivery but not to determine that the goods are in quality and description such as the purchaser ordered. The latter has the right of inspection after delivery to him by the carrier and may take a reasonable time for that purpose. He is bound to accept only when the seller has tendered the thing contracted for. The right of inspection, however, does not change the rule that delivery will be held to have been made to the purchaser at the time of shipment and at his risk during transit.

APPEAL from the district court for Dawes County: EARL L. MEYER, JUDGE. *Reversed and remanded.*

Edwin D. Crites, A. W. Crites, and *Shackelford, Spittler & Emmert,* for appellant.

Charles A. Fisher, for appellee.

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

WENKE, J.

The Storz Brewing Company, a corporation, brought this action in the district court for Dawes County against Homer M. Brown. The purpose of the action is to recover the sale price claimed due for a quantity of beer and containers sold defendant. Verdict was for the defendant and judgment was entered thereon. Plaintiff filed a motion for new trial and from the overruling thereof appealed. Defendant has not cross-appealed.

The only issue submitted to the jury was: "* * * what the intent of the parties was as to the point of delivery of and the passing of title to the goods in question."

The principal question presented by this appeal is, should this issue have been submitted to the jury?

"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." Clouse v. St. Paul Fire & Marine Ins. Co., 152 Neb. 230, 40 N. W. 2d 820.

However, this principle has no application here as the material facts are not in dispute. The following principles are here applicable:

"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, 139 Neb. 677, 298 N. W. 551.

"Where the evidence on the trial in the district court is not conflicting, and reasonable minds cannot differ as to the conclusion to be derived therefrom, it is the duty of the court, when requested, to direct a verdict in accordance with such conclusion." Nebraska Transfer Co. v. Chicago, B. & Q. R. R. Co., 90 Neb. 488, 134 N. W. 163.

See, also, Lewis v. Farmers' Grain & Milling Co., 52 Cal. App. 211, 198 P. 426; Rudy-Patrick Seed Co. v. Roseman, 234 Iowa 597, 13 N. W. 2d 347.

The appellant, located at 1819 North Sixteenth Street in Omaha, Nebraska, is engaged in the brewing business. Appellee, doing business as Brown Beverage Company and located at Chadron, Nebraska, was at all times herein material a wholesale beer distributor. On March 18, 1947, these parties entered into a contract whereby appellee became the distributor of appellant's products in a certain area which included Dawes County, Nebraska, wherein Chadron is located. This contract was in force at all times herein material. It provided in part as follows: "To sell to the Distributor, Storz Brewing Co.'s products at such prices as may be announced by the Storz Brewing Co. all f. o. b. Storz Brewing Co.'s plant, from which shipment is made. * * * Distributor agrees: * * * To pay all freight and transportation charges from Storz Brewing Co.'s place of busi-

ness or to the delivery point designated by the Distributor and all delivery expenses."

This agreement, taken as a whole, provides that prices and shipments are f. o. b. the appellant's plant. Any order by the appellee thereunder would be on that basis unless a contrary intent is shown as having been understood and agreed to by the parties at the time the order was given, accepted, and filled.

By letter dated January 12, 1949, appellee sent the following order to appellant: "Please ship as soon as Steinhaus will accept for sure delivery at Chadron, 150 cases 24/12 oz GC. 50 24/12 oz. Triumph 100 24/12 oz. cans and 30 ½ kegs please try and use aluminum to save the freight on this long haul." No other communication, either oral or written, was had by appellee with appellant in regard thereto before the order was accepted and filled.

The letter was received by appellant in Omaha on either January 13 or 14, 1949. Appellant thereupon called Victor Steinhaus, the party referred to in the letter, and requested him to pick up the order if he could make delivery thereof. Steinhaus accepted the goods ordered by appellee on January 14, 1949. At the time received Steinhaus receipted for them as being in good condition. Steinhaus, who was a licensed common carrier by truck between Omaha and Chadron, had always hauled appellant's products for the appellee.

The weather conditions were bad before, at the time of, and after the order was given by appellee, accepted and filled by appellant, and the goods received by Steinhaus. It was cold and drifting snow was constantly blocking the highways, particularly in the northwest part of the state. This was known or should have been known to all the parties. On the trip to Chadron Steinhaus' truck hauling these products became stalled on the highway because of snow. Instead of making the trip to Chadron in the usual time of 18 to 20 hours it took from five to six days. As a result of being stalled

the beer froze while in transit. This resulted in the beer becoming unusable for distribution to appellee's customers and had the effect of damaging and practically totally destroying the containers in which it was being shipped.

When the truck arrived at Chadron appellee examined the beer and, because of the condition it was then in, refused to accept it. It was subsequently returned to the appellant at Omaha and it salvaged as many of the containers as possible. The beer and containers have never been paid for.

There is nothing ambiguous or uncertain about the order appellee sent on January 12, 1949. It directed appellant to ship him the products therein described as soon as Steinhaus would accept for sure delivery at Chadron. This appellant did by calling Steinhaus and so advising him and then, when he called at appellant's place of business, by delivering to him the goods ordered.

"The letters 'f. o. b.' are an abbreviation of the words 'free on board,' and standing alone in a contract of sale they simply mean that the subject of the sale is to be loaded for shipment without expense to the buyer. See 23 R. C. L. 1337, sec. 159; Vogt v. Schienebeck, 122 Wis. 491, 100 N. W. 820; Hurst v. Altamont Mfg. Co., 73 Kan. 422, 85 Pac. 551. However, if delivery is made by carrier, unless a contrary intent appears, the place of shipment is ordinarily considered the place of delivery. 55 C. J. 333. See Neimeyer Lumber Co. v. Burlington & M. R. R. Co., 54 Neb. 321, 74 N. W. 670." Olsen v. McMaken & Pentzien, 139 Neb. 506, 297 N. W. 830.

"* * * the universal holding of the courts is that where the contract between the vendor and vendee is silent upon the subject of the place of delivery, the delivery of the property by the vendor to a carrier, for transportation to the vendee, of itself then and there divests the vendor's title to the property, and the vendee's title to such property, from the moment of such delivery to the carrier, attaches. (21 Am. & Eng. Ency. Law 528-

530; Benjamin, Sales [2d ed.] secs. 181, 682; 2 Chitty, Contracts [11th Am. ed.] 1201; Smith v. Gillett, 50 Ill. 290; Krulder v. Ellison, 47 N. Y. 36, and cases there cited; McKee v. Bainter, 52 Neb. 604; Congdon v. Kendall, 53 Neb. 282). In such case the carrier is, in contemplation of law, the bailee of the person to whom and not by whom the goods are sent." Neimeyer Lumber Co. v. Burlington & M. R. R. Co., 54 Neb. 321, 74 N. W. 670, 40 L. R. A. 534.

See, also, Fruit Dispatch Co. v. Gilinsky, 84 Neb. 821, 122 N. W. 45; Dentzel v. Island Park Assn., 229 Pa. 403, 78 A. 935, 33 L. R. A. N. S. 54; Hobart v. Littlefield, 13 R. I. 341; Standard Casing Co. v. California Casing Co., 233 N. Y. 413, 135 N. E. 834.

This is in effect the same principle as provided by subdivision (1) of section 69-446, Uniform Sales Act, R. R. S. 1943, except for Rule 5 of section 69-419, of the same act.

Subdivision (1) of section 69-446, R. R. S. 1943, provides: "Where, in pursuance of a contract to sell or a sale, the seller is authorized or required to send the goods to the buyer, delivery of the goods to the carrier, whether named by the buyer or not, for the purpose of transmission to the buyer, is deemed to be a delivery of the goods to the buyer, except in the cases provided for in Rule 5, section 69-419, or unless a contrary intent appears."

Rule 5 of section 69-419, R. R. S. 1943, provides: "If the contract to sell requires the seller to deliver the goods to the buyer, or at a particular place, or to pay the freight or cost of transportation to the buyer, or to a particular place, the property does not pass until the goods have been delivered to the buyer or reached the place agreed upon."

None of the conditions to which Rule 5 is applicable are here existent. It has no application here.

"After Delivery. Where the goods are lost or destroyed after they have been delivered to the buyer

with the intention of passing the title, the loss must fall upon the buyer, * * *. So, where delivery to a carrier is delivery to the buyer, and passes title to him at the place of shipment, the risk of loss or injury after such delivery is on the buyer." 55 C. J., Sales, § 610, p. 599. See Braufman v. Bender, 58 N. D. 165, 225 N. W. 69.

From an examination of the record we find nothing upon which a jury could base its verdict that the parties, by what was done, intended any departure from the general rule that delivery to the carrier was to be considered as delivery to the buyer with the resulting effect that the title to the products passed to appellee immediately therewith. This being true it was prejudicial error to submit such issue to the jury.

Having come to the conclusion that the case must be reversed there are two other points that should be clarified. Appellee refers to his right of inspection and rejection of the goods if not in conformity with the contract.

Subsection (1) of section 69-447, R. R. S. 1943, provides: "Where goods are delivered to the buyer, which he has not previously examined, he is not deemed to have accepted them unless and until he has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract."

This is not a case involving any issue of fact in regard to the right of inspection to determine if the goods delivered to Steinhaus were in conformity with the contract for the record shows they were in good condition when delivered to the carrier but damaged while in transit. The applicable principle is stated in Mette & Kanne Dis. Co. v. Lowrey, 39 Mont. 124, 101 P. 966: "The carrier is the bailee of the purchaser for the purpose of accepting delivery, but not to determine that the goods are in quality and description such as the purchaser ordered. The latter has the right of inspection after de-

livery to him by the carrier, and may take a reasonable time for that purpose. (Benjamin on Sales, 7th ed., 734; Black v. Delbridge etc. Co., 90 Mich. 56, 51 N. W. 269; Schiller v. Blyth & Fargo Co., 15 Wyo. 304, 88 Pac. 648, 8 L. R. A., n. s., 1167; Pope v. Allis, 115 U. S. 363, 6 Sup. Ct. 69, 29 L. Ed. 393.) He is bound to accept only when the seller has tendered the thing contracted for. The right of inspection, however, does not change the rule that delivery will be held to have been made to the purchaser at the time of shipment and at his risk during transit." See, also, Olsen v. McMaken & Pentzien, *supra;* Globe Oil Co. v. Powell, 56 Neb. 463, 76 N. W. 1081; Dow Chemical Co. v. Detroit Chemical Works, 208 Mich. 157, 175 N. W. 269, 14 A. L. R. 1200; Standard Casing Co. v. California Casing Co., *supra;* Fruit Dispatch Co. v. Gilinsky, *supra;* Nelson Bros. Coal Co. v. Perryman-Burns Coal Co., 48 F. 2d 99; Gulf Vegetable & Fruit Co. v. Lane, 258 Mich. 634, 242 N. W. 792; Skinner v. Griffiths & Sons, 80 Wash. 291, 141 P. 693; Delaware, L. & W. R. R. Co. v. United States, 231 U. S. 363, 58 L. Ed. 269, 34 S. Ct. 65; Mobile Fruit & Trading Co. v. McGuire, 81 Minn. 232, 83 N. W. 833.

Paragraph 3 (e) of the parties' agreement provides: "To pay the Storz Brewing Co. in cash or by accepting and paying sight draft attached to order bill of lading, the full price at the time of purchase from Storz Brewing Co. including price of product and containers. In the event sight drafts are not honored by Distributor upon presentation for payment or should the Distributor be otherwise indebted to the Storz Brewing Co., said Storz Brewing Co. shall thereupon have the right, at its option, to withhold making further shipments and delivery to Distributor until such a time as all indebtedness to the Storz Brewing Co. shall have been fully paid."

What effect this provision of the agreement may have is not here material as it was never enforced by appellant. The products sold were sold on open account

and only a copy of the invoice was sent appellee. But even if it had been enforced it would make no difference here. See, Rosenberg Bros. & Co. v. Buffum Co., Inc., 234 N. Y. 338, 137 N. E. 609; Pennsylvania R. R. Co. v. Bank of the United States, 214 App. Div. 410, 212 N. Y. S. 437; Hobart v. Littlefield, *supra*; Gulf, W. T. & P. Ry. Co. v. Browne, 27 Tex. Civ. App. 437, 66 S. W. 341; Wicks & Co. v. Racine Confectioners' Machinery Co. (Tex. Civ. App.), 250 S. W. 236; Lipshitz v. Earl Fruit Co. (Tex. Civ. App.), 265 S. W. 1048.

Other questions raised are either not properly here or, in view of our holding, not necessary to decide. In view of the foregoing we find appellant's motion for new trial should have been sustained. We therefore reverse the judgment of the district court and remand the cause for new trial.

REVERSED AND REMANDED.

RUTH B. MCNAMEE, APPELLEE, V. JOHN C. MCNAMEE, APPELLANT.

47 N. W. 2d 383

Filed April 12, 1951. No. 32958.

1. **Divorce: Appeal and Error.** An appeal lodged in this court from a decree rendered in a divorce action brings the case here for trial de novo on the record made in the district court.
2. **Divorce.** This state is constructively a party to a divorce action, and children involved in such action are wards of the court.
3. ———. The proper rule in a divorce case, where the custody of minor children is involved, is that the custody of the child is to be determined by the best interests of the child, with due regard for the superior rights of fit, proper, and suitable parents.
4. ———. In deciding the question of alimony or division of property as between the parties the court, in exercising its sound discretion, will consider the respective ages of the parties; their earning ability; the duration of and the conduct of each during the marriage; their station in life; the circumstances and necessities of each; their health and physical condition;

their financial circumstances as shown by the property they owned at the time of the divorce, and whether the property was accumulated before or after the marriage; and any and all other circumstances bearing upon the question; and from all of such elements determine the rights of the respective parties.

5. ———. After a decree of divorce has been granted if the circumstances of the parties shall change or if it shall be to the best interests of their children the court may on its own motion revise or alter the decree so far as it concerns the care, custody, and maintenance of the children, or any of them.

APPEAL from the district court for Gage County: CLOYDE B. ELLIS, JUDGE. *Affirmed as modified.*

Hubka & Hubka, for appellant.

Sackett, Brewster & Sackett, for appellee.

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

MESSMORE, J.

This is an action for divorce brought by Ruth B. McNamee, plaintiff, against John C. McNamee, defendant. At the conclusion of the evidence and argument of counsel, defendant's counsel moved to amend his answer and file a cross-petition instanter, praying for a divorce from the plaintiff and for the custody of Jerry John McNamee, a minor son of the parties. The trial court granted the motion. The trial court entered its decree finding generally in favor of the defendant and against the plaintiff; granted the defendant a divorce from the plaintiff on his cross-petition; awarded to the plaintiff the custody and control of two minor children of the parties, Norma Jean McNamee and Jerry John McNamee; awarded an amount to be paid by the defendant for the support of the minor children; and made a property settlement between the parties.

The defendant, cross-petitioner, filed a motion for new trial alleging the decision of the court was contrary to the evidence and the law. He objected to the property settlement on the ground that it was excessive under

the evidence, and further objected to the amount awarded the plaintiff for child support as being excessive and unreasonable based upon the earning capacity of the defendant. Upon the hearing on the motion for new trial, the trial court altered and modified the original decree with reference to the property settlement, and overruled the motion. The defendant, cross-petitioner, appeals.

For convenience we will refer to the parties as designated in the district court.

The plaintiff contends that because of the failure of the defendant to raise the question of the custody of the minor child, Jerry John McNamee, in his motion for new trial, the custody of the child is not a matter to be considered and determined by this court. We are not in accord with the plaintiff's contention in such respect.

An appeal lodged in this court from a decree rendered in a divorce action brings the case here for trial de novo on the record made in the district court. See, § 25-1925, R. R. S. 1943; Lippincott v. Lippincott, 141 Neb. 186, 3 N. W. 2d 207, 140 A. L. R. 901; Nickerson v. Nickerson, 152 Neb. 799, 42 N. W. 2d 861.

The record discloses that the plaintiff was previously married, and by that marriage had a child, Wayne D. Hurtie. She divorced her first husband in 1929. She married the defendant on September 10, 1930, at Burchard, Nebraska. Her child at that time was three years of age. The plaintiff and defendant have three living children, Evelyn Ruth Miller, married to Carlton Miller on March 20, 1948; Norma Jean, born August 28, 1934; and Jerry John, born July 17, 1947.

The plaintiff has been employed by the Nebraska State Home for a year and a half. Her net salary is $117.90 a month. She lives in a rented apartment with the two children. She has no source of income or interest in property except what she may be found to be entitled to in a property settlement. The defendant has been

employed in highway construction, the building of ponds, and general work in removing dirt. His pay averages $140 to $145 a month.

In 1937, the parties moved to Beatrice, and have lived in various houses there. They purchased a home on North Fifteenth Street which they sold, and with the proceeds and by a loan, built a new home into which they moved about the middle of January 1950, and lived there until plaintiff filed suit for divorce on March 8, 1950. This home was sold. The mortgage and certain indebtedness of the defendant were paid, and the balance of the proceeds of the sale is in the custody of the clerk of the district court until the final adjudication of the cause.

The plaintiff testified that the defendant struck her with his fist in February 1949, she having returned late the night before after she had taken the children to a picture show. On this occasion he broke her arm. She further testified that in October 1949, he tried to choke her, that he threatened her on occasions with a butcher knife, and used vulgar and profane language toward her. He falsely accused her of being unfaithful without cause or provocation. He mistreated her son by a former marriage, stating that he was too dumb to learn to handle a tractor and road machinery. He used vile and vulgar language toward his daughter Norma Jean. He forced her to sell the house on North Fifteenth Street by threatening her with a butcher knife.

The evidence in behalf of the defendant is a denial of the plaintiff's testimony with reference to threatening her with a butcher knife. This evidence is corroborated by his eldest daughter and son-in-law who lived with the parties part of the time in the North Fifteenth Street house and in the new house, having a basement apartment in the latter. When the parties lived in the North Fifteenth Street house the plaintiff required the defendant to sleep in a small anteroom off the kitchen. At other places where they resided she required him to

sleep in the basement on a cot, with mover's blankets for bed covering. She denied him the privilege of using the bathroom facilities. He prepared his own breakfasts, ate his lunch downtown, and at times had his supper at home. During the period they lived in the new house he was served 24 evening meals. His meals were served to him in the basement by his son-in-law or his daughter Norma Jean. The plaintiff denied him the privilege of using the upstairs rooms of the house, and on occasions during the past three years when he did, he was required to remove his shoes and wash his feet. All of the family were required to remove their shoes when in the home. When he asked to come upstairs the door was held against him or blocked in such manner that he could not enter. The difficulties between the parties have been over a period of ten years, but more pronouncedly since 1946, when the plaintiff was pregnant with Jerry John. After the birth of the child she had no family relations with the defendant for the reason that, she stated, he had lost his manhood and was incapable of carrying on marital relations. She made reference to him in this respect by the use of vulgar language.

The evidence is in preponderance that the plaintiff, in the presence of her eldest daughter, her son-in-law, and the two minor children, quarreled with the defendant, called him profane, vile, and vulgar names, and nagged at him until he would retaliate and curse her. The plaintiff does not deny that she referred to her husband in such manner. This was a constant occurrence. He denied that he broke her arm or attempted to assault her by striking her, but testified the plaintiff was the aggressor and he sought to stop her from fighting with him and endeavored to make up with her, but without success. The daughter, Norma Jean, made reference to her father in a profane manner, showing lack of affection and respect for him on her part. There is no complaint that the defendant did

not support his family and furnish them with necessities of life to the best of his ability.

We deem further statement of the facts on this phase of the case unnecessary.

This brings us to that part of the court's decree awarding the custody of Jerry John McNamee to his mother, the plaintiff.

This state is constructively a party to a divorce action, and children involved in such action are wards of the court. The ultimate decisions as to the children must be made from the standpoint of their best interests. See, Wassung v. Wassung, 136 Neb. 440, 286 N. W. 340; Hanson v. Hanson, 150 Neb. 337, 34 N. W. 2d 388; In re Application of Reed, 152 Neb. 819, 43 N. W. 2d 161.

In awarding the custody of minor children, the court looks to the best interests of the children, and those of tender years are usually awarded to the mother. Other considerations being equal, it is usual to award the custody to the innocent spouse. See, Bath v. Bath, 150 Neb. 591, 35 N. W. 2d 509; Swolec v. Swolec, 122 Neb. 837, 241 N. W. 771.

"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." Hanson v. Hanson, *supra.*

The court in determining the custody of a child may consider the character and resources of the parents, their fitness, temperamental and otherwise, and the advantages which may be expected to accrue to the child in the event that the custody is given to either of them. See, In re Application of Reed, *supra*; Sheehy v. Sheehy, 88 N. H. 223, 186 A. 1, 107 A. L. R. 635.

With regard to the care, custody, and control of their small child, it was said in Gorsuch v. Gorsuch, opinion on motion for rehearing, 143 Neb. 578, 11 N. W. 2d 456: "The proper rule in a divorce case, where the custody

of minor children is involved, is that the custody of the child is to be determined by the best interests of the child, with due regard for the superior rights of fit, proper, and suitable parents."

It appears from the record that Jerry is nearly four years of age at this time. When Jerry was in the house, the plaintiff compelled him to sit in a chair for long periods of time, apparently so that he would not scratch the furniture or muss up the house. He was denied the privileges of the home to play in, which is necessary for a normal boy of his age. It is clear from the evidence that the plaintiff used vile, profane, and vulgar language in the presence of this child and the family, and that she exhibited temperament and an uncontrolled temper on several occasions. It is likewise clear that the manner in which she treated the defendant could and would destroy Jerry's respect, love, and affection for his father. It also appears from the evidence that the plaintiff, during the pendency of the action, denied the defendant the right to visit the child which caused him to resort to law enforcement officers to exercise this right. Defendant's daughter, Norma Jean, also denied him the privilege of visiting Jerry and closed the door against him. She testified she did so because Jerry was ill.

The plaintiff is employed, and during the daytime it is necessary that Jerry be placed in the custody of strangers. The record is void as to any adequate arrangements having been made in this respect. It does appear from the evidence that the eldest daughter, the mother of two small children with whom the defendant lives and pays for his board and lodging, had the custody of Jerry approximately two months during the pendency of the action. She testified that Jerry did not mind, he did seem to want to play with other children, and she had no trouble with him. She further testified that she would assist if the court granted the

defendant the right to have him over weekends in her home.

We believe, in the light of the evidence, that the plaintiff is an unsuitable and unfit person to have the care, control, and custody of the child, Jerry John McNamee, and under the circumstances is unable to furnish him a good and proper home.

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

It is observable from this provision of the statute that while the divorced parents are granted the right to petition for change of custody, care, and maintenance of the minor children, at the same time the court is granted the right to exercise control thereover, that is, the court has continuing jurisdiction over the custody of children. See Harris v. Harris, 151 Neb. 191, 36 N. W. 2d 849.

The defendant testified that he would furnish Jerry John McNamee a good and proper home, but there is no evidence to disclose that he is prepared to do so at this time. We conclude that the decree should be modified to award the custody of Jerry John McNamee to the defendant, conditioned upon the trial court making any further investigation as may be deemed necessary to ascertain and determine, in awarding the custody of this child, that which would be for the best interests of the child, and then make an appropriate order in such respect.

The child support awarded for Norma Jean in the amount of $35 a month until she graduates from high school or reaches the age of 18 years is not excessive or exorbitant. In view of our holding granting the custody of Jerry John McNamee to his father, the child support for him would not be payable to the

plaintiff, but the father would be obliged to furnish adequate support and provision for the child.

In deciding the question of alimony or division of property as between the parties the court, in exercising its sound discretion, will consider the respective ages of the parties; their earning ability; the duration of and the conduct of each during the marriage; their station in life; the circumstances and necessities of each; their health and physical condition; their financial circumstances as shown by the property they owned at the time of the divorce, and whether the property was accumulated before or after the marriage; and any and all other circumstances bearing upon the question; and from all of such elements determine the rights of the respective parties. See, Green v. Green, 148 Neb. 19, 26 N. W. 2d 299; Kroger v. Kroger, 153 Neb. 265, 44 N. W. 2d 475; Strasser v. Strasser, 153 Neb. 288, 44 N. W. 2d 508.

We have taken into consideration the property of the parties, the value placed thereon as shown by the evidence, and the indebtedness of the defendant. It appears that the plaintiff, under the property settlement made by the court, would receive in property and money approximately $3,328.23. The defendant, when his indebtedness is subtracted from the gross amount awarded to him, would receive $2,867.12, not considering the possibility of a settlement of the chattel mortgage against the tractor for a less amount than $1,100. While there is no hard and fast rule in fixing the amount of alimony, we believe the amount awarded the plaintiff from the proceeds of the sale of the house is excessive. We conclude the plaintiff is entitled to and should be awarded $750 of the proceeds of the sale, and the balance of the same should be awarded to the defendant.

The plaintiff's attorneys are allowed attorney's fees in the amount of $150 for services rendered in this court, to be taxed as costs.

The decree of the district court is affirmed in all re-

spects except as to the property settlement and the custody of the minor child, Jerry John McNamee, and the district court is directed to enter judgment in conformity with this opinion.

AFFIRMED AS MODIFIED.

OLIVE C. WALKER ET AL., APPELLEES, V. ELLA M. BELL ET AL., APPELLANTS.
47 N. W. 2d 504

Filed April 19, 1951. No. 32933.

1. **Adverse Possession.** The title to land becomes complete in the adverse occupant when he and his grantors have maintained an actual, continued, notorious, and adverse possession thereof, claiming title to the same against all persons, for ten years.
2. ———. If the adverse possession of the occupant is a continuation of the possession of a prior adverse possessor claiming title, and such occupant claims title from such prior possessor, then the possession of the occupant may be tacked to that of such prior possessor.
3. ———. In determining the rights of an adverse owner, the entry and possession of his tenant, expressly authorized to act, is the entry and possession of such owner.
4. ———. Payment of taxes by the occupant for a series of years is a strong circumstance, in connection with others, tending to show the adverse holding and the abandonment of the property by the holder of the title.
5. ———. To determine the acts necessary to constitute adverse possession it is sometimes necessary to take into consideration the character of the property and the purposes for which it is suitable.

APPEAL from the district court for Loup County: WILLIAM F. SPIKES, JUDGE. *Affirmed.*

William P. Higgins, for appellants.

A. F. Alder, for appellees.

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

WENKE, J.

Olive C. Walker, Frances Clark, and Margaret Walker brought this action in the district court for Loup County. The purpose of the action is to quiet in them the title to certain lands located in Loup County. The trial court found generally for the plaintiffs and quieted in them the title thereto. Certain of the defendants thereupon filed a motion for new trial and, from the overruling thereof, have appealed.

The question presented by the appeal is the sufficiency of the proof to establish appellees' ownership of the premises by adverse possession.

The action is properly maintainable by appellees under section 25-21,112, R. R. S. 1943. It is equitable in its nature and therefore considered here de novo. See, Sittler v. Wittstruck, 122 Neb. 452, 240 N. W. 562; Frank v. Smith, 138 Neb. 382, 293 N. W. 329, 134 A. L. R. 458; § 25-1925, R. R. S. 1943. The burden of proof is on appellees. See Ferber v. Hines, 111 Neb. 85, 195 N. W. 889.

Before reviewing the facts we will set forth certain principles which are applicable thereto and controlling of the parties' rights.

"In Nebraska the law is settled that the operation of the statute of limitations is to vest absolute title in the occupant, when he has maintained an actual, continued, notorious, and adverse possession under claim of ownership for the statutory period. (Horbach v. Miller, 4 Neb., 31; Gatling v. Lane, 17 Id., 77.)" Lantry v. Parker, 37 Neb. 353, 55 N. W. 962.

"The title to land becomes complete in the adverse occupant when he and his grantors have maintained an actual, continued, notorious, and adverse possession thereof, claiming title to the same against all persons, for ten years." Lantry v. Wolff, 49 Neb. 374, 68 N. W. 494.

See, also, Conkey v. Knudsen, 135 Neb. 890, 284 N. W. 737; Frank v. Smith *supra*; Foltz v. Brakhage, 151 Neb. 216, 36 N. W. 2d 768.

"If the adverse possession of the occupant is a continuation of the possession of a prior adverse possessor claiming title, and such occupant claims title from such prior possessor, then the possession of the occupant may be tacked to that of such prior possessor." Lantry v. Wolff, *supra.*

"In determining the rights of an adverse owner, the entry and possession of his tenant, expressly authorized to act, is the entry and possession of such owner." Cassens v. Wisner, 122 Neb. 408, 240 N. W. 526.

"* * * Payment of taxes by the occupant for a series of years is a strong circumstance, in connection with others, tending to show the adverse holding and the abandonment of the property by the holder of the title." Omaha & F. L. & T. Co. v. Barrett, 31 Neb. 803, 48 N. W. 967. See, also, Dredla v. Patz, 78 Neb. 506, 111 N. W. 136; Twohig v. Leamer, 48 Neb. 247, 67 N. W. 152.

"To determine the acts necessary to constitute adverse possession it is sometimes necessary to take into consideration the character of the property and the purposes for which it is suitable." Ferber v. McQuillen, 99 Neb. 280, 156 N. W. 506.

"* * * a continuous adverse possession does not require a continuous occupancy by someone living on the land all of the time; nor is the use and occupation requisite to the perfection of such title necessarily a constant use. Ordinarily the law does not undertake to specify the particular acts of occupation by which alone title by adverse possession may be acquired since the existence and establishment of the continuity must necessarily depend greatly on the circumstances of each case, and the use to which the property is adapted, the actual manner of its use, the circumstances of the occupant, and to some extent his intention must be considered. It is enough, however, that the land be devoted to the ordinary uses of the adverse claimant provided the uses are such as to put the true proprietor on

notice." 2 C. J. S., Adverse Possession, § 125, p. 681. See, also, Lantry v. Parker, *supra;* Cassens v. Wisner, *supra;* Twohig v. Leamer, *supra.*

The lands involved are described as follows: Northeast quarter of the northeast quarter, west half of northeast quarter, south half of northwest quarter, east half of southwest quarter, and northwest quarter of southeast quarter of Section 8, Township 21 North, Range 20 West of the 6th P. M. in Loup County, Nebraska.

The top soil on these lands, consisting of 320 acres, is of a sandy nature and best suited for pasture, although 30 acres thereof has been broken and put into crops. The improvements thereon consisted of a sod house, a little frame barn, a granary, a windmill, and a water tank. The land was fenced and cross-fenced.

The taxes assessed and levied against these lands for the years 1929 and 1930 became delinquent and remained unpaid. On November 2, 1931, Harry J. Coffin bought two tax sale certificates covering these taxes. As such certificate holder he also paid the taxes subsequently assessed and levied thereon for the years 1931, 1932, and 1933 when the same became delinquent. He began a foreclosure of these certificates and the taxes subsequently paid. However, he dismissed such action and proceeded to obtain a treasurer's deed. He made application therefor to the county treasurer of Loup County. There is evidence that on March 18, 1936, a deed thereto was issued and executed by said county treasurer and left with the county clerk for recording. Whether there is sufficient evidence upon which to base a finding that such instrument was actually executed and delivered to Coffin by the county treasurer and by him, or his attorney, left with the county clerk of Loup County for recording and lost before it was actually recorded we need not decide. Suffice it to say that Coffin's subsequent entering into possession of the premises by a tenant was made under the impression that he had a tax title thereto.

Coffin leased these premises to Ralph Nelson for the period from March 1, 1936, to March 1, 1937. Nelson moved onto the premises and took possession thereof in the fall of 1935. He lived thereon until sometime in March 1937. He paid the rent to Coffin. Coffin paid the taxes assessed and levied upon these lands for the year 1936.

Coffin leased these premises to Ray Nelson for the period from March 1, 1937, to March 1, 1938. Nelson moved onto the premises and took possession thereof in the spring of 1937 after Ralph Nelson had moved off. He stayed thereon during the period of his lease. He paid the rent to Coffin. Coffin paid the taxes assessed and levied on these lands for the year 1937.

Coffin next leased these premises to James McCarthy. McCarthy rented these lands for the years of 1938, 1939, 1940, 1941, 1942, and 1943. He moved onto the premises in the spring of 1938 after Ray Nelson had moved off. He lived thereon until April 1, 1944, when he moved off. He paid the rent to Coffin. Coffin paid the taxes assessed and levied on these premises for the years 1938, 1939, 1940, 1941, and 1942. No one has paid the taxes assessed and levied thereon for the year 1943.

On February 22, 1944, Coffin sold these lands to Robert Rusho for $3 an acre or $960. Of this amount $500 was paid at the time of the sale and the balance was to be paid when Coffin perfected his title and deeded the lands to Rusho. Consequently no deed was given thereto. However, Rusho went into possession under this contract. The balance of the purchase price has never been paid nor were the lands ever deeded by Coffin to Rusho.

Rusho owned other lands adjoining this tract. He put these lands in with his pasture. He had a tenant on his other lands. After he put these lands in with his other lands he leased all of it to his tenant who paid rent for the use thereof. Rusho paid the taxes assessed and levied on these lands for the years 1944 and 1945

except that the taxes on the southeast quarter of the southwest quarter thereof for the year 1944 were paid by J. M. Hyde.

Rusho sold the southeast quarter of the southwest quarter of this tract to J. M. Hyde. Just when this sale was made is not too clearly shown by the record. Hyde paid the taxes assessed and levied on this 40-acre tract for the years 1944, 1946, 1947, 1948, and 1949. The purchase price was $160 but no part of this amount was paid. It is to be paid whenever Rusho delivers a deed thereto to Hyde. Rusho did not deliver his deed to Hyde as he was waiting for Coffin to perfect his title and deed the premises to him. Hyde, however, went into possession of this 40-acre tract by putting it in with his land which is adjoining.

Rusho sold the remaining 280 acres of these lands to Leonard Fowler. This was in October 1945. He sold Fowler a 1,000-acre tract of which the 280 acres was a part. Fowler made a down payment on the purchase price and went into possession of the entire tract. He has been in possession thereof ever since, using the 280 acres as pasture. Rusho did not deliver a deed to the premises to Fowler. He put his deed in escrow, delivery of which was to be made when Coffin perfected his title and deeded the lands to him. Fowler has paid the taxes assessed and levied on these 280 acres for the years 1946, 1947, 1948, and 1949.

The record shows that after 1935, and up until this action was brought, none of the appellants have ever made a claim to these premises or any part therof.

Coffin died on February 26, 1946. At the time of his death he had not perfected his title to these lands nor had he deeded them to Rusho. Rusho still owes the balance of the purchase price. This action is by the appellees, who are the only heirs of Coffin. They are bringing it for the purpose of perfecting title so they can carry out the contract Coffin made with Rusho. The record, viewed in the light of the principles herein-

before set forth, is sufficient to sustain appellees' claim of ownership by reason of an adverse holding for the statutory period.

We therefore affirm the decree of the trial court quieting appellees' title in and to the lands hereinbefore described.

AFFIRMED.

VINTON P. HESTER, APPELLANT, V. ADAH HESTER YOUNG ET AL., APPELLEES.
47 N. W. 2d 515

Filed April 19, 1951. No. 32962.

1. **Pleading.** The correctness of the ruling of the district court sustaining a demurrer to a petition must be determined by consideration only of the facts well pleaded therein and any reasonable intendments implied from them.
2. **Adoption of Children.** Adoption proceedings are judicial and a decree of adoption of a county court is a judgment that may not be assailed collaterally except for lack of jurisdiction of the court.
3. ———. In the absence of a provision stating special terms and conditions of inheritance by an adopted child from an adoptive parent, in the petition for, consent to, and the decree of adoption, as permitted by the statute referred to in the opinion, the adopted child has only the rights of inheritance of a natural child born in lawful wedlock.
4. ———. In adoption proceedings had by virtue of the statute to which reference is made in the opinion, the petition, the consent, and the decree are the measure of rights thereunder, all antecedent agreements in relation thereto are merged in the decree, and it may not be shown in a collateral action that there were understandings of the parties concerned antedating the proceedings inconsistent with the decree of adoption.
5. ———. A decree of adoption which does not obligate the adoptive parents to give the adopted child any more property than if he had been born to them in lawful wedlock does not restrict the right of the parents to dispose of their property by deed or will.

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

D. E. Owens, and *Colfer, Russell & Colfer,* for appellant.

Hines & Hines, Stevens & Scott, Van Pelt, Marti & O'Gara, and *Stewart & Stewart,* for appellees.

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

BOSLAUGH, J.

The object of this action is specific performance of an alleged oral pre-adoption contract made by Hector Piedalue on behalf and for the benefit of his minor son, the appellant, with Elmer E. Hester and Minnie B. Hester, husband and wife, claimed to have been fully performed by appellant and his father and violated by Elmer E. Hester.

General demurrers of each of the appellees to the petition of appellant were sustained, and the action dismissed. This appeal is from the judgment of dismissal.

The petition contains allegations that: Appellant was born on February 8, 1917. His mother died a few days thereafter. He was surrendered to the care and custody of Elmer E. Hester and Minnie B. Hester, and lived with and was cared for in their home until the month of April 1929, at which time an oral agreement was made between them and the father of appellant for and on his behalf, that in consideration of the relinquishment by the father of his rights to and dominion over his child and the consent by the father to the adoption of the child by Elmer E. Hester and Minnie B. Hester, they would legally adopt the child by formal proceedings in Dundy County, Nebraska, and upon the death of either or both of them they "would leave to the plaintiff (appellant) a child's share in their respective estates; and that upon the death of the survivor of them, they would make him the sole heir of their property unless other children were born to * * * or adopted by them." His father on April 25, 1929, in writing, relinquished his rights to and dominion over appellant and consented to his unrestricted adoption by Elmer E. Hester and

Minnie B. Hester, except it was provided therein that if they should die before appellant reached the age of 21 years, the care, custody, and control of appellant should revert to his father. Proceedings were instituted in the county court of Dundy County, Nebraska, on April 25, 1929, for the adoption of appellant, and a decree was rendered therein on May 11, 1929, adjudging that appellant should be and was fully and legally adopted by Elmer E. Hester and Minnie B. Hester, husband and wife, with legal rights as if he had been born to them in lawful wedlock, subject only to the condition that if they should die before appellant attained the age of 21 years, his care, custody, and control should revert to his father. The decree of adoption is and has been since in full force and effect. Appellant lived with his adoptive parents in their home and maintained in reference to them the status of an affectionate, devoted, obedient, and helpful son until the year of 1941, at which time he was married. He assisted his adoptive parents in the conduct and operation of their farms and ranches and at all times recognized and fulfilled the obligations which he owed them as a son without compensation until the year 1944, at which time with the consent of Mr. Hester he moved to and took up his residence at Crete, Nebraska. The adoptive parents from the time of the adoption until their respective deaths recognized appellant as their son, and exercised over him parental rights, supervision, and direction, and exacted from him obedience, respect, and performance of duties assigned to him or incumbent upon him as their son.

Minnie B. Hester died about the 18th of May 1943, intestate. Her heirs were Elmer E. Hester and appellant, and the property then owned by her was distributed and assigned to them. Elmer E. Hester organized the Sarah Ann Hester Memorial Home, a corporation, in 1944, and the Elmer E. Hester Foundation, of Benkelman, Nebraska, a corporation, in 1947. After the organization of these corporations he conveyed to them respectively

until 1948, without consideration and with the intention and for the purpose of defeating the right of inheritance of appellant, valuable and extensive real and personal property in violation of the contract made by him and his wife with the father of appellant. Elmer E. Hester died September 18, 1949, testate. His will has been admitted to probate and by its terms devised all of his property, consisting of valuable personal property and a large amount of real estate, to the appellees, other than Adah Hester Young as the executrix of his last will and testament. The adoptive father bestowed none of his property upon appellant prior to his death or by his will.

Appellant asks that the contract alleged be established, confirmed, and enforced; that the conveyances and transfers of property to the corporations be set aside; that the title thereto and to the property owned by the deceased at the time of his death be quieted and confirmed in appellant; and that surrender of the property to appellant be ordered by the court.

The appeal presents for determination the correctness of the ruling of the district court on the demurrers to the petition and the judgment of dismissal. This must be explored and concluded by a consideration of the allegations of fact well pleaded, and any reasonable and fair intendments implied from them. These must be accepted as true. Koehn v. Union Fire Ins. Co., 152 Neb. 254, 40 N. W. 2d 874; Horrigan v. Quinlan, 149 Neb. 538, 31 N. W. 2d 430.

The oral contract sought to be enforced was made prior to the proceedings for adoption of appellant. It is pleaded by him that these were had in the county court of Dundy County and were completed in the month of May 1929. Their regularity, effectiveness, and finality are not only not assailed, but are alleged. The adoption statute of the state at the time of the adoption required a petition to be filed by any person desiring to adopt an infant in the county court of the county of the residence

of the petitioner. It could, if there were any agreements, "* * * state the terms and conditions on which the adoption is desired to be made." A consent in writing by the person authorized to agree to the adoption had to be filed before there could be a decree in the matter. There was permission for stating therein "the terms and conditions on which the consent is given." If it was the conclusion of the court after hearing that it was for the best interest of the child that the adoption be had, it was required that "a decree of adoption shall be entered in accordance with the terms and conditions of said consent and petition." §§ 43-105, 43-106, and 43-108, Comp. St. 1929. The effect of the adoption was stated in the statute as follows: "Unless the terms and conditions in such consent and petition otherwise provide, the person or persons adopting, and the child adopted shall after adoption, sustain toward each other the usual relation and the adopted child shall have bestowed upon him or her equal rights, privileges and immunities of children born in lawful wedlock, of parent and child, and shall have all the right and be subject to all the duties of that relation, * * *." § 43-109, Comp. St. 1929.

The contents of the petition for adoption are not disclosed by the petition in this case, but it may be presumed that they observed the statute and were consistent with the decree of adoption. The consent was given and executed by the natural father of appellant and contained one condition upon which it was given: "that said child shall be adopted by said Elmer E. Hester and Minnie B. Hester, husband and wife with the understanding that in the event that both of them should pass away before the said minor child shall have attained the age of twenty-one years, the care and custody and control of said child shall revert to me." The decree of adoption was made upon this condition but was otherwise unrestricted. The effect of the condition was exhausted when appellant reached the age of 21 years, be-

cause his adoptive parents were then living, and the rights of the parties then existed as if no condition had been stated in the petition, the consent, or the decree. The rendition of the decree of adoption by the county court was a judicial act, has all the force and effect of a judgment, and may not be collaterally attacked. Ferguson v. Herr, 64 Neb. 659, 94 N. W. 542; In re Estate of Zehner, 130 Neb. 375, 264 N. W. 891; Annotation, 16 A. L. R. 1024. See, also, Stone v. Stone, 119 Neb. 45, 226 N. W. 807; Milligan v. McLaughlin, 94 Neb. 171, 142 N. W. 675, 46 L. R. A. N. S. 1134.

Appellant does not allege that the petition, the consent, or the decree in the adoption proceedings contained the terms or conditions of the special contract between Elmer E. Hester and Minnie B. Hester and the father of appellant for his benefit and now sought to be enforced by him. In the absence of any provision in these of special terms and conditions of inheritance by appellant, he has only the rights of a natural child born in lawful wedlock. Any obligation entered into before the adoption for greater rights for appellant in or to the property of the adoptive parents than he acquired by the adoption was made ineffective and unenforceable by the adoption in the manner and form exhibited by the petition in this case. Appellant had only the rights of inheritance from his adoptive parents that he would have had if he had been their natural child. The principles announced by this court, applied to this case, justify a conclusion that appellant has not pleaded a cause of action. The effect of these decisions is that adoption proceedings in this state are judicial; that the petition, consent, and decree are the measure of rights acquired by adoption; that all antecedent agreements in reference thereto are exhausted and made ineffective by the adoption; and that it may not be shown in a collateral assault on the decree of adoption that there were antecedent terms and conditions in conflict with the decree.

In re Estate of Enyart, 116 Neb. 450, 218 N. W. 89; In re Estate of Grinnell, 117 Neb. 332, 220 N. W. 583; Ferguson v. Herr, *supra.*

In In re Estate of Enyart, *supra,* the court said: "The legislature creates and may take away the right to inherit. It is within the power of the legislature to confer the right of inheritance upon adopted children or adoptive parents, as well as upon natural children and parents. If there are no restrictions, limitations or conditions in the adoption, our statute of adoption creates the legal relation of parent and child and gives to the adoptive parent and the adopted child all of the rights that pertain to that relation by virtue of the statute of descent." See, also, Jones v. Blankenburg, (Cal.) 94 P. 2d 92; McLean v. McAllum, 131 Miss. 234, 95 So. 309.

It was the legal right of Elmer E. Hester to dispose of his property by transfer and conveyance or by will and thereby disinherit his adopted son. It is generally recognized that an adopted child acquires, in the absence of special terms or conditions beyond those provided by statute, only the rights which a natural child born in lawful wedlock would have and no more, that like a natural child he may be disinherited and cut off from any share in the estate of the adoptive parents. In Pohle v. Nelson, 108 Neb. 220, 187 N. W. 772, it is said: "A contract with a child or a decree of adoption, which does not obligate the parents to give the child any more than one born to them in lawful wedlock, does not restrict the rights of the parents to dispose of their property by deed or will." See, also, Pemberton v. Perrin, 94 Neb. 718, 144 N. W. 164, Ann. Cas. 1915B 68; Tuttle v. Winchell, 104 Neb. 750, 178 N. W. 755, 11 A. L. R. 814; Brown v. Blesch, 270 Mich. 576, 259 N. W. 331, 97 A. L. R. 1012; Odenbreit v. Utheim, 131 Minn. 56, 154 N. W. 741, L. R. A. 1916D 421; 1 Am. Jur., Adoption of Children, § 60, p. 660.

The demurrers to the petition of appellant were prop-

erly sustained and the judgment of dismissal should be, and it is affirmed.

AFFIRMED.

STATE OF NEBRASKA EX REL. M. O. BATES, APPELLANT, V. J. W. MORGAN ET AL., APPELLEES.
47 N. W. 2d 512

Filed April 19, 1951. No. 32968.

1. **Counties: Taxation.** Sections 23-143 and 23-144, R. S. 1943, impose a mandatory duty upon a county board to set off and deduct from any account or claim presented to it for allowance the amount of delinquent personal taxes assessed against the person, firm, or corporation in whose favor such account or claim has been presented and allowed.
2. **Mandamus.** Mandamus may issue against a public officer to compel him to act, when: (1) The duty is one imposed upon him by law; (2) the duty still exists at the time the writ is applied for; and (3) the duty to act is clear.
3. ———. Mandamus is not a preventive remedy but essentially a coercive writ, one that commands performance of a duty and not desistance therefrom.
4. ———. Mandamus should be denied where it appears that the acts sought to be coerced are unauthorized or forbidden by law, or where they tend to aid or promote an unlawful purpose, and such a writ will not issue when the act commanded would result in violation of a statute.

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

M. O. Bates, for appellant.

John M. Neff and *Hugh Stuart,* for appellees.

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

CHAPPELL, J.

Relator, county judge, brought this mandamus action seeking to require respondents to issue and deliver to him a warrant for the sum of $39.23, the amount set

off and deducted by the county board from his April 1950 salary claim in payment of his delinquent personal taxes. An alternative writ issued and respondents answered, whereupon the cause was tried on its merits and a judgment was entered, finding and adjudging the issues generally for the respondents, denying the writ, and dismissing the action with costs taxed to relator. Upon the overruling of relator's motion for new trial, contending that the judgment was not sustained by the evidence but contrary thereto and contrary to law, he appealed, assigning like reasons for reversal. We conclude that the assignments have no merit.

The facts are stipulated. On April 29, 1950, relator filed a duly verified claim for his salary as county judge of Dawson County. The amount of such claim was $300, from which there was concededly deductible $19.90 as withholding tax, leaving a balance due relator of $280.10. On May 1, 1950, the claim was duly allowed in full. On that date, relator by his own stipulation "did owe the County of Dawson delinquent personal taxes in the amount of $39.23." Therefore, on May 1, 1950, a warrant payable to relator was issued and delivered to him for the amount of $240.87, which warrant he cashed in the office of the county treasurer on May 2, 1950. On the face of such warrant appeared the prior deduction of "1948 Tax $39.23 Tax $19.90." Also on May 1, 1950, a warrant payable to the county sheriff was issued and delivered to the sheriff for the amount of $39.23, bearing the notation upon its face "for the 1948 tax of M. O. Bates, Lexington, Nebr." Concededly, such warrant was in payment and satisfaction of relator's delinquent personal taxes as a set-off deducted from relator's salary claim theretofore allowed. Thereafter, the sheriff paid such taxes to the county treasurer, who, on June 2, 1950, mailed a receipt therefor to relator verifying payment thereof by him. Such receipt included a distress fee. On June 28, 1950, relator filed this action.

Relator's primary contention was that the action of the county board in the allowance of his claim for salary fixed by statute was a ministerial as distinguished from a quasi-judicial act, and as such was not a claim ex contractu requiring audit and allowance as provided by section 23-135, R. S. 1943, which also provided a remedy by appeal to the district court, and that sections 23-143 and 23-144, R. S. 1943, being simply provisions exclusively relating to and regulating the exercise of section 23-135, R. S. 1943, had no application to his salary claim. Upon that premise, he contended that his remedy was mandamus and that his delinquent personal taxes could not be set off and deducted from his claim for salary. We conclude that the contention has no merit.

It is conceded that the allowance of relator's claim for statutory salary was ministerial. In that connection, we are not required to discuss or decide whether or not the action of the county board in setting off and deducting relator's delinquent personal taxes was quasi-judicial in character and appealable to the district court, thus providing relator with an adequate remedy at law, thereby making mandamus unavailable, as indicated in State ex rel. Ensey v. Churchill, 37 Neb. 702, 56 N. W. 484, reaffirmed in State ex rel. Garton v. Fulton, 118 Neb. 400, 225 N. W. 28.

Rather, we decide the case upon its merits as a mandamus action, bearing in mind that sections 23-143 and 23-144, R. S. 1943, are mandatory provisions, intended as a summary aid in the collection of delinquent personal taxes in all cases where the county is indebted to a delinquent. It will be noted that relator's claim was not disallowed, either in whole or in part. Rather, it was allowed in toto, and subsequently in substantial conformity with the afore-cited sections, relator's admittedly delinquent personal taxes were then set off and deducted therefrom before his warrant was issued. State ex rel. Leidigh v. Johnson, 92 Neb. 736, 139 N. W.

669; State ex rel. Hershiser v. Holt County, 89 Neb. 445, 131 N. W. 960.

In his brief, relator argued that respondents had failed to show that they first "procured from the county treasurer a certificate of the amount of delinquent personal taxes assessed against relator." In that connection, we find no mention of such contention in relator's petition or elsewhere in the record. Under such circumstances, we cannot take judicial notice of or consider any such contention. See State ex rel. Leidigh v. Johnson, *supra,* wherein a similar contention was held to have no merit. Therein it was concluded that a strict construction should not be indulged in when the requirements of law had been substantially followed. It is sufficient here to say that the county board in some manner, we may assume by virtue of distress, as indicated by the receipt mailed to relator by the county treasurer, became officially apprised of relator's admittedly delinquent taxes, and that they were paid to the county treasurer with the amount set off and deducted from relator's claim, who receipted therefor to relator as provided by statute. Certainly on May 1, 1950, when relator received his warrant, he had ample notice of such set-off and deduction, and the reason therefor. Relator's contention should not be sustained.

In the light of the foregoing situation, we have examined the applicable statutes. Section 23-106, R. S. 1943, provides: "The county board shall manage the county funds and county business except as otherwise specifically provided." Section 23-109, R. S. 1943, provides: "The county board shall have power to examine and settle all accounts against the county, and accounts concerning receipts and expenditures of the county." Section 23-143, R. S. 1943, provides: "The county board of any county, whenever the account or claim of any person, firm or corporation against the county is presented to them for allowance, *shall* procure from the county treasurer a certificate of the amount of delinquent per-

sonal taxes assessed against the person, firm or corporation in whose favor the account or claim is presented, and *shall* deduct from any amount found due upon such account or claim the amount of such tax, and shall forthwith issue a warrant for the balance remaining, if any." (Italics supplied.) Section 23-144, R. S. 1943, provides: "For any such delinquent personal taxes so set off and deducted from any such account or claim, the board shall issue an order to the county treasurer directing him to draw from the same fund out of which said account or claim should have been paid the amount of said delinquent taxes so set off or deducted, and apply the same upon said delinquent personal taxes in satisfaction thereof; and the said treasurer shall, upon application, receipt therefor to the person whose taxes are so satisfied."

Section 26-127, Comp. St. 1929, now section 23-143, R. S. 1943, was originally permissive or discretionary. However, that section was amended by Laws of Nebraska, 1933, c. 126, p. 501, entitled: "AN ACT to amend Section 26-127, Compiled Statutes of Nebraska, 1929, relating to revenue; to provide that delinquent personal taxes shall be set off and deducted from any account or claim presented to the governing bodies of counties, cities, villages, school districts or other governmental subdivisions of the State of Nebraska; to repeal said original section; and to declare the provisions of this Act to be cumulative." In conformity therewith, the set-off and deduction of delinquent personal taxes from the account or claim of any person in the manner provided by such section was made mandatory by section 1 of said 1933 act. Likewise, by section 2 thereof, now section 77-1771, R. R. S. 1943, which includes the mandate of section 23-144, R. S. 1943, such mandate was extended to include the set-off and deduction of delinquent personal taxes from the account or claim of any person presented for allowance, not only by county boards but also by "any city, village, school district, or other governmental

subdivision of the state." In addition, section 4 thereof, now preserved by section 49-613, R. S. 1943, specifically provided: "The several provisions of this Act shall *be deemed cumulative* and the authority herein granted to county boards, and to the governing authorities of cities, villages, school districts or other governmental subdivisions of the state *shall not be limited or made inoperative by any existing statute.*" (Italics supplied.) Thus it appears without question that sections 23-143 and 23-144, R. S. 1943, were clearly not only intended to impose a mandatory duty but also to have application to any account or claim presented to the county board for allowance.

Viewed in that light, relator's action, in order to prevail, would require the county board not to observe and perform their statutory duty, but to disobey it. Mandamus will not lie for such a purpose.

Section 25-2156, R. R. S. 1943, insofar as important here, provides: "The writ of mandamus may be issued to any inferior tribunal * * * board or person, to compel the performance of an act which the law specifically enjoins as a duty resulting from an office, trust or station."

This court has held that mandamus may issue against a public officer to compel him to act, when: (1) The duty is one imposed upon him by law; (2) the duty still exists at the time the writ is applied for; and (3) the duty to act is clear. State ex rel. Cashman v. Carmean, 138 Neb. 819, 295 N. W. 801. This court has also held that a peremptory writ of mandamus should be issued only where the legal right to it is clearly shown. State ex rel. Evans v. Brown, 152 Neb. 612, 41 N. W. 2d 862.

The general rule is that mandamus is not a preventive remedy but essentially a coercive writ, one that commands performance of a duty and not desistance therefrom. 34 Am. Jur., Mandamus, § 2, p. 809, § 8, p. 813.

It is also generally the rule that mandamus should be denied where it appears that the acts sought to be coerced

are unauthorized or forbidden by law, or where they tend to aid or promote an unlawful purpose, and such a writ will not issue when the act commanded would result in violation of a statute. 55 C. J. S., Mandamus, § 10, p. 35; 38 C. J., Mandamus, § 29, p. 556.

Since to award relator a writ of mandamus as prayed would give the applicable statutes no force and effect, and in fact would enjoin performance of a mandatory duty imposed by statute upon respondents, it was properly denied.

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

AFFIRMED.

IN RE ESTATE OF ALVIN A. BINGAMAN, DECEASED. JULIAN L. PETERSON, APPELLEE, V. ESTATE OF ALVIN A. BINGAMAN, DECEASED, APPELLANT, JOHN P. MAINELLI, DOING BUSINESS AS MAINELLI CONSTRUCTION COMPANY, APPELLEE.

47 N. W. 2d 435

Filed April 19, 1951. No. 32995.

1. **Appeal and Error.** The initial period provided by statute within which an appellant may reduce his exceptions to writing is 40 days from the date notice of appeal is filed in the district court.
2. ———. This period may be extended not beyond an additional 40 days by the judge who tried the case upon showing of due diligence by appellant.
3. ———. An application for an extension of time to secure a proposed bill of exceptions and the order granting it may be made after the first 40 days and during the additional time granted.
4. ———. The Supreme Court has jurisdiction to grant time additional to the 80 days from the date of the filing of notice of appeal within which appellant may prepare a bill of exceptions.
5. ———. A prerequisite to the exercise of this authority is that the litigant has promptly, diligently, and as effectually as possible pursued the procedure for securing the bill during the 80

days and having it settled within the 110 days allowed from the giving of notice of appeal.

6. ———. An application for an extension of time may not be made in this court until after 80 days from the filing of the notice of appeal.

7. ———. A situation justifying an exercise of the authority to extend the time to secure a bill of exceptions is one beyond the capacity and power of the appellant to have prevented.

APPEAL from the district court for Douglas County: ARTHUR C. THOMSEN, JUDGE. *Motion for extension of time to secure bill of exceptions denied. Motion extending time for preparation and filing of brief granted.*

Cranny & Moore, for appellant.

David D. Weinberg and *G. H. Seig,* for appellees.

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

BOSLAUGH, J.

A motion for an order granting appellant additional time within which to complete and have allowed a bill of exceptions has been submitted herein.

The initial period within which an appellant may reduce his exceptions to writing is 40 days from the date notice of appeal is filed. § 25-1140, R. R. S. 1943; Cozad v. McKeone, 149 Neb. 833, 32 N. W. 2d 760. If he has acted promptly but has failed, without fault on his part, to secure a proposed bill of exceptions, the judge who tried the case is empowered, upon showing of due diligence, to extend by order entered in the case the time allowed by the statute above referred to, but not beyond an additional 40 days. This may be done after the first 40 days and during the additional time granted. § 25-1140.07, R. R. S. 1943; Markel v. Glassmeyer, 132 Neb. 716, 273 N. W. 33.

An appellant is required by the statute, in the absence of intervention by this court, to reduce his exceptions to writing within a maximum of 80 days from the date the notice of appeal is filed, and the proposed

bill of exceptions must be served on any adverse party to be bound thereby within 10 days from the time permitted for securing it. §§ 25-1140.03 and 25-1140.04, R. R. S. 1943. It must be returned to appellant within 10 days of the date of the service and be allowed and settled by the court within 10 days thereafter. § 25-1140.05, R. R. S. 1943.

This court has jurisdiction to grant time additional to the 80 days from the filing of the notice of appeal within which to prepare a bill of exceptions, by virtue of the provision that: "Thereafter, a further extension of time may be granted by the Supreme Court upon application and showing of good cause therefor." § 25-1140.07, R. R. S. 1943. A prerequisite to the exercise of the authority granted by this provision is that the litigant has promptly, diligently, and as effectually as the situation permitted, pursued the procedure for securing a bill of exceptions during the 80 days allowed from the giving of notice of appeal. Until this has been done and the time therefor has expired, there is no right of application in any manner to this court because of the quoted provision, and the court has no power because thereof to grant appellant a further extension of time. The power given the court by this legislation was not intended as another method of securing a bill of exceptions to be resorted to whenever desired, but to prevent injustice in an exceptional case in which an emergency, not caused or contributed to by appellant, has made it impossible for him to secure a bill of exceptions within the maximum periods above stated. It was not intended as a means of relief from the result of negligence, inattention, and delay. A situation justifying intervention of the court by virtue of this provision must be one beyond the capacity and power of the applicant to have prevented. The good cause demanded as a condition of further grant of time means the occurrence of something outside of the control of the litigant. Bryant v. State, 153 Neb. 490, 45 N. W. 2d 169.

The notice of appeal was filed on January 16, 1951. The motion under consideration was filed March 29, 1951, and was submitted April 2, 1951. An extension of time for securing the bill of exceptions granted by the district court expired with April 6, 1951. The substance of the showing in support of the motion is that the bill of exceptions would be completed and delivered to appellant not later than that date. An application to this court for an extension of time may not be made before the expiration of 80 days from the date notice of appeal is filed. It may, and to be effective must be made and presented to the court as promptly thereafter as the situation will permit, and it must be supported by definite, detailed, and convincing evidence that the applicant has used due diligence and because of circumstances beyond his control he has been unable to secure a draft of bill of exceptions or to have it settled. The submitted motion was prematurely made and insufficiently supported by evidence and must be denied.

The request of appellant for an extension of time within which to prepare and file a brief herein should be granted.

The motion of appellant for an extension of time within which to prepare a bill of exceptions should be, and it is denied. The appellant should be, and is given until June 15, 1951, within which to prepare and file a brief herein.

MOTION FOR EXTENSION OF TIME TO SECURE BILL OF EXCEPTIONS DENIED. MOTION EXTENDING TIME FOR PREPARATION AND FILING OF BRIEF GRANTED.

AMENDMENT TO SECTION 7c, PART I, REVISED RULES OF THE SUPREME COURT OF NEBRASKA.

To clarify the Rules of Practice of the Supreme Court to conform with the foregoing opinion, section 7c, Part

I, of the Revised Rules of Practice of the Supreme Court of Nebraska, is amended to read as follows:

An application for further extension of time within which to prepare a bill of exceptions pursuant to section 25-1140.07, R. R. S. 1943, may not be filed in this court until 80 days after the date notice of appeal is filed in the district court, and it must be filed in this court within 30 days thereafter. The application must be supported by detailed and convincing proof of facts showing that applicant has used due diligence and has been unable to secure a draft of bill of exceptions by circumstances beyond his control or power to have prevented. The "showing of good cause" for the application must, if it is possible for applicant to secure it, include a statement under oath of the court reporter who took the testimony setting forth the date he was requested to prepare a transcript of the evidence and all the facts in detail why it has not been possible for him to prepare it within the time provided by statute, as extended by the trial court. If the statement of the reporter cannot be secured, the facts constituting the reason therefor must be exhibited under oath by the applicant, and if sufficient cause for the absence thereof is not shown, the application for extension will be denied.

STATE OF NEBRASKA EX REL. FRED EBKE, RELATOR-APPELLANT, V. BOARD OF EDUCATIONAL LANDS AND FUNDS OF THE STATE OF NEBRASKA ET AL., RESPONDENTS-APPELLEES.

47 N. W. 2d 520

Filed April 26, 1951. No. 32907.

1. **Constitutional Law: Public Lands.** The public school lands of the state are held in trust for educational purposes by the terms of Article VII, section 9, of the Constitution of this state.
2. **Public Lands: Trusts.** As a trustee of the public school lands

and the income derived therefrom, the state is required to administer the trust estate under the rules of law applicable to trustees acting in a fiduciary capacity.

3. ———: ———. A breach of the duties and functions imposed upon the state as a trustee by virtue of its constitutional status as such is a violation of the Constitution itself.

4. ———: ———. The Legislature is authorized to provide by statute the terms upon which the public school lands of the state may be leased, but such terms must be consonant with the duties and functions of a trustee acting in a fiduciary capacity.

5. ———: ———. The state as trustee owes the beneficiaries of the trust its undivided loyalty and good faith, and its acts must be in the sole interest of such beneficiaries.

6. ———: ———. An act of the Legislature dealing with trust property of which the state is the trustee constitutes a breach of trust where it appears that it substantially benefits a special class of persons at the expense of the trust estate.

7. ———: ———. A legislative act which fixes the valuation of the public school lands of the state on an arbitrary basis without regard to its fair market value and requires the Board of Educational Lands and Funds to renew the leases of existing lessees on such basis, is violative of the duties of the trustee in conferring special benefits on such lessees to the detriment of the beneficiaries of the trust.

8. ———: ———. It is the duty of a trustee to obtain a maximum return to the trust estate from the trust properties under its control, subject to the taking of necessary precautions for the preservation of the trust estate.

9. ———: ———. The loss of maximum income properly permitted by a trustee must bear a reasonable relation to the risks sought to be avoided. A trustee may not permit an unreasonable loss of income in protecting the trust res where the loss is out of all proportion to the risk and where the protection of the trust res is, or can be, otherwise amply guarded against.

10. **Constitutional Law: Public Lands.** Sections 72-240 and 72-240.01, R. R. S. 1943, are violative of the duties and functions of a fiduciary trustee and, as such, contravene Article VII, section 9, of the Constitution of Nebraska.

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

Paul W. White, for appellant.

Clarence S. Beck, Attorney General, *Robert A. Nelson,* and *Peterson, Devoe & Ackerman,* for appellees.

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

CARTER, J.

Relator filed his petition for a declaratory judgment in the district court for Lancaster County to obtain a construction and to test the validity of Chapter 235, Laws 1947, and Chapter 212, Laws 1949, both of which relate to the appraisal and leasing of public school lands. The trial court found against the relator and dismissed the action. The relator appeals.

The record shows that the Commissioner of Public Lands and Buildings leased Section 36, Township 13, Range 44, to one W. E. Scott on December 31, 1924, for a period of 25 years. On July 2, 1947, shortly after the effective date of Chapter 235, Laws 1947, the lease was assigned to the intervener, Ramey C. Whitney, for a consideration of $10,000. On July 12, 1949, approximately six months prior to the expiration of the lease by its terms, the relator filed his application for a lease on the property. The application contained an offer to pay $2,500 as a cash bonus for the lease in excess of the annual rental fixed by the then existing lease. Proper tenders were made. Relator also filed objections to the application of Whitney for a renewal of the lease with the Board of Educational Lands and Funds. The board overruled the objections to Whitney's application, denied relator's application, and granted Whitney's application for a renewal of the lease previously held by him by assignment. The evidence shows that both the relator and the intervener Whitney were qualified applicants under the statute dealing with the renewal of school land leases. The offer of a cash bonus of $2,500 by the relator over and above the annual rental fixed by the board is established by the record. The sole reason given by the board for rejecting the application of relator was the requirements of Chapter 235, Laws 1947, as amended by Chapter 212, Laws 1949,

which now appear, insofar as they are applicable to this litigation, as sections 72-233, 72-240, 72-240.01, 72-240.02, 72-240.03, 72-240.04, 72-240.05, and 72-240.06, R. R. S. 1943. It is the contention of the board, and the contention was sustained by the district court, that under the foregoing sections of the statute, particularly sections 72-240 and 72-240.01, R. R. S. 1943, it was required to grant the application of the intervener Whitney, the assignee of the previous lessee. It is the contention of the relator that no such absolute right is given by the cited statutes to one seeking the renewal of a school land lease, and, if it be found that such statutes do confer such a right, that they are unconstitutional and void.

The power to lease the public schools lands of the state rests with the Board of Educational Lands and Funds in the manner provided by the Legislature. The Legislature has provided for the appraisal and reappraisal of public school lands for the purpose of securing a value as a basis for fixing the annual rental. The record discloses the intricate method by which the board classifies public school lands and fixes their value for this purpose. The reasonableness of the method used in fixing the arbitrary value of the various classifications of public lands is not here questioned and we shall not therefore enter into a discussion of that subject.

The public school lands of the state are trust property and the state is required to adminster them as such for the benefit of the common schools of the state. State ex rel. Walker v. Board of Commissioners, 141 Neb. 172, 3 N. W. 2d 196; State ex rel. Johnson v. Central Nebraska Public Power & Irrigation Dist., 143 Neb. 153, 8 N. W. 2d 841. It was intended that the lessee of public school lands should be encouraged to improve the lands in the exercise of good husbandry. He was protected in so doing by a statute which provided in effect that if at the expiration of a lease the highest bid received was that of a person other than the lessee, then the value of the improvements were to be appraised and

paid for by the new lessee. § 72-240, R. S. 1943. The statute as it existed prior to 1947 contemplated a public sale of school land leases at public auction. It was determined by this court in 1946 in State v. Platte Valley Public Power & Irrigation Dist., 147 Neb. 289, 23 N. W. 2d 300, 166 A. L. R. 1196, that a lessee had merely a preference right, as distinguished from an absolute right, to a new lease provided no other person offered a higher bid and a better return to the trust. This holding was undoubtedly a motivating factor in the enactment of the statutes here under consideration and lends credence to the contention that the primary purpose of the subsequently enacted statutes is to avoid the effect of this decision. This, of course, the Legislature has a perfect right to do if constitutional provisions are not infringed.

By constitutional provision the lands set aside for the support of schools by the federal government are held in trust by the state. These lands include generally Sections 16 and 36 of each township, except in cases where sales have been made, and in which event other lands equivalent in area were granted in lieu of the lands sold. These lands, therefore, are subject to the rules of law applicable to the handling of trust estates because of the status assigned to them by the Constitution. State ex rel. Walker v. Board of Commissioners, *supra.*

It is clear from the applicable sections of the statute heretofore cited, and the history of previous legislative enactments on the subject, that the Legislature, prior to 1947, intended the rental of public school lands to be 6 percent of their fair market value. As we have heretofore stated, no question is raised as to the reasonableness of the 6-percent provision. The Legislature had provided for appraisals and reappraisals of this property as a means of determining their fair market value. But the appraised value is not necessarily the fair market value. It is only an arbitrary method of

fixing that value where there is no bid or other evidence from which it can be determined. If this were not so, the provisions for notice and public bidding contained in section 72-233, R. R. S. 1943, would be meaningless. In any event, it is clear that until the enactment of Chapter 235, Laws 1947, such was the intent of the Legislature. Such provisions are consonant with the duties of a trustee in the handling of trust property and, consequently, are consistent with the constitutional provision fixing the status of the state as a trustee in the handling of public school lands.

A trustee acts in a representative capacity and persons dealing with him are bound to be cognizant of his powers. A trustee is required to dispose of trust property upon the most advantageous terms which it is possible for him to secure for the benefit of the cestui que trust whom he represents. The rule is no different in the leasing of property of a trust estate. A trustee is required to accept the highest bid in the absence of cogent reasons for not so doing. It is a breach of trust for a trustee to knowingly handle the property of a trust estate for the benefit of any person at the expense of the trust estate. Rettinger v. Pierpont, 145 Neb. 161, 15 N. W. 2d 393; Clark v. Provident Trust Co., 329 Pa. 421, 198 A. 36; Kane v. Girard Trust Co., 351 Pa. 191, 40 A. 2d 466. It is a fundamental principle that a trustee owes beneficiaries of a trust his undivided loyalty and good faith, and all his acts as such trustee must be in the interest of the cestui que trust and no one else. Wendt v. Fischer, 243 N. Y. 439, 154 N. E. 303; Goldman v. Kaplan, 170 F. 2d 503. The state in acting as a trustee is subject to the same standards, and when its status as a trustee is fixed by the Constitution a violation of its duty as a trustee is a violation of the Constitution itself.

The evidence shows that there are approximately 5,200 tracts of public school lands in this state. While they are subject to reappraisement at any time during

the period of the lease and to a recalculation of the rentals where the existing appraised value is changed, it is shown that a considerable lag exists between market value fluctuations and the appraisal or reappraisal of such lands. Upon the termination of a lease, however, the interests of the beneficiaries of the trust can be protected to some extent, at least, by placing the lease up at public auction as provided by section 72-233, R. R. S. 1943, or by some other method to be provided by statute consonant with the rules of law applicable to trustees acting in a fiduciary capacity.

It is the contention of the board and the intervener that there are other considerations that enter into the situation and that the attainment of a maximum return to the trust is not a controlling factor. In this respect we point out that the primary purpose of the trust is the production of income for the support and maintenance of the common schools of the state. Art. VII, § 4, Constitution of Nebraska. While it is true that reasonable precautions should be taken for the protection of the property within the trust, such a rule does not mean that the question of income becomes an unimportant factor. In the present case, for instance, the board found the relator and intervener were qualified applicants for a lease of school lands. Consequently, the loss sustained by the fund by the failure to accept the cash bonus, or to sell the lease at public auction, cannot be charged to a want of qualification by the relator. In addition thereto the leases are subject to cancellation for failure to comply with requirements. The argument is advanced that a private owner would not seek out a tenant by a public auction of a lease. The situations are not at all comparable, but in any event it seems logical to say that, everything else being equal, a private owner would accept the higher rental offer. We take the view that the losses shown by the record to have been sustained by the trust estate are of such magnitude that they cannot be justified on the basis

that they were necessary to secure a proper handling of the property by lessees. There must be a reasonable relation of the amount of such losses to the evils sought to be corrected, which makes the losses in fact necessary. There is no evidence in the record that any such reason motivated the enactment of the legislation, or that it was necessary to adopt such a plan in order to secure qualified bidders. This attempted justification of the losses sustained appears to be highly speculative and without foundation in fact. The rentals are to be paid in cash and are in no manner dependent upon the crops raised or the uses made of the property. It seems to us that waste and improper husbandry affecting the value of the lands leased can be and are adequately controlled by the statutes on the subject and the regulations of the board.

By the statute here questioned, the Legislature provided that a lessee of public school lands could obtain a renewal of the lease under the following conditions: If the lessee applies for a new lease the board shall cause a reappraisal of the land to be made and shall determine if the applicant during the period of the existing lease has (1) followed the standards of soil conservation and good husbandry, (2) properly utilized the land for the purposes contemplated in the lease, (3) faithfully performed all covenants in the existing lease including payment of the required rental, and (4) has cooperated with the board in the proper care of the premises. If these requirements are met, the board is required to grant a new lease. § 72-240.01, R. R. S. 1943. If no application is made by the lessee, or if he has failed to meet the requirements specified, the board within three months may enter into a lease with any person willing and able to meet such requirements. § 72-240.02, R. R. S. 1943. It will be noted that these sections abandon competitive bidding and require the board to lease the lands to existing lessees at a rental based on the appraised valuation, without regard to the fair

market value of the property. In other words, the arbitrary valuation established by the board is adopted as the fair market value of the property irrespective of any other evidence on the subject. These statutes have removed from the consideration of the board the fair market value of these lands as the same may be made to appear by evidence. The record shows that the board has been required by the provisions of the statute to decline innumerable bids greatly in excess of those accepted from existing lessees. A trustee has no such right to favor one class of bidders at the expense of the trust estate.

An examination of the evidence in this record reveals the results that accrue from the failure of a trustee to comply with the strict requirements imposed upon one acting in a fiduciary capacity.

The statute provides in part that if an assignment of a school land lease is made, one-half of the consideration of the assignment, exclusive of improvements purchased, shall be paid to the board. The record shows that between July 1, 1949, and June 1, 1950, 146 such assignments were made for a total consideration of $153,734.24, of which the board received $76,867.12. It is apparent that the item of $153,734.24 represents a value in the leases assigned over and above the rentals required by the terms of the leases. While it is true that a portion of this amount may be due to increased valuations of the lands after leases were made, and before reappraisal, and is therefore inconclusive, it certainly does not wholly arise from this source when other evidence in the record is considered.

The record shows that there were 49 assignments of school land leases from December 22, 1947, to May 23, 1949, for which a consideration of $171,937.00 was paid in excess of the rentals provided in the leases and the improvements purchased by the assignees. It is noteworthy that the total appraised value of the lands involved in these assignments was $189,655.00. The rent-

als on the lands based on this valuation amount to $11,379.30 a year. For the 12-year period of the lease they would amount to $136,551.60. In other words, the considerations paid for the assignments amount to $171,-937.00, while the rentals obtained amount to only $136,-551.60. In other words, the lands in question were leased at approximately 45 percent of their fair market rental value. It is quite evident that the item of $171,-937.00 is something more than the result of increased valuations occurring during the lag between rising valuations and reappraisals by the board.

The record also shows that from July 1, 1949, to June 1, 1950, the board issued new leases for 61 tracts of public school lands. These 61 tracts produced bonus bids of $98,941.00 in excess of the rentals provided for in the leases themselves. This is of course conclusive proof that 6 percent of the appraised value was not a fair and reasonable return from the lands on the basis of their fair market value.

It is shown that the intervener in the present case paid $10,000 for the lease here involved when it was within two years of expiring by its terms. If this lease was worth $10,000 for two years, in excess of the rentals contracted to be paid, it is self-evident that the appraised value was far less than its fair market value. If the value of the remaining two years of the lease was enhanced by the enactment of the legislation here questioned, it supports the theory of the relator that such legislation was for the benefit of lessees of public school lands at the expense of the beneficiaries of the trust. The fact that the assignment was made almost immediately following the effective date of Chapter 235, Laws 1947, is very persuasive in the reaching of a similar conclusion.

The record shows that 1,235 leases were assigned by lessors or renewed by the board during the year 1949, approximately 1,160 of the number being renewals to former lessees. It is estimated by the board's chief land

appraiser that if these leases had been put up at public auction they would have produced approximately from $1,250,000 to $1,500,000 in excess of the rentals provided for in the leases.

We necessarily come to the conclusion that the applicable sections of the 1947 and 1949 acts provide an arbitrary method of determining the fair market value of the public school lands of the state for the purpose of calculating the rentals to be collected therefrom. The results of the operation of these provisions conclusively establish that the method provided does not reasonably determine the fair market value of these lands, due undoubtedly to the inherent difficulties in determining the fair market values of the 5,200 tracts involved and the inevitable lag that is bound to exist between rising valuations and reappraisals by the board. The effect of the acts here questioned is to confer special benefits upon the holders of leases of school lands to the detriment of the beneficiaries of the trust. A trustee in so handling trust property violates his duty as a trustee. His handling of trust property, including the rental thereof, must be in such a manner as to produce a reasonable rental based upon the fair market value of the property. This duty was imposed upon the state by the Constitution when it designated the state as a trustee. The plan set up by the Legislature is inconsistent with the duties imposed by law upon a trustee and, consequently, inconsistent with the grant and the acceptance thereof.

That the Legislature has the power to provide the method of administering the public school lands of the state as a trust is not subject to question. But the method provided must be one which is within the law governing the administration of trust estates. The designation of these lands as a trust in the Constitution has the effect of incorporating into the constitutional provision the rules of law regulating the administration of trusts and the conduct and duties of trustees. A breach

of trust in such a situation is in effect a violation of the constitutional provision and has the effect of invalidating the legislation authorizing the breach. The evidence in the record establishes that the legislation in question operates to the special benefit of existing lessees desiring to continue as such at rentals based on arbitrary valuations shown to be much less than the fair market value of the property. This is not within the power of the Legislature. Its duty in providing a method of administering a trust, of which the state is a trustee, is to act for the best interests of the trust estate and obtain for it the most advantageous returns possible. In setting up an administrative plan which abandons public bidding in favor of new leases to existing bidders based on arbitrary valuations shown to be substantially less than fair market values, the Legislature has violated the duty of the state as trustee and, as we have heretofore stated, it has violated Article VII, section 9, Constitution of Nebraska.

The respondents cite cases from other jurisdictions holding that under certain conditions a preference right to existing lessees will be given effect. We find no fault with the principles announced in these decisions. We do not doubt that valid reasons may exist under the statutes under consideration which would entitle the existing lessee to a preference. But none of the cases cited are based upon any such statement of facts as are contained in the record before us, nor do they state any principles of law that conflict with the law announced in this opinion. Even if, as contended by respondent, the duty of a trustee is to deal with trust property with such skill and care as a man of ordinary prudence would exercise in dealing with his own property, and that he should use reasonable care only to preserve the trust property and make it productive, a complete answer is that there has not been such a compliance with the rule for which they themselves contend. It would be difficult to visualize a prudent person in the handling of

his own affairs to follow a plan which produces losses of the magnitude shown by this record. To say that a person handling property in a fiduciary capacity under a plan which shows on its face an intent to base the return from it on arbitrary value rather than on its fair market value evidences an intent to circumvent the recognized duties and functions of a trustee.

We hold therefore that the portions of Chapter 235, Laws 1947, and Chapter 212, Laws 1949, now designated as sections 72-240 and 72-240.01, R. R. S. 1943, are violative of Article VII, section 9, Constitution of Nebraska. We further hold that the lease of Section 36, Township 13, Range 44, Deuel County, Nebraska, bearing date of November 14, 1949, to the intervener, Ramey C. Whitney, for a period of 12 years commencing January 1, 1950, was issued without the authority of law, and that relator, under the circumstances shown, was entitled to the lease of said section for the amount bid by him. The judgment of the district court is reversed for the reasons herein stated.

REVERSED.

IN RE APPLICATION OF EARL A. CANADA. EARL A. CANADA, APPELLEE, V. TRANSIT INC., ET AL., APPELLANTS.
47 N. W. 2d 507

Filed April 26, 1951. No. 32938.

1. **Public Service Commissions.** The matter for decision in an appeal from an order of the Nebraska State Railway Commission, while acting within its jurisdiction, is that the order is or is not unreasonable or arbitrary.
2. ———. The Nebraska State Railway Commission may interpret or clarify a certificate of convenience and necessity if it is indefinite, ambiguous, or uncertain in its terms or provisions.
3. ———. Sections 75-228, 75-229, and 75-230, R. R. S. 1943, provide the exclusive method for obtaining a valid certificate of convenience and necessity.
4. **Public Service Commissions: Carriers.** In determining the issue

of public convenience and necessity, controlling questions are whether the operation will serve a useful purpose responsive to a public demand or need; whether this purpose can or will be served as well by existing carriers; and whether it can be served by applicant in a specified manner without endangering or impairing the operations of existing carriers contrary to public interest.

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

Rosewater, Mecham, Stoehr, Moore & Mecham, R. E. Powell, Lawrence W. Moore, and *Einar Viren,* for appellants.

Anderson, Storms & Anderson, for appellee.

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

BOSLAUGH, J.

This is an appeal from an order of the Nebraska State Railway Commission granting a certificate of convenience and necessity.

The application of Earl A. Canada, doing business as Canada Transport, of Bertrand, Nebraska, appellee, made on the 20th day of December 1948, states that he sought authority to operate as a motor common carrier for hire to transport petroleum and its products in bulk in intrastate commerce by irregular routes upon the highways of Nebraska from and to all refining, producing, and shipping terminals in the state to points and places in the state at large; that any existing, conflicting authority be amended to eliminate duplication; and that the proposed service was required by public convenience and necessary because no present authority existed for the service proposed to and from many locations in the area he desired to serve.

The commission, after hearing and report by one of its examiners, recited, and the parties agree, that it issued appellee a certificate on September 26, 1946,

authorizing him to transport liquid petroleum in tank trucks over irregular routes from Superior to and from Benedict, Lincoln, Holdrege, Fairmont, Curtis, McCook, Indianola, Orafino, and Stockville, and occasionally to and from points within the state at large; from McCook to Grant and Hayes Center; from Curtis to Stockville and Moorefield; and that the commission disagreed with the recommendations of the examiner. The commission found that appellee was willing and able to perform the proposed operations as required by law and the rules and regulations of the commission; that public convenience and necessity required the service desired to be performed by appellee; that exceptions to the report of the examiner should be in part sustained; and that the certificate of September 26, 1946, granted to appellee should be revoked.

The order was that the said certificate be revoked and that a new certificate be and was issued to appellee authorizing him to transport as a common carrier petroleum and its products in bulk, in tank trucks, by irregular routes between all producing, refining, and distributing points and places in Nebraska, on the one hand, and on the other hand, points and places within the counties of Chase, Hayes, Dundy, Hitchcock, Frontier, Red Willow, Gosper, Furnas, Phelps, Harlan, Kearney, Franklin, and Hamilton. The motions of appellants for rehearing were denied, and this appeal is prosecuted to test the validity of the order granting and issuing to appellee the certificate.

The matter for decision in an appeal from an order of the Nebraska State Railway Commission, while acting within its jurisdiction, is that the order is or is not unreasonable or arbitrary. In re Application of Moritz, 153 Neb. 206, 43 N. W. 2d 603; In re Application of Petersen & Petersen, Inc., 153 Neb. 517, 45 N. W. 2d 465.

Appellee asserts that the application was not for a new certificate but was to obtain an interpretation and clarification of the certificate granted him in 1946, and

that this was the substance and effect of the order appealed from. He claims jurisdiction in the commission to interpret and clarify a previously issued certificate. It is competent for the commission to do this if the certificate is indefinite, ambiguous, or uncertain in its terms or provisions. In re Application of Meyer, 150 Neb. 455, 34 N. W. 2d 904; Kassebaum v. Nebraska State Railway Commission, 142 Neb. 645, 7 N. W. 2d 464.

In contradiction of the foregoing claim of the appellee as to the nature of the application and effect of the order is his declaration in the discussion of the case that the order of April 7, 1950, (involved in this appeal) "cancelled the above certificate, (of September 26, 1946) and granted a new certificate to appellee * * *." The application was clearly for a new unlimited certificate to transport petroleum and its products from and to all refining, producing, and shipping terminals in the state to all points and places in the state, for many of which appellee had no authority to transport oil and its products to and from them. The nature of the certificate sought was also characterized by the request in the application that any existing authority in conflict with the new operations proposed be amended to eliminate the duplication. The commission understood that appellee was seeking new authority and a new certificate, and not interpretation or clarification of an existing one. In the notice of hearing of the application it stated he was requesting "an EXTENSION of his operations as a common carrier" and "Any duplication of operating rights will be eliminated." The examiner recommended "* * * that the applicant's present certificate be clarified so as to eliminate the alleged ambiguity * * *." The commission denied this because "* * * the applicant now desires state-wide points of origin for his petroleum operation" and it revoked the existing certificate and granted and issued a new one. There is an entire absence of anything concerning interpretation or clarifi-

cation in the recitations, findings, or order of the commission.

The ambiguous provision of the certificate of September 26, 1946, "and occasionally to and from points within the state of Nebraska at large," obviously was not intended to authorize common carrier operations to and from all locations in the state. If it was, the specifications of definite points of origin and destination therein were meaningless. The court in the case of In re Application of Meyer, *supra,* made these observations concerning similar language in a certificate: "* * * 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." It is not proper or necessary to determine what if any significance this language has in the certificate. The certificate of September 26, 1946, specifically permitted operations from three points of origin to twelve destinations.

The order of April 7, 1950, involved in this appeal, authorizes appellee to originate shipments from all producing, refining, and distributing points in Nebraska and to transport them to destination points in 13 Nebraska counties, or about 80 towns, villages, and cities. It increases the specific scope of the destination area permitted appellee many times that authorized by the original certificate.

The application, the proceedings had thereon, and the order plainly show that appellee desired to secure, and the commission granted, a new and original authority in accordance with sections 75-228, 75-229, and 75-230, R. R. S. 1943. It could not be concluded otherwise for

these provide the exclusive method for obtaining a valid certificate of convenience and necessity. In re Application of Richling, *ante* p. 108, 47 N. W. 2d 413. A provision of the statute is that as a condition precedent to the issuance of a certificate, the commission shall find that the service to be authorized is or will be required by present or future public convenience and necessity. The question of the adequacy of service of existing carriers is implicit in the issue of whether or not convenience and necessity demand the service of an additional carrier in the field. Obviously the existence of an adequate and satisfactory service by motor carriers already in the area is complete negation of a public need and demand for added service by another carrier. The record does not show that the commission considered or determined the adequacy of service of existing certificate holders or their ability and willingness to afford prompt and satisfactory handling of all available shipments in the area in which appellee was issued authority to engage in operations. It did not find that the many previously authorized and existing carriers, including appellants, were rendering unsatisfactory or inadequate service or that they were unable and unwilling to render and provide facilities and service to promptly accommodate all requirements of shippers in the broad area to which issuance of certificate was adjudged to appellee by the order. Appellee failed to present competent evidence of inadequacy of service of the existing carriers or of their unwillingness or inability to provide all service that was wanted. Appellants were shown to have unused capacity, and were making continuous solicitations for more and new business in the area here in question. No one testified that the character of the service was not satisfactory or sufficient. It was incumbent upon the commission to give carriers authorized to operate in the territory opportunity to furnish any additional service required to satisfy public convenience and necessity in the manner

and by the means prescribed by the commission, and if they failed or refused to comply with the directions and requirements of the commission, it might then favorably consider applications of others to enter the field. In re Application of Moritz, *supra,* says: "In determining the issue of public convenience and necessity, controlling questions are whether the operation will serve a useful purpose responsive to a public demand or need; whether this purpose can or will be served as well by existing carriers; and whether it can be served by applicant in a specified operation without endangering or impairing the operations of existing carriers contrary to the public interest."

The commission made a finding that present and future public convenience and necessity required the proposed operation to the extent authorized. This finding is destitute of evidential integrity. A representative of an oil company was a witness. He had nothing to do with shipments of the company to its bulk plants, and no duty or authority to procure transportation service otherwise. He did not know whether or not there existed in the territory adequate motor carrier service. His testimony had some tendency and value to establish that appellants and other motor carriers were performing adequate and satisfactory service in the territory. An employee of another oil company stated that his company suspended petroleum business during the war and was resuming it, and that it had no bulk petroleum shipments in Nebraska and no present transportation requirements or interest therein. Three jobbers, located at Beaver City, Lebanon, and Axtell respectively, gave no evidence supporting a claim of demand or necessity for additional motor carrier transportation, but did claim the right to select the person they wanted as their transporter and said they preferred to use the service of appellee because he is a "home town" operator and they liked to keep at home the money they spend. The sales representative of a

third oil company was a witness, but he knew of no instance of appellee presently hauling for his company or its distributors. He admitted that numerous other existing carriers were providing satisfactory service in transporting shipments of bulk petroleum products from the pipeline of the company at Superior.

The burden was on appellee to show that the operation he proposed was and would be required by the present or future public convenience and necessity. In re Application of Richling, *supra;* In re Application of Moritz, *supra.*

The order of April 7, 1950, involved herein, revoking and cancelling the certificate of convenience and necessity issued to appellee on the 26th day of September 1946, and granting and issuing to appellee a certificate of convenience and necessity dated April 7, 1950, is unreasonable and arbitrary, and it should be, and is reversed.

REVERSED.

STANLEY A. KUTA, AND STANLEY A. KUTA BY ANTON KUTA, HIS NEXT FRIEND, APPELLANT, V. ALICE M. KUTA, APPELLEE.
47 N. W. 2d 558

Filed April 26, 1951. No. 32943.

1. **Guardian and Ward.** By statute the duty is imposed upon a guardian to represent his ward in all legal suits and proceedings, except in those instances where a special guardian or next friend has been appointed for that purpose.
2. ———. Where a party plaintiff under guardianship brings an action in his own name without representation by his guardian, or by a special guardian or next friend appointed for the purpose of representation, and the lack of capacity of the plaintiff to sue appears on the face of the petition, objection to such lack of capacity is waived unless it is raised by special demurrer.
3. **Divorce.** A divorce may not be decreed on the uncorroborated declarations of a party seeking a divorce.

APPEAL from the district court for Valley County: ERNEST G. KROGER, JUDGE. *Affirmed.*

Davis & Vogeltanz, for appellant.

Rose & Clinch, for appellee.

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

YEAGER, J.

This is an action for divorce by Stanley A. Kuta personally and by Anton Kuta, his next friend, plaintiff and appellant, against Alice M. Kuta, defendant and appellee. As his reason for instituting the action by next friend as well as personally plaintiff pleaded that he was under guardianship through proceedings in the county court of Hall County, Nebraska, and that C. E. Grundy was his guardian by appointment dated March 7, 1947. The action was tried and at the conclusion of the trial a divorce was denied by decree of the court.

A motion for new trial was filed which was overruled. From the decree and the order overruling the motion for new trial the plaintiff has appealed.

As grounds for divorce the plaintiff alleged that the defendant had abandoned and deserted him for a period of more than two years and she had been guilty of acts including the abandonment which amounted to cruelty.

The defendant by answer denied the allegations of abandonment and desertion and of cruelty. She sought no cross relief but asked only that the relief prayed by the plaintiff in his petition be denied.

She admitted that the plaintiff was under guardianship but did not plead this as a disability of the plaintiff to maintain his action.

No evidence whatever was adduced by either party indicating the nature or character of the guardianship and none was offered which in anywise disclosed the mental qualities or characteristics of the plaintiff either before or at the time of the trial. There is incidental

reference to the guardianship by the defendant in the bill of exceptions but no suggestion by her that the plaintiff was incompetent. The only direct reference to the guardianship is an objection made at the commencement of the trial to any testimony on the ground that the plaintiff had been decreed to be an incompetent person and was still under the care and custody of the county court of Hall County, Nebraska, that he was incompetent, and that there was no provision of law whereby plaintiff was entitled to a divorce. This objection was overruled.

There is evidence that for a considerable period of time plaintiff had been working and going about in the manner of an ordinary person but neither party has sought to relate any of his activities either before or after guardianship to his mental condition or capacity.

The case was tried on the issues presented by the pleadings and after hearing a divorce was denied to the plaintiff on the ground that his evidence was not sufficient to sustain his cause of action.

In this court as in the district court the defendant seeks no affirmative relief. She however does again insist that the plaintiff, being under guardianship, is without right to, either in his own name or by next friend, maintain this action for divorce.

Therefore since the capacity of the plaintiff to sue has been raised and preserved we deem it necessary to pass upon this question before directing our attention to the merits of the pleaded cause of action.

As regards the duty of a guardian, section 38-502, R. S. 1943, provides: "* * * He shall appear for and represent his ward in all legal suits and proceedings, unless where another person is appointed for that purpose, as guardian or next friend."

There is nothing in the record to indicate that Anton Kuta had been appointed as either guardian or next friend of plaintiff for the purpose of representing him

in this action. Therefore under the terms of this statute the action was improperly instituted.

This court has said however that in such cases as this where there is a lack of capacity to sue and the lack appears on the face of the petition advantage thereof must be taken by the opposing party by demurrer and if not so taken advantage of the defect must be deemed to have been waived.

In Farrell v. Cook, 16 Neb. 483, 20 N. W. 720, 49 Am. R. 721, it was said: "A demurrer upon the ground that the plaintiff has not legal capacity to sue will lie only when it appears on the face of the petition that the plaintiff is under legal disability, such as infancy, idiocy, want of authority, etc. * * * There is nothing in the petition showing the personal disability of the plaintiff to maintain the action, and the first ground of demurrer is not sustained."

This is a case, as is observable, where it was held that lack of capacity not appearing on the face of the petition a demurrer on the ground of lack of capacity to sue was not proper. This is the converse of the rule where the lack of capacity does appear.

In State v. Moores, 58 Neb. 285, 78 N. W. 529, this court said: "If the question cannot be now raised, it must be because it goes, not to the sufficiency of the information to state a cause of action, but only to the legal capacity of the plaintiff to sue. The latter defect must, when it appears on the face of the petition, be suggested by special demurrer on that ground or it will be waived."

In Gentry v. Bearss, 82 Neb. 787, 118 N. W. 1077, after referring to certain sections of the statutes which reference we deem unnecessary to repeat here, this court said: "The construction which these sections have received by this court makes it clear that lack of capacity to sue, if disclosed upon the face of the petition, will be waived unless taken advantage of by demurrer. * * * The petition in this case clearly shows upon its face the

plaintiff's lack of capacity to sue. The defendants failed to demur and thereby waived this defense."

In the case before this court the plaintiff pleaded the thing of which the defendant complained. She failed to demur. Her objection came too late. She by the lateness of her objection waived any right to contend that the plaintiff lacked capacity to maintain the action.

As pointed out one of the grounds of action is desertion. As to this ground there is no evidence whatever to support it. The plaintiff had been in the military service and was discharged probably late in 1944 or early in 1945. The record furnishes no authentic information in this respect. From that time forward for a period of probably about 15 months he spent most of his time in United States government hospitals. Thereafter he left the hospital. After leaving the hospital he moved about and was at home a part of the time and away a part. There is no certainty in the testimony in this respect. At some time, probably early in 1947, he went back to the hospital where he remained until about October of that year. His testimony of activities thereafter is again uncertain and indefinite. He testified that the defendant chased him out. This he indicated occurred early in February of 1947. He also testified that the defendant refused to live with him as his wife but no reasonably clear information was furnished on this subject.

There is likewise a lack of evidence of probative value that the defendant was guilty of cruelty upon or toward the plaintiff. The most that was shown or attempted to be shown was that on two or three occasions she was seen in the company of men, that on one occasion she responded to an automobile horn at night and remained outside for about an hour, and that she refused to live with him as his wife.

There was no evidence of wrongdoing in connection with the incidents relating to the men and to the call

from the house. There is just his word that she refused to live with him as his wife.

Even if the evidence adduced may be regarded as of probative value in support of the alleged grounds for divorce set forth in the petition still the plaintiff is not entitled to a divorce. His evidence stands without corroborative evidence or circumstance.

Under the statutes of this state and the decisions of this court a divorce may not be decreed on the declarations of a party alone. Such declarations must be supported by other satisfactory evidence. § 42-335, R. S. 1943; Nuss v. Nuss, 148 Neb. 417, 27 N. W. 2d 624; Strasser v. Strasser, 153 Neb. 288, 44 N. W. 2d 508; Peterson v. Peterson, 153 Neb. 727, 46 N. W. 2d 126.

The decree of the district court is affirmed.

AFFIRMED.

GARY G. STARK, A MINOR, BY FREDERICK A. STARK, HIS FATHER, AND VIRGINIA STARK, HIS MOTHER, AS NEXT FRIENDS, APPELLEE, V. BENJAMIN B. TURNER ET AL., APPELLANTS, JOSEPH L. JOHNSON, APPELLEE.

47 N. W. 2d 569

Filed April 26, 1951. No. 32955.

1. **Trial.** A motion for directed verdict or for judgment notwithstanding the verdict must, for the purpose of decision thereon, be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed. Such party is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference that can reasonably be deduced from the evidence.
2. ———. In an action where there is any evidence which will support a finding for a party having the burden of proof, the trial court cannot disregard it and direct a verdict against him.
3. **Torts.** Where the independent tortious acts of two persons combine to produce an injury indivisible in its nature, either tortfeasor may be held for the entire damage—not because he is

responsible for the act of the other, but because his own act is regarded in law as a cause of the injury.

4. **Negligence.** The violation of any statutory or valid municipal regulation, established for the purpose of protecting persons or property from injury, is sufficient to prove such a breach of duty as will sustain a private action for negligence, if the other elements of actionable negligence concur.
5. ———. Such a violation is evidence of negligence, which the jury is entitled to consider upon the question whether actionable negligence existed.
6. **Automobiles: Negligence.** The lawfulness of the speed of a motor vehicle within the prima facie limits fixed is determined by the further test of whether the speed was greater than was reasonable and prudent under the conditions then existing.
7. ———: ———. One having the right-of-way may not on that account proceed serenely unconscious of the surrounding circumstances. He has the right-of-way over traffic approaching on his left, but is not thereby relieved from the duty of exercising ordinary care to avoid accidents.

APPEAL from the district court for Adams County: FRANK J. MUNDAY, JUDGE. *Affirmed.*

Stiner & Boslaugh, and *Preston J. McDonnell,* for appellants.

J. E. Willits, for appellees.

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

WENKE, J.

Gary G. Stark, a minor, by Frederick A. Stark, his father, and Virginia Stark, his mother, as next friends, brought this action in the district court for Adams County against Benjamin B. Turner, Benjamin K. Turner, and Joseph L. Johnson. The purpose of the action is to recover for damages alleged to have been suffered by plaintiff as the result of an automobile accident alleged to have been caused by the negligent conduct of the defendants. Trial was had. After all the evidence had been adduced and the parties had rested a motion to dismiss plaintiff's action against the defendants Ben-

jamin B. Turner and Benjamin K. Turner was sustained. It was submitted to the jury as to the defendant Joseph L. Johnson. The jury returned a verdict for plaintiff in the sum of $100. Plaintiff thereupon filed a motion for new trial. The trial court sustained this motion and granted plaintiff a new trial against all of the defendants. It is from this order that the Turners have appealed. No appeal was taken from this ruling by the defendant Joseph L. Johnson.

The appellee contends the appeal should be dismissed because the transcript fails to show that appellants complied with the provisions of section 25-1914, R. R. S. 1943. See, Greb v. Hansen, 123 Neb. 426, 243 N. W. 278; Paper v. Galbreth, 123 Neb. 841, 244 N. W. 896. Appellants have caused to be filed a supplemental transcript within the time provided for doing so by our rule 4c. This supplement shows that appellants did comply with the provisions of the foregoing statute. The contention is therefore without merit.

The appeal presents the question: Was the proof offered by appellee sufficient to make a case against appellants that should have been submitted to the jury? If it was, then the court was wrong in sustaining appellants' motion to dismiss and correct in granting appellee a new trial.

Appellee alleged that the cars involved in the accident were being operated at an excessive and unlawful rate of speed, at a rate of speed greater than was reasonable and proper under the circumstances, and in such a manner that the drivers lacked control thereof, all in violation of the ordinances of the city of Hastings; that such operation was negligent and the proximate cause of the accident; and that such conduct on the part of the operators of the cars was joint and concurrent.

The municipal code of the city of Hastings in force at the time of the accident provides, so far as here material, as follows:

"No person shall operate a motor vehicle on any

street, alley or other place within the City of Hastings at a rate of speed greater than is reasonable and proper, having regard for the traffic and roadway and the condition of the street or at such a speed as to endanger the life, limb or property of any person, * * *." Section 40, p. 40.

"It shall be unlawful for the driver of any vehicle, when passing premises on which school buildings are located and which are used for school purposes, during school recess or while children are going to or leaving school during the opening or closing hours to drive such vehicle at a rate of speed in excess of fifteen miles per hour past such premises, * * *." Section 41, p. 41.

"Vehicles approaching public school, * * * must do so in an especially cautious manner, and always by way of the right side of the street." Section 43, p. 41.

Section 41 of the code was, on objection, excluded by the trial court. We find it has application here and the exclusion thereof was error. We have set forth that part of the section that is here material and shall consider it in our disposition of the question presented.

In view of the manner in which the question is here presented we will apply the following principle in considering the facts as we find them disclosed by the record: "A motion for directed verdict or for judgment ment notwithstanding the verdict must, for the purpose of decision thereon, be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed. Such party is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference that can reasonably be deduced from the evidence." Pahl v. Sprague, 152 Neb. 681, 42 N. W. 2d 367. See, also, Whitaker v. Keogh, 144 Neb. 790, 14 N. W. 2d 596; Bixby v. Ayers, 139 Neb. 652, 298 N. W. 533; Klement v. Lindell, 139 Neb. 540, 298 N. W. 137.

That appellee was injured as a result of the accident is not in dispute although the extent thereof is. How-

ever, that question is not raised by this appeal and therefore will not be herein discussed.

The accident happened in Hastings, Nebraska, on September 20, 1946, about 1 p. m. at the intersection of Third Street and California Avenue. Third Street runs east and west and immediately east of where it intersects with California Avenue the traveled portion is graveled. California Avenue runs north and south and is paved. This results in the traveled portion of the intersection being paved. The traveled portion of both streets is 30 feet from curb to curb. At the northeast corner of the intersection is the Alcott school which is one of the public grade schools of Hastings. The grounds of this school extend east along the north side of Third Street for a distance of two blocks and north along the east side of California Avenue for a distance of one block. Located along the north side of Third Street is a sidewalk. The same is true on the west side of California Avenue. These sidewalks meet and cross in the northwest corner of the intersection.

Defendant Joseph L. Johnson owned a 1938 Chevrolet coupe which he was driving north on California Avenue immediately before the accident. Appellant Benjamin B. Turner owned a 1938 Ford coach which, at the time of the accident, was being driven west on Third Street by his son, appellant Benjamin K. Turner. He was operating the Ford coach with the knowledge and consent of his father. It was the family car of the Turners and, at the time, was being used by the son as a member thereof. The two cars came together at about the center of the intersection of these two streets, the left front of the Turner car running into the right rear side of the Johnson car. The impact resulted in the left front fender, light, bumper, hood, radiator, grille, and frame of the Turner car being bent back and sprung and in the right rear fender, door, panel, and running board of the Johnson car being damaged. It caused the Johnson car to skid in a half circle to the northwest. The Johnson

car stopped in the northwest corner of the intersection just north of the east-west traveled portion thereof. Its right rear wheel was over the west curb of California Avenue and north of the east-west sidewalk which runs along the north side of Third Street. It remained upright. Its left rear wheel and both front wheels were on the paved portion of California Avenue, the front wheels being south of the east-west crosswalk area. It was facing mostly south but a little east. The Turner car was stopped in about the center of the intersection but was facing somewhat to the northwest. The distance from the front of the Turner car to the front of the Johnson car, as they were located after the accident, was 30 feet.

The injuries to appellee resulted from his being struck by the rear of the Johnson car. Appellee was returning from his home to the Alcott school where he was a pupil in the fourth grade. He was nine years of age at the time. At the time of the accident he was on the east-west sidewalk in the northwest corner of the intersection some 4 or 5 feet west of the west curb of California Avenue.

From the evidence a jury could properly find that appellant Benjamin K. Turner was driving the Ford coach west on Third Street, adjacent to the Alcott grade school, at 20 miles an hour; that he did not slow up as he approached the intersection of Third Street and California Avenue until he saw the Johnson car approaching from the south on California Avenue; that he was not able to look south on California Avenue for the purpose of observing cars coming from that direction until he arrived at a point on Third Street where he could look past the west end of a hedge located along the south side of Third Street; that upon seeing the Johnson car he immediately applied his brakes; that this caused the tires on his car to skid; that the tires skidded for a distance of 25 feet before his car hit the Johnson car; that part of this skidding was on the gravel on Third

Street and part was on the paved surface of the intersection; that the skidding continued up to the point of impact of his car with the Johnson car; that there was loose gravel on the concrete in the intersection; that the loose gravel on the concrete prevented the tires from taking a very effective hold; that the Turner car hit the Johnson car with sufficient force to cause the rear thereof to skid to the west which caused it to travel in a semicircle until it came to a stop in the northwest part of the intersection; that the Johnson car hit the appellee; and that as a result of being hit the appellee was injured.

The following principles are applicable to the foregoing:

"In an action where there is any evidence which will support a finding for a party having the burden of proof, the trial court cannot disregard it and direct a verdict against him." Hamilton v. Omaha & C. B. St. Ry. Co., 152 Neb. 328, 41 N. W. 2d 139.

"* * * that the defendant failed to do what a reasonable and prudent person 'would ordinarily have done under the circumstances and situation,' or that he did what a reasonable and prudent person 'under the existing circumstances would not have done,' and that his acts were therefore negligent (Eaton v. Merritt, 135 Neb. 363, 281 N. W. 620) * * *." Bixby v. Ayers, *supra*.

" 'The proximate cause of an injury is that cause which, in the natural and continuous sequence, unaccompanied by any efficient intervening cause, produces the injury, and without which the result would not have occurred.' Spratlen v. Ish, 100 Neb. 844, 161 N. W. 573. See, also, Williams v. Hines, 109 Neb. 11, 189 N. W. 623, and Steenbock v. Omaha Country Club, 110 Neb. 794, 195 N. W. 117." Simcho v. Omaha & C. B. St. Ry. Co., 150 Neb. 634, 35 N. W. 2d 501. See, also, Bixby v. Ayers, *supra*; Johnson v. Mallory, 123 Neb. 706, 243 N. W. 872.

"Where the independent tortious acts of two persons

combine to produce an injury indivisible in its nature, either tortfeasor may be held for the entire damage—not because he is responsible for the act of the other, but because his own act is regarded in law as a cause of the injury." Husky Refining Co. v. Barnes, 119 F. 2d 715, 134 A. L. R. 1221.

"* * * where separate, independent acts of negligence by different persons combine to produce a single injury, each participant is liable for the resulting damages, though one of them alone might not have caused the injury. Schweppe v. Uhl, 97 Neb. 328; Robertson v. Chicago, B. & Q. R. Co., 108 Neb. 569; Koehn v. City of Hastings, 114 Neb. 106; O'Neill v. Rovatsos, 114 Neb. 142; Olson v. Hansen, 122 Neb. 492; Zielinski v. Dolan, 127 Neb. 153." Rogers v. Brown, 129 Neb. 9, 260 N. W. 794. See, also, McClelland v. Interstate Transit Lines, 142 Neb. 439, 6 N. W. 2d 384; Johnson v. Mallory, *supra;* Bosteder v. Duling, 115 Neb. 557, 213 N. W. 809; Forslund v. Swenson, 110 Neb. 188, 192 N. W. 649.

"Users of the highway are required to exercise reasonable care. What is reasonable care must, in each case, be determined by its own peculiar facts and circumstances." McClelland v. Interstate Transit Lines, *supra.* See, also, Roby v. Auker, 149 Neb. 734, 32 N. W. 2d 491; Lammers v. Carstensen, 109 Neb. 475, 191 N. W. 670.

"The violation of any statutory or valid municipal regulation, established for the purpose of protecting persons or property from injury, is sufficient to prove such a breach of duty as will sustain a private action for negligence, if the other elements of actionable negligence concur. * * * Such a violation is evidence of negligence, which the jury are entitled to consider upon the question whether actionable negligence existed." Fimple v. Archer Ballroom Co., 150 Neb. 681, 35 N. W. 2d 680. See, also, Crandall v. Ladd, 142 Neb. 736, 7 N. W. 2d 642.

As stated in Novak v. Laptad, 152 Neb. 87, 40 N. W.

2d 331, quoting from Folken v. Petersen, 140 Neb. 800, 1 N. W. 2d 916: " '* * * the lawfulness of the speed of a motor vehicle 'within the prima facie limits fixed is determined by the further test of whether the speed was greater than was reasonable and prudent under the conditions then existing.' "

"One having the right of way may not on that account proceed serenely unconscious of the surrounding circumstances; * * *. He has the right of way over traffic approaching on his left, but is not thereby relieved from the duty of exercising ordinary care to avoid accidents; * * *." Thrapp v. Meyers, 114 Neb. 689, 209 N. W. 238, 47 A. L. R. 585. See, also, Klement v. Lindell, *supra;* Andrews v. Clapper, 133 Neb. 110, 274 N. W. 209.

As stated in Simcho v. Omaha & C. B. St. Ry. Co., *supra,* in quoting from Rocha v. Payne, 108 Neb. 246, 187 N. W. 804: " 'Negligence is a question of fact and may be proved by circumstantial evidence. All that the law requires is that the facts and circumstances proved, together with the inferences that may be legitimately drawn from them, shall indicate, with reasonable certainty, the negligent act complained of.' "

Considering the facts in the manner which we must and applying thereto the foregoing principles, we have come to the conclusion that they present an issue which must be determined by a jury, that is, was appellant Benjamin K. Turner negligent in the operation of the Ford coach and, if so, was such negligence a proximate cause of the injuries sustained by the appellee? This being true it requires our affirmance of the court's order granting appellee a new trial as to each of the appellants for, under the factual situation herein admitted, appellant Benjamin B. Turner would be liable as a matter of law for his son's, appellant Benjamin K. Turner, operation of the car since it was being operated by his son with his knowledge and consent and as a member of his family.

AFFIRMED.

CARL EIRICH ET AL., APPELLANTS, V. HENRY OSTWALD ET AL., APPELLEES.

47 N. W. 2d 574

Filed May 4, 1951. No. 32873.

SUPPLEMENTAL OPINION

APPEAL from the district court for Lancaster County: HARRY R. ANKENY, JUDGE. On oral argument on motion for rehearing. See *ante* p. 8, 46 N W. 2d 686, for original opinion. *Opinion modified. Motion for rehearing denied.*

Littrell & Patz, for appellants.

Towle, Young & Mattson, for appellees.

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

YEAGER, J.

On consideration of the motion for rehearing and a re-examination of the record it appears that the part of the opinion fixing the width of plaintiffs' right on 820 from the tree to the street is erroneous. The line, instead of being "due south," should be a straight line to the street parallel with the east line of the house on 814.

Accordingly the following is substituted for the 11th paragraph of the opinion: "Therefore the evidence of the plaintiffs is in proof of a use from the garage to the tree east of the surveyed line beginning at a point approximately 14 inches east of the surveyed line at the garage and extending in a straight line to the west side of the tree which is probably 3 feet east of the surveyed line. From the tree to the street the claim is to an extension of the line from the tree to the street which would allow a driveway of a width equal to the width used opposite the tree."

Accordingly also the following is substituted for the last paragraph of the opinion: "The decree of the district court is reversed and the cause remanded with directions to enter a decree quieting title in plaintiffs

to that portion of the east half of Lot 21, Block 5, Cahn, Metcalf, and Farwell's Subdivision in Lincoln, Lancaster County, Nebraska, lying west of a straight line beginning 8 inches east of the southeast corner of the garage on the west half of said lot and extending southward to a point 2 feet and 10 inches west of the center of the tree on the east half of said lot, which tree has been described and referred to herein, thence south in a straight line parallel with the east line of the house referred to as 814, and also that portion of the east half, or 820, on which is located a part of the garage of the plaintiffs."

With the opinion thus changed and modified the motion for rehearing is denied.

MOTION FOR REHEARING DENIED.

NORBERT LICHTENBERG, APPELLANT, V. BILLIE JEAN LICHTENBERG, APPELLEE.
47 N. W. 2d 575

Filed May 4, 1951. No. 32909.

1. **Divorce.** Where the evidence on material questions of fact in a divorce suit is in irreconcilable conflict, this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying, and must have accepted one version of the facts rather than the opposite.
2. ———. In a divorce suit in which the custody of a minor child is involved, the rule is that the custody of the child is to be determined by the best interests of the child, with due regard for the superior rights of fit, proper, and suitable parents.
3. ———. The care, custody, and control of a child of tender years is almost uniformly awarded to the mother if she is a fit and suitable person to have its custody.

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

Spear, Lamme & Flory, for appellant.

Stevens & Powell, and *Rohn & Rohn,* for appellee.

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

CARTER, J.

This is a suit for divorce. The trial court denied a divorce to the plaintiff husband and granted a divorce to the wife on her cross-petition. The custody of the two-year-old daughter was given to the wife and plaintiff was ordered to pay child support in the amount of $40.00 a month. Costs and attorneys fees were assessed against the plaintiff. The plaintiff appeals.

The parties were married on February 10, 1947, and separated December 21, 1949. A daughter was born on January 29, 1948. The plaintiff was 23 years of age and the defendant 16 at the time of their marriage. Plaintiff is physically handicapped by the loss of a leg and has an artificial lower limb. The real issue raised by the appeal is the correctness of the trial court's action in awarding the custody of the child to the mother.

The plaintiff commenced the suit for divorce, alleging adultery and extreme cruelty as grounds therefor. The evidence adduced on both grounds is in irreconcilable conflict. There is no direct evidence of adultery on the part of the wife. The evidence is wholly circumstantial. The circumstances are explained by the wife and the man alleged to have been involved. It would serve no purpose to recite the evidence shown by the record. The trial court heard the evidence, observed the witnesses as they testified, and determined the weight and credibility. Where the evidence on material questions of fact is in irreconcilable conflict, this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying, and must have accepted one version of facts rather than the opposite. Meredith v. Meredith, 148 Neb. 845, 29 N. W. 2d 643. The foregoing rule is applicable and controlling in considering the foregoing

evidence. We conclude that the trial court was correct in denying a divorce to the plaintiff.

There is evidence in the record to sustain the granting of a divorce to the wife on her cross-petition. The record shows that plaintiff has moved the family about from place to place during the period of their married life. This has been necessary because of his inability, or unwillingness, to hold a job. He has failed to support his wife and child. The defendant wife has been required to obtain employment to aid in the support of the family. Plaintiff engaged frequently in the writing of no-fund checks, much to the humiliation of his wife. There is evidence that the parties quarreled frequently and that plaintiff used physical violence against her on at least one occasion. The evidence is sufficient to sustain the awarding of a divorce to the defendant wife on her cross-petition.

The trial court granted the custody of the two-year-old daughter to the wife. The plaintiff asserts that the trial court erred in so doing. The rule is that in a divorce case, where the custody of a minor child is involved, the custody of the child is to be determined by the best interests of the child, with due regard for the superior rights of fit, proper, and suitable parents. Gorsuch v. Gorsuch, on rehearing, 143 Neb. 578, 11 N. W. 2d 456; Hodges v. Hodges, *ante* p. 178, 47 N. W. 2d 361. The care, custody, and control of a child of tender years is almost uniformly awarded to the mother if she is a fit and suitable person.

The record shows that defendant and her small daughter have been offered a home by the grandparents of the defendant. The evidence shows that the grandparents have a good home in Schuyler, Nebraska, and that the advantages afforded to the child would be to its best interests. The mother being a fit and proper person to have the custody of the two-year-old daughter, and it appearing that she has made suitable arrangements for its care and custody, we find that the custody of the

child should be awarded to her. If the situation should change, so that this home would no longer be available to her, the trial court has the authority, upon application, to make such further order affecting the custody of the child as the evidence may require. But so long as the home of the grandparents is available to her, and her right to the custody of the child is not otherwise impaired, we are of the opinion that the best interests of the child require that it be placed in the custody of the mother. The decree of the district court being in accord with the conclusion of this court, it is affirmed.

AFFIRMED.

IN RE APPLICATION OF CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, APPELLEE, V. LEAGUE OF NEBRASKA MUNICIPALITIES ET AL., APPELLANTS.

47 N. W. 2d 577

Filed May 4, 1951. No. 32927.

1. **Appeal and Error.** The Legislature may properly specify the nature of orders and rulings subject to review in setting up a special appellate proceeding.
2. **Public Service Commissions: Appeal and Error.** In the enactment of sections 75-405 and 75-406, R. R. S. 1943, the Legislature left it optional whether or not a party dissatisfied with an order of the Nebraska State Railway Commission upon which there has been a hearing, would file a motion for rehearing in order to institute proceedings in the Supreme Court to reverse, vacate, or modify such order.
3. ———: ———. Thus if such party timely files a motion for rehearing he may have one month from the ruling thereon within which to appeal, thereby presenting for consideration and review not only errors of law which allegedly occurred during the hearing but also whether or not the complete record discloses that the commission acted within the scope of its authority and whether or not its order was arbitrary and unreasonable.
4. ———: ———. On the other hand, if such party does not file a motion for rehearing or it is filed out of time but his

appeal is timely perfected within one month from the date of the entry of the order to which complaint is made, then this court will not consider or review any assigned errors of law which allegedly occurred during the hearing, but will search the complete record to determine whether or not the commission acted within the scope of its authority and whether or not its order was arbitrary and unreasonable.

5. ———: ———. As a matter of course, if the appeal of such party is not in such a case timely perfected within one month from the date of the entry of the order to which complaint is made, then this court has no jurisdiction.

6. **Public Service Commissions: Railroads.** If an application filed with the Nebraska State Railway Commission involves the discontinuance and substitution of interrelated trains and presents over-all issues relating to public passenger transportation needs and services which are each component parts of the same problem, then the commission has authority to hear such issues as one proceeding and dispose of them with one order.

7. ———: ———. A final order of the Nebraska State Railway Commission granting a railroad company authority to discontinue specified passenger trains, operated within the state at a loss and for the operation of which no public need exists, is within the scope of its authority and not arbitrary and unreasonable.

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

Perry & Perry, Clarence C. Kunc, and *Mockett, Davies, Pace & Perkins,* for appellants.

J. W. Weingarten and *W. P. Loomis,* for appellee.

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

CHAPPELL, J.

Appellee filed an application with the Nebraska State Railway Commission, hereinafter called the commission, for authority to substitute daily passenger trains 41 and 42 for daily passenger trains 15 and 16 between Table Rock and Wymore and daily except Sunday passenger motor trains 23, 24, 89, and 90 between Lincoln and Wymore, by operating trains 41 and 42 between

Lincoln and Table Rock via Wymore instead of via Tecumseh. In other words, the authority sought by the appellee was to discontinue trains 15 and 16 between Wymore and Table Rock and discontinue motor trains 23, 24, 89, and 90 between Lincoln and Wymore, but in lieu thereof to operate trains 41 and 42, with stops at all stations between Lincoln and Table Rock, via Wymore instead of via Tecumseh, and to schedule full stops at all stations between Lincoln and Table Rock by trains 43 and 44 which would continue to operate between Lincoln and Table Rock via Tecumseh, thus providing daily including Sunday train service for all 23 cities and towns involved in each direction on each line.

The alleged reasons for authority to discontinue trains 15, 16, 23, 24, 89, and 90 were that the general use of motor vehicles by the public, both private automobiles and trucks and common carrier busses and trucks, because of their flexibility and convenient operation upon the now numerous modern county, state, and federal highways, had resulted in practical abandonment by the public of such trains for passenger or express transportation in the territory involved. The alleged net result thereof was that such trains were no longer a public need and the direct out-of-pocket expense of their operation had for a long time exceeded and presently greatly exceeded the revenues produced by the operation thereof, causing each of such trains to be operated at a very substantial loss.

Notice of hearing on the application was timely given. Only the city of Lincoln filed formal written objections and it made no appearance at the hearing. On May 22, 23, and 24, and thereafter on June 12, 1950, an extended hearing was had before the commission whereat voluminous evidence was adduced by appellee to sustain the application, and by appellants' witnesses from Roca, Wymore, DeWitt, and Wilber, who filed no formal objections but appeared and testified opposing the application. Thereafter on August 16, 1950, the commission

entered a comprehensive order granting the application. On August 17, 1950, certified copies of such order were respectively mailed to the parties affected. Motion for rehearing, or in the alternative for a reversal of the order, was filed by appellants on August 30, 1950, more than 10 days after mailing of a copy of the order. On September 8, 1950, the commission overruled the motion for rehearing, and on September 13, 1950, within one month from the date of the entry of the order granting the application, appellants filed notice of appeal and deposited the docket fee with the commission.

In their brief filed in this court, appellants assigned as error substantially: (1) That the commission erred in the admission of certain evidence over appropriate objections; (2) that the commission did not have the authority to hear the entire matter involving three separate lines in one proceeding and dispose of the issues with one order; (3) that the application as it related to trains 41 and 42 should have been dismissed; and (4) that the order granting the application was arbitrary and unreasonable. We conclude that assignments 2, 3, and 4, have no merit, and, as hereinafter observed, we will not consider or review the first assignment.

At the outset we are confronted by the appellee's contention that a motion for rehearing timely filed is mandatory in order for this court to review any question except jurisdiction of the commission and sufficiency of the application to sustain the order granting the application, despite the fact that notice of appeal from the order of the commission granting the application after hearing thereon, was filed and the docket fee was deposited with the commission within one month from the date of entry of the order. The answer to the appellee's contention is dependent upon applicable statutes.

In that connection, section 75-405, R. R. S. 1943, provides: "If any * * * person affected thereby, shall be dissatisfied with the decision of the State Railway Commission * * * with reference to any * * * order, act, or

regulation made or adopted by them upon which there has been a hearing before the commission * * * such dissatisfied * * * person affected may institute proceedings in the Supreme Court of Nebraska to reverse. vacate, or modify the order complained of; Provided, the time for appeal from the *orders and rulings* of the commission to the Supreme Court shall be limited to one month from the date of the entry of the *order or ruling* to which complaint is made." (Italics supplied.)

Section 75-406, R. R. S. 1943, provides: "The procedure to obtain such reversal, modification, or vacation of any such order or regulation made and adopted, upon which a hearing has been had before the State Railway Commission, shall be governed by the provisions in force with reference to appeals from the district courts to the Supreme Court of Nebraska; Provided, no motion for a new trial shall be required to be filed, but instead a motion for rehearing *shall be filed within ten days after the mailing of a copy of such order by the commission to the persons affected,* and the time for appeal shall run *in case such motion is filed* from the date of the ruling of the commission on the motion for rehearing." (Italics supplied.)

Section 75-407, R. R. S. 1943, provides: "The evidence presented before the State Railway Commission, as reported by its official stenographer and reduced to writing, shall be duly certified to by the stenographer and chairman of the commission as the true bill of exceptions, which, together with the pleadings and filings duly certified in the case under the seal of the commission, shall constitute the complete record and the evidence upon which the case shall be presented to the appellate court."

The type of orders reviewable was generally discussed in In re Application of Airline Ground Service, Inc., 151 Neb. 837, 39 N. W. 2d 809, wherein it was held: "The Legislature may properly specify the nature of the orders subject to review in setting up a special appellate proceeding."

We call attention to the fact that section 75-405, R. S. 1943, was amended by Laws of Nebraska, 1949, c. 218, § 1, p. 618, not only to change the time for appeal to "one month" but also to add the words "from the date of the entry of the order or ruling to which complaint is made." More important, by section 2 thereof section 75-406, R. S. 1943, was amended by adding the qualifying words "in case such motion is filed" to the provisions relating to motions for rehearing. It appears that the mandate of said section is not that such a motion must be filed in any event in order to "institute proceedings in the Supreme Court of Nebraska to reverse, vacate, or modify the order complained of" but rather, the mandate has relation to when it shall be filed in order to have the benefit of such a motion.

We conclude that the Legislature left it optional, as distinguished from mandatory, whether or not the party aggrieved would timely file a motion for rehearing. Thus if he timely files a motion for rehearing, he may have one month from the ruling thereon within which to appeal, thereby presenting for consideration and review not only errors of law which allegedly occurred during the hearing, but also whether or not the complete record discloses that the commission acted within the scope of its authority and whether or not its order was arbitrary and unreasonable.

On the other hand, if he does not file a motion for rehearing, or it is filed out of time, but his appeal is timely perfected within "one month from the date of the entry of the order * * * to which complaint is made" as in the case at bar, then this court will not consider or review any assigned errors of law which allegedly occurred during the hearing, but will search the complete record to determine whether or not the commission acted within the scope of its authority and whether or not its order was arbitrary and unreasonable. As a matter of course, if his appeal is not in such a case timely perfected within "one month from the date of

the entry of the order * * * to which complaint is made" then this court has no jurisdiction. Barth v. Lincoln Telephone & Telegraph Co., 122 Neb. 325, 240 N. W. 318.

Viewed in that light, the appellee's contention has no merit, and we will search the record to determine whether or not the commission acted within the scope of its authority and whether or not its order granting the application was arbitrary and unreasonable. The foregoing discussion also disposes of the first assignment.

With regard to the second assignment, the record discloses that this proceeding involved a single application, having to do with interrelated trains in a comparatively small triangular adjacent area. In other words, the over-all issues, relating to public passenger transportation needs and services, were each component parts of the same problem. Contrary to appellants' contention, we therefore conclude that it was within the scope of the commission's authority to hear the issues presented by the application in one proceeding and dispose of them with one order. A related contention was disposed of in In re Application of Petersen & Petersen, Inc., 153 Neb. 517, 45 N. W. 2d 465.

With reference to the third assignment appellants argued that the commission should have dismissed the application as it related to trains 41 and 42, because they operated at a profit. In that connection, such trains concededly did make a profit by including their through service between Lincoln and St. Joseph, but the record discloses that they were little used between Lincoln and Table Rock, the intrastate territory here involved. It will be noted also that the application was not to discontinue the operation of such trains, but rather to reroute them in order, as shown by the record, to make a very substantial net annual savings, and still give adequate passenger train service to all of the cities and towns involved notwithstanding the discontinuance of trains 15, 16, 23, 24, 89, and 90, which without dispute were each and all operated at a very substantial loss

because they were little used by the public. We conclude that the third assignment has no merit.

Finally, we turn to the fourth assignment to determine whether or not the order of the commission granting the application was arbitrary and unreasonable. In that connection, the record discloses that under the authority granted, each city and town involved will be served by modern passenger trains daily, including Sunday, both to and from Lincoln via Wymore to Table Rock, and to and from Lincoln via Tecumseh to Table Rock. The record discloses that the entire area to be served by such trains is interlaced by gravel, black-top, or paved county, state, or federal highways, and that all cities and towns involved, except five, were also served by common carrier daily bus service, which services were used by substantially more people than appellee's passenger trains on parallel routes. It does appear that a few people in at least 4 of the 23 cities and towns will suffer some inconvenience from the change of operations, but while that is a factor to be considered, it is not controlling because other adequate passenger train service is provided by the authority granted, and however trains are operated on every line, some people would likewise suffer some inconvenience.

To recite in detail the voluminous evidence appearing in the record before us would serve no purpose. It is sufficient for us to say that this court has only recently adopted two comprehensive opinions involving applications to discontinue trains operated within the state and substitute other even less adequate services by the same railroad for like reasons under circumstances similar to those at bar. In both such cases the order of the commission refusing to permit discontinuance was reversed as arbitrary and unreasonable.

It would serve no purpose to quote at length from those opinions. It is sufficient for us to say that they are controlling and generally sustain the conclusion that a final order of the Nebraska State Railway Com-

mission granting a railroad company authority to discontinue specified passenger trains, operated within the state at a loss and for the operation of which no public need exists, is within the scope of its authority and not arbitrary and unreasonable. In re Application of Chicago, B. & Q. R. R. Co., 152 Neb. 352, 41 N. W. 2d 157; In re Application of Chicago, B. & Q. R. R. Co., 152 Neb. 367, 41 N. W. 2d 165.

In the light thereof, we have examined the record in the case at bar, which discloses ample competent evidence to sustain the application and order of the commission. In other words, we conclude that the commission acted within the scope of its authority and that its order was not arbitrary and unreasonable. Therefore, the order of the commission should be and hereby is affirmed.

AFFIRMED.

IN RE ESTATE OF FRANK BERGREN, DECEASED. CHARLES FRANKENBERGER ET AL., APPELLEES, V. LAURA IRENE HOLM ET AL., APPELLANTS.

IN RE ESTATE OF FRANK BERGREN, DECEASED. CHARLES FRANKENBERGER ET AL., APPELLEES, V. ARTHUR JOHN BERGREN ET AL., APPELLEES.

47 N. W. 2d 582

Filed May 4, 1951. Nos. 32929 and 32949.

1. **Courts: Descent and Distribution.** By Article V, section 16, of the Constitution, and section 24-503, R. R. S. 1943, the county court has exclusive original jurisdiction of all matters relating to the settlement of the estates of deceased persons.
2. ———: ———. The county court in the settlement of an estate has jurisdiction to determine the heirs of the decedent. In so doing, the court does not determine the title to real estate, although the determination may incidentally involve a question of title.
3. **Husband and Wife: Descent and Distribution.** A surviving husband or wife may file in the county court, within one year after

the issuance of letters testamentary, a refusal in writing to accept real estate devised or other provisions made in the will and his or her intention to take by inheritance, descent, and distribution as by law provided.

4. ———: ———. A person asserting that at the time a surviving spouse executed and filed an election to take under the statute of inheritance, descent, and distribution the spouse was subject to undue influence, must establish by a preponderance of the evidence (1) that the spouse, at the time of executing such instrument, was subject to undue 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.
5. ———: ———. Where it is sought to invalidate and set aside an election to take under the statute of inheritance, descent, and distribution and renounce the provisions of a will for the want of mental capacity of the surviving spouse to execute the instrument, the burden of proof is on the one who alleges the mental incapacity.
6. ———: ———. In order to invalidate an election of a surviving spouse to take under the statute of inheritance, descent, and distribution on the ground of mental incapacity it is necessary to show such a degree of mental weakness as renders the person executing the instrument incapable of understanding and protecting such rights.
7. **New Trial.** A new trial will not be granted upon the ground of newly discovered evidence unless it is made to appear that such evidence, if it had been offered and admitted on the trial, would probably have produced a different result.
8. ———. The application for a new trial on the ground of newly discovered evidence is addressed to the sound judicial discretion of the trial court, and its action thereon will not be overruled unless there is a clear abuse of discretion shown.

APPEAL from the district court for Antelope County: LYLE E. JACKSON, JUDGE. *Affirmed.*

W. G. Whitford and *James F. Brogan,* for appellants.

Elmer C. Rakow, for appellees.

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

MESSMORE, J.

This action was originally instituted in the county court

of Antelope County by Charles Frankenberger, executor of the estate of Frank Bergren, deceased, and Effie Frankenberger, one of the legatees and devisees named in the will of Frank Bergren, deceased, for determination of heirship and the right of descent of the real and personal property belonging to the deceased.

On October 29, 1942, Frank Bergren made and executed a will by the terms of which he bequeathed and devised to his wife, Josephine Bergren, a life estate in all his property, both real and personal. After her death his property was to be divided in equal parts to his sole and only heirs at law, a niece and six nephews, all nonresidents of Nebraska; to his sisters-in-law Matilda Bergren and Caroline Matilda Bergren, the latter having predeceased the testator her share in his estate had lapsed; and to Lilion Owen, referred to as Lillian Owen, Perna Hill, and Effie Frankenberger, step-daughters, all nonresidents of Nebraska except Effie Frankenberger.

On January 26, 1949, Josephine Bergren, the widow of Frank Bergren, deceased, executed an election to take under the statute of inheritance, descent, and distribution, which will hereinafter be referred to as the statute, and renounced the will. This instrument was filed in the county court on January 27, 1949.

On September 15, 1949, objections were filed to the jurisdiction of the county court setting forth that to act upon the plaintiffs' petition necessarily involved a determination of the validity of the election to take under the statute for the reason that the election, if valid, was the equivalent of a determination effecting a present as distinguished from an ambulatory transfer of real estate; and for the further reason that at the time the petition in the instant case was filed in the county court an action was pending in the district court the determination of which necessarily involved the validity of the election of the widow to take under the statute and renounce the will. The objections to the jurisdiction were overruled.

This brings us to the question as to whether or not the county court had jurisdiction over the election of the widow to take under the statute and renounce the will. In this connection we deem the following authorities decisive of the jurisdictional question.

Article V, section 16, of the Constitution of Nebraska provides: "County courts shall be courts of record, and shall have original jurisdiction in all matters of probate, settlement of estates of deceased persons, and in such proceedings to find and determine heirship; * * *: But they shall not have jurisdiction in * * * civil actions in which title to real estate is sought or drawn in question; * * *."

Section 24-503, R. R. S. 1943, provides: "The county court shall have exclusive jurisdiction of the probate of wills, the administration of estates of deceased persons, * * *." See, also, In re Estate of Reikofski, 144 Neb. 735, 14 N. W. 2d 379; Pinn v. Pinn, 108 Neb. 822, 189 N. W. 371; Fischer v. Sklenar, 101 Neb. 553, 163 N. W. 861; Brown v. Webster, 87 Neb. 788, 128 N. W. 635; In re Estate of Shierman, 129 Neb. 230, 261 N. W. 155; In re Estate of Statz, 144 Neb. 154, 12 N. W. 2d 829.

In the case of Billiter v. Parriott, 128 Neb. 238, 258 N. W. 395, the court held: "The right of election of a surviving spouse to take under the will of deceased or to take by inheritance, descent and distribution is purely statutory, and the manner prescribed of exercising that right is a condition upon which the right rests. * * * The county court in the settlement of an estate has jurisdiction to determine the heirs of the decedent. In doing so, the court does not determine the title to real estate, although the determination may incidentally involve a question of title."

Section 30-107, R. R. S. 1943, provides: "If any real estate be devised by a deceased husband or wife, to the surviving husband or wife of such deceased person, or other provision be made for him or her in the last will and testament of such deceased person, he or she shall

be entitled to his or her election to take the lands so devised, or the provision made for him or her in the last will and testament of such deceased husband or wife, or to take by inheritance, descent and distribution the interest in the estate of the deceased, provided by law; but he or she shall not be entitled to both unless it plainly appears by the last will and testament of the deceased to have been so intended by the testator or testatrix."

Section 30-108, R. R. S. 1943, provides: "When a surviving husband or wife shall be entitled to an election under section 30-107, he or she shall be deemed to have elected to take the real estate devised or other provision made by the last will and testament of the deceased, unless he or she shall, within one year after the issuance of letters testamentary, file in the office of the county court of the county in which such estate is being administered, a refusal in writing to accept the real estate so devised or other provision so made, and his or her declaration of his or her intention to take by inheritance and descent and distribution as by law provided. Such refusal and declaration shall be executed by such surviving husband or wife, and acknowledged in the same manner as deeds of conveyance of real estate."

The election made by Josephine Bergren, widow of Frank Bergren, deceased, to take by statute was executed and acknowledged as provided by section 30-108, R. R. S. 1943.

With reference to that part of the objections to jurisdiction having to do with an action filed by Effie Frankenberger against Laura Irene Holm et al., in the district court for the partition of 400 acres of land in Antelope County of which Frank Bergren was the fee simple owner at the time of his death, this court reversed and remanded the cause for insufficient evidence adduced by the plaintiff in that action, and also determined the evidence was insufficient to sustain the cross-action of the appellants for partition. See Frankenberger v. Holm,

ante p. 80, 46 N. W. 2d 901. This decision does not affect the instant case.

We conclude that the objections to jurisdiction were properly overruled by the district court.

Section 30-1606, R. S. Supp., 1949, provides that a case such as the one at bar is tried as an equity case in the district court. On appeal to this court the case is tried de novo on the record presented. See, also, sections 25-1105 and 25-1925, R. R. S. 1943.

The defendants, by answer, alleged facts upon which they rely to have the election of Josephine Bergren, the widow of Frank Bergren, deceased, to take under the statute declared void, for the reason that she lacked the mental capacity to voluntarily execute or understand the election to take under the statute, and further, that the execution of the instrument was not her voluntary act and deed and was procured by the undue influence of Charles Frankenberger, Effie Frankenberger, and others which controlled the will and confused the judgment of Josephine Bergren.

The trial court on June 23, 1950, entered its decree finding that Josephine Bergren was competent at the time she made the election to take under the statute, that the same was her voluntary act and deed, was executed and filed in the manner and form provided by law, and was in all respects valid and binding; and that Frank Bergren, deceased, never had children, and his widow, Josephine Bergren, was therefore entitled to receive one-half of all the property of the said deceased, both real and personal. See subdivision (4) of section 30-101, R. R. S. 1943. The trial court decreed that the real estate, in accordance with the laws of descent of the State of Nebraska and the will of the deceased, descended and became the property of the widow under the laws of the State of Nebraska as an intestate estate, and the heirs at law of the deceased and other persons named in the will. The court then decreed Josephine Bergren an undivided one-half interest in the estate,

and to all of the other legatees and devisees named in the will an undivided one twenty-second interest therein, and provided for distribution.

The defendants filed a motion for new trial, and upon the overruling of the same perfected appeal to this court.

For convenience we will refer to the parties as they are originally designated in the district court. Also, we will refer to Charles Frankenberger as Charles, Effie Frankenberger as Effie, and Josephine Bergren as Josephine.

The record discloses that Josephine Christiansen was born in Sweden on April 1, 1869. She came to America when she was 19 years of age. Her formal education was obtained in the schools of Sweden. She married and had three daughters, Effie, Lillian Owen, and Perna Hill. Her second marriage was to Frank Bergren in 1929, and she lived with him until his death on September 6, 1948, at Elgin, Nebraska. His will was admitted to probate October 14, 1948. He left certain personal estate, 400 acres of land in Antelope County, and his home in Elgin. Josephine and Frank Bergren had no children. Letters testamentary were issued to Charles on October 14, 1948. In 1941, Charles, the son-in-law of Josephine, and his wife Effie, her daughter, moved from Omaha to Elgin at the request of the Bergrens, to take care of them. Charles had retired as a railroad employee. Josephine Bergren died on January 29, 1949. She was nearly 80 years of age at the time.

While it appears from a certificate of death offered in the record that she died on January 28, 1949, occasioned by a cerebral hemorrhage suffered by her on January 23, 1949, there is little doubt but that the preponderance of the evidence discloses that she died on January 29, 1949.

Charles and Effie lived in the home with Josephine and Frank Bergren approximately a year before Mr. Bergren died, and for two or three years prior thereto spent considerable time with them. After Frank Ber-

gren's death Effie and Charles stayed with Josephine, cared for her, and took care of her business. Josephine did not write letters, but could sign checks. In 1934 or 1935, Josephine suffered a stroke of paralysis which affected her throat and speech and made it difficult for her to complete a sentence and for others to understand her, except those who knew her. Dr. Graham who had attended her at that time testified she was just unable to pronounce words. Two months thereafter she was capable of doing some housework, but not the washing. She had help for a period of nine months, and money was sent to her by Effie to have the washing done. She walked with a cane, or with some assistance. On January 19, 1949, Josephine suffered a second stroke of paralysis. After that her speech was very much affected and it was difficult to understand her. She would mix Swedish language in her conversation. She was unable to talk over the telephone. She was stooped over with arthritis and could not hold the telephone, and people on the other end of the line could not understand her. She did not possess an English Bible, but had a Swedish Bible, and she listened to Swedish programs over the radio. Her difficulty was principally due to arthritis in her legs, one of which was shorter than the other. She had difficulty in getting in and out of a car. After January 19, 1949, the date of her second stroke, she was unable to get out of bed unassisted and did not attend to her physical wants after that date.

It appears from the evidence that the matter of Josephine electing to take under the statute had been under consideration for some time. She was confused when she learned that under the provisions of the will she would be unable to sell the home in Elgin. She was desirous of selling the home and purchasing one in St. Paul, Minnesota, to be near her daughters who could assist in taking care of her. In an endeavor to satisfy her she was taken out to the farm, which she had not

seen for years. Considering her desires and the income from the farm not being adequate to support her, in her opinion it was thought best that the election to take under the statute should be made to enable her to get what she wanted and needed. The attorney for the estate explained to her the right to take under the statute and the effect of so doing. On January 26, 1949, at her request Charles went to Neligh to ask the attorney for the estate to prepare such a document, which was done. The attorney returned with Charles to Elgin where they met Mr. Daly and asked him to come along as a witness to a document prepared for Josephine to sign. When they arrived at the home Josephine was lying in bed. She did not have her glasses. It was thought best not to induce her to get up, so two pillows were placed under her which elevated her in a position so that she could see. The evidence shows that she did fancy work without glasses, and was able to see without glasses. Effie read the document to her and asked her if she understood it, and she indicated that she did. Her hand was strong, however she was unable to control it. She had written poorly for years. She took the pen and started to write, making some scratches on the instrument. Effie held her hand and she made her mark. The attorney asked her if she understood what was in the instrument and if it was her voluntary act and deed. She nodded her head indicating that it was. She smiled and shook hands with the attorney, and was assured the instrument would be filed in the Frank Bergren estate proceedings, which she wanted done. She had begged to have this matter attended to as she wanted to sign the instrument, and was pleased when the matter was completed.

The minister who had called on the Bergrens during Mr. Bergren's lifetime and on Josephine after Bergren's death visited with her about half an hour the afternoon the election to take under the statute was signed. He testified that she understood him, but it

was difficult for him to understand her because he was not Swedish; that she had average mental capacity for a person her age; and that her mind was clear.

Dr. Graham who had known the Bergrens for 20 years and served them as family physician, testified that he called on Josephine on January 19 and 22, 1949. She had an extreme weakness of the legs and needed help to stand up. She was mentally competent and knew what she was doing when he attended her. She was able to sit up, with help, on January 22d. He always had difficulty in understanding her because she talked Swedish about one-third of the time.

The prima facie case made by the plaintiffs disclosed that Josephine was mentally competent at the time she executed the election to take under the statute.

The defendants' evidence as to Josephine's mental incapacity to elect to take under the statute and renounce the will dealt to considerable extent with her physical disabilities. She suffered from arteriosclerosis, two paralytic strokes, and arthritis which affected her ability to get around unattended and to talk to the extent of formulating sentences so that she could be understood, and also affected her mentally to know and understand the meaning of an election to take under the statute. She had been confined to the house for a long period of time with Charles and Effie in constant attendance upon her to take care of her physical needs because she was unable to comb her hair or go to the bath unassisted. She was sick in bed approximately three weeks prior to her death. The last ten days of her life she did not mention her daughters in Minnesota or request that they come and see her. She was, for the most part, fed liquids. She signed the election to take under the statute with the knowledge that she was going to die in the near future, and was asked by the minister if she was afraid to go. She indicated that she was not, but in fact she did die three days thereafter. She never consulted any attorney except the attorney for the estate

whom she met after her husband's death, and when this attorney advised with her Charles and Effie were always present. They had managed her business affairs after her husband's death and never left her alone with anybody.

A medical expert testified in behalf of the defendants in answer to hypothetical questions which contained most of the relevant and material evidence adduced, except that eliminated from the questions was the attendance of the family physician on Josephine. This expert gave his opinion that Josephine was incompetent to execute the election to take under the statute on January 26, 1949. He did not express an opinion as to the competency of Josephine, in answer to a hypothetical question if she had suffered a stroke on January 23, executed the election to take under the statute on January 26, 1949, and departed this life on January 28, 1949, whether or not she was competent to do so. However, when he was recalled he did express the opinion that she was incompetent to execute the election to take under the statute considering the dates set forth in the hypothetical question. This expert testified that if the family physician examined the patient and had known her for years, that he would have a fairly good understanding as to her competency. This expert was unacquainted with Josephine and had never seen her.

The medical expert presented by the plaintiffs testified that to determine the competency of a person it is necessary to take into consideration their alertness, whether or not there had been mental deterioration, the extent of it, whether or not the patient had suffered hallucinations of any kind, and the specific history by a physician in whom the examining doctor had confidence.

There are certain letters in evidence upon which the defendants rely as indicating undue influence on the part of Charles and Effie, also evidence that the last year of her life Josephine did not write letters. The

letters relied upon to show undue influence merely show that Charles and Effie were desirous of buying the respective shares of the heirs at law and others.

The arrangements for Josephine to take under the statute had been discussed and agreed upon some months before she actually executed the instrument. While there is some intimation on the part of the defendants that Josephine executed the election to take under the statute anticipating her death in the near future and with the intention to disavow the provisions of the will for the purpose of enhancing the value of the estate for the benefit of her heirs at law and thus defeating the legatees and devisees under the will of a fair share of the estate, we find no merit to this contention. She had the legal right to make the election to take under the statute if she was competent to do so and was not unduly influenced by others to execute the instrument.

The burden of proof is on the party who alleges the mental incapacity of a widow to elect to take under the statute and renounce the will to prove by a preponderance of the evidence that she was not mentally competent at the time she executed the instrument. See Brugman v. Brugman, 93 Neb. 408, 140 N. W. 781. The rule in this respect is the same as when it is sought by a party to set aside a deed or will for the want of mental capacity.

In determining the mental capacity of a widow to execute an election to take under the statute and renounce the will, if it clearly appears that when the instrument was executed the widow had the capacity to understand what she was doing and to decide intelligently whether or not she desired to execute the instrument, it cannot be said that she was incompetent or incapable at the time of executing the instrument. In order to invalidate an election of a widow to take under the statute on the ground of mental incapacity, it is necessary to show such a degree of mental weakness as renders her incapable of understanding and pro-

tecting her own interests at the time she executed the instrument. See, Broeker v. Day, 124 Neb. 316, 246 N. W. 490; Little v. Curson, 114 Neb. 752, 209 N. W. 737; Parkening v. Haffke, 153 Neb. 678, 46 N. W. 2d 117.

In the case of In re Dellow's Estate, 290 Mich. 167, 287 N. W. 420, an 83-year-old widow was an unkempt, sickly person, reserved and disinclined to read and write. It was stated and held that these facts did not necessarily mean that she was incompetent to make an election to take under the statute rather than under her late husband's will, for if she was capable of reasoning and taking reasonable action, she was competent to make an election. Neither the jury nor the court might substitute its views for hers.

The evidence in the instant case, in the light of the afore-cited authorities, clearly indicates that the defendants have failed to prove that Josephine lacked the mental capacity to execute the election to take under the statute. The trial court did not err in so holding.

On the proposition raised by the defendants on undue influence, a person asserting that a widow, at the time she executed and filed an election to take under the statute and renounce the will of a deceased person was subject to undue influence by which the instrument was procured must establish by a preponderance of the evidence (1) that the widow, at the time of executing the instrument, 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. See, In re Estate of Thompson, 153 Neb. 375, 44 N. W. 2d 814; In re Estate of Scoville, 149 Neb. 415, 31 N. W. 2d 284; In re Estate of Benson, 153 Neb. 824, 46 N. W. 2d 176.

The burden is on the defendants in this case to produce evidence tending to prove each of the four elements stated above, as a prerequisite of their right to have the issue determined. If any one of the essential elements enumerated is not supported by evidence or reasonable

inference drawn from a fact or facts otherwise established, the contention of undue influence must be rejected. The evidence must tend to show undue influence directly in reference to the election to take under the statute in question, and be of such a nature as to control the will of the widow of Frank Bergren and cause her to do something that she did not intend. Suspicion or supposition of undue influence is not sufficient to require the court to determine the question and render a judgment to such effect. See, In re Estate of Bayer, 119 Neb. 191, 227 N. W. 928; 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 Bainbridge, 151 Neb. 142, 36 N. W. 2d 625.

From an analysis of the evidence it is true that the opportunity to exercise undue influence existed. However, there is no clear and satisfactory evidence that Josephine was subject to such influence. A disposition to exercise such influence is not clearly and satisfactorily shown, or that the result appears to be the result of such influence. We conclude the trial court did not err in determining that the defendants failed to prove undue influence as required by law.

The defendants filed a supplemental motion for new trial for newly discovered evidence primarily to the effect that Josephine Bergren was deaf to ordinary conversation and therefore unable to know or understand what had been told her about the right to take under the statute. This motion was supported by affidavits to which counter-affidavits were filed. We have examined the purported newly discovered evidence and find that this motion for new trial was properly overruled.

The applicable rule is that a new trial will not be granted on the ground of newly discovered evidence unless it is made to appear that such evidence, if it had been offered and admitted on the trial, would probably have produced a different result. The application for a new trial on the ground of newly discovered evi-

dence is addressed to the sound judicial discretion of the trial court, and its action thereon will not be overruled unless there is a clear abuse of discretion shown. See, Morrill County v. Bliss, 125 Neb. 573, 251 N. W. 106; Hodges v. Hodges, *ante* p. 178, 47 N. W. 2d 361.

Other assignments of error are without merit and need not be determined.

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

AFFIRMED.

ALVIN A. PETERSEN, APPELLANT, V. JOHN SCHNEIDER ET AL., APPELLEES.

47 N. W. 2d 863

Filed May 11, 1951. No. 32859.

SUPPLEMENTAL OPINION

APPEAL from the district court for Morrill County: CLAIBOURNE G. PERRY, JUDGE. On oral argument on motion for rehearing. See Petersen v. Schneider, 153 Neb. 815, 46 N. W. 2d 355, for original opinion. *Opinion modified. Motion for rehearing overruled.*

Otto H. Wellensiek, Olsen & Holtorf, and *Moran & James,* for appellant.

Neighbors & Danielson, for appellees.

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

CARTER, J.

In the opinion previously filed in this case, Petersen v. Schneider, 153 Neb. 815, 46 N. W. 2d 355, we did not discuss the question whether or not the negligence of the driver of the automobile was imputable to the plaintiff. It now appears to us that this is important in

determining the issues to be submitted on the retrial of the case.

The trial court instructed the jury that any negligence on the part of the driver of the automobile was imputable to the plaintiff. The record shows that plaintiff was the owner of the automobile being driven by Wellensiek at the time of the collision. There is no evidence that the occupants of the automobile were engaged in a joint enterprise or that any relationship existed between the owner of the car and the driver which gave the owner authority to direct or to assist in the operation and management of the car. The record shows that the plaintiff and his two companions were on a hunting trip and that each drove the car a part of the time. The owner of an automobile may in some cases be considered a guest of the driver so that the driver's negligence will not be imputed to him. In approving this rule we said: " 'A man may, however, be a guest in his own automobile, and an owner, who, although present in his car while it is being driven by another not his agent, is present merely as a guest, and has no control of the machine, which is not being used in the furtherance of his business or undertaking, is not liable, in absence of any statute imposing liability for the negligence of such person in operating it.' " Gorman v. Bratka, 139 Neb. 718, 298 N. W. 691. In Christensen v. Hennepin Transportation Co., Inc., 215 Minn. 394, 10 N. W. 2d 406, 147 A. L. R. 945, the court in dealing with this question said: "The owner of an automobile may be the operator's guest. Where the owner is the guest of the operator of his automobile, the operator's contributory negligence is not imputable to the owner, except where the operator is the owner's servant or agent or where the operator and the owner are engaged in a joint enterprise."

In Smalley v. Simkins, 194 Wis. 12, 215 N. W. 450, the court in a similar case said: "That Simkins drove the car part way and was riding in the front seat at the

time of the accident does not present any substantially different situation. Each of the men was an experienced driver, and appellant, Simkins, at no time undertook or assumed to direct, as principal, the defendant Smalley as driver. The only thing here that can be recognized under the law as the proximate cause of the injury was the carelessness of the driver, Smalley. The mere fact of ownership of the car by Simkins is not of itself sufficient to create such a liability."

The appellant relies upon Sutton v. Inland Construction Co., 144 Neb. 721, 14 N. W. 2d 387. We therein said: "The prevailing rule is that the relation of principal and agent or master and servant exists between the owner and the driver under such circumstances, and that the owner, being present in the car at the time of the accident and having the control and authority of a principal or master, is responsible for and bound by the negligence of his agent or servant." There was evidence in that case that the owner was directing the driver and exercising some control over the operation of the car. Whether the owner was liable for the negligence of the driver was a question of fact. We think the rule announced in the Inland Construction Company case was incorrect to the extent that it infers that ownership alone is evidence that the relation of principal and agent, or master and servant, exists. The cases cited in that case in support thereof announce a rule that is much broader in scope than the rule followed in this state. The rule in this state is: Where the owner is a passenger in his own automobile while it is being operated by another, the negligence of the operator is not imputable to the owner, except where the operator is the owner's servant or agent, or where the operator and the owner are engaged in a joint enterprise, or where the owner assumes to direct the operation of the automobile and to exercise control over it. See, also, Rodgers v. Saxton, 305 Pa. 479, 158 A. 166, 80 A. L. R. 280 and cases cited in the annotation thereto. We hold therefore that

the negligence of the driver of the automobile is not imputed to the plaintiff under the evidence shown by the record. Under such circumstances it is error to instruct that the negligence of the driver of the car was imputed to plaintiff and where, as here, there is no evidence of any contributory negligence on the part of the plaintiff, it is error to submit the question of contributory negligence to the jury.

The former opinion as herein modified is adhered to and the motion for a rehearing overruled.

MOTION FOR REHEARING OVERRULED.

GILSON JAMES, APPELLANT, V. EVERETT HOGAN, APPELLEE.
47 N. W. 2d 847

Filed May 11, 1951. No. 32918.

1. **Appeal and Error.** It is not the province of this court in reviewing the record in an action at law to resolve conflicts in or weigh the evidence.
2. ———. It is presumed in such an action that controverted facts were decided by the jury in favor of the successful party, and its finding based on conflicting evidence will not be disturbed unless clearly wrong.
3. **Contracts: Rescission.** An indivisible contract cannot be rescinded in part and a part remain executed. If rescinded at all, it must be the entire contract, and the parties thereto placed in the situation they were at the time it was made as nearly as the circumstances will permit.
4. **Damages: Rescission.** The remedies of rescission and damages are inconsistent; the former proceeding upon disaffirmance, and the latter upon affirmance of the contract.
5. **Rescission.** Rescission extinguishes the contract and neither party can thereafter base any right of recovery on any part of it.
6. **Tender.** A plea of tender in an answer is an admission that the amount offered is due the plaintiff.
7. ———. In order to make a tender effective and to relieve defendant from further interest and costs, he must, when sued, not only plead the tender but bring the amount into court so that it is available for the use of the plaintiff.

8. ———. An effective tender must be the amount to which the party is entitled at the time it is made, and if he has become entitled to costs by commencement of an action to recover the indebtedness, a tender which does not include all such costs is nugatory.
9. **Tender: Judgments.** A plea of tender is materially different in character and effect from an offer of confession of judgment after an action is begun.
10. **Judgments: Costs.** An offer to confess judgment after suit commenced in district court to be effective to defeat subsequent costs must comply with the requirements of section 25-906, R. R. S. 1943.
11. **Appeal and Error.** If the result of the trial in the district court is the only one that is permitted by the record, the judgment will not be reversed for errors of the trial court.

APPEAL from the district court for Scotts Bluff County: CLAIBOURNE G. PERRY, JUDGE. *Affirmed as modified.*

F. J. Reed, for appellant.

Herman & Van Steenberg, and *Neighbors & Danielson,* for appellee.

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

BOSLAUGH, J.

This is an action at law based upon rescission by appellant of a contract for the purchase by him from appellee of a new airplane, because of his nonperformance, to recover a money judgment for the amount of the payment made on the purchase price at the time of the transaction, and the amount appellant claims appellee was to allow him and apply on the purchase price of the new machine as the trade-in value of a used airplane owned by appellant that appellee was to accept as his property.

The pleading of appellant is that: Appellee was engaged at Mitchell, Nebraska, in the general airplane business; conducting an airport; buying, selling, and trading new and used airplanes; and that he represented to appellant he was an authorized agent and distributor

of and for Luscombe Airplane Corporation of Dallas, Texas. Appellant owned a plane made by it and sold to him by appellee. The parties on May 6, 1946, made a contract by which appellee sold to and appellant purchased an 85 horsepower deluxe model, all metal, Luscombe airplane for delivery in October of 1946, for the purchase price of $2,995.00, to be paid by appellee buying the used plane owned by appellant for $2,500.00, its then fair and reasonable value, and appellant paying appellee the balance of $495.00. Appellant delivered his plane and paid $495.00 to appellee. He accepted, retained, used, and removed the plane from Nebraska. Appellant performed and complied with all the obligations of the contract required of him. Appellee was not able to and did not deliver or offer to deliver to appellant the new airplane and because thereof he elected to rescind the contract and gave notice of rescission to appellee. Appellant asked judgment for $2,500, the reasonable and agreed value of the used airplane, and $495.00 paid as the balance of the purchase price of the new machine, interest at legal rate from the date of the transaction, and costs.

Appellee admitted that on May 6, 1946, by verbal agreement he sold to and appellant purchased from appellee an 85 horsepower deluxe model, all metal, Luscombe airplane to be delivered to the purchaser when it was constructed and available, and appellant paid appellee $495.00 as a deposit of a part of the purchase price; that appellant elected to rescind the agreement, gave appellee notice thereof in the spring of 1947; and that he agreed to the rescission. Appellee obligated himself to assist appellant in selling his plane to enable him to pay the balance of the purchase price of the new plane. He denied he purchased or in any manner acquired the used plane of appellant, and asserted that he had at all times remained the owner and had and exercised the right of ownership and control thereof. Appellee asserted that before the case was commenced

he tendered and offered to return to appellant the down payment made by him of $495.00 on the purchase price of the new airplane; that he was able, ready, and willing to return it; and that he tendered it into court and renewed and continued the tender. The allegations of appellant not admitted were denied.

The reply was a denial of affirmative matters alleged in the answer.

The result of the second trial of the case was a verdict for appellant for $495.00 with interest thereon at 6 percent from the 6th day of May 1946. The motion of appellant for a new trial was denied. The motion of appellee to amend the verdict by eliminating therefrom the words "with interest thereon at six per cent from the 6th day of May, 1946" was sustained and judgment was rendered for appellant for $495.00 without interest, and all costs were taxed to him. This appeal is from that judgment.

Appellant contests the sufficiency of the evidence to sustain the verdict. The record shows that there was a contract between the parties for the sale by appellee and the purchase by appellant of a new 85 horsepower deluxe model, all metal, Luscombe airplane. An important issue of fact concerned the terms and conditions of the contract. The proof of appellant was to the effect that he purchased the machine to be delivered to him in October 1946, from appellee for the sum of $2,995.00; that he paid the purchase price by selling and delivering his used plane to appellee for the agreed sum of $2,500.00, and by paying him $495.00 in cash on the day of the transaction as the balance of the purchase price in full; and that the used plane was delivered to and accepted by appellee and he has since retained it and converted it to his use. The evidence of this version of the contract was substantial.

Appellee denied the terms and conditions of the contract as shown by the evidence in behalf of appellant and asserted that he agreed to sell to appellant the ma-

chine and deliver it to him when it was constructed and was available for a purchase price to be determined when the manufacturer fixed the selling price thereof; that it was a new model of machine not yet in production; that he required a deposit of a part of the purchase price and appellant paid on that account to appellee on the date of the contract $495.00; that he did not agree to purchase or accept the used plane of appellant as part payment of the new airplane, but appellee did agree to assist appellant to the extent he could in making a sale of the used airplane; and that appellee had no other obligation in reference to it. The record contains much corroboration of appellee.

There was a direct conflict of evidence on this issue. It was the province of the jury to resolve the question of fact as to the terms and conditions of the contract. It is not permissible for this court in reviewing the record in an action at law to resolve conflicts in or to weigh the evidence. It is presumed in such an action that all controverted facts are decided by the jury in favor of the successful party and the finding based on conflicting evidence will not be disturbed unless clearly wrong. Bolio v. Scholting, 152 Neb. 588, 41 N. W. 2d 913. The record prevents a determination that the verdict of the jury is clearly wrong.

The used Luscombe airplane owned by appellant was kept at the airport of appellee from the time it was purchased in January 1946 until it was taken to Denver March 6, 1947. It was registered and licensed in the name of appellant, and the title to it was shown in his name by the Civil Aeronautics Administration. It was never changed. There were negotiations with a Mr. Conley of Dateland, Arizona, for the sale to him of the plane. It was thought it could be sold to him for $1,950.00 if it were taken there. The parties considered the matter and appellant made a bill of sale to appellee to enable him to transfer the plane to Conley if he bought it. This was during December 1946, and Jan-

uary 1947. The prospective purchaser did not buy the machine and appellee returned the bill of sale to appellant. He accepted and retained it. It was alleged in the amended petition that appellant had forgotten he had it at the time the case was commenced and that he "tenders into court said bill of sale for the use of the defendant."

The plane of appellant and a used plane of appellee were taken to Denver, Colorado, on March 6, 1947, and left at the airport of Mountain States Aviation, Inc. It was a used plane exchange, and it accepted used planes for sale. The pilot of the plane of appellant on the trip from the airfield of appellee to Denver was an employee of appellant. Appellant advanced money to his employee to make the trip. He left the plane at the Denver airfield. The plane was then in good condition. Appellee told the sales manager of the company that the plane was owned by appellant and he should be contacted for any authorization desired. He was wired an offer of purchase on May 17, 1947, by the Denver company. Appellant was afterwards in the place of business of the company in Denver. He elected to, and did rescind the contract to purchase a new plane because of failure of appellee to deliver it to him, and gave appellee notice in writing of the rescission on April 30, 1947, and demanded payment by him to appellant of $3,995.00, the amount he claimed as the purchase price of the new machine, and $1,000.00 as the value of his bargain.

Appellant stressed at the trial that appellee did not return or offer to return to him the used plane at the time or after the notice of rescission. He testified that the value of his plane was as much in April and May 1947, as it was May 6, 1946, but that he would not have accepted the return of it if appellee had brought it to him. He knew his plane was taken to Denver with his consent; that it was there when he rescinded the contract; that he had the title thereto; and that he could

have taken it at any time he desired.

Appellant based his case on rescission of the contract to purchase because of the failure of appellee to make delivery of the subject of it. He pleads rescission of the contract as part of his cause of action. Appellee accepted the rescission and characterizes the nature of the action in this court as "* * * a law action based upon rescission by plaintiff * * *" of whatever contract there was between the parties. The legal nature of the case has been conclusively determined by the parties.

Appellant does not in this action, based upon rescission by him of the contract, seek a recovery or return to him of his airplane, but asks judgment for $2,500.00, the amount he claims appellee agreed to pay him for it as a credit on the purchase price of the new airplane. He claims the right of partial rescission of a single indivisible contract and seeks to escape the burdens but to be awarded the benefits. The court may only consider the rules of law applicable to the kind of an action the parties have made.

Appellant upon failure of appellee to deliver him the new airplane had the right to affirm the continued existence of the contract and pursue an action for damages, or, at his election, to rescind the contract and demand that appellee place him in statu quo by restoring to him the $495.00 which he paid to appellee and the used airplane if, as he claims, it was delivered to the appellee in fulfillment and satisfaction of the obligations of the agreement on his part. The contract between the parties was not separable. He could not do both. The two remedies are inconsistent. An indivisible contract may not be rescinded in part and a part remain executed. If a single indivisible contract is rescinded at all it must be the entire contract, and the parties placed in the situation they were at the time the contract was made as nearly as the circumstances will permit. In Alfree Mfg. Co. v. Grape, 59 Neb. 777, 82 N. W. 11, it is said: "A contract can not be rescinded

in part and a part remain executed. If rescinded at all, it must be in toto, and the parties thereto placed in statu quo so far as the circumstances will permit." In Rasmussen v. Hungerford Potato Growers Assn., 111 Neb. 58, 195 N. W. 469, it is determined that: "The two remedies of damages and rescission are inconsistent, the former proceeding upon affirmance, and the latter upon disaffirmance, of the contract; * * *." See, also, Collison v. Ream, 95 Neb. 29, 144 N. W. 1050; McCaw v. Swallow, 112 Neb. 458, 199 N. W. 726; O'Keefe v. Routledge, 110 Mont. 138, 103 P. 2d 307, 148 A. L. R. 409.

Appellant rescinded the contract and the legal right he had thereafter, under the circumstances of this case, was to be placed, as nearly as the facts would permit, in the position he occupied before the contract, which he had repudiated, was made. A party who rescinds can generally recover nothing beyond restitution. He was not entitled to recover any profit of his bargain or to enforce any obligation depending for its existence upon any provision of the contract. To be entitled to do that he would have been compelled to affirm the existence of the contract. This he has barred himself from doing by his election to rescind and by prosecuting this case to judgment. The contract being rescinded, it is totally avoided and as nonexistent as if it had never been made. Alfree Mfg. Co. v. Grape, *supra;* Rasmussen v. Hungerford Potato Growers Assn., *supra;* Collison v. Ream, *supra;* McCaw v. Swallow, *supra;* Fagan v. Hook, on rehearing, 134 Iowa 390, 111 N. W. 981; O'Keefe v. Routledge, *supra;* 12 Am. Jur., Contracts, § 389, p. 966; § 439, p. 1019; 17 C. J. S., Contracts, § 440, p. 924. In Fagan v. Hook, *supra,* the court said: "In its very nature rescission implies the extinction of the contract, and, once accomplished, neither party can base any right of recovery upon it. Plaintiff's right to demand a return or redelivery of the personal property is not because of the existence of any contract between them, but because there is none."

Appellant objects because the trial court found and determined that he was not entitled to interest on the amount stated in the verdict, because appellee before suit tendered $495.00 to appellant and kept the tender good, eliminated the interest, and entered judgment for the principal amount found by the jury, $495.00, without interest, and taxed all costs to him.

Appellee pleaded that before suit was brought he tendered and offered to return to appellant $495.00, the amount paid by him to appellee on the purchase price of the new airplane. The evidence does not sustain this. There was a conversation between the parties in which this subject was discussed in April of 1947, but the result was a postponement by suggestion of appellant and acquiescence therein by appellee, for a week or two because there was a prospect at Sidney, Nebraska, for the purchase of the plane of appellant. What was said and done on that occasion was nothing beyond a demonstration that appellee was willing to return the $495.00, but on the suggestion of appellant all things were left as they then were until the possibility of a sale of the used plane was further explored.

A tender of $495.00 was made in the answer of appellee. This was an admission by him of a liability to appellant for that amount, but it was not an offer by appellee to confess judgment for that or any amount as the statute permits and provides. In Portsmouth Savings Bank v. Yeiser, 81 Neb. 343, 116 N. W. 38, it is said: "They have conceded by pleading a tender that the amount tendered was due at the time it was made, * * *." Phoenix Ins. Co. v. Readinger, 28 Neb. 587, 44 N. W. 864, recognizes that a tender and an offer to confess judgment after suit commenced are two materially different things: "This is a tender and admits that the amount tendered is due the defendant in error. * * * The plea of tender is very different in its effect from an offer of the defendant to allow judgment to be taken against him for a specified sum. In the latter case it is

unnecessary to plead the amount tendered in the answer, nor need any mention be made of it therein." See, also, Murray v. Cunningham, 10 Neb. 167, 4 N. W. 953; Cobbey v. Knapp, 23 Neb. 579, 37 N. W. 485. It is mandatory that an offer to confess judgment should not be included in a pleading affecting the merits of a case and should not be disclosed in the evidence. § 25-906, R. R. S. 1943; Hammang v. Chicago & N. W. Ry. Co., 107 Neb. 684, 186 N. W. 991. On the other hand, a tender to be effective to permit a defendant to escape further interest and costs must be, when he is sued, not only pleaded by him but he must bring the amount into court so that it may be available for the use of the plaintiff. Portsmouth Savings Bank v. Yeiser, *supra;* Scheer v. Nelson, 113 Neb. 821, 205 N. W. 250. There was no compliance by appellee with any of the requirements of the statute providing for confession of judgment after the action was begun. § 25-906, R. R. S. 1943; Rose v. Peck, 18 Neb. 529, 26 N. W. 363; Murray v. Cunningham, *supra.*

The amount of the tender pleaded by appellee was $495.00, the exact amount appellant paid to appellee when the contract was made. The contract was rescinded by appellant on April 30, 1947. Appellee accepted the rescission and has relied on it in this litigation. He received and retained that amount by the action and with the consent and for the benefit of appellant until the contract was rescinded. He was not liable for interest on it before that date. § 45-107, R. S. 1943. It was his legal duty to surrender and return this amount to appellant commencing with the date of the rescission of the contract. He held it without the consent of appellant and without legal right thereafter, and was liable for interest thereon at legal rate. Appellee did not include in the amount of his tender interest on the $495.00 from April 30, 1947, the date of the rescission of the contract, to the date the tender was made, or the costs incurred by appellant to that date. A tender must include everything to which the other party is entitled

and a tender of any less sum is nugatory and ineffective. If a creditor has become entitled to costs by reason of commencement of an action, a tender not including all such costs is insufficient. In McEldon v. Patton, 4 Neb. (Unoff.) 259, 93 N. W. 938, this court said: "The plaintiff in an action already commenced is not compelled to receive a sum of money paid into court in satisfaction of his claim, unless the sum so paid is sufficient to include the costs to the time of payment." See, also, Colby v. Reed, 99 U. S. 560, 25 L. Ed. 484; Annotation, 5 A. L. R. 1228; 52 Am. Jur., Tender, § 22, p. 230. The district court was wrong in denying appellant interest on the $495.00 from April 30, 1947, and in taxing the costs of the case to him.

There are many errors assigned and discussed by appellant. It is not necessary or proper, because of the discussion of and conclusion reached in this case, to consider or determine any of these. It has often been determined that if the result of the trial in the district court is the only one that is permitted by the pleadings and evidence, the judgment will not be reversed for errors occurring at the trial. Holberg v. McDonald, 137 Neb. 405, 289 N. W. 542; Kuhns v. Live Stock Nat. Bank, 138 Neb. 797, 295 N. W. 818. This doctrine is an adaptation of the rule that on appeal an immaterial or harmless error of the trial court does not require or justify a reversal of the judgment. Long v. Guilliatt, 137 Neb. 199, 288 N. W. 689.

The judgment of the district court should be and is modified by eliminating from it the words "without interest" and by inserting in place thereof the words "with interest thereon at 6 percent per annum from April 30, 1947, to the date of the payment of the judgment," and by striking from it the provision that the "costs of the action be taxed to plaintiff" and by inserting in place thereof the words "all costs of the action in both courts should be and they are taxed to the defendant."

The judgment as modified should be and it is affirmed.
AFFIRMED AS MODIFIED.

JOHN M. JOHNSON, APPELLEE, V. EARL R. SCHREPF ET AL., APPELLANTS, EASTERN NEBRASKA PUBLIC POWER DISTRICT, A CORPORATION, APPELLEE.
47 N. W. 2d 853

Filed May 11, 1951. No. 32952.

1. **Trial.** When the defendant in a personal injury action moves for a directed verdict, such motion will be treated as an admission of the truth of all material and relevant evidence favorable to the plaintiff and of all reasonable inferences to be drawn therefrom, and if it tends to support plaintiff's cause of action, the motion should be overruled and the case submitted to the jury.
2. **Trial: Negligence.** Where there is no evidence to support the defense of contributory negligence it should not be submitted to the jury, and to do so under such circumstances would constitute prejudicial error.
3. **Automobiles.** The lawfulness of the speed of a motor vehicle, within the maximum limits fixed by law, is determined by the further test of whether the speed was greater than was reasonable and prudent under the conditions then existing.
4. ———. Where the driver of a motor vehicle upon a public highway, in attempting to pass another vehicle from the rear, operates his vehicle in such a manner as to strike the other vehicle in passing, he is ordinarily guilty of negligence when the driver of the vehicle being passed is without fault.
5. **Damages.** In an action for damages, where the law furnishes no legal rule for measuring them, the amount to be awarded rests largely in the sound discretion of the jury, and the courts are reluctant to interfere with a verdict so rendered.
6. **Trial: Damages.** A verdict may be set aside as excessive only where it is so clearly exorbitant as to indicate that it was the result of passion, prejudice, or mistake, or it is clear that the jury disregarded the evidence or controlling rules of law.
7. ———: ———. A court will not ordinarily hold a verdict to be excessive when the amount fixed by the jury is sustainable by factors of pain, suffering, mutilation, disability, wage losses, medical costs, or other pecuniary losses, including those resulting from existing economic conditions such as the low purchasing power of money.

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

Betty Peterson Sharp, and *Davis, Stubbs & Healey,* for appellants.

Van Pelt, Marti & O'Gara, and *Tyler & Frerichs,* for appellees.

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

CARTER, J.

This is a personal injury action growing out of an accident between two trucks on a public highway. The jury returned a verdict for the plaintiff in the amount of $16,594.85, and the defendants appeal.

The accident took place on a county road about four and one-half miles south and one mile east of Syracuse, Nebraska, on a detour marked as State Highway No. 50, on June 29, 1948, at approximately 4:15 p. m. The highway was graveled. Visibility was good. The traveled portion of the highway was about 18 feet in width at the places material to this case. There was a windrow of gravel along the west side of the highway about 2½ feet wide at the base and 1½ feet high. The road at the scene of the accident sloped downward toward a culvert at the foot of the hill. The incline was not great and it does not appear of importance in the case.

The plaintiff was an employee of the Eastern Nebraska Public Power District at the time of the accident. He was riding in a truck belonging to the district, which was being operated by Lawrence Walters, his foreman. Another employee, Vincent Maillard, sat to the right of the driver and plaintiff was sitting on the right of Maillard, next to the door on the right-hand side of the cab. The three men had completed some work for the district at Lewiston, Nebraska, and were proceeding to their homes in Syracuse.

The district's truck had a platform which was 9 feet

10 inches long and 6 feet 10 inches wide. This platform was equipped with a bolster which pivoted on a heavy pin, set vertically in the platform equidistant from the sides and somewhat back of its center. It was special equipment used in transporting poles. Before leaving Lewiston the three men loaded two timbers on the platform which were described as five by fives and were 10 feet 4 inches in length. The two timbers were wired together at each end, one above the other. They were placed in front of the bolster and wired to it. They were then placed in a diagonal position from the right front to the left rear corners of the platform and wired to the platform on each end. The only other equipment on the platform were some truck chains and log chains on the chain rack at the front of the platform, and some shovels. The evidence shows that the timbers did not extend beyond the rear edge of the platform over an inch, if at all.

It appears that after leaving Lewiston with the truck they came to a bridge located about two miles south of the point of the accident. They stopped before crossing the bridge to permit a combine to cross. While waiting, plaintiff got out of the truck and examined the two timbers and found them to be wired tightly to the bolster and platform. The truck owned by the defendant Schrepf and driven by the defendant Masters came up behind them and stopped, and followed the district's truck across the bridge after the combine had cleared it. The defendant Masters testifies that he saw plaintiff make the examination of the timbers. He says also that the timbers did not extend beyond the platform at this point.

The evidence is that after crossing the bridge the district's truck proceeded on its way north at a speed of 40 to 45 miles an hour. At the place of the accident the driver of the Schrepf truck undertook to pass the district's truck. The district's truck was on the right-hand side of the highway and was proceeding straight

down the road. When the front of the Schrepf truck came alongside the cab door of the district's truck there was a dull thud and the district's truck veered to the right and, after traveling some distance out of control, turned completely over and back up on its wheels. Defendant Masters also describes the noise of contact and the pulling of his truck towards the district truck. He says he pulled his steering wheel to the left and that his truck then appeared to unhook from the other truck. After going by he observed the district truck in the ditch. He went back and assisted the three occupants of the district truck.

The Schrepf truck was a comparatively new truck. The defendant Masters was an employee of the defendant Schrepf and was using the truck in his employer's business at the time of the accident. The defendant Masters testified that the district truck was traveling on its right-hand side of the highway at a speed of approximately 45 miles an hour immediately prior to the accident. He did not observe any timbers extending beyond the platform of the truck when he started to pass. There are marks, indentations, and scraped places on the back of the cab and front of the truck body of the Schrepf truck. When the district's truck came to rest after the accident the two timbers were not attached to the truck platform. One was found broken in two near the truck and the other was found in the ditch nearby. There were some red paint marks on the unbroken timber which resemble the red color of the Schrepf truck. It is claimed by plaintiff that the lower right front corner of the Schrepf truck body struck the district's truck. It is argued by defendants, largely from the circumstances shown, that one or both of the timbers came in contact with the Schrepf truck between the cab and body and caused the accident.

There is no evidence in the record that the timbers came loose before the accident. Plaintiff and Walters testified that they looked back at their load on several

occasions and that it was wired tightly in place at all times. Defendant Masters says that he saw nothing extending beyond the truck bed as he started to pass. The only evidence pointing in that direction is the evidence of the red paint marks on the unbroken timber. There is evidence of damage to the back of the cab and the front of the truck box on defendant's truck. The right front corner of the truck body of the Schrepf truck appears to have been struck a solid blow, a blow sufficient to split the end of the heavy baseboard of the truck box. All the persons involved testify to a contact between the two trucks. Whether the Schrepf truck struck the district's truck and caused the accident is clearly a question of fact to be determined from the evidence. Whether or not the damage to defendants' truck was caused by a loosened timber, and, if it was, whether the timber loosened before or after the collision of the trucks, presents a question for the jury to decide. The trial court was correct in refusing to direct a verdict for the defendants. We think there was sufficient evidence to sustain a verdict for the plaintiff. It is clear from the evidence that there was contact between the two trucks, which resulted in the injury of plaintiff. There is evidence that the lower right front corner of the truck box on the Schrepf truck struck or was struck a solid blow. If the damage to this part of the Schrepf truck was caused by its hitting the district truck and causing it to overturn, the jury could well find, after considering all the testimony and circumstances, that it was due to the negligence of the driver of the Schrepf truck. This the jury evidently did. The evidence is sufficient to support such finding. The rule is: Where the driver of a motor vehicle upon a public highway, in attempting to pass another vehicle from the rear, operates his vehicle in such a manner as to strike the other vehicle in passing, he is ordinarily guilty of negligence when the driver of the vehicle being passed is without fault. Blado v. Draper, 89 Neb. 787,

132 N. W. 410. The trial court correctly overruled the motion for a directed verdict and submitted the case to the jury. Where the defendant in a personal injury action moves for a directed verdict, such motion will be treated as an admission of the truth of all material and relevant evidence favorable to the plaintiff and of all reasonable inferences to be drawn therefrom, and if it tends to support plaintiff's cause of action, the motion should be overruled and the case submitted to the jury. Tews v. Bamrick, 148 Neb. 59, 26 N. W. 2d 499.

The defendants contend that the trial court erred in not submitting the question of plaintiff's contributory negligence to the jury. In this respect it must be noted that plaintiff was not the driver of the district truck. He was an employee working under the directions of a foreman. The evidence of the three men who loaded the timbers shows that the timbers were wired to the bolster and to the truck platform with heavy wire. The load was observed from time to time prior to the accident and each time it appeared to be in the same position in which it was first placed. At the bridge plaintiff examined and tested the condition of the load and found it as originally loaded and fastened. The defendant Masters observed the timbers on the truck at the bridge and he saw nothing indicating that the timbers were improperly fastened to the truck. When Masters started to pass the district truck he saw no timber protruding over the platform. There is no evidence of improper loading, or that the loosening of the timbers was the first of a chain of events which resulted in plaintiff's injury. It is only the fact that the timbers were not attached to the platform after the accident that affords the basis of defendants' contention that the loosening of the timbers was the cause of the accident. This does not necessarily follow. The loosening of the timbers could well have been a result, rather than a cause, of the collision. In any event, the plaintiff is not

shown to have been negligent in anything that he did. Defendants contend he was negligent in not properly loading the two timbers. The loading was supervised by the foreman. The method of loading and fastening the timbers to the truck platform is meticulously described in the record. It is not pointed out wherein the plaintiff failed to use ordinary care in this respect. We think there is no evidence of negligence on the part of the plaintiff which would require the submission of the issue of contributory negligence to the jury. Hendrix v. Vana, 153 Neb. 531, 45 N. W. 2d 429; Costello v. Hild, 152 Neb. 1, 40 N. W. 2d 228.

Defendants contend it was error to submit the question as to whether excessive speed caused the accident. The instruction stated in effect that it is the law of this state that no person shall operate a motor vehicle at a rate of speed greater than is reasonably safe and proper, having regard for the traffic and the use of the highway, and the condition of the highway. The evidence shows that the highway had been freshly graveled and that a windrow of gravel remained along the west side of the road. The road was about 18 feet wide and the width of each truck was approximately 7 feet. Defendants' truck was necessarily being driven in excess of 45 miles an hour. The speed at which defendants' truck was being driven was pleaded as negligence. We think, under the evidence and circumstances here shown, that there was no error prejudicial to the defendants in the giving of the instruction in the form in which it was given. The speed at which the trucks were being driven is a factor in determining who was negligent. There is nothing in the instruction which prejudicially affects the respective rights of the parties. Whether the speed of the defendants' truck was excessive and negligent is a question of fact. The instruction does not submit an issue upon which there is no evidence. The fact that there is no evidence that defendants' truck exceeded statutory speed limits is not controlling on

the issue of excessive speed where conditions exist which in the exercise of reasonable care require that a motor vehicle be driven at a lesser speed. Novak v. Laptad, 152 Neb. 87, 40 N. W. 2d 331; Tews v. Bamrick, *supra.* Consequently, there was no prejudicial error in the giving of the instruction.

Defendants contend that the verdict is excessive. The evidence shows that plaintiff was 42 years of age at the time of the accident. He suffered a comminuted compression fracture of the twelfth dorsal vertebra and a fracture of the ninth rib on the right side. He was unconscious immediately following the accident and suffered from shock for a time thereafter. Plaintiff was taken to a hospital where he was immobilized with his back elevated and his head and feet lowered. He was kept in this position for 14 days, at the conclusion of which he was placed in a body cast extending from the hips to the armpits. The cast was changed three times during the five months he was required to wear it. For seven months thereafter he was required to wear a back brace which fitted around the pelvis and was fitted with arm crutches and a back support. He lost weight and suffered from headaches. He returned to work on March 28, 1949, and has been able to perform light work only. It is estimated by the physician who cared for him that he has sustained a 50 percent total permanent disability to his back. The physician further testified that plaintiff will never be able to do heavy lifting or work requiring that he bend over. At the time of his injury plaintiff was earning $137.50 a month. When he returned to work after the accident the rate of pay of his position had been increased to $160 a month. His life expectancy is about 28 years and his injuries are permanent. He has suffered great pain and will suffer discomfort for an indefinite period, possibly for the remainder of his life. No yardstick has been evolved for accurately determining the measurement of the damages in such cases. The fixing of the damages is the

function of the jury and unless it can be shown to be so exorbitant as to indicate passion, prejudice, mistake, or a complete disregard of the law and the evidence, its judgment will be sustained. Thoren v. Myers, 151 Neb. 453, 37 N. W. 2d 725; Jones v. Chicago G. W. R. R. Co., 97 Neb. 306, 149 N. W. 813. We cannot say that the evidence is not sufficient to sustain the verdict rendered. Economic conditions, including the low purchasing power of money for the necessities of life, is a factor in determining the amount of a verdict. Dailey v. Sovereign Camp, W. O. W., 106 Neb. 767, 184 N. W. 920. The period of inflation now existing is a factor which the jury could consider in arriving at the amount of the verdict. We must assume that the jury gave consideration to this fact, as it had a right to do. We cannot say from this record that the jury failed in its duty in returning a verdict in the amount of $16,594.85 when all the factors entering into the problem are considered. A court should not substitute its judgment for that of the jury when the amount named by the jury is sustainable by factors of pain, suffering, mutilation, disability, wage losses, medical costs, or other pecuniary losses, including those resulting from existing economic conditions such as the low purchasing power of money. We think the verdict is sustained by the evidence.

We have examined the remaining assignments of error and find them to be without merit. The judgment of the district court is therefore affirmed.

AFFIRMED.

ELIZABETH O. WAUGH, APPELLEE, V. HERBERT I. WAUGH, APPELLANT.

47 N. W. 2d 859

Filed May 11, 1951. No. 32963.

1. **Divorce.** In a divorce suit where the court has jurisdiction of

the parties, it has power to adjust all their respective property interests.

2. ———. Upon the granting of an absolute divorce the trial court has a legal right to assign the property, both real and personal, acquired during the marriage by the joint efforts of the parties, between the parties as the equities require.
3. **Parent and Child: Divorce.** A father usually continues to be liable for the support of his minor children to the same extent after the divorce as before, and provisions in a divorce decree for their suitable maintenance and support are entirely distinct from the allowance of alimony to the wife or division of property between the parties.
4. **Divorce.** In the division of property or allowance of alimony in a divorce action, the court, in the exercise of its judicial discretion, should consider the estate of the parties at the time of the marriage and their contributions since; the duration of the marriage; the wife's loss of interest in the husband's property by virtue of the divorce; the social standing, comforts, and luxuries of life which the wife would probably have enjoyed; the conduct of the parties leading up to the divorce; to which party the divorce was granted; the age, condition of health, and earning ability of the parties; and all other relevant facts and circumstances appearing in the particular case; and make such an award as appears to be fair and equitable.

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

Shrout, Brown & Thurmond, for appellant.

Young & Williams, and *Kenneth B. Holm,* for appellee.

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

CHAPPELL, J.

Plaintiff brought this action seeking an absolute divorce from defendant for specifically alleged extreme cruelty by personal violence and other means. Defendant filed an answer and cross-petition denying generally and seeking an absolute divorce from plaintiff upon similarly alleged grounds. On August 18, 1950, after hearing on the merits, the trial court found and adjudged the issues generally in favor of plaintiff upon her petition

and dismissed defendant's cross-petition. Defendant's motion for new trial was overruled, and he appealed, presenting for decision only the question of whether or not that part of the decree dividing the property was just and equitable. Upon trial de novo we modify the decree.

This court has held that: "In a divorce suit where the court has jurisdiction of the parties, it has power to adjust all their respective property interests.

"Upon the granting of an absolute divorce, the trial court has the legal right to assign the property, both real and personal, acquired during the marriage by the joint efforts of the parties, between the parties as the equities require." Sims v. Sims, 148 Neb. 771, 29 N. W. 2d 378. In such case this court also held: "A father usually continues to be liable for the support of his minor children to the same extent after the divorce as before, and provisions in a divorce decree for their suitable maintenance and support are entirely distinct from the allowances of specific alimony to the wife."

Only recently we also reaffirmed the rule that: "In the division of property and allowance of alimony in a divorce action, the court, in the exercise of judicial discretion, should consider the estate of the parties, if any, at the time of the marriage and their contributions since; the duration of the marriage; the wife's loss of interest in the husband's property by virtue of the divorce; the social standing, comforts, and luxuries of life which the wife would probably have enjoyed; the conduct of the parties leading up to the divorce; to which party the divorce was granted; the age, condition of health, and earning ability of the parties; and all other relevant facts and circumstances; and make such an award as appears to be fair and equitable." Pasko v. Trela, 153 Neb. 759, 46 N. W. 2d 139.

In that connection, Mangiameli v. Mangiameli, 153 Neb. 753, 45 N. W. 2d 910, relied upon by plaintiff to sustain a life use of the home awarded to her, is distin-

guishable from the case at bar with particular reference to the age, physical condition, and income-producing capacity of the respective parties.

In the light of the foregoing rules, we have examined the record. The parties were married September 9, 1933. During the 17 years of their marriage, they had four children, two boys and two girls. The eldest was a boy 15 years old. He earned a little money caddying on week ends. The second was a girl 13 years old. The third was a girl 11 years old. The fourth was a boy 7 years old, who was not in robust health and required periodic medical care.

Plaintiff, 37 years old, was a thrifty housewife, otherwise unemployed during the marriage. At time of trial she was in good health, earning $32.50 a week inspecting invoices in a cleaning establishment. Without dispute she was a good mother and a fit and proper person to have the care, custody, and control of the children awarded to her by the decree.

Defendant, 46 years old and in good health, was a casing butcher employed by a packing company earning $3,400 or more last year. The evidence relating to his extreme cruelty will not be repeated. It is sufficient for us to say that plaintiff was clearly entitled to an absolute divorce.

During the marriage, by joint efforts of the parties they had accumulated furniture, household goods, and personal property located in their home, hereinafter discussed. The value of such property was not definitely established by the evidence. The decree gave all of such furniture, household goods, and personal property to plaintiff absolutely. We sustain such disposition.

They had also acquired a $500 joint savings account, fostered and preserved by plaintiff, which she withdrew after the separation and expended $200 thereof, leaving $300 intact. Likewise, they had acquired a $50 Series E government bond. The decree divided the aforesaid $300 and bond equally between the parties. We con-

clude that the court should have awarded all of both to plaintiff absolutely. They are so awarded.

Also, the parties purchased during the marriage three unimproved lots in the name of defendant for $100 at a tax foreclosure sale. At time of trial they were worth about $1,200. The decree divided that property equally between the parties, to be free of liens for child support in order to facilitate their sale without further order of court. We conclude that the court should have so awarded all of such property to defendant. It is so awarded.

In 1942 they acquired a home, known as 5123 South 41st Street, Omaha, in which they subsequently lived. Title was taken in the name of both parties. The purchase price was $2,100. They paid $300 down and gave a mortgage back for the balance. Thereafter, out of defendant's income and with assistance of $400 inherited by him, such home was improved somewhat and cleared of debt by January 1945. However, they thereafter again mortgaged the same for $1,000, with which they substantially improved the property. Of that amount $828, payable $10 monthly, remained unpaid at time of trial. The home, a story and one-half, seven-room modern frame house, in which they then had an investment of about $3,500, was worth about $7,000 at time of trial. The decree divided such home property equally between the parties, subject, however, to the right of plaintiff to use and occupy the same and receive all rents therefrom during her lifetime for herself and the children, whose custody was awarded to plaintiff, together with $20 a week to be paid by defendant as child support. The decree also provided that each party should pay one-half of the mortgage debt, taxes, insurance, and upkeep of the property. The order for child support payments as made will not be disturbed at this time. However, with regard to the home, we conclude that the decree should be and hereby is modified as hereinafter set forth.

In that connection, the duty of defendant to adequately provide for his children still exists, but it is the duty of courts to fairly and justly enforce it. An allowance of $20 a week for the support of four young children in these times will scarcely provide food for them, much less education, clothing, shelter, and other necessities. The mother, who sought no alimony as such for herself, is the innocent spouse, now confronted with the entire responsibility for their parental supervision, thrust upon her by an irresponsible father, who, the record discloses, had concededly failed to pay one week of temporary child support because he needed the money to take a fishing trip, and for reasons not satisfactorily explained had failed to pay all of the temporary allowances for attorney fees and suit money. Thus, a just division of the home property between the parties is distinct, but the use of it is complicated by the necessity of compelling defendant to support and shelter the innocent children so long as it is used by plaintiff as a parental home, and any child unmarried and under 21 years of age survives.

Viewed in that light, we have concluded that such home should and shall remain in the names of the parties equally, but as tenants in common, subject, however, to the absolute right of plaintiff to exclusively use, occupy, and possess the property as a home for herself and the children during such time as she survives and lives there with a child or children, until the youngest then surviving is married or 21 years of age. Should plaintiff no longer exercise her exclusive right to use, occupy, and possess the property as a parental home as aforesaid, or in the event that all the then surviving children should be married or 21 years of age, then or in either event plaintiff's right to exclusively use, occupy, and possess the property, shall be terminated. Otherwise, however, it shall be and remain in full force and effect.

In that connection, it is further understood and here-

by ordered, however, that during all the period of plaintiff's exclusive right to use, occupy, and possess the property as aforesaid, she shall be obligated to pay for all such physical maintenance and upkeep of the property as in her judgment may be required in order to make it livable as a home for herself and the children.

On the other hand, defendant shall *in any event* be obligated and required to pay each and all of the remaining monthly payments and interest upon the real estate mortgage on said property, both accrued and accruing on and after August 18, 1950, *until the mortgage is paid in full.* During the existence of plaintiff's possessory rights aforesaid, defendant shall pay all real estate taxes both accrued and accruing on said property on and after August 18, 1950, and also during such period he shall keep the property adequately insured at all times and pay each and all insurance premiums thereby both accrued and accruing on and after August 18, 1950.

Further, each and all of such obligations heretofore imposed upon defendant, including the provisions for payment of $20 weekly as child support, which are unpaid by defendant when due, shall each and all, in addition to all other remedies provided by law, then forthwith become and remain a continuing first lien or liens upon and against defendant's interest in such property for the benefit of plaintiff and the children respectively, or the survivor of them.

Except as heretofore modified, the judgment should be and hereby is affirmed with all costs taxed to defendant, including an allowance to plaintiff of $150 for her attorney as fees for services rendered in this court.

AFFIRMED AS MODIFIED.

HAROLD MCGILL ET AL., APPELLANTS, V. CARD-ADAMS COMPANY, A CORPORATION, ET AL., APPELLEES.
47 N. W. 2d 912

Filed May 17, 1951. No. 32892.

1. **Waters.** To constitute a watercourse the size of a stream is not material. It must, however, be a stream in fact, as distinguished from mere surface drainage occasioned by freshets or other extraordinary causes, but the flow of water need not be continuous.
2. ———. The flood plane of a watercourse is regarded as a part of the channel and the water flowing within the flood plane is characterized as floodwater.
3. **Drains.** 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.
4. **Waters.** 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.
5. ———. 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.
6. ———. 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.
7. ———. Where surface water resulting from rain and snow flows in a well-defined course, whether it be a ditch, swale, or draw in its primitive condition, its flow cannot be arrested or interfered with by a landowner to the injury of neighboring proprietors.
8. **Injunction: Waters.** For such an injury injunction is the proper remedy, and equity looks to the nature of the injury inflicted, together with the fact of its constant repetition, or continuation, rather than to the magnitude of the damage inflicted, as the ground of affording relief.
9. **Waters.** The upper owner of land has the right, without inter-

ference, to have the flow of surface water follow along a well-defined watercourse from his land.

10. **Drains: Waters.** An owner of land may, without liability in damages, drain the same in the general course of natural drainage by constructing and maintaining in a reasonable and proper manner, and wholly on his own land, an open ditch or tile drain, discharging a reasonable quantity of water therefrom into a natural watercourse upon his own land or into a natural drainway thereon, whereby such water may be carried into some natural watercourse.

11. **Waters: Damages.** Where a substantial amount of water from another source or sources has been added to the water for which defendant is liable and the combined waters have caused the damage, then it is incumbent upon the plaintiff to establish either that his damages would have occurred from the waters for which defendant is liable, or to establish the amount of his damage that had been caused by the waters for which defendant is liable.

APPEAL from the district court for Lancaster County: JEFFERSON H. BROADY, JUDGE. *Reversed and remanded with directions.*

William L. Walker and *Earl Ludlam,* for appellants.

Roy F. Gilkeson, Hymen Rosenberg, and *Merril R. Reller,* for appellees.

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

SIMMONS, C. J.

Plaintiffs brought this action in equity seeking a mandatory injunction requiring the removal of certain dams and obstructions in an alleged watercourse on defendants' land and requiring its restoration to its natural course and condition, and enjoining any future changes therein. Defendants joined issue and prayed for a dismissal of plaintiffs' petition. Defendants by cross-petition sought a mandatory injunction requiring the plaintiffs to fill in ditches and remove dikes on plaintiffs' land and to restore it to the condition prevailing in 1945, and sought damages. Plaintiffs replied to the

answer, and answered the cross-petition and prayed for its dismissal. Trial was had resulting in a decree granting plaintiffs substantial relief against defendants, and granting defendants substantial relief against plaintiffs and awarding damages. From this judgment plaintiffs appeal challenging the correctness of the judgment against them and also the sufficiency of the decree granting plaintiffs relief against defendants, and in particular that part of the decree requiring the defendants to remove all dams and dikes erected by them on their own land "since 1948." Defendants do not cross-appeal.

We try the cause de novo here and reverse the judgment and remand the cause with directions.

Plaintiffs are the owners as tenants in common of a quarter section of land in Lancaster County. The wife of one of the plaintiffs is joined. They purchased the land in 1945. Defendants are a corporation, the owner of land involved herein, and two of its officers. They will be referred to herein as plaintiffs and defendant or, where required, as defendants.

Trying this case de novo, we state largely the conclusions of fact which we reach from the evidence.

We state these conclusions in the light of the provisions of section 31-202, R. S. 1943, that "Any depression or draw two feet below the surrounding lands and having a continuous outlet to a stream of water, or river or brook shall be deemed a watercourse"; and our holdings in Courter v. Maloley, 152 Neb. 476, 41 N. W. 2d 732, that "* * * to constitute a watercourse the size of a stream is not material. It must, however, be a stream in fact, as distinguished from mere surface drainage occasioned by freshets or other extraordinary causes, but the flow of water need not be continuous" and "The flood plane of a watercourse is regarded as a part of the channel and the water flowing within the channel or its flood plane is characterized as floodwater."

Plaintiffs and defendant own adjoining quarter sec-

tions of land. Plaintiffs' land is in Lancaster County and to the west of defendant's land which is in Cass County. These lands are relatively level, being in the basin of a watercourse. Some 1,900 acres of land drained in a state of nature into and across plaintiffs' lands and then defendant's land. The ditches and normal-flow channels referred to herein are shallow; the dikes referred to are low structures. There was a watercourse coming onto the plaintiffs' land at the northeast corner thereof and going south, one to the west thereof and going south. The northwest corner of plaintiffs' land is 9 feet higher than the center and east part. There was a watercourse coming from the northwest entering near the northwest corner and going southeast. There was another watercourse coming from the west, going east through relatively level land, and one coming from the south and going northeast. The west one (of the watercourses from the north), and the ones from the northwest, west, and south finally reached a relatively level area in the center of plaintiffs' land, where they spread out, but finally went in a watercourse to the east and across defendant's land and emptied into Salt Creek to the east. The watercourse from the northeast corner apparently went due south and emptied into the course to the east. Floodwaters coming down across plaintiffs' land spread out over a considerable area in width, forming at times, when receding, one large shallow body of water about the center of plaintiffs' land and a smaller one to the northeast. The evidence is that a large part of the surface soil on both pieces of land was built up by deposits so put on the land. In addition to rain and melting snow run-off there were springs in the area to the west and northwest that supplied an undetermined but probably small amount of water to these courses. It also appears that naturally floodwaters spread out on both pieces of land and either drained off or finally percolated or evaporated from the lands. There was probably a longer period of ponded

waters on plaintiffs' land. Such appears to have been the natural situation.

In 1906, if not before, there was a road along the north side of plaintiffs' land and also along the east side between plaintiffs' and defendant's land. There was a bridge across the road between the two pieces of land under which the normal-flow channel passed from plaintiffs' to defendant's land. Ditches along the sides of these roads carried water first east and then south to the bridge and it appears that the east watercourse from the north became merged with the road ditch. In 1906, the then occupant of plaintiffs' land either cleaned out or made these road ditches and cleaned out and straightened the normal-flow channel running from the bridge west in a Y-shaped manner, so as to bring the water from the south, west, and northwest more directly to the bridge and drain the low area in the center. At that time there was a well-defined meandering normal-flow channel with grassed banks from the bridge east across the defendant's land to Salt Creek. In that condition, floodwaters coming down from the west would escape under the bridge or, in time of greater floods, flow over the road north of the bridge onto defendant's land and ultimately into Salt Creek.

In 1937, Cass County raised the grade of the road and put in a longer and higher bridge. The grade was again raised in 1941. The ditches along the road furnished the dirt used in the elevation of the road. After 1937, floodwaters were held by the road and the only means of escape was under the bridge.

Also in 1937, the then occupant of plaintiffs' lands cleaned out the older ditches and made a smaller ditch leading from the depression in the northeast to the bridge. Prior to 1937, defendant had done some work keeping the normal-flow channel open on its land. In 1937, defendant widened and straightened the channel east of the bridge until it emptied into a deeper channel leading to Salt Creek. This was done again in 1941.

In its own language this ditch of defendant was "only large enough to carry our own water."

In 1945, plaintiffs cleaned out, straightened, and enlarged the old ditches on their land.

In 1946 and thereafter, they extended some of these ditches, changed the course of the one from the northwest so as to come more directly east, and generally bettered the drainage system. Either in 1946 or 1947, they further cleaned out the ditches, made low dikes along the north and east courses so as to better confine the waters in those road ditches, ran the watercourse from the west one of the north courses more directly south, and built a dike along the east side of it to confine waters to the channel. They also made a dike along the south side of the channel coming from the northwest so as to direct waters in that course more directly to the east. They built a "twin" ditch coming in from the southwest and also one from the northeast where there had been single ditches prior thereto. In part these improvements were made on plans of soil conservation officials of the United States Department of Agriculture.

With the exception of the road ditch from the north, these drainage ditches all converged on plaintiffs' land west of the fence line at the bridge. The road ditch joined at the west side of the bridge. In 1945, there was an elevation of land defined as a "rim" across the plaintiffs' land west of the bridge. Its elevation above the land to the west is not shown. In their operations in 1946 or 1947, plaintiffs removed some of this rim and moved it out into their fields to the west. There is no evidence as to the width, length, or depth of the area so changed.

Defendant by cross-petition seeks to compel the removal of the structures made by plaintiffs and prays that they be required to restore their land "to the same condition prevailing at the time" they purchased the land in 1945.

One witness fixed the depth of the large lake at one time at one place at 20 inches. With that exception, the evidence shows no definiteness as to depth or area of the waters referred to variously as "lakes" and "ponds" on plaintiffs' land. Some witnesses describe them as covering a large area, some a fraction of an acre, depending in part on the year or time of year they were observed. More important, there is no evidence as to the water capacity of these lakes or ponds or of the quantity of water drained from the lakes or ponds by plaintiffs' works. Nor is there any evidence that the waters so drained at any time exceeded the capacity of the normal channel of the watercourse on defendant's land. The defendant by its works had made it difficult, if not impossible, to furnish such evidence. The evidence negatives any finding that the construction of the plaintiffs had any appreciable adverse effect upon the volume or flow of water at floodtimes. There is undisputed evidence of one expert witness that plaintiffs' works would be of benefit in floodtimes by carrying off more quickly the initial floodwaters. There is evidence of defendant's engineer that plaintiffs' construction "accelerated the flow and affected pondage to some extent." The evidence negatives a conclusion that it had that effect of accelerating the flow in periods of excessive floods. It is also patent that the roadway embankment retarded the flow of floodwaters upon defendant's land and restricted that flow to the capacity of the bridge outlet. It is also patent that the plaintiffs' works did not add any water to the quantity of water in the drainage basin.

By 1945, defendant's ditch east of the bridge had begun to fill with silt and debris. Defendant did nothing to keep it open. It was largely filled by 1948. In October of that year defendant built a dam across the channel immediately east of the bridge so as to prevent any water flowing from plaintiffs' land until the water reached a level above the level of the land on either

side. It had that purpose and effect of holding the normal-flow waters on plaintiffs' land. Defendant also began down at the deep channel on its own land and built a new ditch to the north of the old channel and in a more direct line toward the bridge. It then built two dikes, one from the northwest and one from the southwest, converging on the new ditch and designed to catch all floodwaters, or waters passing around the smaller dike at the fence and carry them down the new ditch to Salt Creek and prevent them from spreading out and flowing on its land, as floodwaters had previously done. It had the effect of holding back floodwaters on the plaintiffs' land similar to the effect of the road grade. Defendant then leveled off the land where the 1941 channel had been. Plaintiffs' petition is to require the defendant to remove these dams and dikes, and to restore the watercourse so as to permit the water to flow at normal or floodtime as it had formerly done.

Defendant claimed damages for the years 1945, 1947, 1948, and 1949, which it asserts were proximately caused by plaintiffs' works. The area involved where damage to crops occurred was in the flat lands on either side of the normal-course channel and within the flood channel where the water always spread out in time of floods, and some remained to drain off, evaporate, or percolate away.

In 1945, the floods occurred after periods of rain on the defendant's land and after rainwaters draining down the watershed came down across the plaintiffs' land under the bridge and spread out on defendant's land. In short, it was caused by floodwaters which "spread away" from defendant's 1941 ditch out onto defendant's land and "lay there." It is to be noted that in this period, so far as we can determine, either plaintiffs' construction work had not been done or had not progressed beyond plowing out the older ditches.

In 1946, defendant claimed no damages because that year "it rained just right"; there was not a "particle

of runoff" either on plaintiffs' land or defendant's land; there was "no movement of water." In short, there were no floods in 1946.

In 1947, the same situation happened as in 1945. Following rains, water stood on the plaintiffs' and defendant's land.

In 1948, water "came out of the hills and down the McGill ditch" when a 22-inch snow melted in March, spread out over defendant's land, froze there, and killed out a wheat crop. The flood was caused by water "* * * accelerated from the hills and concentrated at the bridge at bridge capacity *and flowed onto our land to a way greater extent than our ditch could carry it*" (emphasis supplied); "* * * the water was roaring down there and slush and snow faster than the bridge could take it, flooding their land, flooding ours."

In 1949, there was "heavy rainfall" and like floods, so much so that at one time water ran around the south end of defendant's Y dike and out onto its lands, finally cutting through the dike itself near the location of the old ditch.

The above is a sufficient summary of the evidence and the conclusions from it to enable a decision of the issues presented.

We take up first the matter of plaintiffs' right to relief against the defendants.

The rules applicable have been repeatedly stated by us.

"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.

"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.

"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.

"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." Beetison v. Ballou, 153 Neb. 360, 44 N. W. 2d 721.

"Where surface water resulting from rain and snow flows in a well-defined course, whether it be a ditch, swale, or draw in its primitive condition, its flow cannot be arrested or interfered with by a landowner to the injury of neighboring proprietors.

"For such an injury injunction is the proper remedy, and equity looks to the nature of the injury inflicted, together with the fact of its constant repetition, or continuation, rather than to the magnitude of the damage inflicted, as the ground of affording relief." Schomberg v. Kuther, 153 Neb. 413, 45 N. W. 2d 129.

"* * * the upper owner of land has the right, without interference, to have the flow of surface water follow along a well-defined watercourse from his land." Jorgenson v. Stephens, 143 Neb. 528, 10 N. W. 2d 337.

Plaintiffs are entitled to injunctive relief. The cause is remanded with directions to grant plaintiffs injunctive relief in accord with the above rules requiring the defendant to remove its dikes and dams constructed in 1948, and to restore a natural watercourse through its land.

We next take up the matter of defendant's right to relief against the works of the plaintiffs.

Section 31-201, R. S. 1943, provides: "Owners of land may drain the same in the general course of natural

drainage by constructing an open ditch or tile drain, discharging the water therefrom into any natural watercourse or into any natural depression or draw, whereby such water may be carried into some natural watercourse; and when such drain or ditch is wholly on the owner's land, he shall not be liable in damages therefor to any person or corporation."

The rule is: "By virtue of section 31-201, R. S. 1943, an owner of land may, without liability in damages, drain the same in the general course of natural drainage by constructing and maintaining in a reasonable and proper manner, and wholly on his own land, an open ditch or tile drain, discharging a reasonable quantity of water therefrom into a natural watercourse upon his own land or into a natural drainway thereon, whereby such water may be carried into some natural watercourse." Halligan v. Elander, 147 Neb. 709, 25 N. W. 2d 13.

We do not undertake here to review all our decisions resulting from the varied fact situations that these drainage cases present. Because defendant's position on its cross-petition is not better than the fact situations there presented, we cite the cases of Todd v. York County, 72 Neb. 207, 100 N. W. 299, 66 L. R. A. 561; and Aldritt v. Fleischauer, 74 Neb. 66, 103 N. W. 1084, 70 L. R. A. 301, where the reasons for the rule and the authorities are discussed. There injunctive relief was denied to the plaintiffs. We have repeatedly followed these decisions. We do so again.

As to the right of defendant to recover damages, the rule is: "Where a substantial amount of water from another source or sources has been added to the water for which defendant is liable and the combined waters have caused the damage, then it is incumbent upon the plaintiff to establish either that his damages would have occurred from the waters for which defendant is liable, or to establish the amount of his damage that had been caused by the waters for which defendant is liable."

Faught v. Platte Valley Public Power & Irrigation District, 147 Neb. 1032, 25 N. W. 2d 889.

There is no attempt made in the present record to make such an allocation of damages. In fact, there is no evidence from which it can be found that any of defendant's damage was caused by plaintiffs' construction. It is patent that defendant's damage was caused substantially by heavy floodwaters and was not proximately caused or contributed to by the construction of the drainage system of plaintiffs. If anything, it was contributed to by its own works in changing the normal-flow channel. It is quite apparent from defendant's testimony that its lands would have been flooded whether or not the works of plaintiffs were there. Defendant is not entitled to recover damages. The cause is accordingly remanded with directions to deny relief to the defendant on its cross-petition.

All costs are to be taxed to defendant.

REVERSED AND REMANDED WITH DIRECTIONS.

DEAN KRISTUFEK, APPELLEE, V. WILLIAM W. RAPP, APPELLANT.

47 N. W. 2d 923

Filed May 17, 1951. No. 32985.

1. **Trial.** A motion for a directed verdict must be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed.
2. ———. Where such evidence, viewed in the light most favorable to the party against whom the motion is directed, tends to sustain his cause of action, the motion should be overruled, even though conflicting evidence may appear in the record.
3. **Automobiles: Evidence.** The speed of a motor vehicle is not a matter of expert knowledge and skill exclusively, and any one with a knowledge of time and distance, and an opportunity to formulate the basis for an opinion, is a competent witness to give an estimate.

4. ———: ———. Where it appears that a witness had no opportunity to formulate a basis for an opinion as to the speed of a motor vehicle, it is error to permit him to estimate such speed.
5. **Trial: Negligence.** An instruction, which places upon the defendant the burden of proving by a preponderance of the evidence "gross negligence or contributory negligence" on the part of the plaintiff in order to establish the defense of contributory negligence, is error.
6. **Trial.** An instruction, which correctly advises the jury that plaintiff must prove all the material elements of his case by a preponderance of the evidence and that if it fails to so establish any one of them the verdict should be for the defendant, is not erroneous in that it fails to inform the jury as to what their verdict should be if the evidence was evenly balanced.
7. **Automobiles.** In an action between the operator of an automobile and a pedestrian crossing a street between intersections it is error for the trial court, when requested, to refuse to instruct the jury that such a pedestrian is required to keep a constant lookout for his own safety in all directions of anticipated danger.

APPEAL from the district court for Douglas County: WILLIAM A. DAY, JUDGE. *Reversed and remanded.*

Fraser, Connolly, Crofoot & Wenstrand, for appellant.

Pilcher & Haney, for appellee.

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

CARTER, J.

This is an action for damages for personal injuries received by plaintiff, a pedestrian, when struck by an automobile owned and operated by the defendant. A verdict was returned for the plaintiff in the amount of $6,000 and defendant appeals.

The accident occurred on Farnam Street, between Park Avenue and Twenty-ninth Street, in Omaha, Nebraska, on November 24, 1948, at approximately 10 p. m. The pavement was dry. The street was well lighted and weather conditions were good. The street was 60 feet wide and was partially occupied by two streetcar tracks in the center of the street.

The evidence shows that plaintiff, accompanied by his mother, Emma Kristufek, his sister, Mrs. Karl Stone, and his niece, Carol Stone, drove east on Farnam Street and parked his automobile parallel with the south curb about 65 feet east of the east curb of Park Avenue for the purpose of looking at the new automobiles on display in the Scott-Nash Company showroom in front of which they had parked. The evidence of the plaintiff is that he went across Farnam Street in a northwesterly direction to a cafe to obtain a package of cigarettes. He returned by the same route, angling back to his car in a southeasterly direction. He testifies that he stopped beside his car to light a cigarette and as he took hold of the door handle of the car, preparatory to entering it, he was struck by the automobile driven by the defendant. The evidence of plaintiff and his witnesses is that he was unconscious from that time until the next morning. Plaintiff testifies that as he started across Farnam Street he looked west at the curb and saw the headlights of a car one and one-half blocks distant. He says he looked again when he reached the center of the street and he saw the lights of a car one block away. He testifies positively that he was within an arm's length of his automobile when he was struck. One of the occupants of his car testifies that he was carried approximately 100 feet by defendant's car before he was thrown to the pavement. The only evidence of the speed of defendant's car offered by the plaintiff was that of his sister, Mrs. Karl Stone. She testified that just as plaintiff started to get into his car she saw defendant's automobile strike him and go on east about 100 feet and stop, that she had driven a car for 15 years, and that in her opinion it was going 40 to 45 miles an hour.

The evidence of the defendant is that he was driving his automobile east on Farnam Street within a foot or two of the south rail of the south streetcar track at a speed of 20 miles an hour. He says that at a point about 160 feet east of the west curb of Park Avenue

he suddenly saw plaintiff in front of him in the street. He estimates that plaintiff was from 10 to 20 feet in front of him, and that he put on his brakes but was unable to avoid the accident. He says that plaintiff fell to the pavement within 5 feet of the place where he was struck and that he stopped his car within 20 feet after he applied his brakes. He further testifies that there was no car immediately south of plaintiff at the place where plaintiff was struck. That plaintiff jaywalked across Farnam Street is not disputed in the record.

The defendant contends that the trial court erred in not sustaining his motion for a directed verdict. It seems to us that the primary issues of fact were very much in conflict. Plaintiff says he jaywalked across Farnam Street and watched for automobiles approaching in the direction of anticipated danger. His testimony is that he crossed the street safely and, while standing by his automobile, was struck and injured. The defendant says that plaintiff was crossing the main portion of the street in the path of oncoming traffic at the time of the accident without exercising the care required of one so doing. In the consideration of the motion for a directed verdict plaintiff is entitled to have it treated as an admission of the truth of all material and relevant evidence submitted on behalf of the plaintiff. Pahl v. Sprague, 152 Neb. 681, 42 N. W. 2d 367. Where the evidence is such that different minds may reasonably draw different conclusions therefrom, the case should be submitted to the jury. This is such a case and the motion for a directed verdict was properly overruled.

The defendant contends that the trial court erred in admitting the evidence of Mrs. Karl Stone as to the speed of defendant's automobile. The evidence shows that Mrs. Stone occupied the rear seat of plaintiff's automobile at the time the accident occurred. She did not see the approach of defendant's car. She testified she heard a loud noise and saw defendant's car hit the

plaintiff and then saw defendant's car continue on in a sort of slanting direction towards the streetcar tracks. She then testified over objection that in her opinion defendant's car was traveling 40 to 45 miles an hour. We think the admission of this evidence was error. The rule is that a person with a knowledge of time and distance, and an opportunity to formulate the basis for an opinion, is a competent witness to give an estimate of the speed at which a motor vehicle is traveling. Where it appears that a witness had no opportunity to formulate a basis for an opinion as to its speed, it is error to permit the giving of an estimate. Knoche v. Pease Grain & Seed Co., 134 Neb. 130, 277 N. W. 798; Tews v. Bamrick, 148 Neb. 59, 26 N. W. 2d 499. Mrs. Stone did not see the defendant's automobile before it struck the plaintiff. She saw it only for a short distance after the accident occurred. The foundation upon which an opinion as to speed could be based was clearly insufficient.

The appellant asserts that the trial court erred in giving instruction No. 4-A which is as follows: "You are instructed that negligence is never presumed, but must be proved. The defendant having alleged that the accident was caused proximately by gross negligence on the part of the plaintiff, or his contributory negligence, the burden is upon the defendant to establish by a preponderance of the evidence such gross negligence or contributory negligence on the part of the plaintiff, and that such negligence was the proximate cause or a contributing cause of the accident." We think the instruction is erroneous in that it improperly injects the question of gross negligence into an instruction dealing with contributory negligence. It has no place in such an instruction. The alternative provisions of the instruction given do not free the instruction from the error pointed out. Whether the giving of the instruction, standing alone, would constitute prejudicial error requiring a reversal we do not here determine in view of

the fact that a new trial of the case is required in any event.

It is urged that instruction No. 4 is erroneous in that it fails to inform the jury as to what their verdict should be if the evidence is equally balanced. The material part of the instruction is: "You are instructed that the burden of proof in this case is upon the plaintiff to establish, by a preponderance of the evidence, all the material allegations of his petition not admitted to be true by the answer of the defendant. Therefore, before the plaintiff can recover he must establish, by a preponderance of the evidence: * * *. If the plaintiff has established all of the foregoing propositions by a preponderance of the evidence, then your verdict should be for the plaintiff and against the defendant. If, however, the plaintiff has failed to establish any one of the foregoing propositions by a preponderance of the evidence, then he cannot recover and your verdict should be for the defendant." We think this is a good instruction. In substance it says that plaintiff must prove all the material elements of his case by a preponderance of the evidence, and that if he fails to so establish any one of them by a preponderance of the evidence, the verdict should be for the defendant. It is the plain import of the instruction that if the evidence is evenly balanced the verdict should be for the defendant.

The objection to the instruction grows out of the incorrect interpretation placed upon the rule announced in Fitzsimons v. Frey, 153 Neb. 124, 43 N. W. 2d 531. In that case the court instructed in part that "'If the plaintiff has established both of said propositions, by a preponderance of the evidence, then your verdict should be for the plaintiff.'" Standing alone, this part of the instruction is not subject to criticism. The trial court, however, added the following: "'On the other hand, if you believe, from a preponderance of the evidence, that plaintiff has failed to establish said propositions, your verdict should be for the defendant.'" The effect

of the latter part of the instruction is to instruct the jury that they shall find for the defendant only where they believe from a preponderance of the evidence that plaintiff has failed to establish his case. To be complete, the instruction, under such circumstances, should also tell the jury that they should find for the defendant if the evidence on any material element of plaintiff's case was evenly balanced, the burden of proof being upon the plaintiff. The case of Ficke v. Gibson, 153 Neb. 478, 45 N. W. 2d 436, is cited by defendant in support of his claim of error. We think it supports the reasoning herein announced by the use of the following language: "Nowhere in this or any other instruction is the jury informed of what their verdict should be if the appellee has not sustained this burden." This is not the situation presented in the case before us where the jury was instructed as to what its verdict would be if plaintiff failed to prove one or more of the necessary allegations of his petition by a preponderance of the evidence. The instruction is free from error.

The defendant complains of the failure of the trial court to give his tendered instruction No. 6, setting out the duty imposed upon one who crosses a street between intersections. The rule is: A pedestrian crossing a street at a place other than a street intersection or crosswalk in direct violation of a city ordinance is required to keep a constant lookout for his own safety in all directions of anticipated danger. Trumbley v. Moore, 151 Neb. 780, 39 N. W. 2d 613. In the opinion in that case we said: "It is elementary that one who attempts to cross a street between intersections without looking is guilty of such negligence as would bar a recovery as a matter of law. If he testifies that he did look, it is implied that he looked in such a manner that he would see that which was in plain sight, unless some reasonable excuse for not seeing is shown." See, also, Ficke v. Gibson, *supra*. While it is true in the case before us that the applicable city ordinance did

not make it a violation of law to cross a street at any point other than a crosswalk, the duty of the pedestrian is the same in any event. As we have so many times said, an ordinance which does make jaywalking a violation of law is only evidence of negligence. Even though the ordinance provides only that a pedestrian crossing the street at any other point other than within a marked or unmarked crosswalk shall yield the right-of-way to vehicles upon the street, the rule announced with reference to the duty of one so doing is as pertinent in the one case as in the other. Chicago, B. & Q. R. R. Co. v. Metcalf, 44 Neb. 848, 63 N. W. 51, 28 L. R. A. 824; Ficke v. Gibson, *supra*. We think that defendant was entitled to an instruction setting out the legal duty imposed upon one crossing a street between intersections. It is error to fail to give such an instruction when requested in a case such as we have before us.

We have examined the other assignments of error and find that they have no merit or are unlikely to occur again upon the second trial of the case. For the reasons stated, the judgment is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

DAVID R. BENDER, APPELLEE, V. WILLIAM H. PALMER ET AL., APPELLANTS.

48 N. W. 2d 65

Filed May 17, 1951. No. 33019.

Schools and School Districts. School district boards are empowered and required to make provision for transportation of pupils to schools of neighboring districts when authorized to do so by a majority of the votes cast at any annual or special meeting in accordance with the provisions of section 79-486, R. R. S. 1943. In the absence thereof section 79-490, R. R. S. 1943, has application and the board is free to invoke the provisions thereof.

APPEAL from the district court for Frontier County: VICTOR WESTERMARK, JUDGE. *Reversed with directions to dismiss.*

Fred J. Schroeder, for appellants.

Frank B. Morrison and *Albert A. Mann,* for appellee.

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

WENKE, J.

This is a mandamus action instituted in the district court for Frontier County by David R. Bender. It was brought against the members of the school board of district No. 39 of Frontier County for the purpose of requiring them to provide transportation for plaintiff's minor child to another school district where elementary school privileges could be had. The trial court found for the plaintiff and so ordered. Defendants filed a motion for new trial and, from the overruling thereof, have appealed.

The facts are not in dispute. The appellants were, at all times herein material, the elected, qualified, and acting members of the school board of district No. 39 of Frontier County. District No. 39 is a rural school district. At the annual meeting of the district held on June 12, 1950, a majority of those present voted in favor of closing the school in the district during the school year of 1950-1951. A motion was made and adopted at this meeting to give the board authority to pay more than 20 cents a mile for transportation, if lawful, however, no action was taken to empower the board to make provisions for the transportation of any pupil in the district to any school of a neighboring district.

Appellee is a resident of school district No. 39 and, with his wife and family, lives on a farm located therein. Included in the family is a daughter, Ruth Esther Bender, who became six years of age on February 5,

1950. Appellants entered into a contract with school district No. 38 of Frontier County to furnish instruction in the elementary grades for any pupil of district No. 39 during the school year of 1950-1951. However, they refuse to enter into any contract to furnish transportation for appellee's child to the school at Moorefield in district No. 38 but have at all times been and are willing to pay mileage to appellee in accordance with the provisions of section 79-490, R. R. S. 1943. Appellee or his wife has been taking their daughter to and from the school in district No. 38.

Section 79-486, R. R. S. 1943, as far as here material, provides: "The governing board of any public school district in this state, when authorized by a majority of the votes cast at any annual or special meeting, is empowered to (1) contract with the district board of any neighboring public school district or districts for the instruction of pupils residing in the first-named district in the school or schools maintained by the neighboring district or districts for a period of time not to exceed three years, and (2) make provision for the transportation of such pupils to the school or schools of the neighboring district or districts. The board of any public school district may also, in its discretion, contract with another public school district or districts for the instruction and transportation of the pupils residing therein for a period of not more than one school year when petitioned to do so by at least two-thirds of the parents residing in said district having children of school age who will attend school. The school board of any district so closed shall assume responsibility in providing contracts for instruction and transportation."

Section 79-490, R. R. S. 1943, as far as here material, provides: "When no other means of free transportation is provided to a child attending an elementary school, there shall be made an allowance for transportation to the family of said child by the district in which such family resides on the basis of the record of attendance

of such child and the trips actually made to and from such school as follows: * * * (2) where the child is required to attend an elementary school outside of his own district there shall be paid ten cents per half mile for each one half mile or fraction thereof for the distance that the school in the other district is in excess of the distance from the school of his residence. The trips actually made to and from such school by means of the nearest practicable traveled road actually traveled shall be reported monthly by the teacher to the school board of such public school district."

It should be remembered that this is not a case where the board, in its discretion, acted upon a petition by at least two-thirds of the parents residing in the district who have children of school age who will attend school. It is a case where the board is acting under and pursuant to the action taken to close the school by a majority of those voting at the annual meeting.

School district boards are empowered and required to make provision for transportation of pupils to schools of neighboring districts when authorized to do so by a majority of the votes cast at any annual or special meeting in accordance with the provisions of section 79-486, R. R. S. 1943. Such authorization was not voted by a majority of those present at the annual meeting when it was voted to close the school. In the absence thereof section 79-490, R. R. S. 1943, has application and the board was free to invoke the provisions thereof. See, Morfeld v. Huddin, 131 Neb. 180, 267 N. W. 350; State ex rel. Millsap v. Stoddard, 108 Neb. 712, 189 N. W. 299.

In view of the foregoing the order of the district court is reversed with directions to dismiss.

REVERSED WITH DIRECTIONS TO DISMISS.

MESSMORE, J., participating on briefs.

MOTORS ACCEPTANCE CORPORATION, APPELLANT, V. J. F. MCLAIN, DIRECTOR OF BANKING, ET AL., APPELLEES.
47 N. W. 2d 919

Filed May 22, 1951. No. 32935.

1. **Administrative Law and Procedure: Appeal and Error.** An appeal from a judgment of the district court affirming an order of the Director of Banking will be heard in this court to determine if such order is unreasonable and arbitrary.
2. **Administrative Law and Procedure.** The act conferring upon the Director of Banking the power to issue a small loan license pursuant to section 45-120, R. S. 1943, after an investigation of the financial responsibility, experience, character, and general fitness of the applicant, and the convenience and advantage to the community in which the business of the applicant is to be conducted resulting from the granting of the license, affords sufficient definite standards for the administrative action which the statute authorizes.
3. ———. Where a statute sets out adequate standards for the exercise of administrative action and provides for a review of the action taken in the courts, it is not invalid as conferring unlimited discretion upon the administrator.
4. ———. Where there is competent evidence in the record that it would not be for the convenience and advantage of the community in which the business of an applicant for a small loan license is to be conducted, the denial of the application is not arbitrary and unreasonable.

APPEAL from the district court for Lancaster County: JOHN L. POLK, JUDGE. *Affirmed.*

Morsman, Maxwell, Fike & Sawtell, and *Woods, Aitken & Aitken,* for appellant.

Clarence S. Beck, Attorney General, and *Robert A. Nelson,* for appellees.

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

CARTER, J.

This is an appeal from a judgment of the district court for Lancaster County affirming an order of the Director of Banking denying a small loan license to

Motors Acceptance Corporation. We shall consider the appeal on the record to determine if the administrative order in question is unreasonable and arbitrary.

The evidence shows that Motors Acceptance Corporation applied for a license to operate a small loan business at 2563 Farnam Street, Omaha, Nebraska. It appears from the record that the nearest small loan business to this address is about 3 blocks east and that there is no such business operating west of Twenty-fourth Street in Omaha. Applicant's manager testifies that there is a need for a small loan business in this area of the city.

The evidence offered by the Director of Banking is that there are already 31 existing small loan licenses in Omaha in addition to 63 other agencies engaged in consumer credit by the direct lending of money. Of the 31 small loan licensees, the evidence shows that 24 were making a profit, the average of which was 6.67 percent in 1948. The remaining 7 suffered losses in 1948, the average of which was 1.56 percent. The average earnings of the 31 licensees in 1948 was 4.74 percent. It is shown by the evidence that existing licensees have adequate capital to handle the small loan business in Omaha and that the granting of more licenses would tend to decrease the net earnings, which would in turn tend to keep the cost to the borrower at maximum levels. It is shown also that the 31 licensees are now required to advertise heavily for business. It is the opinion of the director that to grant more licenses would result in excessive competition which would operate to the disadvantage of the necessitous borrower by forcing maximum rates. It would, also, add to the burden of efficient regulation in that an excessive number of licensees invariably produce increased numbers of violations of the licensing act. There is evidence that existing licensees are so located as to serve the needs of the city of Omaha and that, from the standpoint of the public, no need exists for the proposed service at the place for which the application was made.

The application for the license was made pursuant to section 45-120, R. S. 1943, which provides in part: "Upon the filing of such application, * * *, and, if he (Director of Banking) shall find that (1) the experience, character and general fitness of the applicant * * * are such as to warrant belief that the business will be operated honestly, fairly and efficiently within the purposes of sections 45-114 to 45-155, and (2) allowing such applicant to engage in business will promote the convenience and advantage of the community in which the business of the applicant is to be conducted, the Department of Banking shall issue and deliver an original license to the applicant to make loans at the location specified in said application, * * *." The experience, character, and general fitness of the applicant are not here questioned. The sole question is whether the refusal of the Director of Banking to grant a license to the applicant, on the ground that its granting would not promote the convenience and advantage of the community in which the business of the applicant is proposed to be conducted, is unreasonable and arbitrary under the evidence reflected by the record before us.

It is the contention of the applicant that the Legislature never intended to give to the Director of Banking the authority to determine the number of small loan licenses to be granted by requiring a finding that the issuance of the license would promote the "convenience and advantage" of the community where the business was to be conducted. The small loan business is one which is subject to regulation because of the abuses which seem to be inherently linked with it. Effective regulation requires that the privileges of the act be not granted indiscriminately. Unrestrained competition appears to have attracted an overabundance of capital as compared with borrowing needs. Increased costs of lending and excessive charges to borrowers were the result. To overcome the evils of unrestrained competition in this field the Legislature has limited it to those having ex-

perience, character, and general fitness, and to places where need for that type of credit exists, and where the business would promote the convenience and advantage of the community where it is to be conducted. We think the last clause clearly indicates that some plan of measuring the small loan potential of each community was contemplated and that the licenses issued were intended to be restricted to the need thus found to exist. By this means the Legislature intended to eliminate or reduce unethical business practices, unfair and unrestrained competition, and overextension of credit. It intended also to increase efficiency, reduce costs of operation, and encourage rate reduction; thus contributing to the welfare of the borrowing public in a field where unethical practices have heretofore flourished.

Applicant contends that the "convenience and advantage" clause in the act clothes the Director of Banking with arbitrary power uncontrolled by a reasonable rule of action governing the exercise of the power. This contention was well answered in Kelleher v. Minshull, 11 Wash. 2d 380, 119 P. 2d 302, where the court in dealing with a similar provision said: "It will be observed that the standard adopted by the legislature contemplated two factors: (1) the financial responsibility, experience, character, and general fitness of the applicant for a license, and (2) the convenience and advantage resulting to the community from the granting or denial of a license. Thus, the legislature sought not only to guarantee that the small loan business would be conducted by men of the ability, character, and financial standing necessary for the protection of those who may be compelled by reason of some serious emergency to borrow small sums of money, but also to make sure that the needs of the community in that respect were not outrun by the number of such establishments, at the risk of defeating the beneficent purposes of the act. The legislative desideratum was not the mere restriction in number of licensees, but rather the accomplish-

ment of the well known objectives for which the act was passed.

"It is not always necessary that statutes and ordinances prescribe a specific rule of action. This is particularly true in those situations where it is difficult or impracticable to declare a definite, comprehensive rule, or where the discretion to be exercised by an administrative officer relates to a regulation imposed for the protection of public morals, health, safety, and general welfare. 11 Am. Jur. 948, Constitutional Law, § 234."

In Weer v. Page, 155 Md. 86, 141 A. 518, the court in dealing with similar provisions said: "The statute does not commit to the bank commissioner an unlimited discretion. It directs him to ascertain, 'whether the character, responsibility and general fitness' of the incorporators 'are such as to command confidence and warrant belief that the business of the proposed corporation will be honestly and efficiently conducted,' and 'whether the public convenience and advantage will be promoted by allowing the proposed corporation to engage or continue in business.' These are sufficiently definite standards for the administrative action which the statute authorized. * * * The reasons given by the commissioner for his disapproval of the Sykesville bank charter did not include any objection to the incorporators with respect to their qualifications. The explanation was simply that the bank was not needed and that it would not have a reasonable chance to succeed. This is said to be a different basis of decision from that which the statute defines. Its concern was with the public convenience and advantage, and, according to its evident design, the commissioner was authorized to refuse a projected incorporation by which that object would not be promoted. In stating his conclusion that another bank was not needed at Sykesville, and that its prospect for success was unfavorable, the commissioner was dealing with considerations which vitally affected the

question presented for his determination. It could not be said that the public convenience of a community would be promoted by the organization of an additional bank which it did not need, and its interests might be seriously prejudiced by the unsuccessful operation of such an institution."

See, also, Equitable Loan Society, Inc. v. Bell, 339 Pa. 449, 14 A. 2d 316; Bank of Italy v. Johnson, 200 Cal. 1, 251 P. 784.

We think the evidence shows that the order denying the application for a small loan license was not unreasonable or arbitrary. The restriction of the number of licenses is necessary to the accomplishment of the purposes of the act and not for the purpose of creating a monopoly. The limitation of licenses is incidental merely to the regulation of the business. Such provisions are not violative of constitutional provisions as conferring arbitrary powers where an adequate appeal to the courts is provided. See Althaus v. State, 99 Neb. 465, 156 N. W. 1038. They are not arbitrary or discriminatory if they bear a reasonable relation to the accomplishment of a proper legislative purpose. The small loan business being subject to regulation by the state in the exercise of its police power, it cannot be said that an administrative order, which is sustained by evidence, showing a reasonable relation to its regulation, is unreasonable and arbitrary. The requirement of the statute that the Director of Banking ascertain whether the experience, character, and general fitness of the applicant are sufficient or not, and whether or not the public convenience and advantage will be promoted by allowing an applicant to engage in the small loan business, supplies sufficient standards for the administrative action authorized by the statute in granting or refusing to grant a license. Kelleher v. Minshull, *supra*.

For the reasons stated the judgment of the district court is affirmed.

AFFIRMED.

ALONZO BECKS, APPELLEE, V. ARNOLD SCHUSTER, APPELLANT.
48 N. W. 2d 67

Filed May 22, 1951. No. 32972.

1. **Automobiles: Highways.** The rules of the road fixed by section 39-741, R. S. 1943, extend to all public highways however created.
2. **Trial.** The instructions of the trial court should be confined to the issues presented by the pleadings and the evidence.
3. **Automobiles: Negligence.** When a person enters an intersection of two streets or highways he is obligated to look for approaching cars and to see those within that radius which denotes the limit of danger. If he fails to see a car which is favored over him under the rules of the road, he is guilty of contributory negligence sufficient to bar a recovery as a matter of law. If he fails to see an automobile not shown to be in a favored position, the presumption is that its driver will respect his right-of-way and the question of his contributory negligence in proceeding to cross the intersection is a jury question.
4. ———: ———. Where two motorists approach an intersection at or about the same time, the driver approaching from the right has the right-of-way, and he may ordinarily proceed to cross, having a legal right to assume that his right-of-way will be respected by the other driver, but if the situation is such as to indicate to the mind of an ordinarily careful and prudent person in his position that to proceed would probably result in a collision, then he should exercise ordinary care to prevent an accident, even to the extent of waiving his right-of-way.
5. **Trial: Negligence.** Where different minds may reasonably draw different conclusions or inferences from the evidence or there is a conflict in the evidence as to whether or not negligence or contributory negligence has been established, the question is for the jury.

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

Jack, Vette & Elliott, for appellant.

B. W. Stewart, and *Adams, Adams & Adams,* for appellee.

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

MESSMORE, J.

This is an action at law brought by Alonzo Becks to recover property damage resulting from a collision between his automobile and the automobile of the defendant Arnold Schuster which occurred in a highway intersection, and a cross-action by the defendant against the plaintiff for property damage. The case was tried to a jury resulting in a verdict in favor of the plaintiff. Judgment was entered thereon. Upon the overruling of the defendant's motion for a new trial, the defendant appeals.

The parties stipulated in the district court that the case be tried upon the original pleadings as filed in the county court. The parties also stipulated the amount of property damage to the plaintiff's automobile and to the defendant's automobile.

The pleadings, insofar as necessary to relate here, are in substance as follows.

The plaintiff, by his petition, alleged that the proximate cause of the collision was the negligence of the defendant in the operation of his automobile in the following particulars: He drove his automobile at a high and dangerous rate of speed; failed to maintain a lookout for the plaintiff's automobile then operating in the intersection of the highways here involved; failed to see the automobile being operated by the plaintiff, or if he did see it, continued to drive in disregard of the knowledge thus acquired; failed to have his automobile under reasonable and proper control in approaching an intersection; did not stop his automobile before it collided with the automobile operated by the plaintiff; failed to turn his automobile away from the automobile being operated by the plaintiff or from the path of the plaintiff's automobile; failed to yield the right-of-way to the plaintiff who, being first in the intersection, was entitled thereto; and failed to take into consideration the rights of the plaintiff in the intersection.

The cross-petition of the defendant alleged that the

proximate cause of the accident was the negligence of the plaintiff in the following particulars: Plaintiff attempted to make a "U" or hairpin turn onto the road on which the defendant was driving without ascertaining whether or not such road was occupied and without looking for approaching vehicles and particularly for the vehicle operated by the defendant; failed to give any signal of his intention to turn onto the road on which the defendant was operating his automobile; drove his automobile immediately into the path of the defendant's car when by the exercise of reasonable prudence he could have ascertained that the defendant's car was proceeding south on the highway into which the plaintiff was negotiating a left turn; failed to stop his automobile before leaving the road on which he was traveling and entering onto the road on which the defendant was traveling; failed to yield the right-of-way to the defendant who was traveling in a straight line on the right-hand side of the road; and failed to have his car under reasonable and proper control or do any act to avoid the collision between the automobiles.

We briefly describe the highways, the junctions, and intersections involved so that the issues raised on this appeal may be better comprehended.

State Highways Nos. 3 and 4 running east from Beatrice are combined, 35 feet wide, and consist of blacktop paving. Eight miles east of Beatrice highway No. 3 turns in a northeasterly direction and highway No. 4 turns in a southeasterly direction, and both highways connect with a north-south gravel highway 32 feet in width. A road which continues east from highways Nos. 3 and 4 combined intersects between the point where highway No. 3 turns to the northeast and highway No. 4 to the southeast. Along the east side of the north-south highway is a bank and a ditch. Where the east and west road intersects the north-south highway there is a knoll or rise. There is a culvert at the point where the east-west road intersects the north-south highway

on the south line of that intersection. The north-south highway is level. There are no stop signs at any of the points heretofore described where highways Nos. 3 and 4 intersect the north-south highway, or at the point where the road continues east and intersects the north-south highway. Two hundred feet north of the point where highway No. 3 intersects the north-south road there is a sign designating the junction.

For convenience we refer to the parties as designated in the district court.

The plaintiff, Alonzo Becks, at the time of the accident owned a 1949 Chevrolet coach in good mechanical condition. Arnold Schuster, the defendant, at that time was the owner of a 1949 Ford club coupe in good mechanical condition. Both automobiles were fully equipped with lights. During the evening of February 28, 1950, at about 8 o'clock, the plaintiff, with his mother, his brother Algernon, and his sister went for a ride. Algernon was sitting to the right of the plaintiff who was driving. They proceeded east from Beatrice on highways Nos. 3 and 4 combined. When the plaintiff arrived at the point where highway No. 4 turns to the southeast, he drove in that direction. As he proceeded around the curve he looked in all directions to see if any cars were coming. He observed a car coming from the north some distance away, and believed that this car would slow down. After he had proceeded around the curve going southeast, he made a turn to the north onto the north-south highway. He had crossed to the east side of that highway facing in a northeasterly direction when he observed the car coming from the north "leap" over the knoll at a high rate of speed. The driver of the car coming from the north, the defendant, was proceeding straight south and swerved his car to the left or east into the left front of the plaintiff's car. The plaintiff testified that at the time of the impact his car was on the east side of the north-south highway, headed northeast. The defendant's car, in ap-

proaching from the north, did not stop at any time prior to the time of impact. The plaintiff also testified that a car coming from the north could see the headlights of his car at all times after he had proceeded to the southeast on highway No. 4 and into it to go around the curve and at the point where he had turned to the left or north on the north-south highway. However, he did not know what distance the driver of a car coming from the north could see his headlights. The plaintiff could see the headlights of the defendant's car as it came from the north. When he saw the defendant's car coming from the north it was north of the north junction, that is the junction north of the east-west road. He looked again to the north as he was getting ready to go across the intersection of highway No. 4 and the north-south highway. At that time the defendant's car was just north of the north junction. He saw the defendant's car at all times, and the defendant was in full sight as he proceeded onto the north-south highway. He believed the defendant would slow down for the junction and curves, but he did not. As a result the collision occurred. Previous to the accident as the plaintiff started to turn southeast on highway No. 4, he saw a car coming from the north in front of the defendant's car. It turned on highway No. 3 west to Beatrice. He saw no other cars.

Algernon Becks testified that when the plaintiff was making the turn on highway No. 4 he slowed his car down. Algernon looked to the north and saw the defendant's car and a car in front of it which turned west on highway No. 3 to Beatrice. The plaintiff's car proceeded to a point close to the south junction. Algernon looked to the north again and saw the defendant's car slowing down from a high rate of speed. When plaintiff's car entered the intersection of the north-south highway the defendant's car was entering the intersection where the east-west road intersects the north-south road. He saw the defendant's car close to the

top of the knoll. Plaintiff's car was then in the west lane of the north-south highway, headed east and traveling at a rate of speed of five miles an hour. When the plaintiff's car was about halfway into the intersection the plaintiff started to speed up his car. He crossed to the east lane of the north-south highway and applied his brakes. The defendant's car, proceeding at a high rate of speed, veered to the left, or over into the east lane of the highway, striking the left front wheel of the plaintiff's car.

The defendant Schuster testified that he was traveling south on the north-south highway at the rate of speed of 45 miles an hour which he maintained just preceding the accident. There are no stop signs, slow signs, or warning signs at the south intersection where highway No. 4 turns into the north-south highway. After he had proceeded a little south of the top of the knoll he saw the plaintiff's car barely moving at a rate of speed of between two and five miles an hour. He first saw the plaintiff's car when he was 200 or 150 feet from the point of impact. When he was about 100 feet north of the plaintiff's car he applied his brakes. The plaintiff's car was making a "U" turn to the left, or north, on the north-south highway. No hand signals were given by the plaintiff, and the defendant testified he could have seen one if it had been given. He was not blinded by the lights on the plaintiff's car for the reason that the lights were facing mostly to the east. The defendant applied his brakes and turned his car to the left, or east, in an endeavor to avoid hitting the plaintiff's car. He believed that the plaintiff's car would stop and he could pass around it to the east, but the car kept on coming ahead, turned to the north directly in front of his car, and the collision occurred. The accident happened entirely in the west lane of the north-south highway.

After the collision the front wheels of the defendant's car were in the ditch on the east side of the north-south

road. The front end of his car was pointing slightly southeast, the back end northwest. The plaintiff's car was pointing slightly southwest and the back northeast, and was about in the center of the north-south highway.

Where highway No. 4 turns to the south on the north-south highway a short distance to the north is a culvert, the distance not shown by the record. There is a ditch 2½ or 3 feet deep which extends north from the culvert to where the east-west road intersects the north-south highway. Measurements taken by a witness show the defendant's car was 31 feet south of this culvert, and there was a distance of 28 feet between the back end of the defendant's car and the back end of the plaintiff's car which was facing south and west. Algernon testified that the collision occurred about 15 feet south of this culvert, and the defendant could have proceeded south in the west lane of the north-south highway and would have avoided the plaintiff's car which was in the east lane thereof. A witness testified that it would have been difficult for the defendant to have gone in between where the plaintiff's car stood after the accident and the west end of this culvert. Witnesses testified that there was broken glass near the center of the north-south highway, 5 or 10 feet south of the culvert. One witness testified that the broken glass was 25 feet or so south of the culvert. There was some glass east of the center of the north-south highway.

The defendant assigns as error that the trial court erred in basing its instruction upon the law applicable only to ordinary intersections. While conceding that section 39-741, R. S. 1943, is broad enough to cover a "T" or "Y" junction, some question arises as to whether or not such section covers the south junction here involved, that is, where highway No. 4 turns to the southeast and joints the north-south highway. This section provides: "* * * (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."

The trial court did not err in instructing the jury on this phase of the case. The joinder of highway No. 4 with the north-south highway constitutes an intersection within the meaning of section 39-741, R. S. 1943. See, also, Koutsky v. Grabowski, 150 Neb. 508, 34 N. W. 2d 893.

The defendant contends that the trial court failed to instruct the jury on the defendant's theory of the case, and by failing to do so committed prejudicial error. See, Stoffel v. Metcalfe Construction Co., 145 Neb. 450, 17 N. W. 2d 3; Krepcik v. Interstate Transit Lines, 153 Neb. 98, 43 N. W. 2d 609.

The defendant, in his cross-petition which we repeat in part, charges the plaintiff with negligence which he claims constituted the direct and proximate cause of the accident, that is, the plaintiff, in making a left turn from highway No. 4 onto the north-south highway did so without ascertaining whether or not such highway was occupied and without looking for appoaching vehicles that might be thereon, and in failing to signal his intention to turn to the left. As a result, he drove his automobile directly into the path of the defendant's automobile and failed to yield the right-of-way to the defendant.

This assignment of error is based on the instructions given by the trial court to the jury. In determining it we make reference to certain of the facts and analyze the instructions in conjunction therewith as to their correctness. It is true as stated by the defendant, in summarizing the defendant's cross-petition in instruction

No. 1, the trial court made no reference to the defendant's claimed right-of-way pleaded therein to the effect that the plaintiff failed to yield the right-of-way to the defendant, however, as will subsequently appear, the trial court properly instructed on the issue of the right-of-way.

Instruction No. 12 told the jury that no person shall turn a vehicle from a direct course upon a highway unless such movement can be made with reasonable safety and then only after giving an appropriate signal in the event that any other vehicle may be affected by such movement. The instruction then relates the manner of giving the signal to make the turn and the distance during which the signal should be made before turning. In the second paragraph of the instruction the court told the jury: "If you find that these provisions of the law or any of them were violated by the plaintiff, you are instructed that such violation was not in and of itself negligence but a circumstance which you may take into consideration in determining whether or not the plaintiff was guilty of negligence."

The defendant contends the record shows that no signal to make the left turn was given by the plaintiff, and the court should have instructed the jury, as a matter of law, that the plaintiff violated the provision of the statute regarding a signal for a left turn, and should not have left the matter to the jury to determine whether or not such a signal was given. This instruction merely informed the jury what the law was on the failure to give a left turn signal as required by the statute, and how such failure to give the signal should be considered. We find no prejudicial error in this instruction.

Instruction No. 13 told the jury that motor vehicles traveling on 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 ve-

hicles shall reach the intersection at approximately the same time, and in all other cases the vehicle reaching said intersection first shall have the right-of-way.

Instruction No. 14 told the jury that where two motorists approach an intersection at or about the same time, the driver approaching from the right has the right-of-way and he may ordinarily proceed to cross, having a legal right to assume that his right-of-way will be respected by the other driver; but if the situation is such as to indicate to the mind of an ordinarily prudent person in his position that to proceed would probably result in a collision, then he should exercise ordinary care to prevent an accident, even to the extent of yielding his right-of-way, and his failure to do so under such conditions would be evidence of negligence on his part.

Defendant's contention is that instructions Nos. 13 and 14 are prejudicially erroneous for the following reason: The plaintiff's petition does not allege that he was halfway into the north-south highway or the intersection when his car was struck by the defendant's car, nor does it allege the defendant was negligent in failing to yield the right-of-way to the plaintiff who was entitled thereto because he was approaching the intersection from the right, therefore, the jury was permitted to and could disregard the plaintiff's claimed right-of-way as pleaded, and give him the right-of-way on the basis that he was approaching the intersection from the right. The petition does allege that the plaintiff entered the intersection and was approaching halfway across that portion of the highway running north and south.

The plaintiff charged the defendant with negligence which was the proximate cause of the accident as heretofore set out. Evidence was adduced from which the jury could find that the plaintiff had proceeded across the intersection of highway No. 4 and the north-south highway and was on the east side thereof facing north when the defendant's car veered to the left, or east, and struck the left front wheel of the plaintiff's car. There

is also evidence that, at the time the defendant saw the plaintiff's car then partly in the intersection, he was 150 feet north thereof. The plaintiff's evidence is to the effect that the defendant was 188 feet north of the intersection when the plaintiff was proceeding across it. There is evidence that when the plaintiff approached the intersection from the right the defendant was from a quarter to a half mile north of the place where highway No. 4 intersects the north-south highway. We conclude the instructions complained of are not prejudicially erroneous, but conform substantially to the evidence and the pleadings.

The defendant contends that section 39-751, R. S. 1943, rather than 39-728, R. S. 1943, is applicable to the type of intersection here involved, and also, section 39-750, R. S. 1943, is applicable. The defendant's cross-petition does not sufficiently plead facts sufficient to disclose in what manner the cited sections are applicable, and section 39-728, R. S. 1943, would be inapplicable. The rule is that the instructions given by the trial court should be confined to the issues presented by the pleadings and the evidence. See, Citizens Nat. Bank v. Sporn, 115 Neb. 875, 215 N. W. 120; Franks v. Jirdon, 146 Neb. 585, 20 N. W. 2d 597; Ellis v. Union P. R. R. Co., 148 Neb. 515, 27 N. W. 2d 921.

We believe the trial court followed the rule in the cited authorities in instructing the jury.

When a person enters an intersection of two streets or highways he is obligated to look for approaching cars and to see those within that radius which denotes the limit of danger. If he fails to see a car which is favored over him under the rules of the road, he is guilty of contributory negligence sufficient to bar a recovery as a matter of law. If he fails to see an automobile not shown to be in a favored position, the presumption is that its driver will respect his right-of-way and the question of his contributory negligence in proceeding to cross the intersection is a jury question. See, Elliott

v. Swift & Co., 151 Neb. 787, 39 N. W. 2d 617; Pahl v. Sprague, 152 Neb. 681, 42 N. W. 2d 367; Gorman v. Dalgas, 151 Neb. 1, 36 N. W. 2d 561.

Where two motorists approach an intersection at or about the same time, the driver approaching from the right has the right-of-way, and he may ordinarily proceed to cross, having a legal right to assume that his right-of-way will be respected by the other driver, but if the situation is such as to indicate to the mind of an ordinarily careful and prudent person in his position that to proceed would probably result in a collision, then he should exercise ordinary care to prevent an accident, even to the extent of waiving his right-of-way. See, Gorman v. Dalgas, *supra,* Whitaker v. Keogh, 144 Neb. 790, 14 N. W. 2d 596.

Where different minds may reasonably draw different conclusions or inferences from the evidence or there is a conflict in the evidence as to whether or not negligence or contributory negligence has been established, the question is for the jury. Hamilton v. Omaha & Council Bluffs St. Ry. Co., 152 Neb. 328, 41 N. W. 2d 139; Pahl v. Sprague, *supra.*

We believe the record presented questions of negligence on the part of either of the parties, or both, for a jury to determine under proper instructions.

The judgment on the verdict is affirmed.

AFFIRMED.

MID-CONTINENT AIRLINES, INC., APPELLANT, V. STATE BOARD OF EQUALIZATION AND ASSESSMENT, APPELLEE.

48 N. W. 2d 81

Filed June 1, 1951. No. 32951.

1. **Taxation: Appeal and Error.** The right of appeal provided by section 77-510, R. R. S. 1943, is limited to proceedings for the equalization of assessments contemplated and regulated by sections 77-505 to 77-509, R. R. S. 1943.

2. **Statutes.** In codifying or revising statutes, a mere rearrangement of the sections or parts of a statute, or the placing of portions of what was originally a single section in separate sections, does not change the purpose, operation, and effect thereof.
3. **Appeal and Error.** The right of appeal is purely statutory. Unless the statute provides for appeal in the specific instance under examination at any time, such right does not exist.

APPEAL from the State Board of Equalization and Assessment: *Appeal dismissed.*

Hotz & Hotz and *William F. Dalton,* for appellant.

Clarence S. Beck, Attorney General, and *William T. Gleeson,* for appellees.

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

SIMMONS, C. J.

On September 30, 1950, the State Board of Equalization and Assessment adopted an average state levy pursuant to section 77-629, R. R. S. 1943, and directed that the assessed value, rate of levy, and tax of Mid-Continent Airlines, Inc., be certified to the State Tax Commissioner and State Treasurer pursuant to sections 77-630 and 77-1005, R. R. S. 1943, and that Mid-Continent Airlines, Inc., be notified of the assessment, rate of levy, and tax due.

Mid-Continent Airlines, Inc., will be hereinafter referred to as Mid-Continent; the State Board of Equalization and Assessment, as the board; and the State Tax Commissioner, as the commissioner.

Mid-Continent undertakes to appeal here under authority of section 77-510, R. R. S. 1943, and "possibly" section 77-617, R. R. S. 1943, and rule 1 (c) of the revised rules of this court. We dismiss the appeal.

The statutory provisions with reference to the taxation of Mid-Continent, here involved, are sections 77-1244 to 77-1250, R. R. S. 1943. On forms provided by the commissioner, Mid-Continent furnished information for

the purpose of enabling the commissioner to determine the value of Mid-Continent's flight equipment and the proportion allocated to this state for purposes of taxation. The commissioner called for additional information which Mid-Continent furnished.

On August 21, 1950, the commissioner advised Mid-Continent as to his finding of the taxable value of its flight equipment in Nebraska and of the formula used in determining it.

Under date of September 21, 1950, Mid-Continent expressed doubt as to the method used in arriving at the flight equipment value under the statute, challenged the use of certain elements in arriving at the value, and asked for a reconsideration of the assessment. In the event that was denied, Mid-Continent asked that the whole matter be referred to the board for its review pursuant to section 77-303, R. R. S. 1943, and that it be given an opportunity to be heard before the board.

The commissioner advised Mid-Continent to the effect that it considered the assessment basis correct, questioned the applicability of section 77-303, R. R. S. 1943, advised that the board would be glad to hear Mid-Continent when it met for the purpose of formally adopting the levy, and fixed the date.

On September 26, 1950, Mid-Continent advised the commissioner that it wished to appear before the board "* * * for the purpose of expressing our objection to the assessment method used in arriving at flight equipment values."

Up to this point the matter appears to have been handled by correspondence supplemented by personal contacts.

On September 30, 1950, the board met and took under consideration the assessed valuations of Mid-Continent as submitted by the commissioner. Mid-Continent presented a prepared statement "in an effort to seek a review and an adjustment of the flight equipment values" as determined by the commissioner for the levy of the

1950 flight equipment tax. It contended that the assessed value was in excess of the actual value and that the method used in arriving at the assessed value was improper. It then made a detailed statement in support of its position. It submitted statements showing the cost to it of certain of its aircraft.

The board then took the action hereinbefore set out and Mid-Continent was advised as to the valuation, rate of levy, and amount of tax. Mid-Continent then gave notice of its intention to appeal in accord with section 77-510, R. R. S. 1943.

Mid-Continent here challenges the validity of sections 77-1244 to 77-1250, R. R. S. 1943, and the validity of the decision of the board and the commissioner on state and federal constitutional grounds and, in the event those contentions are not sustained, also challenges the correctness of the valuations found, and asks for trial de novo here.

We are first confronted with the contention of the board that section 77-510, R. R. S. 1943, does not provide an appeal under the circumstances here.

So far as material here, section 77-510, R. R. S. 1943, provides: "From any final decision of the State Board of Equalization and Assessment with respect to the valuation of any real or personal property, any person, county or municipality affected thereby may prosecute an appeal to the Supreme Court."

In 1921, the Legislature enacted chapter 133, "An Act relating to public revenue * * *." Laws 1921, c. 133, p. 545. Section 4 of Article XI, page 591, related to the duties of the State Board of Equalization and Assessment. That section provided, among other things, that "From any final decision of the State Board of Equalization and Assessment, any person, county or municipality affected thereby may prosecute a writ of error to the Supreme Court * * *."

This section became section 5901, Comp. St. 1922. The language last above quoted was before us in Elmen v.

State Board of Equalization and Assessment, 120 Neb. 141, 231 N. W. 772. We there held that section 5901, Comp. St. 1922, was wholly devoted to the subject of the equalization of assessments and procedure prescribed therefor, including provisions for review of the final determinations therein made, and that the specific language last above quoted must be limited to proceedings contemplated and regulated by section 5901, Comp. St. 1922.

This section became section 77-1004, Comp. St. 1929. It was amended in 1933. Laws 1933, c. 129, p. 504. The title provided that it was an act to provide that the State Board of Equalization and Assessment shall equalize the valuation of both real and personal property between counties. The words "real" and "personal property" were inserted in several places in the section. The particular language here involved was amended to read "From any final decision of the state board of equalization and assessment with respect to the valuation of any real or personal property, any person, county or municipality affected thereby may prosecute a writ of error to the supreme court * * *."

In the 1943 revision this section was divided into and became sections 77-505 to 77-510, R. S. 1943. There were a number of editorial changes made in the act which are not important here.

The rule is: "In codifying or revising statutes, a mere rearrangement of the sections or parts of a statute, or the placing of portions of what was originally a single section in separate sections, does not change the purpose, operation and effect thereof." Gembler v. City of Seward, 136 Neb. 196, 285 N. W. 542, on rehearing, 136 Neb. 916, 288 N. W. 545.

The provision for "a writ of error" in the language hereinbefore considered was amended to "an appeal." However, we find nothing in the amendments to indicate a legislative intent to change the construction placed on the appeal provision in the Elmen case.

It is patent that Mid-Continent was not seeking to secure an equalization of assessment before the board, but rather sought there to secure a reduction of its assessment based on alleged errors in the method of computation and elements entering into value. See Scotts Bluff County v. State Board of Equalization and Assessment, 143 Neb. 837, 11 N. W. 2d 453.

"The right of appeal is purely statutory. Unless the statute provides for appeal in the specific instance under examination at any time, such right does not exist." Roberts v. City of Mitchell, 131 Neb. 672, 269 N. W. 515.

Obviously section 77-617, R. R. S. 1943, is not involved here. That section relates to appeals in matters relating to the assessment of railroad property under different and separate statutory provisions.

It necessarily follows that the procedure which Mid-Continent has here followed and the remedy sought here are without authority of law and that the appeal must be dismissed.

APPEAL DISMISSED.

LOWELL DAUGHERTY, ALSO KNOWN AS BUD DAUGHERTY, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.

48 N. W. 2d 76

Filed June 1, 1951. No. 32954.

1. **Larceny.** Larceny is the unlawful and felonious stealing, taking, and carrying away of the personal property of another, of some value, with a felonious intent on the part of the taker to permanently deprive the owner of his property.
2. ———. Taking an article feloniously is accomplished by simply laying hold of, grasping or seizing it animo furandi, with the hands or otherwise. And the very least removal of it from the place where found, by the thief, is an asportation or carrying away.
3. **Trial.** The instructions given to the jury by the trial court defining the expression "beyond a reasonable doubt," and on

the presumption of innocence, as set forth in the opinion are not prejudicially erroneous.

4. **Larceny.** The intent with which the property alleged to be stolen was taken by the accused may be proved by circumstantial evidence.
5. **Trial.** It is not error to refuse requested instructions when the substance of them is given by the court in its instructions to the jury.
6. **Appeal and Error.** Errors assigned by a plaintiff in error but not discussed by him will be considered waived and will not be examined by this court.
7. **Larceny: Trial.** Evidence examined, and held sufficient to sustain a verdict of guilty of the crime charged in the information against the defendant in the case at bar.

ERROR to the district court for Adams County: FRANK J. MUNDAY, JUDGE. *Affirmed.*

J. E. Willits, for plaintiff in error.

Clarence S. Beck, Attorney General, and *Dean G. Kratz,* for defendant in error.

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

MESSMORE, J.

The defendant, Bud Daugherty, was prosecuted in the district court for Adams County and convicted of grand larceny under an information that charged he unlawfully and feloniously, on or about the 4th day of September 1950, stole and took away two truck tires belonging to and owned by the Home Oil Company, of the value of more than $35, to wit: $224, with intent to convert the same to his own use. He filed a motion for new trial. Upon the overruling thereof, and after being sentenced to a term of 18 months in the State Penitentiary, he brings error proceedings to this court to review the record of his conviction and sentence.

We herein refer to Bud Daugherty as the defendant, and the Home Oil Company as the oil company or station.

The defendant appropriately challenged during the

trial the sufficiency of the evidence to prove his guilt beyond a reasonable doubt.

It appears from the record that the Home Oil Company is engaged in the sale of gas, oil, tires, and the servicing of cars. It is located on the east side of Burlington Avenue outside the city limits of Hastings, facing north, and U. S. Highway No. 6 runs east and west to the north of it. The building is approximately 100 yards long and consists of a filling station, garage, and two offices. In addition to the offices there are four large rooms, one located on the south side of the building and used for storage of grease, oils, other materials, and tires. On the south side of this room tires are stored, separated by a wire fence enclosure with a wire gate. In this enclosure there is one door to the east. There are four entrances to the whole room, two large 12 by 12 doors on the north, one 12 by 12 door on the south, and a small door on the northwest corner of the room leading into the office.

The front end of the building sits approximately 50 feet from U. S. Highway No. 6. South of the building is a vacant space used for storage and parking, about 75 yards wide and 125 yards long. Near the south of the building the ground, at the time in question, was hard and dry. Approximately 50 yards from the building the ground was dry and dusty.

An employee of the oil company who works from 9 p. m. until 7 a. m., as a station attendant, first saw the defendant a few minutes before 9 p. m., on September 4, 1950. The defendant was in the station and remained about 15 minutes. The next time this employee saw the defendant was about 11:25 p. m., the same night. He noticed the doors to the south of the garage were open about 18 inches. They were generally opened all the way, or closed. He walked back to close the doors. Before doing so he glanced out and saw a man wandering around about 50 yards distant. It was dark. He walked to where the man was, put his hand on the man's

shoulder, and flashed a light in his face. It was the defendant. The defendant was rolling a tire, and it dropped in front of him. This employee asked him what he was doing. The defendant replied that he did not know, gave no reason for his being there and having the tire, and made some statement that he lived a short distance away. He had had some drinks but his talk made sense. The employee picked up the tire and rolled it back up between the south doors of the station. The defendant did not protest, and the employee did not take him into custody. This employee next saw the defendant about midnight when he was in a taxicab in front of the oil station. The police took him into custody.

The chief of police, who was acquainted with the defendant, saw him on the morning of the 5th of September in the police station. He asked him for his shoes, which the defendant gave him. The chief of police and the sheriff of Adams County went to the oil station at about 10 or 11 o'clock that morning. Together with the manager of the station and the employee who was on duty the night previous they made a comparison of the foot tracks to the south of the building and the defendant's shoes by placing a shoe in a track. It fit exactly. They also observed a tire track and compared it with the tread on the truck tire that was taken. The track fit the tread exactly. They followed the prints from the shoes and one of the tires from the oil company building to where the tracks terminated near a telephone pole situated on the west side of Burlington Avenue which is in the city limits and where they found the other tire. The oil company retained custody of the tires after they were found.

The evidence in behalf of the defendant is to the effect that he and a friend met the evening of September 4, 1950. The defendant had been drinking beer and whisky since 4 or 5 o'clock. The friend testified that the defendant must have had 20 drinks or more. He drank with him and was with him until about 11 p. m.

They parked near a used-car sales place close to the oil company, and the friend went into the Home Cafe right next door to the oil company. The defendant got into the back seat of the car to sleep. He was sick, and had had too much to drink. When the friend returned from the cafe 40 or 45 minutes later, the defendant was gone. The friend went on to his home but later returned, about midnight, and saw the defendant standing in front of the oil company with a police officer.

About 12:12 a. m., a taxicab company received a call from the defendant to transport him to the oil company. En route he stopped at his mother's drive-in which is the first place east of the oil company, where he stayed 20 to 25 minutes to procure something to eat. When he entered he sat on the ice cream counter, endeavored to talk, and seemed to go from one subject to another. His mother prepared him some sandwiches which he wanted to take along. Employees of the drive-in and the defendant's mother, brother, and sister, testified that the defendant was drunk and that he staggered. The driver of the taxicab testified that the defendant was "practically" drunk, his gait was unsteady, and he staggered a little as he left the taxicab to go to the drive-in. The police officers testified that defendant had been drinking, but in their opinion he was not drunk.

There was competent evidence identifying the two truck tires in question in stock in the oil company's building on September 4 and 5, 1950, as two Riverside, Montgomery Ward de luxe truck tires 11.00-20, of the reasonable market value of $224 or more, and were the only truck tires of that size in stock at this time.

In considering the defendant's assignment of error that the evidence is insufficient to prove the defendant guilty of grand larceny beyond a reasonable doubt, we deem the following authorities pertinent to a determination.

In McIntosh v. State, 105 Neb. 328, 180 N. W. 573, 12 A. L. R. 798, the court defined larceny as an "unlawful

and felonious stealing, taking and carrying away of the personal property of another, of some value, with the felonious intent on the part of the taker to permanently deprive the owner of his property," disapproving Ladeaux v. State, 74 Neb. 19, 103 N. W. 1048, and Cheney v. State, 101 Neb. 461, 163 N. W. 804, insofar as such cases make an essential element of the offense "that the taking must be with a felonious intent to convert the stolen property to the taker's own use." The court said: "Any removal of the property, after the same is under the complete control of the taker, from the spot where found, with the requisite intent of the taker to steal, is a sufficient asportation * * *."

The intent with which the property alleged to be stolen was taken by the accused may be proved by circumstantial evidence. See Phillips v. State, 144 Neb. 772, 14 N. W. 2d 606.

In the case of Gettinger v. State, 13 Neb. 308, 14 N. W. 403, the court said: "To take an article feloniously is accomplished by simply laying hold of, grasping or seizing it animo furandi, with the hands or otherwise. And the very least removal of it from the place where found, by the thief, is an asportation or carrying away."

The evidence shows that one of the stolen tires was found in the defendant's possession and the other was found close by. These tires had been carried away and so done without the consent of the owner. We believe the evidence brings the offense committed by the defendant within the elements constituting the crime of grand larceny.

The defendant contends that by the excessive use of intoxicating liquors he was wholly deprived of reason to the extent that he was unable to formulate in his mind the intent to commit the crime of larceny.

The rule is: Intoxication is no justification or excuse for crime; but evidence of excessive intoxication by which the party is wholly deprived of reason, if the intoxication was not indulged in to commit crime, may

be submitted to the jury for it to consider whether in fact a crime had been committed. See O'Grady v. State, 36 Neb. 320, 54 N. W. 556.

The trial court instructed on intoxication in conformity with the above rule and substantially as requested by the defendant, thereby leaving this defense to the jury to determine whether or not, from the evidence, the defendant was capable of forming an intent to commit the crime.

The defendant predicates error on each instruction given by the court and those requested by the defendant and refused. In his brief he does not discuss error in these instructions except given instructions Nos. 8, 9, and 12, and instructions proffered but refused, Nos. 10 and 13.

The trial court in instruction No. 9 informed the jury: "By the term 'reasonable doubt', as herein used, is not meant a mere caprice, conjecture or possibility. It is an actual, substantial doubt based on a reason arising from either the evidence or want of evidence in the case, and sufficient to cause one to hesitate and refuse to act in the more important affairs and concerns of life."

In Smith v. State, 153 Neb. 308, 44 N. W. 2d 497, the same objection was raised as to the legal propriety for furnishing a definition of a reasonable doubt. This court held such instructions were not prejudicial error. We said: "The instructions in these particulars are in all material respects identical with those quoted and approved in a very recent case in this court. Owens v. State, 152 Neb. 841, 43 N. W. 2d 168."

The defendant complains of instruction No. 8, given by the trial court, as follows: "The defendant in this case is presumed to be innocent of the offense with which he stands charged. This presumption of innocence partakes of the nature of evidence, to the benefit of which the defendant is entitled; it includes that the defendant is presumed to have been of good character, and to have

had nothing to do with the commission of the offense charged in the information in this case. This presumption of innocence attends the defendant throughout the trial, until such time as the defendant may be proved guilty beyond a reasonable doubt, to the satisfaction of each and every juror in the case. This does not mean beyond the possibility of a doubt, but, as the language of the instruction expresses it, beyond a reasonable doubt."

In Owens v. State, 152 Neb. 841, 43 N. W. 2d 168, an instruction on the presumption of innocence and reasonable doubt was given in substantially the same language as appears in instructions Nos. 8 and 9 in the instant case. The court said, following Davis v. State, 51 Neb. 301, 70 N. W. 984: "When complaint is made of the refusal of the district court to give an instruction asked, the burden is upon the party complaining to show, not only that he was probably prejudiced by the refusal of the court to give the instruction, but he must also show that the entire instruction was correct as a proposition of law and applicable to the facts in evidence in the case."

In Collins v. State, 46 Neb. 37, 64 N. W. 432, an instruction on reasonable doubt was approved by this court, which contains the subject matter as appears in instruction No. 9 given by the court on reasonable doubt, except that such instruction contained the words "groundless" and "an ordinary prudent man" which were not in instruction No. 9 given by the trial court. Likewise, an instruction very similar to instruction No. 9 in the present case was approved in Whitney v. State, 53 Neb. 287, 73 N. W. 696. See, also, Hiller v. State, 116 Neb. 582, 218 N. W. 386, 58 A. L. R. 1322.

We find no prejudicial error in the giving of the instructions complained of.

The defendant complains of the trial court giving instruction No. 12, which contained the following language: "You will be given two forms of verdict and you will use the one upon which the twelve jurors agree

as the right verdict in the case and sign it by your forman (foreman)." The contention is that the quoted language has the effect of coercing the jury into a verdict, while the law provides a jury may report an agreement impossible. The authorities, Meadows v. State, 182 Ala. 51, 62 So. 737, Ann. Cas. 1915D 663, and Gidley v. State, 19 Ala. App. 113, 95 So. 330, cited by the defendant, are wholly inapplicable, and discussion of the cases is not deemed necessary. This assignment of error is without merit.

We have examined the instructions requested by the defendant and refused. The following rule is applicable.

In Brice v. State, 138 Neb. 853, 295 N. W. 894, the court said: "Defendant also complains of rulings of the trial court in refusing to give a number of instructions requested by him. An examination of the record discloses that the substance of such requested instructions as were proper under the issues, the law and the evidence was given by the trial judge on his own motion. The instructions given do not as a whole contain error prejudicial to defendant." See, also, Owens v. State, *supra.*

The defendant has failed to show the given instructions by the trial court to be legally incorrect and of showing any prejudice in the refusal of his requested instructions.

"It is not error to refuse requested instructions when the substance of them is given by the court in its instructions to the jury." Smith v. State, *supra.*

We have discussed the errors complained of by the defendant in his brief and discussed therein. The defendant has assigned many errors which are not considered in his brief or discussed. We deem the following rule applicable: Errors assigned but not discussed will be considered waived and will not be examined by this court. See, Smith v. State, *supra;* Little v. Loup River Public Power District, 150 Neb. 864, 36 N. W. 2d 261, 7 A. L. R. 2d 355.

For the reasons stated, we find no merit in the contention of the defendant that there were prejudicial errors in the proceedings which resulted in his conviction and sentence.

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

AFFIRMED.

DANNY TURPIT, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.

48 N. W. 2d 83

Filed June 1, 1951. No. 32975.

1. **Appeal and Error.** Errors assigned but not argued will be considered as waived.
2. **Criminal Law: Evidence.** The general rule is that evidence that accused has committed another crime independent of, and unconnected with, the one on trial, is inadmissible; it is not competent to prove one crime by proving another.
3. ———: ———. However, there are exceptions to the above rule, as well established as the rule itself, one of which is that evidence of other similar acts or offenses committed at or about the time involved, is admissible to be considered solely for such purposes where intent is or becomes material and such acts or offenses tend to establish the absence, or to rebut a defensive inference or claim, of mistake, accident, or inadvertence.
4. ———: ———. 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.
5. **Evidence.** 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.
6. ———. 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.
7. ———. Photographs of the person or body of a deceased, proper foundation having been laid, may ordinarily be re-

ceived 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.

8. ———. An objection that certain evidence offered is incompetent, irrelevant, and immaterial, is not necessarily sufficient to require its exclusion on the ground that there is not sufficient foundation for its introduction.

9. **Homicide: Assault and Battery.** Where one intentionally points a loaded gun at another, he is guilty of an unlawful assault, and if such gun is unintentionally discharged and the person assaulted is killed thereby, he is guilty of manslaughter.

ERROR to the district court for Clay County: FRANK J. MUNDAY, JUDGE. *Affirmed.*

Max G. Towle, James D. Conway, and *D. B. Massie,* for plaintiff in error.

Clarence S. Beck, Attorney General, and *Bert L. Overcash,* for defendant in error.

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

CHAPPELL, J.

An information charged defendant with manslaughter. A jury found him guilty. His motion for new trial was overruled, and, after refusing the application of his counsel to place him on probation, defendant was sentenced to one year and three months in the State Penitentiary. Thereupon defendant prosecuted error to this court, assigning substantially that: (1) The trial court erred in admitting certain evidence; and (2) erred in giving instruction No. 7. We conclude that the assignments should not be sustained. Other alleged errors assigned but not argued will, under the rules of this court, be considered as waived. Revised rules of the Supreme Court, 8 a 2 (4), (5). Mason v. State, 132 Neb. 7, 270 N. W. 661; Maher v. State, 144 Neb. 463, 13 N. W. 2d 641, 323 U. S. 757, 65 S. Ct. 91, 89 L. Ed. 606; Moore v. State, 148 Neb. 747, 29 N. W. 2d 366; Hameyer v. State, 148 Neb. 798, 29 N. W. 2d 458.

In the light of the assignments, we have searched the record. Defendant, 14 years old at the time of the alleged offense, had attended a military school for one year. He had returned to his home in Hastings on May 21, 1950. William E. Hewitt, then 13 years old, hereinafter called William, was a friend of defendant. They had corresponded perhaps a dozen times during the year while defendant was away at school. During the week between May 21 and Saturday, May 27, 1950, the day of the alleged offense, they had been together about two hours of each day. Their families lived 3 or 4 blocks from each other. They were friendly and neighborly. The night before the alleged offense they all had dinner together at the Hewitt home.

On Saturday morning defendant returned to the Hewitt home where he and William helped clean up the house. They wanted to go hunting or target shooting, which they both liked to do. They were permitted to go on Saturday morning if an adult went with them, but they found none willing to do so.

Defendant was attracted by guns, and owned several which he frequently handled and at times had previously loaded and neglected to unload them. Among them was a 10-gauge shotgun, only one barrel of which was functioning.

About 11:15 or 11:30 a. m., the two boys returned to the Turpit home where they were alone. There such shotgun, handled by defendant, was discharged, striking William a little to the left of the center of his chest just above the heart, causing his almost instant death. Defendant called the police. The call was received at 12:50 p. m. A police officer responded at once. When he arrived defendant was in the front yard. William was found slumped to the right on a couch located under the east windows of a 12 by 12 sewing room. His body was warm, but there appeared to be no heart beat. An ambulance arrived, and the officer called police headquarters requesting the presence of a doctor, the county

attorney, and other police officers. Upon their arrival William was found to be dead.

Competent evidence adduced by the State was that then and there, while defendant was out in the front yard, he calmly and with a clear voice first made statements to neighbors that he "just shot a kid * * * 'He dared me to shoot him and I shot him.' * * * 'That's only 20 years for manslaughter.'" After such statements had been made, he told the police officer that "they were in this room playing with this gun. He went to the toilet; was in there approximately five minutes; came out of the room. Willie Hewitt said, 'I dare you to fire the gun. Now it is unloaded.' He said, 'I aimed the gun at the windows, pulled the trigger, and I guess when I pulled the trigger it pulled the gun down and that was it.'" However, a short time later defendant said to William's mother and brother, "He dared me to shoot him so I did."

Defendant testified that while playing with guns they both handled the shotgun. He testified that William picked up and loaded the shotgun, but defendant removed the two shells, put them on the couch, and went to the rest room. When he returned, two shells were still on the couch, and William said that defendant would be afraid to shoot the gun, whereupon defendant started to handle the gun and demonstrate the manner in which they did so at military school.

Defendant admitted the shooting and death, but denied that he ever intentionally or willfully pointed the gun at William, but rather that standing 3½ feet from the west wall, he first pointed the gun toward the north, away from William, then, the better to demonstrate, swung around facing him but aimed it at the window above the couch at a 45-degree angle a good 2½ feet over William's head. However, the gun slipped from his arm; he grabbed it with his whole hand, squeezed the trigger as it fell in a downward position, and the gun was discharged. His contention was that

both the aiming and shooting were entirely accidental, and not accompanied by an intentional or willful pointing of the gun at any time. In that situation, a question presented and properly submitted to the jury by the trial court was whether defendant intentionally or accidentally pointed the gun at William.

Therefore, in rebuttal, the trial court over objections of defendant permitted four boys about the same ages as defendant to testify that defendant committed similar acts in the same home with the same gun on Wednesday evening and Thursday just preceding the Saturday offense here involved. Three of them testified in substance that on Wednesday evening, in their presence and also in the presence of William, defendant brought the same shotgun up from the basement in his home, opened the barrel, showed them that he had a cartridge in his hand, inserted it, and loaded the gun, pulled back the hammer part way, and swinging it around aimed it at all of the boys. The fourth boy testified in substance that on Thursday defendant got the same gun in the same home, carried it around, loaded it, cocked it, and pointed it at the chest of the witness.

When such evidence was received, the trial court orally told the jury that it was received for one purpose only, and that it was to be considered by them along with other evidence in the case solely for the purpose of determining whether or not defendant intentionally or accidentally pointed the gun at William before it was fired. In instruction No. 10 given to the jury in writing, the trial court carefully and properly so limited the sole purpose of such evidence by use of the following language: "This evidence has been received and should be considered by you solely on the question as to whether or not the defendant intentionally or accidentally pointed the gun at Hewitt before the said gun was fired. If you find from the evidence beyond a reasonable doubt that the defendant did intentionally point a loaded shotgun at other persons before the shooting of Hewitt, then

you may consider said pointing of said gun at others, together with all the other evidence in this case, upon the question as to whether the defendant intentionally pointed said gun at Hewitt before it was discharged, or whether the pointing of said gun was an accident." No complaint is made of that instruction.

Defendant argued that the admission of such evidence was prejudicially erroneous. Concededly, as stated in 22 C. J. S., Criminal Law, § 682, p. 1084, citing many authorities, including cases from this jurisdiction: "The general rule is that evidence that accused has committed another crime independent of, and unconnected with, the one on trial is inadmissible; it is not competent to prove one crime by proving another."

However, there are exceptions to such rule, as well established as the rule itself, and which have in fact been recognized by some authorities as a part of the rule.

As stated in 22 C. J. S., Criminal Law, § 683, p. 1095, citing numerous cases sustaining it: "Another common exception is that evidence of other offenses, particularly similar ones, is admissible where it tends to establish the absence, or to rebut an inference or claim, of mistake, accident, or inadvertence; * * *."

As stated in I Wharton's Criminal Evidence (11th ed.), § 350, p. 520: "Testimony of other similar offenses has been admitted to show intent where there is or may be, from the evidence, an inference of mistake, accident, want of guilty knowledge, lawful purpose, or innocent intent. Where an act is equivocal in its nature, and may be criminal or honest according to the intent with which it is done, then other acts of the defendant, and his conduct on other occasions, may be shown in order to disclose the mastering purpose of the alleged criminal act." Also, again in § 354, p. 536, citing numerous cases, it is said: "Evidence which shows, or tends to show, the commission of another crime is admissible when it shows

the absence of accident or mistake in the commission of the act charged against the accused."

In Underhill's Criminal Evidence (4th ed.), § 183, p. 327, citing numerous authorities, including cases from this jurisdiction, it is said: "Another exception to the rule occurs when the intention present in an act is material. Thus, suppose the question is, was a given act, either by the accused, or by some other person, intentional or accidental? Here it is relevant to prove that the person whose intention is in question had performed acts of a precisely similar nature either before or after the act the intention of which is in question. And if it be found that he has performed many such acts, we have the best of grounds for drawing the conclusion that the act, in the present instance, is intentional and not accidental." See, also, 20 Am. Jur., Evidence, § 313, p. 293; II Wigmore on Evidence (3d ed.), § 300, p. 192, § 302, p. 196, § 307, p. 207, § 363, p. 274.

As stated in Jones on Evidence, Pocket Edition, § 144, p. 164, citing cases: "Applying the same principle the courts have often received evidence of other similar offenses in the trial of indictments for homicide or homicidal assaults, as tending to show a deliberate plan or to repel the inference of accident." Again, in § 145, p. 165, it is said: "Such evidence is only allowed to show the knowledge or intent of the party or to repel the inference of accident, and then only when the proof shows such a connection between the different transactions as raises a fair inference of a common motive in each." See, also, Knights v. State, 58 Neb. 225, 78 N. W. 508, 76 Am. S. R. 78; People v. Seaman, 107 Mich. 348, 65 N. W. 203, 61 Am. S. R. 326; and People v. Molineux, 168 N. Y. 264, 61 N. E. 286, 62 L. R. A. 193, leading cases; and State v. McDonald, 14 R. I. 270, a case very similar to that at bar.

"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." Anderson v. State, 150 Neb. 116, 33 N. W. 2d 362. In the light of the foregoing, we conclude that the evidence was properly admissible to rebut the defense of accident made by defendant.

Over objection of defendant, a photograph of deceased was received in evidence. It identified him and clearly indicated the nature, size, extent, and location of the wound, thus explaining, attesting, and verifying the related detailed testimony of the physician who first examined deceased after the alleged offense, and testified that the photograph was a fair representation of what he observed at that time. The undertaker also affirmed the accuracy of the photograph. Under the peculiar circumstances it also served as evidence to demonstrate, in the light of scientific tests made with the gun involved, at distances of 3, 6, and 9 feet, that the gun was less than 3 feet from deceased when fired and that the shooting did not occur in the manner and from the point claimed by defendant.

In Vaca v. State, 150 Neb. 516, 34 N. W. 2d 873, this court held: "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.

"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.

"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."

In that connection, Lee v. State, 147 Neb. 333, 23 N. W. 2d 316, and Knihal v. State, 150 Neb. 771, 36 N. W. 2d 109, 9 A. L. R. 2d 891, relied upon by defendant, are

clearly distinguishable upon the facts and applicable law.

The objection made by defendant to admission of the photograph was that it was "incompetent, irrelevant and immaterial; not in support of any issue; highly prejudicial." No objection was made on the ground that there was not sufficient foundation for its introduction.

In Neal v. State, 104 Neb. 56, 175 N. W. 669, this court held: "An objection that certain evidence offered is 'incompetent, irrelevant and immaterial' is not necessarily sufficient to require its exclusion on the ground that there is not sufficient foundation for its introduction." In any event, the photograph was properly identified, verified, and authenticated as correctly reflecting the condition in which the physician and undertaker found the body of deceased after the alleged offense. See Annotation, 9 A. L. R. 2d 899. Under the circumstances presented, we conclude that it was not an abuse of discretion to admit the photograph in evidence.

We turn then to defendant's contention that instruction No. 7 was erroneous. In that connection, it will be noted that an instruction identical in all material respects with that about which defendant here complains was given by the trial court under circumstances comparable with those at bar, and thereafter approved by this court in Egbert v. State, 113 Neb. 790, 205 N. W. 252. We therefore conclude that the contention has no merit.

In the light of the evidence appearing in this record, a jury might well conclude, as it must have done, that defendant intentionally pointed a loaded shotgun at deceased, which was an unlawful assault, and that under such circumstances the gun was unintentionally discharged, killing William, which was manslaughter. Ford v. State, 71 Neb. 246, 98 N. W. 807, 115 Am. S. R. 591; Thiede v. State, 106 Neb. 48, 182 N. W. 570, 15 A. L. R. 237; Egbert v. State, *supra;* Annotation, 5 A. L. R. 610.

For the reasons heretofore stated, we conclude that there was no prejudicial error in the record, and that judgment of the trial court should be and hereby is affirmed.

AFFIRMED.

RICHARD B. RUPLINGER, APPELLANT, V. EDWARD J. RUPLINGER ET AL., APPELLEES.
48 N. W. 2d 73

Filed June 1, 1951. No. 32978.

Corporations. An action to enforce corporate rights or to redress injuries to a corporation cannot be maintained by a stockholder in his own name. Such a suit must be brought by the corporation or by a stockholder on behalf of the corporation.

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

W. H. Kirwin and *Eugene D. O'Sullivan,* for appellant.

Mothersead, Wright & Simmons, for appellees.

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

CARTER, J.

This is an action by plaintiff, Richard B. Ruplinger, to recover for the fraudulent conversion of property and money by the defendants, Edward J. Ruplinger and Emma F. Ruplinger. Defendants filed general demurrers to the petition last filed, which were sustained by the trial court. Plaintiff failed to plead further, and a judgment of dismissal was entered. Plaintiff appeals.

The allegations of the petition are substantially as follows: Plaintiff and Edward J. Ruplinger are brothers. The defendants are husband and wife. In 1920 plaintiff constructed a warehouse in Scottsbluff, Nebraska. The two brothers and James A. Dunlay organized a corpo-

ration known as the Platte Valley Storage Company. Plaintiff transferred the warehouse to the corporation and his brother contributed cash. Stock in the corporation was issued to Edward F. Ruplinger at the book value of $26,000; to Richard B. Ruplinger in the amount of $13,000; and to Dunlay in the amount of $100. It was agreed that $7,000 of the stock issued to Edward was to be held by him for transfer to Richard when it was paid for. Edward was named president of the corporation, Richard was named vice president, and Dunlay became secretary-treasurer. The salary of the president was fixed at $100 a month and that of the vice president at $50 a month. Edward was to manage the business. Richard was not to be active in the business and shortly thereafter he moved to California.

The petition alleges that in 1929 Richard paid the $7,000 for the stock held for him by Edward, but that it was not transferred to him. In August 1926, the name of the corporation was changed to the Ruplinger Storage and Transfer Company. No new stock was issued and salaries were paid until August 1935. No salary was thereafter paid to Richard until 1940 when an adjustment of back salary was made. On October 14, 1943, Edward refused to make further payments of salary and Richard then demanded an accounting of the property and profits of the corporation.

On October 16, 1944, plaintiff discovered through the office of the Secretary of State that the Ruplinger Storage and Transfer Company was dissolved by the defendants in 1934 and that the warehouse and lots upon which it stood were conveyed prior to the dissolution to Edward by Edward and Emma Ruplinger as officers of the corporation. Plaintiff alleges that this property was transferred to Edward without his knowledge or consent. The prayer of the petition is that the court determine the value of his undivided interest in the property and render judgment against the defendants for the amount so found.

The defendants contend that a stockholder has no legal title to the property of a corporation until a dividend is declared, or a division is made on the winding up or dissolution of the corporation. It is urged that the petition shows on its face that the suit is by one stockholder against another to recover his share of the corporate property alleged to have been fraudulently conveyed by the corporation to the defendant Edward J. Ruplinger. The petition clearly shows that this was the nature of the suit. The question raised by the demurrers is whether a stockholder may sue in his own name in such a case, or whether, as contended by the defendants, the suit must be brought by or on behalf of the corporation.

The corporation was formed in 1920. Under the law existing until 1934, the date of the claimed dissolution, it required a vote of two-thirds of its members to dissolve the corporation. § 24-211, Comp. St. 1929. The petition shows that plaintiff was at all times the owner of more than one-third of the stock of the corporation. It would appear that a valid dissolution could not be had by the action of stockholders without the consent of the plaintiff. In any event, the corporation even if dissolved could sue to recover upon a cause of action accruing in favor of the corporation. § 24-112, Comp. St. 1929. Lincoln Butter Co. v. Edwards-Bradford Lumber Co., 76 Neb. 477, 107 N. W. 797. Such corporation could likewise be sued in its corporate name after dissolution. § 24-113, Comp. St. 1929. Heenan & Finlen v. Parmele, 80 Neb. 514, 118 N. W. 324. No statutory bar has been pointed out which would prevent the corporation from maintaining the suit, or to its being made a party to the suit if a stockholder brought the action in a representative capacity.

A stockholder may not bring an action in his own name to recover for wrongs done to the corporation or its property. Such a cause of action is in the corporation and not the stockholders. The right of a stockholder

to sue is derivative in its nature and can be brought only in a representative capacity for the corporation. Rettinger v. Pierpont, 145 Neb. 161, 15 N. W. 2d 393.

The controlling rule is well set out in Wilhelm v. Consolidated Oil Corporation, 84 F. 2d 739, wherein it is said: "The Prairie Companies have not been dissolved. If such agreement, conveyances and transfers were wrongful, the direct injury was to the corporations and their properties. The right of action for such an injury is in the corporation and not in its stockholders; and suit thereon must be brought by the corporation or by a stockholder as a derivative suit. This suit is not brought by the Prairie Companies or by their stockholders as a derivative suit. The bill does not seek restoration to the Prairie Companies of the property conveyed and transferred but seeks recovery thereof to the stockholders of such companies. It seeks relief solely in behalf of the stockholders in their own right and not in behalf of the Prairie Companies as a derivative right. No demand upon and refusal by the Prairie Companies to bring the suit, nor facts excusing such demand and refusal are alleged. The Prairie Companies would be necessary parties to a derivative suit and they are not joined."

The general rule is that actions to enforce corporate rights or to redress injuries to the corporation cannot be maintained by a stockholder in his own name. The injury in such instances is to the corporation and it does not give an individual right of action to a stockholder. Brictson v. Woodrough, 164 F. 2d 107; Hodge v. Meyer, 252 F. 479; Cullum v. General Motors Acceptance Corp. (Tex. Civ. App.), 115 S. W. 2d 1196.

Under the rule announced in the foregoing cases the plaintiff cannot maintain an action in his own name under the facts set out in his petition. The remedy under the facts stated is a suit by the corporation, or, if the corporation refuses to sue, by a suit brought on behalf

of the corporation. The action of the trial court in sustaining the demurrers and dismissing the suit is therefore correct. The judgment is affirmed.

AFFIRMED.

THE BOARD OF REGENTS OF THE UNIVERSITY OF NEBRASKA, A CORPORATION, APPELLEE, V. THE COUNTY OF LANCASTER, NEBRASKA, APPELLANT.

48 N. W. 2d 221

Filed June 7, 1951. No. 32979.

1. **Colleges and Universities: Constitutional Law.** A statute, section 85-172, R. R. S. 1943, making it the duty of the Board of Regents of the University of Nebraska to prescribe rules for the admission of indigent patients who may be sent to the University Hospital by the county authorities of any county of the state and to prescribe the conditions for such admission, is not a delegation of legislative power to an administrative agency which is prohibited by the Constitution.
2. ———: ———. A rule promulgated by the Board of Regents, providing that no indigent patient shall be admitted to the University Hospital from any county except upon condition that the county shall pay the cost of new and expensive drugs and medicines used which are not paid for by the patient, is not unreasonable or arbitrary and is a valid exercise of the rule-making power authorized by section 85-172, R. R. S. 1943.

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

Frederick H. Wagener, Herbert A. Ronin, Rollin R. Bailey, and *William L. Schaumberg,* for appellant.

Cline, Williams, Wright & Johnson, for appellee.

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

CARTER, J.

This is an action upon a claim filed by the Board of Regents of the University of Nebraska against Lancas-

ter County for drugs and medicines in the amount of $39.97 which were furnished to indigent patients sent to the University Hospital by the county. The trial court found for the plaintiff and entered judgment against the county for $39.97 and costs. The defendant county appeals.

The facts are not in dispute. The question raised is whether the plaintiff may charge the county for expensive drugs and medicines furnished by the University Hospital to indigent patients sent to the hospital by the county pursuant to the rules adopted by the Board of Regents governing the admission of indigent patients to the hospital.

The general government of the University of Nebraska is vested in a board of regents, subject to the direction of the Legislature. Art. VII, § 10, Constitution of Nebraska. As such, it is charged with the management and operation of the university, including the College of Medicine and the University Hospital. § 85-107, R. R. S. 1943; § 85-172, R. R. S. 1943. The Legislature has specifically authorized the Board of Regents to prescribe rules for the admission to and discharge from the University Hospital, the medical and surgical care of indigent patients sent to the University Hospital by the county authorities of the counties of the state, and to take all other needful measures to promote the efficiency of the hospital. § 85-172, R. R. S. 1943. Pursuant to this authority the Board of Regents adopted a rule which provides: "Worthy sick, except as hereinafter specified, shall be admitted upon receipt by the hospital authorities of a written application which shall state, among other things, that the patient is in need of medical care or surgical attention and that he is unable to pay for professional services, board or nursing while in the hospital. The application must be signed by the Board of County Commissioners or Supervisors of the county in which the patient resides or by a representative of the Board duly authorized to sign the same in its be-

half. Said application shall be accompanied by a certificate of a legally licensed physician or surgeon of Nebraska, stating that the patient is in need of medical care or surgical attention. That for the purpose of providing necessary funds to defray the cost of certain kinds and types of new drugs, medicines and treatment, including antibiotics such as penicillin, streptomycin, aureomycin, chloromycetin; intravenous fluids such as glucose, Ringer solution, protein solutions and others; oxygen, vitamins and related products; anesthetic gases and such other similar kinds and types of drugs, medicines and forms of treatment, necessary for the proper care of indigent patients admitted to said hospital from any county in the State of Nebraska,—the Dean of the College of Medicine of the University of Nebraska is authorized to charge the county from which such patient or patients are admitted all of the cost, or such part thereof as remains unpaid by the patient at the time of his discharge, of such drugs, medicines and treatment furnished to such indigent patients. The Dean of the College of Medicine is empowered to determine what additional kinds and types of other new and expensive drugs, medicines and treatment, similar in character, shall be included within this rule. No indigent patient shall be admitted to said hospital from any county except upon condition that the county shall pay the cost of such new and expensive drugs, medicines and treatment which are not paid by the patient at the time of his discharge." The record shows that each county of the state was duly notified of the adoption of the foregoing rule and that the claim here made is for new drugs and medicines necessary for the care of indigent patients entering the hospital after notice of the adoption of the rule had been given to Lancaster County.

It is the contention of the county that the rule promulgated by the Board of Regents is invalid for the reason that it is beyond the scope of the delegation of

power contained in section 85-172, R. R. S. 1943, and, in any event, such section is void in that it purports to grant legislative powers to an administrative agency of the state.

We think it is within the power of the Legislature to delegate authority to the governing body of the university to make rules pertaining to the admission and discharge of indigent patients who, at the instance of county authorities, desire to make use of the facilities of the University Hospital. The rule made was germane to the efficient operation of the hospital and clearly within the range of the rule-making power contemplated by the Legislature when it enacted section 85-172, R. R. S. 1943. It is clearly evident that the Legislature never intended that all indigent patients could use the facilities of the University Hospital as of right. The purpose of the hospital was dual in character—to provide training for medical students and to treat indigent patients sent to them by the county authorities of the state. It was not the intent of the Legislature to relieve counties of their responsibilities to the indigent sick. It was only to the extent that the hospital could assume such responsibility that its facilities were made available to the counties of the state as an aid to the care of indigent patients. The necessity for rules governing the admission, care, and discharge of such patients was immediately evident to the Legislature. The power to make such rules was delegated to the Board of Regents. The rules are necessarily based upon the findings of facts, existing conditions, and available facilities. We think it was a proper exercise of legislative power to delegate to the Board of Regents the authority to find the facts and make the rules based thereon necessary to the efficient operation of the hospital to accomplish the purposes for which it was established. The rules made bear directly upon this subject and, being within the range of the powers delegated, they must be sustained unless found to be unreasonable and arbitrary. A rule

which provides for the payment by the county for new drugs and medicines furnished to indigent patients residing in such county, without profit to the Board of Regents, as a condition to the admission of the patient to the hospital, is not unreasonable or arbitrary, nor does it violate Article II, section 1, or Article III, section 1, of the Constitution of Nebraska. The relief from such a rule must come from the Legislature and not the courts.

The county relies upon Smithberger v. Banning, 129 Neb. 651, 262 N. W. 492, 100 A. L. R. 686. The case is not comparable to the situation presently before us. There the Legislature sought to delegate its powers to an outside agency by appropriating $4,000,000 without providing any rules or standards for its expenditure. In the case before us the purposes are expressed in the statutes on the subject. Section 85-172, R. R. S. 1943, makes it the duty of the Board of Regents, an administrative agency of the state, to make the rules by which the purpose of the statute may be expeditiously accomplished. A legislative enactment may properly confer general powers upon an administrative agency and delegate to the agency the power to make rules and regulations covering the details of the legislative purpose. The courts generally hold such rules to be valid except where they are not germane to the purposes of the act, or where they are unreasonable and arbitrary. Foley v. Benedict, 122 Tex. 193, 55 S. W. 2d 805, 86 A. L. R. 477; Griffin v. Gass, 133 Neb. 56, 274 N. W. 193; Lennox v. Housing Authority of City of Omaha, 137 Neb. 582, 290 N. W. 451. In the last case cited we said: "It must be borne in mind that it is for the legislature to determine what the law shall be; to create rights, duties and powers, and provide the general mode of conduct to be followed. This does not mean that the legislature must lay down a strict rule which must be followed by an administrative officer or board, but that such persons or boards may be vested by the legislature within rea-

sonable limits with the exercise of judgment in carrying out the expressed legislative purpose of the act. To ascertain and determine whether a certain area is unsanitary and substandard within the meaning of the act is an administrative function. The other functions prescribed in subdivison (b) are likewise rights, duties and powers properly delegated to the housing authority as the administrative agency. It cannot be seriously disputed that the legislature is clothed with power to delegate to administrative boards and agencies of the state the power of ascertaining the facts upon which the laws are to be applied and enforced. It may also authorize the doing of specific acts necessary to the furtherance of the purposes of the act. Such delegations of power and authorizations of acts do not transcend constitutional inhibitions so long as the law-making power is wholly reserved to the legislature and no part thereof has been delegated to any other governmental subdivision, board or agency."

The exercise of a legislatively-delegated authority to make rules to carry out an expressed legislative purpose, or for the complete operation and enforcement of a law with designated limitations, is not an exclusive legislative power. It is administrative in its nature and its use by administrative agencies is usually essential to the complete and wise exercise of the power in the accomplishment of the purpose which the Legislature intended. Consequently, the courts are not inclined to interfere with rules established by legislative direction where they bear a reasonable relation to the subject of the legislation and constitute a reasonable exercise of the powers conferred. The rule here involved is not violative of any legislative act and meets all other requirements of the exercise of the rule-making power by an administrative agency. The trial court was correct in so holding and the judgment entered for the plaintiff is therefore affirmed.

AFFIRMED.

ROBERT L. GILBERT, ADMINISTRATOR OF THE ESTATE OF SAMUEL M. KELLY, DECEASED, APPELLANT, V. THE FIRST NATIONAL BANK, MINATARE, NEBRASKA, A BANKING CORPORATION, APPELLEE, VERA FEIDLER, INTERVENER-APPELLEE.

48 N. W. 2d 401

Filed June 7, 1951. No. 32986.

1. **Trial: Parties.** A motion for judgment on the pleadings admits facts well pleaded or admitted, but does not admit conclusions of law, and it is only where, upon statements in the pleadings, one party is entitled by law to judgment in his favor that judgment should be so rendered by the court.
2. ———: ———. One having an interest in the result of pending litigation may intervene as a matter of right by virtue of section 25-328, R. R. S. 1943.
3. ———: ———. An intervener must factually plead some interest in the subject matter of the litigation as distinguished from a mere denial of the rights of plaintiff or defendant.
4. ———: ———. The interest in a matter in litigation which will authorize a person to so intervene must be such a direct and immediate interest that the person or persons seeking to intervene will either lose or gain by the direct operation and legal effect of the judgment which may be rendered in the action.
5. ———: ———. Such an interest must be one arising from a claim to the subject matter of the action or some part thereof or a lien upon the money or property or some part thereof, as distinguished from an indirect, remote, or conjectural interest in the result of the suit which is not enough to permit intervention.
6. ———: ———. An intervener who is not an indispensable party cannot change the position of the original parties or change the nature and form of the action or the issues presented.
7. ———: ———. An intervener is ordinarily entitled to present only issues, as distinguished from facts, which sustain or oppose the respective contentions of the plaintiff and defendant or either of them.
8. **Executors and Administrators.** The true representative is bound by those acts of an executor de son tort which are lawful and such as the true representative would be bound in any event to perform in the due course of administration.
9. ———. Although an executor de son tort cannot by his own wrongful act acquire any benefit, yet he is protected in all his

acts not for his own benefit which a rightful representative might do.

10. ———. An executor de son tort is liable to the lawful representative or a creditor, either in an action at law for conversion, or in equity for an accounting, for all the assets of the estate he received, except such as were used in payment of such demands as he, having the burden, affirmatively shows by way of set-off were just and lawful claims against the estate and such payments for the use and benefit of distributees as would have been lawfully made in due course of administration.

11. **Subrogation.** The doctrine of subrogation is not administered by courts of equity as a legal right, but is applied to subserve the ends of justice and do equity in the particular case under consideration. It does not rest on contract, and no general rule can be laid down which will afford a test in all cases for its application. Whether the doctrine is applicable to any particular case depends upon the peculiar facts and circumstances of such case.

12. **Subrogation: Executors and Administrators.** One advancing money to an executor or an administrator which is applied to the payment of debts for which the estate is bound may be subrogated to the place of the executor or administrator if it clearly appears by competent evidence that the estate has been benefited, or, in other words, that such money has been applied beneficially in payment of the debts.

13. ———: ———. It must be remembered, however, that the only equity of such a subrogee arises in case the money advanced has in fact been applied to the payment of debts for which the estate was justly and legally bound.

14. ———: ———. Such a subrogee can acquire no greater rights than those possessed by the party to whose rights he succeeded at the time such payments were made. In other words, a party cannot acquire by subrogation any rights not possessed by the party whose rights are subrogated.

15. ———: ———. Such rules apply as well where money is advanced or paid to an executor de son tort or a creditor of the estate, and applied by him to payment of debts for which the estate was justly and legally bound, since in such a situation it was in fact paid to the estate.

16. ———: ———. While such payments by third persons directly to a representative or creditors of an estate are not favored, reimbursement by way of subrogation will generally be allowed where it is clearly established that the payments were not made voluntarily but in good faith whereby the estate received the benefit thereof.

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

Jack L. Raymond and *Robert L. Gilbert,* for appellant.

Atkins, Lyman & Ferguson, and *Mothersead, Wright & Simmons,* for appellees.

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

CHAPPELL, J.

Plaintiff originally brought this action against The First National Bank of Minatare, hereinafter called the bank, to recover assets of the estate of Samuel M. Kelly, deceased. The petition substantially alleged that Samuel M. Kelly, also known as Sam Kelly, died intestate on October 29, 1949, at which time he had on deposit $1,775.13 in said bank payable upon his demand, and that plaintiff was appointed administrator of his estate on January 27, 1950. It alleged that although notified of his death on or about the date it occurred, the bank subsequently, without authority, paid out all of such money and, upon demand made by plaintiff on March 21, 1950, the bank refused to pay him any sum whatsoever.

Thereafter, defendant bank filed a motion to make Vera Feidler a party defendant, for the reason that she was a necessary party and claimed an interest in the subject matter of the action by reason of a survivorship account created by Sam Kelly and Vera Feidler. After a hearing the motion was sustained, and plaintiff was directed to file an amended petition making her a defendant. Thereafter plaintiff filed an amended petition reciting substantially the allegations of his original petition and adding: "That the plaintiff has been advised by the defendant Bank that said moneys were paid to Vera Feidler."

Upon the filing thereof, Vera Feidler filed a motion for leave to intervene and set up a claim to a part of the money claimed by plaintiff for the reason that she drew

a part of such funds from defendant bank and used them to pay lawful claims against the estate. Leave was granted, and she filed a petition in intervention, considered also by the parties as an answer, alleging in substance that after the death of Sam Kelly she withdrew $1,140.66 from the account which had been deposited in the name of Sam Kelly or Vera Feidler in case of death, for payment of certain specific charges which would have been proper claims against his estate, and that defendant bank paid $250 to Glenn Kelly on a check not drawn by intervener but by Sam Kelly during his lifetime. She admitted that she thereafter withdrew the balance of the deposit and placed it in another account, and offered to confess judgment therefor in favor of plaintiff. She alleged that if the bank wrongfully paid out the deposit, that she was also liable with the bank therefor, except the $250 aforesaid, and that she was entitled to a set-off for the amount withdrawn and paid for the benefit of the estate. Her prayer was for such relief, and for such other and further relief as might be just and equitable.

Plaintiff's motion thereafter filed, to strike the paragraphs of intervener's petition relating to payment of such claims for the benefit of the estate, and the prayer thereof, was overruled. In that connection, plaintiff in this appeal assigned such action by the trial court as error, but since such assignment was not contained in plaintiff's motion for new trial, it will not be considered here. Plaintiff then answered, denying generally.

The defendant bank answered plaintiff's amended petition, denying generally, but admitting the date of Sam Kelly's death and notice thereof, and admitting that on that date deceased had $1,775.13 on deposit with it, payable on his demand. In that connection, it alleged, however, that the deposit was in the name of "Sam Kelly or Vera Feidler, in case of death only" and that the bank and Vera Feidler, both mistakenly and without advice of counsel, construed said deposit to be

a survivorship account whereby the funds lawfully became the exclusive property of Vera Feidler upon the death of Sam Kelly, after which Vera Feidler withdrew all of said funds except the sum of $250 paid by the bank to Glenn Kelly, a son of deceased, upon a check given to him and signed by Sam Kelly prior to his death, the payment of which check was made at the request of the widow of deceased. It alleged that if the bank wrongfully paid out moneys from the account to Vera Feidler, then she was liable with the bank for such withdrawal, and if she paid out $1,140.66 for the benefit of the estate as alleged in her petition in intervention, it should be set off as just claims against the estate, and for such other and further relief as might be just and equitable. Plaintiff's reply denied generally the allegations of such answer. The defendant bank also answered the petition in intervention, alleging substantially the same facts as in its answer to plaintiff's amended petition, and prayed for like relief. Prior to the introduction of any evidence, plaintiff's motion for judgment on the pleadings was overruled, and intervener offered to confess judgment for $384.47.

All of the evidence was stipulated. It was in substance that Samuel M. Kelly, also known as Sam Kelly, died intestate on October 29, 1949; that plaintiff was appointed administrator of his estate; that on October 29, 1949, deceased had $1,775.13 on deposit in defendant bank payable upon his demand; that on March 21, 1950, plaintiff demanded payment thereof which was refused, the bank having theretofore paid all of it to Vera Feidler, except $250 paid on December 10, 1949, to Glenn Kelly on a check, exhibit No. 3, dated August 25, 1949, signed by Sam Kelly in his lifetime; that Vera Feidler if present would testify, subject to plaintiff's objection as to competency and materiality, that certain checks, totaling $1,140.66, appearing in the record as exhibit No. 2, drawn by her payable to the persons named thereon, and paid by the bank, were in payment of funeral expenses, last

illness, and other debts of Samuel M. Kelly. In that connection, plaintiff assigned as error the admission of exhibit No. 2 in evidence, but since no such assignment was contained in his motion for new trial, it will not be considered here.

It was also stipulated that exhibit No. 1, the signature card for the checking account involved, should be received in evidence, which disclosed that it was dated August 28, 1945, and that the title of the account was Sam Kelly or Vera Feidler "in case of death only." It was agreed that Vera Feidler signed the exhibit subsequent to August 28, 1945, sometime during 1949, in the presence of Sam Kelly and an employee of the bank.

The trial court in its decree found and adjudged that deceased, on the date of his death, had $1,775.13 on deposit in defendant bank subject to payment on his order; that, however, in the fall of 1949, prior to his death, Sam Kelly and Vera Feidler, by exhibit No. 1, attempted to create a survivorship account, which failed because in law it was testamentary in character. It found that nevertheless, through mistake of law, defendant bank and Vera Feidler construed the account as creating a survivorship subject to withdrawal by her after the death of Sam Kelly and before the appointment of plaintiff as administrator, who made no claim to such funds until March 21, 1950. Thus Vera Feidler drew, and the bank paid, checks on the account to third persons in the total amount of $1,140.66 for the payment of debts, funeral expenses, and last illness of deceased, all of which would have been proper claims against the estate, and that intervener also withdrew $384.47 for herself, for which she offered to confess judgment. It found that defendant bank, without authority, paid to Glenn Kelly $250 after the death of Sam Kelly on a check given by him prior to his death. It found that defendant bank and intervener were entitled to set off $1,140.66 against the total deposit, which was properly ordered paid and was paid by them for items that would have been just

claims against the estate. It found that both defendant bank and intervener acted in good faith and the bank received no benefit by said transactions and that intervener received for her benefit only $384.47.

Therefore, plaintiff was given a judgment against the bank for $250 with interest at 6 percent from October 29, 1949, and against intervener for $384.47 with interest at 6 percent from October 29, 1949. The record discloses that those amounts, with interest, were respectively thereafter paid to the clerk of the district court on December 6, 1950, and April 2, 1951. There is no controversy here by anyone with respect to such sums.

Plaintiff's motion for new trial was overruled, and he appealed, assigning substantially, insofar as important here, that: (1) The court erred in requiring plaintiff to make Vera Feidler a party defendant; (2) erred in refusing to sustain plaintiff's motion for judgment on the pleadings; and (3) that the judgment was not sustained by the evidence but contrary thereto and contrary to law. We conclude that the judgment was not sustained by sufficient evidence, but that the other assignments have no merit.

The first assignment, if erroneous, was without prejudice to plaintiff, since, as hereinafter observed, Vera Feidler did have a right to intervene and properly did so. That contention, therefore, does not require further discussion.

With regard to the second assignment, the rule is that a motion for judgment on the pleadings admits facts well pleaded or admitted but does not admit conclusions of law, and it is only where, upon statements in the pleadings, one party is entitled by law to judgment in his favor, that judgment should be so rendered by the court. State ex rel. Nebraska State Bar Assn. v. Wiebusch, 153 Neb. 583, 45 N. W. 2d 583. In the light of such rules, the pleadings, and propositions of law hereinafter discussed, we conclude that the court properly refused to sustain plaintiff's motion for judgment on the

pleadings. Thus, the second assignment has no merit.

Plaintiff argued that intervener had no right or authority to seek any relief in the cause and that if she did, her petition in intervention changed the issues, which intervener had no right to do.

The rule is that one having an interest in the result of pending litigation may intervene as a matter of right by virtue of section 25-328, R. R. S. 1943. Allen v. City of Omaha, 136 Neb. 620, 286 N. W. 916. In that connection, intervener must factually plead some interest in the subject matter of the litigation as distinguished from a mere denial of the rights of plaintiff or defendant. The interest in a matter in litigation which will authorize a person to so intervene must be such a direct and immediate interest that the person or persons seeking to intervene will either lose or gain by the direct operation and legal effect of the judgment which may be rendered in the action. Such an interest must be one arising from a claim to the subject matter of the action or some part thereof, or a lien upon the money or property or some part thereof as distinguished from an indirect, remote, or conjectural interest in the result of the suit which is not enough to permit intervention. Cornhusker Electric Co. v. City of Fairbury, 131 Neb. 888, 270 N. W. 482.

We conclude that intervener did have a right to intervene, and the trial court properly permitted her to do so.

The question then arises whether or not by intervention she changed the issues. The general rule is that: "An intervener who is not an indispensable party cannot change the position of the original parties or change the nature and form of the action or the issues presented therein." State ex rel. Nelson v. Butler, 145 Neb. 638, 17 N. W. 2d 683. As concluded in that opinion, interveners are ordinarily entitled to present only issues, as distinguished from facts, which sustain or oppose the respective contentions of the plaintiff and

defendant, or either of them. The issue presented here was simply whether or not the administrator was entitled to the deposit involved or any part thereof as assets of the estate. That issue was not changed by intervener's petition. It simply pleaded facts which, if appropriately established, would defeat plaintiff's right to all of the deposit, and being germane, squarely met the issue actually presented.

Only recently, in Rose v. Kahler, 151 Neb. 532, 38 N. W. 2d 391, following Lenderink v. Sawyer, 92 Neb. 587, 138 N. W. 744, L. R. A. 1915D 948, Ann. Cas. 1914A 261 and notes, this court held: "The true representative is bound by those acts of an executor de son tort which are lawful and such as the true representative would be bound in any event to perform in the due course of administration.

"Although an executor de son tort cannot by his own wrongful act acquire any benefit, yet he is protected in all his acts not for his own benefit which a rightful representative might do.

"An executor de son tort is liable to the lawful representative or a creditor, either in an action at law for conversion, or in equity for an accounting, for all the assets of the estate he received, except such as were used in payment of such demands as he affirmatively shows were just claims against the estate, and such payments for the use and benefit of distributees as would have been made in due course of administration." See, also, Dame, Probate and Administration (3d ed.), § 274, p. 292. Dobney v. Chicago & N. W. Ry. Co., 120 Neb. 824, 235 N. W. 585, relied upon by plaintiff, is clearly distinguishable upon the facts and applicable law.

Under the issues presented, intervener, as an executor de son tort, came squarely within the foregoing rules with regard to $1,140.66 of the deposit, which she could, if the proof were sufficient in that regard, set off against the claim of plaintiff.

In that connection, Rose v. Kahler, *supra,* and Lend-

erink v. Sawyer, *supra,* concluded that an executor de son tort, when attempting to assert such a set-off, has the burden of affirmatively showing that he has applied the assets of the estate which have come into his hands, in the same manner in which they would have been lawfully applied by a rightful representative. In other words, he assumes the burden of producing competent evidence that would be sufficient to prove such claims in administration or probate proceedings in case of objection, and that they would have been required by law to have been paid in any event in the same amount, order of preference, and manner by the representative. No such showing was made by intervener or defendant bank in the case at bar. Whether the estate was solvent and the debts were all payable as provided in section 30-614, R. R. S. 1943, or insolvent and there was a limitation or preference requirement as provided by section 30-615, R. R. S. 1943, is not shown by the record. Also, concededly, the widow survived deceased. Whether or not there were other claims or debts and whether or not there was property or money other than the deposit involved to take care of such debts if existent, and the widow's allowances and exemptions, if demanded, do not appear in the record as now before this court.

For the foregoing reasons the judgment of the trial court was not sustained by sufficient evidence. We turn then to consideration of the status of defendant bank in the litigation.

In that connection, this court held in Fender v. Reed, 143 Neb. 911, 12 N. W. 2d 98: "The doctrine of subrogation is not administered by courts of equity as a legal right, but the principle is applied to subserve the ends of justice and to do equity in the particular case under consideration. It does not rest on contract, and no general rule can be laid down which will afford a test in all cases for its application. Whether the doctrine is applicable to any particular case depends upon the peculiar facts and circumstances of such case."

It is well established that: "One advancing money to an executor or administrator which is applied to the payment of debts for which the estate is bound may be subrogated to the place of the executor or administrator. But reason, as well as sound policy, requires that it should be shown by the clearest evidence that the estate has been benefited, or, in other words, that the money has been applied beneficially and in the payment of the debts." 25 R. C. L., Subrogation, § 25, p. 1342. See, also, notes 99 Am. S. R. 491; 11 Ann. Cas. 678. In that connection, however, it must be remembered that the only equity of such a subrogee arises in case the money advanced has in fact been applied to the payment of debts for which the estate was justly and legally bound. In such case, the creditor of the administrator will be permitted to take his place, and will be subrogated to his rights. A fortiori, the rule applies as well where money is advanced or paid to an executor de son tort or a creditor of the estate and applied by him to payment of debts of the estate for which the estate was justly and legally bound, since in such a situation it was in fact paid to the estate.

As stated in 24 C. J., Executors and Administrators, § 1210, p. 443: "Advances by third persons to the representative for the purpose of paying the debts of an estate ordinarily create only a personal liability on the part of the representative; but, in cases where the representative is entitled to reimbursement from the estate for the debts paid by him, equity will subrogate the person advancing the money to the rights of the representative and allow him to be repaid directly from the estate, but only to the extent that the money advanced has been actually used in the payment of debts for which the estate was legally bound. While payments by third persons directly to creditors of an estate are not favored, reimbursement will generally be allowed where the payments are made in good faith and for the benefit of the estate, * * *." See, also, 60 C. J., Subrogation, § 36,

p. 725; 34 C. J. S., Executors and Administrators, § 463, p. 333; 50 Am. Jur., Subrogation, § 41, p. 709.

We therefore conclude that defendant bank may be entitled to a set-off by way of subrogation. In other words, if defendant bank, not voluntarily but innocently and in good faith, by mistake of law, believing it was its legal duty to do so, paid out the $1,140.66 here involved, upon checks drawn by the intervener to pay debts of the estate, it would become entitled by subrogation to any rights which it may be ultimately established that the intervener had against the plaintiff administrator. As a matter of course, the bank, as such subrogee, could acquire no greater rights than the intervener had, to whose rights it succeeded at the time such payments were made by it. In other words, a party cannot acquire by subrogation any rights not possessed by the party whose rights are subrogated. Metropolitan Casualty Ins. Co. v. First Nat. Bank, 139 Neb. 329, 297 N. W. 593; American Surety Co. v. School District, 117 Neb. 6, 219 N. W. 583; Federal Land Bank v. Worley, 135 Neb. 493, 282 N. W. 476.

If intervener actually paid debts of the estate which would permit her as executor de son tort to set them off against the claim of the plaintiff, then it would be unjust to require defendant bank, who furnished her the money with which such payments were made, to unjustly enrich the estate by paying them again. Therefore, in the light of the foregoing discussion and the pleadings heretofore summarized, we conclude that plaintiff's motion for judgment on the pleadings was properly overruled.

The district court having acquired jurisdiction of the parties, the whole subject matter was presented to it for adjudication in one action by a single decree. To hold otherwise would but encourage a multiplicity of actions with added costs, and permit the parties to toy with courts and justice.

For the reasons heretofore stated, we conclude that

the judgment of the trial court should be and hereby is reversed and the cause is remanded for a new trial in conformity with this opinion.

REVERSED AND REMANDED.

LEROY C. JACOX, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.

48 N. W. 2d 390

Filed June 7, 1951. No. 33006.

1. **Criminal Law.** The rule of criminal procedure is that an information need not negative exceptions of a statute which are not descriptive of the offense.
2. **Indictments and Informations.** A defendant is entitled to the protection of the statutes of limitation when prosecuted by information as he would have been if presented for the same offense by indictment.
3. ———. An information must be filed within the period designated by the statutes of limitation or a prosecution for an offense within its terms is barred.
4. ———. The violations of the Blue Sky Law alleged in the information and described in the opinion constitute felonies.
5. **Criminal Law: Limitations of Actions.** Statutes of limitation, as applied to criminal procedure, need not be specially pleaded and may be raised under a plea of not guilty.
6. ———: ———. The applicable statutes of limitation should be liberally construed in favor of defendant in a criminal case.
7. **Indictments and Informations.** The offenses charged against defendant in the information in this case, as outlined in the opinion, are not continuing crimes.
8. **Criminal Law: Appeal and Error.** A verdict of guilty in a criminal case that is contrary to the evidence will not be sustained.

ERROR to the district court for Cheyenne County: ISAAC J. NISLEY, JUDGE. *Reversed and remanded.*

Heaton & Connors, Torgeson, Halcomb & O'Brien, and *James Barrett,* for plaintiff in error.

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

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

BOSLAUGH, J.

LeRoy C. Jacox, plaintiff in error and defendant, seeks exoneration from his conviction and sentence for violation of provisions of the Blue Sky Law.

The information consists of two counts, and makes these charges against the accused: (1) That he, on or about the 13th day of March 1947, the 19th day of August 1947, and the 8th day of May 1948, in Cheyenne County, Nebraska, unlawfully, willfully, and feloniously negotiated for the sale and transfer and sold and transferred to Cecil Warren securities, consisting of an interest in oil and gas leases on property in the State of Wyoming, not exempt from the provisions of the Blue Sky Law, and not authorized to be sold, disposed of, or transferred by the Department of Banking of the State of Nebraska; and (2) that he on or about the 13th day of March 1947, the 19th day of August 1947, and the 8th day of May 1948, in Cheyenne County, Nebraska, unlawfully, willfully, and feloniously negotiated for the sale and assignment and sold and assigned to Cecil Warren securities, consisting of an interest in oil and gas leases on property in the State of Wyoming, without having secured from the Department of Banking of Nebraska a permit to transact business as a broker, as required by the Blue Sky Law.

The plea of defendant to each count of the information was "not guilty." The jury found him guilty as charged in each count.

The first count alleged that the securities offered for sale by defendant and sold to Cecil Warren were not excepted from the provisions of the Blue Sky Law upon which the prosecution was based. The defendant offered and requested the court to give the jury an instruction containing the language of subsection (10) of section 81-312 of the act, and advising the jury that

the class of securities therein described were exempt from the provisions of the act, and that any transaction concerning them was not a violation of it. This was refused, and the charge of the court to the jury did not mention the subject. The defendant complains that this was error. The rule of criminal procedure decisive of this contention is that an information need not negative the exceptions of a statute which are not descriptive of the offense. Pandolfo v. State, 120 Neb. 616, 234 N. W. 483; Emery v. State, 138 Neb. 776, 295 N. W. 417. This was applied in the Pandolfo case to exemptions specified in the act under which this prosecution was had.

The offenses attributed to defendant are that he unlawfully on each of three separate and specific occasions negotiated for the sale and transfer and sold and assigned securities not authorized to be sold by the Department of Banking to Cecil Warren in Cheyenne County, Nebraska, in violation of the Blue Sky Law, and that at the time of each of the transactions he had not secured from the Department of Banking and did not have a permit to do business as a broker, as that act requires.

The first transaction relied upon by the State was on the 13th day of March 1947. It originated, was conducted, and wholly completed on that date within a period of not more than an hour and a half at the farm home of the purchaser. It concerned an offer to sell him an interest in oil and gas leases on land in Niobrara County, Wyoming, owned by the Blacktail Oil Development Company. He bought an undivided one percent interest in the leases in accordance with and under the terms of a written agreement, made a part of his written purchase contract, completed and delivered at the time of the transaction. It was provided in writing at that time what he bought, that the purchase price was fully paid, and that he thereby became and was the owner thereof. There was nothing unfinished to be done by anyone.

The information was filed in the district court for Cheyenne County, Nebraska, July 11, 1950, more than three years and three months after the transaction relied upon by the State as constituting the offenses charged against him and committed on or about March 13, 1947. The defendant relies upon the statute of limitations, which provides: "No person * * * shall be prosecuted for any felony * * * unless the indictment for the same shall be found by a grand jury within three years next after the offense shall have been done or committed, * * *." § 29-110, R. R. S. 1943. The defendant has the same right to the protection of this statute when prosecuted by information as he would have if prosecuted for the same offense upon indictment. § 29-1603, R. R. S. 1943. An indictment must be found or an information must be filed within the time designated by the above statute or any prosecution for an offense within its terms is barred. Colling v. State, 116 Neb. 308, 217 N. W. 87; Gragg v. State, 112 Neb. 732, 201 N. W. 338; State v. Robertson, 55 Neb. 41, 75 N. W. 37; Taylor v. O'Grady, 113 F. 2d 798; Annotation, 13 A. L. R. 1446. The violations of the provisions of the Blue Sky Law alleged in the information constitute felonies. § 81-333, R. R. S. 1943; § 29-102, R. R. S. 1943.

The general issue in a criminal case interposes the defense of the statute of limitations. The burden is on the State to prove all of the essential elements of the crime charged, including the fact it was committed within the time fixed by law. If it has expired before an information is filed by the State, a conviction for the offense alleged is not sustained by the evidence, is contrary to law, and may not be upheld. In Emery v. State, *supra,* it is said: "Statutes of limitation, as applied to criminal procedure, need not be specially pleaded and may be raised under a plea of not guilty." Boughn v. State, 44 Neb. 889, 62 N. W. 1094, states the reason for this rule: "The reason for this rule is that the general issue in a criminal prosecution is broader

than in a civil action and casts upon the state the burden of proving every element of the offense, including the fact that it was committed within the period of limitations." Hogoboom v. State, 120 Neb. 525, 234 N. W. 422, 79 A. L. R. 1171, says that: "It is to be remembered in this connection that the generally accepted rule is that statutes of limitation as applied to criminal procedure need not be pleaded, but may be taken advantage of on the general issue * * *. So, too, the construction of this statute is liberal to the defendant, * * * 'not only because such liberality of construction belongs to all acts of amnesty and grace, but because the very existence of the statute is a recognition and notification by the legislature of the fact that time, while it gradually wears out proofs of innocence, has assigned to it fixed and positive periods in which it destroys proofs of guilt'. 1 Wharton, Criminal Procedure (10th ed.) 415, sec. 367."

The difficult situation of the State in this case, substantially conceded by it, induces it to contend that the offenses as alleged against defendant, because of the transaction of March 13, 1947, were continuous crimes and that the transaction was not then completed and the offenses were not wholly committed until August 17, 1948. This contention is without support in either fact or law.

The Blacktail Oil Development Company was a voluntary unincorporated association from and after January 15, 1947, until it was incorporated as Blacktail Oil Company in 1948. The agreement which set forth and governed the rights of Cecil Warren as a purchaser of an interest in the oil and gas leases by virtue of the transaction of March 13, 1947, provided that Blacktail Oil Development Company, the voluntary association, should be "subject to incorporation under the laws of the State of Wyoming whenever such development results in commercial production and the membership deem such incorporation advisable." Cecil Warren purchased

an undivided one percent interest in the leases, paid the purchase price, and became the owner thereof on March 13, 1947. This, by the terms of the agreement, gave him a right to a one percent interest in any incorporation afterwards organized as the written agreement provided it might or might not be, depending upon the desire and act of the membership of the voluntary association. A corporation was formed a year or more later and a certificate of stock dated August 3, 1948, was issued to Cecil Warren as the agreement provided it should be done if a corporation was organized. These facts do not in any way militate against the conclusion that the transaction of March 13, 1947, was had and wholly completed on that date, and any violation of the Blue Sky Law because of that transaction constituted immediately a crime by virtue of the Blue Sky Law of Nebraska.

The principal authority cited and the only one discussed by the State on the subject of continuing crimes is State v. Way, 5 Neb. 283. The continuing offense charged therein was that defendant, a married man, did unlawfully keep a woman other than his wife and unlawfully and wantonly cohabited with her in a state of adultery for a period of about a year. The charge was substantially in the words of the statute. The offense was not a single act of improper relations, but cohabitation in a state of adultery for a period of time. The court appropriately said in the decision of that case that: "* * * this is a continued offense, and if it should be proved that he wantonly cohabited with the woman in a state of adultery, during any portion of this time, such proof would be sufficient to establish the crime * * *." The inapplicability of that decision to the case made by the record under review is obvious.

It is sometimes difficult to determine whether a statute is directed against a general course of conduct or whether it prohibits individual acts themselves considered in isolation. In such an instance, there are no

specific rules which solve the problem to a certainty, and the legislative intention must be gained from all intrinsic and extrinsic indications which the law permits and recognizes as helpful to correct interpretation. This case presents no such a situation. The basis of this prosecution is a statute which prohibits any attempt to sell, dispose of, or deal in securities, or to sell, dispose of, or deal in them unless their sale or disposition is authorized by the Department of Banking and unless the person negotiating for or conducting the transaction has a permit from the designated agency of the state. Any and every act contrary to the law is made a separate and distinct offense. The State claims by its information that defendant violated the law on three separate dates. These were separate offenses and none of them was a continuing crime. Neither was there any attempt made by the State to charge a continuing crime. May v. State, 153 Neb. 369, 44 N. W. 2d 636.

The court advised the jury that if they found from the evidence beyond a reasonable doubt that defendant on or about the 13th day of March 1947, or on or about the 19th day of August 1947, or on or about the 8th day of May 1948, in Cheyenne County, Nebraska, negotiated for the sale and transfer and sold and transferred securities consisting of an interest in oil and gas leases on property in Wyoming, which were not then authorized for sale by the Department of Banking of the state, to Cecil Warren, it must find the defendant guilty of the crime as charged in count 21 of the information. Likewise, if the jury found from the evidence beyond a reasonable doubt that defendant on or about any one of the dates negotiated for the sale and assignment and sold and assigned said securities to Cecil Warren, in that county, without having obtained and then having a permit to do business as a broker as the Blue Sky Law required, it must find the defendant guilty as charged in count 22 of the information. The jury was obedient to the instructions and returned a verdict of guilty as

charged in each count. The jury was permitted to and may have based its verdict entirely upon the evidence concerning the transaction of March 13, 1947. Any violation because of that transaction was barred by the statute. That it may have done so is not entirely speculation. That was the only transaction at which the defendant was present and in which he personally participated. Cecil Warren had no acquaintance with defendant before March 13, 1947, and no contact with defendant thereafter until all of the times stated in the information had passed. In any event it cannot be ascertained that the jury did not convict the defendant for crimes barred by the statute before the filing of the information. The charge of the court permitted a conviction of defendant for crimes contrary to law and the evidence. "A verdict of guilty in a criminal case that is contrary to the evidence will not be sustained." May v. State, *supra.*

The judgment of the district court should be, and is, reversed and the cause is remanded.

REVERSED AND REMANDED.

JOHN F. MUNDY, APPELLEE, v. TITUS E. DAVIS, APPELLANT.
48 N. W. 2d 394

Filed June 14, 1951. No. 32915.

1. **Negligence.** Negligence is a failure to do what reasonable and prudent persons would ordinarily have done under the circumstances and situation, or doing what reasonable and prudent persons under the existing circumstances would not have done.
2. ———. Contributory negligence is conduct for which plaintiff is responsible, amounting to a breach of the duty which the law imposes upon persons to protect themselves from injury, and which, concurring and cooperating with actionable negligence for which defendant is responsible, contributes to the injury complained of as a proximate cause.
3. ———. If the defendant pleads that the plaintiff was guilty of contributory negligence the burden is upon him to prove that

defense and this burden does not shift during the trial of the case. However, if the evidence adduced by the plaintiff tends to prove that issue the defendant is entitled to receive the benefit thereof and the court must instruct the jury to that effect.

4. **Automobiles.** 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.
5. **Negligence.** The violation of any statutory or valid municipal regulation, established for the purpose of protecting persons or property from injury, is sufficient to prove such a breach of duty as will sustain a private action for negligence, if the other elements of actionable negligence concur.
6. ———. Such a violation is evidence of negligence, which the jury is entitled to consider upon the question whether actionable negligence existed.

APPEAL from the district court for Douglas County: ARTHUR C. THOMSEN, JUDGE. *Reversed and remanded.*

Rosewater, Mecham, Stoehr, Moore & Mecham, for appellant.

Wear, Boland & Nye, Robert E. McCormack, and *John J. Powers,* for appellee.

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

WENKE, J.

John Mundy brought this action in the district court for Douglas County against Titus E. Davis. The purpose of the action is to recover for damages resulting from injuries allegedly caused by the negligent conduct of defendant. Plaintiff recovered a verdict. The court entered judgment thereon. Defendant thereupon filed a motion for new trial and for judgment notwithstanding the verdict. These motions were both overruled. Defendant appeals from the overruling thereof.

Appellant contends that the trial court should have either sustained his motion for a directed verdict or for

a judgment notwithstanding the verdict. He bases this contention on the ground that appellee, as a matter of law, was guilty of conduct contributing to the accident that was more than slight negligence and that, under our comparative negligence doctrine, this would defeat any right to recover that he might otherwise have. We do not think the factual situation here presented, which is hereinafter set forth, sustains this contention. See, Brenning v. Remington, 136 Neb. 883, 287 N. W. 776; Grantham v. Watson Bros. Transportation Co., on rehearing, 142 Neb. 367, 9 N. W. 2d 157.

Appellant further contends that if we should decide that the question of whether or not appellee's conduct was such that it would prevent his recovery under the comparative negligence doctrine was a question of fact for the jury rather than one of law for the court that in such event the trial court erred in not granting him a new trial for the reason that such issue was not properly submitted.

" 'Negligence is a failure to do what reasonable and prudent persons would ordinarily have done under the circumstances and situation, or doing what reasonable and prudent persons under existing circumstances would not have done.' Omaha Street R. Co. v. Craig, 39 Neb. 601, 58 N. W. 209." Eaton v. Merritt, 135 Neb. 363, 281 N. W. 620. See Bixby v. Ayers, 139 Neb. 652, 298 N. W. 533.

"Contributory negligence is conduct for which plaintiff is responsible, amounting to a breach of the duty which the law imposes upon persons to protect themselves from injury, and which, concurring and cooperating with actionable negligence for which defendant is responsible, contributes to the injury complained of as a proximate cause." 45 C. J., Negligence, § 501, p. 942. This definition has been cited with approval by this court in Kovar v. Beckius, 133 Neb. 487, 275 N. W. 670; Eaton v. Merritt, *supra;* and Frazier v. Anderson, 143 Neb. 905, 11 N. W. 2d 764.

The trial court submitted this issue by the following instruction: "Negligence is not presumed but must be proved. The defendant having alleged in his answer that the proximate cause of the accident was negligence on the part of the plaintiff, the burden is upon the defendant to establish by a preponderance of the evidence any such negligence of the plaintiff and that the same was the proximate cause of, or proximately a contributing cause to, the accident."

We have recently stated:

"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." Johnson v. Griepenstroh, 150 Neb. 126, 33 N. W. 2d 549. See Plumb v. Burnham, 151 Neb. 129, 36 N. W. 2d 612.

" 'If the defendant pleads that the plaintiff was guilty of contributory negligence, or that the accident resulted solely from his negligence, the burden is upon the defendant to prove those defenses, and does not shift during the trial of the case, but he should receive the benefit of the plaintiff's evidence tending to prove those issues.' McGahey v. Citizens Ry. Co., 88 Neb. 218, 129 N. W. 293." Spaulding v. Howard, 148 Neb. 496, 27 N. W. 2d 832.

A review of our holdings on this question indicates the following to be the applicable rule: If the defendant pleads that the plaintiff was guilty of contributory negligence the burden is upon him to prove that defense and this burden does not shift during the trial of the case. However, if the evidence adduced by the plaintiff tends to prove that issue the defendant is entitled to receive the benefit thereof and the court must instruct the jury to that effect. See, Durrell v. Johnson, 31 Neb. 796, 48 N. W. 890; Rapp v. Sarpy County, on rehearing,

71 Neb. 385, 102 N. W. 242; City of Beatrice v. Forbes, 74 Neb. 125, 103 N. W. 1069; Cook v. Chicago, R. I & P. Ry. Co., 78 Neb. 64, 110 N. W. 718; Vertrees v. Gage County, 81 Neb. 213, 115 N. W. 863; McCulley v. Anderson, 119 Neb. 105, 227 N. W. 321; Schrage v. Miller, 123 Neb. 266, 242 N. W. 649; Cotten v. Stolley, 124 Neb. 855, 248 N. W. 384; Pinches v. Village of Dickens, 127 Neb. 239, 254 N. W. 877; Carlson v. Roberts, 133 Neb. 166, 274 N. W. 473; Nichols v. Havlat, 140 Neb. 723, 1 N. W. 2d 829, on rehearing, 142 Neb. 534, 7 N. W. 2d 84; Roberts v. Carlson, 142 Neb. 851, 8 N. W. 2d 175; Frazier v. Anderson, 143 Neb. 905, 11 N. W. 2d 764; Meyer v. Platte Valley Construction Co., 147 Neb. 860, 25 N. W. 2d 412; Spaulding v. Howard, 148 Neb. 496, 27 N. W. 2d 832; Elliott v. Swift & Co., 151 Neb. 787, 39 N. W. 2d 617; Anthony v. City of Lincoln, 152 Neb. 320, 41 N. W. 2d 147.

The quoted instruction given by the trial court did not instruct the jury to that effect. This requires a consideration of the evidence which appellee adduced for if it contains nothing from which it can be said that he appears to have been guilty of contributory negligence then it was not error to fail to do so.

Appellee adduced evidence to the following effect: That the accident happened on Sunday, February 29, 1948, at about 10 p. m.; that it happened on U. S. Highway No. 6 at a point between 2½ and 3 miles from Gretna going toward Omaha; that it happened where the road runs north and south and slopes gently down grade to the north; that at the point of the accident the surface of the highway was concrete, 20 feet wide, with 6 foot shoulders; that at the time of the accident a very heavy snow was falling but no wind was blowing; that immediately preceding the snow a mist had fallen and frozen on the concrete surface of the highway causing it to become icy and very slippery; that about 1 to 2 inches of snow had fallen and covered the icy concrete to that depth; that as he approached the place of the accident

he observed three or possibly four cars stopped on the right side of the highway on the paved surface thereof; that he did not know why they were stopped there; that the lights of these cars, both front and rear, were burning; that he brought the car he was driving to a stop at a point about 10 feet from the rear of the last of these parked cars; that the car he was driving, which was a 1947 Chevrolet sedan, belonged to his brother; that there was room to the left, or west side, of the parked cars sufficient to have permitted him to pass and proceed to the north; that he stopped his car on the concrete or paved surface of the highway on the right side thereof although there was room to park on the shoulder; that he kept the lights of his car, both front and rear, burning; that he and his wife, who was riding with him, remained seated in the car; that shortly after they had stopped the rear of the car was bumped; that he then got out of the car, getting out on the left side, and started toward the rear thereof; that as he reached a point opposite the left rear fender of his car he observed the appellant's car approaching from the south some 500 feet away; that it was traveling on the east or right-hand side of the road; that he estimated it was approaching at the rate of 50 miles an hour; that he continued to the rear of his car to inspect the damage done thereto, if any; that the right rear fender had been bumped; that it had been hit by a car driven by Dr. Coppoc; that the Coppoc car had stopped alongside the right rear of his car, the Coppoc car being on the shoulder but up against his car for a distance of about 1 or 2 feet along the right rear fender; that after inspecting the right rear bumper he turned to look south; that when he turned he was at a point to the left or west of the rear center of his car; that he then observed the appellant's car, which was continuing to approach; that it was then about 200 feet away; that it was traveling about 20 miles an hour; that it was traveling on the east or right-hand side of the road; that he stood in that

position, looking to the south, until the two cars came together; that he was pinned between the bumpers, being the rear bumper of his and the front bumper of appellant's car; that the collision threw him against the rear of his car; and that, as a result, he suffered the injuries for which he now claims damages.

We think, from the evidence adduced by appellee, a jury could properly find that he was guilty of conduct constituting contributory negligence sufficient, under our comparative negligence doctrine, to either defeat or reduce any recovery which the jury might find he was entitled to. As stated in McGahey v. Citizens Ry. Co., 88 Neb. 218, 129 N. W. 293: "The plaintiff's testimony upon direct as well as upon cross-examination is such that the jury might have found that he was guilty of contributory negligence, and the defendant was entitled to an instruction giving him the benefit of that testimony." Leaving out of the instruction the requirement referred to did not properly submit to the jury for its consideration of this issue the evidence adduced by appellee. This prejudiced his rights.

It is true, as we have often said, that: "Instructions given to a jury must be construed together, and if, when considered as a whole, they properly state the law, it is sufficient." Clausen v. Johnson, 124 Neb. 280, 246 N. W. 458. See, also, Kovar v. Beckius, *supra*. However, we find nothing in the other instructions given by the court that properly advised the jury in regard thereto.

In view of the fact that the foregoing requires a new trial we shall discuss appellee's contention that he was entitled to a directed verdict. This contention is based on the following principle: "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." Roth v. Blomquist, 117 Neb. 444, 220 N. W. 572, 58 A. L. R. 1473.

"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.

Appellant testified that he approached the place of the accident from the south; that the highway was slippery and covered with 2 or 3 inches of snow; that he approached over the crest of a hill; that he came over the crest of the hill at about 18 to 20 miles an hour; that because of falling snow visibility was reduced; that the area ahead lighted by his lights ranged from 75 to 125 feet; that he saw appellee's car when it was 100 to 150 feet away; that he saw it as he came over the crest of the hill; that he immediately applied both his hand and foot brakes; that he also tried to turn his car to both right and left but, because of the icy condition of the pavement and the fact that he was traveling in the tracks in the snow left by other cars, he was not able to turn either way; that his car kept sliding forward; that it kept slowing down but could not stop; that he slid into the back of appellee's car at a speed of from 4 to 5 miles an hour; and that appellee was pinned between the two cars when they collided.

"* * * the existence or presence of smoke, snow, fog, mist, blinding headlights or other similar elements which materially impair or wholly destroy visibility are not to be deemed intervening causes but rather as conditions which impose upon the drivers of automobiles the duty to assure the safety of the public by the exercise of a degree of care commensurate with such surrounding circumstances. Anderson v. Byrd, 133 Neb. 483, 275 N. W. 825; Fischer v. Megan, 138 Neb. 420, 293 N. W. 287." Fairman v. Cook, 142 Neb. 893, 8 N. W. 2d 315.

"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." Remmenga v. Selk, 150 Neb. 401, 34 N. W. 2d 757.

While there are recognized exceptions to the general rule or instances to which it does not apply, the factual situation here does not take this case out of the general rule. There is nothing here to excuse appellant. He knew the conditions of the road and the fact that his visibility was limited by the falling snow. In view thereof he was duty bound to drive at such a rate of speed that he could stop when an object came within the area lighted by his headlights. This he was not able to do as his testimony shows that he actually saw appellee's car either before or as soon as it came into the area lighted by his lights.

As to the contention that appellee violated the provisions of section 39-757, R. S. 1943, by stopping or parking his car on the paved portion of the highway the trial court instructed in regard to this statute as follows: "The violation of any of these statutes by either of the drivers is not as a matter of law negligence, but, inasmuch as these statutes are passed for the better protection of persons and property from injury and damage, the violation thereof should be considered as evidence of negligence together with all other facts and circumstances in evidence to determine whether the one violating the same was negligent."

We said of the requirements of this statute in Huston v. Robinson, 144 Neb. 553, 13 N. W. 2d 885: "The requirement in that respect is positive unless circumstances exist which make moving of the vehicle off the paved, improved or main traveled portion of the highway impracticable."

The rule applicable to violations of a statute in regard to rules of the road is as follows:

"A violation of statutes regulating the use and operation of motor vehicles upon the highways is not negligence per se, but evidence of negligence which may be taken into consideration with all the other facts and circumstances in determining whether or not negligence is established thereby." Dickman v. Hackney, 149 Neb. 367, 31 N. W. 2d 232.

"The violation of any statutory or valid municipal regulation, established for the purpose of protecting persons or property from injury, is sufficient to prove such a breach of duty as will sustain a private action for negligence, if the other elements of actionable negligence concur.

"Such a violation is evidence of negligence, which the jury are entitled to consider upon the question whether actionable negligence existed." Fimple v. Archer Ballroom Co., 150 Neb. 681, 35 N. W. 2d 680.

This instruction properly submitted this issue.

There are other questions raised. Some of them are fully answered by the foregoing, some become immaterial by reason thereof, and some become immaterial in view of the fact that a new trial must be had. Consequently we do not think it either necessary or proper to consider them.

In view of what has herein been said we find the trial court should have instructed the jury that appellant was guilty of negligence which was a proximate cause of the accident but that the appellee's right to recover was subject to the defense of contributory negligence and should have properly submitted that issue. We therefore reverse the judgment of the trial court and remand the cause.

REVERSED AND REMANDED.

CARTER, J., dissenting.

I am not in accord with that part of the opinion which holds that the trial court, in the absence of request, must instruct the jury that defendant is entitled to receive the benefit of any evidence of contributory

negligence which the evidence offered by plaintiff tends to establish. The trial court is required to instruct upon the issues of the case, whether requested or not, but it is my understanding that it is not reversible error to fail to instruct upon the effect of particular evidence adduced in the absence of request.

I submit that the cases cited in support of the announced rule do not sustain the holding. In Johnson v. Griepenstroh, 150 Neb. 126, 33 N. W. 2d 549, the question was not raised, discussed, or considered, and is pure dictum insofar as the interpretation claimed for it by the majority opinion is concerned. In Plumb v. Burnham, 151 Neb. 129, 36 N. W. 2d 612, the words "and the trial court should so instruct the jury" do not appear and the case does not therefore support the rule for which it is cited as a precedent. An examination of these cases shows that they were dealing with the question of the burden of proof and not with the question of whether or not the trial court must instruct on his own motion that the jury should consider any evidence of contributory negligence which appears in the evidence adduced by the plaintiff.

By instruction No. 14 the court told the jury, among other things, that it was to consider "all other evidence, facts and circumstances proved tending to corroborate or contradict such witnesses." In City of Beatrice v. Forbes, 74 Neb. 125, 103 N. W. 1069, this court held a similar instruction to be adequate in the following language: "It can hardly be, however, that the jury were misled, as in its fourth instruction the court told them that, in determining the issues in the case, they should take into consideration the whole of the evidence and all the facts and circumstances proved on the trial, giving the several parts of the evidence such weight as they thought it entitled to." I submit that the logic and conclusion of this case sustain my position in the case before us.

As I view it, the instructions taken as a whole properly

submit the issues, and in the absence of a request the court committed no error in not giving the instruction which the majority opinion holds was required. The majority opinion announces a new rule which is not sustained by logic or authority. I would affirm the judgment.

I am directed by Yeager, J., to state that he joins in this dissent.

STEWART B. DALE, APPELLANT, V. OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY, A CORPORATION, APPELLEE.

48 N. W. 2d 380

Filed June 14, 1951. No. 32953.

1. **Automobiles: Highways.** Where the driver of an automobile claiming negligence against another enters an intersection without looking where looking would be effective to prevent an accident he is guilty of contributory negligence as a matter of law.
2. ———: ———. If the driver of an automobile entering an intersection looks for approaching vehicles but fails to see one which is favored over him under the rules of the road, he is guilty of contributory negligence sufficient to bar a recovery as a matter of law.
3. ———: ———. A person traveling a favored street protected by a stop sign, of which he has knowledge, may properly assume that oncoming traffic will obey it.
4. ———: ———. Where the operator of an automobile about to enter an intersection sees an approaching car and tests an obvious danger by moving from a place of safety into the path of the oncoming vehicle and is struck, he is guilty of contributory negligence sufficient to bar a recovery as a matter of law.
5. ———: ———. The duty of the driver of a vehicle to look for vehicles approaching on the highway implies the duty to see what is in plain sight.
6. ———: ———. The duties and obligations which attend a motorist when he approaches a stop sign erected pursuant to city ordinance are the same as those which attend when he approaches one erected pursuant to statute or statutory rules of the road.

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

Pilcher & Haney, for appellant.

Kennedy, Holland, DeLacy & Svoboda, for appellee.

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

YEAGER, J.

This is an action for damages for personal injuries and damage to property by Stewart B. Dale, plaintiff and appellant, against Omaha & Council Bluffs Street Railway Company, a corporation, defendant and appellee.

At the conclusion of the plaintiff's evidence the defendant moved for a dismissal of plaintiff's action for the reason that negligence on the part of the defendant had not been established and for the further reason that the evidence established contributory negligence on the part of plaintiff which was more than slight.

The motion for dismissal was sustained. A motion for new trial was filed which was overruled. From the judgment of dismissal and the order overruling the motion for new trial the plaintiff has appealed. The assignments of error are that the court erred in sustaining the motion for dismissal and in overruling the motion for a new trial.

The incident out of which the action flows was a collision between an automobile owned and operated by plaintiff and a streetcar owned by the defendant and operated by one of its employees. The collision occurred in the intersection of Underwood Avenue and Happy Hollow Boulevard in Omaha, Nebraska, at about 9:50 p. m., February 6, 1949. Happy Hollow Boulevard will be hereinafter referred to as the boulevard and Underwood Avenue as the avenue. The avenue extends east and west. The boulevard from the intersection extends generally north and south. The first street east of the boulevard is Fifty-second Street. This street is pro-

tected by stop signs for east and west traffic. It is estimated to be about 320 feet east of the boulevard. The boulevard is protected by a slow sign for west-bound traffic on the avenue. The speed indicated by the sign is 15 miles an hour. The avenue at the intersection in question here is protected on the south by a stop sign for north-bound traffic on the boulevard. The stop sign is 25 feet south of the south curb of the avenue. The defendant has a single streetcar track extending from the east across Fifty-second Street on west through the intersection involved here. The south rail of this track is about 15 feet north of the south curb line of the avenue. In a parking strip to the south of the avenue is a row of trees. This row of trees extends generally from the boulevard to Fifty-second Street. The row of trees is about 10 feet south of the south curb line of the avenue. The trees are spaced from 32 to 35 feet apart.

The night on which the accident happened was cold. Snow had been pushed off the boulevard to the east and there was a ridge of snow along the east curb of considerable height. The surface of the street was icy and travel thereon was undoubtedly difficult.

According to the testimony of plaintiff he approached the avenue on the boulevard from the south. He stopped his automobile about 15 feet to the south of the stop sign. He looked east to Fifty-second Street where he saw the streetcar of the defendant either in or emerging from the intersection of Fifty-second Street with the avenue. He estimated its speed at about 10 miles an hour. He estimated the distance away at 320 feet. After seeing the streetcar he moved forward at a speed of 5 or 6 miles an hour. He never looked to the right again until, as he says, his automobile was entering the intersection. At this time he looked and could see 140 to 150 feet east of the intersection. He never looked to the east again. After looking to the east on this occasion he looked to the west, then to the north, and at that time

he saw the streetcar out of the corner of his eye. It was then about 50 feet east of the curb line of the boulevard. At that time the front end of his automobile was in the middle of the intersection with the front wheels between the streetcar rails. He was allowed over objection to give it as his opinion that the streetcar was proceeding at a speed of at least 30 miles an hour. He tried to get out of the way but the wheels of the automobile spun and he was unable to do so. The streetcar struck the automobile on its right-hand side in consequence of which it was caused to go into the banked snow somewhere near the northwest corner of the intersection. This is a résumé of the oral testimony necessary to be considered in determining whether or not the district court erred in sustaining the motion of the defendant for dismissal.

The plaintiff pleaded as a ground of negligence that the defendant operated its streetcar in excess of 25 miles an hour contrary to the city ordinances. A portion of the ordinances of the city of Omaha was introduced and read into the record disclosing that the maximum speeds allowable in passing a slow sign is 15 miles an hour.

Also introduced were the following from the city ordinances:

" 'Right-of-Way Between Vehicles':

" '(a) Vehicles approaching an intersection: The driver of a vehicle approaching an intersection shall yield the right-of-way to a vehicle which has entered the intersection.' "

" 'STOP SIGNS. Where stop signs have been placed at any intersection, upon a boulevard, school zone, or upon any other street, it shall be unlawful for the operator of a vehicle to proceed past such stop sign until such operator has brought his vehicle to a complete stop at the stop sign.' "

Other provisions of the ordinances were received. Some of them have no material bearing on the controversy here and others so inadequately appear that they may not receive comprehensive attention, therefore they

will not be considered further herein. It is doubted that they would have a bearing if they were more clearly set forth.

On this evidence the district court sustained the motion for dismissal.

The theory of the motion was twofold, first, that the evidence was insufficient to sustain any charge or charges of negligence made against the defendant, and second, that the evidence of plaintiff showed that he was guilty of contributory negligence and that the degree of such contributory negligence was such as to defeat a right of recovery against the defendant. The latter of the two propositions will be considered first.

Nelson v. Plautz, 130 Neb. 641, 265 N. W. 885, was a case where, like in the case at bar, the district court directed a verdict in favor of the defendant on the ground that the plaintiff in driving into an intersection ahead of another vehicle was guilty of contributory negligence as a matter of law which negligence was of such a degree as to defeat a right of recovery on the part of the plaintiff. In the opinion it was pointed out that where a plaintiff testified that he looked and failed to see a vehicle coming toward the intersection the question of whether or not he was guilty of contributory negligence was ordinarily one of fact. It was however further observed, and on this basis the action of the district court was affirmed, that where one entered an intersection without looking where looking would have been effective he would be guilty of contributory negligence as a matter of law. The court said: "The driver of plaintiff's car had the opportunity to look when by looking he could see that defendant was coming at such a speed as would endanger plaintiff's car and its occupants, if it proceeded into the intersection without stopping or slowing down. Preventive action was easy. It would have been effective. He took no action whatever. This made him negligent in the circumstances, as a matter of law."

These observations were made in the case of an inter-

section where the defendant had no protection of a stop sign. Also the approach of the plaintiff to the intersection was to the right of the defendant.

In Riekes v. Schantz, 144 Neb. 150, 12 N. W. 2d 766, it was said: "A person traveling a favored street protected by a stop sign, of which he has knowledge, may properly assume that oncoming traffic will obey it."

In Whitaker v. Keogh, 144 Neb. 790, 14 N. W. 2d 596, it was said: "If the driver of an automobile entering an intersection looks for approaching vehicles but fails to see one which is favored over him under the rules of the road, he is guilty of contributory negligence sufficient to bar a recovery as a matter of law.

"When the driver of an automobile entering an intersection looks but fails to see an approaching automobile not shown to be in a favored position, the presumption is that the driver of the approaching automobile will respect his right of way, and the question of his contributory negligence in proceeding to cross the intersection is a jury question.

"Where the operator of an automobile about to enter an intersection sees an approaching car and tests an obvious danger by moving from a place of safety into the path of the oncoming vehicle and is struck, he is guilty of contributory negligence sufficient to bar a recovery as a matter of law, whether he is driving the favored car or not."

In Simcho v. Omaha & C. B. St. Ry. Co., 150 Neb. 634, 35 N. W. 2d 501, it was said: "The duty of the driver of a vehicle to look for vehicles approaching on the highway implies the duty to see what is in plain sight."

In Kraft v. Wert, 150 Neb. 719, 35 N. W. 2d 786, it was said: "When a person enters an intersection of two streets or highways he is obligated to look for approaching cars and to see those within that radius which denotes the limit of danger. If he fails to see a car which is favored over him under the rules of the road, he is guilty

of contributory negligence sufficient to bar a recovery as a matter of law."

It is to be observed that these quoted statements are directed to duties and obligations imposed by statutory rules of the road, whereas this case relates to the obligation of a motorist with reference to a stop sign placed pursuant to power contained in a city ordinance.

In Simcho v. Omaha & C. B. St. Ry. Co., *supra,* however, without directly so stating, it is indicated that the rules with reference to stopping at stop signs placed pursuant to city ordinances are the same as where the stop sign has been placed pursuant to statute.

In that case the stop sign was one in the city of Omaha. In relation thereto by quotation from Meyer v. Hartford Bros. Gravel Co., 144 Neb. 808, 14 N. W. 2d 660, it was said: "A driver of a motor vehicle about to enter a highway protected by stop signs must stop as directed, look in both directions and permit all vehicles to pass which are at such a distance and traveling at such a speed that it would be imprudent to proceed into the intersection."

We conclude that the same duties and obligations attend a motorist when he approaches a stop sign erected pursuant to a city ordinance as when he approaches one erected pursuant to state law.

Under these rules it clearly became the duty of the plaintiff to stop in the vicinity of the stop sign and to look to the east for west-bound traffic. He stopped 15 feet back of the stop sign and did see the approach of the streetcar which was about 320 feet away. At the time he stopped he was about 40 feet from the south curb line of the avenue and about 55 feet from the streetcar track. He proceeded at 5 or 6 miles an hour. He said that on account of the row of trees mentioned here he never saw and could not see the streetcar until his front wheels were in the streetcar track and the streetcar was about 50 feet east of the boulevard. He said that he looked to the east as he was entering the intersection

but could see only 140 to 150 feet to the east up the avenue. After looking at that time he never looked again but when the streetcar was about 50 feet east of the boulevard he saw it out of the corner of his eye at which time he estimates that it was traveling about 30 miles an hour.

His evidence that he could not see the streetcar from the time he started until he passed the line of trees must be accepted as true, but his statement that he could not see more than 140 to 150 feet east as he entered the intersection must, on the record, be rejected. From a point 10 feet south of the south curb line of the avenue the view to Fifty-second Street was entirely unobstructed. This point was about 25 feet south of the streetcar track. From his testimony and its inescapable inferences the plaintiff came into this intersection in the path of a vehicle which was favored over him. He knew it was coming but a short distance away. If he looked he saw it in time to avoid the collision. It was his duty to look and if he failed to do so the consequences of his failure are his own.

The plaintiff insists that the questions of negligence and of contributory negligence were for the jury and that it was improper for the court to hold that the plaintiff was guilty of contributory negligence sufficient as a matter of law to defeat a recovery. He relies in the main on McCulley v. Anderson, 119 Neb. 105, 227 N. W. 321.

His substantial theory is that he having stopped at the stop sign thereafter had the right-of-way and that for interference therewith the defendant was guilty of negligence. McCulley v. Anderson, *supra,* does not categorically so hold.

The effect of the opinion in that case is to say that a motorist may stop at a stop sign and thereafter cross an intersection in the face of oncoming traffic if as a reasonably prudent person he believes that in the exercise of ordinary care and caution for his own safety and

the safety of others he has an opportunity to do so. In so doing he has the right to assume that others will operate their automobiles in a lawful manner. The case does not hold, as is the fact in the case at bar, that after stopping at a stop sign he may blindly or without looking drive into an intersection.

We conclude therefore that the district court correctly found that the plaintiff was guilty of contributory negligence as a matter of law sufficient to defeat a recovery in this case. This conclusion renders unnecessary a discussion of the question of whether or not the defendant was guilty of negligence.

AFFIRMED.

CHICAGO & NORTH WESTERN RAILWAY COMPANY, A CORPORATION, APPELLEE, V. CITY OF OMAHA, A MUNICIPAL CORPORATION, APPELLANT.
48 N. W. 2d 409

Filed June 14, 1951. No. 32973.

1. **Railroads: Municipal Corporations.** A railroad company's right-of-way and other real property specially benefited by a public improvement is liable for special assessments in its general relations apart from its particular use for railroad purposes in the same manner and upon the same basis as other property owners in a public improvement district.
2. **Municipal Corporations.** In making special assessments for benefits received, it is presumed that the authorities arrived at the amounts thereof with reference alone to the benefit accruing to the property assessed, and that the owners are required to contribute to the cost of the improvement only in proportion as their property is specially benefited thereby.
3. ———. When a party attacks a paving assessment as void, the burden is upon him to prove the invalidity of such assessment.

APPEAL from the district court for Douglas County: JACKSON B. CHASE, JUDGE. *Reversed and remanded with directions.*

Edward F. Fogarty, Edward Sklenica, James M. Paxson, and *Herbert M. Fitle,* for appellant.

Neely, Otis & Cockle, for appellee.

Perry & Perry, amicus curiae.

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

CHAPPELL, J.

This is an appeal from a special assessment levied by the city council of Omaha upon plaintiff's right-of-way included in a municipal paving district in which the lots, lands, and real estate of other owners included therein were also assessed under the same plan of assessment. Street improvement district No. 4142 was duly organized for the purpose of constructing paving, curbs, and gutters along Forty-second Street in the city of Omaha, between Redman Avenue and Redick Avenue. Forty-second Street runs north and south and the railroad right-of-way runs out of Omaha toward Irvington in a northwesterly direction, crossing Forty-second Street slightly diagonally at Hartman Avenue. The right-of-way is 100 feet wide, and the intersection with the railroad is wider than the intersection with Hartman Avenue, an unpaved street intersecting only on the east. The railroad was assessed only for as much of its right-of way as is not included within the boundary lines of Hartman Avenue extended, and one-half the cost of paving the intersection of the streets was not assessed to the property owners in the improvement district but paid out of the city's intersection fund. There is a cinder roadbed approximately 10 feet wide, with a single track laid in the center of the right-of-way. Other property owners assessed in the improvement district under the same plan of assessment are owners of platted lots, vacant or improved, some of which are only 40 feet wide.

The paving of Forty-second Street was constructed under contract with the city pursuant to petition of in-

terested property owners and the usual published notice of intention to pave and for selection of materials. A plan of assessment was worked out by the department of public improvements of the city, of which the owners had notice, pursuant to which plaintiff filed objections that the city was without any statutory authority to levy special assessments upon its right-of-way and that its right-of-way received no benefits from the improvement.

The plan of assessment was upon a scaling-back and graduating process with reference to benefits conferred by the improvement as provided by section 14-545, R. S. 1943. Each assessment, estimated to be uniform and not in excess of the benefits conferred by the improvement, was approved by the city council acting as a board of equalization. After overruling the railroad's objections, it was found by the board that the various lots, lands, and real estate included within the district had been benefited by reason of the improvement to the extent of the full amount of the assessment thereon. Thereafter in due time an ordinance levying the special tax and assessment was adopted by the city council and an assessment of $708.52 was imposed upon plaintiff's right-of-way as lands and real estate referred to therein.

Thereafter, plaintiff filed its bond with the city clerk as required by law, and perfected an appeal to the district court. There the issues were tried to the court, whereat evidence was adduced and a decree was rendered finding that plaintiff had a 100-foot right-of-way, devoted primarily to the operation of trains, without depots, sheds, warehouses, loading docks, or industries located on that part of its right-of-way within the improvement district, and that there was not sufficient evidence to support a finding that such part of plaintiff's right-of-way was then or would be in the future specially benefited in any particular by the improvement. It adjudged that the special assessments were

therefore null and void, and discharged plaintiff's property from the lien thereof.

Defendant's motion for new trial was overruled, and it appealed, assigning that the judgment was not sustained by the evidence but contrary thereto and contrary to law. We sustain the assignments.

There are two questions presented for decision. The first, a question of law, is whether or not plaintiff's right-of-way could be lawfully assessed for the improvement. The second, a question of fact arising only if the first should be answered affirmatively, is whether or not there has been such a showing of lack of benefits as to make the assessment void. With reference to the first question, the city's authority to create the improvement district, contract for and construct the paving, and levy special assessments on all lots, parts of lots, lands, and real estate within the district specially benefited by such improvement to cover the cost thereof, and its procedure generally in doing so, is not questioned here. In that regard, plaintiff's counsel argued that its 100-foot right-of-way, carrying a single center standard track used for the passage of freight trains across the city but not then and there serving, adjacent to, or abutting on any industrial sites, depots, warehouses, or other railroad property, could not be subjected to special assessments, under applicable statutes to defray the costs of paving. Defendant's counsel argued otherwise, and we sustain that contention.

Section 14-545, R. S. 1943, provides: "All special assessments to cover the cost of any public improvements herein authorized shall be levied and assessed on *all lots, parts of lots, lands, and real estate* specially benefited by such improvement, or within the district created for the purpose of making such improvement, to the extent of the benefits to such *lots, parts of lots, lands, and real estate* by reason of such improvements, such benefits to be determined by the council sitting as a board of equalization. Where they shall find such benefits to

be equal and uniform, such assessment may be according to the foot frontage, and may be prorated and scaled back from the line of such improvements according to such rules as the board of equalization shall consider fair and equitable." (Italics supplied.)

Section 14-543, R. S. 1943, provides: "The word 'lot' as used in this act shall be taken to mean a lot as described and designated upon the recorded plat of any such city, and in case there is no recorded plat of any such city, it shall mean a lot as described and designated upon any generally recognized map of such city. The word 'lands' shall mean any unsubdivided real estate. The word 'street' shall be deemed to include boulevards, avenues, alleys and lanes, or any form of public roadway in the city."

In that connection, other related sections in article 3, Chapter 14, R. S. 1943, giving the municipality authority to pave and outlining procedure therefor, use designations such as: "the abutting, adjacent and benefited property proposed to be assessed"—"the property in such district"—"the property within the improvement district"—"taxable property abutting"—"property owners"—"foot frontage of taxable property"—"lots and parcels of land"—"property especially benefited"—"such property"—"lots and parcels of land abutting"—"taxable foot frontage abutting"—"owners of any property"—"property owners within any district"—and "taxable property."

In construing applicable statutes, we are mindful of the rule that: "The legislative power and authority delegated to a city to construct local improvements and levy assessments for payment thereof is to be strictly construed and every reasonable doubt as to the extent or limitation of such power and authority is resolved against the city and in favor of the taxpayer." Besack v. City of Beatrice, *ante* p. 142, 47 N. W. 2d 356.

At the outset it should be stated that this is not a case where a track, as the only property of the railroad, oc-

cupies the street or runs longitudinally or parallel on the paved public street, as were those involved in the authorities cited in Annotation, 29 A. L. R. 679, and those relied upon in plaintiff's brief. Rather, this is one running across the pavement with available right-of-way lands or real estate adjoining each side of the track, approximately 45 feet wide and 300 feet long, abutting upon each side of the pavement.

As stated in Annotation, 37 A. L. R. 228: "Municipal authorities having no inherent power to levy assessments for local improvements can only do so when authorized by the legislature (see 25 R. C. L. 88); it is generally held, however, that authority for assessing a railroad right of way exists by virtue of statutory provisions authorizing the levying of assessments for local improvements on 'owners of land,' 'lots or parcels of land,' 'pieces of land,' 'lands or property,' etc., benefited by or abbutting (abutting) on the proposed improvements, without the necessity of there being specific mention of assessing railroad property or roadbeds." As stated on page 255: "The weight of authority holds that a railroad right of way may be benefited by the improvement of an abutting or adjacent street, and liable for an assessment for the cost of such improvement." See, also, 48 Am. Jur., Special or Local Assessments, § 111, p. 660; 63 C. J. S., Municipal Corporations, § 1334, p. 1070; Annotation, 82 A. L. R. 426.

As stated in McQuillin, Municipal Corporations, Revised Volume 5 (2d ed.), § 2199, p. 812: "Unless it has been exempted from assessment by some constitutional or statutory provision, it is well settled that railroad property is subject to special assessments for local improvements, if made so by appropriate legislation in the particular jurisdiction, even in the hands of a lessee, provided, of course, such property is specially benefited by the improvement; nor is such a levy obnoxious to any provisions of the state or federal constitutions. And it seems that it is unnecessary for legislation in express

terms to make such property assessable. Accordingly, under some statutes and municipal charters the tracks and right of way of a railroad company are subject to taxation for local improvements, the same as other lands benefited by the improvement, as lands in the benefit district, or abutting upon the street improvements."

In 2 Elliott on Railroads (3d ed.), § 950, p. 358, it is said: "As said in the preceding section, there is a conflict in the adjudicated cases as to whether or not the right of way of a railroad company is subject to local assessments. The question has been discussed in a great number of instances, and different conclusions reached in apparently similar cases. The latest authorities on the subject, however, recognize what we believe to be the true rule, and that is, that, where the right of way receives a benefit from the improvement for which the assessment is levied, and there is no statute exempting the railroad company from local assessments in clear and unequivocal terms, it is subject to assessment."

In 4 Dillon, Municipal Corporations (5th ed.), § 1451, p. 2586, it is said: "According to the view very generally held, land occupied and used by railroad companies for roadbeds, depots, freight houses, and other corporate purposes, whether the company be owner of the fee or has only an easement or qualified right therein, is to be regarded as real estate, which may be subjected by the legislature to special assessment for the opening, paving, and grading of streets and for other local improvements in the same manner as the real property of private individuals."

Many cases cited in notes appended to the foregoing statements conclusively support them. They are too numerous to cite in this opinion. In that connection, this court cited and approved the last above quoted statement in Chicago & N. W. Ry. Co. v. City of Albion, 109 Neb. 739, 192 N. W. 233, wherein it was concluded that a railroad company's right-of-way and other real property specially benefited by a public improvement was

liable for special assessments in its general relations and apart from its particular use for railroad purposes, in the same manner and upon the same basis as other property owners in a public improvement district. See, also, Louisville & Nashville R. R. Co. v. Barber Asphalt Paving Co., 197 U. S. 430, 25 S. Ct. 466, 49 L. Ed. 819.

The statutes applicable here have not changed the rule or exempted plaintiff's property in any way, and we conclude that its right-of-way comes within the definition of property, lands, and real estate within the district involved.

We turn then to the question of whether or not there has been such a showing of lack of benefits as to make the assessment void. In that connection, it is well established in this jurisdiction that: "Special assessments for paving by a municipality upon privately owned property for the public benefit in excess of the benefits to the owner of the property so assessed are unauthorized.

"The owner of property in a municipality cannot lawfully be assessed for a public improvement thereon or adjacent thereto beyond the amount of the present benefit or such reasonably prospective benefit as such owner may derive from the improvement in question." However, "When a party attacks a paving assessment as void * * * the burden is on him to prove the invalidity of the assessment." Munsell v. City of Hebron, 117 Neb. 251, 220 N. W. 289. See, also, Whitla v. Connor, 114 Neb. 526, 208 N. W. 670; City of Superior v. Simpson, 114 Neb. 698, 209 N. W. 505; Chicago & N. W. Ry. Co. v. City of Albion, *supra.*

In Whitla v. Connor, *supra,* quoting with approval from Chicago, R. I. & P. Ry. Co. v. City of Centerville, 172 Iowa 444, 153 N. W. 106, it is said: " 'Speaking generally, there is a fair presumption that all real estate receives some degree of benefit from the permanent (or temporary) improvement of a street upon which it abuts. It is upon such presumption that the whole sys-

tem of special assessments for local improvements is justified and sustained. * * *' "

In Medland v. Linton, 60 Neb. 249, 82 N. W. 866, it was held by this court: "In making special assessments for benefits received it is presumed that the authorities arrived at the amounts thereof with reference alone to the benefits accruing to the property assessed, and that the owners are required to contribute to the cost of the improvement only in proportion as their property is specially benefited thereby."

In McQuillin, Municipal Corporations, Revised Volume 5 (2d ed.), § 2195.2, p. 807, citing authorities, it is said: "There is a presumption in favor of the validity of local improvement assessments. For example, there is a presumption of benefit to all property abutting on a street to be improved, although this presumption does not arise as a matter of law; accordingly the burden of proving the contrary is on the landowner." See, also, Johnson v. City of Waterloo, 202 Iowa 617, 210 N. W. 755; Maryland & P. R. R. Co. v. Nice, 185 Md. 429, 45 A. 2d 109.

In the last-cited case, under facts peculiarly distinguishable from those at bar controlling decision, it is said: "It is a general rule that the law presumes that street paving, which facilitates travel and affords better access to abutting property, confers a special benefit upon the abutting property owner as well as a general benefit upon the community. * * * The prevailing view, however, is that the court cannot say as a matter of law that the right of way of a railroad may not be benefited or susceptible of benefit by local improvements, and we accordingly hold that a right of way is subject to assessment for improvements if specially benefited thereby."

As stated in City of Grand Rapids v. Grand Trunk Ry. System, 214 Mich. 1, 182 N. W. 424: "The weight of authority is, and we so hold, that the court may not say as a matter of law, that the track, roadbed, or right of

way of a railroad may not be benefited or susceptible of benefit by a local improvement."

In the light of the foregoing rules, we have examined the record. In that connection, it will be noted that plaintiff's position was and is that its right-of-way received no special benefit, but rather suffered a detriment as a result of the paving.

Five photographs were offered by plaintiff and received in evidence. They reveal that plaintiff's track, with plank-maintained crossing, goes over the paving of Forty-second Street at a slight angle. Plaintiff's right-of-way land on each side of the tracks is level as it abuts the pavement, except on the side where intersecting Hartman Avenue slopes down to the pavement on the east. The pavement on Forty-second Street, sloping from the north, is curbed with grated drainage facilities installed near the track on each side of the pavement. There is a wigwag signal on the right-of-way south of the tracks, and east of the pavement. North of the tracks, on the west side of the pavement, is an ordinary cross buck warning sign. Looking south there are first a few vacant lots, and then residence properties on the east side of the pavement. On the west, there are a few vacant lots, then a store building, and residences farther south. Looking north, there are a few vacant lots, then residences on the west side. Trees obscure a view of the east side. No industrial or other commercial facilities are observable in the photograph.

A blueprint offered by plaintiff illustrates how Forty-second Street intersects plaintiff's right-of-way and Hartman Avenue; outlines the respective properties included in the district, including plaintiff's right-of-way; and shows the amount of assessment levied against each one of them.

Plaintiff's division engineer testified that plaintiff maintained a single track on its right-of-way, known as the main line, used mostly for freight trains, between Elkhorn Junction east of the intersection, and Irvington,

the first station west of Omaha, and South Omaha. He testified that no industry was located near the vicinity of Forty-second Street and Hartman Avenue. Contrary to common knowledge, he also stated that there was no room for any industry of any kind or possibility of construction thereof on either side of its right-of-way spaces, each 45 feet by 300 feet, and as a conclusion, over defendant's objection, he testified that "there is no benefit whatever to the railroad company, the paving does not benefit it in any manner."

On the other hand, plaintiff also called the Omaha city assessment clerk as a witness, who testified at length concerning the manner, reason, and method of assessing and the amount assessed against each property in the improvement district, after which, without objection, he was asked by plaintiff's counsel: "And you figure that the right of way of the railway company was benefited to the extent of the assessment?" To which he answered: "That is right." Thus, as we view it, there was not sufficient competent evidence adduced by plaintiff from which it could have been reasonably concluded that plaintiff received no special benefits from the paving.

On the other hand, a witness then employed by the city in planning, designing, and zoning service, formerly employed by the Railway Educational Bureau and Boeing Aircraft Company, testified for defendant. He testified without objection that plaintiff did receive special benefits from the improvement, present and future, by reason of facilitated access from the highway system to its right-of-way, the strong possibility in the future for location of industrial and commercial facilities along plaintiff's right-of-way, seeking both highway and railroad transportation at or near that point, the availability and accessibility of fire protection, and as an aid to plaintiff in actually maintaining its right-of-way.

As stated in Munsell v. City of Hebron, *supra,* quoting from Chicago, R. I. & P. R. R. Co. v. City of Centerville, *supra*: " 'Benefits capable of instant demonstration and

mathematical accuracy are not necessary in order to support an assessment.' " See, also, Morse v. City of Omaha, 67 Neb. 426, 93 N. W. 734.

There is not sufficient competent evidence in this record which would justify the district court or this court in avoiding or annulling the assessment. In the situation presented, the action of the taxing authorities in levying special assessments as provided for by law is conclusive because plaintiff has not proved that such taxing body making such special assessments proceeded upon an illegal principle or an erroneous rule of law. Village of Winside v. Brune, 133 Neb. 80, 274 N. W. 212; Whitla v. Connor, *supra.*

For the reasons heretofore stated, we conclude that plaintiff failed to sustain the burden imposed upon it, and that the judgment of the district court should be and hereby is reversed and the cause remanded, with directions to enter a judgment for defendant in conformity with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

HARVEY R. ZIMMERMAN, APPELLANT, V. CLIFFORD LINDBLAD, APPELLEE.

48 N. W. 2d 415

Filed June 14, 1951. No. 32977.

1. **Trial.** As a general rule it is improper to allow the cross-examination of a witness to be extended beyond the facts and circumstances connected with matters testified about on direct examination.
2. ———. Where testimony is given by a witness on direct examination, from which an inference of fact arises favorable to the party producing him, anything within the knowledge of the witness tending to rebut that inference is admissible on cross-examination, and the opposing party is entitled to pursue that line of cross-examination as a matter of right.
3. **Pleading: Evidence.** Pleadings in another case or parts thereof which amount to admissions against interest in a case on trial are admissible against the party who made the admissions.

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

Hubka & Hubka, for appellant.

Hevelone & McCown, for appellee.

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

YEAGER, J.

This is an action for damages for personal injuries by Harvey R. Zimmerman, plaintiff and appellant, against Clifford Lindblad, defendant and appellee, claimed to have been sustained as the result of plaintiff being struck by an automobile owned and operated by the defendant about 11 p. m., September 3, 1947, in one of the public streets of Beatrice, Nebraska.

In the light of the limits of the assignments of error no detailed statement of the facts on which the action is based is required. The assignments of error are all predicated upon errors of law occurring at the trial. They relate solely to claimed errors in the admission of evidence.

The record discloses that on August 19, 1947, the plaintiff, while working for Walco Engineering and Construction Company, fell from a scaffold and was injured. The injury described was a fracture of the greater tuberosity of the left shoulder bone. "Greater tuberosity" was described as a little button in the left shoulder bone.

For treatment of this injury he was under the care of a physician on September 3, 1947. The plaintiff claims that on September 3, 1947, he was struck by the automobile of the defendant and that the injury sustained on August 19, 1947, was aggravated and he was otherwise injured. The action here is for damages for this aggravation and the additional injuries.

The action was tried to a jury and a verdict was returned in favor of plaintiff for $250. The plaintiff filed

a motion for new trial which was overruled whereupon judgment was entered on the verdict. From this judgment and the order overruling the motion for new trial the plaintiff has appealed.

On account of the accident of August 19, 1947, the plaintiff instituted action against Walco Engineering and Construction Company, his employer, and Standard Accident Insurance Company, the employer's workmen's compensation insurance carrier, to recover compensation under the Workmen's Compensation Act. In that action he obtained an award whereby he recovered for 24 weeks and 3 days temporary total disability and thereafter 15 percent permanent partial disability.

On cross-examination in this case the plaintiff was required to answer questions which elicited this information. For his first assignment the plaintiff urges that this was error. The theory of the assignment is that this inquiry was beyond and outside the circumstances stated in direct examination.

By the petition of plaintiff and the further pleadings in the case the question of whether the injuries for which plaintiff seeks recovery in this action were sustained in the accident of August 19, 1947, or the one of September 3, 1947, became a question for consideration and determination.

In the petition the plaintiff gave information as to the accident and injuries sustained on August 19. The defendant charged affirmatively in his answer that the injuries for which this action was instituted grew out of that accident. This was by reply denied. Thus it becomes clear that this was an issuable matter.

The general rule is that a party has no right to cross-examine a witness except as to facts and circumstances connected with matters testified about on his direct examination. Atwood v. Marshall, 52 Neb. 173, 71 N. W. 1064. However within the meaning of this rule cross-examination is proper as to anything tending to affect the accuracy, veracity, or credibility of the witness.

Citizens Bank of McCook v. Warfield, 85 Neb. 328, 123 N. W. 315. Also where testimony is given by a witness on direct examination, from which an inference of fact arises favorable to the party producing him, anything within the knowledge of the witness tending to rebut that inference is admissible on cross-examination, and the opposing party is entitled to pursue that line of cross-examination as a matter of right. Larson v. Hafer, 105 Neb. 257, 179 N. W. 1013. Again, anything within the knowledge of a witness tending to rebut evidence given on direct examination is admissible as a matter of right on cross-examination. Blue Valley State Bank v. Milburn, 116 Neb. 131, 216 N. W. 299.

Under these rules this cross-examination was clearly proper. The information elicited showed that the plaintiff claimed total disability in the workmen's compensation court, had a trial on the issue, and obtained a favorable adjudication and award which award he accepted for a portion of the time for which he seeks to recover damages for disability in this action. The inquiry provided a test of the veracity and credibility of the plaintiff as a witness. It was with regard to testimony given on direct examination from which an inference of fact arose favorable to him. It was in rebuttal of evidence given by him on direct examination. This cross-examination was not erroneously permitted.

Assignments of error Nos. 2 and 3 are that the court erred in admitting in evidence that part of the award in the workmen's compensation case hereinbefore referred to setting forth the disability of plaintiff and the amount of the adjudication in his favor, and in admitting the record showing receipt and satisfaction of the award by plaintiff.

The brief contains no statement of valid reason why this evidence was not admissible. There is no contention that the information thus conveyed to the jury was not correct. In truth in his own oral evidence the plaintiff

testified to the correctness of the information. Certainly this evidence was material and relevant.

The plaintiff having recovered judgment for total disability, rules of law will not allow evidence of that fact to be suppressed to the end that he might be permitted to recover against another for total disability growing out of another accident for a portion of the same period of time. There was no error in the admission of this evidence.

The court admitted in evidence in the form of exhibits a part of the answer filed by the defendants in the workmen's compensation case and a portion of the reply thereto by the plaintiff. This is the basis of the 4th and 5th assignments of error. The substance of the portion of the answer admitted was an allegation that the plaintiff was after August 19, 1947, struck by an automobile (the occurrence which is the basis of this action) and that thereby he suffered increased disability in his left arm and shoulder. This allegation was denied by the admitted portion of the reply. The authenticity of the exhibits was admitted by stipulation of the attorney for the plaintiff.

These exhibits taken together amounted to a voluntary admission or declaration of the plaintiff contrary to the issue and theory on which the present cause of action was presented for consideration and determination. These exhibits were admissible under the rule that pleadings may be received in evidence in suits other than those in which they were filed as admissions or declarations against interest. Paxton v. State, 59 Neb. 460, 81 N. W. 383, 80 Am. S. R. 689, on rehearing, 60 Neb. 763, 84 N. W. 254.

The remaining assignment is that the court erred in allowing witnesses to testify that they detected the odor of alcoholic liquor on the breath of the plaintiff. This assignment requires consideration no further than to say that if it was error it was without prejudice. The plaintiff himself testified that he had been drinking

beer. The effect of the testimony of these two witnesses was to say only that they detected the odor of the beer which plaintiff testified that he had consumed.

The judgment of the district court is affirmed.

AFFIRMED.

GORDON NELSON, APPELLEE, V. ANTON WIEPEN ET AL., APPELLANTS.

48 N. W. 2d 387

Filed June 14, 1951. No. 32981.

1. **New Trial.** Where a trial judge does not give a reason for granting a new trial, justification for so doing must be found in the record.
2. ———. Where a trial judge grants a new trial there is no burden in the sense of a burden of proof on either party. The burden is upon both parties to assist the court to a correct determination of the question or questions presented.
3. **Appeal and Error: New Trial.** Errors alleged to have been committed in a trial where the trial court grants a new trial will be considered and determined in this court so far as necessary to the appeal, subject to the right to notice and consider plain errors not assigned.
4. **Damages.** Where the pleadings and evidence sufficiently raise the issue in a personal injury case concerning damages for loss of time or earnings, the trial court should properly instruct the jury concerning the same.
5. ———. Where the issue is duly raised, the trial court may and should advise the jury that it may award damages for impaired earning capacity by an instruction in proper form and clearly stating applicable rules.
6. **Trial.** It is the duty of the trial court to instruct the jury upon the issues presented by the pleadings and the evidence, whether requested to do so or not.

APPEAL from the district court for Cedar County: SIDNEY T. FRUM, JUDGE. *Affirmed.*

Clarence E. Haley, for appellants.

John E. Newton and *C. M. Kingsbury,* for appellee.

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

MESSMORE, J.

This is an action at law brought by the plaintiff Gordon Nelson to recover damages for personal injuries he received and damages to his automobile resulting from a collision between his automobile, driven by his brother Dale Nelson, and the automobile owned by the defendant Anton Wiepen, driven by his minor son Bruno Wiepen who was not the holder of a driver's license and allegedly driving his father's car with his father's consent, which is disputed. The accident occurred in an intersection in Cedar County. The case was tried to a jury resulting in a verdict in favor of the plaintiff in the amount of $2,569.30. The plaintiff filed a motion for a new trial which was sustained by the trial court. The defendants appeal.

For convenience we will refer to the parties as originally designated in the district court.

We deem it unnecessary to set forth the pleadings or the evidence. Suffice it is to say thereunder the questions of negligence and contributory negligence on the part of the plaintiff were for the jury to determine. The trial court properly instructed on this phase of the case, and also on the comparative negligence rule.

The sole question to be determined in this appeal is whether or not the trial court erred in granting the plaintiff a new trial. The trial court did not give a reason for granting a new trial, however, it need not do so. Justification for so doing must be found in the record.

There is no burden in the sense of a burden of proof upon either party. The burden is upon the parties to assist the court to a correct determination of the question or questions presented.

Alleged errors will be considered and determined here as far as necessary to the appeal, subject, of course, to the right to notice and consider plain errors not assigned.

See Greenberg v. Fireman's Fund Ins. Co., 150 Neb. 695, 35 N. W. 2d 772.

After review of the record, in compliance with the rules announced in the afore-cited authority, we determine the only meritorious assignment of error. The plaintiff assigns as error that the trial court failed to instruct the jury with reference to loss and reduction of earnings and of earning capacity, and by such failure committed prejudicial error as against the plaintiff.

The plaintiff's amended petition pleaded that the plaintiff suffered damages by loss of earnings or income from his business to the extent and in the amount of $4,000. In this connection the record discloses that the plaintiff, as a result of the accident, sustained numerous bruises, contusions, and injury to his brain as a result of which he suffered several months from headaches, pain in his arm and shoulder, impairment of his eyesight and hearing, and loss of memory. The plaintiff was 33 years of age at the time of the accident, and his health was good. He was engaged in the business of auctioneering, the buying and selling of livestock, and also in the seed business. He entered the hospital at Yankton, South Dakota, the afternoon of August 1, 1949, an hour or so after the accident in which he had been involved. He was unconscious at the time. After arrival at the hospital he was given a complete physical examination. As a result of this examination a specialist was called in who examined him and recommended an operation on his brain which was performed the next day. He was released from the hospital on August 18, 1949. He remained unconscious or semiconscious from the time of his admittance until the time he returned home. After arriving home, due to the injuries above described, he was unable to use his arm, to dress himself, or to stand unassisted. He improved to some extent in two or three months. His eyes did not function normally and the hearing of his right ear was slightly affected. His upper lip and tongue were

thick, and he noticed it to considerable extent for the reason that he was unable to cry a sale. He had no endurance. His voice was weak, and he was required to employ help to assist him in any sales he might have and to do other business in which he was engaged.

After his removal from the hospital he was examined on several occasions by an eye, ear, nose, and throat specialist for double vision which he suffered for some period of time following the accident. The specialist who operated on the plaintiff's brain testified he would be permanently disabled to carry on his occupation or business to the extent of 10 to 20 percent. The eye specialist gave as his opinion that the plaintiff would suffer 15 percent disability to carry on his usual ordinary business, due to the double vision of his eyes which had improved but was not entirely corrected.

The evidence further shows that the plaintiff's expenses for medical attendance, operation, medicines, nursing, X-rays, and the damage to his automobile totaled $2,289.08. The evidence also shows that the average income of the plaintiff from his business for two years prior to the date of the accident was $7,650. The year following the date of the accident, the record shows items of expense as a result of the accident which the plaintiff claimed reduced his net income for that year to $1,425.

It is true the trial court in instruction No. 1 restated the amended petition including the allegation therein with reference to loss of earnings. However, in the instruction on the measure of damages the court informed the jury as to the elements it might take into consideration in determining the measure of damages. In so doing the court left out of this instruction any statement with reference to the diminution of earning capacity of the plaintiff or loss of earnings or income. Even though instructions were given upon the expectancy tables in evidence and upon the decreased value of the dollar in purchasing power, such instructions were not sufficient

to cure the absence in instruction No. 1 of the diminution of earnings or loss of earnings and income, as pleaded, and on which there is evidence that goes to the quantum of the proof of the damages suffered by this plaintiff, an issue in the case. The following authorities are applicable:

"Where the pleadings and evidence sufficiently raise such issue, the court in a personal injury case should properly instruct the jury concerning damages for loss of time or earnings." 25 C. J. S., Damages, § 185, p. 890.

"Where the issue is duly raised, the court may and should advise the jury that it may award damages for impaired earning capacity, by instruction in proper form and correctly stating applicable rules, * * *." 25 C. J. S., Damages, § 185, p. 891. See, also, 15 Am. Jur., Damages, §§ 379, 380, p. 818.

In Crecelius v. Gamble-Skogmo, Inc., 144 Neb. 394, 13 N. W. 2d 627, the court said: "In an action for damages for personal injuries which are permanent and have impaired the earning capacity, damages for pecuniary loss by reason of decreased earning power are to be based on life expectancy immediately before the injury and for future mental and physical suffering on probable expectancy of life in plaintiff's injured condition. * * *

"The only future pain and suffering which a jury is entitled to consider in the assessment of damages is such as the evidence shows with reasonable certainty will be experienced."

It is the duty of the court to instruct the jury upon the issues presented by the pleadings and evidence, whether requested so to do or not. See Fimple v. Archer Ballroom Co., 150 Neb. 681, 35 N. W. 2d 680.

For the reasons herein given, the judgment of the trial court in granting the plaintiff a new trial is affirmed.

AFFIRMED.

WILLIAM H. HARKNESS ET AL., APPELLANTS, V. CENTRAL NEBRASKA PUBLIC POWER AND IRRIGATION DISTRICT, APPELLEE.

48 N. W. 2d 385

Filed June 14, 1951. No. 32998.

1. **Appeal and Error.** When a demurrer to a petition is sustained, the plaintiff's action dismissed, and a motion for a new trial and rehearing is filed, in the event it is ruled upon, then under section 25-1912, R. R. S. 1943, the time for appeal begins to run from the date of the ruling on the motion for a new trial and rehearing.
2. ———. During the pendency of a motion for a new trial timely filed, no appealable order is considered as having been rendered until the motion for a new trial is disposed of.

APPEAL from the district court for Dawson County: JOHN H. KUNS, JUDGE. *Appeal dismissed.*

Bannister & Deines, and *Smith Brothers,* for appellants.

R. O. Canaday, Johnson & Stuart, and *Beatty, Clarke, Murphy & Morgan,* for appellee.

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

MESSMORE, J.

This is an action brought by the plaintiffs against the defendant to recover damages to crops caused by the construction of a system of canals, reservoirs, and incidental structures by the defendant, and the impounding of large amounts of water through the canals into the reservoirs. As a result of such construction and operation by the defendant water has seeped from the reservoirs and canals toward and under the property of the plaintiff, destroying the value of the soil and causing damage to the growing crops alleged to have been caused solely by water escaping from the defendant's works.

The plaintiffs' amended petition set forth four alleged causes of action on the basis heretofore mentioned. On

November 20, 1950, the defendant demurred to the amended petition on the ground that it did not state a cause of action, and prayed its dismissal. On December 13, 1950, the trial court sustained the demurrer of the defendant to the plaintiffs' amended petition. On December 23, 1950, the plaintiffs filed a motion for a new trial in which they asked for rehearing on the demurrer sustained by the trial court on the ground that dismissing of the plaintiffs' cause of action was contrary to law. On January 11, 1951, the plaintiffs filed notice of appeal to this court. The motion for new trial and rehearing is still pending in the district court for Dawson County.

The defendant moves this court to dismiss the appeal for the reason that the record herein shows that no final appealable order, judgment, or decree has been entered in the cause in the district court for Dawson County which court still has jurisdiction of the cause, there being no final adjudication or final order, judgment, or decree entered by the district court from which an appeal to this court can be prosecuted.

Section 25-1911, R. 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 25-1912, R. R. S. 1943, insofar as necessary to state here, provides for the filing in the office of the clerk of the district court in which a judgment, decree, or final order was rendered, within one month after the rendition of the same, or the making of such final order, or within one month from the overruling of a motion for new trial in said cause, a notice of intention to prosecute such appeal signed by the appellant or appellants or his or their attorney of record.

Section 25-1902, R. R. S. 1943, provides: "An order affecting a substantial right in an action, when such order in effect determines the action and prevents a judgment, and an order affecting a substantial right made in a special proceeding, or upon a summary application

in an action after judgment, is a 'final order' which may be vacated, modified or reversed, as provided in this chapter."

As stated in Anson v. Kruse, 147 Neb. 989, 25 N. W. 2d 896, citing Smith v. Sahler, 1 Neb. 310, "A decree to be final must dispose of the whole merits of the case, and leave nothing for the further consideration of the court. An order is final when it affects a substantial right and determines the action. * * * When no further action of the court is required to dispose of the cause pending, it is final; when the cause is retained for further action, as in this case, it is interlocutory." See, also, Barry v. Wolf, 148 Neb. 27, 26 N. W. 2d 303; Western Smelting & Refining Co. v. First Nat. Bank, 150 Neb. 477, 35 N. W. 2d 116.

This court has not passed upon the precise question presented, however, we believe the principle adopted in McGerr v. Marsh, 148 Neb. 50, 26 N. W. 2d 374, is controlling and decisive of the proposition under consideration. In the cited case this court held: "If a motion for a new trial is filed in a case in which a judgment of dismissal was entered before any evidence was taken, then under section 25-1912, R. S. 1943, the time for taking an appeal to this court begins to run from the date of the entry of the order overruling such motion for a new trial." The court further said: "If the defeated litigant desires to give the trial court an opportunity to correct his judgment, if he has made an error, by filing a motion for a new trial or rehearing, it is our opinion that the time for appeal to this court should not be cut off until that motion has been overruled by the district court, and it stands to reason that the rule should be uniform in all cases." The phrase "in all cases" applies both in actions at law or suits in equity.

The general rule as stated by text writers is that a pending motion for a new trial seasonably filed keeps the cause in the trial court and so long as it remains undisposed of there can be no final judgment within

the meaning of the statutes regulating appeals. As soon as a motion for a new trial is filed the district court's jurisdiction over the case is retained and continued.

During the pendency of a motion for a new trial no appealable order is considered as having been rendered until the motion for a new trial is disposed of.

In the light of the foregoing authorities, and for the reasons given in this opinion, the motion to dismiss the appeal filed by the defendant should be sustained.

APPEAL DISMISSED.

HAWKEYE CASUALTY COMPANY, A CORPORATION, APPELLANT, V. JOE H. STOKER ET AL., APPELLEES.

48 N. W. 2d 623

Filed June 22, 1951. No. 32948.

1. **Trial: Judgments.** Under the Uniform Declaratory Judgments Act an issue of fact properly triable to a jury in an action at law may properly be submitted for determination by a jury in a declaratory judgment action.
2. **Automobiles.** Under the laws of Iowa the registration certificate of an automobile is prima facie evidence of ownership of the automobile. It may be overcome by other evidence.
3. ———. Under the laws of Iowa where an automobile is registered in the name of one person and an issuable claim is made that the true ownership is in another the question of ownership is one of fact determinable by a jury.
4. **Trial.** If an instruction is reasonably sufficient and not incorrect as to law or fact a party may not be heard to complain of its insufficiency or inadequacy in the absence of a request for a more specific instruction.
5. **Insurance.** Before an insurer may make a defense of misrepresentation or breach of condition or warranty it must have seasonably tendered back the unearned premium and kept such tender good.
6. ———. An insurer has the right under a reservation of rights agreement to defend an insured without waiver of right or estoppel to defend against liability under a policy of insurance.
7. ———. Where an insurer disclaims liability under an insur-

ance policy either on the ground that the policy is void or that the policy does not furnish coverage it may not of right exact of the insured a reservation of rights agreement and thus become entitled to defend an action without waiver of or estoppel to assert nonliability under the policy.

8. ———. An insurer does not have the right without consent of the insured to retain control of the defense of an action indemnifiable under the apparent terms of an insurance policy and at the same time reserve the right to disclaim liability on the policy.

9. ———. Where an insurer denies liability for indemnity under an insurance policy on the ground that the policy is void or that the insured has breached a representation, warranty, or condition the insured has the right to treat the denial as a breach of the contract by the insurer and to secure attorneys of his own choosing and on his own behalf defend an action.

10. ———. Where an insurer accepts the defense of an action under a reservation of rights agreement with the insured and thereafter but before disposition of the action which it has agreed to defend institutes action in which it unequivocally declares nonliability and invalidity of the policy and prays for judgment accordingly, the insured is freed from any obligation either under the policy or the reservation of rights agreement to allow the insurer to continue with the defense of the action.

11. ———. Under such circumstances the insurer waives its right to defend which leaves the insured free to defend the action in actual trial to judgment or in good faith make such a settlement as ordinary and reasonable prudence and caution might dictate as advisable.

12. **Attorney and Client.** Before a litigant may claim the right to have an attorney's fee assessed in a case statutory authority or a uniform course of procedure must be found therefor.

13. ———. Section 44-359, R. S. 1943, permits of the allowance of attorney's fees to parties designated who bring actions at law against the classes of insurers designated therein who are doing business in this state.

14. ———. A party not entitled at the time to maintain an action at law under section 44-359, R. S. 1943, is not entitled to have an attorney's fee assessed under any of the terms of that statute.

APPEAL from the district court for Douglas County: JACKSON B. CHASE and ARTHUR C. THOMSEN, JUDGES. *Affirmed in part, modified in part, and in part reversed.*

Gross, Welch, Vinardi & Kauffman, and *H. B. White,* for appellant.

Richard A. O'Connor, Cook & Cook, and *McCormack & McCormack,* for appellees.

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

YEAGER, J.

This is an action instituted on August 10, 1949, by Hawkeye Casualty Company, a corporation, under the Uniform Declaratory Judgments Act of the State of Nebraska against Joe H. Stoker, Thelma I. Stoker, Leonard Bertelsen, Louis Bertelsen, Quentin Peterson, Helen Foreman, Delores Wahlstrom, Lila May Woodin, and Steven Hill, defendants, to have determined the liability of the plaintiff, if any, under a policy of liability insurance issued to the defendant Thelma I. Stoker. The Stokers are husband and wife. Plaintiff, in an original petition based on specific grounds, declared that there was no liability and prayed for an adjudication accordingly. By amendment to the petition the plaintiff alleged additional specific grounds for nonliability under the policy and prayed for adjudication in conformity with the amendment.

The case came to trial and certain issues of fact were submitted for determination to a jury. These issues were decided in favor of the defendants whereupon, among other things which will be considered later herein, the court determined that there was liability under the policy and adjudicated accordingly.

From this and the adjudication on the other questions and an order overruling a motion for new trial duly and timely filed the plaintiff has appealed.

The factual situation out of which the action flows is substantially the following: The plaintiff is an Iowa corporation engaged in the business of issuing automobile liability insurance policies. The defendants Stoker are residents of Council Bluffs, Iowa. On August 21,

1947, the plaintiff issued to Thelma I. Stoker a standard automobile liability insurance policy covering a 1936 Plymouth automobile. The policy contained what is commonly called an omnibus clause, that is a clause which extended the coverage of the policy to anyone using the automobile with the consent of the insured. This clause of course gave coverage to Joe H. Stoker when he was using the automobile with the consent of Thelma I. Stoker.

On or about August 24, 1947, the defendant Joe H. Stoker was operating the insured automobile in Douglas County, Nebraska, wherein with the automobile he had an accident. He promptly made report of the accident to the plaintiff.

The defendants Bertelsen, the defendant Peterson, and the defendant Helen Foreman, as a consequence of the accident, brought action against Joe H. Stoker for damages. Leonard Bertelsen was joined as a defendant in the action instituted by Helen Foreman but that is of no importance here. The other named defendants apparently asserted claims for damages but also apparently did not institute actions. After commencement of the actions the plaintiff assumed their defense as was its duty if there was liability under the terms of the policy, and retained the law firm of Gross and Welch to represent the defendants Stoker in the actions.

On January 28, 1949, the plaintiff secured from Joe H. Stoker a reservation of rights agreement the effect of which was to permit the plaintiff to investigate and defend the actions against Joe H. Stoker without waiver of right to assert nonliability under the policy. Later and on May 23, 1949, the plaintiff secured a like reservation of rights from both Joe H. Stoker and Thelma I. Stoker.

The alleged ground of nonliability contained in the original petition is that by the terms of the policy there is no liability unless the insurance is written and carried in the name of the sole owner of the automobile. The

plaintiff says, and on this ground it seeks avoidance of liability and to avoid the policy, that Thelma I. Stoker was not the sole owner of the automobile but that on the contrary Joe H. Stoker was the owner.

The alleged ground of nonliability contained in the amendment, which amendment was filed by leave of court January 19, 1950, is that the defendants Stoker violated and breached the cooperation clause of the policy, the important part of which insofar as this case is concerned is the following: "The insured shall not, except at his own cost, voluntarily make any payment, assume any obligation or incur any expense other than for such immediate medical and surgical relief to others as shall be imperative at the time of accident."

The substantial contention in this connection is that defendants Stoker made settlement and allowed judgments to be entered as follows: In favor of Quentin Peterson for $8,000, in favor of Louis Bertelsen for $5,000, and in favor of Leonard Bertelsen for $3,000, without the consent of plaintiff.

These judgments were entered on October 4, 1949. In the case of Quentin Peterson v. Joe H. Stoker, the entry representing the settlement and judgment is as follows: "Jury waived, trial to the court, judgment for plaintiff in the sum of $8,000.00 and costs. Complete record waived." The other two are the same except as to amounts of judgment. There was in the true sense no trial. No witness appears to have been sworn and no evidence was received. It clearly appears that the judgments were entered pursuant to agreement among the attorneys representing the parties and with consent of Joe H. Stoker.

The defendants Bertelsen, the defendant Foreman, and the defendant Peterson were made parties to the action because of the fact that they had instituted action against Joe H. Stoker and to them the plaintiff would be required to respond in case the defendant Joe H. Stoker was liable in damages, of course within the limits

of the policy, which limits it may be well to state were for bodily injuries, $5,000 for each person with a maximum of $10,000 for each accident and a maximum of $5,000 for property damage for each accident.

The defendants have contested the action on various grounds. The first to be noted here is that the plaintiff was without right at the time this declaratory judgment action was instituted to maintain the action. This question was not presented to the district court. It therefore will be passed without further consideration, except as it may be referred to later in determination of the character and quality of a declaratory judgment action, a determination made necessary by certain contentions of the plaintiff. The second is that the rule that the insured is required to have an insurable interest in the property insured has no applicability to indemnity policies. The third is that the question of whether or not Thelma I. Stoker was the sole owner of the automobile was one of fact and the fact having been determined by a jury favorable to her under proper instructions the finding is conclusive on that point. The fourth is that a provision in a policy forbidding the insured to settle claims without insurer's consent is limited to cases where the insurer performs its contract to defend actions against the insured. The fifth is that in case an insurer claims a breach on the part of the insured of the cooperation clause of a policy, the insurer must show not only a breach but also that the breach operated to its prejudice. The sixth is that the plaintiff is estopped to assert a breach by the insured by its retention and failure to timely tender a refund of premiums. The tender of refund of premiums was not made until January 19, 1950.

On the part of plaintiff, it was and is here contended that under the Uniform Declaratory Judgments Act it was not proper to submit the question of the ownership of the automobile to a jury as in a law action. It does not contend that the question of ownership was not a

question of fact presented for determination in the case nor that the court erred with regard to the burden of proof in this connection but it contends that the question of fact was not one properly submissible to a jury. The ground of the contention is that the action is sui generis and essentially equitable in character.

It appears appropriate to consider first the questions presented under the Uniform Declaratory Judgments Act. The following are pertinent provisions of the act:

"Courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect; and such declarations shall have the force and effect of a final judgment or decree." § 25-21,149, R. S. Supp., 1949.

"Any person interested under a deed, will, written contract or other writings constituting a contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise and obtain a declaration of rights, status or other legal relations thereunder." § 25-21,150, R. R. S. 1943.

"A contract may be construed either before or after there has been a breach thereof." § 25-21,151, R. R. S. 1943.

"The enumeration in sections 25-21,150, 25-21,151 and 25-21,152 does not limit or restrict the exercise of the general powers conferred in section 25-21,149, in any proceeding where declaratory relief is sought, in which a judgment or decree will terminate the controversy or remove an uncertainty." § 25-21,153, R. R. S. 1943.

"When a proceeding under this act involves the determination of an issue of fact, such issue may be tried and determined in the same manner as issues of fact are tried and determined in other civil actions in the court in which the proceeding is pending." § 25-21,157, R. R. S. 1943.

"This act is declared to be remedial; its purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations; and is to be liberally construed and administered." § 25-21,160, R. R. S. 1943.

The action here was for a declaratory judgment after claimed breach and this the act specifically authorizes.

An issue of fact as to whether or not Thelma I. Stoker was the sole owner of the automobile in question was presented by the petition. It is difficult to see how it may be said that it was improper under the act to submit this question to a jury, especially in view of the pronouncement that the act is to be liberally construed and administered. The act by its terms has application both substantively and adjectively and we think that the provision for liberal construction applies adjectively as well as substantively. See, 13 A. L. R. 2d 777 et seq.; Fidelity & Casualty Co. of New York v. Groth, 47 N. Y. S. 2d 68; Crollard v. Northern Ins. Co., 240 Mo. App. 355, 200 S. W. 2d 375; Utica Mut. Ins. Co. v. Beers Chevrolet Co., Inc., 250 App. Div. 348, 294 N. Y. S. 82; State ex rel. United States Fire Ins. Co. v. Terte, 351 Mo. 1089, 176 S. W. 2d 25; American Employers Ins. Co. v. Wentworth, 90 N. H. 112, 5 A. 2d 265.

The plaintiff contends that there was no question of ownership to be determined by a jury for the reason that on the trial it was conclusively shown that Thelma I. Stoker was not the sole owner. As to this, the automobile was registered in Iowa and the plaintiff agrees that the law of Iowa is applicable to this situation. It was there registered in the name of Thelma I. Stoker and had been so registered since 1940.

Under Iowa law the registration certificate of an automobile is prima facie evidence of ownership of an automobile which may be overcome by other evidence. Abraham v. Hartford Fire Ins. Co., 215 Iowa 1, 244 N. W. 675; Craddock v. Bickelhaupt, 227 Iowa 202, 288 N. W. 109, 135 A. L. R. 474.

The Iowa court in the Abraham case held that, where there was a dispute as to true ownership between one who claimed to be the owner and an insurance company defending on the ground of lack of sole ownership against liability for loss on account of theft of the automobile, the question of ownership was one of fact for a jury.

That was a case where the claim was made by a person claiming ownership although the certificate of registration was in another. In this case the automobile was registered in the name of Thelma I. Stoker and the plaintiff contends that she was not the sole owner but that it was owned by Joe H. Stoker.

The facts in this connection as disclosed by the record are that this automobile was purchased in 1940 by exchange of another and with funds drawn from a joint bank account of the Stokers. It was registered by Thelma I. Stoker soon thereafter and it remained so registered up to and after the accident. It was used for the most part by her in business which she was conducting through the intervening years. She serviced it for the most part. It was used and serviced but little by Joe H. Stoker. On the trial Thelma I. Stoker testified that the automobile belonged to her. Joe H. Stoker likewise testified.

As against this the plaintiff had identified two statements, one signed by Joe H. Stoker and one by Thelma I. Stoker. The former was dated April 26, 1949, and the latter May 23, 1949. This one was signed in Council Bluffs, Iowa. It was substituted by the plaintiff for a like one the same in substance but unsatisfactory in form which had been signed the previous day. Each

of the statements contains a history of the acquisition of this automobile.

The former contains the following: "On August 23, 1947, when the car was involved in an accident on Highway #275, near Valley, Nebraska, the car did not have a mortgage or lien of any type against the car, and at that time I considered this car to be my own car."

The latter, near the end, contains the following: "In the purchase of any of the above mentioned cars, none of my money was used and I never considered myself the owner of any of these cars."

The Stokers respectively admitted the signing of the two documents. They however testified to the surrounding facts and circumstances which together with their positive testimony as to ownership was sufficient to present to a jury a controverted question of fact as to ownership.

What the Stokers testified to in relation to ownership notwithstanding the instruments introduced by the plaintiff was clearly admissible under Iowa law.

In Abraham v. Hartford Fire Ins. Co., *supra,* the questions of the knowledge of the content and effect of written instruments were brought into question. Speaking to that subject the court said:

"The appellant contends that the court erred in permitting appellee and her witnesses to testify in contradiction of the written statements made by the appellee and in contradiction of the written transfer of the certificate of registration.

"We do not think there is merit in the appellant's contention at this point. The question was essentially one of fact as to whether or not the appellee was the unconditional and sole owner of the automobile at the time the policy of insurance was written."

The conclusion reached is that there was no error in the submission of the question of ownership of the automobile to a jury.

The next question is that of whether or not the issue

was submitted under proper instructions. The plaintiff contends it was not.

The policy contains the following: "Except with respect to bailment lease, conditional sale, mortgage or other encumbrance the named insured is the sole owner of the automobile, except as herein stated: No exceptions."

The policy also contains the following: "By acceptance of this policy the named insured agrees that the statements in the declarations are his agreements and representations, that this policy is issued in reliance upon the truth of such representations and that this policy embodies all agreements existing between himself and the company or any of its agents relating to this insurance."

Particularly speaking the plaintiff contends that the instructions do not contain a sufficient and proper definition of the term "sole owner."

In this connection it is to be observed that the plaintiff submitted no proposed instruction in definition of "sole owner." It follows therefore that if the definition of "sole owner" was reasonably sufficient and not incorrect the contention of plaintiff may not be sustained since if it desired a more specific definition of this issue it was its duty to make request therefor. Plumb v. Burnham, 151 Neb. 129, 36 N. W. 2d 612; In re Estate of Hunter, 151 Neb. 704, 39 N. W. 2d 418.

Sole ownership was defined in instruction No. 9 as follows: "Sole ownership is defined to mean the person who holds the legal title to said motor vehicle and is in fact the actual, true and real owner of said motor vehicle." This conforms well to the lexicographer's definition of "sole" and of "ownership."

In truth it appears that the plaintiff inconsistently urges that the term requires definition. It was used in the policy without definition and it becomes clear that plaintiff expected Thelma I. Stoker to understand its meaning without definition. It hardly seems reasonable to expect a less acute power of understanding on the part of the jury than of this laywoman.

The contention that the jury was not properly instructed on the question of sole ownership is without merit.

There is another reason why the defense of misrepresentation as to the ownership of the automobile is not available to the plaintiff. There was no tender of refund of unearned premiums made, as hereinbefore pointed out, until January 19, 1950.

In Gosnell v. Camden Fire Ins. Assn. (Mo. App.), 109 S. W. 2d 59, it was said: "Before a defendant may make such a defense as that of misrepresentation or breach of warranty, it must not only have pleaded the same but must have tendered back the unearned premiums and kept such tender good."

In Thomas v. American Automobile Underwriters Agency, Inc. (Mo. App.), 5 S. W. 2d 660, it was said: "It appears to be recognized as a general rule that a return of the premium is not essential to the avoidance of an insurance contract, nor is its mere retention a waiver, especially where the insured was guilty of fraud in obtaining the insurance. But the rule is otherwise where the ground of avoidance goes to the root of the whole insurance contract and avoids it from the beginning, so that no risk ever attached, and where there was no fraud in obtaining the insurance."

The general rule is stated in 45 C. J. S., Insurance, § 716, p. 696, as follows: "Insurer is precluded from asserting a forfeiture where, after acquiring knowledge of the facts constituting a breach of condition, it has retained the unearned portion of the premium or has failed to return or tender it back with reasonable promptness, especially where the nature of the breach or ground for forfeiture is of such character as to render the policy void from its inception * * *."

The conclusions arrived at effectually dispose of all matters presented by the petition before it was amended to include the contention that the terms of the policy

were violated for failure of cooperation with the plaintiff in defending actions for damages indemnifiable under the terms of the policy.

It appears that it should be pointed out here that the claim of noncooperation came after settlement and the entry of judgment in the three actions which have been mentioned. No claim was made that the Stokers failed or refused to cooperate in any respect with regard to the defense of the actions on their merits or otherwise until after the commencement of this declaratory judgment action. This is made clear by exhibit No. 9, this being a letter dated September 20, 1949, from Leslie Husted to Richard A. O'Connor, attorney for the Stokers at the time the judgments were entered.

The effect of this and the clear declaration of the petition for declaratory judgment was to say that the policy was void and the Stokers had no insurance coverage since the policy was not issued to the true owner or, in the words of the policy, the "sole owner."

On the basis of this contention the plaintiff obtained from the Stokers the reservation of rights agreements which would permit it to defend without waiver of the right to assert that the policy was void and there was no coverage.

Having concluded that the policy is not void and that there was coverage under the policy may the plaintiff be heard to say that there was noncooperation in the respects mentioned with regard to the defense of the actions on the part of the Stokers?

The plaintiff substantially contends that under the circumstances as shown by the record and the reservation of rights agreements it had the right to defend the actions and the Stokers were under obligation to allow them so to do, and that withdrawal from such defense on demand of the Stokers amounted to noncooperation on their part within the meaning of the policy; also that settlement and consent to judgment relieved it from liability.

It is unquestionably true that with the consent of the

Stokers the plaintiff had the right to defend these actions without waiver of right or estoppel to defend against liability under a policy of insurance. Rodenkirk v. State Farm Mutual Auto Ins. Co., 325 Ill. App. 421, 60 N. E. 2d 269; McCann v. Iowa Mutual Liability Ins. Co., 231 Iowa 509, 1 N. W. 2d 682; Wigington v. Ocean Accident & Guarantee Corporation, 120 Neb. 162, 231 N. W. 770; Myers v. Ocean Accident & Guarantee Corporation, 99 F. 2d 485; Salonen v. Paanenen, 320 Mass. 568, 71 N. E. 2d 227; Great American Indemnity Co. v. City of Corpus Christi (Tex. Civ. App.), 192 S. W. 2d 917.

None of these cases and none cited and examined holds however that where an insurer disclaims liability under a policy of insurance either on the ground that the policy is void or that the policy does not furnish or afford coverage it may of right exact of the insured a reservation of rights and thus become entitled to defend an action without waiver of or estoppel to assert nonliability under the policy. The two cases cited last above, which appear in plaintiff's brief, make this point clear.

In Salonen v. Paanenen, *supra,* it was said: "We are not to be understood as holding that an insurer may reserve its rights to disclaim liability in a case and at the same time insist on retaining control of its defence."

In Great American Indemnity Co. v. City of Corpus Christi, *supra,* it was said: "The unequivocal denial of all liability to pay a loss under its insurance policy, in the absence of a special contract with the assured, disqualifies the insurance company from defending a suit against the assured for the recovery of damages which the insurance company says is not covered by its policy. The insurance company and the assured may enter into a special contract relating to the defense of a claim asserted against the assured by a third party, based upon the premise that the liability of the insurance company is doubtful or not admitted, but after an absolute and continued assertion of non-liability, the assured is not required to accept such a contract, American Fidelity &

Casualty Co. v. Williams, Tex. Civ. App., 34 S. W. 2d 396, writ refused, and may treat the denial of liability as a breach of the insurance contract and proceed to defend the claim by securing the services of attorneys of its own selection, as was done by the City in this case."

The rule in this case appears to apply to the facts in the case at bar. The parties here had a special agreement (reservation of rights agreement) based upon the premise that the liability of the insurance company was doubtful. Later however by its petition filed in the case at bar, and particularly paragraphs 11 and 12 and the prayer, the denial of liability became unequivocal.

If therefore the case last quoted from is to be accepted as precedent for the determination herein it must be said that the Stokers had the right to treat the denial as a breach of the insurance contract and proceed to defend the claim by securing the services of an attorney of their own selection.

The cases are numerous which hold that where an insurance company on the ground of nonliability repudiates its obligation to defend, the insured has the right to make his own defense. Fullerton v. United States Casualty Co., 184 Iowa 219, 167 N. W. 700, 6 A. L. R. 367; Rosenberg v. Maryland Casualty Co., 3 N. J. Misc. 1132, 130 A. 726, (This case was affirmed without opinion by the Court of Errors and Appeals in 102 N. J. Law 724, 132 A. 923.); Jaloff v. United Auto Indemnity Exchange, 121 Or. 187, 253 P. 883; Jones v. Southern Surety Co., 210 Iowa 61, 230 N. W. 381; Thomas Kilpatrick & Co. v. London Guarantee & Accident Co., 121 Neb. 354, 237 N. W. 162; Socony-Vacuum Oil Co. v. Continental Casualty Co. (Ohio App.), 67 N. E. 2d 836; American Fidelity & Casualty Co., Inc. v. Williams (Tex. Civ. App.), 34 S. W. 2d 396.

Under the singular facts of this case as shown by the record it appears that there are cogent reasons why the rule in Great American Indemnity Co. v. City of Corpus Christi, *supra,* should have application here. Here not

only did the insurer ultimately unequivocally deny liability on the policy but it instituted action wherein it repudiated liability, which action was instituted against the Stokers by the attorneys who were representing them in the damage cases.

In the very nature of things, after this happened, could it be expected of the Stokers that they would further entrust the defense of their damage cases to attorneys employed by the insurer after the insurer caused such attorneys to take a position directly opposed to their interests?

We think not, especially in view of the following paragraphs from the sixth section of the Canons of Professional Ethics adopted by this court on September 20, 1937, the design of which canons was to guide the members of the legal profession and to protect the rights of litigants in their relations with legal representatives:

"It is unprofessional to represent conflicting interests, except by express consent of all concerned given after a full disclosure of the facts. Within the meaning of this canon, a lawyer represents conflicting interests when, in behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose.

"The obligation to represent the client with undivided fidelity and not to divulge his secrets or confidences forbids also the subsequent acceptance of retainers or employment from others in matters adversely affecting any interest of the client with respect to which confidence has been reposed."

It is concluded that in this action the plaintiff may not be heard to say under the circumstances that the Stokers failed to cooperate in the defense of the damage actions by discharging the attorneys retained by the plaintiff and by retaining an attorney of their own choice to conduct the defense.

The next contention to be considered is that of whether or not under the circumstances the insurer is bound

by the judgments which were entered against Joe H. Stoker in the damage actions.

In Fullerton v. United States Casualty Co., *supra,* an Iowa case, in considering this subject it was said: "We are cited to a clause of the contract to the effect that the right of the insured to maintain an action against the company is limited to cases of 'loss actually sustained and paid in money in satisfaction of a judgment after trial of the issue,' and it is said that the payment to Mrs. Jacobson by plaintiff was by way of a settlement, and not in satisfaction of a judgment. But this provision can avail the appellant nothing in this case. It repudiated its obligation to assume and carry the defense to final judgment; and, having abandoned the case, it left the assured at liberty to take up the defense and contest the claim to final judgment, or, if so advised, to make the most favorable settlement possible."

In Jones v. Southern Surety Co., *supra,* an Iowa title insurance case, it was said: "Defendant refused to defend the cancellation suit. Thereby defendant necessarily waived its right, as well as violated its duty, to defend. By so violating its duty and waiving its right to defend, defendant authorized the insured to conduct the defense in good faith, and thereunder in good faith to make such a settlement as ordinary or reasonable prudence and caution might dictate to be advisable, and waived the right to demand prosecution of the action to final judgment."

In the case at bar there can be no question of good faith. There could be no question of good faith except as to the amount of the judgment. On this question the plaintiff made no substantial showing and it resisted the efforts of the defendants to show that the judgments were reasonable.

In Thomas Kilpatrick & Co. v. London Guarantee & Accident Co., *supra,* this court said: "An indemnity insurance company obligated to defend suits against the insured, even if groundless, breaches its contract by a

denial of liability as to an accident and thereby releases the insured from an agreement in the policy not to settle any claim. In such a case, the insured is not compelled to go to trial and risk the hazard of a large judgment, but is justified in making a favorable settlement."

Socony-Vacuum Oil Co. v. Continental Casualty Co., *supra,* is a case defining the rights of an insured where in very much the same manner as here the insurer at first assumed the defense of actions and later as here denied liability. In the opinion it is said: "We conclude, therefore, that Continental committed a breach of its obligations under the policy of indemnity insurance with the Oil Company by reason of its letter of August 9, 1939, which necessitated the Oil Company to act in its own defense with regard to the claim of Harper and that all reasonable expense thereby incurred would constitute the measure of damages suffered by it as a result of such breach."

In American Fidelity & Casualty Co., Inc. v. Williams, *supra,* it was said: "It is a fundamental rule of the law of contracts that, when one party repudiates the agreement and refuses to be bound by material obligations, the other party may accept such repudiation as final and is not required to further regard the obligations imposed upon him thereby."

Further in the opinion the following from 34 C. J., Judgments, § 1463, p. 1031, was quoted with approval: "Where a person who is responsible over, either by operation of law or express contract, to another for whatever may be recovered in a suit against such other, has notice of a suit against the latter and an opportunity to appear and defend, the judgment rendered in the action, if obtained without fraud, will be conclusive on him, whether he appeared or not."

It is concluded that, bad faith or fraud not appearing, the Stokers were within their legal rights and were not acting in violation of any policy provision by which they were bound in making the settlements and per-

mitting and causing the judgments to be entered in the three actions for damages.

On the same day that the decree was entered herein the defendants Bertelsen and the defendant Peterson filed a motion for an order taxing as part of the costs against the plaintiff an attorney's fee for their attorneys. The motion was later amended but in a manner not important here.

Later the defendants Stoker filed a motion for an order taxing as a part of the costs an attorney's fee for their attorney for service performed in this action.

The transcript contains no ruling on the motion of the Stokers. It however does contain an order sustaining the motion of the other defendants and allowing a fee in the amount of $1,500. From this order the plaintiff has appealed.

The apparent theory on which the fee was allowed was that it was proper under section 44-359, R. S. 1943, as follows: "In all cases where the beneficiary, or other person entitled thereto, brings an action at law upon any policy of life, accident, liability, sickness, guaranty, fidelity, or other insurance of a similar nature, or upon any certificate issued by a fraternal beneficiary association, against any company, person or association doing business in this state, the court, upon rendering judgment against such company, person or association, shall allow the plaintiff a reasonable sum as an attorney's fee in addition to the amount of his recovery, to be taxed as part of the costs. If such cause is appealed, the appellate court shall likewise allow a reasonable sum as an attorney's fee for the appellate proceedings."

In resistance of the allowance the plaintiff says that the statutory provision has no application to a case of this kind, and further the policy being an Iowa contract it is controlled by the laws of Iowa which state has no law authorizing the assessment of attorney's fees in actions involving liability under contracts of insurance.

Passing for the moment the question of whether or

not the Iowa law is controlling in the premises, it is pointed out here that before a litigant may claim the right to have an attorney's fee assessed in a case statutory authority or a uniform course of procedure must be found therefor.

In Higgins v. Case Threshing Machine Co., 95 Neb. 3, 144 N. W. 1037, it was said: "It is the practice in this state to allow the recovery of attorneys' fees only in such cases as are provided for by law, or where the uniform course or procedure has been to allow such recovery. As a general rule of practice in this state, attorneys' fees are allowed to the successful party in litigation only where such allowance is provided by statute." This pronouncement was followed in State ex rel. Charvat v. Sagl, 119 Neb. 374, 229 N. W. 118; Voss v. Voss, 144 Neb. 819, 14 N. W. 2d 849; Shepard v. Shepard, 145 Neb. 12, 15 N. W. 2d 195.

Attention has been directed to no uniform course of procedure for the allowance of attorney's fees in cases such as this. The authority for allowance must therefore be found, if indeed it may be found, in the statute.

It will be observed that the statute does not limit the right to allow attorney's fees to actions arising out of contracts entered into in this state but extends to insurers doing business in this state. The decisions already referred to on the question of the authority to allow attorney's fees make clear that the authority to allow attorney's fees is procedural though in part controlled by statute. It would appear reasonable therefore to say that an allowance of attorney's fees would be proper under this statute in a case otherwise contemplated by the statute on a sufficient showing that the company was doing business in this state.

The record here however is insufficient upon which to determine whether or not this plaintiff within a legal sense was doing business in the State of Nebraska. It follows that this phase of the statute can avail these defendants nothing.

Turning again to the statute it is to be further observed that actions contemplated are those where the *beneficiary or other person entitled thereto brings an action at law.*

As hereinbefore indicated the present action was under the Uniform Declaratory Judgments Act in part an action at law and properly so regarded by the district court.

It was not however one wherein these defendants brought action as beneficiaries or as other persons entitled to bring action at law on the policy. Undeniably the action was not brought by them or any of them.

Even if it be said that their answers amounted to action against the plaintiff still no statute or decision of either the State of Iowa or of this state has been cited which grants these defendants the right to maintain in this case action which would authorize the allowance of a fee to their attorneys. To the phase of the case which amounted to a law action these defendants were neither necessary nor proper parties. That part of the action was between the plaintiff and the defendants Stoker.

Furthermore the policy limits the right of commencement of action against the plaintiff by parties in the situation of these defendants as follows:

"No action shall lie against the company unless, as a condition precedent thereto, the insured shall have fully complied with all the terms of this policy, nor until the amount of the insured's obligation to pay shall have been finally determined either by judgment against the insured after actual trial or by written agreement of the insured, the claimant and the company.

"Any person or organization or the legal representative thereof who has secured such judgment or written agreement shall thereafter be entitled to recover under this policy to the extent of the insurance afforded by this policy. Nothing contained in this policy shall give any person or organization any right to join the company as a co-defendant in any action against the insured to determine the insured's liability.

"Bankruptcy or insolvency of the insured or of the insured's estate shall not relieve the company of any of its obligations hereunder."

While this policy provision appears to grant to these defendants a right to maintain action against the plaintiff as judgment creditors of the defendants Stoker on failure of plaintiff to pay the judgments up to the limits of the policy it does not appear to grant them any rights in this action.

We conclude therefore that the court erred in taxing the attorney's fee.

The district court decreed that the plaintiff was indebted to the defendants Stoker in the amount of $10,000, which is the maximum liability under the policy for personal injuries, and that such indebtedness was for the benefit of the defendants Bertelsen and the defendant Peterson. It was ordered that this amount be paid into court for distribution to these three defendants.

We think the absolute requirement that this amount should be paid in to apply on these judgments is erroneous. It should be paid in, conditioned upon the right of the plaintiff to show, if it is able to do so, by appropriate pleading herein and proper and sufficient proof that there is another party or are other parties who has or have in whole or in part priority over these three judgments and for failure so to do this amount is ordered to be distributed to the parties the court finds are entitled thereto.

To this extent the decree is modified. It is otherwise affirmed.

The order allowing $1,500 as an attorney's fee for the attorneys for the defendants Bertelsen and the defendant Peterson is reversed. Costs are taxed to the appellant.

AFFIRMED IN PART, MODIFIED IN PART, AND IN PART REVERSED.