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REPORTS OF CASES

DECIDED BETWEEN
JANUARY 22, 1954 AND JUNE 18, 1954

IN THE

Supreme Court of Nebraska

JANUARY TERM 1954

VOLUME CLVIII

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SUPREME COURT

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CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

JANUARY TERM, 1954

ELMER W. RING, APPELLEE, V. RICHARD J. KRUSE, APPELLANT.

62 N. W. 2d 279

Filed January 22, 1954. No. 33371.

1. **Trial.** A motion for directed verdict or its equivalent must, for purpose of decision thereon, be treated as an admission of the truth of all competent evidence submitted on behalf of the party against whom the motion is directed. Such party is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference that can reasonably be deduced from the evidence.
2. **Negligence.** In order to constitute actionable negligence, there must exist three essential elements, namely, a duty or obligation which the defendant is under to protect the plaintiff from injury; a failure to discharge that duty; and injury resulting from the failure. The petition must allege these essential elements, and the proof must support them, or there can be no recovery.
3. **Master and Servant: Negligence.** A master is not an insurer of the safety of the appliances and machinery which he furnishes an employee. He is liable for consequences not of danger but of negligence, and the test of negligence in methods, machinery, and appliances, is the ordinary usage of the business.
4. ———: ———. Where the relation of master and servant exists, the master is liable to the servant for personal injuries sustained by him which have been incurred while he is within the course and scope of his employment, by reason of the master's negligence, except insofar as the common-law rules have been modified or affected by statute, or by application of the doctrines of assumed risk, contributory negligence, and fellow servants.

5. ———: ———. As a general rule, where the servant has actual knowledge of the dangers to which the service exposes him or where the defects or dangers are so patent and obvious that in the exercise of ordinary care, in the performance of the services for which he was employed, he should have known of their existence, he assumes the risk of injury incident thereto.
6. ———: ———. Contributory negligence by an employee is the failure to use such precautions for his own safety as ordinary prudence requires under the circumstances presented. He is chargeable with contributory negligence where he fails to take due care to avoid defects and dangers which are so open and obvious that anyone in the exercise of ordinary care and prudence would discover them.
7. ———: ———. In the absence of any statutory regulation of the subject, where a servant continues work with knowledge, actual or constructive, of dangers which an ordinarily prudent man would refuse to subject himself to, he is guilty of contributory negligence, particularly where he has created the danger.
8. ———: ———. Where a danger is as open and obvious to the servant as to the master, or where the servant has better means of knowledge than the master, he will be charged with such negligence as to bar a recovery. So too where it does not appear that the master knew, or with ordinary care ought to have known of the defect which caused the injury, and it does appear that the servant had equal means with the master of ascertaining its existence, the servant cannot recover.
9. ———: ———. All employees serving a common master, working under the same control, deriving authority and compensation from the same source, and engaging in the same general business, although in different grades or departments, are fellow servants. It is not necessary that they be hired or discharged by the same superior agent of the master, or that they be employed for the same time, or that the amount or manner and time of payment of wages be the same, and one may be a fellow servant without having been actually employed by the master himself.
10. ———: ———. The liability of the employer is determined by the nature of the act in question; and if the nature thereof establishes that the accident was caused by the negligence of a fellow servant, and not by any defect in the place to work or in the tools or instrumentalities to be used, the employer is not liable.
11. ———: ———. If the place to work and the tools and instrumentalities with which to work are reasonably safe, the employer

is not ordinarily liable for a misuse of such tools and instrumentalities by a fellow employee who is employed with reasonable care as to his fitness and carefulness.

12. ———: ———. The employer is not required to anticipate the negligence of a competent employee. Ordinarily, in forecasting the probable consequences of his own acts or omissions, he may rely on the presumption that each such employee will exercise due care not only to avoid injury to himself, but to his co-employees.

APPEAL from the district court for Thurston County: SIDNEY T. FRUM, JUDGE. *Reversed and remanded with directions to dismiss.*

Young, Williams & Holm, Keith Miller and *Alfred D. Raun,* for appellant.

Mark J. Ryan, for appellee.

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

CHAPPELL, J.

Elmer W. Ring brought this action to recover damages for personal injuries alleged to have been proximately caused by the negligence of defendant Richard J. Kruse, his agents and employees. His agents and employees were Paul Johnson, foreman of defendant's livestock and feeding operations in Thurston County, who had general charge of employing, supervising, and discharging help on defendant's farm and who employed plaintiff on February 3, 1949, to help them "a few days," and Fred Drapeau, a farm hand, who plaintiff alleged was a superior employee or servant, authorized to give orders and directions to plaintiff, an alleged subordinate employee.

The negligence charged by plaintiff was in ordering and directing him to start a defective International farm tractor, property of defendant, by cranking it by hand while another tractor was being used to start it by means of a belt and pulley, and in furnishing plaintiff defective and unsafe machinery with which to work, which

allegedly placed plaintiff "in an unusual and extraordinarily hazardous position in his employment, and that condition could not have been known or could have been foreseen by him; that plaintiff was unfamiliar with the defective condition of said tractor, its magneto, and its spark plugs." Defendant for answer denied generally but admitted that he was engaged in livestock feeding and farm operations; admitted that Paul Johnson was his manager or foreman thereof, who so employed plaintiff on February 3, 1949; and admitted that plaintiff received a broken arm while starting the tractor belonging to defendant. Defendant then alleged that injuries received by plaintiff, who was an experienced operator of tractors like the one involved, and familiar with all the details of starting same, were solely and proximately caused by plaintiff's own negligence, in that he voluntarily attempted to start the tractor without putting down the impulse on the magneto thereof. Both at conclusion of plaintiff's evidence and at conclusion of all the evidence, defendant moved to direct a verdict, but such motions were overruled and the issues were submitted to a jury which returned a verdict for plaintiff in the sum of $2,500, and judgment was rendered thereon. Defendant's respective motions to vacate and set aside the verdict and judgment and correct the court's alleged error in overruling his motion to direct a verdict "at the condlusion (sic) of all of the testimony," and for new trial, were overruled. Thereupon defendant appealed, assigning substantially that: (1) The verdict and judgment were not sustained by sufficient evidence and were contrary to law, as in violation of the doctrines of assumed risk, contributory negligence, and fellow servants; and (2) the trial court erred in admitting certain incompetent evidence and in the giving and failing to give certain instructions. We sustain the first assignment, and for that reason the giving or failing to give instructions requires no further discussion.

On the other hand, the record discloses that defendant

made no objection whatever to the incompetent evidence admitted, about which he now complains. Such evidence was adduced by one of plaintiff's witnesses with relation to purported subsequent repairs made upon the tractor by replacement of its magneto and a couple of spark plugs in an attempt to establish that on February 3, 1949, they were defective. Defendant not only made no objection thereto, but cross-examined the witness at length with regard to the testimony so given, and did not subsequently move to strike the same. A comparable situation will be found in Lindley v. Wabash Ry. Co., 120 Neb. 195, 231 N. W. 812, with another opinion thereon upon motion for rehearing at page 204, 233 N. W. 450, certiorari denied, 283 U. S. 863, 51 S. Ct. 655, 75 L. Ed. 1468.

As held in Combs v. Owens Motor Co., 121 Neb. 5, 235 N. W. 682, the general rule is that: "Errors, if any, in receiving incompetent evidence are presumed to have been waived, unless objected to when the evidence is offered."

In any event, as hereinafter observed, there was some evidence from which it could have reasonably been concluded that the magneto on the 22-36 tractor might have been subsequently replaced by another, but if that were true, of which there is doubt, there is no competent evidence whatever that the magneto removed was then or theretofore defective in any manner. The witness testified also that a couple of spark plugs, "fouled and like in any tractor, need replacing after a certain length of time" or "they won't start in cold weather," were subsequently replaced in the 22-36 tractor, but there was no competent evidence from which it could have been reasonably concluded that defendant or his employees knew or should have known that the spark plugs had such a latent defect at time of accident or that in any event it proximately caused the tractor to kick back and break plaintiff's arm. The evidence is to the contrary. In that situation, testimony of the witness could

not have been prejudicial but rather was beneficial to defendant.

In Chicago, B. & Q. R. R. Co. v. Kellogg, 55 Neb. 748, 76 N. W. 462, this court held: "Where a servant sues his master on account of injuries resulting from the use of a defective tool or appliance, the fact that the accident happened cannot be taken as evidence of the master's negligence.

"To entitle the plaintiff to a verdict in such case, he must affirmatively show that the defendant either knew or was inexcusably ignorant of the defective condition of the implement or appliance causing the injury."

There are certain other applicable rules which are controlling here. It is now elementary, as held in Davis v. Spindler, 156 Neb. 276, 56 N. W. 2d 107: "A motion for directed verdict or its equivalent must, for purpose of decision thereon, be treated as an admission of the truth of all competent 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."

In Langenfeld v. Union P. R. R. Co., 85 Neb. 527, 123 N. W. 1086, followed in McDonald v. Omaha & C. B. St. Ry. Co., 128 Neb. 17, 257 N. W. 489, it was held: "In order to constitute actionable negligence, there must exist three essential elements, namely, a duty or obligation which the defendant is under to protect the plaintiff from injury; a failure to discharge that duty; and injury resulting from the failure.

"The petition must allege these essential elements, and the proof must support the allegations, or there can be no recovery."

In speaking of the master and servant relation, this court said in Westover v. Hoover, 88 Neb. 201, 129 N. W. 285, 19 A. L. R. 215: "The master is the person in whose work he is engaged, and who has the right to direct and control his actions."

As stated in Cudahy Packing Co. v. Roy, 71 Neb. 600, 99 N. W. 231: "The rule is well settled in this state that it is the duty of a master to use ordinary and reasonable care to furnish appliances reasonably safe for the use of his servants in carrying on his business, and that a failure to exercise such reasonable and ordinary care upon his part renders him liable, if the servant suffers any injury by reason of his negligence in that behalf. The master is not an insurer of the safety of the appliances which he furnishes. If he exercises the reasonable care which a prudent man would ordinarily take for his own safety, under like circumstances, in furnishing his servants with instruments reasonably safe for the particular purpose for which they are used, he has fulfilled his whole duty in that respect."

As stated in Lincoln Street Ry. Co. v. Cox, 48 Neb. 807, 67 N. W. 740: "A master does not insure his servants against defective appliances. He is not chargeable in all events because the appliances furnished his employees are defective. He is liable only when he has been negligent in the matter. The rule is that as to his servants he is bound to use such care as the circumstances reasonably demand, to see that the appliances furnished are reasonably safe for use, and that they are afterwards maintained in such reasonably safe condition. He is not liable for defects of which he has no notice, unless the exercise of ordinary care would have resulted in notice. Sioux City & P. R. Co. v. Finlayson, 16 Neb., 578, Missouri P. R. Co. v. Lewis, supra, Union P. R. Co. v. Broderick, 30 Neb., 735, all recognize this rule."

In Central Granaries Co. v. Ault, 75 Neb. 249, 106 N. W. 418, on motion for rehearing at page 255, 107 N. W. 1015, it was said: "The rule undoubtedly is that the master is not liable for furnishing dangerous machinery and appliances for the use of his servant, for all machinery is more or less dangerous. Employers are not insurers. They are liable for consequences, not of dan-

ger, but of negligence, and the unbending test of negligence in methods, machinery and appliances is the ordinary usage of the business." See, also, Phillips v. Chicago, B. & Q. R. R. Co., 119 Neb. 182, 227 N. W. 931.

As stated in 56 C. J. S., Master and Servant, § 171, p. 841: "Where the relation of master and servant exists, the master is liable to the servant for personal injuries sustained by him which have been incurred while he is within the course and scope of his employment, by reason of the master's negligence, except in so far as the common-law rules have been modified or affected by statute, discussed infra § 173, or by the application of the doctrines of assumed risk, infra, §§ 357-420, contributory negligence, infra §§ 421-488, and of fellow servants, infra §§ 321-356."

In 56 C. J. S., Master and Servant, § 382, p. 1189, citing Nebraska cases, it is said: "Except in so far as modified or abrogated by statute, as considered infra § 383, and in the absence of a contract to the contrary, as a general rule, where the servant has actual knowledge of the dangers to which the service exposes him or where the defects or dangers are so patent and obvious that in the exercise of ordinary care, in the performance of the services for which he was employed, he should have known of their existence, he assumes the risk of injury incident to their existence."

It is elementary that contributory negligence by an employee is his failure to use such precautions for his own safety as ordinary prudence requires under the circumstances presented. As stated in 56 C. J. S., Master and Servant, § 433, p. 1257: "An employee is chargeable with contributory negligence where he fails to take due care to avoid defects and dangers which are so open and obvious that anyone in the exercise of ordinary care and prudence would discover them."

As stated in 56 C. J. S., Master and Servant, § 434, p. 1258: "In the absence of any statutory regulation of the subject, where a servant continues work with knowl-

edge, actual or constructive, of dangers which an ordinarily prudent man would refuse to subject himself to, he is guilty of contributory negligence, particularly where he has created the danger." See, also, 56 C. J. S., Master and Servant, § 435, p. 1259, where it is said: "Where a danger is as open and obvious to the servant as to the master, or where the servant has better means of knowledge than the master, he will be charged with such negligence as to bar a recovery. So too where it does not appear that the master knew or with ordinary care ought to have known of the defect which caused the injury, and it does appear that the servant had equal means with the master of ascertaining its existence, the servant cannot recover."

As stated in Restatement, Agency, § 521, p. 1220: "Except as provided by statute and subject to the limitation stated in §§ 522-524, in the absence of an agreement to the contrary, a master is not liable for harm caused by an unsafe state of the premises or of other conditions of the employment to a servant who, knowing the facts and understanding the risks therein, voluntarily enters or continues in the employment."

Further, as stated in 56 C. J. S., Master and Servant, § 327, p. 1085: "It has frequently been stated that all serving a common master working under the same control, deriving authority and compensation from the same source, and engaged in the same general business, although in different grades or departments, are fellow servants. More briefly, it is sometimes stated that all persons are, at least prima facie, fellow servants who are in the common service of, and controlled by, a common master. It is not necessary that they be hired or discharged by the same superior agent of the master, or that they be employed for the same time, or that the amount or manner and time of payment of wages be the same; and in contemplation of law one may be a fellow servant without having been actually employed by the master himself."

In Bryant v. Beebe & Runyan Furniture Co., 78 Neb. 155, 110 N. W. 690, this court held: "Ordinarily, in forecasting the probable consequences of his own acts or omissions, an employer may rely on the presumption that each employee will exercise due care not only to avoid injury to himself, but to his coemployees."

In Poos v. Krug Brewing Co., 101 Neb. 491, 163 N. W. 840, L. R. A. 1918D 515, this court held: "The liability of the employer is determined by the nature of the act in question; and if 'the nature of the act in question' establishes that the accident was caused by the negligence of a fellow servant, and not by any defect in the place to work or in the tools or instrumentalities to be used, the employer is not liable.

"If the place to work and the tools and instrumentalities with which to work are reasonably safe, the employer is not liable for a misuse of such tools and instrumentalities by a fellow employee who is employed with reasonable care as to his fitness and carefulness.

"The employer is not liable for anything that he could not avoid by the exercise of foresight and care. He could not anticipate and avoid the negligence of a competent employee." See, also, Restatement, Agency, § 474, p. 1114.

In the light of the foregoing rules, we have examined the record. The parties herein will be designated as plaintiff and defendant. Paul Johnson will be designated as defendant's foreman, and Fred Drapeau as Drapeau or "the other hired man" as he was designated by plaintiff.

The following is either without dispute or the only conclusions that could reasonably be derived from the evidence adduced: At the time of trial plaintiff was a farm hand nearing 53 years of age. At time of accident he was 48 years old. He lived on a farm with his parents from 1901 until 1926 when he began substantial farming operations for himself. Except for 2 years, 1935 and 1936, he was so engaged until 1945. During almost all of that period he had owned and operated

farm tractors which were comparable with that here involved, none of which had self-starters, and when he started them he had always first pushed the impulse down, or some one else had done it for him. During 1935 and 1936 he worked some on farms with farm tractors. During 1946 he did a little farming for himself on shares and worked as a farm hand for defendant and others. During part of 1946, 1947, and 1948, plaintiff worked upon the farm here involved, where, in performing his farm work, he had generally started and operated farm tractors which were not self-starting. In that connection, there can be no other reasonable conclusion, despite plaintiff's evasive protests to the contrary, except that he had owned and was an experienced operator of different kinds of farm tractors which, like the one here involved, did not have self-starters, and he was entirely familiar with all the details of starting and operating them. As a matter of fact, he sold an old International 22-36 tractor to defendant in 1947 or 1948. Defendant's check in payment therefor appears in the record, dated December 1, 1948.

Defendant lived in Omaha. He operated a commission firm in South Omaha and owned, or leased and operated, a livestock farm in Thurston County where plaintiff had previously on several occasions been employed as a general farm hand. Defendant went up to his farm every week or two to observe its operations over which Paul Johnson was foreman. Defendant owned several farm tractors, among which was a 1932 International 22-36 tractor here involved. It had been overhauled in 1946 or 1947 and had been generally used a day or more every week for feed grinding purposes during the past 2 years, without any notice or knowledge that it was defective in any manner. Defendant knew nothing of plaintiff's injuries until February 5, 1949, when he drove to the farm, where he inspected the tractor and found it in very good operating condition. He had never previously received any complaint that it was de-

fective in any manner, or was difficult to start. Defendant's foreman and the other hired man both verified such evidence.

On February 3, 1949, defendant's foreman was in town where he met plaintiff who asked permission to ride out to the farm with him, from which point plaintiff could walk a mile east thereof to his mother's home. It was agreeable with the foreman, and they arrived at defendant's farm about 10 a. m. There they had coffee together. It was a cold day, zero or below, with heavy snow, and the foreman, not feeling very well, asked plaintiff to help them a few days. Plaintiff consented, and after being fitted out with heavy jacket, mittens, and six-buckle overshoes, the foreman told him they were going to grind feed, and instructed him to "go out and scoop the hammer mill out and zerk it" and "then wait for me." Plaintiff denied that the foreman said "then wait for me" but did not claim to have received any further instructions from the foreman. When plaintiff had finished the work he was instructed to do, the foreman had gone back to the house. Then, hearing a noise in the corn crib, plaintiff went there, where he found Drapeau, the other hired man, trying to start an F-30 tractor by cranking it and plaintiff either volunteered or was asked to assist. Something was broken under the radiator, so plaintiff voluntarily corrected that and cranked the tractor, which started at once, and it was backed out of the corn crib. At this point it should be said there is no competent evidence from which it could be reasonably concluded that Drapeau was a superior servant or that plaintiff was a subordinate servant. Drapeau was simply another competent and experienced hired man, who had been employed by defendant for several years, with no right of supervision or authority over plaintiff. They were simply fellow servants employed by and under the direct supervision and control of the same master, defendant's foreman, in the same farm work enterprise.

Drapeau then said that he would "crank the grinding tractor, which is the 22-36 * * * with the Ferguson," a self-starting tractor. As requested by Drapeau, plaintiff started the Ferguson and drove it to the corn crib where they connected a continuous belt and pulley between the Ferguson and the 22-36 tractor, and made it tight by jacking the two apart in order to turn over the 22-36 in an attempt to start it. The belt remained intact on the tractors at all times. Drapeau got up on the seat of the 22-36 and stepped on the clutch while plaintiff sat on the Ferguson. Drapeau made no other adjustments for starting the 22-36 after plaintiff returned. Plaintiff then put the Ferguson in gear, pushed down the lever, let out the clutch, and speeded it up, but the 22-36 did not start. Drapeau then told plaintiff to jump off and crank the 22-36 while he followed with the belt. Plaintiff did so, whereupon it started, ran for about 30 seconds, and stopped. Plaintiff then cranked it again as directed and it kicked or backfired, breaking his arm. In that connection, the impulse on the 22-36, which should have been pulled down to retard and give a hotter spark and prevent backfiring, could not be operated from the seat of the tractor where Drapeau sat, but only by a person standing, as plaintiff was, down on the ground much nearer, a step or two, from where plaintiff was cranking the tractor. There is no evidence that it had ever theretofore backfired with the impulse down. In that connection, plaintiff admitted that he did not push the impulse down before cranking it. Sometime after the accident plaintiff, pointing to the 22-36 here involved, told the foreman and others that it would kick "if you don't put the impulse down." At another time, plaintiff said to the foreman, "I don't know how it happened. * * * it was no fault of yours." Several times plaintiff told the foreman that the accident resulted because "he" plaintiff, "forgot to push the impulse down." In that regard, plaintiff told another witness that "he forgot to check the impulse," to see

whether or not it had been pushed down. Plaintiff told still another witness "I must have forgot to put the impulse down." Plaintiff, in his testimony, denied that he told the foreman "I don't know how it happened" or that "he forgot to push the impulse down." However, plaintiff did not deny the other alleged statements aforesaid made to the other witnesses. Defendant and the foreman both knew that the 22-36 had been started sometimes in cold weather by use of a belt connection to another tractor, but there was no evidence that it was dangerous to do so. In that connection, an experienced mechanic who testified for plaintiff said, "I have used it lots of times" but "It wouldn't be too safe" to "have some one engage the crank and follow around." In that regard, also, an experienced mechanic who testified for defendant said, "It isn't good practice. * * * It would be a dangerous practice, * * *." There was no evidence that such method was ordinarily used or that any one had ever previously used such method, and clearly neither defendant nor his foreman knew that plaintiff and Drapeau were using it. Assuming, as plaintiff would have us do, that it was a dangerous practice to "have some one engage the crank and follow around," it was one which should have been observable and well known to plaintiff, who assumed the risk thereof. Further, we conclude that the accident was proximately caused by the negligence not only of plaintiff's fellow servant, who without authority directed how the starting of the tractor should be done, but as well by plaintiff's own negligence more than slight as a matter of law, both by undertaking it and by doing so without first pushing the impulse down, well knowing that there was danger such failure would cause the tractor to backfire.

For the reasons heretofore stated, the judgment of the district court should be and hereby is reversed, and the cause is remanded with directions to dismiss the action.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

IN RE GUARDIANSHIP OF CHESTER D. ERNST, INCOMPETENT. COUNTY OF ADAMS, NEBRASKA, APPELLANT, V. ORLA ERNST, GUARDIAN OF CHESTER D. ERNST, INCOMPETENT, APPELLEE.
62 N. W. 2d 110

Filed January 22, 1954. No. 33388.

1. **Limitations of Actions.** The maxim that lapse of time does not bar the right of the state is an attribute of sovereignty and applies only to the state and not to counties and other political subdivisions of the state.
2. ———. An action by a county to recover quarterly payments made to a state hospital for the insane pursuant to section 83-352, R. R. S. 1943, is based on a liability created by statute and is within the general statute of limitations barring recovery after 4 years.
3. ———. A cause of action accrues when a suit may be maintained thereon and the statute of limitations begins to run at that time.

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

Richard E. Hunter and *Melvin K. Kammerlohr*, for appellant.

Stiner & Boslaugh, for appellee.

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

CARTER, J.

This case originated by the filing of a claim in the county court of Adams County in the guardianship proceedings of Chester D. Ernst, incompetent, for the maintenance of the guardian's ward at the Hastings State Hospital. An appeal was taken to the district court for Adams County where the claim was allowed for 4 years prior to the date of its filing. An appeal was taken to this court by the County of Adams in which it assigns as error the holding of the district court that the statute of limitations barred a recovery for more than 4 years prior to the filing of the claim. This presents the only issue on appeal.

The evidence shows that on April 9, 1931, Chester D. Ernst was adjudged insane and committed to the Hastings State Hospital where he has since been confined. It is stipulated that the maintenance for the ward in the hospital based on the per capita cost from April 9, 1931, to March 1, 1952, amounts to $7,086.78. It is also stipulated that no claim was filed or demand made for payment of maintenance costs until July 24, 1952, and that the cost of maintenance from July 24, 1948, to March 1, 1952, amounted to $2,301.75.

The statutes of this state provide that a patient in a state hospital for the mentally ill shall pay to the superintendent of the hospital an amount equal to the per capita cost of maintaining the patient in the hospital. They provide further that the amounts to be paid shall constitute a claim against the estate of the patient and be collectible therefrom. Unpaid claims are certified for payment to the county clerk of the county for the care of patients admitted to the hospital from such county and the county is authorized to bring action to recover such amounts. § 83-352, R. R. S. 1943.

The right to bring an action in such cases has been recognized. In re Guardianship of Kraft, 150 Neb. 171, 33 N. W. 2d 534. The county asserts that there is no statute of limitations applicable against the county in this type of claim.

In State ex rel. Chemical Nat. Bank v. School Dist., 30 Neb. 520, 46 N. W. 613, 27 Am. S. R. 420, this court said: "More than five years had elapsed after the maturity of the warrant before suit was commenced. The statute of limitations was applied, and it was held that 'the maxim, lapse of time is no bar to the rights of the sovereign, applies only to a sovereign state, and not to municipal corporations deriving their powers from the state, although their powers, in a limited sense, are governmental; and thus it appears that the statute runs for and against cities, towns, and school districts in the same manner that it does for and against individuals.'" See,

also, Chaffee v. City of Omaha, 145 Neb. 418, 16 N. W. 2d 852. In Bryant v. Cedar County, 122 Neb. 853, 241 N. W. 538, the court specifically stated that "Counties come within the purview of this principle of law." The rule announced in the early case of County of St. Charles v. Powell, 22 Mo. 525, 66 Am. D. 637, makes the correct distinction by the following language: "The immunity, however, it seems, was, even at common law, an attribute of sovereignty only, and did not belong to the municipal corporations or other local authorities established to manage the affairs of the political subdivisions of the state. * * * The money here sued for belonged to the county and not to the state at large."

We think the rule is that immunity from a general statute of limitations is accorded only to the sovereign power, the state, and does not extend to subdivisions of the state unless the Legislature specifically so provides. Admittedly there is no special statute applicable to the present case. Under such circumstances the 4-year limitation upon a liability created by statute provided in section 25-206, R. R. S. 1943, is applicable. Barney v. City of Lincoln, 144 Neb. 537, 13 N. W. 2d 870.

The statute, section 83-352, R. R. S. 1943, provides that the maintenance of the insane ward shall be paid quarterly during the time the ward is in the hospital. A cause of action arises, therefore, on each quarterly payment made by the county and unless such action is brought within 4 years the action is barred. Barney v. City of Lincoln, *supra;* Sogn v. Clark County, 50 S. D. 499, 210 N. W. 738. It is not a continuing open account as contended by the county; nor is the recovery by the county against the estate of the insane ward a claim for the recovery of revenue by the state within the meaning of section 25-218, R. R. S. 1943.

We conclude that the trial court properly determined that the statute of limitations was a defense to all quarterly payments for maintenance of the insane ward

falling due more than 4 years prior to filing claim for the same.

AFFIRMED.

MARGARET ANN AMBROZI, APPELLEE, V. FLOYD FRY, APPELLANT.

62 N. W. 2d 259

Filed January 22, 1954. No. 33390.

1. **Highways: Negligence.** A left-hand turn across a public highway between intersections is fraught with danger, and one making such a movement is required to exercise a degree of care commensurate with the danger.
2. **Trial.** Where a plaintiff, without reasonable explanation, testifies to facts materially different concerning a vital issue than had previously been testified to by him under oath in another action, the change clearly being made to meet the exigencies of the pending action, the evidence is discredited as a matter of law and should be disregarded.
3. **Automobiles: Evidence.** Where it appears that a witness had no reasonable time, means, distance, or opportunity to formulate a basis for an opinion as to the speed of a car, the testimony of such witness is insufficient to sustain a finding of excessive speed in the absence of other evidence on the subject.
4. ———: ———. 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.
5. **Witnesses.** It is only as to matters relevant to some issue involved in a case that a witness can be contradicted for the purpose of impeachment.
6. ———. A witness cannot be cross-examined as to any fact which is collateral and irrelevant to the issues, for the purpose of contradicting him by other evidence if he should deny it, thereby discrediting his testimony.
7. **Damages.** When the amount of the damages allowed by a jury is clearly inadequate under the evidence in the case, it is error for the trial court to refuse to set aside such verdict.

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

W. O. Baldwin, Van Pelt, Marti & O'Gara, Warren K. Dalton, and *Robert D. McNutt,* for appellant.

Harvey W. Hess and *J. V. Gaddy,* for appellee.

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

WENKE, J.

Margaret Ann Ambrozi brought this action in the district court for Thayer County against Floyd Fry. The purpose of the action is to recover damages for personal injuries suffered in an automobile accident which she alleged was caused by the defendant's negligence in suddenly, without warning, making a left turn in front of the car in which she was riding. Trial was had. The jury returned a verdict for plaintiff but assessed the amount of her recovery at "$ none." The trial court thereupon advised the jury it could not accept a verdict in that form, telling them that if they found for the plaintiff she was entitled to some damages. The jury, after further deliberation, returned a verdict for plaintiff in the sum of $75. Defendant thereupon filed a motion asking the court to enter judgment on the verdict for "$ none." Plaintiff filed a motion for new trial. The trial court sustained plaintiff's motion. It is from this order that defendant appeals.

Without dispute the evidence shows the accident happened shortly after 6 p. m. on Saturday, June 11, 1949, on U. S. Highway No. 81 at a point about 3¼ miles north of Chester, Nebraska; that the cars involved were a 1939 Chevrolet two-door sedan owned by appellant and a 1946 Buick four-door sedan owned by Martin Ambrozi of St. Joseph, Missouri, father of appellee; that the party in the Buick had left St. Joseph that day shortly after 12 noon to go to Grand Island, Nebraska; that St. Joseph is about 170 miles from Chester; that the party in the Buick consisted of appellee and her sister Mary Alice, who were riding in the front seat, and their sister Freta and her husband, Robert Birmingham, who were riding in the back seat; that Mary Alice Ambrozi, appellee's sister, was driving; that appellant was driving his car

and the sole occupant thereof; that at the time of the accident both cars were proceeding north on U. S. Highway No. 81, the Chevrolet in the lead; and that the right front of the Buick ran into and hit the left rear of the Chevrolet.

Appellee was married in June 1950, and her name is now Margaret Ann Osenberger.

U. S. Highway No. 81 cuts across a farm which, at the time, appellant was occupying as tenant. In fact, the highway is situated between the house and the other farm buildings located thereon. The house is west of the highway and a private lane extends east from a point just south of the house to intersect with the highway. The other farm buildings are on the east side of the highway and the private driveway also extends east from the highway to them. This lane had a dirt surface and is about 16 feet wide.

The highway at this point is straight and level. The traveling surface is covered with an oil mat which is about 26 feet in width. It had a white stripe down the center at the time of the accident. The day was clear and the surface of the highway dry and comparatively smooth. The impact occurred on the highway some 45 feet, or more, south of the south line of this private driveway if extended across the highway.

It is appellant's thought that the successful party in a case, who under the evidence adduced is not entitled to recover in any event, is not in a position to complain of errors alleged to have occurred at the trial and, because thereof, have the verdict in his favor set aside and a new trial granted. See, Copeland v. Junkin, 198 Iowa 530, 199 N. W. 363. In support of this thought appellant contends there is no evidence of any negligence on his part. In this respect he points to the following testimony of the driver of the Buick as the only evidence to support appellee's charge of negligence. She testified she was traveling between 50 and 60 miles an hour and when, "We was about four or five car lengths

behind Mr. Fry and I was going to pass him and pulled out into the left lane and blew my horn and started to go around him and was gaining speed, and then I noticed he was going to turn into a driveway and evidently he saw me and he started to pull over to the right, and then I pulled back into the right lane and I hit him."

Standing alone this statement would not be evidence that appellant had turned, or was turning, to the left into his driveway as the Buick attempted to pass. It would only be evidence of the fact that the driver of the Buick "noticed he was going" to do so. However, the driver of the Buick also testified that, "when he (appellant) started to turn into his lane (private driveway) he didn't have a tail light signal," nor did he give any hand signal.

"Negligence is the omission to do something which a reasonable man guided by those considerations which ordinarily regulate the conduct of human affairs would do, or doing something which a prudent and reasonable man would not do." Murray v. Pearson Appliance Store, 155 Neb. 860, 54 N. W. 2d 250.

"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." Murray v. Pearson Appliance Store, *supra.*

"(a) No person shall turn a vehicle from the direct course upon a highway unless such movement can be made with reasonable safety, * * * and after giving an appropriate signal in the manner hereinafter provided in the event any other vehicle may be affected by such movement. (b) A signal of intention to turn right or left shall be given continuously during not less than the last fifty feet traveled by the vehicle before turning." § 39-7,115, R. R. S. 1943.

"A left-hand turn across a public highway between intersections is fraught with danger, and one making such a movement is required to exercise a degree of care

commensurate with the danger." Petersen v. Schneider, 153 Neb. 815, 46 N. W. 2d 355.

When the foregoing is considered in connection with the evidence that appellant told the driver of the Buick "it was his fault" and that at the time of the accident he was looking at his chickens, as he had had several killed, and was not paying too much attention to his driving, we think it sufficient to support a verdict for the appellee.

In this respect we have not overlooked the fact that appellant denies having turned to the left and also denies having made the statements. As to the former, although he admits he intended to turn to the left and into his private lane which leads to his home, he testified he had not reached the point where he intended to do so and therefore had given no signal of his intent nor taken any action to accomplish it. This left a conflict in the evidence as to whether or not he had started to turn into his lane, which conflict was for the jury.

It is appellant's further thought that this case falls into that class of cases in which it is held that when a jury returns a verdict for the plaintiff, but finds that plaintiff is entitled to no damages, it should, in fact, be considered a verdict for the defendant.

Under the proposition already discussed we have come to the conclusion that the evidence is sufficient to support a verdict for appellee as to appellant's liability. This issue was submitted by parts 1 and 2 of instruction No. 3. If the evidence as to damages, which issue was submitted by parts 3 and 4 of instruction No. 3, was such that the jury could properly have found appellee had suffered none then it could properly be said that that part of the jury's verdict was, in fact, for the defendant. See, Rubinson v. Des Moines City Ry. Co., 191 Iowa 692, 182 N. W. 865; Royal Indemnity Co. v. Township of Island Lake, 177 Minn. 408, 225 N. W. 291.

As stated in Royal Indemnity Co. v. Township of Island Lake, *supra*: "The verdict returned by the jury

was: 'We, the jury in the above entitled action, find for the plaintiff and assess damages in the sum of none dollars.' In a case like this, there are usually sent out to the jury two printed forms of verdict—one finding for plaintiff with a blank space therein in which to insert the amount of damages found for the plaintiff; the other a verdict for defendant. The jury used the first form, simply inserting the word 'none' in the blank space. It is clear that the intention of the jury, by the verdict returned, was to find that plaintiff was not entitled to any damages against the defendant. It had the same effect as, and was in fact though not in form, a verdict for defendant. The court might well have had the verdict corrected before being finally received and recorded. It was not however necessary."

In fact, in such case a verdict for the defendant would here have been the proper one under part 3 of instruction No. 3 and merely because the jury, instead of doing so, separated its findings in this regard by the verdict it rendered would not prevent a proper judgment for defendant from being entered thereon. But here the evidence is not of that character. The evidence shows beyond dispute that appellee was injured and suffered damages. If the jury came to the conclusion appellant was liable, appellee would then be entitled to recover therefor. In this situation the trial court was correct in doing what it did when the jury returned its first verdict. Whether or not the amount returned on the second verdict is so inadequate as to justify a new trial we shall consider later in this opinion. However, we do not think appellant's motion for a judgment in his favor, based on the first verdict returned, could or should have been sustained.

Appellee contends it was error to permit appellant to testify as to the speed of the Buick car.

The first basis for this contention is that he should not be permitted to change his testimony in this regard from what it was at a previous trial in another case

arising out of the same accident. In this previous trial, held some 9 or 10 months before, he had testified he was not capable of estimating, with any fair degree of accuracy, the speed of an automobile approaching from the rear when observed through a rear-view mirror and that he could not estimate the speed of the Buick because it was so close when he first saw it he did not have time.

But at the trial he said he thought he could as he had thought it over and now thinks he can tell the speed of an automobile coming up from the rear as he observes it approaching in the rear-view mirror, judging it by the distance of the space closed up between the two automobiles.

The rule is stated in Gohlinghorst v. Ruess, 146 Neb. 470, 20 N. W. 2d 381, as follows: "Where a plaintiff, without reasonable explanation, testifies to facts materially different concerning a vital issue than had previously been testified to by him under oath in another action, the change clearly being made to meet the exigencies of the pending action, the evidence is discredited as a matter of law and should be disregarded."

The evidence here relates to a matter of whether or not he had an opinion. Appellant sought to explain why he felt he could now express an opinion, whereas, at a previous trial, he had not felt capable of doing so. We cannot say the explanation is entirely unreasonable. We think it was a question for the jury to decide. It had before it the record of his previous testimony. Under the situation here we think no error occurred in this regard.

Appellant was permitted to testify that when he first observed the Buick in his rear-view mirror that it was, in his opinion, traveling between 60 and 70 miles an hour. Appellant testified that he first became aware that a car was approaching from the rear when he heard a screaming of brakes on the road; that he then glanced in his rear-view mirror and noticed a large black sedan,

the Buick, right behind him; and that then there was a crash. He also testified that skid marks, made by the Buick, extended south about 96 feet from where it had stopped on the highway; that broken glass was on the highway at a point about 45 feet south of where the Buick had stopped; and that the point of the impact was 45 feet or more south of his private driveway. The evidence shows the Buick stopped on the highway at about the south edge of appellant's private driveway, if extended. It was mostly west of the center of the highway and was facing northeast.

The rule governing has often been stated by this court. As stated in Fairman v. Cook, 142 Neb. 893, 8 N. W. 2d 315: "Where it appears that a witness had no reasonable time, means, distance, or opportunity to formulate a basis for an opinion as to the speed of a car, the testimony of such witness is insufficient to sustain a finding of excessive speed in the absence of other evidence on the subject."

And in the recent case of Kristufek v. Rapp, 154 Neb. 343, 47 N. W. 2d 923, we said: "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."

Considering this evidence in its most favorable light it shows that during the time the Buick traveled less than 50 feet at an admitted speed of 50 to 60 miles an hour appellant first became aware it was behind him by hearing the screaming of its tires on the road, that he then glanced into his rear-view mirror and observed the car right behind him, and that the crash occurred. We still think, as appellant testified in the previous trial, that it was so close when he first observed it he did not have time or opportunity to estimate its speed. In this respect we have not overlooked our holding in Koutsky v. Grabowski, 150 Neb. 508, 34 N. W. 2d 893. While the situation involved in that case is somewhat similar to the situation here, nevertheless we think the

facts considered therein distinguishes it from the case before us.

The appellee also contends the court erred in permitting the appellant to impeach appellee's witness Mary Alice Ambrozi, driver of the Buick, on an immaterial and collateral matter.

"It is only as to matters relevant to some issue involved in a case that a witness can be contradicted for the purpose of impeachment." Carpenter v. Lingenfelter, 42 Neb. 728, 60 N. W. 1022, 32 L. R. A. 422.

"A witness cannot be cross-examined as to any fact which is collateral and irrelevant to the issues, for the purpose of contradicting him by other evidence if he should deny it, thereby discrediting his testimony." Nickolizack v. State, 75 Neb. 27, 105 N. W. 895.

"The general rule is that a witness cannot be impeached as to collateral or immaterial matter brought out on cross-examination; * * *." Abbott's Civil Jury Trials (5th ed.), § 157, p. 364.

On cross-examination this witness was asked: "Q. I will ask you if you had a conversation at the jail house with Mrs. Bernard Sloey? A. Yes, sir. Q. And I will ask you if you had a conversation with Mrs. Bernard Sloey in which you stayed (stated) that you had been driving the automobile at a rate of speed of about 80 miles per hour at some time prior to the accident but just before the accident had slowed up to about 60 miles an hour? A. No, sir."

Mabel Sloey, over proper objection, testified: "She (Mary Alice Ambrozi) said that if it had happened back in Kansas where she had been driving about 80 miles an hour she wouldn't be so surprised, but she had slowed to around 60 when she hit Nebraska."

Without doubt the testimony as to what speed she had been driving in Kansas was immaterial. See, Prince v. Petersen, 144 Neb. 134, 12 N. W. 2d 704; Showers v. Jones Co., 126 Neb. 604, 253 N. W. 902.

As stated in Prince v. Petersen, *supra*: "The rule of

these cases is hereby approved but the discretion therein contemplated does not permit the admission of evidence of speed at other points unless the points are of such close proximity that a reasonable inference could be drawn that it was continued to the point of accident, or unless, if more remote, there is evidence of fact or circumstance from which a reasonable inference could be drawn that speed was continued at approximately the same rate over the intervening distance."

However, the testimony that she had slowed to around 60 miles an hour when she hit Nebraska does not fall into this same category. She had testified that her speed in Nebraska was between 50 and 60 miles an hour and that she was traveling at that speed as she came up behind appellant's car and pulled out to pass. The issues submitted included the question of Mary Alice Ambrozi's negligence and, if she was negligent, whether it was the sole proximate cause of the accident. In respect to this issue the speed at which she was driving the Buick was material and certainly not a collateral issue. On proper motion part of this testimony should have been stricken but no such motion was made. We find this contention to be without merit.

Both parties refer to the question of the inadequacy of the verdict as the basis on which the trial court granted a new trial.

"The rule is, viz.: 'When the amount of the damages allowed by a jury is clearly inadequate under the evidence in the case, it is error for the trial court to refuse to set aside such verdict.' Preston v. Farmers Irrigation District, 134 Neb. 503, 279 N. W. 298. See, also, Meier v Bridgeport Irrigation District, 113 Neb. 344, 203 N. W. 543; Mares v. Chaloupka, 110 Neb. 199, 192 N. W. 397." Dolen v. Beatrice Restaurant Co., 137 Neb. 247, 289 N. W. 336.

We have also said: "* * * where the recovery awarded is sufficient to probably do justice to the injured party,

an appellate court should not interfere." Cronin v. Cronin, 94 Neb. 353, 143 N. W. 214.

We have carefully examined the evidence in regard to medical expenses, loss of earnings, pain and suffering, and disability suffered. Without setting it out in detail we have come to the conclusion that if appellant is liable the amount of $75 is so grossly inadequate that the trial court was right in awarding a new trial. While a jury could properly find that the fracture to the bone in appellee's left wrist was not caused by the accident, we think, however, that the other injuries suffered, particularly to her right hand, made the award entirely inadequate.

Having come to the conclusion that the trial court was correct in awarding appellee a new trial, we affirm its action in doing so.

AFFIRMED.

LEONARD PORTIS, APPELLEE, V. CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD COMPANY, APPELLANT.
62 N. W. 2d 323

Filed January 22, 1954. No. 33410.

1. **Negligence.** The Minnesota rule as to contributory negligence pleaded and proven by the defendant here is as follows: If the plaintiff failed to exercise the care that a person of ordinary prudence would have exercised under similar circumstances, he was guilty of negligence; and, if his negligence contributed, proximately, in any degree to the injury, as a cause, he was, in law, guilty of contributory negligence, and cannot recover.
2. ———. The Minnesota rule is that a plaintiff's negligence is sufficient to bar a recovery, if it proximately contributes to the result in any degree.
3. ———. When the negligence of the party seeking to invoke the last clear chance rule is active and continuous as a contributing factor up to the time of the injury, the last clear chance rule has no application.

APPEAL from the district court for Douglas County:

HENRY J. BEAL, JUDGE. *Reversed and remanded with directions.*

Fraser, Connolly, Crofoot & Wenstrand, for appellant.

Robert D. Mullin and *Robert E. McCormack,* for appellee.

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

SIMMONS, C. J.

This is an action for property damages resulting from a collision between a trailer-tractor unit and a train of the defendant. Issues were made and trial had resulting in a judgment for plaintiff. Defendant appeals. We reverse the judgment and remand the cause with directions to dismiss.

The accident happened at Owatonna, Minnesota. Plaintiff was the owner of the tractor. Union Transfer Company was the owner of the trailer. Its claim is assigned to the plaintiff. Plaintiff sues on the two alleged causes of action. The equipment was driven by an employee of Union Transfer Company. A Minnesota statute provides, in case of accident, that the driver is deemed the agent of the owner. The act of the driver is accordingly here deemed by the parties to be the act of the plaintiff on both causes of action.

Defendant moved for a directed verdict at the close of plaintiff's case and at the close of all the evidence. These motions were overruled. Defendant assigns these rulings, among others, as error.

We consider the evidence as it stood at the close of the trial of the case.

Defendant's tracks run through the city of Owatonna in a northwest-southeast direction and in that direction cut across North Street and Cedar Street slightly west of the intersection of the two streets. North Street runs east and west. Cedar Street runs north and south. The right-of-way is 100 feet wide. Plaintiff's driver ap-

proached the scene of the accident from the west on North Street. From that direction on North Street there is first a standard "cross buck" railroad crossing sign on the right-hand side (or south), then a side track, then the main-line track, then a second side track, and then another "cross buck" sign on the left or north side of the street. The distance between these two "cross buck" signs is stated at about 96 feet.

The distance between the south siding and main track widens slightly to the southeast and is not definitely shown by any testimony. In between these two tracks on North Street and on the right-hand or south side is a pole upon which there was, at the time of the accident, a no-thoroughfare sign, the exact wording being in dispute.

Between these two tracks on the defendant's property to the south of North Street is a driveway called the cut-off road, which runs through to Cedar Street. It was orginally intended for the use of the defendant and the Owatonna Canning Company, and has been and was being used up to the time of the accident by the public to go from North Street to Cedar Street. The canning company's places of business are to the west of the right-of-way on both sides of North Street.

The accident happened on the morning of January 5, 1951. It had been and was then snowing, and snow covered the tracks. The depth of the snow was fixed by plaintiff's witnesses at 8 inches and by defendant's witnesses at 3 to 5 inches.

Plaintiff's driver came to Owatonna to pick up a load of freight for Nebraska. He came east on North Street and stopped at the office of the canning company where he was told to locate the foreman in one of the buildings, which is not definite in the record. He then drove east past the cross buck sign, and saw both of the signs. He crossed the west-side track. He saw a freight car on the track to his right where men were unloading freight into a cannery building. He went to the left of the pole between the west side and main tracks and pulled in to

the right-of-way property. In doing so he followed vehicle tracks leading to Cedar Street that were there in the snow. He stopped in those vehicle tracks so as to leave the equipment almost parallel to the main-line track and with the left-rear end of the trailer fouling the main-line track. The rear end of the trailer was about 20 feet south of North Street. The equipment was about 10 to 15 feet east of the box car to which reference has been made. He cut off the ignition of his motor, put on the emergency brakes, and put the equipment into gear. He got out of the left-hand side of his tractor. Plaintiff's driver testified that he did not see the main-line track. He does not testify as to any investigation as to his location save as to the location in relation to the box car and being south of North Street. He did not testify as to any inquiry made of the men at the box car. The decision to park where he did was his own. He left his equipment and went into one of the buildings of the canning company. In about 4 or 5 minutes while he was still in the building a south-bound passenger train of defendant ran into the trailer unit. The point of impact was the right front of the engine and about 18 inches on the left rear of the trailer. Substantial damage was done.

It is undisputed that this passenger train had a regular stop at Owatonna. The air brakes were applied about half a mile away and the train had slowed down from a speed of 55 miles per hour to about 15 or 20 miles per hour when the collision occurred. Some distance to the west the customary whistle signals were blown. Plaintiff's driver heard the whistle and then the crash. Both the engineer and fireman saw the trailer when about 100 feet north of North Street. Prior to that time a curve in the track interfered and then snow blocked vision when the point of impact might have been visible otherwise. The emergency brakes were applied, the bell was rung, and the tracks were sanded.

The engine stopped about 100 feet east of the point of impact.

Plaintiff argues that because of the use for which the cut-off road was intended and because of the use of the cut-off road by the public he was an invitee and on the premises by permission. We have searched this record for evidence as to the boundaries of the cut-off road. It was somewhere between the main-line and west-side tracks. Plaintiff shows only that his driver was on a track that had been used by some one or more vehicles that day. Certainly it cannot be assumed or inferred that the carrier granted or allowed a use of its property which included a right to block movement of trains on its main line.

The plaintiff, as against a motion for a directed verdict, 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. Davis v. Spindler, 156 Neb. 276, 56 N. W. 2d 107.

The Minnesota rule as to contributory negligence pleaded and proven by the defendant here is as follows: If the plaintiff failed to exercise the care that a person of ordinary prudence would have exercised under similar circumstances, he was guilty of negligence; and, if his negligence contributed, proximately, in any degree to the injury, as a cause, he was, in law, guilty of contributory negligence, and cannot recover.

The above rule is taken substantially from the opinion in Eichhorn v. Lundin, 172 Minn. 591, 216 N. W. 537. In the body of that opinion the court makes this statement also: "There are two necessary elements in contributory negligence: First, a want of ordinary care; and second, a causal connection between plaintiff's conduct and the accident. The rule is that a plaintiff's negligence is sufficient to bar a recovery if it proximately contributes to the result in any degree."

The Minnesota court in Carlson v. Naddy, 181 Minn.

180, 232 N. W. 3, citing the Eichhorn case, held: "The question is not as to the amount of a plaintiff's negligence, if any, but whether, if present at all, it contributed as a cause proximately to the result."

Under these circumstances, the cause of action having arisen in Minnesota, we recognize and follow the Minnesota rule as to contributory negligence. Whitney v. Penrod, 149 Neb. 636, 32 N. W. 2d 131; Scott v. Scott, 153 Neb. 906, 46 N. W. 2d 627, 23 A. L. R. 2d 1431; Smith v. Brooks, 154 Neb. 93, 47 N. W. 2d 389.

Tested by the above rules it is patent that plaintiff's driver, under the circumstances which he relates, exercised a want of ordinary care in parking where he did and leaving the tractor and trailer unattended; that that want of care continued to the time of the accident without intervening event or condition altering it; that there was a causal connection between the conduct of plaintiff's driver and the accident and that it proximately contributed as a cause to the result; and that the Minnesota rule bars a recovery.

Plaintiff, however, denying his driver was guilty of any negligence which proximately contributed to the cause of the collision, argues that even assuming initial negligence it was not continuing and hence the doctrine of the last clear chance should be applied. Defendant argues that the Minnesota rule on last clear chance applies and that the Minnesota rule is less liberal to the person invoking it than is the Nebraska rule. Plaintiff argues that the Minnesota rule was not timely presented and hence we should follow the Nebraska rule. We need not determine this question because it is clear that the Nebraska rule cannot be invoked under the circumstances here.

Plaintiff relies here on our decision in Whitehouse v. Thompson, 150 Neb. 370, 34 N. W. 2d 385. There we held: "When the negligence of the party seeking to invoke the last clear chance rule is active and continuous as a contributing factor up to the time of the injury, the last

clear chance rule has no application." See, also, Carter v. Zdan, 151 Neb. 185, 36 N. W. 2d 781; Bush v. James, 152 Neb. 189, 40 N. W. 2d 667.

Plaintiff contends that his negligence, if any, was not continuing and relies on Whitehouse v. Thompson, *supra*. There we found that the plaintiff was negligent in driving his car to the place near the tracks. At that point the car became lodged in a water drain in such a manner that the icy condition of the street prevented its removal under its own power. We held that that fact was an "intervening condition" which imposed new duties on the parties irrespective of prior negligence and that the last clear chance doctrine applied. But here there was no new or intervening condition which made it impossible for plaintiff's driver to move the tractor and trailer to a place of safety. The act of plaintiff's driver in leaving the trailer and tractor unattended where he did is not a new or intervening condition. For anything that appears in this evidence plaintiff's driver was in control of the situation.

It necessarily follows that the doctrine of the last clear chance has no application here.

The trial court erred in overruling the motion to dismiss. Its judgment is reversed and the cause remanded with directions to dismiss.

REVERSED AND REMANDED WITH DIRECTIONS.

GAIL STICKELL, ALSO KNOWN AS MRS. L. B. STICKELL, APPELLEE, V. IRA HAGGERTY, APPELLANT.
62 N. W. 2d 107

Filed January 22, 1954. No. 33412.

1. **Replevin.** The burden is on the plaintiff in a replevin action to prove by a preponderance of the evidence that at the time of the commencement of the action he was the owner of the property sought to be replevied, that he was entitled to the immediate possession of it, and that the defendant wrongfully detained it.

2. Liens. Pursuant to statute when a person procures, contracts with, or hires another person to feed and care for any livestock, the person so procured, contracted with, or hired shall have a first, paramount, and prior lien upon such property for feed and care bestowed by him for the contract price, and in case no price has been agreed upon, then for the reasonable value of the feed and care.

APPEAL from the district court for Frontier County: VICTOR WESTERMARK, JUDGE. *Reversed and remanded with directions.*

William S. Padley, for appellant.

Morrison & Gruver, for appellee.

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

YEAGER, J.

This is an action in replevin instituted by Gail Stickell, plaintiff and appellee, against Ira Haggerty, defendant and appellant. The action was instituted by the filing of a petition and an affidavit in replevin in which plaintiff declared that she was the owner of 12 cows and 1 bull, that she was entitled to their possession but they were detained by the defendant, and that the defendant refused to deliver them to her.

Eleven of the cows and the bull were taken by the sheriff under a writ of replevin and delivered to the plaintiff, who, according to the bill of exceptions, disposed of them. For the purposes of this opinion what happened to the other cow is of no material concern except to say that it apparently was not in possession of the defendant.

The defendant filed an answer in which after generally denying the allegations of plaintiff's petition he alleged, as to the animals involved in the action, that he took them under an oral agreement to keep and care for until sold, at the request of plaintiff, for which care and keep the plaintiff agreed to pay the fair and

reasonable cost, and that the reasonable care and cost was $959.

For this amount the defendant prayed judgment against the plaintiff.

In his answer the defendant asserted that he is entitled to a further amount of $52.50 as one-half of the sale price of six calves but we do not think that the record in this case is sufficient to permit of any adjudication herein. This however may not be taken to mean that the defendant shall be barred or prevented from reasserting this claim in the further progress of this action.

To the answer the plaintiff filed a reply in which she pleaded that by agreement in writing the defendant agreed to and did care for other cattle and their calves and that by the terms of this written agreement agreed to care for and feed them until the calves were weaned for which he would receive one-half of the calves raised by the cows, and that it was orally agreed that the cattle involved here were taken under the same conditions as those taken under the written contract.

The case was tried to a jury and verdict was returned in favor of the plaintiff. Judgment was rendered in favor of plaintiff for possession of the cattle and damages in the amount of one cent. Motion for new trial was duly filed which motion was overruled. From the judgment and the order overruling the motion for new trial the defendant has appealed.

There are numerous assignments of error. The first is the following: "The verdict is contrary to the evidence and was arrived at by the jury in disregard of the evidence." The second is: "The verdict is contrary to law." These two will be treated together.

"The plaintiff in an action of replevin has the burden of proving his case by a preponderance or greater weight of the evidence. Thus, the burden is upon him to show that at the time of the commencement of the action he was the owner of the property sought to be replevied,

that he is entitled to the immediate possession of the property, and that the defendant wrongfully detains it." Fitzsimons v. Frey, 153 Neb. 124, 43 N. W. 2d 531.

Under this rule the plaintiff had the burden of proving by a preponderance of the evidence that she was entitled to the immediate possession of the cattle involved here.

The evidence of the plaintiff makes clear and conclusive that she placed the cattle in question with the defendant and that the defendant was to be compensated for that care.

The theory of her presentation is that the compensation to be received by the defendant was calves as she pleaded in her reply. However, as becomes apparent from a reading of the bill of exceptions, her evidence fails either directly or by reasonable inference to sustain this theory or any other theory. The written contract is in evidence but neither the plaintiff nor any other witness testified directly or indirectly that there was an oral agreement that the cattle involved here were to be cared for pursuant to the written agreement.

The testimony of the plaintiff, who was the only witness who testified on her behalf with regard to placement of the cattle, negatives any such oral agreement. The pertinent part of her testimony on direct examination in this respect is as follows: "Q- What was said between you and Mr. Hagerty at that time with reference to the cattle? A- Not a word. I asked him if he could use more cattle, and he said he had plenty of feed and he could. Q- Was that all that was said at that time? A- That's right." As a part of the cross-examination the following appears: "Q- Did he ever tell you that the last 15 came under the terms of the contract? A- I wouldn't say no, not definitely. Q- At the time you made this contract you had no agreement with him to take any additional cattle other than the 35 listed? A- Not until I asked him if he could use more cattle, and he agreed to take these 15."

The full and conclusive purport of plaintiff's evidence therefore was to say that plaintiff gave the care and possession of the cattle involved to the defendant and that the defendant was to be compensated for the care. There is an entire absence of evidence of agreement either written or oral as to what he was to receive for that care.

Section 54-201, R. R. S. 1943, contains the following: "When any person shall procure, contract with, or hire any other person to feed and take care of any kind of livestock, the person so procured, contracted with, or hired, shall have a first, paramount and prior lien upon such property for feed and care bestowed by him upon the same for the contract price therefor, and in case no price has been agreed upon, then for the reasonable value of such feed and care, * * *. The person entitled to a lien under the provisions of this section, may foreclose the same in the manner provided by law for the foreclosing of chattel mortgages; * * *."

As already pointed out the defendant in his answer alleged that he took the cattle under an agreement whereby he was to receive the fair and reasonable value of the care and keep. His testimony departs in part from the allegations of the answer in this respect. The effect of his testimony is to say he was to receive pay for care and feed for all except the cows which had calves. This is reflected in the following: "Q- What did you tell her you would do? A- Take the cattle if she would pay the pasture bill on them that didn't have calves. * * *."

For the purposes of the decision here it does not become necessary to consider the matter of whether or not the cows had calves except to say that some of them did not, that apparently none of them which had been bred before defendant assumed care had calves which lived, and that some which were bred after the defendant assumed care did have calves.

Under the law declaring the burden of proof imposed

upon the plaintiff, the facts as disclosed, and the provisions of section 54-201, R. R. S. 1943, it must be said that the verdict may not be allowed to stand.

The defendant had a first lien upon the cattle whereby he was entitled to retain possession thereof until payment was made, and for failure of payment he had the right to foreclose. If the contract was complete in terms his lien was for the amount due under the contract, and if not then the lien was for the reasonable value of feed and care.

On the record and under law the plaintiff was not entitled to a judgment of possession. On the trial the defendant was entitled to have the plaintiff's claim to possession withdrawn from consideration of the jury, and to have the character, extent, and amount of defendant's lien submitted for determination by the jury. Also the defendant was entitled to judgment for the return of the cattle or in the alternative a judgment for the amount found to be due under the lien together with such damages as the jury might find due to the defendant for the wrongful taking of the cattle.

In this light consideration of the other assignments of error is not required.

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

REVERSED AND REMANDED WITH DIRECTIONS.

JOHN J. BUFORD, ADMINISTRATOR OF THE ESTATE OF ERNEST R. DAHLKE, DECEASED, APPELLANT, V. LAURA H. DAHLKE ET AL., APPELLEES.

62 N. W. 2d 252

Filed January 22, 1954. No. 33414.

1 **Pleading: Appeal and Error.** An appeal from a judgment of dismissal of the case after a general demurrer to the petition

has been sustained presents for decision the sufficiency of the facts well pleaded to state a cause of action.

2. **Vendor and Purchaser.** An executory contract for the sale and purchase of real estate, enforceable for and against vendor and vendee, is a present equitable conversion of real estate into personalty and of personalty into real estate.
3. **Joint Tenancy.** The creation as well as the continued existence of an estate in joint tenancy under the common law, which is allowed to exist in this jurisdiction, requires a unity of possession, a unity of interest, a unity of time, and a unity of title in all holding an interest in such estate.
4. ———. Any act of a joint tenant which destroys one or more of its necessarily coexistent unities operates as a severance of the joint tenancy and extinguishes the right of survivorship.
5. **Vendor and Purchaser: Joint Tenancy.** A contract to sell real estate owned by a husband and wife as joint tenants made by both the tenants destroys the joint tenancy in the real estate and effects an equitable conversion of it into personalty consisting of the contract for sale in which the husband and wife each own an undivided one-half interest though they retain legal title to the real estate as security for a part of the purchase price.
6. **Vendor and Purchaser: Tenancy in Common.** If a contract for the sale of real estate is silent as to the relationship of the vendors as owners of the contract they own it as tenants in common.
7. **Joint Tenancy: Tenancy in Common.** A joint tenancy may be created only by contract and the purpose to do so must be clearly expressed otherwise the tenancy is presumed to be in common.

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

Robert H. Petersen and *Charles E. O'Brien*, for appellant.

Oscar T. Doerr, for appellees.

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

BOSLAUGH, J.

This appeal developed because of a general demurrer by appellees to the petition of appellant, the action of

the court sustaining the demurrer, the refusal of the appellant to plead further in the case, and a judgment of dismissal.

The appellant alleged in his petition that: He was the appointed and qualified administrator of the estate of Ernest R. Dahlke. Prior to September 1, 1949, Ernest R. Dahlke and Laura H. Dahlke, his wife, were the owners in joint tenancy of a described tract of real estate in Douglas County, Nebraska, and on that date they contracted in writing to sell it to George N. Chadwell and J. Louise Chadwell for $4,750, payable to Ernest R. Dahlke and Laura H. Dahlke at the times fixed by the contract. A copy of the contract was attached and made a part of the pleading. The vendees had paid to Laura H. Dahlke, since the death of her husband on January 13, 1951, $192 because of the contract. The unsatisfied part of the purchase price was $2,929.50. One-half of the money paid or to be paid because of the contract after the death of Ernest R. Dahlke was an asset of his estate. The wife of the deceased had refused to account to appellant for one-half of the amount paid to her by the vendees on the contract after the death of the deceased, and the vendees have refused to account to appellant for one-half of the amount due by the terms of the contract. The vendees maintain that they should, and they have declared that they will, pay all further amounts required by the contract to Laura H. Dahlke, the surviving wife of the deceased, and will not pay to appellant one-half thereof as he has requested and demanded. The appellant asked for a judgment against appellees for one-half of the amount paid by the vendees to Laura H. Dahlke since the death of her husband, for a declaratory judgment that one-half of all amounts to be paid by virtue of the contract constitute an asset of the estate of the deceased and should be paid to appellant, and for other equitable relief.

The vendors are named in the contract as "Ernest R. Dahlke and Laura H. Dahlke, husband and wife, par-

ties of the first part" and the purchase price is required to be paid to them. They are not referred to therein in any other capacity or status. The vendees are described in the contract as "George N. Chadwell and J. Louise Chadwell, as joint tenants with right of survivorship, parties of the second part" and they were given possession of the premises from the date the contract became effective.

The appeal presents for decision the sufficiency of the facts well pleaded by the petition to state a cause of action in favor of the appellant. Panebianco v. City of Omaha, 151 Neb. 463, 37 N. W. 2d 731; Koehn v. Union Fire Ins. Co., 152 Neb. 254, 40 N. W. 2d 874.

The real estate described in the petition and in the contract of sale and purchase referred to therein was owned in joint tenancy by Ernest R. Dahlke and Laura H. Dahlke. They, on September 1, 1949, obligated themselves in writing to sell and convey it for a stated consideration to George N. Chadwell and J. Louise Chadwell, as joint tenants with right of survivorship, and they agreed to buy it and pay the purchase price partly in cash and the balance in installments. The contract was properly executed and delivered. Its validity and enforceability has not been questioned and obviously could not be because appellant pleads it as the basis of the relief he seeks and appellees admit all facts concerning the contract asserted by the pleading of appellant. The specific problem is who was entitled to the unpaid part of the purchase price of the property at the time of the death of Ernest R. Dahlke on January 13, 1951. The appellant claims one-half of it as an asset of the estate of the deceased. The appellee, Laura H. Dahlke, says she is the owner of all of it by right of survivorship.

It is important to consider who was the owner of the real estate at the time of the death of Ernest R. Dahlke. That is clearly outside the range of argument. It has been frequently and consistently decided by this court, as it is quite unanimously agreed by courts generally,

that if the owner of real estate enters into a contract of sale whereby the purchaser agrees to buy and the owner agrees to sell it and the vendor retains the legal title until the purchase money or some part of it is paid, the ownership of the real estate as such passes to and vests in the purchaser, and that from the date of the contract the vendor holds the legal title as security for a debt as trustee for the purchaser. The interest or estate acquired by the vendee is land and the rights conferred by the contract upon and vested in the vendor are personal property. In case of the death of the vendee intestate his interest or estate in the land would descend to his heirs and in the case of the death of the vendor intestate the rights acquired by him because of the contract would pass as personal property to his administrator. In Hendrix v. Barker, 49 Neb. 369, 68 N. W. 531, this court said: "In an executory contract for the sale of real estate equity treats the vendor as the trustee of the purchaser and the purchaser as the trustee of the purchase money for the vendor. This rule rests upon the doctrine that equity considers that done which ought to be done." The statement of the rule in Jewett v. Black, 60 Neb. 173, 82 N. W. 375, is: "An executory contract for the sale of land vests the equitable ownership of the property in the purchaser, and in such case the seller retains the legal title as security for the deferred installments of the purchase price." It is said in Grandjean v. Beyl, 78 Neb. 349, 110 N. W. 1108: "A vendee in possession of land under a contract of purchase, on which part of the purchase price has been paid, holds equitable title to the land, which on his death descends to his heirs." In re Estate of Wiley, 150 Neb. 898, 36 N. W. 2d 483, contains this language: "An executory contract for the sale and purchase of land, enforceable for and against vendor and vendee, is a present equitable conversion of land into personalty and of personalty into land. * * * Where an owner of realty entered into a binding contract for the sale thereof prior

to his death equity will treat the realty as personalty in distributing his estate." See, also, Dorsey v. Hall, 7 Neb. 460; Gardels v. Kloke, 36 Neb. 493, 54 N. W. 834; First Nat. Bank of Falls City v. Edgar, 65 Neb. 340, 91 N. W. 404; United States v. Sode, 93 F. Supp. 398; 19 Am. Jur., Equitable Conversion, § 15, p. 15. This court has not deviated from this doctrine and has applied and enforced it when the contract of purchase and sale was "enforceable for and against vendor and vendee." Grandjean v. Beyl, *supra;* In re Estate of Wiley, *supra.*

A matter of prime importance was the effect of the contract of sale and purchase upon the status of the vendors as joint tenants. An indispensable requisite of a common law joint tenancy was the four unities of time, title, interest, and possession. The tenants thereof were required to have one and the same interest resulting from the same conveyance, commencing at the same time, and accompanied by undivided possession. These were required to be continued during the jointure. Any act which destroyed one or more of the unities caused a severance and destruction of the joint tenancy. In Stuehm v. Mikulski, 139 Neb. 374, 297 N. W. 595, 137 A. L. R. 327, it was said: "The creation as well as the continued existence of an estate in joint tenancy under the common law, which is allowed to exist in this jurisdiction, requires a unity of possession, a unity of interest, a unity of time and a unity of title in all holding an interest in such estate." See, also, Anson v. Murphy, 149 Neb. 716, 32 N. W. 2d 271.

Any act of a joint tenant which destroys one or more of its necessarily coexistent unities operates as a severance of the joint tenancy and extinguishes the right of survivorship. Stuehm v. Mikulski, *supra*; Van Antwerp v. Horan, 390 Ill. 449, 61 N. E. 2d 358, 161 A. L. R. 1133. A conveyance by one joint tenant of his interest destroys the unities of title, interest, and possession and causes a severance of the joint tenancy. A contract by one joint tenant to convey his interest to a stranger severs

a joint tenancy since equity regards that as done what in good conscience ought to be done. In Naiburg v. Hendriksen, 370 Ill. 502, 19 N. E. 2d 348, it is said: "We have been unable to find any cases from this jurisdiction on the question of whether a contract to convey operates as a severance of a joint tenancy. However, the courts of other jurisdictions, and leading text writers, are unanimously of the opinion that a contract to convey operates, in equity, as a severance of the joint tenancy. (In re Hewett, 1 Ch. Div. 362 (1894); Gould v. Kemp, 2 Myl. & K. 304, 309, 39 Eng. Rep. 959, 961 (1833); In re Wilford's Estate, 11 Ch. Div. 267 (1879); Burnaby v. Equitable Reversionary Interest Society, 28 Ch. Div. 416 (1885); Brown v. Raindle, 3 Ves. Jun. 256, 257, 30 Eng. Rep. 998, 999 (1796); Kurowski v. Retail Hardware Mutual Fire Ins. Co. of Minnesota, 203 Wis. 644.) Tiffany, in his Law of Real Property, volume 1, paragraph 191, at page 638, says: 'It has been decided that in equity a mere contract by one joint tenant to sell his share or to settle it will effect a severance.' The rule announced by these authorities is based on the equitable maxim 'Equity regards as done what in good conscience ought to be done.' " In a later case decided by the Illinois court, Klouda v. Pechousek, 414 Ill. 75, 110 N. E. 2d 258, it is said: "* * * a contract to convey made by a joint tenant will operate, in equity, to sever the joint tenancy * * *." See, also, Kozacik v. Kozacik, 157 Fla. 597, 26 So. 2d 659; Annotation, 129 A. L. R. 816; 48 C. J. S., Joint Tenancy, § 4, p. 927. A conveyance of joint property by all the joint tenants destroys the joint tenancy. Ball v. Mann, 88 Cal. App. 2d 695, 199 P. 2d 706.

It logically follows from what has been said that if all the joint tenants enter into a joint contract to sell the joint property, receive and accept a part of the purchase price, and put the purchaser in possession of the property this destroys the joint tenancy in the realty, even though the vendors retain the legal title to the realty as security for the balance of the purchase price.

In re Sprague's Estate, — Iowa —, 57 N. W. 2d 212, considered these facts: James Sprague and Nancy M. Sprague, husband and wife, owned real estate as joint tenants. Mrs. Sprague made a will and codicil by which she gave it to named stepdaughters if she survived her husband, became vested with full title thereto as surviving joint tenant, and was possessed of it at the time of her death. A sister of the testatrix was the residuary beneficiary named in the will. Thereafter Mr. and Mrs. Sprague made a valid contract for the sale and conveyance of the real estate to vendees named therein. The purchase price, a large part of which was unpaid at the time of the death of Mr. Sprague, was required to be paid in installments. Later and about 5 years after the date of the contract Mrs. Sprague died. It is said in the headnotes to that case: "Contract to sell realty owned by husband and wife as joint tenants with right of survivorship destroyed the joint tenancy in the realty and effected an equitable conversion of the realty into personalty consisting of contract for sale, in which husband and wife each owned an undivided one-half interest, though they retained legal title to the realty as security for payment of purchase price." It is said in the opinion that the comments of the trial court, relative to the real estate involved, aptly set forth the views of the Supreme Court relative to this feature of the case. These contain the following: "'* * * The making of this contract (to sell the real estate) * * * destroyed the joint tenancy of Nancy M. Sprague and James A. Sprague in the Cedar Rapids real estate, and, after the making of this contract, they were each the owner of an undivided one-half interest in such contract. The making of this contract for the sale of this real estate operated so that Mrs. Sprague did not own this real estate at the time of her death in the ordinary sense of ownership; there was a change from outright ownership to security ownership. In other words, while Mr. and Mrs. Sprague retained legal title to the real

estate, they retained title merely as security for the payment of the balance due upon the purchase price, and, they were, in effect, from and after the making of the Kilpatrick contract, merely the owners of personal property: there had been an equitable conversion of such real estate into personal property. * * * Mrs. Sprague never became "vested with full title (of the Cedar Rapids real estate) as surviving joint tenant", nor was she "possessed of it" at the time of her death; she was merely the owner of an undivided interest in the Kilpatrick contract. * * *' "

The ownership of the real estate described in this case as such passed to the purchasers by the contract made by the owners and from that time forth the vendors had only the legal title as security for a debt and this they held as trustees. The interest the vendees acquired was real estate. The right conferred by the contract upon the vendors was personal property. The contract put the vendees in complete possession of the real estate. Their possession was adverse to any right of possession of the vendors. The vendees are in possession as owners and the vendors or their successors can never by their own volition alone terminate that possession or ownership. It is not convincing to contend that the joint tenancy continued when the tenants by their voluntary act deprived themselves of their unities of possession, interest, and title. They had neither title to the real estate, interest in, nor possession of it after the contract of sale was made. The contract of sale destroyed the joint tenancy of the vendors.

The cases primarily relied upon by appellees will be noticed. In re Estate of Jogminas, 246 Ill. App. 518, involved these facts: Frank M. Jogminas and Amelia Jogminas, husband and wife, owned real estate as joint tenants. They entered into contracts to sell and convey it. The purchase price was partly paid and the balance deferred. The husband died. The widow had custody of the contracts and claimed as her property

all amounts unpaid on them by right of survivorship. The administrator of the estate of the deceased husband instituted proceedings in the probate court to recover one-half of the amount unpaid on the contracts at the time of the death of the husband as the property of the estate of the deceased husband. The appellate court in sustaining the conclusion of the probate court stated that the doctrine of equitable conversion was recognized and applied in Illinois but that the theory that it was applicable to the pending case was untenable and asserted, without reference to authority or assignment of any reason, that: "The doctrine of equitable conversion does not apply to joint tenancies. At any rate the probate court of Cook county is not a court of equity but a court of law and therefore legal rather than equitable rules must be applied." A persistent search has failed to disclose that this case has ever been referred to as authority in any decision or text. It should not be overlooked that it was an expression of the appellate court and was not reviewed by the Supreme Court of Illinois. Subsequent decisions of that court do not agree with it. Naiburg v. Hendriksen, *supra;* Klouda v. Pechousek, *supra.* The opinion is not convincing. It is in conflict with the firmly established and consistently applied doctrine of equitable conversion as recognized by the courts of this state. The authority of the district court in this state is not limited as was the jurisdiction of the probate court in Illinois. The district court has general jurisdiction and applies legal and equitable principles as the litigation presented to it requires. Burnham v. Bennison, 121 Neb. 291, 236 N. W. 745; Penn Mutual Life Ins. Co. v. Katz, 139 Neb. 501, 297 N. W. 899.

Simon v. Chartier, 250 Wis. 642, 27 N. W. 2d 752, is quoted in this way by appellees: "'By the death of Lawrence * * * his interest in joint tenancy passed to his wife * * * the signing of the land contract did not constitute a severance of the joint estate. Kurowski v.

Retail Hardware Mut. Fire Ins. Co., 203 Wis. 644, 647, 648, 234 N. W. 900. The legal title was in the Simons jointly at the husband's death and passed by survivorship to his widow.' " The sole support of the conclusion stated therein was the cited prior decision of the Wisconsin court. That case considered a situation in which the title to a lot was owned in joint tenancy by a husband and wife. The husband orally agreed to form a partnership with his son; that the partnership should erect a building on the lot; and that the partnership should own the premises. That case was decided on the basis that the husband as one of the joint tenants did not convey or agree to convey his interest in the lot but that he agreed that the entire lot should belong to the partnership. This it was said did not cause a severance of the joint tenancy. The language of the court in this regard follows: "It is true that, generally speaking, a transfer by a joint tenant of his interest constitutes a severance. It is also true that a contract by a joint tenant to transfer his interest may effect a severance in equity although it does not at law. * * * But in the latter case the interest contracted to be transferred must be that of the joint tenant contracting, not that of his cotenant or the property in entirety. Here the agreement of the father was not to transfer his interest to the partnership but the entire property."

Detroit & Security Trust Co. v. Kramer, 247 Mich. 468, 226 N. W. 234, considered transactions involving lands owned by a husband and wife as tenants by the entireties. It did not relate to or consider any matter affecting or resulting from a joint tenancy. The two estates are not identical but in most respects dissimilar. What is said therein on the subject of equitable conversion which is characterized as "at best is somewhat far fetched" and "Carried to its logical conclusion * * * leads to many strange and serious results" may not be accepted because of the more tolerant view of the decisions of this court toward that doctrine. The specula-

tion indulged by the writer of the opinion as to what the parties intended is wholly unimportant in this case because the contract here involved is clear, unambiguous, and complete. The facts pleaded as a cause of action are admitted by the demurrer. It must be concluded that what the joint tenants did is what they intended to do. The result of their acts is a legal conclusion to be determined by the court. The Michigan case is neither applicable nor helpful.

The contract of sale of the real estate provides that the purchase price shall be paid to the parties of the first part who are named as Ernest R. Dahlke and Laura H. Dahlke, husband and wife. The contract attributes to them no other relationship or status. Joint tenancies may only be created by contract. If an instrument transfers a right to or creates an interest in two or more persons and it is silent, indefinite, or ambiguous as to the nature of the estate transferred or created it will be considered as a tenancy in common and not a joint tenancy. There is no expression in the contract important to this controversy indicating any intention of the vendors to have, receive, or hold the benefits accruing to them because of the contract as joint tenants. In Sanderson v. Everson, 93 Neb. 606, 141 N. W. 1025, it is said: "Joint tenancies are created by contract, and, if not so created, they do not exist. True, they are not favored, and, if not expressly created by contract, the law presumes the tenancy is in common, and that upon the death of one of the holders of the title his or her interest descends to his or her heirs. * * * It is true that, in order to create a joint tenancy, the purpose must be clearly expressed, otherwise the tenancy will be held to be in common." See, also, Olander v. City of Omaha, 142 Neb. 340, 6 N. W. 2d 62; In re Estate of Vance, 149 Neb. 220, 30 N. W. 2d 677; Bodeman v. Cary, 152 Neb. 506, 41 N. W. 2d 797. This doctrine applies to joint tenancies without regard to the character of the property, that is, whether it is real estate or personal property. In re Estate of Vance, *supra*.

Accepting as true the facts pleaded, as must be done because of the general demurrer to the petition, the contract of sale of the real estate and all the benefits accruing because of it to the parties of the first part named therein were owned by Ernest R. Dahlke and Laura H. Dahlke as tenants in common at the time of the death of Ernest R. Dahlke, and one-half of the then unpaid purchase price of the real estate as provided by the contract was an asset of the estate of the deceased and should be paid to the appellant. The petition states a cause of action. The demurrer was improperly sustained.

The order sustaining the demurrer and the judgment of dismissal entered in this case by the district court should be and they are each reversed, and this cause is remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

IN RE ESTATE OF COLLIN L. RAGAN, DECEASED. LULU JANE HEDGES RAGAN, APPELLANT, V. S. E. RAGAN ET AL., APPELLEES.

62 N. W. 2d 121

Filed January 22, 1954. No. 33417.

1. **Marriage.** A common-law marriage is not valid in this state unless entered into prior to the adoption of section 42-104, R. R. S. 1943, in 1923.
2. ———. Where the evidence affirmatively shows that there was no mutual consent by the parties to assume the status of husband and wife prior to the enactment of section 42-104, R. R. S. 1943, cohabitation or other subsequent conduct does not support a claim that a common-law marriage existed.
3. ———. A meretricious relationship continued over a long period of time raises no presumption of a common-law marriage where it affirmatively appears that no mutual consent to assume the status of husband and wife was ever entered into.

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

Perry & Ginsburg and *R. E. Lunner,* for appellant.

Kirkpatrick & Dougherty and *McKillip, Barth & Blevens,* for appellees.

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

CARTER, J.

This is an action arising out of proceedings in the county court of York County for the administration of the estate of Collin L. Ragan, deceased, who died intestate. The issue is whether Lulu Jane Hedges was the common-law wife of the deceased and entitled to share in his estate by virtue of such relationship. The trial court found against Lulu Jane Hedges and she appeals.

Common-law marriages entered into since the enactment of section 42-104, R. R. S. 1943, are not recognized in this state. Scott v. Scott, 153 Neb. 906, 46 N. W. 2d 627, 23 A. L. R. 2d 1431. The statute had no retroactive aspects and common-law marriages entered into and consummated prior to the adoption of the act are valid. This court had many times held that if a man and woman, each competent to marry the other, agreed to become married, lived and cohabited together as husband and wife, and so held themselves out to the public, such acts constituted a valid marriage. Collins v. Hoag & Rollins, 122 Neb. 805, 241 N. W. 766; Forshay v. Johnston, 144 Neb. 525, 13 N. W. 2d 873. A common-law marriage is a status assumed by competent parties based on mutual consent whereby they undertake to each other the duties and obligations of husband and wife. It is not required that the mutual consent of the parties be expressed by any prescribed form of words. There must be evidence, however, that the parties consented to assume the status of husband and wife, al-

though no explicit verbal agreement was made. Consent may be expressed by conduct as effectively as by words, and proof of conduct is proof of consent. University of Michigan v. McGuckin, 64 Neb. 300, 89 N. W. 778. In order to establish mutuality of consent by conduct, the evidence must show that they cohabited as man and wife and held themselves out as man and wife in the community of their residence. Coad v. Coad, 87 Neb. 290, 127 N. W. 455; Wilson v. Wilson, 139 Neb. 153, 296 N. W. 766. Open cohabitation, between unmarried persons, although generally known, who do not hold themselves out as husband and wife, does not establish a common-law marriage. Coad v. Coad, *supra;* Moore v. Flack, 77 Neb. 52, 108 N. W. 143. The facts will be discussed with these principles of law in mind.

The evidence shows that Lulu Jane Hedges was employed by the parents of Collin L. Ragan at Utica for 2 or 3 months in 1906. She became acquainted with Ragan at that time and he immediately commenced courting her. In the year 1907 he placed a ring on the finger of Lulu Jane Hedges and she inquired if that meant she belonged to him. She quotes his answer as "you take it as you want to." Lulu testifies that they commenced having sexual relations shortly thereafter. In 1908 they went to Lincoln where they lived in a hotel for 2 or 3 months. Thereafter they went to Denver, Colorado, where they lived at a hotel for more than 3 months. They returned to Lincoln where Lulu ran a rooming house, Ragan maintaining his own place of abode. The evidence is not clear as to how long they lived in Lincoln, but it appears that after 7 or 8 years they went back to their original homes. Ragan lived with his mother and Lulu rented various places to live during their stay. She claims that Ragan paid her rent, bought her necessaries of life, and came and went as he pleased, except that he returned to his mother's home each night. Ragan's mother died in 1924 and shortly thereafter he went to Omaha. Lulu Jane Hedges later

went to Omaha. It is evident that they lived together at times and at other times they lived apart. Ragan sought the company of other women on many occasions with knowledge and without protest on the part of Lulu. She says that Ragan supported her during this period. Ragan suffered a stroke in 1947 and both returned to York the following year. Lulu cared for Ragan the next 4 years until he died.

Lulu Jane Hedges testifies that she went under the name of Hedges until they returned to York in 1947. She testifies that she never introduced Ragan as her husband and that he never introduced her as his wife. She says that Ragan introduced her as Lulu or as his companion. He never introduced her as his wife. She generally introduced Ragan as her companion. She never introduced him as her husband.

The record shows that in 1925 or 1926 she employed legal counsel to bring a breach of promise suit against Ragan, which was amicably adjusted. She did not claim a marriage relationship at that time. The nature of the proposed suit indicated the contrary. Ragan sold a farm in 1946, the deed showing that he was a single person. Lulu was fully aware of this and during the negotiations for the sale introduced herself as Ragan's housekeeper. Out of the proceeds he bought her a home and the title was taken by her under the name of Lulu Jane Hedges. Lulu testifies that she never told any of Ragan's family that they were ever married, nor did she ever hear Ragan tell any of them that they were husband and wife. The record shows that Lulu Jane Hedges was asked this question: "Q. And there never has been so far as you are concerned any kind of an agreement between either you or Coll (Ragan) whereby you mutually agreed among yourselves to live as husband and wife prior to June, 1947; is that right? A. Yes." The record is replete with statements by Lulu that there was never any mutual consent of the parties to assume a marriage status prior to June 19, 1947.

The evidence will not support a finding that a common-law marriage existed prior to the enactment of section 42-104, R. R. S. 1943. The evidence of Lulu Jane Hedges is very conflicting on the question of continuing sexual intercourse between the parties over the years. Her testimony was also in serious conflict with that given by her in the county court. Assuming that Lulu and Ragan occupied the same bed over the years and purported when expedient to hold themselves out as husband and wife, it does not tend to establish a common-law marriage where the evidence affirmatively shows that there was never a mutual consent to assume the status of husband and wife. The evidence clearly shows the relationship of the parties to have been a meretricious one, lacking the primary aspect of a common-law marriage. The trial court properly so found and the judgment of the district court is in all respects correct.

AFFIRMED.

GERALD FREDERICK RAKES, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.

62 N. W. 2d 273

Filed January 22, 1954. No. 33419.

1. **Witnesses.** The question of competency of a person to be a witness is left to the sound discretion of the trial judge, leaving the jury to determine the credit that should be given to the testimony.
2. ———. In jury cases, juries are ordinarily the sole judges of the credibility of witnesses and of the weight to be given their testimony, and within their province, they have the right to credit or reject the whole or any part of the testimony of witnesses in the exercise of their judgment.
3. **Criminal Law: Trial.** An instruction in a criminal case, the effect of which is to infringe upon the right of a jury as the judge of the credibility of witnesses and the weight to be given their testimony, is ordinarily an invasion and an abridgment of a substantial right of the defendant.

4. **Witnesses: Trial.** The rule that the court must not determine, express, or intimate the degree of credit or weight to be given to a witness' testimony applies to the testimony of children.
5. **Trial: Appeal and Error.** An instruction to a jury, the effect of which is to invade or abridge a substantial right of a defendant in a criminal case, is reversible error.
6. **Juries.** In impaneling a jury, all challenges for cause will be decided by the court, as provided in section 29-2007, R. R. S. 1943, and appropriate explanatory statements of the trial court with relation thereto during voir dire examination are not instructions required to be in writing under the provisions of sections 25-1111 and 25-1115, R. R. S. 1943.
7. **Trial.** Insofar as cross-examination of a witness relates either to facts in issue or relevant facts, it may be pursued by counsel as a matter of right, but when its object is to collaterally ascertain the accuracy or credibility of a witness, a latitude should be permitted, but its method and duration are ordinarily subject to the discretion of the trial judge, and, unless abused, its exercise is not reversible error.
8. **Appeal and Error.** A judgment will not be reversed for error in sustaining an objection to the evidence of a witness upon a point which is otherwise established by the testimony.
9. **Trial.** A litigant has the right to cross-examine a witness produced against him to show the interest, bias, or prejudice of such witness, but the extent to which such an examination may be carried is a matter resting very largely in the sound discretion of the trial court.
10. **Appeal and Error.** A judgment will not be reversed because of the limitation placed by the court upon the cross-examination of a witness as to his interest, bias, or prejudice, unless it appears from the record that the party against whom the witness was called was probably prejudiced by such limitation.
11. **Trial.** When a witness upon cross-examination admits making statements out of court inconsistent with his evidence upon the trial, it is erroneous to permit other witnesses to testify to the statements admitted by the witness, and to detail the circumstances under which the statements were made.
12. ———. Section 25-1141, R. R. S. 1943, which provides that "it shall be unnecessary to repeat the same objection to further testimony of the same nature by the same witness in order to save the error, if any, in the ruling of the court whereby such testimony was received," has no application to further testimony of the same nature by other witnesses to which no objection has been made.

ERROR to the district court for Otoe County: JOHN M. DIERKS, JUDGE. *Reversed and remanded.*

Betty Peterson Sharp, for plaintiff in error.

Clarence S. Beck, Attorney General, and *C. C. Sheldon,* for defendant in error.

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

CHAPPELL, J.

Plaintiff in error, Gerald Frederick Rakes, hereinafter called defendant, was tried to a jury and found guilty upon an information charging him with robbery. His motion for new trial was overruled and he was sentenced to serve 6 years in the Nebraska State Penitentiary. Therefrom he prosecuted error to this court, assigning substantially that the trial court erred prejudicially: (1) In the giving of instruction No. 13 on its own motion; (2) in giving oral instructions to the jury on voir dire; and (3) in admitting and refusing to admit certain evidence. The sufficiency of the evidence to sustain a verdict in the absence of reversible error is not questioned and it will not be summarized here except as may be necessary to dispose of the assignments aforesaid. We sustain the first assignment and subsequently discuss the others, because the judgment is reversed and the cause is remanded for new trial.

In addition to a perfectly proper instruction upon credibility which had like application to each and all of the witnesses, the trial court gave instruction No. 13, fundamentally conflicting therewith, which reads in part: "The defendant relies in this case in part on the testimony of * * * a little girl of about nine years of age. You are cautioned to consider her testimony with great care and caution, being careful to give it only such weight and credit as it ought to receive under all the facts and circumstances shown by the evidence, keeping in mind that she is very young in years, experience and

judgment, and her faculty of accurate memory, and her ability to observe and relate past events is not as fully developed as would be such faculties and characteristics in a more mature or adult person." We conclude that the giving of such instruction was prejudicially erroneous.

In that connection, when the child, 9 years old, who lived in defendant's home at time of the alleged offense, was called and sworn as a witness for defendant, his counsel examined her at length with regard to her competency to be a witness and she gave responsive, intelligent answers to all questions so propounded, which clearly demonstrated that she understood the nature and obligation of an oath and was a competent witness. Defendant then inquired of the county attorney: "Is there any objection to the child testifying?" To such inquiry the reply was "No." She then testified at length in support of defendant's alibi defense. As early as Davis v. State, 31 Neb. 247, 47 N. W. 854, involving the testimony of a girl 11 years of age, this court said: "No fixed rule can be laid down as to the age a child must be to entitle it to testify as a witness in a court of justice. The question of competency of a person to be a witness must be left to the sound legal discretion of the trial judge, leaving to the jury to determine the credit that ought to be given to the testimony." The question of the child's credibility here involved does not come within any exceptions recognized by this court wherein a cautionary instruction with relation thereto should or may be given.

In our discussion here, we have not overlooked the provisions of section 29-2308, R. R. S. 1943. It is sufficient for us to observe that as an elementary proposition it has no application where, as here, a substantial right of defendant has been abridged, because the province of the jury was necessarily invaded by the instructions given. As late as Skelton v. State, 148 Neb. 30, 26 N. W. 2d 378, this court reaffirmed that: "The question of

competency of a person to be a witness is left to the sound discretion of the trial judge, leaving to the jury to determine the credit that ought to be given to the testimony."

In Wilson v. State, 150 Neb. 436, 34 N. W. 2d 880, this court held: "An instruction to a jury the effect of which is to invade or abridge a substantial right of a defendant in a criminal case is reversible error.

"In jury cases juries are the judges of the credibility of witnesses and of the weight to be given their testimony and, within their province, they have the right to credit or reject the whole or any part of the testimony of a witness in the exercise of their judgment.

"An instruction in a criminal case the effect of which is to infringe upon the right of a jury as the judge of the credibility of witnesses and the weight to be given their testimony is an invasion and an abridgement of a substantial right of the defendant."

As stated in the opinion: "This court has consistently held that in cases tried to them juries are the judges of the credibility of witnesses and of the weight to be given to their testimony and, within their province, they have the right to credit or reject the whole or any part of the testimony of a witness in the exercise of their judgment. Baker v. Racine-Sattley Co., 86 Neb. 227, 125 N. W. 587; Dore v. Omaha & C. B. St. Ry. Co., 97 Neb. 250, 149 N. W. 792; Kraemer v. New York Life Ins. Co., 134 Neb. 445, 278 N. W. 886.

"The right of a defendant in a criminal case, or in truth the right of a litigant in any case triable to a jury, to have the jury weigh the evidence free from interference, we think, is a substantial right and a restriction upon or abridgment of that right by the trial court in instructions to a jury amounts to the deprivation of the benefits of this substantial right. In such an instance the statute relied upon by the State has no application."

Wilson v. State, *supra,* was cited with approval and

relied upon in Frank v. State, 150 Neb. 745, 35 N. W. 2d 816; Knihal v. State, 150 Neb. 771, 36 N. W. 2d 109, 9 A. L. R. 2d 891; Jennings v. State, 150 Neb. 828, 36 N. W. 2d 268; Schluter v. State, 151 Neb. 284, 37 N. W. 2d 396; and Franz v. State, 156 Neb. 587, 57 N. W. 2d 139. See, also, Witt v. State, 123 Neb. 799, 244 N. W. 395.

As stated in 23 C. J. S., Criminal Law, § 1175, p. 717: "The rule that the court must not determine, express, or intimate the degree of credit or weight to be given to a witness' testimony applies to the testimony * * * of children * * *." See, also, 16 C. J., Criminal Law, § 2337, p. 955.

It should be said also that there is another logical reason why instruction No. 13 was prejudicially erroneous. The child's testimony was materially in corroboration of that comparable in nature given by defendant and other witnesses who testified in his behalf. To tell the jury that the child's evidence should be considered with great care and caution in determining its weight and credibility, would be to directly cast a doubt upon the credibility of and discredit the evidence of such other witnesses, who gave substantially the same testimony. The State has cited no authority, and we have found none which could give the instruction validity.

During the examination of jurors for cause by defendant's counsel, a juror expressed his inability to understand the meaning of "beyond a reasonable doubt" as explained by defendant's counsel. Thereupon, with express approval of defendant's counsel, the trial court explained to the jury clearly and at length the proper meaning and application of the language in such manner as to be beneficial to defendant, also telling the jurors in substance that they would be fully instructed thereon before final submission of the case. Defendant's counsel then proceeded with the examination for cause, without objection. In that regard, defendant now assigns that in so doing, the trial court erred by giving oral instructions contrary to the provisions of sections

25-1111 and 25-1115, R. R. S. 1943. We conclude that the assignment has no merit. This court was confronted with a comparable situation in Lee v. State, 147 Neb. 333, 23 N. W. 2d 316. Therein we called attention to the fact that in impaneling a jury all challenges for cause shall be tried by the court as provided in section 29-2007, R. R. S. 1943, and proper explanatory statements of the trial court with relation thereto during voir dire examination are not instructions required to be in writing under the provisions of section 25-1111, R. R. S. 1943. In that regard, the opinion said: "Obviously, this is not an instruction to the jury and not within the provisions of section 25-1111, R. S. 1943." By analogy, of course, if such explanatory statements are not instructions, then also section 25-1115, R. R. S. 1943, has no application. The assignment has no merit.

The complaining witness was a man 80 years old, with only one eye and some defect of vision in the other. He identified defendant and pointed him out in the courtroom as the man who robbed him. In that connection, he knew defendant well as a boy but had not seen him except twice in the last 4 or 5 years. However, on the night of the robbery, January 31, 1953, he claimed that defendant had been in his home about 2 hours or more while defendant visited with him. The trial court in no manner restricted defendant in cross-examining such witness with regard to his identification of defendant, and the means by which such identification was made. However, upon cross-examination, defendant attempted, as claimed here, to ascertain the witness' power of memory, discernment, and observation as affecting his credibility, by asking him, "would you care to step down and point him out," thus referring to another named person then in the courtroom with whom the witness was acquainted. Objection thereto was sustained, and an offer of proof was made, whereupon the State renewed its former objection to the question and objected further that the offer was broader than the question,

which was the fact, and such objection was sustained. In that situation, defendant complains that cross-examination of the witness was unduly restricted. The general rule is that so far as cross-examination of a witness relates either to facts in issue or relevant facts, it may be pursued by counsel as matter of right, but when its object is to collaterally ascertain the accuracy or credibility of a witness, a latitude should be permitted, but its method and duration are ordinarily subject to the discretion of the trial judge and, unless abused, its exercise is not reversible error. Goldman v. State, 128 Neb. 684, 260 N. W. 373; O'Connor v. State, 123 Neb. 471, 243 N. W. 650; 3 Jones on Evidence (4th ed.), § 826, p. 1526. Upon the record as presented here, we conclude that the trial court did not abuse its discretion.

The chief of police at Nebraska City testified as a witness for the State. He was recalled for rebuttal, and defendant complains that the trial court unduly restricted cross-examination when it sustained objections to three questions allegedly tending to show his interest, bias, or prejudice. To recite the questions at length here would serve no purpose. In that regard, evidence of similar nature was already before the jury, given in response to comparable questions theretofore asked, and the record is such that defendant could not have been prejudiced by refusal to permit the questions to be answered. In Stump v. State, 132 Neb. 49, 271 N. W. 163, it was held: " 'A judgment will not be reversed for error in sustaining an objection to the evidence of a witness upon a point which is otherwise well established by the testimony.' Macrill v. City of Hartington, 93 Neb. 670, 141 N. W. 825." Further, as held in Matters v. State, 120 Neb. 404, 232 N. W. 781: "The exclusion of competent evidence, cumulative in character, will not work a reversal, unless such exclusion has been prejudicial to the complaining party."

In Davis v. State, 51 Neb. 301, 70 N. W. 984, this court held: "A litigant has the right to cross-examine a wit-

ness produced against him to show the interest, bias, or prejudice of such witness, but the extent to which such an examination may be carried is a matter resting very largely in the sound discretion of the trial court. Consaut v. Sheldon, 35 Neb., 247, followed.

"A case will not be reversed because of the limitation placed by the court upon the cross-examination of a witness as to his interest or bias, unless it appears from the record that the party against whom the witness was called was probably prejudiced by such limitation."

During cross-examination of a witness for defendant, the State, over objection thereto, introduced in evidence exhibit 1, a written statement, admittedly first read and then signed by the witness with a name not her own, in which she stated some matters inconsistent with her testimony given on direct. On redirect she testified that the chief of police told her if she knew anything about the facts to tell the truth, but that part of what appeared in the statement was not true, and she signed it because she was afraid he was going to take her child away from her. On recross, she testified that all the officers asked for when they took the statement was the truth, and they got it. Thereafter on rebuttal, the deputy sheriff, a witness for the State, who wrote the statement, testified without objection that when the statement was taken no threats were made to take her child away. However, thereafter over objections that it was incompetent, irrelevant, immaterial, without sufficient foundation, not made in the presence of defendant, and improper impeachment, she having admitted the statement, the deputy sheriff was permitted to repeat the details and conversation which occurred with relation to the taking of her statement. Defendant complains that the admission of such evidence was erroneous. In that connection, he relies upon Brown v. State, 88 Neb. 411, 129 N. W. 545, wherein it was held: "When a witness upon cross-examination admits making statements out of court inconsistent with her evidence upon the trial, it is

erroneous to permit other witnesses to testify to the statements admitted by the witness, and to detail the circumstances under which the statements were made." As stated in the opinion: "When a witness is asked in cross-examination as to statements that she has made out of court for the purpose of laying the foundation for impeachment, and admits fully that she has made such statements, that is all that the cross-examination is entitled to."

See, also, 3 Jones on Evidence (4th ed.), § 849, p. 1577, wherein it is said: "If the witness admits having made the impeaching statement, there is no reason for further proof on the subject; and none should be received."

As we view it, such evidence came squarely within and is controlled by the rule relied upon by defendant. It should have been excluded.

Nevertheless, the admission of such evidence in this case could not have been prejudicially erroneous because the chief of police, another witness subsequently called by the State in rebuttal, gave testimony of the same nature, to which no objection whatever was made. In that regard, section 25-1141, R. R. S. 1943, which provides that: "* * * it shall be unnecessary to repeat the same objection to further testimony of the same nature by the same witness in order to save the error, if any, in the ruling of the court whereby such testimony was received," has no application to further testimony of the same nature by other witnesses to which no objection has been made.

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

REVERSED AND REMANDED.

HERMAN EGGERT, GUARDIAN OF MARY A. SCHROEDER, INCOMPETENT, APPELLANT, V. FREDERICK E. SCHROEDER ET AL., APPELLEES.

62 N. W. 2d 266

Filed January 22, 1954. No. 33426.

1. **Deeds.** The law recognizes the right of the aged to control and dispose of their own property and their right to choose the persons who shall be the recipients of their bounty.
2. ———. Courts should not set aside the disposition of property made by deed without good reasons, based upon clear and satisfactory proof.
3. ———. The undue influence which will avoid a deed is an unlawful or fraudulent influence which controls the will of the grantor.
4. ———. A case of undue influence is made out, in case of a deed, where it is shown by clear and satisfactory evidence (1) that the grantor 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.
5. ———. Undue influence is never presumed but the one attacking an instrument on the ground that its execution was so procured has the burden resting on him to prove that fact.
6. **Parent and Child: Gifts.** The rule is well established in this jurisdiction, in a case of gift and voluntary conveyance from a parent to a child, no presumption of fraud or undue influence arises as between the parties thereto from the mere fact of the relation.
7. ———: ———. The affection, confidence, and gratitude of a parent to a child which inspires the gift is a natural and lawful influence and will not render it voidable unless this influence has been so used as to confuse the judgment and control the will of the donor.
8. **Deeds.** To set aside a deed on the ground of want of mental capacity on the part of the grantor it must be clearly established that the mind of the grantor was so weak or unbalanced at the time of the execution of the deed that he could not understand and comprehend the purport and effect of what he was then doing.
9. ———. Where it is sought to cancel a deed for the want of mental capacity of the grantor to make the instrument, the burden of proof is on the one who alleges the mental incapacity.

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

Cook, Cook & Line, for appellant.

Spear & Lamme, for appellees.

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

WENKE, J.

This is an action commenced in the district court for Dodge County by Herman Eggert, guardian of Mary A. Schroeder, an incompetent, against Frederick E. Schroeder and Myrtle A. Schroeder. The purpose of the action is to have set aside a certain deed executed by Mary A. Schroeder to the defendants. The basis on which such relief is sought is that the grantor was, at the time of the execution of the deed, mentally incompetent and that it was obtained by undue influence. Trial was had on November 17 and 18, 1952. The trial court found generally for the defendants and dismissed plaintiff's petition. His motion for new trial having been overruled plaintiff took this appeal.

As stated in Wiskocil v. Kliment, 155 Neb. 103, 50 N. W. 2d 786: " 'Actions in equity, on appeal to this court, are triable de novo 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.' Sopcich v. Tangeman, 153 Neb. 506, 45 N. W. 2d 478."

George and Mary A. Schroeder, whom we shall herein refer to either as the parents or as father or mother, lived on a farm in Burt County, Nebraska. There they raised their family consisting of three children who are George E., at the time of the trial 62 years of age and

the oldest, Matilda C., at the time of the trial 60 years of age and the second oldest, and Frederick E., at the time of trial 57 years of age and the youngest. Matilda was married in 1914 and became Matilda C. Rewinkel. She thereafter left the parents' home, living first in Leigh, Nebraska. Later, in 1925, she moved from there to Denver, Colorado. She has lived in Denver ever since, becoming a widow in 1945 when her husband died.

The parents retired from the farm in 1921 and moved to Fremont, Nebraska, purchasing a home located at 749 East Military Avenue. The title to the home was placed in the name of the mother and is the property herein involved. When the parents retired from active farming they owned two farms in Burt County consisting of a total of 320 acres. At the time the parents retired in 1921 son Frederick E. married and he and his wife, Myrtle A., the appellees here, moved onto the home farm. At that time son George E. was farming the other place. George E. continued to farm it until 1925. Then he left the farm and has since lived at various places. At the time of the trial he was living in Las Animas, Colorado.

Appellees stayed on the home place until 1936. Then they moved to Oakland, Nebraska. The father died in January 1943. Shortly thereafter appellees moved to Fremont, doing so on April 26, 1943. Until they could find a place in which to live they stayed with the mother, doing so until September 26, 1943. They continued to live in Fremont until the latter part of 1947 when they moved to South Dakota. However, they returned to Fremont about February 10, 1948. On their return they again lived with the mother until about March 1, 1948, when they were able to get a place for themselves. They have lived in Fremont ever since.

When the father died he gave the mother the life use of the farms and, subject thereto, gave each of the children a one-third interest therein. Up until September 1951, the family seems to have gotten along very well.

Although he never lived in Fremont it appears that in late years son George E. would come to Fremont about twice a year to visit his mother. He usually came on either the 4th of July, Labor Day, or Thanksgiving and would stay a day or two. Likewise Matilda, who never lived in Fremont, would come to visit her mother once or twice a year. She would usually stay a week or 10 days. The mother always paid the expenses of her trips. In fact it would appear the mother wanted Matilda to come and stay with her but apparently Matilda did not want to leave Denver. The appellees, with the exceptions already noted, have lived in Fremont since shortly after the father's death. Although the mother, since the father's death, has always taken care of her business it does appear that her son Frederick E. helped her manage the farms. It also appears he helped her take care of her yard and garden and did many other odd jobs for her. The evidence shows appellees were in every way kind to and considerate of the mother and interested in her welfare.

On February 5, 1951, the mother called the appellees' home by telephone and wanted to talk with her son Frederick E. When informed he was not home she left word for him to call. This he did. Later that day, when he came to her home, the mother advised him she was going to will the home property to appellees. This was the first information that either of the appellees had that she intended to give them the home property. Arrangements were made and on Saturday, February 10, 1951, mother and son went to the office of the mother's attorney. Then, in place of making a will, the mother executed a deed giving appellees the home property located at 749 East Military Avenue but reserving to herself the life use thereof. The deed, after its execution, was immediately placed of record.

Matilda, while visiting her mother in July 1951, discovered what her mother had done. Shortly thereafter, on September 1, 1951, she and George E. filed a petition

in the county court for Dodge County seeking the appointment of a guardian for their mother. The petitioners alleged therein that she was incompetent to take care of her property. A hearing to determine this issue was held by the county court on September 21, 1951. On November 29, 1951, the county court found the mother to be incompetent and appointed appellant the guardian of her person and property. Appellant qualified and is now acting in that capacity and, pursuant to authority of the county court, has brought this action.

"The law recognizes the right of the aged to control and dispose of their own property and their right to choose the persons who shall be the recipients of their bounty." Lund v. Woodward, 137 Neb. 689, 291 N. W. 90. See, also, Blochowitz v. Blochowitz, 122 Neb. 385, 240 N. W. 586, 82 A. L. R. 949.

"Courts should not set aside the disposition of property made by will or deed without good reasons, based upon clear and satisfactory proof." Woodring v. Seibold, 136 Neb. 647, 287 N. W. 75.

" 'The undue influence which will avoid a deed is an unlawful or fraudulent influence which controls the will of the grantor.' Clark v. Holmes, 109 Neb. 213." Little v. Curson, 114 Neb. 752, 209 N. W. 737. See, also, Blochowitz v. Blochowitz, *supra*.

"A case of undue influence is made out where it is shown by clear and satisfactory evidence (1) that the testator or grantor was subject to such influence; (2) that the opportunity to exercise it existed; (3) that there was a disposition to exercise it; (4) that the result appears to be the effect of such influence." Gidley v. Gidley, 130 Neb. 419, 265 N. W. 245.

"* * * undue influence is never presumed but that the one attacking an instrument on the ground that its execution was so procured has the burden resting on him to prove that fact." Kucaba v. Kucaba, 146 Neb. 116, 18 N. W. 2d 645.

"The rule is well established in this jurisdiction, in a

case of gift and voluntary conveyance from a parent to a child, no presumption of fraud or undue influence arises as between the parties thereto from the mere fact of the relation." Little v. Curson, *supra.*

" 'The affection, confidence and gratitude of a parent to a child which inspires the gift is a natural and lawful influence, and will not render it voidable, unless this influence has been so used as to confuse the judgment and control the will of the donor.' Hacker v. Hoover, 89 Neb. 317." Little v. Curson, *supra.* See, also, Borgmann v. Borgmann, 110 Neb. 318, 193 N. W. 711; Blochowitz v. Blochowitz, *supra;* Kucaba v. Kucaba, *supra;* Parkening v. Haffke, 153 Neb. 678, 46 N. W. 2d 117.

Other than the fact that appellee Frederick E. Schroeder helped his mother transact some of her business and manage her farms, which would give him the opportunity to exercise it, there is no evidence to sustain any of the other elements of undue influence. In this respect we have not overlooked, in examining the evidence, that: "* * * the circumstances under which a conveyance was made, the condition of the grantor at the time, and the injustice to him and his heirs, if it is upheld, may be such as to cast upon the grantee the burden of showing that it is untainted with undue influence, imposition or fraud, but is the intelligent and deliberate act of the grantor." Gidley v. Gidley, *supra.*

In discussing this, we said in Kucaba v. Kucaba, *supra*:

"* * * when a party seeking to set aside a conveyance because of undue influence establishes facts which show the relationship of the parties and their dealings to be such that a presumption of undue influence arises therefrom, the burden then shifts to the party seeking to sustain such conveyance to introduce evidence to overcome such presumption and in the absence thereof a decree should be entered against him.

"It is impossible to lay down any hard and fast rule in cases of this kind as to when a presumption of undue influence arises. The rule must of necessity be applied

according to the particular facts and circumstances of each case in which the question arises. It may generally be stated that if the facts and circumstances of a case show such a confidential, fiduciary or trust relation that it would be inequitable to sustain the deed in question then such presumption arises and the burden of going forward with the evidence rests upon the grantee to show the bona fides thereof."

We do not think the facts and circumstances disclosed by the record before us establishes a situation in which it would be inequitable to sustain the deed in question. In fact, we think the exact opposite is true.

"The rule of law is well settled that, to set aside a deed on the ground of want of mental capacity on the part of the grantor, it must be clearly established that the mind of the grantor was so weak or unbalanced at the time of the execution of the deed that he would not understand and comprehend the purport and effect of what he was then doing. Clark v. Holmes, 109 Neb. 213; Schley v. Horan, 82 Neb. 704; West v. West, 84 Neb. 169." Blochowitz v. Blochowitz, *supra.*

As far back as Mulloy v. Ingalls, 4 Neb. 115, we said: "* * * mere imbecility or weakness of mind, however great, will not avoid a deed or contract unless there be evidence to show a total want of reason or understanding, * * *."

And more recently this court, in quoting from Brugman v. Brugman, 93 Neb. 408, 140 N. W. 781, held in Kucaba v. Kucaba, *supra,* that: " 'It is not every weakness of mind rising from old age or sickness, or other causes, that will avoid a deed. There must be a total want of reason or understanding. * * * Mere mental weakness will not authorize a court of equity to set aside an executed contract. * * * In order to vacate a deed on the ground of mental incapacity of the grantor, it is necessary to show such a degree of mental weakness as renders the maker of the deed incapable of understanding and protecting his own interest. The mere

circumstance that the mental powers have been somewhat impaired by age or disease is not sufficient, if the maker of the deed still retains a full comprehension of the meaning, design and effect of his act, * * *.' "

That a grantor did not understand and comprehend the purport and effect of what he did when he executed the deed may be established by the opinion of nonexpert witnesses if proper and sufficient foundation therefor has been laid. See, In re Estate of Wahl, 151 Neb. 812, 39 N. W. 2d 783; In re Estate of Witte, 145 Neb. 295, 16 N. W. 2d 203.

As stated in In re Estate of Wahl, *supra:* "A nonexpert witness who is shown to have had a more or less intimate acquaintance with a person may be permitted to state his opinion as to the mental condition of that person, if said condition becomes a material subject of inquiry, by giving the facts and circumstances upon which the opinion is based."

" 'Where it is sought to cancel a deed for the want of mental capacity of the grantor to make the instrument, the burden of proof is on the one who alleges the mental incapacity.' Hitchcock v. Guilliams, ante, p. 522." Little v. Curson, *supra.* See, also, Blochowitz v. Blochowitz, *supra;* Kucaba v. Kucaba, *supra;* Borgmann v. Borgmann, *supra;* Kiihne v. Charf, 149 Neb. 271, 30 N. W. 2d 914.

The evidence shows the mother was 80 years of age when she executed the deed. But, as said in Lund v. Woodward, *supra:* "There is no presumption that a person of advanced years is incapable of transacting business. * * * It has long been recognized, and the world is full of proof, that the ability to think and reason clearly may alone survive the passing of youth and middle age."

After the father died the mother continued to live in the home and take care of it and herself, doing the cooking, household duties, and some of the work in the yard and garden. She also attended to her business,

although her son Frederick E. helped her in this regard and in the management of the farms. As is common with people of advancing years her memory started to fail and on occasions she did not recognize relatives, old friends, and familiar places; she would become confused in directions and in knowing just where she was; and she would repeat what she had already said and questions she had already asked. But the evidence shows she knew who her children, the natural objects of her bounty, were; that she knew what property she had; and that she knew what she wanted to do with it. Under all the facts we cannot say she made an unnatural disposition of the home property. In fact we think she fully understood and comprehended the purport and effect of what she was doing when she executed the deed.

Having come to the foregoing conclusions, we affirm the action of the trial court.

AFFIRMED.

ELWYN D. KROGER, APPELLANT, V. STATE OF NEBRASKA, APPELLEE.

62 N. W. 2d 312

Filed January 22, 1954. No. 33452.

1. **Criminal Law: Appeal and Error.** When part of a sentence is illegal an appellate court may, if the sentence is divisible, modify it by striking out the illegal part.
2. **Criminal Law.** When a defendant has been found guilty of separate offenses on separate charges the better practice is to impose separate sentences on each charge whereof he has been found guilty.

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

R. A. Vestecka, for appellant.

Clarence S. Beck, Attorney General, and *Ralph D. Nelson,* for appellee.

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

WENKE, J.

This is an appeal by Elwyn D. Kroger from an order of the district court for Dodge County.

Kroger was charged in a justice of the peace court of Dodge County as follows: "* * * that Elwyn D. Kroger * * * did * * * willfully and unlawfully operate a motor vehicle on a public highway in said county at a rate of speed greater than was reasonable and prudent under the conditions then existing and at a rate of speed in excess of 50 miles per hour, and at a rate of speed such as to endanger the life or limb of other persons in lawful use of said highway * * *." And it was also charged that he, "* * * did * * * unlawfully operate a motor vehicle upon the public highways in said county in such a manner as to wantonly and indifferently disregard the safety of persons and property * * *."

Kroger pleaded guilty to both charges and the justice of the peace thereupon entered the following order: "* * * that defendant pay a fine of $25.00 on the first count, $25.00 on the second count and his drivers license is suspended for 30 days * * *."

He thereupon filed a petition in error in the district court asking that court to eliminate the provision of the justice of the peace's order relating to the suspension of his driver's license. It is from the district court's order dismissing this petition in error that this appeal was taken.

It is appellant's thought that the justice of the peace's order suspending his driver's license for 30 days was solely part of his sentence on his plea of guilty to the second charge and, since a suspension is not authorized by section 39-7,107.01, R. R. S. 1943, that that part of the justice of the peace's order is void.

After a plea of guilty is made to an offense properly lodged in his court a justice of the peace, in imposing

punishment, is limited as to what he can do in the way of punishment by the legislation relating thereto; that is, he can only impose punishment to the extent authorized by the Legislature for the offense charged and any punishment in excess thereof is illegal. When part of a sentence is illegal an appellate court may, if the sentence is divisible, modify it by striking out the illegal part. 15 Am. Jur., Criminal Law, § 463, p. 121; McElhaney v. Fenton, 115 Neb. 299, 212 N. W. 612.

For the purpose of discussion only we shall assume that the justice of the peace's order suspending the driver's license of appellant for 30 days relates solely to the second charge.

The first charge was made under section 39-723, R. R. S. 1943, which provides, as far as here material, as follows: "No person shall operate a motor vehicle on any highway outside of a city or village at a rate of speed greater than is reasonable and proper, having regard for the traffic and use of the road and the condition of the road, nor at a rate of speed such as to endanger the life or limb of any person, * * *."

Section 39-725, R. R. S. 1943, provides, as far as here material, that: "Any person, * * * who shall violate any of the provisions of sections 39-719 to 39-724, * * * shall be deemed guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not less than ten dollars nor more than one hundred dollars for each offense. If the offender so violating is an individual, he may be punished by imprisonment in the county jail not exceeding thirty days, or by both such fine and imprisonment."

In addition to the foregoing penalty section 60-427, R. R. S. 1943, provides: "Upon conviction in any court within this state of any violation of any law of this state pertaining to the operation of motor vehicles or of any city or village ordinance pertaining to the operation of a motor vehicle in such a manner as to endanger life, limb or property, * * * the magistrate or judge of

such court may, in his discretion, suspend the license of such convicted person to operate a motor vehicle for any purpose for a period of time not less than ten days nor more than one year, unless a greater period of suspension or revocation be made mandatory by sections 39-727 or 39-7,107, * * *."

Under the provisions of these sections, when the appellant pleaded guilty to the first charge, the justice of the peace had authority to impose upon him the penalty provided for in section 39-725, R. R. S. 1943, and to suspend his driver's license as authorized by section 60-427, R. R. S. 1943.

Section 39-7,107, R. R. S. 1943, under which the second charge was made, provides: "Any person who drives any motor vehicle in such a manner as to indicate an indifferent or wanton disregard for the safety of persons or property shall be deemed to be guilty of reckless driving."

The penalty which may be imposed for doing so is as follows: "Every person convicted of reckless driving shall be punished by imprisonment in the county jail for a period of not less than five days nor more than thirty days, or by a fine of not less than ten dollars nor more than one hundred dollars, or by both such fine and imprisonment." § 39-7,107.01, R. R. S. 1943.

We think the meaning of the language contained in section 39-7,107, R. R. S. 1943, brings it within the quoted language of section 60-427, R. R. S. 1943. This seems to be clearly evidenced by the following language thereof, to wit: "* * * unless a greater period of suspension or revocation be made mandatory by sections * * * 39-7,107; * * *." That is, the Legislature intended section 60-427, R. R. S. 1943, to apply to section 39-7,107, R. R. S. 1943, but did not intend it to be any limitation or restriction on the greater periods of suspension authorized by the latter.

We think this is further evidenced by language contained in the title of L. B. 162 enacted by the 1947 Legis-

lature, which included both sections 39-7,107 and 60-427. Therein it is stated: "* * * to provide that the person convicted of reckless driving, * * * as part of the judgment of conviction, be ordered not to drive any motor vehicle for any purpose during certain periods of time under the prescribed circumstances and conditions; to provide for suspension or revocation of operator's license as prescribed; * * *." Laws 1947, c. 148, p. 408.

We hold that section 60-427, R. R. S. 1943, is applicable when persons are convicted on charges properly brought under either section 39-723, R. R. S. 1943, or section 39-7,107, R. R. S. 1943.

While we have assumed, for the purpose of discussion only, that the justice of the peace's order relating to the suspension of the driver's license of appellant had relation solely to his sentencing defendant on the second count we do not actually think such to be a fact. By the language used we think it could relate to either or both charges. In this respect it is the better practice for trial courts to impose separate sentences on each charge when a defendant has been convicted on two or more charges, as doing so will enable a reviewing court to better deal with questions presented on appeal. See Williams v. State, 114 Neb. 132, 206 N. W. 731. However, where the language used will permit a construction sustaining the trial court we will adopt that construction rather than one which would have the opposite effect.

Having come to the conclusion that the justice of the peace's order was within his authority, we affirm the action of the district court.

AFFIRMED.

CLYDE CREASON, ADMINISTRATOR OF THE ESTATE OF RAYMOND L. SHIELDS, DECEASED, APPELLANT, V. RILEY D. WELLS ET AL., APPELLEES.
62 N. W. 2d 327

Filed January 29, 1954. No. 33395.

1. **Fraudulent Conveyances.** A conveyance between close relatives is presumptively fraudulent as to an existing creditor, and in litigation between the creditor and the parties to the conveyance testing the validity of the conveyance the burden is on the parties to it to establish the good faith of the transaction.
2. ———. If real estate is purchased and paid for by a wife with her money, but deeded to her husband, he holds the title in trust for his wife, and she is not prevented from claiming the land against the creditors of the husband unless by her conduct she induced them to believe that the husband was the actual owner of the property and to extend credit to him because thereof.
3. ———. Proof that a conveyance of real estate by a husband to his wife was made in good faith and for an adequate consideration is sufficient to sustain the conveyance against an attack on it by a creditor of the husband.
4. ———. A creditor whose debt did not exist at the time of a voluntary conveyance by the debtor cannot attack such conveyance for fraud, unless he pleads and proves that the same was made to defraud subsequent creditors whose debts were in contemplation at the time.

APPEAL from the district court for Lincoln County: ISAAC J. NISLEY, JUDGE. *Reversed and remanded with directions.*

Dryden, Jensen & Dier and *Baskins & Baskins,* for appellant.

Maupin & Dent, for appellees.

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

BOSLAUGH, J.

A judgment for money only was rendered by the district court for Hall County on January 27, 1950, in favor of appellant and against Riley D. Wells. A transcript

of it was made of record in the office of the clerk of the district court for Lincoln County on February 1, 1950. The attempt of appellant to collect the judgment by execution was wholly unsuccessful. He claimed that the judgment debtor was the owner of two lots in the city of North Platte and an automobile, and that he had conveyed one of the lots to Walter T. Bassett and the other lot and the automobile to his wife, Lillie D. Wells, for an inadequate consideration with intent to hinder, delay, and defraud appellant in the enforcement of his judgment. Appellant sought by this suit in equity to subject the real estate and the automobile to the payment of his judgment.

The result of the trial of the case was findings that Lillie D. Wells bought the real estate in good faith, paid the entire purchase price thereof, and that she was the owner of it in fee as her separate property and estate; that it was the statutory homestead of appellees; and that the automobile involved was exempt property and was not, at the time of its transfer by the judgment debtor to his wife, the subject of fraudulent transfer. A judgment of dismissal was rendered by the district court. This is an appeal from that judgment. Riley D. Wells and Lillie D. Wells will be identified herein as appellees.

The real estate involved is two lots in Block 6 of Cody's Addition to North Platte, Nebraska. Lot 4 has no improvements. It was bought by Lillie D. Wells on September 13, 1944, for $300. She paid from her separate property that amount in cash to the then owners and on that date they executed and delivered to her a warranty deed for the property in which she and her husband were named as grantees in the relationship of joint tenants. The same day she bought lot 5, which adjoins the other lot and was improved as a residence property, for $2,500. She paid from her separate estate that amount in cash to the then owners, and they on that date executed and delivered to her a warranty deed for the

property in which the grantees were named and described identically as they were in the deed for the other lot. The grantees were described in the deed as joint tenants solely because the real estate man who was concerned with the transfers, prepared the deeds, directed their execution, and took the acknowledgments of the grantors advised Mrs. Wells to have appellees named as grantees so "That if anything happened to me, why my husband would come in without having to go into court." Riley D. Wells did not purchase the property and he made no contribution to the purchase price of either lot. The real estate broker knew that Mrs. Wells was the sole purchaser and that she alone paid all the consideration for the lots. She and her husband took possession of the lots as one tract and have since occupied and used them as their home.

Lillie D. Wells and Riley D. Wells are respectively 72 and 73 years of age. They were married in 1907. They have no children. They conducted farming operations before they became residents of North Platte. Their financial affairs were inconsiderable. They had an understanding that Mr. Wells would pay from his income their living expenses, and that any amount earned and received by Mrs. Wells should be her separate property. They maintained this arrangement. Mrs. Wells while they were farming retained and saved the money she received from chickens and cream. After they moved to North Platte in 1924 Mrs. Wells bought and took title to a small residence property. It was encumbered by mortgage. She received about $1,500 from the estate of her mother and from this the mortgage on the house was paid. This house was divided into three units. Appellees lived in one, and two of them were rented from about the year 1925 to 1944. Much of the time the rental was small but the rental therefrom for some period of time was as much as $50 a month. Mrs. Wells received the rental. She, during a period of about 20 years commencing about 1924

until she purchased the real estate involved herein, worked for hire doing all kinds of manual labor including housework, scrubbing floors, house cleaning, and laundry work. She estimated that she was engaged to and had performed labor in as many as 50 separate homes in North Platte. She also did laundry work in her home for others. Her compensation was not large but she was constant in her effort and her income though small was continuous. Literally she slaved and saved. She made a record of the work performed and the compensation she was paid. Two of the books containing the record are exhibited in this case. One of these begins with January 7, 1925, and continues to December 30, 1930. This indicates a total in excess of $4,000. The other commences with January 3, 1931, and ends with two entries in 1950. The amount she earned and received as shown in the last book was $2,894.48. She retained the money she earned and the rental she received as her separate property and estate. Mr. Wells used the money he earned for living expenses including the maintenance of the home. He had a small balance left from the sale of his personal property used in farming when appellees moved to North Platte. He was a laborer while living in North Platte. He was a railroad section hand for several years, worked for about 4 years on the Union Pacific rip track, and was a janitor in the public schools for some period of time.

The deeds complained of by appellant were made after and as a result of the submission to an attorney of the history of the arrangement between and the financial transactions of appellees, the facts concerning the purchase of the property involved, the manner in which the money had been earned and saved by Mrs. Wells which was used to pay the purchase price of the property, and the fact that the money was her separate property. Riley D. Wells executed and delivered to Lillie D. Wells on December 2, 1949, a quitclaim deed in which is described lots 4 and 5 referred to above.

Appellees on December 5, 1949, executed to Walter T. Bassett a quitclaim deed to lot 4 described above. These are the two deeds challenged by appellant. There was no consideration for the deed to Walter T. Bassett or for the deed from him and his wife to appellees for the same property and made on the same day as the deed to Walter T. Bassett. He or his wife claims no interest in any part of the property affected by this litigation. Appellant claims that the proof is insufficient to establish that title to the real estate was vested in Lillie D. Wells in good faith and for an adequate consideration.

Section 36-401, R. R. S. 1943, contains the following: "Every conveyance * * * of any * * * interest in lands * * * made with the intent to hinder, delay or defraud creditors * * * shall be void." It has been considered and often expressed that a conveyance of real estate from a husband to his wife is presumptively fraudulent as to any existing creditor of the husband if it prejudices the creditor in the collection of his claim, and in litigation between the creditor and the parties to the conveyance testing the validity of the conveyance the burden is on the parties to it to establish the good faith of the transaction. Riggs v. Hroch, 133 Neb. 260, 274 N. W. 598; Bank of Brule v. Harper, 141 Neb. 616, 4 N. W. 2d 609; Van Steenberg v. Nelson, 147 Neb. 88, 22 N. W. 2d 414; Nowka v. Nowka, 157 Neb. 57, 58 N. W. 2d 600.

Appellant relies upon this doctrine in his challenge of the integrity of the judgment of the district court. Lillie D. Wells urges in opposition that she has established adequacy of consideration and good faith. She bought and paid for the property in question by the use of her separate property and estate on September 13, 1944. The evidence of this is not disputed. She was induced by incorrect information to accept deeds in which her husband was named as a grantee. Whatever he acquired thereby he held under the circumstances here shown as trustee for his wife. She paid $2,800 for the property in 1944. The maximum estimate of the value of the prop-

erty at the trial was $4,000. All things considered as reflected by the record permits it to be said and found that the value of the property does not exceed the amount she has devoted to it. The evidence shows good faith and adequate consideration. Lillie D. Wells was entitled to a conveyance from her husband. The making of it was not a legal wrong to appellant. Proof that a conveyance of real estate from a husband to his wife was made in good faith and for an adequate consideration is sufficient to sustain the conveyance against an attack on it by a creditor of the husband. In Slosburg v. Hunter, 136 Neb. 324, 285 N. W. 563, the court considered these facts: Delle Hunter, the wife of Chester E. Hunter, received on July 11, 1910, $2,000 from an insurance policy on the life of her father. She invested the money in stocks and bonds for about 3 years. The securities were then converted to cash and it was paid on a home, the title to which was taken in the name of her husband. The home was traded for a farm. The title to it was taken in the name of her husband. A deed made by the husband to his wife for an undivided one-half of the farm was attacked as fraudulent in a suit commenced by a creditor and subsequently prosecuted by the trustee in bankruptcy of the estate of the husband. The court in sustaining the conveyance from Chester E. Hunter to his wife, Delle Hunter, said: "The evidence of the only disinterested witness fixes the value of the Sarpy county land at $10,000 or $11,000. The property was encumbered by a first mortgage of $3,000. Under this statement of the record the trial court was justified in holding that there was ample consideration for the conveyance of an undivided one-half interest in the land to Delle Hunter. That she had $2,000 invested in the land is satisfactorily established. Any reasonable computation of interest on this amount for the time it was invested shows that the value of the property conveyed did not exceed the amount due from the grantor. The trial court was right in sustaining the

conveyance of an undivided one-half interest in the Sarpy county land to the defendant Delle Hunter." See, also, Big Horn Collieries Co. v. Roland, 116 Neb. 846, 219 N. W. 233; Butke v. Nachschoen, 133 Neb. 366, 275 N. W. 318; Cleghorn v. Obernalte, 53 Neb. 687, 74 N. W. 62; Hews v. Kenney, 43 Neb. 815, 62 N. W. 204; Taggart v. Fowler, 25 Neb. 152, 40 N. W. 954.

It is necessary to the success of a suit against a wife to set aside a conveyance of property made to her by her husband to allege and establish that the relation of debtor and creditor existed between the plaintiff and the husband at the time the conveyance was executed or that it was executed fraudulently with the expectation on the part of the husband that he would become indebted to the plaintiff at a future time and for the purpose of preventing, hindering, and delaying the collection of the debt when it should finally be contracted. A conveyance between close relatives is only presumed to be fraudulent as to a creditor of the grantor who owned an indebtedness of the grantor at the time of the conveyance. In Big Horn Collieries Co. v. Roland, *supra,* this court said: "A creditor whose debt did not exist at the date of a voluntary conveyance by the debtor cannot attack such conveyance for fraud, unless he pleads and proves that the same was made to defraud subsequent creditors whose debts were in contemplation at the time." There is no proof of the time when the claim or cause of action resulting in the judgment of appellant against Riley D. Wells arose or accrued. It cannot be presumed it was before the conveyances assailed in this case. The burden was on appellant in this regard. There is an absence of evidence that either of the deeds was made in contemplation of a future indebtedness of Riley D. Wells to appellant or his decedent. It was not evidence of fraud that Lillie D. Wells obtained a conveyance to complete the evidence of the title to property owned solely by her and to prevent any part of it being subjected to a debt of her husband.

There is no estoppel against Lillie D. Wells by virtue of the fact that she permitted the deeds and the record title of the real estate to recite that her husband was apparently the owner of an interest in the real estate. Appellees and Raymond L. Shields, deceased, were strangers. It is not shown that they had any contact or acquaintance or that there was any transaction between them or any of them that was in any way induced, influenced, or affected by the fact that Riley D. Wells was named in the deeds from the vendors of the real estate. In Cleghorn v. Obernalte, *supra,* it is said: "Where land is paid for with a wife's money, but deeded to the husband, he will hold the title in trust for her; and she is not estopped from claiming the land as against her husband's creditors unless her conduct in the premises induced them to believe that the husband was the actual owner of the land and to extend credit to him on the strength thereof." See, also, Hews v. Kenney, *supra;* Big Horn Collieries Co. v. Roland, *supra.*

The 1939 Chevrolet automobile was purchased and owned by Riley D. Wells until he transferred it to his wife in 1949. The value of it did not exceed $250. Appellees claim that Riley D. Wells was the head of a family; that he owned no property subject to a homestead exemption; and that the car was exempt property. § 25-1552, R. R. S. 1943. The real estate owned by Lillie D. Wells was selected as and it was a homestead. It was not only her homestead but also the homestead of her husband. He could not claim personal property as an exemption by virtue of the statute referred to above as long as he had a homestead exemption or estate in the real property of his wife. In Stout v. Rapp, 17 Neb. 462, 23 N. W. 364, it is said: "Where the title to the family residence is in the wife, it is nevertheless the homestead of the family, and is exempt from judgment or forced sale upon execution or other process, and in such case the head of the family is not entitled to the further exemption of $500 in personal property under the

provisions of section 521 of the civil code." See, also, Widemair v. Woolsey, 53 Neb. 468, 73 N. W. 947; Dennis v. Omaha National Bank, 19 Neb. 675, 28 N. W. 512. However appellant did not allege and prove that the transfer of the motor vehicle was made in contemplation of a future indebtedness of Riley D. Wells. Big Horn Collieries Co. v. Roland, *supra*.

A cross-petition was made by Lillie D. Wells in which she asked the court to quiet the title to the property involved in her free of the claims and alleged lien of appellant because of his judgment against Riley D. Wells. Lillie D. Wells is entitled to this relief and to have the costs of the litigation in the district court and in this court taxed to the appellant.

The judgment of the district court dismissing this case should be and it is reversed and the cause should be and it is remanded with directions to the district court for Lincoln County to render and enter a judgment quieting the title to all the property involved herein in Lillie D. Wells free and clear of all claims made by appellant in reference to said property and subject only to the homestead rights of Riley D. Wells in the real estate. The costs of the case in this court and the district court should be and they are ordered to be taxed to appellant.

REVERSED AND REMANDED WITH DIRECTIONS.

MAUDE HARDING, APPELLEE, V. ARTHUR HOFFMAN, APPELLANT.

62 N. W. 2d 333

Filed January 29, 1954. No. 33406.

1. **Automobiles: Trial.** An instruction reciting the provisions of statutes regulating and controlling the speed of motor vehicles should include therein all the material applicable statutory limitations and qualifications to enable a jury to observe and understand the duty of drivers at the time and place in question.
2. **Negligence: Pleading.** In the absence of an issue of negligence

by plaintiff or by a third person imputable to plaintiff, allegations in an answer denying that defendant was negligent and alleging that the accident and resulting damages were solely and proximately caused by the negligence of such third person is not an affirmative plea in avoidance of plaintiff's cause of action and imposes no burden of proof upon defendant with relation thereto, but rather is one entirely consistent with and provable under the general issue.

3. **Automobiles.** 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 motor vehicles the duty to assure the safety of the public by the exercise of a degree of care commensurate with such surrounding circumstances.
4. ———. Where the vision of the driver of a motor vehicle is obscured by any of the foregoing elements, it is his duty to stop until visibility is restored, or to reduce his speed and have his motor vehicle under such control that he can stop immediately if necessary.
5. **Negligence: Trial.** Where in an action to recover for personal injuries the jury is properly instructed upon the burden of proving the negligence charged as a proximate cause of the injury, then the issue of unavoidable accident is sufficiently submitted, and ordinarily it is not reversible error to either give or refuse an instruction on that issue.
6. **Trial.** It is the duty of the court to instruct the jury upon the issues presented by the pleadings and evidence whether requested to do so or not.

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

Luebs & Elson, for appellant.

William P. Mullen and *Harold A. Prince,* for appellee.

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

CHAPPELL, J.

Plaintiff, Maude Harding, brought this action seeking to recover damages for personal injuries in one cause of action and on an assigned claim for hospital and medical expenses in another, which damages were alleged to

have been proximately caused by negligence of defendant, whose car collided at an intersection of county roads with one driven by plaintiff's son in which plaintiff was riding. Defendant for answer admitted the collision but denied generally and alleged that the accident was proximately caused by plaintiff's contributory negligence and by negligence of plaintiff's driver imputable to her, and that such negligence was the sole and only proximate cause of the accident. Neither party moved for directed verdict at conclusion of all the evidence. There was no evidence supporting defendant's allegations of contributory negligence or imputable negligence, so the issues of defendant's negligence and the negligence of plaintiff's driver, together with proximate cause, were submitted to the jury, whereupon it found for defendant and judgment was accordingly rendered. Thereafter, the trial court, without giving any particular reason therefor, sustained plaintiff's motion to set aside the verdict and judgment and grant a new trial. Therefrom defendant appealed, assigning that such action was erroneous. We affirm the action of the trial court.

Concededly, the method of procedure followed by the parties before this court in the case at bar, and the rules controlling the right and authority of the trial court to award or deny a new trial, are found in Greenberg v. Fireman's Fund Ins. Co., 150 Neb. 695, 35 N. W. 2d 772, which we reaffirmed and followed as late as Pongruber v. Patrick, 157 Neb. 799, 61 N. W. 2d 578. Those cases need no further discussion.

In the brief of plaintiff it is contended that the award of a new trial should be affirmed because the trial court erred prejudicially: (1) In the giving of instructions Nos. 1, 4, 6, 7, 8, and 13; (2) in failing to instruct on certain issues presented by the pleadings and evidence; (3) in the admission of certain evidence; and (4) that the verdict for defendant was contrary to law and not sustained by sufficient evidence. We sustain such contentions in part.

The parties involved will be designated as plaintiff, plaintiff's driver or son, and defendant. The accident happened on July 20, 1950, about 7:30 a. m. at a point where a north and south graveled county road, protected by a stop sign located 26 feet from the east edge of the north and south road, and an east and west graveled county road intersect each other at right angles. The traveled portion of the north and south road was 26 feet wide, and that of the east and west road was 24 feet wide. Both roads were dry and almost level at the point of accident. A shelter belt about one-sixteenth mile in length, extending from the intersection north along the east side of the north and south road, generally obscured the view both to the east from that road and to the north from the east and west road. Concededly, it was a hazardous intersection. Plaintiff's driver approached the intersection with his Plymouth sedan from the north on the right side of the north and south road, and defendant approached the intersection with his Chevrolet sedan from the east, driving near or a little south of the center of the east and west road. The cars collided in about the west one-third of the intersection. Plaintiff was riding in the back seat of her son's car. His wife was riding in the front seat with him. One of defendant's sons was riding in his car with him. All of the parties involved lived nearby and were familiar with the hazards of the intersection. Numerous photographs appear in the record which respectively depict the topography at and adjacent to the intersection, the location of the cars after the accident, and their physical condition. Otherwise the evidence was generally conflicting upon material issues.

Plaintiff's theory, supported by her testimony and that of her driver and his wife, was substantially as follows: That they drove south on the right side of the north and south road between 35 and 50 miles an hour. It was a bright, sunny morning, with good visibility. When about 50 or 60 feet from the intersection, they looked west and

east, whereupon plaintiff, who looked through a breach between the trees and saw defendant approaching from the east said, "look out." They all at that time saw defendant approaching from the east a little south of the center about 20 feet, or a car and one-half length east of the stop sign, at a speed of about 30 miles an hour. Plaintiff's driver then took his foot off the gas and slowed up to about 30 miles an hour, expecting that defendant, who was looking right at them all the time, would stop. However, he did not do so, but rather continued at the same speed right on into and across the intersection. Upon seeing that defendant was not going to stop, plaintiff's driver put on his brakes quickly and swung to the right, skidding 51 feet on the gravel, whereupon the left front corner of his car and the right front corner of defendant's car collided and both cars swung around, slapping their rear portions together. Defendant's car then went on some distance southwest into a ditch and stopped, headed west against the west bank thereof, just south of the southwest corner of the intersection. The car of plaintiff's driver stopped, headed more west than south in the intersection just off the grass in the southwest corner. Defendant then got out of his car and said, "I thought you were going to stop," and "he thought he could get his car through." In that connection, defendant in his testimony denied making the first statement, but did say, "I thought I was past."

It should be noted that on cross-examination some of the testimony of plaintiff's driver, his wife, and plaintiff was impeached in material respects. In that regard, plaintiff's driver admitted that in a deposition taken before trial and referring to defendant's car, he testified: "I first saw his car when I was 20 feet from his car" and "When I first saw the Hoffman car, the front end of his car was about 3 feet east of the stop sign. At that time my car was about 20 feet from the intersection." On cross-examination of the wife of plaintiff's driver, she admitted that in a statment given on July 21, 1950, she

said that she first saw defendant's car when "we were about 15 to 20 feet north of the intersection" and that he "was going west on the east-west road at a speed of about 30 to 40 miles an hour." On cross-examination of plaintiff it was disclosed that in her deposition taken before trial she testified as follows: Q. " 'How far was your car from the intersection, the north edge of the intersection when you saw the other car?' " A. " 'Oh, I think, we were almost in the intersection.' " * * * Q. " 'Do you have an opinion how far your car was from the north edge of the intersection?' A. 'I don't know, we were almost in it.' " * * * Q. " 'When you first saw the other car, where was it?' A. 'I don't know, it was coming from the east. It was not up to the edge yet.' " * * * Q. " 'Where was each car when you first noticed the danger?' A. 'We were just entering the intersection and the other car was on the other side of the stop sign.' "

Defendant's theory, supported by his testimony and in part by testimony of a patrolman, a neighbor, and the impeaching evidence aforesaid, was substantially as follows: It had been cloudy earlier in the morning and both just before and at time of the accident it was foggy for a short time with visibility limited to about 200 feet. Defendant was driving west a little in from the north side of the traveled portion of the east and west road to avoid collision with cars making a turn to the left from the north. He stopped just short of the stop sign and looked north, but could see no cars from there. He then drove slowly to the east edge of the north and south road, and seeing no cars, went slowly on into the intersection. As he started on across he saw plaintiff's car coming out of the fog about 175 to 200 feet away, so watching it and thinking that he had plenty of time to get across, he stepped clear down on the throttle, speeding up to 12 or 15 miles an hour, and swung a little, but plaintiff's driver swung to the west, and at a point about two-thirds distant across the intersection the left corner of such driver's car collided

with defendant's car just in front of the right front door, throwing it toward the south. When defendant got out of his car he said, "I thought I was past," and plaintiff's driver said, which statement is undenied, "always take them broadside and nobody gets hurt."

After laying a proper foundation for the expression of an opinion with regard to the speed of plaintiff's car, defendant was asked what it was. Objection thereto "as no foundation" was properly overruled, whereupon defendant answered, "The length of time he come from that distance, he might have been going 60 or 75 miles an hour." Such answer remained in the record without objection or motion to strike, and on cross-examination of defendant, the following appears without objection: "Q. You fixed his speed between 60 and 70 miles an hour? A. Yes, sir. Q. When did you first decide after you saw him that he was going 60 to 70 miles an hour? A. After the accident. Q. Did you have any thought in your mind at the time you saw him in the first instance, he was going 60 or 70 miles an hour? A. No."

The patrolman, who testified as a witness for defendant, arrived at the scene of the accident about 8 a. m. before the cars were moved, and found marks in the intersection indicating approximately the point of collision. He measured the distance from that point to the respective cars to determine how far they moved after the accident, and concluded that plaintiff's car moved 20 feet and defendant's car moved 38 feet. He also testified that plaintiff's driver told him that he was driving about 50 miles an hour before the accident. At that time, he noticed no foggy condition and there was no conversation by the parties about it.

From the record as it comes to us we are unable to conclude as a matter of law that plaintiff's driver was traveling at a lawful rate of speed not to exceed 50 miles an hour or that the verdict was not supported by sufficient evidence, as plaintiff would have us do.

Therefore, the granting of a new trial is affirmed upon other grounds hereinafter discussed.

We first discuss instruction No. 8 because of its logical relation to instruction No. 1 hereinafter discussed, and conclude that both instructions were prejudicially erroneous. Instruction No. 8 undertook to recite the provisions of statute regulating and controlling the speed of motor vehicles involved at the time and place of the accident. To repeat its language would serve no purpose. It is sufficient for us to point out that the instruction did not include several material applicable statutory limitations and qualifications upon speed. In that connection, section 39-7,108, R. R. S. 1943, insofar as applicable here, provides: "(1) No person shall drive a vehicle on a highway at a speed greater than is reasonable and prudent under the conditions then existing. * * * (3) The following speeds shall be prima facie lawful, but in any case when such speed would be unsafe, they shall not be lawful: * * * (c) sixty miles per hour between the hours of sunrise and sunset * * * upon any highway outside of a city or village. (4) The fact that the speed of a vehicle is lower than the foregoing prima facie limits shall not relieve the driver from the duty to decrease speed when approaching and crossing an intersection, * * * or when special hazards exist with respect to * * * other traffic or by reason of weather or highway conditions, and speed shall be decreased as may be necessary to avoid colliding with any * * * vehicle or other conveyance on or entering the highway in compliance with legal requirements and the duty of all persons to use due care; * * *."

In Hamblen v. Steckley, 148 Neb. 283, 27 N. W. 2d 178, this court concluded that a similar instruction, given under circumstances comparable with those at bar, was prejudicially erroneous. Therein it was held: "An instruction reciting the provisions of statutes regulating and controlling the speed of motor vehicles should include therein all the material applicable statutory limi-

tations and qualifications to enable the jury to observe and understand the duty of drivers at the time and place in question." In the opinion we said: "In the absence of certain other applicable statutory limitations and qualifications omitted from and not recited in the instruction, it appears that the language used would naturally lead the jury to erroneously assume that at the time and place of the accident defendant driver had a lawful right to drive at a rate of speed which was in fact unlawful. * * * The material applicable limitations and qualifications upon speed contained therein should have all been included in the instruction to enable the jury to observe and understand the duty of the drivers in approaching the intersection of narrow country roads at a blind corner where special hazards existed with respect to other traffic by reason of highway conditions." Such language has application in the case at bar wherein there was competent evidence from which it could have been reasonably concluded that plaintiff's driver was driving at an unlawful rate of speed and that defendant was driving at an unlawful rate of speed, to wit, 30 miles an hour without decreasing same while approaching and crossing the intersection where a known special hazard existed with respect to other traffic or by reason of weather or highway conditions.

In that connection also, plaintiff, among other things, alleged in her petition that defendant was negligent in that he drove his car "at a high and dangerous rate of speed, and at a rate of speed greater than was reasonable and proper having regard for the traffic and conditions of the road, and at a rate of speed such as to endanger the life and limb of the plaintiff and the safety of others upon said county road." As heretofore observed, there was competent evidence in the record supporting that allegation. However, instruction No. 1 erroneously omitted any submission of such issue to the jury. It simply recited an allegation: "That defendant failed to slacken the speed of his automobile," with-

out subsequently reciting in any instruction the material applicable statutory limitations and qualifications imposed upon him with regard to speed at the place and under the conditions presented.

Instruction No. 1 also summarized defendant's answer by enumerating his allegations of negligence by plaintiff's driver which were allegedly the sole proximate cause of the accident. Among them was submitted the allegation that plaintiff's driver "failed to turn left to avoid the collision." In that regard, plaintiff's theory was that her driver, confronted by an emergency created by defendant's negligence, slowed down, put on his brakes, and turned right in an effort to avoid collision. There is some evidence from which it could have been reasonably concluded that if plaintiff's driver had turned left he might have avoided a collision, but the instruction as given erroneously inferred that his duty to do so was absolute. No instruction was given defining an emergency or explaining its proper application with regard to the duty of plaintiff's driver if confronted by an emergency. It appears that the jury was thus permitted to speculate that under the circumstances plaintiff's driver owed the duty to turn left and avoid the accident and to find that plaintiff had no cause of action, even if it found that all of plaintiff's evidence was true.

We turn then to a discussion of instruction No. 4. It will be noted that the issue of plaintiff's contributory negligence, both direct and imputed, had been eliminated from the case for want of any evidence to support them. In Umberger v. Sankey, 151 Neb. 488, 38 N. W. 2d 21, this court held, under comparable circumstances, that: "In the absence of an issue of negligence by plaintiff or by a third person imputable to plaintiff, allegations in an answer denying that defendant was negligent and alleging that the accident and resulting damages were solely and proximately caused by the negligence of such third person is not an affirmative plea in avoidance of plaintiff's cause of action and imposes no burden of

proof upon defendant with relation thereto, but rather is one entirely consistent with and provable under the general issue."

Instruction No. 11 given by the trial court in the case at bar clearly stated the applicable rules with regard to concurrent negligence and proximate cause with relation thereto, after which it was said: "but if you find that the defendant driver was not negligent or that the sole proximate cause of the plaintiff's injury was the negligence of the driver of the car in which she was riding, then your verdict would be for the defendant."

Instruction No. 4, as given by the trial court, imposed the burden of proof upon defendant to prove by a preponderance of evidence that plaintiff's driver was negligent in one or more of the particulars alleged by defendant, and that such negligence was "the proximate cause" of the collision, instead of saying "the sole proximate cause." As indicated in Shiers v. Cowgill, 157 Neb. 265, 59 N. W. 2d 407, operative conversely here, if there was any error in using the words "the proximate cause" instead of "the sole proximate cause" it was favorable to plaintiff by imposing an improper burden upon defendant. While the instruction was erroneously given it could not have been prejudicial to plaintiff. In that connection, instruction No. 6 was correct in every respect.

Instruction No. 7 given by the trial court attempted to concisely summarize the rules promulgated and reaffirmed in Borcherding v. Eklund, 156 Neb. 196, 55 N. W. 2d 643, but erroneously neglected to tell the jury in such instruction or any other instruction that defendant's duty was to stop at a point where he could see and to see approaching vehicles in plain sight on the favored highway, unless some reasonable excuse for not seeing is shown, or that if defendant saw the approaching car it was his duty not to test an obvious danger by moving from a place of safety into its path as indicated in Whitaker v. Koegh, 144 Neb. 790, 14 N. W. 2d 596, or that a

person traveling a favored highway protected by a stop sign of which he has knowledge may ordinarily assume that oncoming traffic will obey it as indicated in Dale v. Omaha & C. B. St. Ry. Co., 154 Neb. 434, 48 N. W. 2d 380. See, also, Simcho v. Omaha & C. B. St. Ry. Co., 150 Neb. 634, 35 N. W. 2d 501; Bergendahl v. Rabeler, 133 Neb. 699, 276 N. W. 673. Also, in that portion of instruction No. 7 purporting to absolve defendant from negligence, the instruction said: "he is not chargeable with negligence in attempting to cross, unless he does something, or fails to do something that an ordinarily prudent and cautious person would not *not* do under similar circumstances." It should have read: "unless he does something that an ordinarily prudent and cautious person *would not do* or fails to do something that an ordinarily prudent and cautious person *would do* under similar circumstances." Obviously, such portion as given was confusing in that it erroneously predicated negligence upon a double negative.

In that connection, also, this court said in Murray v. Pearson Appliance Store, 155 Neb. 860, 54 N. W. 2d 250, citing numerous authorities: " 'On principle it would appear that 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. * * *

" ' "* * * where the vision of the driver of an automobile is obscured whether by the lights of an approaching car, fog, smoke, or for any other reason, it is his duty to stop until visibility is restored, or to reduce his speed and have his car under such control that he can stop immediately if necessary. * * * " ' "

Also, in Borcherding v. Eklund, *supra,* this court reaffirmed that: "It is the duty of the court to instruct

the jury upon the issues presented by the pleadings and evidence whether requested to do so or not." Nevertheless, the trial court gave no instruction whatever upon that important and material issue presented by the pleadings and evidence. Failing to do so was prejudicially erroneous.

Instruction No. 13 told the jury in substance that the mere fact that an accident happened and plaintiff sustained damages therein would not alone be sufficient to justify an award of damages to her against defendant, or in finding that either of the drivers were guilty of negligence because accidents may happen without the negligence of any person, and thus be inevitable in their nature and not such as to be the basis of any recovery. Without citing any authority in point, plaintiff argued that the instruction was prejudicially erroneous because not raised by the pleadings or presented by the evidence. In Bonacci v. Cerra, 134 Neb. 476, 279 N. W. 173, this court concluded that where in an action to recover for personal injuries the jury is properly instructed upon the burden of proving the negligence charged as a proximate cause of the injury, then the issue of unavoidable accident is sufficiently submitted, and ordinarily it is not reversible error to either give or refuse an instruction on that issue. We therefore conclude that instruction No. 13 could as well have been omitted, but it was not prejudicially erroneous.

A meteorologist at the Grand Island Airport weather bureau, 15 miles from the point of accident, was permitted by the trial court, over appropriate objections by plaintiff, to testify at length "for what it is worth" with reference to weather and fog conditions at Grand Island, as shown by weather bureau records there at or about the time of the accident. Such evidence was adduced by defendant purportedly to support his contention that there was a fog which obscured the view of the drivers and to refute plaintiff's evidence that it was a bright, sunny morning at the time and place of the acci-

dent. Upon foundational inquiry by both counsel and the court, such witness frankly stated that he would be unable to state from the records that the weather conditions at the time and place of the accident would be the same as those at Grand Island, 15 miles away. In other words, he admitted that he could not tell from the records whether or not there was a fog at the time and place of the accident. In reply to a hypothetical question, including other physical elements, he said: "That is a hard question to answer. With reasonable certainty, I would say no. Because there is no—you are not certain. I would say there is a possibility of it. As far as being positive of it in my own mind, I have many, many doubts on that." We conclude that the evidence of such witness was incompetent, irrelevant, and immaterial, and as such was erroneously admitted.

For the reasons heretofore stated, we conclude that the judgment of the trial court setting aside the verdict and judgment and granting a new trial, should be and hereby is affirmed.

AFFIRMED.

GERALDINE SCHWARTING, APPELLEE, V. ERVIN SCHWARTING, APPELLANT.

62 N. W. 2d 315

Filed January 29, 1954. No. 33421.

1 **Divorce.** An action for divorce is required to be tried in this court de novo upon the record of the case made in the district court.

2. ———. Extreme cruelty may consist of personal injury or physical violence, or it may be acts or omissions of such a character as to destroy the peace of mind or impair the bodily or mental health of the one upon whom they are inflicted or towards whom they are directed, or be such as to destroy the objects of matrimony.

3. ———. Jurisdiction relative to divorce is given by statute, and

every power exercised by the court with reference thereto must look for its source in the statute or it does not exist.

4. ———. A decree of divorce may only be granted when the evidence brings the case within the definition of the statute providing for such relief.

5. ———. A decree of divorce may not be granted on the uncorroborated declarations, confessions, or admissions of the parties to the case.

6. ———. A general rule by which to measure the exact amount or degree of corroboration required in a divorce case cannot be formulated and each case must be determined upon its facts and circumstances.

APPEAL from the district court for Douglas County: HERBERT RHOADES, JUDGE. *Reversed and remanded with directions.*

Leonard A. Hammes, for appellant.

Hosford & Kanouff, for appellee.

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

BOSLAUGH, J.

Appellee alleged as a cause of action for absolute divorce from appellant that they were married on December 3, 1934; that they were residents of Douglas County, Nebraska; that they had no children; and that in recent years appellant had committed acts towards appellee that destroyed the purposes of matrimony and entitled her to a divorce on the ground of extreme cruelty as follows: Appellant argued with her without cause; embarrassed her before mutual friends; criticized her without cause; improperly associated with other women; stayed away from their home at night without appellee knowing where he was; drank regularly; and the parties were generally incompatible. Appellant admitted the marriage and that they had no children; denied the other charges made by appellee; and alleged that she in 1943 accepted employment and had since worked at the Music Box in Omaha, a public dance hall with bowling alleys;

that she became interested in her employment to the extent that she preferred to be at the dance hall and bowling alleys during business days and Sundays rather than to do household duties; that she lost all interest in her home and refused to discontinue her employment; and that on June 20, 1952, she left her home and separated from appellant and has since resided at the Princeton Apartments in the immediate vicinity of the Music Box.

The findings of the district court on the issue concerning divorce were general; that appellant had been guilty of acts against appellee which constituted extreme cruelty towards her; that the ends of matrimony had been destroyed; that the parties could no longer live together as husband and wife; and that appellee was entitled to a divorce. The judgment awarded her an absolute divorce. The motion of appellant for a new trial was denied.

The ground of divorce alleged and relied upon by appellee is extreme cruelty. An assignment urged by appellant is the insufficiency of the evidence to establish extreme cruelty of appellant towards appellee. The issue of fact presented by the appeal is required to be tried in this court de novo upon the evidence exhibited by the record, and to be thereby determined without reference to the conclusion reached by the district court or the fact that there may be some evidence to support it. § 25-1925, R. R. S. 1943; Mason v. Mason, 157 Neb. 279, 59 N. W. 2d 365.

The allegation that appellant argued with his wife without cause was not supported by proof. The specification that he improperly associated with other women was not established. The effort to compromise appellant by the testimony of two women wholly failed of its purpose. The fact was shown that they confessed to and were convicted of participating in a prearranged and fully executed nighttime highway robbery of appellant on a street in Omaha upon which he was traveling. He was not a transgressor but a victim of an assault and

a highway holdup by despicable characters, one of whom was an ex-convict and who undeniably fled Omaha immediately after the crime. Another had been an inmate of the Girls' Training School. The third participant was the willing recipient of a substantial part of the amount realized from the crime. The charge that appellant stayed away from home at night without appellee knowing where he was is not proven. She said that on many occasions when appellant represented he was going to attend American Legion meetings she would go to but did not enter the building where the meetings were held; that she knew that appellant did not attend the meetings because she did not see the automobile he used parked near the building; and that he would return home on these occasions about midnight or later or earlier. She further said she became suspicious of her husband in 1938 and she had since on occasions followed him. Sometimes she was accompanied by others. She did not claim that she learned anything on these trips of investigation uncomplimentary to appellant or helpful to her. The claim that appellant drank regularly was denied by the testimony of appellee that he did not drink intoxicating liquor regularly or improperly. She said that when they indulged it was to be sociable. The charge of general incompatibility is without significance. Incompatibility of the parties to a marriage which does not amount to extreme cruelty is legally unimportant in this state. It is a matter for premarriage consideration and to be endured if it exists after the marriage vows have been taken. It is included in the ceremonial phrase "for better or for worse."

The evidence of appellee is to the effect that the parties to this case were married December 3, 1934. Soon thereafter they went to Omaha and since 1939 have resided at 5005 Izard Street until appellee left the home of the parties in October of 1951 for a week or two and a second time in January 1952 for about a month and finally on June 20, 1952. The last time she did not

return though she has at all times had her personal belongings at the home. She has occupied a furnished apartment near the Music Box in Omaha where she has been employed since 1941. Appellee testified that the extreme cruelty of appellant she complained of commenced soon after the marriage and consisted of "Just aggravation and continual criticism"; continual complaint of what she cooked and the result of her cooking; the way she dressed, walked, and sat; that she was not a lady; and that she was treated like she was just a maid in the home. If she parked the automobile away from the home and did not lock it her husband would "eat me out all the way home because I was so negligent and irresponsible." He often said that she was a native of Kansas and because thereof she was "ignorant all the time." He applied to her such words as stupid, ignorant, and ugly. When they were shopping for clothing or merchandise of that general character appellant would aggravate and embarrass her by "Dickering about prices and telling me people knew me when they saw me coming; that I was ignorant so they put the price up." She objected that appellant frequently talked about security and saving for old age. She thought his talk about security was "just miserly." "If you wanted to buy something you couldn't buy it because when you got old you might need it. You couldn't live today." They had few meals away from their home and attended very few shows because appellant said they cost too much.

Appellee was first employed at the Music Box in 1941. She claimed she did this because of the request of appellant that she seek and continue work outside of the home. Her initial wage was $12 a week. Her compensation at the time of the trial was $52.50 a week, a yearly bonus of $500, and her expenses when attending bowling conventions and similar meetings. She was permitted to purchase certain merchandise at the wholesale price through her employer. A part of the time since she has been employed she worked on Sunday.

She claimed appellant had Monday off and because of that she did not work on Monday. Each of the parties indulged in bowling 3 nights and sometimes 4 nights a week. She has become and is engaged as a bowling league promoter and she has the highest rating as such. She organized bowling leagues of women. She works 6 days a week and has not lost time by sickness or otherwise except when she was afflicted with measles. The hours of her employment were 9 a. m. to 5 p. m. and she was required to be back at the place of business at 7 p. m. for the evening. She bowls in the daytime and at night, generally 3 nights each week, sometimes 4 nights each week. A part of the time she bowls Sunday afternoons and Sunday nights. She also does payroll work in the office.

The reason she left her husband and home in June of 1952 was "Just inhuman treatment continually." Whenever her husband spoke to her he criticized and nagged. She did not remember that he ever said a kind word to her. She did not leave him to have a good time. Her home was like a jail. Anything she did was wrong. She "was just a maid in a jail." It is not disputed that after appellee left appellant there was this conversation between her and her mother-in-law: " 'Oh, Geraldine, what has happened now? What has he done now?' And she said, 'Oh, nothing,' and I said, 'Why are you doing this?' 'Oh,' she says, 'So many are doing this.' "

This is sufficient to indicate the view appellee had of her marital relationship and the basis of her belief that she was entitled to a divorce. It is significant that no disinterested person unrelated to either of the parties was produced to testify to the existence or happening of any of the matters related by appellee as misconduct by appellant toward her. An older sister of appellee, whose address is Reserve, Kansas, could not tell how often she had seen the parties to this case or been in their home but she estimated it was about once a year;

that these were visits of short duration; and that she, her husband, and children would stop and eat dinner in the home of her sister infrequently but they did not stay overnight. She testified to the conclusion that on occasions in the presence of the witness, her husband, and children appellant criticized appellee for the meal they were having, notwithstanding the witness said the meal was properly prepared. When asked specifically what the language of appellant was she could only remember that he said "'Is this all you fixed?'" Another sister of appellee said that before she was married, about 13 years prior to the trial of this case, she stayed in the home of appellant and appellee for about a month and since that time she had been in their home and sometimes, but not often, had stayed for a meal; and that she had not heard appellant criticize appellee concerning the way she prepared and served food. She did express the conclusion, without stating any fact or purporting to relate any language of appellant, that he constantly "criticized and belittled her (appellee)." The parties to this case and Mr. and Mrs. Larson had been acquainted for about 7 years and had spent two vacation periods at the same place in Minnesota. Mrs. Larson said that the general attitude of appellant towards appellee was "more or less indifferent." The only attempt to corroborate the testimony of appellee was what her two sisters and Mrs. Larson said as above summarized.

It is true that physical violence is not the only form of extreme cruelty. Likewise the fact that a husband and wife cannot live together, as the trial court found in this case, and that general incompatibility exists, without more, is not extreme cruelty. Extreme cruelty consists of acts or omissions of such a character as to destroy the peace of mind or impair the bodily health of the injured party or be such as to destroy the ends and objects of matrimony. Peterson v. Peterson, 153 Neb. 727, 46 N. W. 2d 126. However the authority of the court relative to divorce is given by statute and the exercise of

power with reference thereto must find its source in the statute or it does not exist. The language in Brown v. Brown, 130 Neb. 487, 265 N. W. 556, is appropriate in the consideration of this case: "It is not for this court to attempt to do what is best for the parties. The relief which should be granted is that provided by the statute upon the establishment of misconduct on the part of the defendant amounting to extreme cruelty. A decree of divorce from the bonds of matrimony should only be granted when the evidence bring (brings) the case within the definition of the statute providing for such relief. While it is apparent that the results of this marriage have at times been most unhappy, that is no sufficient cause named in the statutes for granting a decree of divorce." See, also, Dier v. Dier, 141 Neb. 685, 4 N. W. 2d 731.

Corroboration of the testimony of appellee in support of her appeal to the court for relief was indispensable to her success in this case. The most indulgent view of the record is that there was very slight if any corroboration of the misconduct attributed to appellant by appellee. The testimony offered for this purpose is unsatisfactory, unsubstantial, and unconvincing. It is recognized that it is impossible to formulate a general rule by which to measure the exact amount or degree of corroboration required in a divorce case and hence each case must be determined upon its facts and circumstances. The corroboration relied upon must in itself be competent evidence of the acts and conduct asserted as a ground of divorce. The matters offered in this case as corroboration of the testimony of appellee do not satisfy this test. Peterson v. Peterson, *supra;* Hines v. Hines, 157 Neb. 20, 58 N. W. 2d 505. Reference is made by appellee to the practice in the review of an equity case in this court where the evidence is irreconcilably conflicting that this court will in considering the weight of the evidence give attention to the fact that the trial court saw and heard the witnesses and accepted one

version of the facts over the other. This does not eliminate the necessity for evidence corroborating the facts essential to granting a divorce. Hines v. Hines, *supra.*

The conclusion is that appellee has not sustained the burden imposed on her by the law; that the decree of divorce is not sustained by sufficient evidence; and that it is contrary to law.

The decree rendered in this case on March 18, 1953, should be and it is reversed and the cause is remanded with directions to the district court for Douglas County to dismiss the case and to tax the costs in that court, including the allowance made by it as compensation of the attorneys for appellee, to appellant. The costs of this appeal should be and they are ordered to be taxed to and paid by appellee.

REVERSED AND REMANDED WITH DIRECTIONS.

ANNA B. GRANT (REVIVED IN NAME OF W. I. GRANT, EXECUTOR OF THE ESTATE OF ANNA B. GRANT, DECEASED), APPELLEE, V. MYRON WILLIAMS, APPELLANT.

62 N. W. 2d 532

Filed February 5, 1954. No. 33389.

1. **Limitations of Actions.** Money loaned without an agreement as to time of repayment is in law due immediately, and the statute of limitations begins to run at once against the lender.
2. ———. Whenever it is in the power of a person to enforce his demand his cause of action has accrued.
3. ———. An action is not upon an agreement, contract, or promise in writing within the meaning of section 25-205, R. R. S. 1943, if the writing relied upon as the basis of the action contains no promise to do the thing for the nonperformance of which the action is brought or states no fact from which the law implies an obligation to do that thing.
4. **Trial: Appeal and Error.** The verdict of a jury in an action at law based on conflicting evidence will not be disturbed unless clearly wrong.
5. ———: ———. The findings of a court in an action at law have the effect of a verdict of a jury and will not be disturbed unless clearly wrong.

APPEAL from the district court for Chase County: VICTOR WESTERMARK, JUDGE. *Reversed and remanded with directions.*

George B. Hastings, for appellant.

Charles M. Bosley, for appellee.

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

BOSLAUGH, J.

The purpose of this litigation is the recovery of a judgment of $1,500 and interest by appellee against appellant. The judgment in the trial court was for appellee.

There was a dam constructed on the land of appellant under the supervision of the Chase County Production Marketing Administration in conformity with the program of soil conservation authorized by Congress. The location of the dam, the plan of construction, and the details of the work were controlled and supervised by the PMA, the successor of the AAA. The landowner selected a person to do the construction work but before the contractor could execute any part of it he had to be approved by the PMA. F. D. Hayes of Wauneta had done similar work in the county as a part of the soil conservation program. He was approved for that purpose. He solicited the opportunity to construct a dam on the land of appellant and arrangements were completed about January 1, 1946, for him to do so. Thereafter appellant was not consulted about and had no part in the building of the dam.

Appellant was given to understand and he believed that the cost of the work would be provided by the government of the United States, and that it would be paid to Hayes by the local PMA office. Appellant consented to the building of the dam on this basis. The government contributed 10 cents a cubic yard for the construction of this nature for soil conservation purposes and

the landowner paid any balance that was required to fully satisfy the cost of the construction. The estimated cost of the dam built on the land of appellant was $2,000 but the actual cost was less than was estimated but was more than $1,500. The amount allowed by the government was sufficient to satisfy the total cost of building the dam. Hayes told appellant during their negotiations, before any of the construction work was done, that he would turn in the figures on the work to the local AAA office which was then the PMA. When this was done the landowner could make application to the county office of the PMA and the matter of financing the construction work was then conducted through that office. The practice at the time the dam in question was constructed on the land of appellant was for the government not to pay the amount it allotted because of the improvement until "the next spring, a year later."

The building of the dam on the land of appellant was substantially completed about March 1, 1946. Thereafter and not later than March 18, 1946, the exact date not being shown by the record, a printed form, identified as ACP-69, furnished by the PMA office was completed by filling in the blanks appearing in it by typewriting. This was done in the local office of the PMA and the completed instrument is referred to in the record as exhibit No. 2 and will be herein referred to in the same manner or as the assignment. Hayes came to appellant and wanted him to sign the assignment so that Hayes could get his money for the work he had done on the dam. It is a fair inference that Hayes and appellant went to the PMA office and appellant there signed the assignment. The purpose of it was so that Hayes could get money to apply on the expense of building the dam before the lapse of the many months when the government would pay what it allotted to the cost of the project. Appellant understood that Hayes wanted to use the assignment to secure money and that appellee was

intending to furnish money to Hayes on the assignment but appellant did not know the amount thereof, except the statement of consideration in the assignment.

Appellee was not present when the assignment was completed or when it was signed by appellant. Appellant had no contact or communication with appellee or any one representing her concerning the assignment or any money she was intending to advance or loan or that she did advance or loan on it as security. The original assignment, after it was signed by appellant, was placed in the custody of Hayes. A duplicate of it was left in the PMA office and recorded in a book belonging to that office. Hayes took the assignment to appellee on March 18, 1946. She gave him her check for $1,500, took the assignment, and accepted and retained it as security for the money she furnished or loaned Hayes. The check was paid to Hayes and he got and retained the proceeds of it. Appellee had previously made "loans and advances" to Hayes in the same manner and on like assignments because of soil conservation work Hayes had done and because of the fact that the time had not elapsed when the contribution to be made by the government thereof would be paid. She was paid by Hayes on the former advances or loans interest at 8 percent per annum in advance. It does not appear whether or not any interest was paid her because of the $1,500 she furnished him on March 18, 1946.

The assignment contains the following: Appellant assigns for a consideration of $1,500 to Anna B. Grant, subject to the conditions stated to the extent of the consideration, all payments which may be or become due and payable to the assignor on account of his participation on his farm in the program for the current year under section 8 of the Soil Conservation and Domestic Allotment Act. The consideration expressed in the assignment was or is being advanced to the assignor in cash, supplies, or services to finance making a crop in the crop year now current. The assignment is made to

secure repayment of said sum. The Secretary of Agriculture is requested to cause said payments, or an amount equal to the consideration, to be paid to the assignee unless, prior to the time application is made to the United States for said payments, there has been filed in the office in which the assignment is filed proof that the indebtedness secured by this assignment has been repaid or otherwise discharged in which case the assignment shall be of no force and effect and any payments hereby conditionally assigned shall be made to the assignor.

Appellant was not present at the time appellee loaned Hayes $1,500 on March 18, 1946, and had no part in or knowledge of what was done at that time by appellee and Hayes. There is no proof that appellant received any part of the amount loaned to Hayes.

The claim of appellee against appellant is that he delivered the assignment to appellee; that she paid over at that time to Hayes $1,500 at the direction of appellant and accepted the assignment as security for the repayment of that amount to her; that appellant then stated to appellee the money was to be used by him for the construction of a dam on his property and to enable him to pay Hayes for his work on the dam as it was done; that appellee is the owner of the assignment and the indebtedness created by the loan made by her; that no part of the indebtedness owing to her because of the loan has been paid; and that she is entitled to a judgment against appellant for the amount of the loan with interest. This is denied by appellant. There is an absence of any proof that appellant delivered the assignment to appellee; that she furnished any money to Hayes at the direction of appellant; and that there was any communication between him and appellee in reference to the transaction between her and Hayes on March 18, 1946. The evidence in these respects is directly contrary to the allegations made by appellee.

A defense relied upon by appellant to the cause of ac-

tion alleged by appellee is the statute of limitations. The money was loaned by appellee on March 18, 1946. The record is silent as to repayment of the money loaned. If there is no agreement as to the time of repayment of money loaned, the amount thereof is in law due immediately, and the statute of limitations begins to run at once in favor of the borrower. Teasley v. Bradley, 110 Ga. 497, 35 S. E. 782, 78 Am. S. R. 113, states the rule in this language: "When money is loaned and there is no agreement as to the time of repayment, the amount loaned is in law due immediately, and the statute of limitations begins to run at once in favor of the borrower." Hodgson v. Keppel, 211 Iowa 795, 232 N. W. 725, says on this subject: "From the record, then, there being a debt due, and no time fixed for its payment, under the authorities it became due on demand, and even in the absence of a demand, the statute began to run forthwith." See, also, Jelsch v. Laurich (La. App.), 187 So. 819; Loraine Transfer Co. v. Daniel (La. App.), 11 So. 2d 244; Sturdivant v. McCorley, 83 Ark. 278, 103 S. W. 732, 11 L. R. A. N. S. 825; Uvalde Nat. Bank v. Brooks (Tex. Civ. App.), 162 S. W. 957; Howard v. Presbyterian Church, 51 Mich. 125, 16 N. W. 307; Ray v. Ray, 24 Misc. 155, 53 N. Y. S. 300; 54 C. J. S., Limitations of Actions, § 129, p. 45. It has been determined by this court that an action to enforce an indebtedness payable on demand may be commenced on the day after it was contracted. In Luikart v. Hoganson, 135 Neb. 280, 281 N. W. 27, the note on which the suit was brought was payable "on demand after date." It is said therein: "Payee in a note payable on demand after date with interest may bring an action thereon the day after the note is executed and delivered." In the opinion it is said: "It is argued that the statute of limitations did not begin to run from the date of the original note but only from the date of actual demand, since payment was to be made 'on demand after date' * * *. This position does not seem to be tenable. No

one but payee or its successor in interest could make the demand. * * * By failing to make a demand, payee in a note payable on demand cannot do away with the statute of limitations." See, also, Melville Lumber Co. v. Scott, 135 Neb. 379, 281 N. W. 803; Citizens Bank v. Taylor, 201 Iowa 499, 207 N. W. 570.

Whenever it is in the power of a person to enforce his demand his cause of action has accrued. The statute of limitations begins to run when a cause of action accrues. Luikart v. Hoganson, *supra;* Melville Lumber Co. v. Scott, *supra.*

Any cause of action alleged by appellee accrued on March 18, 1946. This case was commenced on October 20, 1950, more than 4 years after March 18, 1946. If this is an action upon an "agreement, contract or promise in writing," as appellee contends, it is not barred by the statute of limitations. § 25-205, R. R. S. 1943. If it is an action "upon a contract, not in writing, expressed or implied," as appellant contends, the statute of limitations defeats it. § 25-206, R. R. S. 1943.

This action to be upon an agreement, contract, or promise in writing must be for the recovery of money or an indebtedness promised to be paid by the assignment, the only writing relied upon by appellee in the pleading of her alleged cause of action and in the evidence produced to sustain it. If the promise, indispensable to the cause of action alleged, arises upon the proof of extrinsic facts the writing is not within the purview of the statute permitting an action to be commenced thereon within 5 years from the time when it accrued. A cause of action is not upon an instrument in writing within the meaning of the code because it is in some way remotely or indirectly connected with the instrument or because the instrument might be a link in the chain of evidence establishing the cause of action. In order for an action to be upon an instrument in writing it must in itself contain a contract or promise to do the thing for the nonperformance of which the

action is brought. A contract is unwritten if it cannot be wholly proved by a writing or writings. If there is anything that must be supplied by parol evidence to make it a binding obligation an action upon it is not one on a written instrument. In Naeve v. Shea, 128 Neb. 374, 258 N. W. 666, it is said: "An agreement partly written and partly oral may, in legal effect, be regarded in its entirety as a parol contract."

In Bracklein v. Realty Ins. Co., 95 Utah 490, 80 P. 2d 471, it is said: An "* * * action is 'founded upon an instrument in writing' if liability grows out of written instruments, not remotely or ultimately, but immediately; if it arises or is assumed or imposed from the instrument itself, or its recitals; if the instrument acknowledges or states a fact from which law implies obligation to pay or contains the contract or promise to pay or to do the thing for which action is brought. * * * A cause of action is not 'founded on a written instrument' within statute of limitations merely because indirectly connected with the instrument, or because writing may be a link in the chain of evidence establishing liability or there is a parol acceptance of a written offer."

Mills v. McGaffee (Ky. App.), 254 S. W. 2d 716, states the rule in this manner: "* * * if the contract be partly oral and partly in writing or if a written agreement is so indefinite as to necessitate a resort to parol testimony to make it complete, the * * * statute of limitations concerning 'contracts not in writing' would be applicable just as though the contract had rested entirely in parol." See, also, O'Brien v. King, 174 Cal. 769, 164 P. 631; McDonald v. Thompson, 184 U. S. 71, 22 S. Ct. 297, 46 L. Ed. 437; Martin v. Potashnick, 358 Mo. 833, 217 S. W. 2d 379; Sunset Pacific Oil Co. v. Railroad Co., 110 Cal. App. 773, 290 P. 434; Cowart v. Russell, 135 Tex. 562, 144 S. W. 2d 249; Schmulbach v. Williams, 95 W. Va. 281, 120 S. E. 600; Federal Land Bank v. Collins, 156 Miss. 893, 127 So. 570, 69 A. L. R. 1068; Simmons v. Birge Co., Inc., 52 F. Supp. 629; Annotations,

129 A. L. R. 603, 3 A. L. R. 2d 809. The assignment does not contain a promise of appellant to pay appellee $1,500 or any amount. It states no fact from which the law implies an obligation of appellant to pay any amount to appellee. The cause of action alleged by appellee is barred by the 4-year statute of limitations. § 25-206, R. R. S. 1943.

Appellee does not attempt to make the instrument dated May 14, 1946, shown by the record, any part of or material to her alleged cause of action. This appears from examination of the amended petition and the statements in the brief of appellee that this action is to recover the sum of $1,500 "founded upon an assignment, in writing, executed and delivered by the defendant (appellant) to the plaintiff (appellee)" and that the loan of money by appellee, the assignment securing its repayment, and the default in payment of the indebtedness to her "is a cause of action on the assignment by assignee against assignor for recovery of the money, founded upon an instrument in writing which is not barred by the statute of limitations until five years from the date thereof." Because of this and the effect of what has been said herein it is neither necessary nor proper to consider or determine the significance of the instrument of May 14, 1946, or of the things said or done concerning it. These are immaterial to this litigation.

The manner of considering an action at law brought to this court by an appeal has often been stated substantially as contended by appellee. It is not the province of this court in reviewing the record in an action at law to resolve conflicts or to weigh evidence. If there is a conflict in the evidence produced in the action this court in reviewing the judgment rendered will presume that controverted facts were decided by the jury in favor of the successful party and the finding of the jury on conflicting evidence will not be disturbed unless clearly wrong. Bolio v. Scholting, 152 Neb. 588, 41 N. W. 2d 913; James v. Hogan, 154 Neb. 306, 47 N.

W. 2d 847. A like presumption will be accorded the findings if an action has been tried, as this case was, by the court without a jury. Sorter v. Citizens Fund Mutual Fire Ins. Co., 151 Neb. 686, 39 N. W. 2d 276; Garbark v. Newman, 155 Neb. 188, 51 N. W. 2d 315. In this case the evidence is not conflicting in respect to any matter material to the issue presented. The finding that appellant is indebted to appellee because of the allegations of appellee is contrary to the evidence and is clearly wrong. The judgment is contrary to law.

The judgment should be and it is reversed and the cause is remanded with directions to the district court for Chase County to dismiss the action.

REVERSED AND REMANDED WITH DIRECTIONS.

MESSMORE, J., participating on briefs.

IN RE APPLICATION OF EILEEN E. LAKEY FOR A WRIT OF HABEAS CORPUS. EILEEN E. LAKEY, APPELLANT, V. MABEL ALICE GUDGEL ET AL., APPELLEES.

62 N. W. 2d 525

Filed February 5, 1954. No. 33422.

1. **Divorce.** A divorce decree is not conclusive in a subsequent habeas corpus proceeding where the parties to the two proceedings are not the same.
2. **Divorce: Parent and Child.** The courts may not properly deprive a parent of the custody of a minor child unless it is shown that such parent is unfit to perform the duties imposed by the relation or has forfeited that right.
3. **Habeas Corpus: Infants.** Where the custody of a minor child is involved in a habeas corpus action, the custody of the child is to be determined by the best interests of the child, with due regard for the superior rights of a fit, proper, and suitable parent.
4. **Trial: Appeal and Error.** Where the evidence on material questions of fact in a case such as the instant case is in irreconcilable conflict, this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying, and must have

accepted one version of the facts rather than the opposite.

5. **Case Partially Overruled.** Any language appearing in the case of Kaufmann v. Kaufmann, 140 Neb. 299, 299 N. W. 617, in conflict with the rules announced governing habeas corpus actions for the custody of minor children as set forth in this opinion is hereby overruled.

APPEAL from the district court for Brown County: DAYTON R. MOUNTS, JUDGE. *Affirmed.*

R. L. Haines, for appellant.

Dryden, Jensen & Dier and *Arthur A. Weber,* for appellees.

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

MESSMORE, J.

This is a habeas corpus action brought by Eileen E. Lakey, sometimes known as Ellen E. Lakey, as plaintiff or relator in the district court for Brown County to obtain the custody of a minor son, Charles William Switzer, Jr., from Mabel Alice Gudgel and Amos Gudgel, wife and husband, defendants or respondents.

The relator's petition is to the effect that the respondents have the custody of the minor child in question and unlawfully and forcibly detain him in their home under the pretext that they have furnished board and lodging and necessaries of life for him in the past.

The respondents, by separate answers, allege the relator abandoned the child to the care and control of the respondent Mabel Alice Gudgel who has cared for and provided for the child; that the child has remained in the household of these respondents and has been treated as one of the family; and that it would be detrimental to the child's welfare and health to be removed. The prayers of these answers are to leave the custody of the child with these respondents.

The trial court heard the case on its merits and thereafter rendered a decree finding generally in favor of the

respondents and against the relator, awarded the custody of the child to the respondents until further order of the court, dismissed the petition for a writ of habeas corpus on the part of the relator, and taxed the costs to the relator. The relator filed a motion for a new trial which was overruled, and relator appeals.

At the outset it may be said that a prior divorce decree determining custody of a minor child, although binding as between the parents, is not a bar to a subsequent habeas corpus proceeding to determine custody, since the decree did not consider the position of the state as parens patriae and the welfare of the child. See Wear v. Wear, 130 Kan. 205, 285 P. 606, 72 A. L. R. 425. And, a divorce decree is not conclusive in a subsequent habeas corpus proceeding where the parties to the two proceedings are not the same. See, Barnes v. Morash, 156 Neb. 721, 57 N. W. 2d 783; 39 C. J. S., Habeas Corpus, § 46, p. 584.

It will be observed that in the instant case the parties are not the same as in the divorce proceedings. In this case the mother of the child is seeking its custody against these respondents, as reflected by the pleadings heretofore set out. The former husband of the relator is not a party to this action and seeks no relief.

The legal principles on which the determination of this case must depend have been well stated in the opinions of this court. In Norval v. Zinsmaster, 57 Neb. 158, 77 N. W. 373, 73 Am. S. R. 500, it was said: "The statute and the demands of nature commit the custody of young children to their parents rather than to strangers, and the court may not deprive the parent of such custody unless it be shown that such parent is unfit to perform the duties imposed by the relation or has forfeited the right." See, also, In re Application of Schwartzkopf, 149 Neb. 460, 31 N. W. 2d 294.

In the supplemental opinion in Gorsuch v. Gorsuch, 143 Neb. 578, 11 N. W. 2d 456, which was an action to modify a portion of a decree relating to the custody of a child, it was said: "The proper rule * * *, 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. Where both parents are affirmatively found to be unfit, the custody of the child will be determined solely by the welfare and best interests of the child. * * * But this court has never deprived a parent of the custody of a child merely because, on financial or other grounds, a stranger might better provide." See, also, Barnes v. Morash, *supra.*

Custody of a child of tender years should be awarded to 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. See, In re Application of Reed, 152 Neb. 819, 43 N. W. 2d 161; Bath v. Bath, 150 Neb. 591, 35 N. W. 2d 509; Hodges v. Hodges, 154 Neb. 178, 47 N. W. 2d 361; Barnes v. Morash, *supra.*

We believe the afore-cited authorities disclose the manner in which the writ of habeas corpus involving the custody of a minor child is to be considered in this jurisdiction.

It appears that the case of Kaufmann v. Kaufmann, 140 Neb. 299, 299 N. W. 617, contains language that is in conflict with the rules as announced in the foregoing-cited authorities. Any such language appearing in Kaufmann v. Kaufmann, *supra,* contrary and in conflict with the rules hereinbefore announced governing cases of this nature is overruled.

The relator will hereafter be referred to as the appellant and the respondents as the appellees, and we will refer to Mrs. Eckhout as Mrs. Gudgel as she appears herein.

At the time of trial the appellant was 30 years of age. She was married when she was 17 years of age to Charles William Switzer who was then 19 years of age, and while she was attending high school and he was a member of the Civilian Conservation Corps camp at

Broken Bow. This marriage was unsuccessful, and the parties moved from place to place where the husband obtained employment. There were charges and countercharges on the part of each of the parties as against each other which did not add to nor lend to a stabilized home but produced difficulties and tribulations that were not beneficial to the minor children of the parties. Four children were born to this union, Robert Lee on October 26, 1941, Rose Ella on August 1, 1942, Everett Owen on April 12, 1943, and a child, the subject of this action, on February 7, 1947. At the time of trial all of the children except the subject of this action were in the custody of the father, this marriage having resulted in a divorce and the father, having married again, was living in the State of Missouri.

It appears from the record that in 1944, the appellant's husband was inducted into the military service. She was to reside in Miller, Nebraska, in a rented house. She got along very well for a period of a year when a young lady who was having difficulty with her mother moved in with the appellant without objection on the part of the mother. This created adverse talk in the village with reference to the appellant. In September or October 1945, the appellant's husband returned from military service and took up residence with her. Difficulties arose between the parties. The appellant developed a lung hemorrhage and went to the Nebraska Hospital for the Tuberculous at Kearney. She returned home in April 1946. Difficulties again arose between the parties and she was requested by her husband to leave. The child who is the subject of this action was born after the separation and was named after his father in an attempt to effect a reconciliation which failed.

Other details of the lives of these parties need not be discussed. More particularly, we think the following evidence is of importance. In September 1947, the appellant met Mrs. Eckhout who is now Mabel Alice Gudgel, appellee, who married Amos Gudgel on October 7, 1949.

Mrs. Eckhout at that time was running a nursery in Kearney. By arrangements with the appellant, Mrs. Eckhout came to see the appellant, and it was finally determined that Mrs. Eckhout would take charge of the child, the subject of this action, for a dollar a day. The record further discloses that the appellant was in various places such as Tucson and Phoenix, Arizona, and many other places which need not be mentioned, and had made arrangements at one time to marry a man and establish a home. This plan failed. During this period of time Mrs. Eckhout had full charge and care of the child. On occasions the appellant paid Mrs. Eckhout in part for the care of the child, but in fact showed a desire not to retain the custody of her own child but was willing to let Mrs. Eckhout retain such custody, which she did.

The appellant met her present husband in a night club in Carlsbad, New Mexico, in the latter part of February 1948. They were married at Artesia, New Mexico, on March 11, 1948. In May 1948, the appellant went to Kearney by bus. She and Mrs. Eckhout discussed the possibility of taking the child home with her. Mrs. Eckhout refused to let the child go with the appellant. The appellant at that time owed Mrs. Eckhout $300 for the care of the child, and Mrs. Eckhout did not trust her to pay this amount. The appellant did not contact any police officer or her attorney in Kearney. She apparently relied upon the advice of an attorney in Carlsbad who told her that she would have to acquire residence in Nebraska in order to bring an action to obtain the custody of her child. She contacted the Federal Bureau of Investigation and was informed that this was not in their line of work. In October 1952, she wrote to a welfare agency at Kearney and received advice that an action for a writ of habeas corpus would be the proper remedy.

The reason she gave for not being able to pay Mrs. Eckhout was that her husband, prior to her marriage to him, had his money invested in an oil-drilling project

and was unable to obtain money with which to pay Mrs. Eckhout. After she returned to Carlsbad, she sent Mrs. Eckhout $12.50 for the care of the child.

She told of her place of residence in Carlsbad and described the furnishings therein. She further testified that she had a little boy 3½ years old; that when she first went to Carlsbad she worked as a practical nurse; that after her child was 3 years old she worked again in the same occupation; and that in the last year she had earned $600. Her husband was employed in a potash mine and received $325 to $375 a month. She and her husband had talked about the matter of obtaining the child in question. She stated that he was her child and she wanted him. She also testified that she had joined the church of the Assembly of God, and had contributed $150 to that church in the past year.

The appellant's husband testified as to the circumstances under which he met the appellant; that he was 47 years of age; that he had been married in 1939 and obtained a divorce in 1946; and that he earned from $325 to $375 a month. He further testified that he remembered his wife being in Kearney in May 1948; that he was working the day shift and returned home about 4:30 or 5 p. m.; that on a Saturday night there was a telegram sent by his wife requesting $300; and that everything was closed and he was unable to do anything about this matter at that time or on the following day which was Sunday. His wife returned to Carlsbad either on that Sunday night or the next Monday morning. Shortly thereafter his father had a paralytic stroke and he was required to borrow money to get his father to Hot Springs. In addition, his money had been tied up in an oil-drilling venture which he thought was good but which turned out bad, and he lost $4,000 in the venture. His wife had some interest in this venture also. He further testified that he purchased a farm of 380 acres in Arkansas for $5,500, upon which he owes $2,800. His residence in Carlsbad is valued at $8,500, and there is

$4,569 against it. He carries $14,000 life insurance. His home was purchased in 1949. He further testified that he would be pleased to adopt the child in question and that he had been a resident of Carlsbad for 12 years, including 2 years in military service in the engineer corps. He further testified that he and appellant offered to pay Mrs. Gudgel the $300 after this action was commenced.

The appellant introduced depositions by persons residing in Carlsbad to the effect that while the appellant worked in the hospital there as a practical nurse connected with general floor duty, her work was satisfactory, her moral reputation was good, and that she was clean and even tempered. There is also testimony of a minister of the church that she attended that the appellant was a member of his church, bore a good reputation, and attended church regularly. Another witness who worked with the appellant's husband and had known him for a considerable length of time testified to the good reputation of the appellant and her husband and the manner in which they clothed and took care of their little boy. Other witnesses, for the most part merchants with whom the appellant and her husband traded, testified to the appellant's good moral character, that the son of the parties was well provided for and well clothed, and that the appellant's husband bore a good reputation in the community.

The appellee, Mabel Alice Gudgel, who was formerly Mrs. Eckhout and will hereinafter be referred to as Mrs. Gudgel, testified that she was 46 years of age; that her former husband died on December 15, 1947; and that she then resided in Kearney and conducted a nursery in a home which was owned by her husband. She had adopted two children. She became acquainted with the appellant when the appellant called her, the object being to make arrangements to care for the minor child here involved. Arrangements were made for the care of this child, the appellant to pay $12.50 a week for such

service. This arrangement occurred on July 7, 1947. In October 1947, the appellant asked Mrs. Gudgel to get the baby ready to go with her. The appellant brought the baby back almost immediately and told Mrs. Gudgel that she could not care for him. She used a bad name for the child and said she could not do anything for him. She asked Mrs. Gudgel to take him back, to which Mrs. Gudgel replied that she would, under the same circumstances and arrangements. The appellant then "went west" and it was quite awhile before Mrs. Gudgel saw her again. She did not write nor send any money for the child's keep.

When Mrs. Gudgel first got the care of the baby it had no clothing, and Mrs. Gudgel purchased and provided clothing that would be adequate. She was not paid for this.

When the appellant returned from her western trip she was going to leave again. This was shortly before December 15, 1947. Appellant then returned on January 20, 1948. She did not write during this time nor send any money to Mrs. Gudgel. The appellant told Mrs. Gudgel that she was going to Wisconsin, and took the baby with her. She partially paid for the care of the child at that time. This was January 20, 1948. She returned the child January 27, 1948. The child recognized Mrs. Gudgel and called her "Mama." The child was sick with fever, had some difficulty with his legs, and was unable to walk for 2 or 3 months.

Upon her return from Wisconsin, the appellant told Mrs. Gudgel that she did not have any more use for the child, could not take care of him, and that he was Mrs. Gudgel's to keep. Mrs. Gudgel told her that would be all right, but she would like to have her money or some arrangement made for the keep of the child. To this the appellant said she would pay her when she got a job.

Mrs. Gudgel did not see the appellant again until May 1948, when the appellant came to Kearney and told Mrs. Gudgel she was married. At that time Mrs. Gudgel

was employed at the hospital during the nighttime and had a lady staying in the home during this time because Mrs. Gudgel wanted to be with the children during the daytime. She was required to work and support herself. When Mrs. Gudgel came home the appellant was there, and she told Mrs. Gudgel that she had someone who would give her $500 to adopt the child. Mrs. Gudgel told her she should not do that, that it was not right, and if she did not want the baby she, Mrs. Gudgel, would certainly keep him. She had had the care of him this long and had learned to love him as her own child. The appellant laughed a little and wanted to know how much she owed Mrs. Gudgel. It amounted to a little over $300. Mrs. Gudgel then testified that the appellant called her husband at Carlsbad, or sent a telegram, she did not know which. Anyway, at the conclusion of the conversation the appellant slammed up the receiver and using profanity told Mrs. Gudgel she did not have any money and that Mrs. Gudgel could have the child, and she went out of the house mad. Mrs. Gudgel never saw her again until after this action was brought.

Mrs. Gudgel kept her home together, with her two daughters and this little boy. After she married Amos Gudgel they moved to Ainsworth, taking her two daughters, Sharon and Sharrill, and this little boy referred to as Jackie, with them. Later she and her husband moved to Johnstown where he owns a modern home consisting of 10 rooms which she described, and testified that the children each have separate rooms and there are a spare bedroom and other accommodations in the house. As to the schools, the school at Johnstown goes to the eighth grade. After completion of the eighth grade, the children who go to high school are transported in a bus to Ainsworth, 10 miles distant.

The appellee, Amos Gudgel, testified that he was 62 years of age; that he had five boys and two girls of his own; and that he had known his present wife 5 or 6 years previous to their marriage. He further testified

that the child in question recognized him as his father and Mrs. Gudgel as his mother; that no members of the family have any objection to the arrangement as made; that Jackie was treated as one of the family; that he is willing to adopt the child and make him one of his own as far as heirs are concerned; and that there is no objection to his adopting Jackie and giving him the same rights as the other children. He further testified that in his opinion if Jackie was removed from the appellees' custody it would have an ill effect upon his health and would be bad for him. He further testified that he was active in business matters and generally supervised a 1,458-acre ranch southeast of Johnstown. One of his sons manages the ranch which is fully stocked with cattle.

Jackie's grades, as testified to by his teacher, were satisfactory and above average. The minister of the Methodist church testified as to his visits to the appellees' home in the past 2 years, that the home was kept in an immaculate condition, the environment was excellent, and that Jackie was a well-behaved child and very happy.

In addition to the foregoing testimony, several neighbors testified, as did members of the Gudgel family. Suffice it is to say that all of the witnesses called in behalf of the appellees testified that Mrs. Gudgel was an immaculate housekeeper, bore a good reputation in the community, was a 4-H leader, and possessed a great deal of thoughtfulness for children; that most of the children in the town visit her home quite often; that Amos Gudgel was a good business man and bore a good reputation in the community; and that Jackie was happy and was treated and considered as a member of the Gudgel family.

The first husband of the appellant, by deposition, testified to the effect that the appellant did not take proper care of the minor children of the parties; that she neglected them and failed to properly feed them;

that she ran up bills which he had to pay upon his return from the army, none of which were for the proper kind of food the children should have; that the children were dirty and not cleaned up; and that on one occasion the appellant returned home with the children at 3 o'clock in the morning in an intoxicated condition. There are other matters detailed by this witness which need not be discussed.

It might be stated at this point that any allotment made by the appellant's first husband while he was in the military service for the benefit of this minor child, while the child was under the care of Mrs. Gudgel when she was Mrs. Eckhout, was satisfactory with him. In addition, no fault was found on the part of the appellant with the manner in which Mrs. Gudgel had cared for this child.

All of the matters testified to in the deposition of the first husband as to the manner in which the appellant provided for and cared for the minor children were corroborated by other witnesses. In addition, witnesses testified that the appellant's reputation in the community was bad; that she had on occasions left town and placed the children in the care and custody of the mother of the young lady who lived with the appellant; and that she had been with other men on occasions. For the most part, the appellant denied this testimony, stating that her trip out of town on one occasion was to visit relatives, and that the man who took her out of town on one occasion had worked for her father, had some difficulty, and as a consequence was sent to the penitentiary.

The appellees argue, and we agree, that the child is now, and ever since coming to their home has been, cared for, reared, and trained in a most exemplary and devoted manner, and the child will be safe, healthy, moral, and happy if his raising and education remain their responsibility.

It is also apparent from the evidence that the child

in question had adequate and proper dental and medical care. The appellant has paid very little, if any, attention to the child, has paid for no clothing or doctor bills, and has, according to the evidence, avoided all responsibility of parenthood except that she paid Mrs. Gudgel part of the keep of the child, but paid no part when she was financially able to do so. The appellant has, in fact, as shown by the evidence, abandoned this child and forfeited any right she might have to his custody. The trial court so determined. We are loath to disturb the happy relations that exist at the present time from the facts as we understand them from the record.

"Where the evidence on material questions of fact in a case such as the instant case 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." Barnes v. Morash, *supra.*

From an analysis of the evidence and the authorities herein cited, we conclude that the judgment of the trial court should be affirmed.

AFFIRMED.

ANTON E. BENES, DOING BUSINESS AS WAHOO IMPLEMENT CO., APPELLEE, V. HAROLD A. REED ET AL., APPELLANTS.
62 N. W. 2d 320

Filed February 5, 1954. No. 33439.

1. **Frauds, Statute of: Pleading.** A pleading affirmatively showing reliance by the vendor on an oral contract for the sale of goods exceeding $500 in value is demurrable where it does not state facts taking the contract out of section 69-404, R. R. S. 1943.
2. **Frauds, Statute of.** A delivery alone by the vendor is not sufficient to take an oral contract out of the statute of frauds. There must also be a receipt and acceptance by the vendee of the goods sold to have that effect.

3. **Frauds, Statute of: Pleading.** Under a general denial of the allegations in a petition upon an oral agreement for the sale and delivery of personal property the defendant may avail himself of the defense that the agreement is not enforceable under the statute of frauds.
4. ———: ———. An allegation that goods were sold and delivered to the vendee is an insufficient pleading of receipt and acceptance of the goods by the vendee.
5. **Frauds, Statute of: Evidence.** Evidence of an oral agreement within the statute of frauds is not admissible where proper objections are made if there are no allegations of fact taking it out of such statute.
6. **Frauds, Statute of: Pleading.** If receipt and acceptance is to be relied upon to take an oral agreement out of section 69-404, R. R. S. 1943, it must be pleaded in the petition; otherwise the petition is demurrable and evidence of the oral agreement subject to objection.

APPEAL from the district court for Lancaster County: JOHN L. POLK, JUDGE. *Reversed and dismissed.*

Richard O. Johnson, for appellants.

R. A. Vestecka and *Emory P. Burnett,* for appellee.

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

CARTER, J.

Plaintiff brought this action to recover the reasonable value of a cornpicker alleged to have been sold to the defendants. The jury found for the plaintiff in the amount of $1,239.50. Defendants appeal from the judgment entered thereon.

In 1948 the plaintiff was engaged in the sale of farm implements under the name of the Wahoo Implement Co. at Wahoo, Nebraska. The defendants are brothers, who were engaged in farming. Each farmed his own land and owned his own stock and machinery. They were living at the home of their father and, other than helping each other from time to time, they operated separately and independently of each other.

The evidence shows that the defendant Donald Reed

owned an old cornpicker which was causing trouble because of breakdowns. He was able to secure replacement parts from the plaintiff and made several trips to plaintiff's place of business for that purpose in October and November 1948. Plaintiff testifies that about the middle of November Donald Reed talked with him about the possibility of obtaining a new cornpicker, and plaintiff said he was getting some in a week or 10 days. Plaintiff says that Donald asked if he could have one and plaintiff replied that he would try to save him one. Donald is alleged to have said: "Well, I want one for this year, or next year, I don't care if it is this year or next year, but I want it." Plaintiff says he told Donald that the price would be about $1,000. Plaintiff testifies that Harold Reed came up and Donald informed him: "We could get a picker in about a week or ten days," and Harold said: "That's fine, bring it on down." These conversations are denied by the defendants, Harold asserting that he had never seen Anton Benes nor his wife prior to February 21, 1949. Leo Dillon, a brother-in-law of the Reeds, says that it was he and not Harold who was with Donald, and he, too, denies that any such conversation took place. There is evidence by Benes and his wife that they called on Donald to collect for repairs on the old cornpicker and for the sale price of the new one. They testify that Donald paid for the repairs, which is evidenced by a cancelled check dated February 21, 1949, but said he would see them in a few days about settling for the new cornpicker. This latter statement was also denied by Donald.

The defendants assert that the trial court erred in not holding that the oral agreement was within the statute of frauds as a matter of law. It is contended by the plaintiff that there was a receipt and acceptance of the cornpicker. The defendants contend to the contrary.

The pertinent parts of the statute of frauds here applicable provide:

"(1) A contract to sell or a sale of any goods or

choses in action of the value of five hundred dollars or upwards shall not be enforceable by action unless the buyer shall accept part of the goods or choses in action so contracted to be sold or sold, and actually receive the same, or give something in earnest to bind the contract or in part payment, or unless some note or memorandum in writing of the contract or sale be signed by the party to be charged or his agent in that behalf. * * *

"(3) There is an acceptance of goods within the meaning of this section when the buyer, either before or after delivery of the goods, expresses by words or conduct his assent to becoming the owner of those specific goods." § 69-404, R. R. S. 1943.

That the alleged agreement was an oral one for the sale of goods of the value of $500 or upwards is clearly shown by the pleadings and the evidence. The defendants contend that the trial court erred in overruling objections to evidence purporting to establish the oral agreement. A review of the pleadings is necessary to determine the correctness of the trial court's rulings on this question.

The petition in substance alleges that plaintiff sold and delivered to the defendants, and each of them, at the special instance and request of each of them, verbally, a cornpicker of the agreed and reasonable value of $1,025. There is no allegation of part payment, nor receipt and acceptance of the cornpicker. The petition was clearly demurrable as being within the statute of frauds. Wright v. Schram, 121 Neb. 775, 238 N. W. 658; Smith v. Aultz, 78 Neb. 453, 110 N. W. 1015. No demurrer was filed to the petition. Defendants' answer was in effect a general denial under which defendants could avail themselves of the defense of the statute of frauds. Powder River Live Stock Co. v. Lamb, 38 Neb. 339, 56 N. W. 1019; Smith v. Aultz, *supra*. The record shows that objection was timely made to the testimony on the ground that the verbal agreement was within the statute of frauds. Under the state of the pleadings the

trial court erred in not sustaining the objection. The rule is clearly stated in Powder River Live Stock Co. v. Lamb, *supra,* as follows: "The contract declared upon in the amended petition is a verbal one for the sale of a quantity of corn exceeding in value the sum of $50. No part of the purchase money was paid at the time the contract was entered into. This is conceded; but the plaintiff below insists that the stipulations in the contract have been fully performed on his part; hence, the statute of frauds does not attach. The delivery of the corn by the plaintiff to the defendant is averred in the petition, but it is nowhere alleged in the pleading that the defendant accepted or received any part thereof. A delivery alone by the vendor of the thing sold is insufficient to take a parol contract for the sale of goods, of the price of $50 or more, out of the statute, but there must also be a receipt and acceptance by the buyer of at least a part of such goods under and in pursuance of the terms of the contract. In Reed on the Statute of Frauds, vol. 1, sec. 262, the author says: 'There must be both delivery and acceptance; and both of the parties must partake in the same act. * * * And it has been said that certainly unless accept means no more than received, as surely it must, for otherwise the word "deliver" would of itself have sufficed, acceptance must mean some act or conduct on the part of the buyer indicating an intention to retain the goods, or such as reasonably to lead the seller to suppose so. To constitute acceptance two acts are necessary: The goods must be accepted and actually received. No act of the seller will amount to acceptance.' "

The precise question before us is fully answered in Powder River Live Stock Co. v. Lamb, *supra,* by the following, contained in that opinion: "It is urged that the defendant waived its exception to the ruling on the demurrer by answering to the merits. Conceding this point to be well taken, still the question of the statute of frauds was repeatedly raised during the trial on the

introduction of testimony to establish the contract and to show the defendant accepted the corn under the terms of the parol agreement. This evidence was admitted over the objection of the defendant that it is not alleged in the petition that it accepted or received any part of the corn sued for, and that the contract was void under the statute. This evidence was clearly inadmissible, without the pleading was amended. It is a fundamental rule that the allegata et probata must agree."

Plaintiff contends that the petition, properly construed, does not allege an oral agreement. We have hereinbefore set out the allegations of the petition. It clearly pleads an oral agreement. But even if it did not, and the evidence was therefore properly admitted, the evidence shows conclusively that plaintiff's claim was based on an oral agreement. The result would necessarily be the same. Plaintiff relies upon McMillan v. Heaps, 85 Neb. 535, 123 N. W. 1041. We point out that in that case facts were pleaded from which an acceptance could readily be inferred. In the case at bar there were no facts pleaded that in any manner related to any receipt or acceptance by the defendants.

The agreement pleaded was an oral one for the sale of goods of the value of $500 or upwards. No part payment was made. There are no allegations of receipt and acceptance to take it out of the provisions of section 69-404, R. R. S. 1943. Under such circumstances, objections to evidence of an oral agreement on the ground that it was barred by section 69-404, R. R. S. 1943, should have been sustained. Facts taking the oral agreement out of the statute must be pleaded. An allegation that the goods were delivered is not enough. If receipt and acceptance of the goods, or a part thereof, is relied upon to take the oral agreement out of the statute, such facts must be alleged. So far as the pleadings in this case show, a recovery was defeated by the statute of frauds.

This being true, defendants' motion for a directed

verdict should have been sustained. For the reasons shown, the motion for a judgment notwithstanding the verdict is sustained and the judgment is reversed and the cause dismissed.

REVERSED AND DISMISSED.

EDWARD RANDAL LOVINGS, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.

62 N. W. 2d 672

Filed February 5, 1954. No. 33442.

1. **Rape.** Under the laws of this state, an accused charged with rape cannot be convicted solely on the uncorroborated testimony of prosecutrix, but if she is corroborated as to material facts and circumstances which tend to support her testimony and from which, together with her testimony as to the particular act an inference of guilt may be drawn, the corroboration is sufficient.
2. ———. The slightest penetration of the sexual organ of the female is sufficient, if established beyond a reasonable doubt, to constitute the necessary element of penetration in a prosecution for rape, and such element may be proved by either direct or circumstantial evidence.
3. **Criminal Law: Evidence.** In laying a foundation in a criminal case for the admission of a confession in evidence, it is sufficient to establish affirmatively all that occurred immediately prior to and at the time of making the confession, provided such affirmative proof shows it to have been freely and voluntarily made and excludes the hypothesis of improper inducements or threats.
4. **Criminal Law: Trial.** It is only where there is a total failure of competent proof in a criminal case to support a material allegation in the information, or where the testimony adduced is of so weak or doubtful a character that a conviction based thereon could not be sustained, that the trial court will be justified in directing a verdict of not guilty.
5. **Criminal Law: Evidence.** In a criminal prosecution any testimony otherwise competent which tends to dispute the testimony offered on behalf of the accused as to a material fact is proper rebuttal testimony, and it is within the discretion of the court to permit in rebuttal the introduction of evidence not strictly rebutting.
6. **Criminal Law: Trial.** Instructions are to be considered to-

gether to the end that they may be properly understood, and, when so construed, if as a whole they fairly state the law applicable to the evidence, error cannot be predicated on the giving of the same.

ERROR to the district court for Douglas County: HENRY J. BEAL, JUDGE. *Affirmed.*

Ralph R. Bremers, for plaintiff in error.

Clarence S. Beck, Attorney General, and *Ralph D. Nelson,* for defendant in error.

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

CHAPPELL, J.

Plaintiff in error, Edward Randal Lovings, 48 years of age, hereinafter called defendant, was charged in an information with statutory rape upon a female child 5 years of age. The offense allegedly occurred February 19, 1952. Defendant pleaded not guilty, but upon trial to a jury he was found guilty. His motion for new trial was overruled and he was sentenced to serve 3 years in the penitentiary. Therefrom he prosecuted error to this court, assigning and arguing substantially that: (1) The evidence was insufficient to sustain the verdict; (2) the trial court erred in refusing to give his requested instruction No. 12, and in giving instructions Nos. 7, 10, 12, 13, and 16 on its own motion; and (3) the trial court erred in the admission of certain evidence. We conclude that the assignments should not be sustained. In that regard, there were other errors assigned, but they were either specifically noted as abandoned or were not argued in defendant's brief. They will not be discussed.

This court recently, in Sherrick v. State, 157 Neb. 623, 61 N. W. 2d 358, reaffirmed that: "Under the laws of this state, an accused charged with rape cannot be convicted solely on the uncorroborated testimony of prosecutrix, but if she is corroborated as to material

facts and circumstances which tend to support her testimony and from which, together with her testimony as to the particular act an inference of guilt may be drawn, the corroboration is sufficient.

"It is only where there is a total failure of competent proof in a criminal case to support a material allegation in the information, or where the testimony adduced is of so weak or doubtful a character that a conviction based thereon could not be sustained, that the trial court will be justified in directing a verdict of not guilty."

In Cook v. State, 85 Neb. 57, 122 N. W. 706, this court also concluded that the slightest penetration of the sexual organ of the female is sufficient, if established beyond a reasonable doubt, to constitute the necessary element of penetration in a prosecution for rape, and such element may be proved by either direct or circumstantial evidence. See, also, 75 C. J. S., Rape, § 10, p. 472, § 50, p. 522, § 71, p. 547; 44 Am. Jur., Rape, § 3, p. 902.

In Gallegos v. State, 152 Neb. 831, 43 N. W. 2d 1, affirmed in 342 U. S. 55, 72 S. Ct. 141, 96 L. Ed. 86, this court held: "In laying a foundation in a criminal case for the admission of a confession in evidence, it is sufficient to establish affirmatively all that ocurred immediately prior to and at the time of making the confession, provided such affirmative proof shows it to have been freely and voluntarily made and excludes the hypothesis of improper inducements or threats."

In the light of such rules we have examined the record which discloses that the State adduced competent evidence in chief substantially as follows: That defendant was 48 years old, and the child involved was 5 years old and a kindergarten student at time of the alleged offense. She was 6 years old and in first grade at time of trial. As a witness for the State she testified simply, intelligently, and without equivocation as to the particular act. It occurred with defendant, at his instigation, in his own locked bedroom at his home in

Omaha, a few doors from where the child lived with her mother. The mother was a witness for the State. After the alleged offense, the child went directly home, with two pennies and a nickel which defendant had given her not to tell, and in tears complained to her mother. Upon examination by her mother it was discovered that the child's panties were all sticky wet with what looked like a discharge and her private parts, together with surrounding areas, were red and swollen. The police were called, whereupon the child and her mother were taken to a hospital. There the child complained to and was examined by a physician. He testified that there was a colorless stained area in her panties, 8 by 12 centimeters in size, having an odor not unlike that of semen; her labia majora was swollen and contused; her hymenal ring and hymen were markedly reddened, with a 5 to 10 millimeter perforation at the center; and her entroitus was markedly contused and bruised. In his opinion there had been a penetration of her labia majora and entroitus and tissue surrounding but not within the vagina itself. By laboratory and microscopic examinations of saline washings taken from the child's panties, the physician identified non-motile spermatozoa, which could only have been deposited there by an ejaculation of the male organ.

On the evening of the alleged offense, defendant was taken to the Central Police Station. There the next morning he made a statement in the presence of a deputy county attorney, who informed defendant that he was such officer, and an official court reporter, who first took such statement in shorthand and then transcribed it in the presence of defendant. Defendant read and signed each typed page thereof as they were completed, and at the end certified that it was all true, "So help me God." Before such statement was taken, defendant was advised by the deputy county attorney that he was not required to make a statement or answer any questions that might tend to incriminate him; that anything he

said might be subsequently used against him; and that he was entitled to have a lawyer present to represent him if he desired. There was also competent evidence that no promises were made to and no threats or force were made against defendant, whereupon he voluntarily made the statement. It was thereafter offered and properly received in evidence. The contents thereof confessed at length and in detail every element of the crime charged and corroborated the testimony of prosecutrix in every material respect. We conclude that the evidence aforesaid was amply sufficient to sustain the verdict.

Defendant, as a witness in his own behalf, testified that he went with police to the station on the evening of February 19, 1952. He denied that he was guilty of the crime charged, but testified that a captain of police, a large man then on duty, threateningly rose up in his chair and began to question defendant, whereupon he began to break under the strain of mental confusion and fear of what might happen to him, so he orally made up a false story, the substance of which was to admit that he "had done these things that were charged." Admittedly, the captain did not lay his hands on defendant physically or tell him that anything would happen if he did not confess, and no policeman "worked him over" or coerced or threatened him verbally, but they had opportunity to do so and he was expecting it because of what he had read or seen and heard over television. He denied that the written statement given by him the next morning had been voluntarily made but said it was done because he was confused and afraid of the police as aforesaid, and because he relied upon certain promises that had been made by the deputy county attorney. It is also interesting to note defendant testified that he made the statement under duress, but admitted that such duress was "fear of Almighty God." Other witnesses testified in defendant's behalf in an effort to cast doubt upon his guilt, but their evidence

was in no manner conclusive of innocence as argued by defendant, and to recite it here would serve no useful purpose.

In rebuttal, to impeach defendant's statements or inferences that force, threats, and promises had been made which induced his confessions, the State called as witnesses the night and day police captains, and the former deputy county attorney who was not then in office. They testified in substance that no threats or force or promises of any kind were made to or against defendant in order to induce his admissions of guilt, and that defendant had been advised of every constitutional right as aforesaid before he made the written statement.

Relying upon Jones v. State, 97 Neb. 151, 149 N. W. 327, which is clearly distinguishable from the case at bar, defendant argued that the admission of such rebuttal evidence was prejudicially erroneous. We conclude that it was not. The argument is answered by Drewes v. State, 156 Neb. 319, 56 N. W. 2d 113, in which we held that: "Impeaching evidence is that which is directed to the question of the credibility of the witness.

"In a criminal prosecution, any testimony, otherwise competent, which tends to dispute the testimony offered on behalf of the accused as to a material fact, is proper rebuttal testimony.

"It is within the discretion of the court to permit in rebuttal the introduction of evidence not strictly rebutting." The opinion in that case cites and discusses Jones v. State, *supra,* and makes the distinctions applicable here, wherein a proper foundation had been laid and defendant's written statement had been properly received in evidence as part of the State's case in chief.

Defendant's requested instruction No. 12, which he contended was erroneously refused, told the jury in effect that in weighing the testimony of police officers, greater care should be exercised than in weighing the testimony of other witnesses, because of their material bias, prejudice, and preconceived opinions of guilt. In

McCartney v. State, 129 Neb. 716, 262 N. W. 679, this court specifically held that: "The mere fact that witnesses in a criminal prosecution are regular police officers of a city will not justify an instruction that the jury, in weighing their testimony, should exercise greater care than in weighing the testimony of other witnesses." We have never departed therefrom. See Fisher v. State, 154 Neb. 166, 47 N. W. 2d 349. Defendant's contention has no merit.

Instruction No. 7 about which defendant complained was identical with instruction No. 3 requested by him. It not only correctly recited the provisions of section 29-106, R. R. S. 1943, but also defendant has placed himself in a position where he has no right to complain about the giving of it.

Defendant did not request any instruction specifically defining the word "abuse" which appears in section 28-408, R. R. S. 1943, and the court gave none. Defendant contended that the failure to define such word was prejudicial error. In that connection, instructions Nos. 8 and 9 given by the trial court correctly defined "penetration," "carnally know," and "sexual intercourse." Also, in connection with other instructions given, it was made perfectly plain that penetration was an element of the offense charged, which the State was required to prove beyond a reasonable doubt before defendant could be found guilty as charged. The failure to define the word "abuse" under the circumstances presented here could not have been prejudicial to defendant. The instruction involved in Chambers v. State, 46 Neb. 447, 64 N. W. 1078, relied upon by defendant, was entirely distinguishable from those at bar.

In Vanderheiden v. State, 156 Neb. 735, 57 N. W. 2d 761, it was held: "Instructions are to be considered together, to the end that they may be properly understood, and, when so construed, if as a whole they fairly state the law applicable to the evidence, error cannot be predicated on the giving of the same.

"Where the charge to the jury, considered as a whole, correctly stated the law, the verdict will not be reversed merely because a single instruction, when considered separately, is incomplete."

Also, as held in Jones v. State, 147 Neb. 219, 22 N. W. 2d 710: "It is the duty of the court to instruct the jury on the law of the case, whether requested so to do or not; and an instruction or instructions which, by the omission of certain elements, have the effect of withdrawing from the consideration of the jury an essential issue or element of the case, is erroneous; but where the jury is instructed generally upon the law, and when the instructions given do not have the effect above stated, error cannot be predicated upon the failure of the court to charge upon some particular phase of the case unless a proper instruction was requested by the party complaining." Defendant's contention has no merit.

Instruction No. 10 about which defendant complained related to the necessity for corroboration of prosecutrix. After an examination of the instruction, we conclude that it correctly stated the law as approved in Schreiner v. State, 155 Neb. 894, 54 N. W. 2d 224; Linder v. State, 156 Neb. 504, 56 N. W. 2d 734; and Sherrick v. State, *supra.*

Instruction No. 12 given by the trial court related to defendant's confession and properly informed the jury with regard to the force and effect if any of all or any part of it as evidence, depending upon whether the jury first found that the confession was voluntary or involuntary. Defendant contended that its language infringed upon the prerogative of the jury as triers of fact in determining what evidence they wished to believe or disbelieve. In Clark v. State, 151 Neb. 348, 37 N. W. 2d 601, this court held: "Where, in an instruction dealing with a written statement signed by an accused and received in evidence, the jury is told that if it found that the statement was freely and voluntarily given and

signed without fear, compulsion, or inducements, the jury should consider it the same as any other evidence, it is not necessary that the court include in the instruction the requirement that the jury so find beyond a reasonable doubt where the court in other instructions had told the jury that the State was required to prove each and every material allegation of the information beyond a reasonable doubt and defined a reasonable doubt." See, also, Furst v. State, 31 Neb. 403, 47 N. W. 1116; Ringer v. State, 114 Neb. 404, 207 N. W. 928. The instruction was not erroneous. Defendant's contention has no merit.

Defendant contended that instruction No. 13, which related to credibility of the testimony given by accused, was erroneous because it shifted the burden of proof to defendant. In Johnson v. State, 88 Neb. 565, 130 N. W. 282, Ann. Cas. 1912B 965, this court considered and approved an identical instruction, and after reciting numerous authorities, said: "It was therefore properly given." That statement has application here. See, also, Annotation 85 A. L. R. 523. Like complaint was made by defendant with regard to instruction No. 16 relating generally to the credibility of all other witnesses. Schluter v. State, 151 Neb. 284, 37 N. W. 2d 396, relied upon to sustain that contention, is entirely distinguishable upon the basis of language contained in the credibility instruction involved therein. It is sufficient for us to say that language identical in every material respect with instruction No. 16 here involved was approved by this court as early as Richards v. State, 36 Neb. 17, 53 N. W. 1027, and we have never departed therefrom.

An examination of all the instructions discloses that they properly and fairly submitted the issues to the jury. An examination of the record also discloses that both at conclusion of the State's case in chief and at conclusion of the trial the evidence adduced was amply sufficient to sustain the verdict. We conclude that there was no error in the record prejudicial to defendant. Therefore,

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

AFFIRMED.

IN RE APPLICATION OF THE CITY OF SEWARD, NEBRASKA, A MUNICIPAL CORPORATION AND BODY CORPORATE AND POLITIC TO CONDEMN REAL ESTATE FOR FLOOD CONTROL PURPOSES. CITY OF SEWARD, APPELLEE, V. LOUIS E. GRUNTORAD ET AL., APPELLANTS, SEWARD COUNTY AGRICULTURAL SOCIETY, APPELLEE.

62 N. W. 2d 537

Filed February 5, 1954. No. 33456.

1. **Statutes.** In construing a statute, the legislative intention is to be determined from a general consideration of the whole act with reference to the subject matter to which it applies and the particular topic under which the language in question is found, and the intent as deduced from the whole will prevail over that of a particular part considered separately.
2. ———. Provided always that the interpretation of a statute is reasonable and not in conflict with legislative intent, it is a cardinal rule of construction of statutes that effect must be given, if possible, to the whole statute and every part thereof and it is the duty of the court, so far as practicable, to reconcile the different provisions so as to make them consistent, harmonious, and sensible.
3. ———. Just as an interpretation which gives effect to the statute will be chosen instead of one which defeats it, so an interpretation which gives effect to the entire language will be selected as against one which does not.
4. **Eminent Domain: Appeal and Error.** The 50-day period for the filing of a petition in the district court on an appeal in eminent domain proceedings under Chapter 76, article 7, R. S. Supp., 1953, begins to run with the date of the filing of notice of appeal in the county court.
5. **Appeal and Error.** The failure of appellants to timely file a petition in the district court does not affect or defeat jurisdiction.
6. ———. Where a discretionary duty is imposed upon a district court to determine whether or not good cause has been shown for the failure of a party to plead within the time required, and after the court has heard the reasons of the party in default for

his failure to timely plead, and in the exercise of a legal discretion has decided that no sufficient cause has been shown, this court will not ordinarily disturb the decision of the district court.

7. Costs. The ordinary rule is that the successful party is entitled to a judgment for costs.

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

William L. Walker and *Earl Ludlam,* for appellants.

Flansburg & Flansburg, Paul H. Bek, and *Harry L. Norval,* for appellees.

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

SIMMONS, C. J.

This is a proceeding brought in the county court by the city of Seward to condemn two pieces of real estate. The property was alleged to be owned by Louis E. and Lillian Gruntorad, hereinafter called the appellants, and the Seward County Agricultural Society, hereinafter called the Society. Appraisers were appointed. On June 16, 1952, the appellants filed an answer in which they alleged a series of reasons to sustain the prayer of the answer that the petition of the city to condemn be dismissed. The appraisers reported June 17, 1952, fixing the damages of the appellants as $1,382, and of the Society as $255.

On June 20, 1952, the appellants filed a notice of appeal to the district court. On July 16, 1952, appeal bond and praecipe for transcript were filed. On July 17, 1952, the transcript was filed in the district court.

On September 18, 1952, the city filed a motion to dismiss for reasons that (1) no appeal bond was filed as required by law, and (2) the appellants failed to file a petition in the district court.

On October 8, 1952, the appellants filed a pleading denominated an "Answer and Cross-Petition" together

with interrogatories. On October 15, 1952, the appellants filed a motion for leave to file a petition, a copy of which was attached to the motion. This proposed petition sought a dismissal of the city's action, a decree directing a restoration of the property to the condition in which it was taken in condemnation, a decree declaring that they owned all of the property, and if dismissal was not granted, that they recover consequential damages.

To this motion the city filed objections and renewed the motion to dismiss. The date of the filing of this motion does not appear in the transcript.

On June 4, 1953, the matter came on for hearing in the district court. The journal recites that the Society offered to make an assignment of its award to the appellants "as a condition of dismissal of the appeal." The court ordered the appeal dismissed and required the Society to assign its award to the appellants. From that order the appellants appeal here. We affirm the judgment of the trial court.

The provisions of the eminent domain statute which are to be construed here are found in Chapter 76, article 7, R. S. Supp., 1953. This act was Chapter 101, Laws 1951. It became effective May 21, 1951. The title recites that it was an act, in part, "to provide a uniform procedure for the condemnation of property for public use."

Appellants contend that the act leaves the procedure in conflict and confusion. The conflict and confusion which appellants find disappear when the act is analyzed as to each step in perfecting an appeal and making of issues in the district court on appeal.

In In re Application of Silberman, 153 Neb. 338, 44 N. W. 2d 595, we restated these rules:

" 'In construing a statute, the legislative intention is to be determined from a general consideration of the whole act with reference to the subject matter to which it applies and the particular topic under which the language in question is found, and the intent as deduced

from the whole will prevail over that of a particular part considered separately.

" 'Provided always that the interpretation of a statute is reasonable and not in conflict with legislative intent, it is a cardinal rule of construction of statutes that effect must be given, if possible, to the whole statute and every part thereof and it is the duty of the court, so far as practicable, to reconcile the different provisions so as to make them consistent, harmonious, and sensible. Just as an interpretation which gives effect to the statute will be chosen instead of one which defeats it, so an interpretation which gives effect to the entire language will be selected as against one which does not.' "

The above rules have been followed since in Allen v. Tobin, 155 Neb. 212, 51 N. W. 2d 338, and Ledwith v. Bankers Life Ins. Co., 156 Neb. 107, 54 N. W. 2d 409.

Section 76-715, R. S. Supp., 1953, provides that either the condemner or condemnee may appeal from the assessment of damages by the appraisers. The first step is the filing of a notice of appeal with the county judge within 30 days from the date of filing of the report of the appraisers.

Section 76-717, R. S. Supp., 1953, provides that within 30 days from the filing of the notice of appeal the county judge shall prepare and transmit to the clerk of the district court a duly certified transcript of all proceedings upon payment of the legal fee therefor.

Section 76-717, R. S. Supp., 1953, then provides: "The proceeding shall be docketed in the district court, showing the party first appealing as the plaintiff and the other party as the defendant." There can be no uncertainty as to the meaning of that provision. The Gruntorads as the parties first appealing became plaintiffs in the district court.

The section then provides: "After docketing of the appeal, the issues shall be made up and tried in the district court in the same manner as an appeal from the county court to the district court in a civil action."

Section 24-544, R. R. S. 1943, provides that in civil actions either party may appeal from the judgment of the county court "in the manner as provided by law in cases tried and determined by justices of the peace."

Section 27-1303, R. R. S. 1943, provides that the justice shall make a certified transcript of his proceedings, including the undertaking on appeal, and deliver it to appellant who shall deliver it to the clerk of the court "within thirty days next following the rendition of such judgment."

Section 27-1305, R. R. S. 1943, provides that in such an appeal "The plaintiff in the court below shall be the plaintiff in the district court." Appellants find a conflict between the above provision and that in section 76-717, R. S. Supp., 1953, with reference to the docketing of parties. There is no conflict in fact for the reference to the appeal procedure comes after the designation of the parties is definitely fixed in section 76-717, R. S. Supp., 1953.

Section 27-1306, R. R. S. 1943, provides that in all cases of appeal from the county court or justice of the peace, the plaintiff in the court below shall "within fifty days from and after the date of the rendition of the judgment in the court below, file his petition as required in civil cases in the district court, and the answer shall be filed and issue joined as in cases commenced in such appellate court." This is the sentence that has caused in large part the contentions here.

Appellants say the "in the same manner" provision of section 76-717, R. S. Supp., 1953, does not include the time element involved. We see no merit in this contention. The Legislature did not leave a void in the procedure there. Our holdings are to the contrary. See In re Estate of Lindekugel, 148 Neb. 271, 27 N. W. 2d 169. The 50-day provision applies.

Appellants say they were not the plaintiffs in the court below and hence the provision in section 27-1306, R. R. S. 1943, cannot be applied. As pointed out above

the Legislature made them, as parties appealing, the plaintiffs in the district court.

Appellants point out that the provision in section 27-1306, R. R. S. 1943, calls for a petition to be filed in the district court "within fifty days from and after the date of the rendition of the judgment in the court below." They then point out that a period of 60 days could have elapsed under sections 76-715 and 76-717, R. S. Supp., 1953, before the filing of a transcript was required in this action in the district court, and they argue that if that provision is applicable, they could be required to file a petition 10 days before the filing of a transcript.

It is obvious that the Legislature intended that a plaintiff under section 27-1306, R. R. S. 1943, should have at least 20 days after the filing of a transcript in which to file his petition in the district court. If the issues are to be made up "in the same manner" in the district court in eminent domain under section 76-717, R. S. Supp., 1953, the act should be construed, if it may properly be done, so as to give at least 20 days after the filing of the transcript for the filing of a petition.

Appellants here relate "after the date of the rendition of the judgment" in section 27-1306, R. R. S. 1943, to the "filing of the report of appraisers" under section 76-715, R. S. Supp., 1953. They would start the 50-day period from the latter date. Therein is the fallacy of their position. The date of the rendition of the judgment under section 27-1303, R. R. S. 1943, is also the date for the beginning of the 30-day period for the preparation and filing of the transcript. The 30-day period for the preparation and filing of a transcript, under section 76-717, R. S. Supp., 1953, begins with the filing of the notice of appeal. Reconciled on that basis the two provisions become consistent and in accord with the obvious legislative intent. Accordingly, we hold that the 50-day period for the filing of a petition in the district court on an appeal in eminent domain proceedings under Chapter 76, article 7, R. S. Supp., 1953, begins to run with

the date of the filing of notice of appeal in the county court.

The 50-day period began here then on June 20, 1952, and expired 50 days thereafter, or on August 9, 1952. Appellants filed no pleading until their purported answer and cross-petition on October 8, 1952. Their motion for permission to file a petition came still later on October 15, 1952.

The failure of appellants to timely file a petition in the district court does not affect or defeat jurisdiction. In re Estate of Myers, 152 Neb. 165, 40 N. W. 2d 536.

Section 27-1307, R. R. S. 1943, provides in part: "If the plaintiff in the action before the justice shall appeal from any judgment rendered against such plaintiff, and after having filed his transcript and caused such appeal to be docketed according to the provisions of this article, shall fail to file his petition within fifty days from the date of the rendition of such judgment by the justice, unless the court, on good cause shown, shall otherwise order, or otherwise neglect to prosecute to final judgment, the plaintiff shall become nonsuited; * * *."

We construed this statute in In re Estate of Lindekugel, *supra*. We applied it in In re Estate of Myers, *supra*, and held: "A discretionary duty is imposed upon a district court to determine whether or not good cause has been shown for the failure of a party to plead within the time required, and after the court has heard the reasons of the party in default for his failure to timely plead, and in the exercise of a legal discretion has decided that no sufficient cause has been shown, this court will not ordinarily disturb the decision of the district court."

The question then is: Was good cause shown?

In their motion for leave to file a petition appellants recited their contentions, heretofore determined, recited that they believed that it was the duty of the city to file a petition in the district court, and that it was not their duty to do so; they recited their contention that

the procedure was confusing, uncertain, and doubtful, and stated that the court should prescribe rules of procedure and order issues made up accordingly. It is to be noted that this showing and request, if it be termed such, for rules of procedure was filed over 2 months after appellants were in default of a petition, and almost a month after the city had on file its motion to dismiss.

When this matter came on for hearing on the motion to dismiss on June 4, 1953, appellants offered their affidavit of counsel in evidence. It is preserved in a bill of exceptions as the only evidence offered at that time. This affidavit recites that appellants' first knowledge of the city's motion to dismiss was had on October 8, 1952, when the answer and cross-petition was filed; that after the statutory provision as to the first appellant being designated a plaintiff the procedure provided becomes uncertain, confused, and doubtful; and that the uncertainty, confusion, and ambiguity is sufficient reason and good cause for their failure to file a petition.

Appellants were in default of a pleading when the city filed its motion to dismiss on September 18, 1952; they remained in default 20 days thereafter when they undertook to file an answer to a petition which was not on file, and it was a week later that they undertook to get permission to file a petition and get guidance from the court. We find no abuse of discretion on the part of the trial court in dismissing the action.

Finally it is urged that the court erred in taxing all costs to appellants. The journal entry makes no reference to costs. Assuming, however, that the costs have been taxed to appellants, we determine the question to prevent a further appeal on that matter. The ordinary rule is that the successful party is entitled to a judgment for costs. Tobas v. Mutual Building & Loan Assn., 147 Neb. 676, 24 N. W. 2d 870.

Section 76-720, R. S. Supp., 1953, provides: "If on any appeal, the appellant shall not obtain a more favorable

judgment than was given by the report of the appraisers, the appellant shall be adjudged to pay all costs made on the appeal."

Appellants contend that they received a more favorable judgment in the district court than that given by the report of the appraisers because of the provision of the decree that the Society should make an assignment of its award to appellants. The report of the appraisers remained exactly the same. It was not changed. The appellants, at best, received only an assignment of the award of a party not appealing. The statute does not relieve them from costs under these circumstances.

The judgment of the trial court is affirmed.

AFFIRMED.

MICHAEL J. HEALY, APPELLANT, V. METROPOLITAN UTILITIES DISTRICT, A MUNICIPAL CORPORATION, ET AL., APPELLEES.

62 N. W. 2d 543

Filed February 12, 1954. No. 33325.

1. **Trial: Judgments.** In order to obtain a summary judgment the movant must show, first, that there is no genuine issue as to any material fact in the case and, second, that he is entitled to a judgment as a matter of law.
2. ———: ———. In considering a motion for summary judgment the court should view the evidence in the light most favorable to the party against whom it is directed.
3. ———: ———. The court examines the evidence on motion for summary judgment, not to decide any issue of fact presented, but to discover if any real issue of fact exists. If there is a genuine issue of fact to be determined, a summary judgment may not be properly entered.
4. ———: ———. The credibility of witnesses, who give evidence by affidavit or deposition, is not ordinarily material. Unless there is a dispute of fact, no reason exists ordinarily for attacking their credibility.
5. ———: ———. Where a party resisting a summary judgment intends to dispute facts by attacking the credibility of the

witnesses of the movant, indicating a reasonable basis for such attack, a genuine issue of fact usually exists.

6. ———: ———. In cases where the evidence in a claimed fraudulent transaction rests exclusively within the knowledge of those seeking summary judgment it may be inequitable and unjust to grant summary judgment where the resisting party has no means to successfully meet the facts stated in the supporting affidavit. In such cases justice and fairness require a denial of a summary judgment.

7. ———: ———. A motion for a summary judgment is not a substitute for a motion to dismiss, a demurrer, or a judgment on the pleadings. It is a new procedure which may be used in certain cases where other procedural steps are not effective.

8. ———: ———. The summary judgment is effective and serves a separate useful purpose only when it can be used to pierce allegations in the pleadings and show that the facts are otherwise than as alleged.

9. ———: ———. Summary judgment was not intended, nor can it be used, to deprive a litigant of a fair and impartial trial. It is only where the situation exists that its terms imply and entitle the movant to judgment as a matter of law that it may be used to avoid an unnecessary trial.

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

Pilcher & Haney, for appellant.

Kennedy, Holland, DeLacy & Svoboda, Wells, Martin & Lane, Finlayson, McKie & Kuhns, Swarr, May, Royce, Smith & Story, Eugene D. O'Sullivan, and *Warren C. Schrempp,* for appellees.

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

CARTER, J.

This action was commenced by plaintiff as a resident taxpayer of the city of Omaha and a user of the gas and water facilities of the Metropolitan Utilities District of Omaha, for himself and all others similarly situated, for the benefit of such district, and against such district, its directors and their respective surety companies, and Dana Van Dusen, to recover for attorney's

fees paid to Van Dusen in excess of the maximum salary of $5,000 per year permitted by section 14-1020, R. S. 1943. A motion for a summary judgment of dismissal was sustained and the plaintiff appeals.

The petition sets forth an action by which the plaintiff seeks to recover back for the benefit of the Metropolitan Utilities District the salaries paid to Van Dusen in excess of the maximum limit fixed by statute, from September 16, 1939, to March 25, 1947. The directors of the district and their respective bonding companies are made parties defendant. The district is made a defendant for the reason that the action is brought in its behalf. A demurrer to the petition by Van Dusen was sustained and the cause dismissed as to him for the reason that the action as to him was barred by the statute of limitations. No appeal was taken from this action by the trial court and, consequently, Van Dusen is no longer a defendant.

Various motions were filed by the remaining defendants, including the motion for a summary judgment of dismissal. No answer has been filed by the defendants. The only question here presented is whether the trial court erred in sustaining the motion for a summary judgment of dismissal under the circumstances shown.

The petition alleges in substance that Van Dusen was employed as legal counsel for the district from September 16, 1939, to March 25, 1947, and thereafter, said contract being oral, as plaintiff is informed and believes. A separate cause of action is stated against each director for the time he occupied such office, and his surety or sureties for the payments made in excess of the statutory limit but not exceeding the amount of the bond.

The motion for a summary judgment sets forth the contention that there is no genuine issue of fact as shown by the supporting affidavit of Walter S. Byrne, the general manager and secretary of the district, in which he states that the agreements with Van Dusen were in writing, that Van Dusen was paid only $5,000 as legal counsel, and that additional payments made to him were

for his services as assistant to the general manager or as vice-general manager and assistant secretary. Resolutions and written contracts to this effect are incorporated verbatim into the affidavit. It is also asserted that the payroll records of the district show payment of compensation to Van Dusen in accordance with the official actions of the board of directors and the written contracts executed by the district and Van Dusen.

The motion for summary judgment was resisted by the plaintiff. In support of such resistance the affidavit of plaintiff was filed, wherein it was alleged that the actions of the board of directors and the contracts entered into were set up solely and wholly for the purpose of avoiding the statutory law of the state prohibiting a salary for legal counsel in excess of $5,000 per year, and thereby circumventing the meaning and legislative intent of the statute. The affidavit contains a recitation of the facts pertaining to the employment of Van Dusen and other legal counsel employed by the district, including the periods they were part-time and full-time attorneys for the district. The affidavit states that the district had a general manager and assistant manager other than Van Dusen, and that the designation of Van Dusen as assistant to the manager or vice-general manager and assistant secretary was for no other purpose than to evade, circumvent, and avoid the provisions of the statute relative to the employment of legal counsel by the district. The affidavit states that Van Dusen devoted all his time to legal matters, and that the proof is largely circumstantial and composed of admissions and inferences to be drawn from the direct evidence, the cumulative effect of which cannot be produced other than at a trial. It is further stated that to compel plaintiff to support his counter-affidavit with depositions would amount to oppression and operate to deprive plaintiff of evidence which lies wholly in the minds of the officers of the district.

The applicable part of the summary judgment stat-

ute provides: "The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." § 25-1332, R. S. Supp., 1953. It is plain that the movant in order to obtain a summary judgment must show, first, that there is no genuine issue as to any material fact in the case and, second, that he is entitled to a judgment as a matter of law. Illian v. McManaman, 156 Neb. 12, 54 N. W. 2d 244; Dennis v. Berens, 156 Neb. 41, 54 N. W. 2d 259; Palmer v. Capitol Life Ins. Co., 157 Neb. 760, 61 N. W. 2d 396. The second provision is met if movant would be entitled to a directed verdict on the basis of the undisputed facts if the case were being tried to a jury. Sartor v. Arkansas Natural Gas Corp., 321 U. S. 620, 64 S. Ct. 724, 88 L. Ed. 967. If the case is one tried to the court, it would seem that the same standard would apply if a motion for a summary judgment is made. "The purpose of the rule is to provide against the vexation and delay which comes from the formal trial of cases in which there is not substantial issue of fact, and to permit expeditious disposition of cases of that kind." Broderick Wood Products Co. v. United States, 195 F. 2d 433. But the purpose of the rule does not include the depriving of a litigant of a formal trial where there is a genuine issue of fact to be determined. Blood v. Fleming, 161 F. 2d 292. As a protection to the litigant against whom the motion is made, the court should take the view of the evidence most favorable to him and a stricter view of the affidavits and supporting evidence of the movant. Mecham v. Colby, 156 Neb. 386, 56 N. W. 2d 299.

Ordinarily the credibility of the witnesses who give evidence by affidavit or deposition does not seem to be material for the reason that, unless a genuine issue of fact is presented, credibility could play no part in the result. Unless there is a dispute of a material fact, no

reason exists for attacking their credibility. But if the party resisting a summary judgment intends to dispute facts by impeaching or otherwise attacking the credibility of the witnesses of the movant, indicating the basis for such attack, no doubt exists that there is an issue of fact which requires a trial. Firemen's Mut. Ins. Co. v. Aponaug Mfg. Co., 149 F. 2d 359. In cases involving fraud, intent, good faith, and the like, credibility often becomes a vital factor. Fogelson v. American Woolen Co., 170 F. 2d 660. The observance by the court or jury of witnesses while they are testifying in this class of cases may become so important as to constitute a disputed issue of fact. The crucial test of credibility is the valuable privilege of cross-examination. This is particularly true when the facts are peculiarly within the knowledge of the party moving for summary judgment. Hummel v. Riordon, 56 F. Supp. 983. Evidence of fraud or bad faith is often hidden within the minds of hostile witnesses and difficult of proof by affidavits or depositions in resisting summary judgment. The observation of witnesses by the trier of fact in such cases ought not to be readily denied, and summary judgment should be granted only when it is clear that a formal trial can accomplish no useful purpose.

We point out here that a motion for a summary judgment was not intended to be, and is not, a substitute for a motion to dismiss, a demurrer, or a motion for a judgment on the pleadings. In this respect we differ with the practice in the federal courts. There a petition need not state a cause of action and the demurrer no longer is recognized. But in this jurisdiction a petition must state a cause of action or it may be properly attacked by demurrer. The retention of this practice at the time of the adoption of the summary judgment act requires us to take a somewhat different view of the act than that taken by the federal courts. It necessarily follows that some of the federal cases are not authoritative where differences in practice exist. In other words, where

a defense is strictly a legal one, summary judgment may not be substituted for a motion to dismiss, a demurrer, or a motion for a judgment on the pleadings. The summary judgment procedure is effective and serves a useful purpose only when it can be used to pierce allegations in the pleadings and to show that the facts are otherwise than as alleged, that there is no genuine issue of fact, and that movant is entitled to a judgment as a matter of law. Engl v. Aetna Life Ins. Co., 139 F. 2d 469. This simply means that summary judgment will be allowed where the allegations of the pleading have been pierced by the movant and the resistance to the motion fails to show that a genuine issue of fact exists. Mueller v. Shacklett, 156 Neb. 881, 58 N. W. 2d 344. In the final analysis a summary judgment should be allowed when it is made abundantly clear that a formal trial could serve no useful purpose and could only result in a judgment as a matter of law. Hanna v. Mitchell, 202 App. Div. 504, 196 N. Y. S. 43, affirmed in 235 N. Y. 534, 139 N. E. 724. In the latter case it was stated: "It is not the object of this rule to deprive anyone who has a right to a jury trial of an issue of fact, but to require a defendant, when it is claimed that in fact he has no honest defense and no bona fide issue, to show that he has at least an arguable defense, that he has not merely taken advantage of a technicality in the form of pleading for the purpose of delaying the enforcement of an honest claim to which in fact he has no colorable defense. The court does not try the issues but ascertains whether in fact there is an issue. * * * To say that a false denial, which defendants are unable to justify, must nevertheless put the plaintiff to his common-law proof before a jury, although the result would be a directed verdict in plaintiff's favor as a matter of law, is to exalt the shadow above the substance."

The salary statute involved in the present case provides in part: "The board of directors may also retain and employ legal counsel and provide the compensation

thereof as in the case of other employees, but no salary or fee shall be paid in excess of five thousand dollars per annum to any attorney or counsel for services rendered." § 14-1020, R. S. 1943. The petition alleges that the district entered into agreements believed to be oral by which Van Dusen received amounts as legal counsel in excess of $5,000 per year. The defendants moved for summary judgment and showed by affidavit and otherwise that the contracts were written and that, in accordance with such contracts, Van Dusen was paid only $5,000 per year as legal counsel and that other amounts were paid to him in other capacities under the terms of other agreement provisions. In resisting the motion plaintiff asserts that the written agreements were a sham to circumvent the statute, that Van Dusen devoted his whole time as legal counsel, and that the evidence with reference thereto is wholly within the possession of the defendants and can be obtained only by cross-examination of certain defendants and officers of the district. The affidavit in resistance to the motion also points to an admission of the general manager of the district that Van Dusen spent substantially all of his time on legal matters and matters incidental thereto. This amply shows that a genuine issue of fact exists which can be determined only by a trial.

The defendants at the hearing on the motion for summary judgment offered extensive evidence tending to establish the truth of the assertions contained in the affidavit in support of the motion. This is a complete misconception of the summary judgment procedure. When the allegations of the petition had been pierced in an attempt to show that no genuine issue of fact existed, it devolved upon the plaintiff to show by a supporting affidavit or other evidence authorized by the statute that a material issue of fact did exist. Having done so, the right to summary judgment was dissipated. When a genuine issue of fact is shown to exist, additional proof

is surplusage. The case is then for trial as if summary judgment had not been applied for.

The depositions and admissions on file, together with the affidavits, show that there was a genuine issue of fact to be tried, and that defendants are not entitled to a judgment as a matter of law.

The defendants assert additional reasons why a summary judgment should be granted. (1) It is urged that no proper demand was made on the district as a condition precedent to a derivative action. (2) It is urged also that plaintiff failed to show any special or peculiar injury to himself and that he is not therefore a proper person to maintain the action. (3) It is likewise asserted that it is not shown that the defendant directors were actuated by mercenary motives beneficial to themselves, and where the services have been performed and paid for and recovery from the employee receiving them is barred by the statute of limitations, a court of equity will not entertain a derivative action on behalf of the corporation. Some of the defendants assert further that (4) the petition does not state a cause of action, (5) that the action was barred by the statute of limitations, and (6) that the several causes of action were improperly joined. All of these contentions can be disposed of by procedures in existence prior, as well as subsequent, to the adoption of the summary judgment act. The latter act provides a new procedure in proper cases, but it does not supersede existing provisions of our code of civil procedure. Where the provisions of the code are adequate, summary judgment is not a proper remedy. It is only where false allegations may be pierced and the real facts shown upon which there is no genuine issue to be determined, entitling the movant to judgment as a matter of law, that summary judgment may be employed to prevent vexatious delay and permit the expeditious disposition of cases.

For the reasons stated, the trial court erred in sustaining defendants' motion for a summary judgment.

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

REVERSED AND REMANDED.

STATE EX REL. LEAGUE OF NEBRASKA MUNICIPALITIES, A CORPORATION, APPELLANT, V. LOUP RIVER PUBLIC POWER DISTRICT, A CORPORATION, ET AL., APPELLEES, CONSUMERS PUBLIC POWER DISTRICT, A CORPORATION, INTERVENER-APPELLEE.

62 N. W. 2d 682

Filed February 12, 1954. No. 33423.

1. **Appeal and Error.** Affidavits used in district court upon the hearing of a motion and not preserved in a bill of exceptions will not be considered on appeal.
2. ———. In all appellate proceedings the record of the trial court imports absolute verity.
3. ———. On appeal, error will not be presumed, but must affirmatively appear from the record.
4. ———. In the absence of a bill of exceptions it will be presumed that issues of fact raised by the pleadings were supported by the evidence and that such issues were correctly determined.
5. ———. A question requiring an examination of the evidence will be disregarded in the absence of a bill of exceptions preserving the evidence.
6. **Pleading.** Where no ruling is shown on a demurrer to a pleading and it appears that thereafter trial was had the demurrer will be held to have been waived.
7. **Appeal and Error.** In the absence of a valid bill of exceptions, the only issue that can be considered on appeal is the sufficiency of the pleadings to sustain the judgment.
8. **Mandamus.** The court has no power by mandamus to control the decision of those matters which are left by statute to the discretion of the governing body of a governmental agency.
9. ———. A peremptory writ of mandamus should be issued only where the legal right to it is clearly shown.
10. ———. Mandamus, while classed as a law action, is an extraordinary remedy, which is not awarded as a matter of right, but rests in the sound discretion of the court governed by

equitable principles, and will not issue when to do so would compel the doing of a substantial wrong.

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

Perry & Perry and *W. W. Nuernberger,* for appellant.

Walter, Albert & Leininger and *Crosby & Crosby,* for appellees.

Davis, Healey, Davies & Wilson, for intervener-appellee.

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

SIMMONS, C. J.

In this action relator sought a peremptory writ of mandamus. The trial court denied the writ. Relator appeals. We affirm the judgment of the trial court.

In brief summary relator filed its petition seeking the writ on December 15, 1952. On the same day order to show cause was issued answerable December 29, 1952. On the latter date respondents answered. Relator demurred "for the reason that the Answer does not state any facts constituting a defense." The Consumers Public Power District filed a petition in intervention resisting the writ. The journal entry shows that oral objection was made to the intervention and no ruling thereon. On that day the trial court denied the peremptory writ of mandamus.

The court then took under consideration a motion of relator to make individual cities and villages "parties defendant" and a motion of the respondents for dismissal of the case. On April 10, 1953, the court denied the motion of relator, granted the motion of respondents, and dismissed the action.

On April 16, 1953, relator filed in one pleading a motion seeking to set aside the dismissal, a motion for trial on the merits, and a motion for a new trial. On May

7, 1953, this motion was overruled. Relator appeals.

The relator's assignments of error may be reduced to the contentions hereinafter considered.

Relator contends the court erred in reciting in its journal entry that a trial had been had whereas in truth no trial was had, but only an argument on questions of law, and that a trial on the merits should have been permitted. The journal entry shows that "said matter proceeded to trial to the Court" on December 29, 1952.

Relator further assigns error in that the court failed to permit it to appear and argue its demurrer. Among other things the journal entry shows a reference to a demurrer on behalf of relators, appearance by counsel for relators, and "said matter having been argued to the Court." There is nothing to indicate that argument was not had on the demurrer as a part of "said matter."

Relator further assigns error in the court's statement in the journal entry that the relator orally moved to make individual cities and villages "parties defendants" contending that the motion made was to make them "parties relator," and that the court erred in failing to grant the motion which relator here contends it made. The journal entries for December 29, 1952, and April 10, 1953, both refer to a motion to make the cities and villages parties defendant.

The relator further contends that the court erred in permitting and considering an oral motion for dismissal where "trial on the merits" had not been had.

The relator further contends that there was a stipulation made in open court in January 1953, that the cause should be continued without further decision pending negotiations of the parties, and that the court erred in ignoring that stipulation when it made its judgment of April 10, 1953. No journal entry of such a stipulation appears.

The transcript shows that after the journal entry herein referred to had been filed relator filed the pleading entitled a motion to set aside dismissal, for trial on

the merits, and for new trial. In this motion relator made all the contentions now urged in its assignments of error, including those hereinabove summarized. Concurrently with this motion was filed an affidavit of relator's counsel to the effect that no trial was had and that there had been a stipulation made with counsel for one of respondents that the matter be held in abeyance without decision pending negotiations for settlement. Subsequently there was filed an affidavit of the counsel for respondent that he had made no such stipulation.

On May 7, 1953, the trial court denied the motion. Subsequently there has been filed here an affidavit of the court reporter "that during the progress of said case, there was no testimony reported by me."

This appeal is here on the transcript without bill of exceptions as to any of the matters herein mentioned. The rule is: "Affidavits used in district court upon the hearing of a motion and not preserved in a bill of exceptions will not be considered on appeal." Wytoski v. Kiolbassa, 96 Neb. 173, 147 N. W. 126.

Obviously affidavits filed here cannot be considered under these circumstances.

In all appellate proceedings the record of the trial court imports absolute verity. Kennedy & Parsons Co. v. Schmidt, 152 Neb. 637, 42 N. W. 2d 191.

In Buck v. Zimmerman, 144 Neb. 719, 14 N. W. 2d 335, we had an appeal where there was no bill of exceptions. We there held: "Appellant contends that no evidence was taken and hence there was no evidence to make up a bill of exceptions. The order entered by the trial court plainly shows that a hearing was had and evidence taken. This court has held many times that the record imports absolute verity and it may not be disputed on appeal.

"On appeal, error will not be presumed, but must affirmatively appear from the record. First Nat. Bank v. Stockham, 59 Neb. 304, 80 N. W. 899. In the absence

of a bill of exceptions it will be presumed that issues of fact raised by the pleadings were supported by the evidence and that such issues were correctly determined. Backes v. Schlick, 82 Neb. 289, 117 N. W. 707. The evidence upon which the trial court acted not being before us, there is nothing for us to decide. It is a rule long established that a question requiring an examination of the evidence will be disregarded in the absence of a bill of exceptions preserving the evidence. Doolittle v. American Nat. Bank of Omaha, 58 Neb. 454, 78 N. W. 926."

In Reeker v. Reeker, 152 Neb. 390, 41 N. W. 2d 231, we held: "In this state of the record the rule that affidavits used in the district court upon the hearing of a motion and not preserved in a bill of exceptions will not be considered on appeal is applicable and the only conclusion that can be reached is that there has been no record presented which will permit of a review of the discretion exercised in this case by the trial court."

Under this state of the record and consistent with our holdings, the assignments above discussed cannot be sustained.

This brings us to relator's contention that the court erred in dismissing the action without first ruling on its demurrer to respondents' answer; and in failing to sustain the demurrer. The transcript does not show a ruling on the demurrer.

Section 25-2164, R. R. S. 1943, provides that in mandamus cases no other pleading or written allegation is allowed than the writ and answer.

In State ex rel. Glatfelter v. Hart, 106 Neb. 61, 182 N. W. 567, a demurrer to the writ was filed and sustained. We held that the demurrer was irregular, but was to be treated as an admission of the facts alleged in the writ. The relator's demurrer was obviously so considered by the trial court here for the journal entry refers to the petition and application of the relator, the filing of an answer by the respondents, "and issue having been joined

by filing of demurrer on behalf of" relator "said matter proceeded to trial." No objection appears to that construction of the demurrer. However, if it is to be treated as a demurrer in the usual sense, then the following rule applies:

Where no ruling is shown on a demurrer to a pleading and it appears that thereafter trial was had the demurrer will be held to have been waived. Foster's Admr. v. Gatewood, 314 Ky. 322, 235 S. W. 2d 764; McCulley v. Ray (Ky.), 251 S. W. 2d 878; Peterson v. Fowler, 76 Mich. 258, 43 N. W. 10; Danielson v. Gude, 11 Colo. 87, 17 P. 283; White v. Turner, 114 Wash. 405, 195 P. 240; American Mortg. Co. of Scotland v. Inzer, 98 Ala. 608, 13 So. 507; Lahr v. Ulmer, 27 Ind. App. 107, 60 N. E. 1009; Devine v. Chicago City Ry. Co., 237 Ill. 278, 86 N. E. 689; Murphy v. Lincoln, 63 Vt. 278, 22 A. 418.

This brings us to relator's contention that the court erred in failing to grant a peremptory writ of mandamus. This assignment must be determined pursuant to the following rules:

"In the absence of a valid bill of exceptions, the only issue that can be considered on appeal is the sufficiency of the pleadings to sustain the judgment." Cozad v. McKeone, 149 Neb. 833, 32 N. W. 2d 760. See, also, Blake v. Pathfinder Hotel Co., 153 Neb. 231, 44 N. W. 2d 310.

"The court has no power by mandamus to control the decision of those matters which are left by statute to the discretion of the governing body of a governmental agency.

"A peremptory writ of mandamus should be issued only where the legal right to it is clearly shown." State ex rel. Strange v. School District, 150 Neb. 109, 33 N. W. 2d 358.

"Mandamus, while classed as a law action, is an extraordinary remedy, which is not awarded as a matter of right, but rests in the sound discretion of the court governed by equitable principles, and will not issue

when to do so would compel the doing of a substantial wrong." State ex rel. Heil v. Jakubowski, 151 Neb. 471, 38 N. W. 2d 26. See, also, State ex rel. Evans v. Brown, 152 Neb. 612, 41 N. W. 2d 862; State ex rel. Shineman v. Board of Education, 152 Neb. 644, 42 N. W. 2d 168; State ex rel. Bintz v. State Board of Examiners, 155 Neb. 99, 50 N. W. 2d 784.

The facts which we now recite are gleaned from the petition of the relator and the answer of respondents.

Relator is a nonprofit corporation organized under the provisions of Chapter 21, article 15, R. S. 1943. Its articles recite that its objects shall be the study of municipal problems and the general improvement of municipal government and its administration in this state through cooperative effort. By amendment adopted in 1952, its articles added as a means for advancing its purpose "To purchase, for re-sale to, or to purchase for and on behalf of, its member municipalities or any association of its member municipalities, electric power and energy from any supplier thereof, upon proper contracts of payment therefor from such member municipalities."

By resolutions adopted during November 1952, the cities of Cozad, Holdrege, North Platte, and Lincoln and the villages of Smithfield, Bertrand, and Loomis authorized and directed the relator to arrange for a contract to purchase electrical power and energy on their behalf from the respondents.

The respondents are corporations organized under the provisions of Chapter 70, article 6, R. R. S. 1943. The individual respondents are officers of the corporate respondents. The two corporate respondents operate in part as the Nebraska Public Power System.

Respondents have adopted a rate resolution which, among others, includes what is here referred to as an AO-1 rate schedule wherein the cost for power and energy is reduced as the consumption increases. The rate resolution defines customer as "any person, firm, asso-

ciation, or corporation, public or private, including Participating Customers, which purchases electric power and energy from the System." Relator contends that it comes within that definition and is entitled to purchase under the AO-1 rate schedule. For and on behalf of the named municipalities on November 20, 1952, it requested recognition and a contract for the purchase of power under the AO-1 rate schedule, the contract to include the cities and villages above named. The respondents refused to enter into the contract and this action followed.

Relator prayed for a peremptory writ of mandamus requiring the respondent to sell to the relator, on behalf of the cities and villages above named, or for resale to them of electrical power and energy in accordance with the AO-1 rate schedule.

The obvious purpose of the procedure here undertaken is to secure a lower ultimate rate for the villages and cities named than they are able to get under individual separate contracts. The relator states here that it proposes to operate as a group-billing agency whereby the meter readings of the seven municipalities would be combined monthly, billed to relator as one account, and prorated to each municipality, and the amounts would be collected from each municipality and paid to respondents by the relator.

We do not determine the power of the cities and villages to delegate the power here recited to the relator.

The rate schedule provides that power shall be available to an "electric utility system." The answer of the respondents alleges the fact to be that the term electric utility system means a legal entity capable of contracting valid and binding contracts, and possessing and operating electrical transmission and distribution equipment consisting of poles, lines, wires, transformers, switches, and related facilities, and retailing to the ultimate user and consumer; further that relator does not possess or operate any electrical transmission or distribution equip-

ment or facilities; and that it does not sell and does not propose to sell at retail to the ultimate user or consumer. In the absence of a bill of exceptions and under the rules above stated we are required to accept the facts to have been established as alleged.

It becomes obvious that the relator is not a customer entitled to a contract under the rate schedule involved.

Respondents are subject to the provisions of section 70-626.01, R. R. S. 1943. This section provides: "A public power district which is engaged in the generation and transmission of electrical energy shall be required to sell electrical energy at wholesale directly to any municipality or political subdivision in the state which is engaged in the distribution and sale of electrical energy when such municipality or political subdivision makes application for the purchase of electrical energy, provided such district has the requested amount of electrical energy available for sale, and the municipality or political subdivision agrees to make or pay for the necessary physical connection with the electrical facilities of such district."

The statute provides for sale "directly" to a "municipality." It does not show a legislative intent to require a public power district to sell indirectly to a municipality through a group or association of municipalities, as relator asks it be required to do here.

The pleadings sustain the judgment entered. The judgment of the trial court is affirmed.

AFFIRMED.

HAROLD L. BENSON, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.

62 N. W. 2d 522

Filed February 12, 1954. No. 33508.

1. **Justices of the Peace: Appeal and Error.** The defendant in an action before a justice of the peace wherein a fine or imprison-

ment, or both, have been imposed has the right of appeal to the district court.

2. **Criminal Law: Appeal and Error.** This right of appeal exists in his favor even though he has pleaded guilty to the charge or charges against him.
3. ———: ———. The right of appeal may be exercised at any time within 10 days from the date of the judgment.
4. ———: ———. The right of appeal is dependent upon the defendant entering into a written recognizance agreeable to the provisions of section 29-611, R. R. S. 1943, or by the deposit of a cash bond in a sum to be fixed by the justice of the peace in lieu of a written recognizance.

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

Dryden, Jensen & Dier, for plaintiff in error.

Clarence S. Beck, Attorney General, and *Richard H. Williams,* for defendant in error.

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

YEAGER, J.

On April 6, 1953, a complaint in the name of the State of Nebraska was filed in the justice of the peace court of John C. Mitchell, a justice of the peace in Buffalo County, Nebraska, charging that Harold L. Benson operated a motor vehicle on the public highways of the State of Nebraska, (1) while under the influence of intoxicating liquor, (2) in such a manner as to indicate a willful disregard for the safety of persons and property, and (3) at a rate of speed in excess of 50 miles an hour between sunset and sunrise.

Benson was arraigned and he pleaded not guilty to the first charge and guilty as to the other two. The first charge was dismissed. On the second he was fined $100 and sentenced to a term of 30 days in jail in addition to which his operator's license was suspended for 1 year from the date of release from jail. On the third charge

he was fined $50. The costs were also taxed to him.

On April 9, 1953, Benson made a motion for leave to withdraw his plea of guilty and for a trial on the charges made against him. The motion was on the same day overruled. Also on the same day notice of appeal was given and a cash appeal bond was given in the justice court in the amount of $300.

The record does not clearly disclose whether the intention was to appeal from the conviction and sentence imposed or the refusal to allow him to withdraw his plea of guilty, or both, but the parties have in their presentation treated it as an intention to appeal from both. We will regard it in the same manner.

The justice of the peace prepared a transcript of the proceedings and delivered it to the clerk of the district court on April 11, 1953.

The county attorney filed a motion to quash the appeal on the following grounds:

1. That an appeal is not available since Benson pleaded guilty to the charges of which he was convicted.

2. That the justice of the peace did not within 10 days forthwith make a return of the proceedings and failed to certify the complaint and warrant together with the recognizance taken.

3. That no recognizance was filed within 10 days conditioned on the appearance of Benson.

4. That no recognizance was executed or acknowledged in the presence of the justice of the peace conditioned for appearance of Benson in the district court.

The motion was sustained and the appeal quashed. Thereafter a motion for new trial was filed which was overruled. Benson has brought the order quashing the appeal and the order overruling the motion for new trial to this court for review by petition in error. He contends that the appeal was erroneously quashed.

Hereinafter for convenience Benson will be referred to as defendant and the State of Nebraska as the State.

The first question which will be considered is that of

whether or not a plea of guilty in a justice of the peace court and a sentence on the plea is a bar to an appeal to the district court.

The general rule with regard to this subject is stated as follows in 22 C. J. S., Criminal Law, § 390, p. 573: "Whether an appeal will lie from a judgment of conviction in a justice's court, where accused pleads guilty, depends upon the wording of the particular statute. Under the statutes in some jurisdictions a plea of guilty will not preclude an appeal, while in others it will preclude an appeal, * * *." See, also, Wright v. City of Bessemer, 209 Ala. 374, 96 So. 316; Burris v. Davis, 46 Ariz. 127, 46 P. 2d 1084; State ex rel. Baggs v. Frederick, 124 Fla. 290, 168 So. 252; State v. Dawn, 41 Idaho 199, 239 P. 279; Yager v. State, 190 Ind. 550, 131 N. E. 42; Thomas v. Montcalm Circuit Judge, 228 Mich. 44, 199 N. W. 610; State v. Funderburk, 130 S. C. 352, 126 S. E. 140; Weaver v. Kimball, 59 Utah 72, 202 P. 9; Dickerson v. Commonwealth, 162 Va. 787, 173 S. E. 543.

The statute which the defendant contends gives him the right of appeal is section 29-611, R. R. S. 1943, in pertinent part as follows: "The defendant shall have the right of appeal from any judgment of a magistrate, including justices of the peace, municipal judges and county judges, imposing fine or imprisonment, or both, * * *."

It will be observed that there are no exceptions to the right declared by the statute. The State does not contend that there are any exceptions in the statute. It does contend substantially that this court in Kissinger v. State, 147 Neb. 983, 25 N. W. 2d 829, has effectually declared that there may be no appeal to the district court from a conviction based on a plea of guilty.

The case does not so hold. No appeal was taken or attempted in that case. Review was sought, it is true, but it was by petition in error under section 29-617, R. R. S. 1943. The substance of the holding was that where there had been a conviction based on a plea of guilty the

factual question of guilt or innocence could not be inquired into in an error proceeding in the district court.

We think the clear and unambiguous statement of section 29-611, R. R. S. 1943, should be accepted and that it should be said that a conviction based on a plea of guilty before a justice of the peace is no bar to an appeal from the conviction.

The second ground of the motion to quash is in part contradicted by the record on which it is based. A transcript was made, certified, and duly returned to the district court within 5 days instead of 10. It contained the complaint and the proceedings had. It did not contain a warrant but the reason for the absence of a warrant is reasonably inferable from the transcript of the proceedings. It is reasonably inferable that the defendant was arrested without a warrant and brought before the justice of the peace.

It is true that in the literal sense the transcript did not contain a return and certification of a recognizance. The question then is presented as to whether or not under the facts and the law a recognizance in the literal sense was a requisite of a valid appeal. A determination of this question is determinative of the questions presented by the third and fourth points of the motion to quash.

Section 29-611, R. R. S. 1943, contains the following: "* * * No appeal shall be granted or proceedings stayed unless the appellant, together with his surety or sureties, shall, within ten days after the rendition of such judgment, appear before such magistrate, and then and there enter into a written recognizance to the people of the State of Nebraska in a sum not less than one hundred dollars, with surety or sureties to be fixed and approved by the magistrate before whom such proceedings were had, conditioned for his appearance forthwith and without further notice, at the district court of such county, * * *; Provided, that the party appealing may in lieu of such undertaking deposit with the clerk of such court

a cash bond in a sum to be fixed by the magistrate but not less than one hundred dollars; and such cash bond shall be accepted in the cause, upon the same conditions and with like effect as undertakings hereinbefore set out, * * *".

The defendant deposited a cash bond in the amount of $300 which was accepted by the justice of the peace and duly reported and certified to the district court.

The State urges that this was not compliance with the requirements of the statute in the case of the giving of cash bond instead of a written recognizance. Particularly, as we interpret it, the basis of the contention is that in addition to making the deposit the defendant was required to enter formally into an undertaking that he would appear forthwith and without further notice at the district court for the county.

The statute does not so state. The statute, fairly interpreted, requires the magistrate to accept the cash bond and attaches to the acceptance without any other formal requirement an obligation on the defendant to appear in the district court.

The second, third, and fourth points of the motion to quash are without merit.

The statute granted the defendant the right of appeal if he perfected his appeal within 10 days. He did so in manner and form required by statute. It follows therefore that no grounds existed for quashing the appeal.

This conclusion dispenses with the necessity for a consideration of the question of whether or not a justice of the peace has jurisdiction to vacate and set aside a judgment of conviction after it has been entered and has become effective and the related question of whether or not an appeal may be taken from an order refusing so to do.

The order of the district court quashing the appeal herein is reversed and the cause is remanded with di-

rections to proceed as required by section 29-613, R. R. S. 1943.

REVERSED AND REMANDED WITH DIRECTIONS.

FLOYD LACKAFF ET AL., APPELLANTS, V. NELLE BOGUE ET AL., APPELLEES, ELMER L. HARLAN ET AL., INTERVENERS-APPELLEES.

62 N. W. 2d 889

Filed February 19, 1954. No. 33379.

1. **Appeal and Error.** Actions in equity are triable de novo upon appeal to this court, but in a case wherein the trial court has made a personal examination of the physical facts and the oral evidence in respect of material issues is so conflicting that it cannot be reconciled, this court will consider the fact that such examination was made and that 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. **Appeal and Error: Evidence.** The trial court is required to consider any competent and relevant facts revealed by a view of premises as evidence in the case, and a duty is imposed upon this court on review of findings made by the trial court to give consideration to the fact that the trial court did view the premises, providing that the record contains competent evidence to support the findings.
3. **Injunctions.** A party seeking an injunction must establish by competent evidence every controverted fact necessary to entitle it to relief and an injunction will not lie unless the right is clear, the damage is irreparable, and a remedy at law is inadequate to prevent a failure of justice.
4. ———. Acts which destroy or result in a serious change of property either physically or in the character in which it has been held or enjoyed have been held to do an irreparable injury.
5. ———. Ordinarily where an injury wrongfully committed by one against another is continuous or is being constantly repeated so that complainant's remedy at law requires the bringing of successive actions, that remedy is inadequate and the injury will be prevented by injunction.
6. ———. In such cases, 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 damages inflicted, as the ground of affording relief.

7. **Waters: Injunctions.** Where water is impounded upon land by natural conditions whereby a lake is formed, the owner of such land has no lawful right to remove an impediment to its flowage and thereby cause such water to flow upon the land of another to his damage. For such injury injunction is a proper remedy and an injured party may recover such damages in the same action as he may have sustained by such wrongful act.
8. **Waters: Drains.** Section 31-201, R. R. S. 1943, is a general law dealing generally with drainage by landowners where a ditch or drain is constructed wholly on the owners' land and waters collected therein are discharged into a natural watercourse, or into a natural depression or draw on the owners' land, whereby such water may be carried into some natural watercourse.
9. ———: ———. Sections 81-702 to 81-708, R. R. S. 1943, deal with a specific subject, the provisions of which have control over the general provisions of section 31-201, R. R. S. 1943.
10. ———: ———. If it is established by a preponderance of evidence that the lake or lakes involved come within the provisions of sections 81-702 to 81-708, R. R. S. 1943, inclusive, and that a party has attempted by ditches or otherwise to artificially drain, lower, or in any manner reduce or divert the water supply thereof without prior approval of the Department of Roads and Irrigation, then a judgment should be rendered in favor of a party or parties injured or damaged by such action, enjoining the same and awarding them such damages as competent evidence establishes were wrongfully occasioned thereby.

APPEAL from the district court for Rock County: DAYTON R. MOUNTS, JUDGE. *Affirmed.*

Ely & Ely, Morsman, Maxwell, Fike & Sawtell, and *Harvey D. Davis,* for appellants.

Julius D. Cronin and *Deutsch & Jewell,* for appellees.

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

CHAPPELL, J.

Plaintiffs Lackaff brought this action seeking to enjoin defendants Bogue and Stewart from damming up or otherwise obstructing an alleged watercourse existing on and crossing Section 15, Township 28 North, Range 18 West of the 6th P. M., in Rock County. Defendants and certain interveners, all of whom owned

or leased real estate upon which the waters involved were alleged to have been wrongfully discharged by plaintiffs, filed answers and cross-petitions or petitions in intervention, fundamentally of like nature. Therein they denied generally and alleged that plaintiffs in the spring of 1949 wrongfully and without any permit from the Department of Roads and Irrigation constructed certain ditches on their own land and that of defendants Bogue in order to lower or divert the water from Cameron Lake and Linke Lake, two natural, perennial, permanant lakes, neither of which overflow except at times of rare abnormal precipitation, and each of which has an area exceeding 20 acres at low water stage; and that construction of such ditches by plaintiffs caused the waters therefrom to spread out and be diffused in a northerly and northeasterly direction upon and over defendants' and interveners' lands in a long continuous hay and cattle-raising valley, thereby causing them irreparable damage and enriching plaintiffs with additional hay meadow land. Defendants and interveners admitted that in the spring of 1949 defendants Bogue, upon request, gave plaintiffs oral permission to construct a ditch across an oxbow or horseshoe out of Linke Lake upon the land of defendants Bogue, subject, however, to the express condition, to which plaintiffs agreed, that if the water therefrom caused any damage, then plaintiffs, upon demand, would forthwith fill the ditch. It was alleged that such damage did occur in 1949, and thereafter demand was made upon plaintiffs that they close such ditch and all other ditches aforesaid, which plaintiffs failed and refused to do. It was also alleged that thereafter, during the spring of 1951, defendant Earl Stewart, with permission and direction of defendants Bogue, caused the ditch on their land to be filled, whereupon plaintiffs dynamited the fill, reopened the ditch, and commenced this action wherein defendants and interveners by their answers, cross-petitions, and petitions in intervention prayed

for money damages, an order requiring plaintiffs to forthwith fill all the ditches and keep the same filled, and that they should be perpetually enjoined from causing or permitting said waters to overflow in the manner aforesaid.

Plaintiffs' replies and answers denied generally and alleged that the natural course of drainage from Linke Lake was in a northeasterly direction in a well-defined watercourse located in a continuous hay valley, and that the said watercourse had existed for more than 30 years until filled by defendants, after which plaintiffs caused it to be reopened and restored to its normal condition. They then renewed the prayer of their petition.

At beginning of the trial it was agreed by all parties that all questions pertaining to an injunction and issues in connection therewith should be first finally determined by the trial court or on appeal therefrom, before any evidence would be submitted upon the question of the right to recover money damages sought by defendants and interveners. Therefore, the trial court retained jurisdiction of the cause for subsequent trial and determination of the claims of defendants and interveners for money damages should it be ultimately found that they were entitled to injunctive relief.

After trial as aforesaid, whereat voluminous oral evidence was adduced and numerous exhibits, including some pleadings and orders in another cause, leases, blueprints, maps, atlases, and ordinary and aerial photographs, had been offered and received in evidence, the trial court "made a personal inspection of the lands of the East Cameron Lake or Cameron Slough and Linke Lake basins, and the drainage ditches involved in the above cause, together with a part of the area over which the drainage from said lakes flowed by reason of such ditches" and rendered a judgment, finding and adjudging the issues generally against plaintiffs and each of them upon their petition and for defendants and interveners upon their respective answers, cross-petitions,

and petitions in intervention. Insofar as important here, the judgment ordered and directed plaintiffs to forthwith fill and keep filled to the height of the natural ground adjacent thereto each and every one of the ditches constructed by them about which defendants and interveners complained. It forever enjoined plaintiffs and each of them and all persons acting by direction or under them or either of them from attempting to drain either of said lakes and ordered that plaintiffs and their successors in title and the described land owned by plaintiffs should be charged with performance of or compliance with the decree.

Subsequently, at the insistence of plaintiffs, the trial court vacated the judgment and rendered another one, new in form but alike in result, except that it forever enjoined plaintiffs and each of them as aforesaid, without providing that plaintiffs and their successors in title or the described land owned by plaintiffs should be charged with performance or compliance with the judgment.

The trial court subsequently overruled defendants' and interveners' motion to amend and enlarge the judgment to include such provisions aforesaid as were omitted from the second judgment, and overruled plaintiffs' motion for new trial. Plaintiffs appealed, assigning some 13 errors, the effect of which was to substantially claim: (1) That the trial court erred in failing to strike the cross-petitions of defendants and the petitions in intervention; and (2) that the findings and judgment of the trial court were not sustained by the evidence but were contrary thereto and contrary to law. We conclude that the assignments have no merit.

Defendants and interveners cross-appealed, assigning substantially that the trial court erred in overruling their motion to amend and enlarge the second judgment. We conclude that such assignment should not be sustained.

For clarity and convenience we first dispose of the

cross-appeal. In doing so, we are not required to discuss or decide whether or not the trial court had the power to so amend and enlarge its last judgment. That is true because in our view the judgment is, for all practical purposes, as effective without the amendment desired by defendants and interveners as it would be if included. In Ahlers v. Thomas, 24 Nev. 407, 56 P. 93, wherein defendants were enjoined from diverting water from a stream, appropriate language was used which has application here. In that opinion it was said: "The general rule is that judgments are binding only upon parties, but there are exceptions as in the case of privies.

" 'When a judgment has been rendered between the parties, they are bound by it; and, to give full effect to the principle by which the parties are held bound by it, all persons who are represented by the parties, and claim under them, or are privy to them, are equally concluded by the same proceedings. By "privity" is meant the mutual or successive relationship to the rights of property; and privies are classified according to the manner of this relationship. * * * The reason why persons standing in this relation to the litigating party are bound by the proceedings to which he is a party is that they are identified with him in interest; and, whenever this identity exists, all are alike concluded. Privies are therefore estopped from litigating that which is conclusive upon him with whom they are in privity.' (3 Bouvier's Institutes, p. 373-4.)"

As stated in State ex rel. Knittle v. Will, 86 Kan. 561, 121 P. 362: "An injunction against the owner of property is not only binding upon him but also upon those who may take or hold under him. It is, in one sense, an incumbrance on the property, and the owner who has been enjoined can not, by transferring it to another, by grant, lease or otherwise, free it from the limitation imposed by the injunction. (The State v. Porter, 76 Kan. 411, 91 Pac. 1073.)" Defendants and interveners also assigned in their cross-appeal that the trial court

erred in refusing to amend and enlarge its judgment in another respect, but such assignment was not argued in the brief and will not be discussed.

We turn then to a discussion of plaintiffs' contentions. In that connection, they cited no authority and made no argument upon the first assignment except to say that the trial "court was clearly in error in allowing the issue of Cameron slough or any of the intervenors to come into this case." In that connection, the record discloses competent evidence that the ditches wrongfully constructed by plaintiffs first brought the waters from Cameron slough, hereinafter called East Cameron Lake, in a northerly and northeasterly direction over the lands of defendants Bogue, thence into Linke Lake, thence therefrom over the lands of defendants and interveners located on down the valley, all of whom were allegedly damaged thereby. The issue of East Cameron Lake was thus properly brought into the case by defendants and interveners who claimed to have and did have an interest in the matter in litigation, and who had a right to intervene and unite with defendants in resisting plaintiffs' claims. Following section 25-328, R. R. S. 1943, are annotated many cases sustaining that conclusion. They are too numerous to cite here.

We turn then to the second assignment, and in doing so examine the record in the light of language appearing in Jack v. Teegarden, 151 Neb. 309, 37 N. W. 2d 387, where we said: "Applicable here is the following from Probert v. Grint, 148 Neb. 666, 28 N. W. 2d 548: ' "When an action in equity is appealed, it is the duty of this court to try the issues de novo and to reach an independent conclusion without reference to the findings of the district court. Comp. St. 1929, § 20-1925 (this section being now 25-1925, R. S. 1943). But in a case wherein the trial court has made a personal examination of the physical facts, and where, in the same case, the oral evidence in respect of material issues is so conflicting that it cannot be reconciled, this court

will consider the fact that such examination was made and that such court observed the witnesses and their manner of testifying, and must have accepted one version of the facts rather than the opposite." City of Wilber v. Bednar, 123 Neb. 324, 242 N. W. 644. See, also, State v. Delaware-Hickman Ditch Co., 114 Neb. 806, 210 N. W. 279; Greusel v. Payne, 107 Neb. 84, 185 N. W. 336.

" ' "The trial court is required to consider any competent and relevant facts revealed by a view of premises as evidence in the case, and a duty is imposed on this court on review of findings made by the trial court to give consideration to the fact that the trial court did view the premises; provided, that the record contains competent evidence to support the findings." Columbian Steel Tank Co. v. Vosika, 145 Neb. 541, 17 N. W. 2d 488.' See Carter v. Parsons, 136 Neb. 515, 286 N. W. 696."

Insofar as important here, the record discloses that plaintiffs as joint tenants owned described lands in Sections 21, 22, 28, and 15, in Township 28 North, Range 18 West of the 6th P. M., in Rock County. Defendant Nelle Bogue owned all of Section 23, and a part of Sections 11, 14, 15, and 22 in the same township and range. Defendant Earl Stewart was the owner of the northeast quarter of Section 20 in Township 29, and was a tenant of his mother in possession of described lands located in Township 29 some distance northeast down the valley from that owned by plaintiffs and defendants Bogue. The lands owned or leased by interveners lie along the valley between plaintiffs and defendants Stewart and Bogue.

Linke Lake is a natural perennial or permanent lake located largely in Section 15. It is fed by surface waters and the overflow waters, if any, in times of rare abnormal precipitation from East Cameron Lake, which in turn is fed by waters from Cameron Lake. Both of such latter lakes are fed by surface waters and are con-

nected by a culvert or passageway. They are located at a higher level south of Linke Lake on Sections 21, 22, 23, and 28. Concededly defendants Bogue are owners of land riparian to and owners of a portion of the beds of both East Cameron Lake and Linke Lake. East Cameron Lake is also a natural perennial or permanent lake which with the ditches operating at time of trial had an open water area of 96.9 acres with a depth of at least 5 feet. Linke Lake with the ditches operating at time of trial had an open water area of 119.1 acres with a depth of more than 6 feet.

There is a natural rim around each of said lakes and neither has a natural surface outlet under normal conditions, and except for abnormal precipitation at rare intervals neither of them is subject to overflow. In 1919 or 1920 the natural rim of East Cameron Lake was lowered by a shallow spaded ditch which to a certain extent accelerated overflow therefrom into Linke Lake during periods of rare abnormal precipitation. However, there is no natural well-defined watercourse, depression, or draw between the two lakes, and when there was an overflow from East Cameron Lake, the water spread out over meadows which generally sloped toward Linke Lake, thence into such lake. Eventually, many years ago, as early as 1929 at least, the natural rim of East Cameron Lake filled up again with blow sand and dirt as also did the spaded ditch which grassed over and was abandoned.

At the northeast corner of Linke Lake is a natural depression, draw, or watercourse containing what is described as an oxbow or horseshoe, thence extending several miles northeast into the Elkhorn River. In 1919 or 1920, a ditch was dug from such lake across the base of the oxbow by plaintiffs and one O'Brien, who then owned the Bogue lands involved here. Subsequently, however, during 1927 to 1930, plaintiff Floyd Lackaff owned such lands as well as that now jointly owned by plaintiffs. In that connection, such ditch

was filled up with blow sand and dirt to a depth of only 8 to 10 inches and grassed over, so that for many years no water passed through it and a car could readily drive over it. Clearly it was abandoned as early as 1929.

In 1949, with knowledge and permission of defendants Bogue, but upon the agreed condition that it would be filled by plaintiffs upon demand if damage resulted from it, plaintiffs excavated the rim of Linke Lake, reopened the old ditch, and constructed a new ditch across the base of the oxbow to a depth of about 3.1 feet below the flow line of the oxbow or horseshoe around which no water had flowed for more than 20 years prior to 1949. In 1949 plaintiffs also, without any permission, excavated the rim of East Cameron Lake at the northeast corner thereof, reopened the old ditch, and constructed new ditches therefrom north to and around defendant Bogue's fence corner and on west to a blowout, thence north again to a slough where the ditch ended. Such ditches caused the water from East Cameron Lake to thus flow and be diffused over the lands of defendants Bogue and into Linke Lake, thence north across the valley. For many years a road used by the public ran along the northerly rim of East Cameron Lake and except in the 1890s and during 1915 to 1920, no one ever saw water flow over such northerly rim. The evidence establishes that such ditches constructed by plaintiffs caused water in volume to be continuously discharged out of such lakes away from plaintiffs' land into the hay valley extending in a northerly and easterly direction upon and over the property of defendants and interveners, from which they sustained irreparable injury. When such damages occurred, defendants Bogue demanded that plaintiffs fill up the ditches and they promised to take care of the same, but failed and refused to do so. Thereafter defendant Stewart, with permission and direction of defendants Bogue, filled up the oxbow ditch for about 125 feet on lands owned by them, whereupon plaintiffs dynamited the fill and

brought this action. We conclude that the evidence was amply sufficient to sustain the judgment unless, as claimed by plaintiffs, they had a lawful right to so construct and maintain the ditches.

The only question left then is whether or not the judgment was contrary to law. We conclude that it was not. Plaintiffs argued that even if they were entirely at fault, still defendants and interveners have not shown their right to mandatory injunctive relief against plaintiffs. In that connection plaintiffs first argued that they did only what they had a right to do, in effect that they had a permissive easement since 1919 or 1920, and that in 1949 in any event defendants Bogue, at request of plaintiffs, consented to a reconstruction of the oxbow ditch and thus neither defendants nor interveners could obtain an injunction. The answer with regard to 1919 or 1920 is twofold. First, if plaintiffs had an easement it was extinguished by merger of title without any subsequent reservation thereof. See, 28 C. J. S., Easements, § 57, p. 720; 19 C. J., Easements, § 156, p. 945. Again, if plaintiffs had an easement it was entirely abandoned many years ago by them. This intent to abandon was established by many years of non-use, natural obliteration, and subsequent request for renewal thereof. See, 28 C. J. S., Easements, § 58, p. 722; 19 C. J., Easements, § 149, p. 940. With regard to 1949, assuming that a permissive easement was given by defendants Bogue, it was dependent upon an agreed condition that it could continue only so long as no damage arose therefrom, but if damage accrued because thereof, the right would cease. Damages evidently did occur, the condition ceased to exist, and plaintiffs' rights were thereby extinguished by agreement. 28 C. J. S., Easements, § 65, p. 732; 19 C. J., Easements, § 155, p. 944. In that connection, the general rule is that when an easement has been extinguished it cannot ipso facto be revived. 28 C. J. S., Easements, § 66, p. 733. In any event, we have said in Bussell v. McClellan, 155 Neb.

875, 54 N. W. 2d 81: "Of course what one could not legally do a group could not in concert legally do." In other words, neither plaintiffs nor defendants Bogue nor all of them could agree to violate the law and thereby flood and damage the lands of lower owners in such a case as that at bar.

Plaintiffs also contended that defendants and interveners failed to establish that their damage was caused by construction of the ditches herein, as distinguished from drainage flowing out of other claimed watercourses and from abnormal precipitation of rain and snow. Such contention may have some relation to the ability of defendants and interveners to subsequently recover dollar damages but it is not controlling upon the issues of injunction here presented where there is competent evidence that plaintiffs' ditches wrongfully and continuously drained water over their lands. Applicable language appears in Faught v. Platte Valley Public Power & Irr. Dist., 147 Neb. 1032, 25 N. W. 2d 889, where it is said: "We have said in Gering Irrigation District v. Mitchell Irrigation District, 141 Neb. 344, 3 N. W. 2d 566: '* * * a party seeking an injunction must establish by competent evidence every controverted fact necessary to entitle it to relief, an injunction will not lie unless the right is clear, the damage is irreparable and the remedy at law is inadequate to prevent a failure of justice.'

" 'Ordinarily, to warrant injunctive relief, it must clearly appear that some act has been done, or is threatened, which will produce irreparable injury to the party asking for such relief.' 43 C. J. S., Injunctions, § 23a, p. 446.

" 'Acts which destroy or result in a serious change of property either physically or in the character in which it has been held or enjoyed have been held to do an irreparable injury.' 43 C. J. S., Injunctions, § 23b (2), p. 448.

" 'As a general rule, where an injury committed by one against another is continuous or is being constantly

repeated, so that complainant's remedy at law requires the bringing of successive actions, that remedy is inadequate and the injury will be prevented by injunction. The fact that an injured person has the right of successive actions for the continuance of the wrong does not make it an adequate remedy at law which bars the jurisdiction of a court of equity to grant an injunction to restrain the continuance of the injury.' 43 C. J. S., Injunctions, § 24a, p. 449.

"As stated in Hackney v. McIninch, 79 Neb. 128, 112 N. W. 296: 'It is now well settled that injunction is a proper remedy, particularly when, as in this case, the injury is of a continuous nature and committed under a claim which indicates a continuance or frequent and constant repetition of it. Courts of equity take cognizance of these cases to prevent the vexation and harassment of continued disturbances, prevent a multiplicity of suits, and to preserve the right by restraining the commission and repetition of threatened injury. Pohlman v. Trinity Church, 60 Neb. 364; Carroll v. Campbell, 108 Mo. 550.' See, also, Hagadone v. Dawson County Irrigation Co., 136 Neb. 258, 285 N. W. 600; Mooney v. Drainage District, 126 Neb. 219, 252 N. W. 910."

As early as Davis v. Londgreen, 8 Neb. 43, this court held: "In such cases 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." Plaintiffs' contentions have no merit.

Plaintiffs contended that, under the facts established here, they had an absolute right in the interest of good husbandry to maintain the ditches regardless of the effect upon the lands of defendants and interveners. We conclude otherwise.

In that connection, plaintiffs, without prior approval of the Department of Roads and Irrigation, rely upon section 31-201, R. R. S. 1943, and authorities dealing with situations involving surface waters and temporary

sloughs, basins, or ponds where by ditches constructed wholly on the owners' land, such waters are caused to flow into natural watercourses or into natural depressions or draws on the owners' land, whereby such water may be carried into some natural watercourse, which are entirely distinguishable from the situation presented in the case at bar. Surface waters comprehend waters from rains, springs, or melting snows which lie or flow on the surface of the earth but which do not form part of a watercourse or lake. Restatement, Torts, § 846, p. 333; Krueger v. Crystal Lake Co., 111 Neb. 724, 197 N. W. 675; Morrissey v. Chicago, B. & Q. R. R. Co., 38 Neb. 406, 56 N. W. 946; Jack v. Teegarden, *supra.* As stated in 67 C. J., Waters, § 286, p. 863: "Surface waters cease to be such when they empty into and become part of a natural stream or lake, but they do not lose their character as such by reason of their flowing from the land on which they first make their appearance onto lower land in obedience to the law of gravity, or by flowing into a natural basin from which they normally disappear through evaporation or percolation, * * *." See, also, 56 Am. Jur., Waters, § 65, p. 547. Numerous cases will be found cited in Nebraska Law Bulletin, Vol. 6, p. 201, pointing out the distinctions here involved. The statutes and rules relied upon by plaintiffs have no controlling application here.

In Bussell v. McClellan, *supra,* speaking of section 31-201, R. R. S. 1943, this court said: "The section clearly means as it clearly says that in order that there shall be no liability in damages for the construction of a ditch or drain such as is authorized by the statute the ditch or drain must be 'wholly' on the owner's land and the water collected therein must be discharged in a natural watercourse or natural depression or draw on the owner's land." See, also, Rudolf v. Atkinson, 156 Neb. 804, 58 N. W. 2d 216.

As recently as Lackaff v. Department of Roads and Irrigation, 153 Neb. 217, 43 N. W. 2d 576, which involved

at least one of these same plaintiffs but a different permanent lake, plaintiffs contended that they were entitled, by virtue of section 31-201, R. R. S. 1943, to reconstruct another abandoned drainage ditch from such lake into a watercourse. This court, in sustaining a denial of that right, said: "It is apparent that section 31-201 is a general law dealing generally with drainage by landowners. Sections 81-702 and 81-705 deal with a specific subject, the drainage of natural lakes covering an area in excess of 20 acres at low water stage. Specific statutory provisions relating to a particular subject control over general provisions. Canada v. State, 148 Neb. 115, 26 N. W. 2d 509."

In Beem v. Davis, 111 Neb. 96, 195 N. W. 948, this court, referring to sections 8480 to 8486, Comp. St. 1922, now sections 81-702 to 81-708, inclusive, R. R. S. 1943, said: "The drainage and reclamation of swamps or ponds is a matter advantageous to the state and the public at large. Todd v. York County, 72 Neb. 207; Aldritt v. Fleischauer, 74 Neb. 66. On the other hand, the preservation of large bodies of water which form refuges for wild fowl and afford places for sport and recreation is also a matter of public concern. This has been recognized by the legislature in the enactment of sections 8480-8486, Comp. St. 1922. If it is desired to drain natural or perennial lakes, exceeding 20 acres in extent at low water, application must be made to the department of public works for a permit to do so. If the permit is refused the applicant may appeal to the district court. If the body of water is not a natural or perennial lake, and defendants herein are only slightly damaged by its drainage through a natural waterway, as alleged, the rule in Todd v. York County and Aldritt v. Fleischauer, *supra,* applies, and the owner may drain into a natural waterway upon his own land, using reasonable care not to damage the lower lands. But, if the lake belongs in the other category, then the injunction should be allowed, because plaintiffs have not applied

for a permit to drain it as the statute requires. This question is one of fact which must be determined from evidence."

In Davis v. Beem, 115 Neb. 697, 214 N. W. 633, this court held: "The principle that 'A landowner who is not guilty of negligence may, in the interest of good husbandry, accelerate surface water in the natural course of drainage without liability to the lower proprietor,' held inapplicable to the waters of a permanent lake on a cattle ranch in a semi-arid region.

"The draining of a lake through a cattle ranch over objections of an owner who would suffer recurring damages by the drainage, held properly prevented by injunction under the evidence outlined in the opinion."

In the opinion it was appropriately said: "There is no law authorizing defendants to injure or destroy these valuable hay meadows in order to create new hay meadows of their own. In equity there is a recognized rule that 'A landowner who is not guilty of negligence may, in the interest of good husbandry, accelerate surface water in the natural course of drainage without liability to the lower proprietor,' as stated in Steiner v. Steiner, 97 Neb. 449; but this rule by its own terms is limited to surface waters. It does not necessarily apply to the waters of a permanent lake having no surface outlet under normal conditions."

In Graham v. Pantel Realty Co., 114 Neb. 397, 207 N. W. 680, this court held: "Where water is impounded upon land by natural conditions whereby a lake is formed, the owner of such land has no lawful right to remove an impediment to its flowage and thereby cause such water to flow upon the land of another to his damage. For such injury injunction is a proper remedy and an injured party may recover such damages in the same action as he may have sustained by such wrongful act."

In the opinion it was said: "Certain it is that an upper proprietor cannot lawfully cut away the rim of

the banks, which incloses a body of standing water on his land, and by the installation of a system of ditches, thereby discharge such water over and upon the lower lands of his neighbor to his injury. This constitutes a nuisance for which the trespasser may be enjoined. And, besides, he may be held in the same suit, to make good for such damages as he may have so unlawfully occasioned." See, also, Warner v. Berggren, 122 Neb. 86, 239 N. W. 473; Rudolf v. Atkinson, *supra.*

Likewise, in Yocum v. Labertew, 145 Neb. 120, 15 N. W. 2d 384, this court, citing and quoting from like cases, held: "Where water is impounded upon land by natural conditions whereby a lake is formed, the owner of such land has no lawful right to remove an impediment to its flowage and thereby cause such water to flow upon the land of another to his damage.

"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."

We have been unable to find any authority and none has been cited by plaintiffs which could sustain their contentions. For the reasons heretofore stated, we conclude that the judgment of the trial court should be and hereby is affirmed. All costs are taxed to plaintiffs.

AFFIRMED.

EDNA M. PERRINE, APPELLANT, V. HAROLD HOKSER, APPELLEE.

62 N. W. 2d 677

Filed February 19, 1954. No. 33434.

1. **Appeal and Error.** It is error for the trial court to submit to the jury an issue not pleaded in the case.
2. **Trial.** The charge of the trial court to the jury should be

confined to the issues presented by the pleadings and supported by evidence.

3. **Automobiles.** It is a matter for the jury to decide, in the absence of an authorized requirement otherwise, whether under the circumstances before it the operator of a motor vehicle should have given a signal.
4. **Appeal and Error.** It is not error to refuse a requested instruction if the substance of it is included in the instructions given.
5. **Municipal Corporations: Evidence.** Courts do not usually take judicial notice of a municipal ordinance, and a party to have the benefit of it as evidence must generally plead and prove the existence of the ordinance.
6. **Appeal and Error.** Errors assigned by a litigant but not discussed by him will be considered waived and will usually not be examined or decided by this court.
7. **Damages: Appeal and Error.** If the jury finds the defendant in a personal injury action is not chargeable with negligence an error relating to the subject of damages is necessarily harmless.

APPEAL from the district court for Lancaster County: JOHN L. POLK, JUDGE. *Affirmed.*

Perry & Perry and *W. W. Nuernberger,* for appellant.

Stewart & Stewart and *William H. Meier,* for appellee.

Heard before CARTER, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

BOSLAUGH, J.

Appellant sought to recover damages from appellee on the basis that injury to her person and property by the collision of an automobile operated by appellant and a motor vehicle driven by appellee was caused by his negligence. A verdict for appellee was the result of the trial in the district court. A judgment was rendered in harmony with the verdict.

Appellant alleged that on or about October 15, 1951, at about 4 o'clock in the afternoon she was operating her automobile in a careful manner in an easterly direction on B Street between Tenth and Eleventh Streets in the city of Lincoln; that appellee was driving an automobile towards the east on B Street near the loca-

tion of the car of appellant in a careless and negligent manner; that appellee attempted to pass the car of appellant from the rear and in doing so failed to allow sufficient clearance on the right side of his vehicle for the car of appellant; that appellee turned his vehicle to the right in the street before there was clearance of the car of appellant as it was traveling to the east; that appellee ran his vehicle into, against, and upon the car of appellant; that appellee failed to have his vehicle under control; that he failed to yield the right-of-way to appellant; that appellee failed to keep a proper lookout for the car of appellant; that the vehicles collided as a proximate result of the said careless and negligent acts and omissions of appellee; and that multiple and serious injuries were caused appellant and these resulted in permanent disability. She pleaded and asked recovery of damages in a large amount.

Appellee by his answer admitted that at the time stated his automobile and one operated by appellant came in contact with each other at the place described by her; denied all other matters alleged by her; alleged that appellee was at the time the automobiles came in contact with each other operating his automobile in a careful and prudent manner; and that the contact of the cars with each other and any damage resulting to appellant were proximately caused or contributed to by her negligence which was more than slight compared to any negligence of appellee.

Appellant denied the contents of the answer of appellee and alleged that the negligence of appellee was gross in character.

Appellant claims prejudice because the trial court did not include in the charge to the jury instructions No. 2 and No. 6 tendered by her. The first of these proposed that the jury be advised that if it found that appellee failed to give an audible signal of his intention to pass the car of appellant that this omission would constitute a violation of the statutes of Nebraska, would

not necessarily constitute negligence, but should be considered with the other evidence in the case in determining whether or not the appellee was guilty of negligence which caused or contributed to the accident. The other proposal was in substance that the law of the state requires a motor vehicle to have a horn or other audible signal device capable of being heard for at least 200 feet; that it is the duty of a driver of an overtaking vehicle to give an audible signal of his intention to pass another motor vehicle; and that if the jury found that appellee passed the automobile of appellant without giving an audible signal of his intention to do so his failure in this regard should be considered by the jury as evidence of negligence.

The essence of the complaint made because of the refusal of the proposed instructions alluded to above was that the court was wrong in not instructing the jury that the failure of appellee to sound the horn on his automobile at the time he attempted to pass the car of appellant was evidence of negligence competent for the jury to consider with all the other evidence in deciding the issue of negligence of appellant. The refusal of the court was justified in this respect by the absence from the petition of appellant of a charge that appellee failed to sound his horn and that the failure to give a signal of his intention to pass the car of appellant caused or contributed to the collision of the vehicles. Any instruction on the failure of appellee to give a signal of his intention to pass the car of appellant would have given her the benefit of a specification of negligence not claimed by her as a part of her cause of action. It is error for the trial court to submit to the jury an issue not raised by the pleadings. Citizens Nat. Bank v. Sporn, 115 Neb. 875, 215 N. W. 120; Reid v. Brechet, 117 Neb. 411, 220 N. W. 590. The requirement of the law is that instructions given by the trial court be confined to the issues pleaded and supported by evidence. Becks v. Schuster, 154 Neb. 360, 48 N. W. 2d 67.

The first tendered instruction noticed above is not a correct statement of any rule of law. It asserts that failure of appellee to give an audible signal was a violation of the statute. The statute quoted in the proposal does not require an operator of a motor vehicle to give such a signal before passing another car moving in the same direction. § 39-7,109, R. R. S. 1943. The obligation imposed by the statute is that the driver of an overtaken vehicle shall give way in favor of the overtaking vehicle on the giving of an audible signal. The assertion of the tendered instruction No. 6 that it is the duty of a driver of a motor vehicle to give an audibile signal of his intention to pass another vehicle overtaken by the former is not true. The duty of the operator of a motor vehicle to signal depends upon the circumstances of the case. It is ordinarily a matter for the jury to decide whether or not under the circumstances before it the driver should have given a signal. Tews v. Bamrick, 148 Neb. 59, 26 N. W. 2d 499; Adams v. Welliver, 155 Neb. 331, 51 N. W. 2d 739. The action of the trial court in refusing the proposals of appellant discussed above was correct.

Appellant complains of the refusal of her requested instructions No. 4 and No. 5. The first of these was to the effect that it was negligence as a matter of law for a passing motor vehicle not to clear the overtaken vehicle before returning to the right lane of travel. The other proposal was in substance that it is negligence as a matter of law for the passing vehicle to interfere with the right-of-way of the overtaken vehicle. Appellant has not directed the court to any decision that acts of this character are negligence as a matter of law. A search has failed to lead to a determination by this court that it is negligence as a matter of law to fail to clear an overtaken vehicle when passing it. That is an improbable conclusion because it would mean that a passing operator of a motor vehicle would be negligent as a matter of law although the driver of the over-

taken car turned into the side of the passing car. The effect of the proof in this case tends to establish that is what caused the accident here complained of. Johnson v. Schrepf, 154 Neb. 317, 47 N. W. 2d 853, says: "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." The proposals of appellant disregarded the qualification or condition expressed by the words "when the driver of the vehicle being passed is without fault." An instruction which does not state the law should be refused. Likewise it is not improper for the trial court to withhold from the jury a correct tendered instruction if the substance of it is included in instructions given. Peacock v. J. L. Brandeis & Sons, 157 Neb. 514, 60 N. W. 2d 643. The court, by the charge given, told the jury that the laws of Nebraska provide that the driver of a vehicle overtaking another vehicle proceeding in the same direction shall pass to the left thereof at a safe distance, and shall not again drive to the right of the roadway until safely clear of the overtaken vehicle. The court also advised the jury that if it found from the evidence that any of the parties violated any of the laws of the State of Nebraska, as set out in these instructions, the violation thereof was not in and of itself negligence as a matter of law but the violation was evidence of negligence which it should consider together with all the other evidence in the case to determine whether or not the parties or any of them were guilty of negligence.

An assignment of error relates to the refusal to give instruction No. 3 tendered by appellant. This concerned an ordinance of the city of Lincoln. The petition made no mention of it. Courts do not generally take judicial notice of a municipal ordinance. Pleading and proof thereof are required. This requirement was ap-

plicable here. There was no general allegation of negligence. Spomer v. Allied Electric & Fixture Co., 120 Neb. 399, 232 N. W. 767; Carter v. Zdan, 151 Neb. 185, 36 N. W. 2d 781. The ordinance was not offered by appellant as proof in her case-in-chief. Her offer of it was a part of her objection to an offer of evidence by appellee while he was making his case. The offer of appellant was rejected by the court. The action of the court in this regard is not assigned as error. The offer of the ordinance was not renewed as rebuttal evidence, neither did appellant attempt to withdraw her rest and have it included as a part of her case-in-chief. The action of the court in rejecting her tendered instruction No. 3 was not error.

The assignment that the trial court erred in giving instructions Nos. 5, 6, 7, 8, 16, and 17, and each of them, is not discussed or again mentioned in the brief of appellant, except as the instructions enumerated or some of them pertain to the duty of a motorist to give an audible signal of his intention to pass another vehicle and to his duty to clear the overtaken vehicle. It will not be further considered. Errors assigned by appellant but not discussed by him will be considered waived and will not be examined by this court. Schluter v. State, 153 Neb. 317, 44 N. W. 2d 588; Johnson v. Richards, 155 Neb. 552, 52 N. W. 2d 737.

The errors claimed by appellant which have not been discussed herein relate to evidence produced by appellee in reference to the physical condition of appellant and the subject of damages. The evidence was sharply in conflict as to the manner and cause of the collision of the automobiles. The trial court properly submitted the issue of negligence of appellee and the issue of contributory negligence of appellant to the jury and fully advised it of the doctrine of comparative negligence and its effect. The verdict for appellee was necessarily a finding either that he was not chargeable with negligence which proximately caused or contributed to the

accident or that appellant was guilty of such contributory negligence as deprived her of any recovery. The jury did not reach the question of damages in this case. Any incorrect ruling of the court that concerned the matter of damages was error without prejudice. The finding of the jury that appellant had no cause of action against appellee foreclosed the possibility of prejudicial error in the receipt or rejection of evidence on the subject of damages. In re Estate of Potts, 144 Neb. 729, 14 N. W. 2d 323, states the rule: "Where a jury found the defendant to be free from negligence in a personal injury action, an error in the instruction stating the measure of damages is necessarily harmless." See, also, Shiman Bros. & Co. v. Nebraska Nat. Hotel Co., 146 Neb. 47, 18 N. W. 2d 551; Potach v. Hrauda, 132 Neb. 288, 271 N. W. 795; Murphy v. Shibiya, 125 Neb. 487, 250 N. W. 746; Mensinger v. Ainsworth Light & Power Co., 94 Neb. 465, 143 N. W. 475; Whiteside v. Adams Express Co., 89 Neb. 430, 131 N. W. 953.

The judgment should be and it is affirmed.

AFFIRMED.

JAMES E. BAUM ET AL., APPELLANTS, V. BAUM HOLDING COMPANY ET AL., APPELLEES.

62 N. W. 2d 864

Filed February 19, 1954. No. 33454.

1. **Corporations.** If a purported corporation has no existence, either de jure or de facto, it is subject to collateral attack by private persons as well as the state.
2. **Corporations: Quo Warranto.** If, however, a company has corporate existence, either de jure or de facto, a suit questioning its corporate capacity must be by direct attack by the state by quo warranto proceedings.
3. **Corporations.** In order for a de facto corporation to exist there must be a statute authorizing a corporation de jure.
4. ———. A purported corporation having no authority for its existence by statute may become a de facto corporation by the

amendment of the statute authorizing the organization for the objects and purposes for which it was purported to have been organized in the first instance, where there has been a colorable compliance with its requirements and an actual user of corporate power.

5. ———. The power granted by section 21-1,141, R. S. 1943, for corporations to own and hold capital stock of another corporation is an independent as distinguished from an incidental power.
6. ———. A corporation owning and holding stock in another corporation is authorized to vote such stock by the express provisions of section 21-1,141, R. S. 1943.
7. ———. When a company is made a party defendant in a suit questioning its existence as a corporation, it is a recognition of its corporate existence.
8. ———. The stock owned by a corporation may be voted as directed by a majority of the stockholders of the corporation.
9. ———. Provisions contained in the articles of incorporation may be sustained as a contractual obligation, though they may appear invalid as an infringement upon the right of ownership of property.
10. ———. The organization of a holding company for the express purpose of gaining control of another corporation is not an unlawful object.
11. ———. Majority stockholders may be held responsible in a proper action for fraud or a breach of trust toward minority stockholders.
12. ———. The majority stockholders and directors are required to comply with the articles of incorporation with respect to the distribution of earnings and, upon failure to so comply, they will be compelled to do so at the suit of the corporation or an injured stockholder.

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

Kennedy, Holland, DeLacy & Svoboda, for appellants.

King, Haggart & Kennedy, for appellees.

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

CARTER, J.

This is an action for a declaratory judgment declaring

the rights, status, and other legal relations of the Baum Realty Company and the Baum Holding Company, and the stockholders of each, with relation to the facts pleaded in the petition, and praying for an injunction and other equitable relief. The trial court sustained a demurrer to the petition and dismissed the action. Plaintiffs appeal.

As a matter of convenience the Baum Realty Company will be referred to as the realty company and the Baum Holding Company will be designated as the holding company.

On February 18, 1922, the realty company was incorporated under the laws of this state. Its incorporation appears to have been the result of a disagreement between David A. Baum and the heirs of James E. Baum. The stockholders were all members of the Baum family who were the owners of the Bennett Building at Sixteenth and Harney Streets in Omaha and the adjoining garage property at Seventeenth and Howard Streets. The purpose of the incorporation of the realty company was to place the ownership and management of these properties in the hands of a corporation as a matter of convenience. Stock was issued in the amount of 1,237 shares to the members of the family in proportion to their interests in the property. It is important to note that David A. Baum and members of his immediate family became the owners of less than a majority of the stock of the realty company.

It appears from the petition that David A. Baum, Daniel Baum, Charles L. Baum, and Margaret Greer Baum, shortly after the incorporation of the realty company, organized the holding company. The four of them owned 620 shares of stock in the realty company, a majority of the stock of the latter company. Each assigned his shares of stock in the realty company to the holding company and received in exchange therefor an equal number of shares of holding company stock. The 620 shares of realty company stock constitute the total

assets of the holding company, and under its articles of incorporation it can have no assets other than the realty company stock.

The articles of incorporation of the holding company state that the purpose of its organization was "to acquire, own and hold 620 shares of the par value of $100 per share of Baum Realty Company, a Nebraska corporation." The articles also provided: "The corporation shall have power to purchase additional shares of stock of said Baum Realty Company but shall not have power to sell, transfer, assign or otherwise dispose of any stock of Baum Realty Company acquired, owned, held, or controlled by it at any time except as hereinafter provided for in these articles." It was provided elsewhere in the articles that "The property of this corporation may be sold as a whole but not in part, and only by consent of at least ⅔rds of the outstanding stock of the corporation." It was further provided that the articles could not be amended except upon a vote "of at least ⅔rds of the outstanding stock." The petition further alleges that David A. Baum and his daughter, Margaret Greer Baum, owned more than two-thirds of the stock of the holding company at the time it was organized, and that the defendants other than the holding company, the State of Nebraska, and the Attorney General of the State of Nebraska, are the successors in interest and the present owners of the stock owned by David A. Baum and Margaret Greer Baum when the holding company was organized.

The petition alleges that it appears on the face of the articles of incorporation of the holding company that it was the purpose of David A. Baum to create a holding company to hold a majority of the shares of stock of the realty company, which he could control by virtue of his ownership of a majority of the holding company stock. By this device, it is alleged, he could vote the 620 shares of realty company stock owned by the holding company and thereby control completely both cor-

porations, although he was in fact a minority stockholder in the realty company. The minority stockholders question the right of the majority stockholders of the holding company to thus control the realty company and, more particularly, to do the following: (a) To cast the vote of 620 shares of realty company stock held by the holding company as a unit, regardless of the wishes of the other stockholders of the holding company, (b) to sell or prevent the sale of all or any part of said 620 shares of the stock of the realty company, (c) to control absolutely the affairs of the realty company through their power to elect a majority of its board of directors, (d) to control absolutely the affairs of the holding company through their power to elect a majority of its board of directors, and (e) to prevent any amendment of said articles that would tend to change the situation.

It is the contention of the defendants that plaintiffs, as stockholders in the holding company, cannot question the validity of the holding company as a corporation. The answer to this question turns on whether or not the holding company is a corporation, either de jure or de facto. If the holding company has no existence, either de jure or de facto, it is subject to collateral attack and plaintiffs can properly question it as a legal entity in the manner here sought. But if the holding company is a corporation, de jure or de facto, a suit to destroy it must be by direct attack by the state by quo warranto proceedings. Parks v. James J. Parks Co., 128 Neb. 600, 259 N. W. 509.

It is urged by the plaintiffs that corporations in this state were not permitted to hold and own stock in another corporation at the time the holding company was organized. We assume, without deciding the question, that this was true. In 1941, however, the Legislature enacted Chapter 41, section 77, Laws 1941, now section 21-1,141, R. S. 1943, which provides: "Any corporation operating or organized under this article may guarantee, purchase, hold, sell, assign, transfer, mortgage, pledge

or otherwise dispose of, the shares of the capital stock of, or any bonds, securities or evidence of indebtedness created by any other corporation or corporations of this state or any other state, country, nation or government, and while owner of said stock may exercise all the rights, powers, and privileges of ownership including the right to vote thereon."

The defendants contend that with the adoption of section 21-1,141, R. S. 1943, the power to organize a corporation to hold the stock of another was specifically granted and from and after that enactment, a de jure corporation could exist. The petition shows that the holding company carried on as a corporation many years after 1941. Officers were elected and dividends were paid. Plaintiffs recognized the holding company as a corporation until the difficulties arose which brought about this suit. We agree with the defendants that the enactment of section 21-1,141, R. S. 1943, was sufficient authority to organize a de jure corporation for the holding of stock in another corporation and, consequently, it affords a sufficient basis for a holding that the holding company was a de facto corporation after its enactment.

The Illinois court had a somewhat similar question before it in Lewis v. West Side Trust & Savings Bank, 376 Ill. 23, 32 N. E. 2d 907. In that case it appeared that when the original corporation was formed there was no statutory authority for it to invest in the stock of another corporation. Subsequently the statutes of that state were amended to permit such a corporation to own and hold such stock, such amendments being identical to those made in the case before us. It was there contended that the amendments would not apply to a previously existing company which had not amended its articles to conform to the new law. The court held to the contrary, saying: "The legislature, which is the judge of what is politic for this State, changed its policy by the 1919 Corporation act, and stockholding by corporations was thereby authorized. Another answer to

the point that the defendant had not accepted the 1919 act assuming, arguendo, that acceptance was necessary, is that the act could be accepted by user, where no other method was prescribed * * *." See, also, Roedelsheim v. Twelfth Street Store Corporation, 325 Ill. App. 692, 60 N. E. 2d 650.

It is a fundamental principle that there cannot be a corporation de facto where there are no laws authorizing a corporation de jure. Assuming that there were no laws authorizing a corporation de jure prior to the enactment of Chapter 41, Laws 1941, such authorization clearly existed after the adoption of that act. A purported corporation was in existence which could have been organized pursuant to the 1941 corporation act. A colorable compliance with the act subsequent to 1941 was had. There was an actual user of the authority granted by the act in which the plaintiffs participated and acquiesced. The holding company carried on business in full compliance with Chapter 41, Laws 1941, for many years before plaintiffs undertook to question its validity and powers. In discussing the nature of de facto corporations this court has said: "But, ofttimes, an association may not be able to justify itself when called on by the state to show by what authority it assumes to be, and acts as, a corporation. It may, however, be so far a corporation that, for reasons of public policy, no one but the state will be permitted to call in question the lawfulness of its organization. Such is what is termed a corporation de facto; that is, a corporation from the fact of its acting as such, though not in law or of right a corporation." Parks v. James J. Parks Co., *supra.* We conclude therefore that as to parties involved in this litigation, they are estopped to deny that the holding company is what it held itself out to be. We quote again from the case of Parks v. James J. Parks Co., *supra:* "A substantial compliance will create a corporation de jure. But there must be an apparent attempt to perfect an organization under the

law. There being such apparent attempt to perfect an organization, the failure as to some substantial requirement will prevent the body being a corporation de jure; but, if there be user pursuant to such attempted organization, it will not prevent it being a corporation de facto."

The holding company being a de facto corporation it cannot be attacked collaterally and its legality as an entity may be called into question only by direct attack by the state. "The reason a collateral attack by a third person will not avail against a corporation de facto is that, if the rights and franchises have been usurped, they are the rights and franchises of the state, and it alone can challenge the validity of the franchise. Until such interposition, the public may treat those in possession and exercising corporate powers under color of law as doing so rightfully. The rule is in the interest of the public and is essential to the safety of business transactions with corporations. It would produce disorder and confusion, embarrass and endanger the rights and interests of all dealing with the association, if the legality of its existence could be drawn into question in every suit in which it is a party or in which rights were involved springing out of its corporate existence." Thies v. Weible, 126 Neb. 720, 254 N. W. 420. In Haas v. Bank of Commerce, 41 Neb. 754, 60 N. W. 85, we also said: "It would be intolerable to permit in any civil action, to which such a body was a party, an inquiry into the legal right to exercise corporate functions - a right which it is for the state alone to question in appropriate proceedings for that purpose. On this there is a substantial unanimity in the authorities."

Plaintiffs urge that in any event the right of one corporation to own and hold stock in another as permitted by the 1941 act is not an unlimited one, but merely a power to be exercised incidentally by a corporation organized for some purpose other than the mere holding of stocks. The statute bears no such construction and

the articles themselves cannot be so limited where the only purpose, as here, is the holding of stocks in a named corporation. Cases which interpret the objects and purposes of a corporation as stated in its articles with respect to the holding of stocks of other corporations are not pertinent to the construction to be placed upon the statutory provision relating thereto in the 1941 act. Such act, section 21-1,141, R. S. 1943, contains no language from which it can be inferred that the right to own and hold stock of another corporation is an incidental as distinguished from an independent power.

It is also urged that a corporation owning and holding the capital stock of another is not entitled to vote its stock or otherwise participate in the management or control of the corporation in which it acquires stock. Whatever the rule may be in the absence of statute, we point out that such right is expressly granted by section 21-1,141, R. S. 1943.

We point out, also, that the holding company is made a party defendant to this litigation. This is a recognition of its corporate existence by the plaintiffs. State ex rel. Summers v. Uridil, 37 Neb. 371, 55 N. W. 1072; State ex rel. Caldwell v. Lincoln Street Ry. Co., 80 Neb. 333, 114 N. W. 422, 14 L. R. A. N. S. 336; State ex rel. Bute v. Village of College View, 88 Neb. 232, 129 N. W. 296.

For the reasons stated, that part of the petition which questions the existence of the holding company as a corporation does not state a cause of action on the part of these plaintiffs.

The plaintiffs as minority stockholders question the right of the holding company to vote the 620 shares of realty company stock owned by it as a unit as directed by the majority stockholders of the holding company. The answer to this contention is found in section 21-1,141, R. S. 1943, wherein it is stated that "Any corporation operating or organized under this act may guarantee, purchase, hold, * * * the shares of the capital

stock of * * * any other corporation or corporations of this state * * *, and while owner of said stock may exercise all the rights, powers, and privileges of ownership including the right to vote thereon." It is clear that the holding company has statutory authority to vote the stock owned by it as a unit. There is no merit to this contention of the plaintiffs.

Plaintiffs assert that the majority stockholders of the holding company have no right to sell or prevent the sale of all or any part of the 620 shares of stock of the realty company, or to prevent the amendment of the articles of incorporation so as to change the situation created by the organizers of the holding company when they adopted its articles. It is true, as we have hereinbefore quoted, that the articles of incorporation of the holding company provide that no part of the 620 shares of stock of the realty company owned by the holding company can be sold without the approval of the owners of two-thirds of the stock of the holding company and that the articles of incorporation of the holding company may not be amended except by the approval of the owners of two-thirds of the stock of the holding company. The question here presented is whether the court, at the instance of dissatisfied minority stockholders, may compel action in conflict with the adopted articles of the corporation. We find no statute prohibiting the provisions contained in the articles. It is not urged that they are in violation of any statute.

It is asserted in the petition that David A. Baum induced his two brothers, Daniel Baum and Charles L. Baum, to join with him in organizing the holding company for the express purpose of gaining personal control of the company. This is not an unlawful object. Contracts between stockholders whereby they agree or combine for the election of directors or other officers, so as to secure or retain control of the corporation where the object is to carry out a particular policy with a view to promote the best interests of stockholders, have been

generally upheld. We can see no reason why the same object may not be attained by the organization of a holding company as by a contract between the parties. In one sense of the word the organization of the holding company is by virtue of an agreement. David A. Baum, Daniel Baum, Charles L. Baum, and Margaret Greer Baum entered into the agreement to organize the holding company. They knew the contents of the articles of incorporation and affixed their signatures thereto. It is not claimed that any wrong was perpetrated in so doing, other than the claim that David A. Baum was seeking to control the corporation, an object that we have held to be entirely proper. This court has held that the contents of articles and by-laws may be held valid as an agreement between the parties, even if the validity of such may be subject to question. Elson v. Schmidt, 140 Neb. 646, 1 N. W. 2d 314, 138 A. L. R. 641. It would seem therefore that the provisions of the articles of incorporation, even though they appear to infringe upon the right of ownership of property, may be sustained as a contractual restriction. The argument advanced by the plaintiffs that defendants have acted fraudulently or in violation of their trust relationship with the minority stockholders has no merit in this case for the reason that facts are not alleged which constitute fraud or a breach of trust. We concede that majority stockholders must act honestly and if fraud or a breach of trust toward minority stockholders can be shown, the law provides a remedy. But the petition before us does not plead facts entitling plaintiffs to such a remedy.

The petition does allege that the articles of incorporation of the realty company provide that the net income of the corporation shall be distributed monthly. It further states that the defendants Sloan Allen and Margaret Greer Baum Allen as majority stockholders and directors have willfully refused to comply with this provision of the articles and have withheld net

income from distribution in violation thereof. The realty company appears as a party plaintiff asking that the defendants be compelled to comply with the provisions of its articles. This clearly states a cause of action against the officers and directors of the realty company. On this issue the trial court was in error in sustaining the demurrer to the petition. If these allegations are found to be true upon a trial, plaintiffs are clearly entitled to relief.

The judgment of the district court is therefore reversed and the cause is remanded with directions to the district court to enter an order overruling the demurrer and requiring the defendants to answer that part of the petition stating a cause of action against them as herein found. The costs of this appeal are taxed against the defendants Sloan Allen and Margaret Greer Allen.

REVERSED AND REMANDED WITH DIRECTIONS.

DOROTHY L. STYSKAL, APPELLEE, V. LEONARD L. BRICKEY, APPELLANT.

62 N. W. 2d 854

Filed February 19, 1954. No. 33459.

1. **Trial.** Each party to a lawsuit is entitled to have the jury pass upon the evidence without having its effect or importance altered, either as to credibility or value, by the indulgence of the court in remarks to witnesses or comments upon them or their testimony, which may tend either to magnify or diminish it in the jury's estimation.
2. ———. It is the duty of the trial judge to instruct the jury upon the law of the case, whether requested by counsel to do so or not.
3. **Appeal and Error.** It is error to submit issues upon which there is no evidence to sustain an affirmative finding.
4. **Negligence.** An instruction which does not limit negligence to that charged in the plaintiff's pleading, but authorizes recovery for negligence generally, is objectionable.
5. **Highways: Automobiles.** When, at an intersection, traffic con-

trol signals are in operation or traffic is being directed by police officers, such traffic control signals or directions by police officers shall have precedence over stop signs and are controlling thereof.

6. ———: ———. A "go" signal at a street intersection confers no authority on the driver of an automobile who receives this signal to proceed across that intersection regardless of other persons or vehicles that may already be within it. It is not a command to go, but a qualified permission to proceed lawfully and carefully in the direction indicated.
7. ———: ———. A motor vehicle having started to cross an intersecting street in accordance with the signal light is ordinarily entitled to complete the crossing notwithstanding a change in lights.
8. ———: ———. A vehicle entering a street intersection with a traffic light in his favor is under obligation to use due care and to yield the right-of-way to vehicles in the intersection. His right-of-way is subject to the rights of those already in the intersection.
9. **Negligence: Trial.** Where it is claimed that the conduct of another, not a party to the suit, was the sole proximate cause of the accident such defense is not an affirmative plea in avoidance of plaintiff's cause of action and imposes no burden of proof upon defendant with relation thereto but is one entirely consistent with and provable under the general issue. However, some place in the instructions the jury should be advised that if it should find the sole proximate cause of the accident in which plaintiff was injured was the negligence of the other then its verdict should be for the defendant.
10. **Automobiles.** The duty of a guest riding in an automobile is to use care in keeping a lookout commensurate with that of an ordinarily prudent person under like circumtances. The guest is not required to use the same degree of care as devolves upon the driver. If the guest perceives danger, or if at certain times and places should anticipate danger, he should warn the driver. Ordinarily the guest need not watch the road or advise the driver in the management of the automobile.

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

Fraser, Connolly, Crofoot & Wenstrand, for appellant.

Cranny & Moore, for appellee.

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

WENKE, J.

Dorothy L. Styskal commenced this action in the district court for Douglas County against Leonard L. Brickey. It is a tort action arising out of an automobile accident. Plaintiff recovered a verdict and from an order overruling his motion for either a judgment notwithstanding the verdict or a new trial the defendant has appealed.

The accident in which appellee was injured happened shortly after 5 p. m. on Saturday, March 29, 1952. It occurred in the intersection of Twenty-first Street and Railroad Avenue. This intersection is located in South Omaha, Nebraska. Railroad Avenue is a through street carrying U. S. Highways Nos. 73 and 75. At its intersection with Twenty-first Street, Railroad Avenue is surfaced to a width of 64 feet. It has four lanes of travel, two each way, with a parking area at each curb. It runs in a northwesterly and southeasterly direction. Twenty-first Street is surfaced to a width of 24 feet and runs north and south, consequently it intersects Railroad Avenue at an angle. Twenty-first Street ends with Railroad Avenue but the intersection is completed by a slight jog to the east to connect with Gilmore Avenue which extends south from Railroad Avenue. Traffic at the intersection is controlled by two automatic signals. One signal is located just south of the south curb of Railroad Avenue at a point approximately 5 feet west of the west curb line of Twenty-first Street if it was extended across Railroad Avenue. The other is just north of the north curb of Railroad Avenue at a point where the east curb line of Gilmore Avenue would intersect the north curb of Railroad Avenue if the former was extended across Railroad Avenue. The traffic signal on the north side of Railroad Avenue is 137 feet east of the east curb line of Twenty-first Street,

thus making it necessary for a car traveling northwest on Railroad Avenue to travel that distance, after passing this traffic light, in order to reach and enter the actual intersection of Twenty-first Street and Railroad Avenue. At the time of the accident appellant was driving his 1950 Chevrolet sedan toward the northwest on Railroad Avenue in the outer lane for travel. At the same time Louis Styskal, appellee's father, was driving his 1933 Ford coach south on Twenty-first Street. Appellee was riding with her father, sitting on the right-hand side of the front seat. The impact of the two cars occurred in the intersection in the outer lane of traffic for west-bound cars. The Styskal car ran into the right side of appellant's car.

The first question presented is, did the conduct of the trial judge prevent appellant from having a fair trial? This question relates itself primarily to the language used by the trial judge in ruling on the admissibility of the testimony of several of appellant's witnesses and to voluntary comments of the trial judge relating thereto.

In this regard we have said: "In jury trials the credibility of a witness and the weight of his testimony are matters for the jury and not for the court. As stated in 64 C. J. 90: 'In accordance with the general rule that the judge presiding at a trial must conduct it in a fair and impartial manner, he should refrain from making any unnecessary comments or remarks during the course of a trial which may tend to a result prejudicial to a litigant or are calculated to influence the minds of the jury. A remark or comment which is shown to be prejudicial to the rights of the party complaining, or which is such that it may be assumed prejudice will result therefrom, is fatal to the validity of the trial; * * *.' And as stated in Abbott, Civil Jury Trials (5th ed.) 1082: 'Each party is entitled to have the jury pass upon the evidence without having its effect or importance altered, either as to credibility or value, by the indul-

gence of the court in remarks to witnesses or comments upon them or their testimony, which may tend either to magnify or diminish it in the jury's estimation.' " Langdon v. Loup River Public Power Dist., 144 Neb. 325, 13 N. W. 2d 168.

" 'In the trial of a cause before a jury, improper comments of the trial judge from the bench may be prejudicially erroneous where they tend to discredit a witness and his testimony.' McCulley v. Anderson, 119 Neb. 105, 227 N. W. 321. And as stated in In re Estate of Strelow, 117 Neb. 168, 220 N. W. 251: '* * * under our practice the jury are the sole judges of the credibility of the witnesses, and the weight to be given their testimony. Hence, it is our conclusion that such remark made by the trial judge was without the province of the court, and was erroneous and prejudicial.' See, also, Langdon v. Loup River Public Power District, 144 Neb. 325, 13 N. W. 2d 168. Judges should be careful in jury trials and refrain from commenting upon witnesses or their testimony for each party is entitled to have the jury pass upon the evidence without having its effect or importance altered, either as to credibility or value." Stoffel v. Metcalfe Construction Co., 145 Neb. 450, 17 N. W. 2d 3.

We have come to the conclusion that the record leaves no doubt of the fact that appellant did not have a trial of his rights in the fair and impartial manner that our system of jurisprudence contemplates. Having come to this conclusion it would serve no useful purpose to quote the numerous comments of the trial judge that seriously reflect on the credibility of appellant's witnesses and the weight of their testimony.

Having come to the conclusion that a new trial must be had, we come next to the question of whether or not appellant's motion for a judgment notwithstanding the verdict should have been sustained. For the purpose of determining this issue we must apply the following principles in considering the evidence adduced:

"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." Stark v. Turner, 154 Neb. 268, 47 N. W. 2d 569.

"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." Stark v. Turner, *supra.*

Considering the evidence in this light we think it would support a jury's finding that appellant was guilty of one or more of the following specifications of negligence set forth in appellee's petition: "* * * That the Defendant violated the mandate of a red signal light governing him and directing him to stop, and ran through said red signal light. * * * That Defendant failed to yield the right of way to Plaintiff's automobile which was on his right, and which had first entered said intersection of 21st Street and Railroad Avenue."

"It is the duty of the trial judge to instruct the jury upon the law of the case, whether requested by counsel to do so or not, * * *." Shiers v. Cowgill, 157 Neb. 265, 59 N. W. 2d 407.

In view of the specifications of negligence set forth in the court's instruction No. 1 that find no support in the evidence and the general language of its instruction No. 4, we call attention to the following principles that are applicable thereto:

" 'This court has often pointed out that it is error to submit issues upon which there is no evidence to sustain an affirmative finding. It is the duty of trial courts to determine the issues upon which there is competent evidence and submit them, and them only, to the jury. The submission of issues upon which the evidence is

insufficient to sustain an affirmative finding is generally very prejudicial and invariably results in a second trial.' (Johnson v. Anoka-Butte Lumber Co., 141 Neb. 851, 5 N. W. 2d 114.)" Simcho v. Omaha & C. B. St. Ry. Co., 150 Neb. 634, 35 N. W. 2d 501.

"As stated in 38 Am. Jur., Negligence, § 370, p. 1090: 'An instruction which does not limit negligence to that charged in the plaintiff's pleading, but authorizes recovery for negligence generally, is objectionable.'" Ellis v. Union P. R. R. Co., 148 Neb. 515, 27 N. W. 2d 921.

In its instruction No. 1 the court submitted the following: "* * * that defendant operated his automobile at the time and place at a speed greater than was reasonable and prudent, having regard for the traffic and use of the street."

By its instruction No. 7 the court advised the jury that: "There is no testimony in this case of excessive speed of either of the drivers, so that question need not be considered by you, * * *."

When a specification of negligence finds no support in the evidence it should be omitted. It is not good practice to submit it and then advise the jury it need not be considered.

We come then to the question of the conduct of the driver of the car in which appellee was riding and whether or not, if negligent, it could be found to be the sole proximate cause of the accident. The first contention in this regard is that the trial court refused and failed, although requested to do so, to instruct the jury that the driver of the car in which appellee was riding was required to stop at a stop sign located on the west side of Twenty-first Street for traffic approaching the intersection on that street. It becomes apparent, from what has been said, that traffic approaching Railroad Avenue on Twenty-first Street was confronted with two signals, that is, the automatic signal light and a stop sign. It is apparently appellant's thought that the driver of

the car in which appellee was riding was under obligation to obey both.

Bearing in mind that Railroad Avenue is a state highway carrying U. S. Highways Nos. 73 and 75 it would ordinarily, because of the stop sign, be the duty of any driver of a vehicle approaching it to come to a full stop as near the curb line as possible before driving onto it and give the right-of-way to vehicles upon the highway until such time, after stopping, as he could drive onto the highway without interfering with the traffic thereon. See §§ 39-724 and 39-754, R. R. S. 1943.

As stated in Meyer v. Hartford Bros. Gravel Co., 144 Neb. 808, 14 N. W. 2d 660: "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 for him to proceed into the intersection." See, also, Schrage v. Miller, 123 Neb. 266, 242 N. W. 649; Simcho v. Omaha & C. B. St. Ry. Co., *supra;* Borcherding v. Eklund, 156 Neb. 196, 55 N. W. 2d 643; Dorn v. Sturges, 157 Neb. 491, 59 N. W. 2d 751.

But section 39-767, R. R. S. 1943, provides: "* * * that local authorities shall have power to provide by ordinance for the regulation of traffic by means of traffic officers or semaphores or other signaling devices on any portion of the highway where traffic is heavy or continuous, * * *."

The city of Omaha has provided by ordinance as follows:

Section 55-3.2 provides: "Operators of all vehicles and street cars are required to observe the instructions of all traffic signs placed under the provisions of this Article. Such signs shall include all lettered signs, all buttons in streets or on curbing, all mechanical traffic signals, and all paint or other markings placed upon the surface of the roadway. Such signs shall be held to

have the same authority as the personal direction of a Police Officer."

Section 55-7.19 provides: "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."

Section 55-3.3 provides: "Whenever traffic at an intersection is controlled by a traffic control signal, exhibiting colored lights, or written directions, such lights or directions shall indicate as follows:

"GREEN OR 'GO': Traffic facing the signal may proceed, except the vehicular traffic shall yield the right-of-way to pedestrians lawfully entering a crosswalk or intersection at the time such sign was exhibited.

"YELLOW OR 'CAUTION': Traffic facing the signal shall stop before entering the nearest crosswalk in the intersection unless so close to the intersection that a stop cannot be made in safety.

"RED OR 'STOP': Traffic facing the sign shall stop before entering the nearest crosswalk in the intersection or at such other point as may be designated by signs or markings placed by the Superintendent and remain standing until Green or Go is shown."

Section 55-7.18 provides: "Every driver of a vehicle or street car or other conveyance traveling upon any street intersecting any through street above designated, shall stop such vehicle, street car, or other conveyance at the place where such street meets the prolongation of the nearest property line of such through street or at such point where signs have been erected, subject, however, to the direction of any traffic control sign or signal or any Police Officer at any such intersection."

It will thus be observed the city of Omaha enacted ordinances to control situations of this kind and gave traffic control signals or directions by police officers precedence over stop signs. This would only seem

logical. To hold that traffic entering a through street or arterial highway had to obey both would only increase traffic difficulties and not decrease them. See, Sam v. Sullivan (Tex. Civ. App.), 189 S. W. 2d 69; Carlin v. Prickett, 81 Cal. App. 2d 688, 184 P. 2d 945.

The court instructed the jury: "* * * the testimony is undisputed that plaintiff's driver had a green light across the street from him, opening that street to traffic by him." It would seem from this, and other language that followed, that the jury could reasonably infer that appellee, because the light across Railroad Avenue was green, had an absolute right to proceed. The correct principles in regard thereto are as follows: "A 'go' signal at a street intersection confers no authority on the driver of an automobile who receives this signal to proceed across that intersection regardless of other persons or vehicles that may already be within it. It is not a command to go but a qualified permission to proceed lawfully and carefully in the direction indicated: * * *." Harris v. Moran, 121 Pa. Super. 16, 182 A. 660.

A motor vehicle having started to cross an intersecting street in accordance with the signal light is ordinarily entitled to complete the crossing notwithstanding a change in lights.

A vehicle entering a street intersection with a traffic light in his favor is under obligation to use due care and to yield the right-of-way to vehicles in the intersection. His right-of-way is subject to the rights of those already in the intersection. See, Capillon v. Lengsfield (La. App.), 171 So. 194; Galliano v. East Penn Electric Co., 303 Pa. 498, 154 A. 805; Spence v. Waters, 39 Del. 582, 4 A. 2d 142; Valench v. Belle Isle Cab Co., 196 Md. 118, 75 A. 2d 97; United States Fidelity & Guar. Co. v. Continental B. Co., 172 Md. 24, 190 A. 768; Schindler v. Gage (La. App.), 59 So. 2d 215; 5 Am. Jur., Automobiles, § 309, p. 671; 60 C. J. S., Motor Vehicles, § 360, p. 854.

As stated in 2 Blashfield, Cyclopedia of Automobile Law and Practice (Perm. ed.), § 1005, p. 256: "* * *

the 'go' signal confers no authority to proceed across the intersection, regardless of other persons or vehicles already within it."

It should be understood that even though the driver of a motor vehicle has the right-of-way he must always use ordinary care and prudence to avoid an accident. Caryl v. Baltimore Transit Co., 190 Md. 162, 58 A. 2d 239; Byrne v. Schultz, 306 Pa. 427, 160 A. 125.

In regard to this duty it is stated in Byrne v. Schultz, *supra*: "The signal to cross is not a 'command to go, but a qualified permission,' and the qualification is 'to proceed lawfully and carefully,' as a prudent man would under the circumstances, which certainly requires looking to the right and left before entering upon the intersecting street."

We stated in Whitaker v. Keogh, 144 Neb. 790, 14 N. W. 2d 596: "The driver of an automobile entering an intersection of two streets or highways is obligated to look for approaching cars and to see those within that radius which denotes the limit of danger."

And as stated in Bergendahl v. Rabeler, 133 Neb. 699, 276 N. W. 673: "'* * * to look for vehicles approaching on the highway implies the duty to see what was in plain sight.' Vandervert v. Robey, 118 Neb. 395, 225 N. W. 36, citing Kemmish v. McCoid, 193 Ia. 958, 185 N. W. 628."

However, in this regard: "A person traveling a favored street protected by a traffic signal, of which he has knowledge, may properly assume that oncoming traffic will obey it." Angstadt v. Coleman, 156 Neb. 850, 58 N. W. 2d 507.

That the jury should understand these principles has particular application here because, from the evidence adduced, a jury could find that both drivers entered the area controlled by the automatic signals on a green light, that is, the lights could have changed while the appellant was traveling the 137 feet to the actual intersection of Railroad Avenue and Twenty-first Street. If

the jury so found it was important that it be advised of the law then applicable.

Likewise it was important that the jury be advised in regard to appellant's contention, as pleaded, that the conduct of the driver of the car, in which appellee was riding, was the proximate cause of the accident, particularly in view of the fact that he testified he did not see appellant's car until the moment of the impact.

Such defense is not an affirmative plea in avoidance of appellee's cause of action and imposes no burden of proof upon appellant with relation thereto but is one entirely consistent with and provable under the general issue. However, some place in the instructions the jury should be advised that if it should find the sole proximate cause of the accident in which appellee was injured was the negligence of the driver of the car in which she was riding then its verdict should be for the appellant. See, Umberger v. Sankey, 151 Neb. 488, 38 N. W. 2d 21; Harding v. Hoffman, *ante* p. 86, 62 N. W. 2d 333.

This is particularly true in view of the fact that the trial court, under the evidence here adduced, should advise the jury: " 'Where separate independent acts of negligence by different persons combine to produce a single injury, each participant is liable for the resulting damages, although one of them alone might not have caused the injury. * * *.' McClelland v. Interstate Transit Lines, 142 Neb. 439, 6 N. W. 2d 384." Kuska v. Nichols Construction Co., 154 Neb. 580, 48 N. W. 2d 682.

Under the situation disclosed by the evidence adduced the following has application to the imputation to appellee of the negligence, if any, of which the driver of the car in which she was riding may have been guilty:

"It is the law of this state that in cases of this character negligence of the driver cannot be imputed to a guest in the automobile." Gleason v. Baack, 137 Neb. 272, 289 N. W. 349.

"The negligence of a person while driving an auto-

mobile with another as his guest may not ordinarily be imputable to the guest, but such guest may be responsible for the consequences of his own negligence." Kuska v. Nichols Construction Co., *supra.*

We come then to the duty of a guest in a car and whether or not the evidence adduced presents a question of fact in this regard. We have often stated the rules applicable to a guest. In Kuska v. Nichols Construction Co., *supra,* we said:

"The duty of a guest riding in an automobile is to use care in keeping a lookout commensurate with that of an ordinarily prudent person under like circumstances. The guest is not required to use the same degree of care as devolves upon the driver. If the guest perceives danger, or if at certain times and places should anticipate danger, he should warn the driver. Ordinarily, the guest need not watch the road or advise the driver in the management of the car.

"It is the duty of an invited guest in an automobile driven by another, with knowledge of approaching danger, to exercise ordinary care to warn the driver of the danger, unless to a reasonably careful, cautious, and prudent person it appears that the warning would be of no avail or go unheeded, or that the driver observed or should have observed the danger, as well as the guest, and for failure to give such warning the guest would be chargeable with contributory negligence.

"It is the duty of an invited guest, with knowledge of approaching danger, in the exercise of ordinary care to protest to the host if there is time and opportunity, unless it reasonably appears that such protest would go unheeded or would be of no avail, and for failure so to do the guest would be chargeable with contributory negligence."

See, also, Gleason v. Baack, *supra;* Fulcher v. Ike, 142 Neb. 418, 6 N. W. 2d 610; Erickson v. Morrison, 152 Neb. 133, 40 N. W. 2d 413; Hendrix v. Vana, 153 Neb. 531, 45 N. W. 2d 429.

The evidence discloses appellee's father had been driving a car for about 40 years; that he was familiar with this intersection as he had crossed it several times daily in taking his wife to and from work, which he had been doing for many months; that the intersection, at the time, presented nothing new or different in the way of hazards; and that it was a bright and clear day with the sun shining.

Under this situation we think the following quote from Lewis v. Rapid Transit Lines, 126 Neb. 158, 252 N. W. 804, in Hamblen v. Steckley, 148 Neb. 283, 27 N. W. 2d 178, has application: " 'Ordinarily, the guest passenger in an automobile has a right to assume that the driver is a reasonably safe and careful driver; and the duty to warn him does not arise until some fact or situation out of the usual and ordinary is presented.' "

Under the evidence adduced we do not think it could reasonably be concluded that appellee was guilty of any negligence which contributed to her injury.

We come then to the excluded testimony of police officers Morris Dyles and William F. Carney. These police officers responded to a call and arrived at the scene of the accident in a cruiser car. They arrived shortly after the accident happened and before either of the cars had been moved. They made a report in accordance with section 39-764, R. R. S. 1943. This statute provides: "* * * that all reports made by an officer of the Nebraska Safety Patrol, sheriffs or their deputies, police officers, and village marshals, or made to or filed with such officers in their respective offices or departments, or with, by, or to any other law enforcement agency of the state shall be open to public inspection, but accident reports filed with the Department of Roads and Irrigation shall not be open to public inspection. The fact that such reports have been so made shall be admissible in evidence solely to prove a compliance with this section, but no such report or any part thereof or statement contained therein shall be ad-

missible in evidence for any other purpose in any trial, civil or criminal, arising out of such accidents."

We think, because of the foregoing, the court properly excluded the report. See, McBride v. Stewart, 227 Iowa 1273, 290 N. W. 700; Rockwood v. Pierce, 235 Minn. 519, 51 N. W. 2d 670; Jakubiec v. Hasty, 337 Mich. 205, 59 N. W. 2d 385. But as to testifying to what they observed at the scene these police officers stand in no different position than any other witness. If sufficient foundation is laid to show that the conditions they observed are the same as existed immediately following the accident, the officers should be permitted to testify in regard to what they observed insofar as it is relevant and material to the issues here involved. This would include their observation of the operation of the traffic lights. See Rockwood v. Pierce, *supra*. In this regard they may use the report to refresh their memory.

While there are other questions raised they become immaterial in view of what we have already said since the cause must be returned to the district court for retrial. The order of the district court denying a new trial is vacated and set aside and the cause is returned to the district court for a new trial.

REVERSED AND REMANDED WITH DIRECTIONS.

CHARLES VORE, JR., PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.

62 N W. 2d 141

Filed February 26, 1954. No. 33438.

1. **Continuances.** An application for a continuance is addressed to the sound discretion of the trial court and its ruling thereon will not be held erroneous, unless an abuse of discretion is disclosed by the record.
2. **Criminal Law: Witnesses.** The liability of a county for the per diem and mileage of defendant's witnesses in a prosecution for

a felony must arise from some express provision of the statutes and not by implication.

3. ———: ———. A statute (section 29-1908, R. R. S. 1943) providing that in a criminal action the defendant is entitled to secure the attendance of witnesses in his behalf from without the state does not authorize the courts to procure their attendance at the expense of the county.
4. ———: ———. Section 29-1904, R. R. S. 1943, does not authorize the taking of the depositions of witnesses for the defendant at the expense of the county.
5. **Pleading.** A motion may properly be overruled when it cannot be allowed in substantially the same terms as requested.
6. **Intoxicating Liquors.** A statute providing that a presumption of intoxication arises upon a determination that the amount of alcohol in the subject's body fluid at the time in question is 0.15 percent or more, by weight, as shown by chemical analysis, is in derogation of the common law and subject to strict construction.
7. **Intoxicating Liquors: Trial.** Where it is shown that the amount of alcohol in the subject's body fluid is less than 0.15 percent by chemical analysis, by weight, no presumption of intoxication arises under such statute, and it is prejudicial error to submit such issue to the jury.

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

Warren C. Schrempp, David S. Lathrop, and *L. W. Powers,* 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, WENKE, and BOSLAUGH, JJ.

CARTER, J.

Defendant was charged and convicted of the offense of motor vehicle homicide. He brings the case here for review.

The defendant was 21 years of age at the time of the trial. He was employed as a truck driver at $35 per week at the time the alleged offense was committed. He was a resident of Denison, Iowa, and appears to

have had a good reputation as a law-abiding citizen prior to the happening of the events hereinafter set forth.

The record shows that on May 4, 1952, the defendant came to Council Bluffs, Iowa, to attend the stock car races. He was accompanied by Joseph Smith, Ronald J. Pruter, Vern Carstensen, and Mert Brockman. They came in an automobile owned by Pruter. They had a case of 3.2 beer in the car when they left home. Defendant admits drinking three or four cans of beer prior to 4 p. m. After the races were over they decided to drive to Fremont, Nebraska, to visit a friend who had formerly lived in Denison. On arrival in Fremont they found their friend was not at home. They started home, and a few miles outside of Fremont they overtook a car being driven by one Paul Scadden and in which Delores Luce was riding. The defendant was driving at the time. While driving at a high rate of speed defendant hit the Scadden car with great force, causing it to leave the highway and turn over. Delores Luce was instantly killed, the evidence showing that she was decapitated as a result of the force of the impact. Insufficiency of the evidence to sustain a verdict is not assigned as error, nor is the sentence claimed to be excessive.

The defendant contends that the trial court erred in not granting a continuance, in not requiring the county to pay the expense of compulsory process or the cost of taking depositions, and in admitting certain evidence of a medical expert offered by the State and the correctness of the instructions with respect thereto. We shall deal with these assignments in the order in which we have stated them.

It appears from the evidence that at the time of the accident defendant was accompanied by four young men who were subsequently inducted into the armed forces. None of them was present for the trial, and defendant moved for a continuance for this reason. The accident

occurred on May 4, 1952. The record does not show the date that the complaint was filed, but a preliminary hearing was had in August 1952. On August 28, 1952, the information was filed in the district court. Defendant was arraigned on January 30, 1953. On March 10, 1953, the trial was definitely set for April 13, 1953. The affidavits filed in support of the motion for a continuance state that the four young men accompanying him were eye witnesses, but it is nowhere stated what they would testify to if they were present. The addresses of three of them were known to the defendant long before the trial. Defendant had counsel representing him from the beginning of the litigation. Ray Carstensen testified that he is the father of Vern Carstensen and that the latter at the time of trial was located at Camp Roberts, California. He stated that Vern was inducted into the service on February 9, 1953, 9 months after the accident of May 4, 1952. Horace Smith testified that he is the father of Joseph Smith and that the latter was located with the American Armed Forces in Austria at the time of the trial. He testified that Joseph was inducted into service on May 7, 1952, and that he was home on furlough in the fall of 1952, probably in October of that year.

The evidence shows a complete want of diligence in obtaining the evidence of these eye witnesses to the accident. It was known that the young men riding with defendant were about to go into service, but nothing was done at that time about obtaining their evidence for use at the trial. One of them was home on furlough after the information was filed and nothing was done at that time to obtain his evidence for use at the trial. The affidavits in support of the motion for a continuance do not state what these witnesses would testify to, or even that their evidence would be material other than the conclusion of counsel for the defendant to that effect. The defendant had from May 4, 1952, to April 14, 1953, to obtain the testimony of these witnesses.

Even if the materiality of the evidence had been shown, which it is not, the want of diligence is so great as to warrant the denial of a continuance. No abuse of discretion on the part of the trial court is shown by the record.

The general rule governing the right to a continuance is stated in Dolen v. State, 148 Neb. 317, 27 N. W. 2d 264, as follows: "Generally this court has held that 'An application for a continuance is addressed to the sound discretion of the trial court and its ruling thereon will not be held erroneous, unless an abuse of discretion is disclosed by the record.' "

The defendant contends, however, that the trial court erred in failing to enter an order for compulsory process for his witnesses and for an advance appropriation of 10 cents per mile and $5 per day for each witness payable out of the funds of the county. In Hewerkle v. Gage County, 14 Neb. 18, 14 N. W. 549, in dealing with this very question, the court said: "But it cannot be claimed, upon any reasonable construction of the language of the constitutional provision in question, that it was the intention of its framers to make it the duty of the legislature to provide for the payment of defendants' witnesses in such cases, and, however that may be, they certainly have never done it." See, also, Worthen v. Johnson County, 62 Neb. 754, 87 N. W. 909.

In Fanton v. State, 50 Neb. 351, 69 N. W. 953, 36 L. R. A. 158, it was clearly stated that " 'The right to compulsory process for witnesses does not and cannot extend to nonresident witnesses.' "

The defendant contends that these cases are no longer the law because of the enactment in 1937 of the Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings, which is now sections 29-1906 to 29-1911, R. R. S. 1943, inclusive. Section 29-1908, R. R. S. 1943, makes no provision for the advancement of mileage and per diem to a defense witness from another state. The liability of a county for the per diem

and mileage of defendant's witnesses in a prosecution for a felony must arise by some express provision of a statute, and not by implication. Worthen v. Johnson County, *supra.*

In State v. Fouquette, 67 Nev. 505, 221 P. 2d 404, a recent case arising under the uniform act now before us, the court said: "Certainly this statute does not entitle a defendant to have witnesses brought into court at public expense. (citing cases). * * * Although no case directly in point has been found, it is clear that this statute, providing, as it does, that specified sums for fees and mileage shall be paid or tendered to nonresident witnesses summoned to attend and testify in criminal prosecutions in this state, but not providing, either expressly or by implication, that such witnesses summoned on behalf of the defendant shall be brought in without expense to him, does not confer upon the courts of this state authority to procure the attendance and testimony of witnesses from without the state for the defendant in any case at the expense of the public."

The defendant complains that the trial court erred in denying a motion to take depositions at county expense about 1 week before the trial. Defendant relies on section 29-1904, R. R. S. 1943. But this statute does not provide for the taking of depositions at county expense in advance of the trial. Defendant was entitled to an order entitling him to take the depositions of witnesses, but when he coupled with it a demand that it be done at the expense of the county, he was not entitled to have his motion sustained. "A motion may properly be overruled which cannot be allowed in substantially the same terms as requested." Weideman v. Estate of Peterson, 129 Neb. 74, 261 N. W. 150.

We conclude that the trial court did not abuse its discretion in denying a continuance to the defendant. The trial court was also correct in denying compulsory process for defendant's witnesses when coupled with a request that the county be ordered to pay the cost there-

of in advance. The order of the trial court was likewise correct in denying defendant the right to take the depositions of witnesses when it was coupled with a request that the county be required to advance funds for this purpose prior to the trial.

The defendant objected to certain evidence of Dr. Victor E. Levine offered by the State. Dr. Levine was shown to be the head of the department of biological chemistry at the Creighton Medical School at Omaha. He holds degrees as Doctor of Medicine and Doctor of Philosophy in biological chemistry. He was qualified under the requirements of the Department of Health to analyze blood for alcoholic content. He had experience in such work in the army during World War II and since that time had run numerous tests for the Omaha police department and the Nebraska Safety Patrol. The defendant stipulated that Dr. Levine was a qualified medical and biochemical expert. Dr. Levine testified that he had received a sample of blood drawn from the person of the defendant some 15 hours thereafter. No preservative was added until it was received by him. A test was run on the blood sample showing 0.11 percent alcoholic content. It was the testimony of Dr. Levine that blood drawn from a living person is alive and that it continues to use up alcohol unless the blood cells are killed by the addition of a preservative to accomplish that purpose. Dr. Levine gave it as his opinion that the blood of this defendant which tested 0.11 percent after 15 hours would necessarily have tested 0.18 or 0.19 percent alcoholic content at the time the blood was drawn. The reasons and calculations leading to this conclusion were fully testified to by the witness.

The defendant produced Dr. Fred L. Humoller who was a Doctor of Philosophy in biochemistry and for the last 5 years has been in the department of pharmacology and physiology at the University of Nebraska Medical School at Omaha. The evidence of Dr. Humoller is that drawn blood does not use up alcohol in any appreciable

amount during the first 24 hours thereafter. His evidence is that losses occur while the blood is in the body due to the action of the kidneys and liver, but that no such reduction takes place in drawn blood except by the action of bacteria. He states that preservatives are added to prevent the growth of bacteria and the action of other elements which might even produce alcohol and add to the alcoholic content of the blood.

The evidence of these two witnesses is in conflict and, if properly admitted, presents a question for the jury. The evidence was undoubtedly admissible as tending to show that defendant was or was not intoxicated at and immediately following the accident. The question here raised is whether the evidence was sufficient for the court to instruct on the presumption of intoxication in accordance with section 39-727.01, R. R. S. 1943.

No objection was made that a preliminary foundation had not been laid for the admission of the result of the test into evidence. Remoteness as to time in making the test does not appear important in view of the evidence that the longer the test was delayed, in the absence of a preservative, the more favorable the situation would be for the defendant.

The trial court instructed the jury in part as follows: "You are instructed that the Statutes of the State of Nebraska in force and effect at the time of the accident involved herein provided, in substance, that in any criminal prosecution for a violation of the law relating to driving a vehicle while under the influence of intoxicating liquor, the amount of alcohol in the defendant's body fluid at the time alleged, as shown by chemical analysis of the defendant's blood, shall give rise to the following rebuttable presumptions: 1) If there was 0.05 per cent or less, by weight, of alcohol in the defendant's body fluid, it shall be presumed that the defendant was not under the influence of intoxicating liquor at the time the specimen was obtained; 2) If there was, at that time, in excess of 0.05 per cent, but less than

0.15 per cent, by weight, of alcohol in the defendant's body fluid, such facts shall not give rise to any presumption that the defendant was or was not under the influence of intoxicating liquor; but such fact may be considered, with other competent evidence, in determining the guilt or innocence of the defendant; and 3) If there was 0.15 per cent or more, by weight, of alcohol in the defendant's blood, it shall be presumed that the defendant was under the influence of intoxicating liquor at the time the specimen was taken."

It was clearly the purpose of the statute, section 39-727.01, R. R. S. 1943, upon which the foregoing instruction was based, to provide a fixed standard by which a presumption of intoxication arose. It is an attempt to substitute scientific determination for objective tests and superficial opinion in that part of the field where it can be safely done. The standard provided is the amount of alcohol in the defendant's body fluid at the time alleged, as shown by chemical analysis. This statute creates a presumption in derogation of the common law and it should therefore be strictly construed. State v. Resler, 262 Wis. 285, 55 N. W. 2d 35. "If an affirmative statute, which is introductory of a new law, direct a thing to be done in a certain manner, that thing shall not, even though there are no negative words, be done in any other manner, the mode prescribed by statute for the exercise of a power, must be adopted. In some cases, a strict, and even literal, compliance is required. This is particularly true in regard to enactments modifying the course of the common law." 50 Am. Jur., Statutes, § 19, p. 40.

The general rule governing the testing of body fluids with relation to intoxication is stated in an annotation in 159 A. L. R. 210 in the following language: "From the cases generally, it is apparent that, subject to compliance with conditions as to relevancy in point of time, tracing and identification of the specimen, accuracy of the analysis, and qualification of the witness

as an expert in the field, there is rather general agreement that where the prosecution in a criminal case seeks to establish the intoxication of the accused, evidence as to the obtaining of a specimen of his body fluid at or near the time in question, evidence as to the alcoholic content of such specimen, as determined by scientific analysis, and expert opinion testimony as to what the presence of the ascertained amount of alcohol in the blood, urine, or other body fluid of an individual indicates with respect to the matter of such individual's intoxication or sobriety, is ordinarily admissible as relevant and competent evidence upon the issue of intoxication, at least where the accused voluntarily furnished the specimen for the test, or submitted without objection to its taking." See, also, Annotation 127 A. L. R. 1514. This rule applied before the enactment of any statutory law on the subject. Kuroske v. Aetna Life Ins. Co., 234 Wis. 394, 291 N. W. 384, 127 A. L. R. 1505.

It seems clear to us that the evidence of Dr. Levine was properly admissible as bearing upon the question as to whether or not the defendant was intoxicated at the time charged. Whether the trial court erred in instructing the jury regarding the presumption of intoxication as set forth in section 39-727.01, R. R. S. 1943, presents quite a different question.

The historical background of section 39-727.01, R. R. S. 1943, which has been adopted in substance by many states, is set forth in Toms v. State (Okl. Cr.), 239 P. 2d 812. It is therein pointed out that much alarm has been expressed by the legal profession in regard to statutes fixing a formula for determining intoxication by testing body fluids when there is such a degree of variability in humans. It is there stated, accompanied by the citation of ample medical and legal authority, that impairment sufficient to adversely influence driving ability is demonstrated quite clearly in the average individual at alcoholic concentrations of 0.09 percent to 0.11 percent in the blood. The court then states that

the establishment of 0.15 percent as the presumption limit allows sufficient tolerance for individual variation. Consequently the fixing of 0.05 percent and below as creating a presumption of nonintoxication, and the fixing of 0.15 percent and above as creating a presumption of intoxication, affords full protection against individual variation to those submitting to the test. Between these two fixed points a test creates no presumption, although it is properly admissible along with the evidence of an expert to show the condition of the subject as to being intoxicated, according to the express wording of section 39-727.01, R. R. S. 1943. Such evidence is for the jury to consider without the benefit of any statutory presumption.

It seems clear to us, however, that the language of the statute must be strictly followed and that the presumption of intoxication created by it does not exist unless the blood test shown by the chemical analysis amounts to or exceeds 0.15 percent. In the present case the blood test showed 0.11 percent of alcohol. This was an insufficient amount to create a presumption of intoxication, although it was otherwise competent to submit to the jury upon the question of defendant's alleged intoxication. It was a proper subject of expert testimony, but it could not rise to the dignity of a presumption under the statute.

If the statute is not so construed, the attempt of the Legislature to substitute scientific certainty for guess, estimate, or opinion would be defeated. The presumption was intended to rest on scientific certainty, free of additional evidence upon which disagreement might well arise. The two experts were entitled to testify the same as in any case calling for expert opinion evidence insofar as it was material to the issue. But their evidence is immaterial to any presumption contained in the statute when the chemical analysis was determined. When it is shown that the test was properly

made, the chemical analysis alone determines the provision of the statute that is applicable.

The trial court erred in giving parts (1) and (3) of the instruction hereinbefore designated for the reason that there was no competent evidence upon the subject.

It was therefore prejudicial error for the trial court to instruct in regard to any presumption of intoxication arising under the statute under the undisputed facts in the case. The judgment of the district court is reversed and the cause is remanded for a new trial.

REVERSED AND REMANDED.

FAYE SCHLUETER, APPELLEE, V. FRANK SCHLUETER, APPELLANT.

62 N. W. 2d 871

Filed February 26, 1954. Nos. 33445, 33475.

1. **Divorce: Appeal and Error.** Divorce cases are tried de novo on appeal to this court, subject to the rule that when credible 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 as to such reliability will be carefully regarded by this court on review.
3. **Divorce.** 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. ———. Extreme cruelty may consist of personal injury or physical violence, or it may be acts or omissions of such character as to destroy the peace of mind or impair the bodily or mental health of the person upon whom they are inflicted or toward whom they are directed, or be such as to destroy the objects of matrimony.
5. ———. The court in deciding the amount of alimony or in making a division of property in a divorce case will consider

the age 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, the physical condition of each, the property owned by them and whether or not it was acquired by their joint efforts, and any other pertinent facts.

6. **Divorce: Appeal and Error.** Compliance with section 25-1912, R. R. S. 1943, lodges an appeal in this court and vests this court with jurisdiction of the action. Any order made by the district court awarding temporary alimony during the pendency of the action in this court is void and of no effect.

APPEAL from the district court for Sarpy County: JOHN M. DIERKS, JUDGE. *Affirmed in part, and in part reversed and remanded with directions.*

William R. Patrick and *Smith & Smith,* for appellant.

Tesar & Tesar, for appellee.

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

MESSMORE, J.

The plaintiff Faye Schlueter brought this action seeking a divorce from the defendant Frank Schlueter. Her amended petition alleged extreme cruelty and prayed for temporary alimony during the pendency of the action, permanent alimony, attorney's fees, and costs. The defendant's answer, after admitting certain facts contained in the plaintiff's amended petition, denied generally the allegations of extreme cruelty contained therein and prayed that plaintiff's action be dismissed.

Trial was had to the court on the issue as to whether or not the plaintiff was entitled to a divorce from the defendant, and on the issue as to the extent and value of the property of the parties and the permanent alimony to be awarded the plaintiff, if any. At the conclusion of the trial the trial court granted the plaintiff an absolute divorce from the defendant, made a division of the property of the parties, both real and personal, awarded the plaintiff attorney's fees as part of the costs, and required the defendant to pay the costs. A motion for a new trial

was filed on the divorce issue and another motion for a new trial was filed on the division of the property as made by the trial court, both of which were overruled, and the defendant appealed to this court.

The plaintiff testified that she became acquainted with the defendant on November 9, 1924, when he was living on an 80-acre farm owned by his father and located approximately 6 miles from Papillion. She went to work for him as a housekeeper and was to receive $30 a month as wages, and board and lodging for her 4-year-old son by a previous marriage and for her brother who at that time was 18 years of age. The defendant paid her wages for the first 2 months and then, due to the fact that the defendant desired to purchase some more cows and needed equipment for the farm, no more wages were paid. However, it was understood between the parties that when each had accumulated one thousand dollars they would be married. They were married on March 14, 1929, in Sarpy County. No children were born to this union.

The plaintiff's son resided with the parties and was cared for and went to school through the eighth grade. When he was 18 years of age, in 1938, he left the farm to visit his father in Nevada. He returned after about 4 months, worked 4 or 5 months for a party in Papillion, and entered the military service of the United States from which he was discharged about 6 years later. While he resided on the farm of the defendant he did chores and other work incident and necessary to farm work.

At the request of the plaintiff, the defendant went to Omaha and brought the plaintiff's brother out to the farm in August 1924, where he made his home and was provided for. He remained on the farm until he left on a trip to California in 1952. He had trouble with his feet and had undergone surgical operations and medical treatment to enable him to walk better. The defendant, for a period of about a year, massaged his

legs to help him in this respect. The plaintiff's brother worked in the fields for the most part, using farm implements upon which he could ride. He was considered a good farm hand and worker, and his relationship with the defendant was good.

The difficulty between the parties seems to have started in 1938, when the defendant was a candidate for sheriff of Sarpy County and was unsuccessful. Thereafter the defendant became sullen and would not speak to the plaintiff or the neighbors for weeks at a time. He would also go away from home and remain for long periods of time. He drank to excess and on many occasions would come home in an intoxicated condition and go to bed with his clothes on, and would urinate in various places in the home in the presence of persons who were visiting there. The plaintiff requested the defendant to sleep in the bunkhouse where her brother and her son slept. He did not object to this, and did so for a period of 2 or 3 years.

The plaintiff kept track of the bills to be paid, and on numerous occasions she would ask the defendant for money to pay the bills. He would tell her that he had no money, when she knew that he had considerable money which he received from the sale of farm products or from his father's estate. He either carried this money on his person or placed it in a cupboard. She estimated the amount of the inheritance to be approximately $5,000. He testified that he desired to keep the inheritance separate from the farm money.

The defendant called the plaintiff vulgar and indecent names. He would fly into a rage over the payment of bills, pound the table, and exhibit a violent temper. This appears to have been more pronounced from and after 1945. On one occasion the defendant, when he was mad, threw a cup at the plaintiff and missed her. Another time he struck her across the face with his open hand, mashed her nose, and cut her lip open. She bled from the blow. On another occasion he pushed her against

the door when they were having difficulty over the payment of bills. On another occasion, when the plaintiff was injured by being bumped by a hog, the defendant locked the automobile so she could not use it. However, she subsequently did use it to go to a doctor. The defendant neglected repairs around the house and premises, and had no pride in his home. The plaintiff was unsuccessful in her attempts to comfort him.

The defendant never discussed his financial affairs with the plaintiff or coöperated with her over the period of their married life to enable her to keep proper accounts of the farm products or the stock or grain sold by him. On many occasions he failed to deposit in the bank the money received from such sources and the plaintiff was required to call the bank to ascertain if there was any money upon which she could draw to pay the bills. On one occasion there was $590 in the bank and a few days thereafter a $12.50 check was returned to her because of insufficient funds.

There is evidence that the defendant drank intoxicating liquor on occasions, however, the evidence with respect to the use of intoxicating liquor by the defendant is not such that it could be concluded that he was a drunkard.

The plaintiff belonged to different ladies' societies and would request the defendant to take her to the meetings. He would, on occasions, leave her there and let her get home the best way she could by coming home with neighbors or other parties.

There is also evidence that the plaintiff had indulged in playing bingo to some considerable extent. She testified that by the sale of farm products she bought from others and resold, the defendant was not out of pocket in such respect.

The plaintiff's brother corroborated her testimony to the effect that the defendant on many occasions called the plaintiff vulgar names, came home in an intoxicated condition, and went to bed with his clothes on; that the

defendant would stay away from the home for a period of time; and that there was always an argument between the parties over the payment of bills. He also testified that the defendant would double up his fists, swear, and make threatening gestures toward the plaintiff; and that he saw the plaintiff, after the defendant had struck her across the face, in bed endeavoring to keep her mouth from bleeding, and her face was swollen the next day before she went to the doctor. He further testified that he was present when the defendant threw a cup at the plaintiff and missed her. The defendant was mad on any occasion when the plaintiff requested money from him to pay bills.

The plaintiff's son testified to arguments between the plaintiff and defendant with reference to bills that had to be paid. The defendant would declare that he had no money, when in fact he had money in his pocket to pay the bills.

A hired man who worked occasionally for the defendant testified that he observed that the defendant would not speak to the plaintiff for long periods of time; that the defendant refused to make repairs around the home; and that whenever bills were mentioned an argument ensued and the defendant declared he had no money with which to pay bills.

The plaintiff's sister testified that when she visited the home of the parties there was always tension created by the defendant, and the defendant would refuse to give the plaintiff money even for the necessities of life. This money had to come from other sources, principally from farm products such as chickens, eggs, and cream sold by the plaintiff. This witness furnished money to the plaintiff to buy chickens and fix up things around the house. The defendant refused to give the plaintiff money on many occasions.

For the most part, the defendant's testimony denied any extreme cruelty on his part. He testified that the plaintiff always referred to him in vulgar and bad lan-

guage; that he never used such language toward her; that she had access to the banking account; and that at times he was short of money and could not pay his bills, but that the bills were eventually paid.

A former schoolmate of the plaintiff who had known her for 40 years testified that plaintiff always referred to the defendant in an uncomplimentary and vulgar manner; that plaintiff stated she was going to send him "down the road without a shirt on his back when she got through with this"; and that the defendant would listen to the plaintiff's arguments about money, would make a few gestures, and leave. This witness and her husband were friends of the parties and visited in their home, and the visits were returned on occasions.

A person who worked for the defendant on the farm testified that he heard the plaintiff call the defendant vulgar names.

A friend of both of the parties was contacted by the plaintiff with reference to interceding in the difficulties between the parties in February or March 1953. The plaintiff did not mention anything in connection with the domestic difficulties had between the parties, but desired this witness to contact the defendant to effect a reconciliation. This witness did contact the defendant without success.

The defendant testified that he did not think he could resume the marriage relation with the plaintiff, or that they could live as a happily married couple. He told the friend who contacted him for the purpose of effecting a reconciliation that there was no possibility of doing so.

Divorce cases are tried de novo on appeal to this court, subject to the rule that when credible 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.

See, Killip v. Killip, 156 Neb. 573, 57 N. W. 2d 147; Wakefield v. Wakefield, 157 Neb. 611, 61 N. W. 2d 208.

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 as to such reliability will be carefully regarded by this court on review. See, Hodges v. Hodges, 154 Neb. 178, 47 N. W. 2d 361; Stefan v. Stefan, 152 Neb. 23, 39 N. W. 2d 918; Trevett v. Trevett, 151 Neb. 517, 38 N. W. 2d 332.

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. See, Brown v. Brown, 146 Neb. 908, 22 N. W. 2d 148; Green v. Green, 148 Neb. 19, 26 N. W. 2d 299; Johnsen v. Johnsen, 144 Neb. 208, 12 N. W. 2d 837; Wakefield v. Wakefield, *supra.*

Extreme cruelty may consist of personal injury or physical violence, or it may be acts or omissions of such character as to destroy the peace of mind or impair the bodily or mental health of the person upon whom they are inflicted or toward whom they are directed, or be such as to destroy the objects of matrimony. See, Messer v. Messer, 157 Neb. 312, 59 N. W. 2d 395; Wakefield v. Wakefield, *supra;* Green v. Green, *supra;* Roberts v. Roberts, 157 Neb. 163, 59 N. W. 2d 175; Oertle v. Oertle, 146 Neb. 746, 21 N. W. 2d 447; Ellison v. Ellison, 65 Neb. 412, 91 N. W. 403; McNamara v. McNamara, 93 Neb. 190, 139 N. W. 1045; Kroger v. Kroger, 153 Neb. 265, 44 N. W. 2d 475.

Considering the foregoing authorities and the evidence adduced at the trial, we conclude that there was sufficient corroboration of the plaintiff's testimony to warrant the trial court in granting her a decree of divorce from the defendant on the grounds of extreme cruelty.

The record discloses that the home place, upon which the parties lived, is described as the Northeast quarter of the Northwest quarter, and the Northwest quarter of

the Northeast quarter of Section 13, Township 13, Range 12 East of the 6th P. M., in Sarpy County, Nebraska. The Clarke 80 acres is described as the South half of the Southwest quarter of Section 12, Township 13, Range 12 East of the 6th P. M., in Sarpy County, Nebraska. The Leaders 40 acres is described as the Southwest quarter of the Southeast quarter of Section 12, Township 13, Range 12 East of the 6th P. M., in Sarpy County, Nebraska.

It appears that the first described land was deeded to the defendant by his father on March 4, 1935. The defendant assumed a mortgage of $2,000 on this land, which was paid off, and the title thereto remained in the defendant. After the marriage, the Clarke land heretofore described was purchased for $12,000, with a $2,000 down payment, a mortgage of $10,000 was assumed by the defendant and subsequently paid off, and title thereto was taken in the name of the defendant. The Leaders land above described was purchased for $6,500 in May 1946, and paid off in the same year by the sale of crops from the defendant's lands. The title to this land was taken in the name of both parties as tenants in common.

The house on the home place is small, consisting of a large front room, a small bedroom, and a kitchen. During the marriage of the parties considerable improvements were made on the farm such as a new dairy barn, milkhouse, chicken house, and bunkhouse. Modern machinery and other modern farm equipment was purchased.

The record further discloses that on March 15, 1952, the parties borrowed $10,000 from the Prudential Life Insurance Company. This amount was deposited in the Live Stock National Bank of Omaha. From this amount $2,580 was withdrawn for the purchase of dairy cattle, $89.90 for attorney's fees and costs in the separate maintenance suit brought by the plaintiff against the defendant in 1951 which was dismissed, and for abstracts, and $445.25 to pay a judgment obtained against

the plaintiff on two promissory notes she gave to a bank to be used to pay debts that accumulated and which the defendant refused to give her money to pay. There remained on deposit from this loan $6,884.85. On May 19, 1952, the plaintiff withdrew from the foregoing account $5,000 which she deposited in another bank in her name. On May 5, 1953, the plaintiff had a balance in the bank in her name in the amount of $2,131.01. The defendant had a balance of $496.81 in a bank in his name on April 21, 1953.

An inventory of the property, both real and personal, of the defendant was made by three disinterested appraisers during the trial. They fixed the gross amount of such property at $42,571. The property consisted of an automobile and trucks of the value of $2,000; farm machinery, including a side-delivery rake of the value of $285 which was not paid for, of the value of $2,203; livestock of the value of $4,438; and 400 bushels of corn valued at $560. The buildings on the home 80 acres were valued at $7,170. The 80 acres known as the home place was valued at $10,000, the Clarke 80 acres at $11,200, and the Leader 40 acres at $5,000.

The trial court, in its decree, adjudged the plaintiff should have as her sole property the 80 acres known as the Clarke farm, free and clear of all encumbrances. In addition, she was to have $2,600 in cash to be paid by the defendant within 90 days from the date of the signing of the decree. It was further adjudged that she was entitled to keep the balance of the $5,000 withdrawn by her from the $10,000 loan as above mentioned, and to retain all personal effects in her possession or in the possession of the defendant; and she also was awarded the landlord's share of two-fifths of the 1953 crop planted on the Clarke 80 acres of land which was awarded to her. The defendant was awarded the balance of the real estate and tangible personal property of the parties including livestock, farm equipment, corn in the crib, the balance of cash in his personal checking ac-

count, and all other chattel property in his possession, except personal effects of the plaintiff. The defendant was ordered and directed to assume and pay the principal and interest on the $10,000 loan secured by a mortgage held by the Prudential Life Insurance Company covering all the real estate involved in this action, and to remove any encumbrances on the land here involved decreed to the plaintiff by a quitclaim deed, which appears in the record. In addition, the defendant was ordered to pay attorney's fees taxed as part of the costs in the amount of $1,500, and the costs.

The court in deciding the amount of alimony or in making a division of property in a divorce case will consider the age 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, the physical condition of each, the property owned by them and whether or not it was acquired by their joint efforts, and any other pertinent facts. See, Messer v. Messer, *supra;* Killip v. Killip, *supra.*

At the time of trial, the plaintiff was about 55 years of age, the defendant was 54 years of age, and their marriage had endured for a period of 24 years. The defendant appears to be in good health and able to carry on his duties as a farmer. The plaintiff had a gall bladder operation in 1950, has high blood pressure, and is required to keep her leg bandaged and can be on her feet for only short periods of time. Her health is not that of a robust person.

The rule above stated does not permit a mathematical certainty in arriving at the answer as to alimony or a division of property. See Messer v. Messer, *supra.*

The property here involved, for the most part, was accumulated by the joint efforts of the parties. The defendant inherited an equity in the 80 acres of land referred to as the home place, subject to a $2,000 mortgage that was subsequently paid off. As we view the record, the plaintiff performed the necessary duties and

met the requirements of a farm wife, and the defendant carried on his duties with the assistance of the plaintiff's brother and her son in farming the land, and he was considered a good, average farmer.

Considering all the matters shown in the evidence, we have concluded that the division of property and the award of alimony made by the trial court is excessive. The decree of the district court should be, and is hereby, modified as follows: The plaintiff is to be entitled to keep the balance of the $5,000 withdrawn by her from the Live Stock National Bank; the plaintiff is to receive permanent alimony in the sum of $9,000, to be paid by the defendant in semiannual installments of $750 on May 1, 1954, and on December 1, 1954, and the same amounts to be paid on the same dates in the succeeding years which would necessitate the last installment of $750 to be paid on December 1, 1959; and the defendant is to have the privilege of paying the amount awarded as permanent alimony on or before the final date of the last payment to be made as heretofore designated. The plaintiff is to retain the personal property awarded to her by the decree of the district court. The defendant is to have the title to the 200 acres of land herein described and to assume and pay the $10,000 mortgage thereon, the interest due or to be paid thereon, and to pay the insurance and taxes due or to become due. In addition, the defendant is to pay the outstanding $1,500 lumber bill to the Harberg Lumber Company, the $285 due for the side-delivery rake, and $1,500 attorney's fees allowed by the trial court as costs to the plaintiff for the benefit of her counsel. The defendant is also to be awarded the 1953 crop raised on the 80 acres of land originally awarded to the plaintiff, or in the event this land is farmed by a tenant, then the landlord's share of such crop, and the personal property as awarded in the decree of the district court.

The defendant contends that after the notice of appeal had been filed on June 10, 1953, and the docket fee

of $20 paid, the appeal had been perfected and jurisdiction was thereby lodged in the Supreme Court in accordance with section 25-1912, R. R. S. 1943.

On July 3, 1953, the trial court allowed the plaintiff $100 a month temporary alimony and $75 suit money, by continuing its former order for temporary allowances entered June 25, 1952. The defendant, in his first notice of appeal, gave notice of appeal from each and all of the rulings, judgments, decrees, and orders of the trial court. A supersedeas bond was given. Following the overruling of the defendant's motion for a new trial as to the order entered by the trial court on July 3, 1953, as above mentioned, the defendant filed a second notice of appeal and gave a supersedeas bond. Therefore, the order of July 3, 1953, entered by the trial court is void for lack of jurisdiction in the district court to enter such order.

We conclude, from an examination of the record, that the defendant has complied with section 25-1912, R. R. S. 1943, and by doing so has properly perfected appeal to this court, vesting this court with jurisdiction of the entire matter. See, Ash v. City of Omaha, 152 Neb. 699, 42 N. W. 2d 648; Madison County v. Crippen, 143 Neb. 474, 10 N. W. 2d 260; Moritz v. State Railway Commission, 147 Neb. 400, 23 N. W. 2d 545; Thesing v. Westergren, 75 Neb. 387, 106 N. W. 438; Fisher v. Keeler, 142 Neb. 79, 5 N. W. 2d 143.

We recognize that in some jurisdictions an award of temporary alimony during the pendency of the appeal in the Supreme Court of the state has been approved. However, under the authority above cited and in the light of our statute, we determine otherwise, and the plaintiff's contention in such respect is without merit.

It might also be noted that the record discloses that the plaintiff had received $900 temporary alimony during the pendency of the action in the district court and, in addition, at the time of trial she apparently had at least $2,000 in cash.

For the reasons given in this opinion, the judgment of the district court is affirmed in part and in part reversed, and the cause is remanded to the trial court with directions to enter a decree in accordance with this opinion. Costs are taxed to defendant.

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

IN RE MICHAEL ALLEN GODDEN, A MINOR CHILD UNDER 18 YEARS OF AGE. DOROTHEA W. RIPLEY ET AL., APPELLEES, V. DOROTHY GODDEN, APPELLANT.

63 N. W. 2d 151

Filed February 26, 1954. No. 33492.

1. **Appeal and Error: Courts.** A review of a finding and adjudication of the district court by authority of section 43-202, R. R. S. 1943, that a child is dependent and neglected, that his mother is not a suitable person to have his custody, and that the custody of the child should be committed to the Child Welfare Department, may be had by an appeal to this court.
2. ———: ———. Such an adjudication is an order in a special proceeding, it affects a substantial right, and it is a final order for purposes of an appeal to this court.
3. **Courts.** The Juvenile Court Act did not create a new court but it conferred new and additional powers on the district court. It did not change the rules, practice, and procedure applicable to hearings without a jury of contested issues of fact in that court.
4. **Courts: Appeal and Error.** The action of the trial court preventing the court reporter from making a report of the proceedings had in the court for which he was appointed, as the law requires him to do, is reversible error if the litigant is prejudiced thereby.
5. **Witnesses: Appeal and Error.** A failure or refusal of the district court to comply with the requirement of section 25-1237, R. R. S. 1943, that before testifying the witness shall be sworn is prejudicial error if timely objection is made and the omission is not waived.
6. **Parent and Child.** A parent may not be deprived of the custody of his child by the court until it is established that the parent

is unfit to perform the duties of the relationship of parent and child or has forfeited the right to the custody of the child.

7. ———. The custody of a child is to be determined by its best interest with due regard to the superior rights of a fit and suitable parent.

8. **Courts.** A contested issue of fact in a proceeding authorized by the Juvenile Court Act, concerning the fitness of a parent to have the custody of his child and a claim that the child is dependent and neglected, must be heard and determined by substantial observance of the rules of evidence and procedure that are considered essential and appropriate to ascertain the truth and to protect substantial rights in hearings had without a jury for the adjudication of issues of fact in civil cases in the district court.

9. **Courts: Statutes.** The essential processes, rules, and procedure of the law established and observed to aid courts in the investigation and adjudication of contested issues of fact are not discarded or permitted to be disregarded because a pertinent statute refers to the proceeding as a summary one.

10. **Evidence.** Reports of an ex parte investigation made by investigators from the police department and the Child Welfare Department are not competent evidence and may not be considered by the court in the hearing and decision of a disputed issue of fact.

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

Merril R. Reller and *John McArthur,* for appellant.

Clarence S. Beck, Attorney General, *Homer L. Kyle,* and *Frederick H. Wagener,* for appellees.

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

BOSLAUGH, J.

A petition was filed with the consent of the county attorney in the district court for Lancaster County by Dorothea W. Ripley, recited to be a reputable person, in which it was averred Michael Allen Godden was a dependent neglected child of the county without parental care and control. The child whose custody is the subject of this inquiry was 9 months of age. Appellant, his

mother, who had his care and custody appeared with her counsel and made objections to and defense against the charge contained in the petition to the extent and within the limited time the district court permitted. The trial court found that Michael Allen Godden was dependent and neglected; that appellant was unfit to have his custody; that the family home was not an appropriate place for the child; and that it was for his best interest that his temporary custody be and it was given to the Child Welfare Department (Mrs. Helen Cox) for placement, supervision, and boarding home care. The motion of appellant for a new trial was denied and she has brought this appeal.

Appellees argue that the law does not provide for an appeal to this court from any action of the district court in proceedings authorized by the Juvenile Court Act. §§ 43-201 to 43-227, R. R. S. 1943. A review of a finding and adjudication of the district court by authority of the Juvenile Court Act that a child is dependent and neglected, that his mother is not a suitable person to have his custody, and committing the child to the Child Welfare Department for placement, supervision, and boarding home care, may be had by an appeal to this court. Krell v. Mantell, 157 Neb. 900, 62 N. W. 2d 308. The argument of appellees that the order of the district court in this case was not a final order and that by reason thereof this appeal is unauthorized may not be accepted. The order was made in a special proceeding and it affects a substantial right. § 25-1902, R. R. S. 1943.

Appellant filed a written request that the court reporter be present and make a record of the proceedings and the matters offered as evidence at the hearing. The trial court announced before any proof was offered or received that this was a juvenile proceeding, a clinical hearing, and informal in character; that it was not a proceeding in which appellant was entitled to a record; and that there would be no record of anything that happened thereafter during the hearing of the case.

The court did consent that appellant might, at her expense, have a record of the proceedings made. A court reporter is in Nebraska a state officer and an officer of the court. §§ 24-338, 24-341, R. R. S. 1943; § 24-339.01, R. S. Supp., 1953. See State ex rel. Carey v. Cornell, 50 Neb. 526, 70 N. W. 56. He is required by legislative mandate to make a stenographic report of oral proceedings had in the court for which he is appointed reporter "including the testimony of witnesses * * * and any further proceedings or matter when * * * requested by either party to said proceeding * * *." § 24-340, R. R. S. 1943. The duty the statute enjoins may not be disregarded by the reporter and the trial court has no authority or right to keep the reporter from performing his duty. A litigant is not obliged to make a request for a record by the reporter except in those situations where it is affirmatively required by the terms of the statute, otherwise a litigant may rely upon the reporter for a record of the proceedings. See Holland v. Chicago, B. & Q. R. R. Co., 52 Neb. 100, 71 N. W. 989. The office of court reporter is an important and responsible one. The duties of the office should be performed efficiently and with fidelity. In Home Fire Ins. Co. v. Johnson, 43 Neb. 71, 61 N. W. 84, it is said: "It is easily conceivable that a case of hardship might arise by a refusal of the character indicated, and if such hardship appeared, the judgment could not stand. Provision has been made for the use of stenographers as reporters, and to the proper administration of justice their services are very valuable, and they should be required to be in attendance, just as is required of any other officer of the court, when a trial is in progress." The court erroneously prevented the court reporter from making a record in this case. It improperly caused an expense to appellant as a condition of having the proceedings recorded. The error however was harmless because appellant, at her expense, provided a reporter who did what the court reporter should have done. If the appellant had sustained legal

prejudice because of the ruling of the court it would have been reversible error. Home Fire Ins. Co. v. Johnson, *supra;* Coupe v. United States, 113 F. 2d 145.

The record does not show that any of the several persons referred to in the record as witnesses who appeared and gave information during the hearing of this case were administered an oath. It is certain that an oath was not taken by any of them. The court responded to a suggestion of appellant that an oath had not been administered to a person produced and who was about to be examined that "You are presumed to be under oath anyway." Section 25-1237, R. R. S. 1943, requires an oath to be administered to all witnesses and to be given in the manner "most binding upon the conscience of the witness." The exact language thereof is: "Before testifying, the witness shall be sworn to testify the truth, the whole truth, and nothing but the truth. The mode of administering an oath shall be such as is most binding upon the conscience of the witness." This provision of the law requires an oath of any witness. This proceeding was contested litigation involving a question of fact. It was a judicial search for the truth as a basis of deciding an issue affecting the right of a mother and her infant child. The failure to observe the plain mandate of the law is reversible error if objection is made and the omission is not waived. Fetty v. State, 119 Neb. 619, 230 N. W. 440; Krell v. Mantell, *supra.*

Appellant was not permitted an opportunity for an orderly and reasonable cross-examination of the persons examined in support of the charges made in the petition. The request of counsel for appellant to examine additional persons in support of her contentions that the claims made in the petition were untrue was refused by the court. The reason for this is clear from statements made by the court during the hearing that this was only a clinical proceeding; that the right of cross-examination did not exist; that it was not the kind of a proceeding where the credibility of a witness could be tested or ques-

tioned; that the rules of evidence were not applicable; and that a judgment was unnecessary.

The problem in this case was whether or not appellant was unfit to perform the duties of mother of the infant child or whether or not she had by wrongful acts or neglect forfeited the right to the custody of her child. It is firmly established in this state, and has been recently restated, that courts may not properly deprive a parent of the custody of a minor child unless it is shown that such parent is unfit to perform the duties of the relationship of parent and child and has forfeited the right to his custody. The custody of a child is to be determined by the best interest of the child with due regard to the superior rights of a fit and suitable parent. Lakey v. Gudgel, *ante* p. 116, 62 N. W. 2d 525. This case affects a 9-month-old infant who was in the custody of his mother. She and the father of the child had separated and the family home had been abandoned. The mother and the child were living in the parental home of the mother. An action for divorce and custody of the child was pending in the district court when this proceeding was commenced. The mother had the custody of the child and she is contesting to maintain her custody of him. There is probably no action known to the law more worthy of judicial consideration and careful determination than a proceeding affecting the custody of a little child. Claims of a parent should not be regarded in the removal of a child from the control of its parent if the parent is clearly unfit or has by misconduct forfeited his right to the custody of the child and if such drastic action is for the welfare of the child. However the devotion, care, and guidance of a normal parent are invaluable to his child and the relationship of parent and child should not be severed or disturbed unless the facts justify it. The interests of all parties concerned require, when the issue is contested in court, that the facts be shown by competent evidence. This should be accomplished by substantial observance of the rules of

evidence and procedure that are usually considered essential to protect substantial rights in hearings without a jury had for the adjudication of issues of fact in civil cases in the district court. The essential processes, rules, and procedure of the law established and observed to aid courts in the investigation and adjudication of controversies and contested issues are not discarded or permitted to be disregarded because a pertinent statute refers to the proceeding as a summary one. If there is a contested issue of fact to be tried and determined in a proceeding by virtue of the statute concerning juvenile dependents or delinquents, as there is in this case, the result of an investigation ex parte and clinical in its nature may not be used as legal evidence in the trial of the contest, except insofar as it satisfies the requirements of the rules of evidence. It is sometimes said in delinquency cases involving very serious juvenile misconduct that constitutional safeguards and the procedures of the criminal law may be disregarded, but even in this there is no implication that a purely informal, hasty trial of a contested issue of fact may properly or legally be had with only scant regard to rules of evidence or of procedure. There must be a reasonably definite charge and customary rules of evidence essential to getting at the truth with reasonable certainty must be observed. Findings of fact must rest on preponderance of competent proof produced under such rules and an adjudication should be made in harmony with the findings. Krell v. Mantell, *supra;* Mill v. Brown, 31 Utah 473, 88 P. 609, 120 Am. S. R. 935; State ex rel. Palagi v. Freeman, 81 Mont. 132, 262 P. 168; In re Matter of Hill, 78 Cal. App. 23, 247 P. 591; People v. Lewis, 260 N. Y. 171, 183 N. E. 353, 86 A. L. R. 1001.

The best of intentions and the greatest zeal to care for neglected, dependent, or delinquent children do not justify the violation of the constitutional provisions as to due process that are involved in removing a child from

the custody of its parent. The indispensable elements of due process are a tribunal with jurisdiction, notice of a hearing to the proper party, and an opportunity for a fair hearing according to applicable procedures. Appellant did not have an opportunity for or a fair hearing in this case.

Appellant complains that the court in its consideration and determination of this case considered not only the statements of unsworn persons examined during the hearing but many undisclosed reports made and communicated to the court by unnamed persons described as investigators from the police department and the Child Welfare Department. The record justifies the complaint of the appellant. The reports were not admissible in evidence. They were improper to be considered by the court in this case. If material competent information known to any of the persons who made the reports was desired as evidence it should have been produced under oath with opportunity for cross-examination. Appellant could not meet matters contained in reports of which she had no knowledge or means of knowledge and the record in the case in this court on appeal could not present information contained in the reports and considered as a basis of the adjudication in the district court. Scherz v. Platte Valley Public Power & Irr. Dist., 151 Neb. 415, 37 N. W. 2d 721; Pope v. Tapelt, 155 Neb. 10, 50 N. W. 2d 352; Krell v. Mantell, *supra*. In State ex rel. Palagi v. Freeman, *supra*, the court said: "At most, the court had before it the ex parte reports of the probation officer above quoted, which were not legal evidence of even the facts therein set forth. As these matters must be set forth in the petition and charges made therein, those charges must be established by evidence, with the corresponding right of cross-examination." See, also, In re Matter of Hill, *supra;* People v. Lewis, *supra*.

This was a contested matter in the district court and the hearing should have been conducted with regard for established rules and procedures. State ex rel. Miller

v. Bryant, 94 Neb. 754, 144 N. W. 804, decided that the act of the Legislature of 1905 (Laws 1905, c. 59, p. 305) in reference to dependent, neglected, and delinquent children, in essential particulars so far as applicable to this case the same as statutes now on the subject, did not create a new court or any court but only imposed new and additional powers on the district court. It is said therein: "By the act under consideration no new court was created, but the already existing district court was given new and additional powers and jurisdiction. That court is a court of general common law and equity jurisdiction, and it was clearly within the power of the legislature to require that court to exercise the powers and jurisdiction provided for by the juvenile court law." The Juvenile Court Act did not change the rules, practice, and procedure applicable to hearings without a jury of contested issues of fact in the district court.

The findings and adjudication of the district court should be and they are reversed and the cause is remanded for further proceedings.

REVERSED AND REMANDED.

COUNTY OF HAMILTON, APPELLEE, V. HERLUF O. THOMSEN, APPELLANT.

63 N. W. 2d 168

Filed March 5, 1954. No. 33429.

1. **Insane Persons.** If the spouse of a patient in a state hospital for the mentally ill is possessed of an estate and income sufficient to meet the expense of the care and maintenance in the hospital without depriving those dependent upon the patient or spouse of their necessary support the spouse is obligated to pay to the superintendent of the hospital quarterly a sum to be fixed by the Board of Control which shall be an amount equal to the per capita cost of maintaining the patient in the hospital.
2. **Constitutional Law: Statutes.** A statute imposing liability on the spouse of a mentally ill person to pay the cost of maintenance in a state hospital is constitutional.
3. ———: ———. The title to an act which recites that it relates

to state institutions, and provides procedure for the recovery of cost of maintenance of patients in state hospitals, is not subject to attack on constitutional ground that it contains more than one subject.

4. ———: ———. If the general purpose of a legislative act is expressed in the title and the matter contained in the body of the act is germane thereto the title is sufficient to satisfy constitutional requirements.

5. ———: ———. No rule of constitutional interpretation is violated by a legislative provision declaring retroactively a procedural method of recovery upon an existing substantive right.

6. **Insane Persons.** The absence of a statute allocating funds received by a county or the state as the result of legal action against a spouse to enforce his obligation to support and maintain a patient in a state hospital is not available as a defense to the action.

7. **Evidence.** Duly certified copies of records and entries or papers belonging to any public office, or by authority of law filed to be kept therein, shall be evidence in all cases of equal credibility with the original records or papers so filed.

8. ———. The records of the Board of Control pertaining to the control and operation of state institutions under its jurisdiction are, within the meaning of statute, business records.

9. ———. The business record of acts, conditions, or events of the Board of Control to the extent that they are relevant are competent evidence if identified properly by the custodian or other qualified witness and proved to the satisfaction of the court pursuant to section 25-12,109, R. S. Supp., 1953.

10. **Officers: Evidence.** In the absence of evidence to the contrary a presumption obtains that official acts, including ministerial acts, or duties have been properly performed.

11. ———: ———. The law presumes official acts of public officers, in a collateral attack thereon, to have been done rightly, and with authority, in the absence of evidence to the contrary, and, in such a collateral attack, acts done, which presuppose the existence of other acts to make them legally effective, are presumptive proof of the existence of such other acts.

APPEAL from the district court for Hamilton County: HARRY D. LANDIS, JUDGE. *Affirmed.*

Fraizer & Fraizer, for appellant.

Clarence S. Beck, Attorney General, *Homer L. Kyle,*

and *John W. Newman,* for appellee.

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

YEAGER, J.

This is an action at law instituted by the County of Hamilton, Nebraska, plaintiff and appellee, against Herluf O. Thomsen, defendant and appellant, to recover $2,526.36 claimed to be due and payable for maintenance of Mae Thomsen, the wife of the defendant, at the Hastings State Hospital at Ingleside, Nebraska.

A trial was had to a jury and a verdict was returned in favor of plaintiff for $2,000.75. Judgment was entered on the verdict. Motion for new trial was filed and overruled. From the judgment and the order overruling the motion for new trial the defendant has appealed.

The salient facts necessary to an understanding of the questions involved are the following:

On May 9, 1939, Mae Thomsen, wife of the defendant, was admitted to the state hospital at Ingleside, Nebraska, where she remained until December 15, 1939. The hospital was and is maintained by the state. It was denominated at that time a hospital for the insane. It is now denominated a hospital for the mentally ill. She was readmitted on May 19, 1941, and remained until September 9, 1942. She was readmitted on June 9, 1949, and remained in the hospital until February 29, 1952, when she was paroled to her husband.

The action here is for the recovery of $116.60 for the period beginning May 9, 1939, to December 15, 1939; $309.01 for the period beginning May 19, 1941, and ending September 9, 1942; and $2,000.75 for the period from June 9, 1949, to February 29, 1952, or a total of $2,426.36.

That portion of the action which pertained to the first and second periods when Mrs. Thomsen was in the hospital was, by the effect of instructions given, withdrawn by the court from consideration by the jury and only

the third submitted. The verdict and judgment were for the amount claimed as to this one.

No cross-appeal was taken by the plaintiff, therefore for the further purposes of this case we are concerned only with the question of whether or not the plaintiff is entitled to recover on this part of the pleaded cause of action.

To the petition the defendant filed a general demurrer which was renewed in the answer. The amended answer contains what amounts to a general denial and in it is also pleaded unconstitutionality of the statutory provision which contains the basis for the action as it was submitted to the jury.

The statutory provision brought into question is section 83-352, R. R. S. 1943. The section in its present form was enacted in 1949 and was in certain respects amendatory of preexisting statutes.

The act of 1949 provides, among other things, that if the spouse of a patient in the state hospital is possessed of an estate and income sufficient to meet the expense of the care and maintenance in the hospital without depriving those dependent upon the patient or spouse of their necessary support the spouse shall pay to the superintendent of the hospital quarterly a sum to be fixed by the Board of Control which shall be an amount equal to the per capita cost of maintaining the patient in the hospital.

This provision is not substantially different in the respect mentioned from long preexisting provisions.

The matter of care of the mentally ill is not a new one. The duty to provide care was assumed by the territorial Legislature in 1865. Laws 1865, p. 8. This assumption was carried into the statutes after statehood.

By the act of 1873, chapter 31, page 411, the Legislature imposed a burden on the several counties to support and maintain those admitted to the state hospital from the respective counties. This burden has been continued from that time down to the present date without

substantial change. Only mechanics of application have changed.

By the act of 1873 it became the duty of the board of trustees to fix the per capita cost of maintenance of patients in the hospital (G. S. 1873, c. 31, § 46, p. 422), and then quarterly to certify the amounts attributed to the respective counties to the state auditor whose duty it then became to notify the county clerks and charge the amounts to the counties (G. S. 1873, c. 31, § 47, p. 422). In this manner the amounts became collectible from the counties.

There have been some changes in the mechanics of this operation but they have been so slight as not to require further mention here.

This burden however even at the outset was not unconditional and at no time over the years did it become unconditional. Chapter 31, section 48, of the Laws of 1873, declared: "The provisions herein made for the support of the insane at public charge, shall not be construed to release the estates of such persons nor their relatives from liability for their support, * * *."

Though there have been amendments over the years relating to the care of the mentally ill no substantial change has been made in this declared obligation.

In 1947 the declaration of obligation became less general and more specific. The obligation was imposed on the spouse, the parent, and the child. § 83-352, R. S. 1943, as amended by the Laws of 1947, c. 335, § 40, p. 1072. There has since been no substantial change.

Section 48 of the act of 1873 empowered county commissioners to collect for maintenance from persons legally bound to support patients in the hospital. This remained true until 1915 when the superintendent was empowered to maintain action in behalf of the state. Laws 1915, c. 134, § 1, p. 299. This power continued until 1945 when the power was given to the county to sue in the name of the state. Laws 1945, c. 248, § 2, p. 784. In 1949 power was conferred on the counties to sue

in their own behalf. § 83-352, R. R. S. 1943.

As pointed out the defendant questions the constitutionality of the act under which the action is brought. He does not question it on the ground of lack of power to enforce the obligation upon him to pay for the maintenance of his wife. In any event such a contention, if made, would be without merit since it is clear that a statute imposing liability on the spouse of a mentally ill person to pay the cost of maintenance in a state hospital is constitutional. State v. Heupel, 114 Neb. 797, 210 N. W. 275, 48 A. L. R. 728; 28 Am. Jur., Insane and Other Incompetent Persons, § 44, p. 684.

The basis of his contention is that the title to the amendatory act is not broad enough to permit the Legislature to provide the specified procedure for maintenance of the action against him.

The title to the act in question is, to the extent necessary to state it, the following: "AN ACT to amend section 83-352, Revised Statutes Supplement, 1947, relating to state institutions; to provide procedure for the recovery of cost of maintenance of patients in a hospital for the mentally ill; * * *; and to repeal the original section." Laws 1949, c. 298, p. 1010.

The objection is that the title is violative of the constitutional provision that no bill shall contain more than one subject which shall be clearly expressed in the title or specifically that the title is too broad in that in addition to providing for the maintenance of mentally ill persons in the state hospital it creates a cause of action in favor of a county and a right to bring suit.

The contention is basically, in the light of the legislative history adverted to herein, unsound. The amendment does nothing more than to prescribe a procedure for reimbursement to the county for the payment of an obligation of the spouse for the support of a mentally ill person in the state hospital. This obligation of the spouse to the county is basically and inextricably of the substance of the legislation on this subject.

It is a rule that if the general purpose of a legislative act is expressed in the title and the matter contained in the body of the act is germane thereto, the title is sufficient to satisfy constitutional requirements. State ex rel. Baughn v. Ure, 91 Neb. 31, 135 N. W. 224; Sheridan County v. Hand, 114 Neb. 813, 210 N. W. 273; City of Mitchell v. Western Public Service Co., 124 Neb. 248, 246 N. W. 484.

The case here clearly falls within the purview of this rule.

The defendant urges that in any event the plaintiff may not recover for maintenance for any period prior to August 27, 1949, which was the effective date of the 1949 amendment, for the reason that to so allow would cause the amendment to operate retroactively and not prospectively. This contention is based on the theory that a new right has been created. This theory is not tenable. The right involved is based on the obligation of the spouse to maintain his wife which right, as has been pointed out, obtained throughout the entire year of 1949 and before.

No rule of constitutional interpretation is violated by a legislative provision declaring retroactively a procedural method of recovery upon an existing substantive right. Such a provision may be retroactive in its application. 82 C. J. S., Statutes, § 421, p. 996; 50 Am. Jur., Statutes, § 482, p. 505.

The contention that the amendment in this respect is unconstitutional is without merit.

The defendant substantially contends that since the statute (§ 83-352, R. R. S. 1943) makes no provision for allocation of funds received as the result of such actions as this it ought to be said that there shall be no liability on persons having the status of the defendant.

We fail to see, even if there be no provision for allocation of money recovered, how any benefit could flow from it to the defendant. His obligation to maintain his wife in the state hospital has become fixed by law and

while the disposition of funds coming to a county is of general public concern the disposition cannot be of particular concern in an action of this kind.

The next question presented is that of whether or not the evidence adduced to sustain the claim was erroneously admitted and whether or not there was competent evidence to sustain the claim. This point relates to the matter of proof of the rate charged against the defendant for the time involved. The only evidence adduced to sustain the rate or rates were copies of resolutions adopted by the Board of Control and certain testimony of the superintendent of the hospital.

The statute provides that the rate or sum shall be "fixed by the Board of Control which shall be an amount equal to the per capita cost of maintaining the patient in the hospital." § 83-352, R. R. S. 1943.

Dr. G. Lee Sandritter, the superintendent of the hospital, was called and gave testimony. In his testimony the following appears: "Q What factors were taken into consideration in making these computations? A The dates on which the patient was in the hospital, and the maintenance charges set for us by the Board of Control during those dates." It is to be observed that there is nothing in this to indicate the basis of the charge set by the Board of Control.

Charles R. Kuhle, secretary of the Board of Control, was called as a witness. He identified three exhibits which were admitted in evidence over objection. These were not original records. Each was a copied excerpt from the minutes of the Board of Control signed by the chairman and the witness and sworn to before a notary public. They contained the rates for maintenance of patients in the state hospitals as fixed by the Board of Control. They were objected to substantially on the ground that they were without foundational proof necessary to admit them as evidence of the records of the Board of Control.

They do not purport to show on their face that these

rates represent the per capita cost of maintenance of a patient at the state hospital at Ingleside, Nebraska. There is no other evidence in the record bearing upon per capita cost of maintenance except the testimony of the witness Sandritter, and his fixation of cost is not based on anything from which an inference of cost could be reasonably inferred. As he testified his fixation depended upon a rate of charge made by the Board of Control.

That there was foundation for the admission of these exhibits as proof of action by the Board of Control there can be little doubt. They were sufficient as certified copies of proceedings of the Board of Control and were admissible under section 25-1279, R. R. S. 1943, as follows: "Duly certified copies of all records and entries or papers belonging to any public office, or by authority of law filed to be kept therein, shall be evidence in all cases of equal credibility with the original records or papers so filed."

We think also that pursuant to statute the exhibits were competent as evidence of action taken by the Board of Control to the extent that action was outlined in the exhibits.

Section 25-12,108, R. S. Supp., 1953, which is a part of the Uniform Business Records as Evidence Act, provides: "The term 'business' shall include every kind of business, profession, occupation, calling, or operation of institutions, whether carried on for profit or not."

Section 25-12,109, R. S. Supp., 1953, provides: "A record of an act, condition, or event, shall, insofar as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition, or event, and if, in the opinion of the court, the sources of information, method, and time of preparation were such as to justify its admission."

We think that these exhibits were business records

and under the prescribed restrictions they were admissible as such.

The exhibits complied with the provisions of statute requiring the Board of Control to fix the amount to be charged to the spouse of an inmate. They did not by recital or otherwise state that the amount so fixed was equal to the per capita cost of maintaining the patient in the hospital.

We think however that in the light of the statutes it must be presumed that the Board of Control fixed the rate of charge with reference to the per capita cost notwithstanding no such mention was made. The rule in this connection is stated as follows in 31 C. J. S., Evidence, § 146, p. 799: "In the absence of evidence to the contrary, there is always a presumption that official acts, including ministerial acts, or duties have been properly performed, * * *."

This court said in Majerus v. School District, 139 Neb. 823, 299 N. W. 178: "The law presumes official acts of public officers, in a collateral attack thereon, to have been done rightly, and with authority, in the absence of evidence to the contrary, and, in such a collateral attack, acts done, which presuppose the existence of other acts to make them legally effective, are presumptive proof of the existence of such other acts." See, also, State ex rel. Campbell v. Slavik, 144 Neb. 633, 14 N. W. 2d 186.

In the case at bar there was no competent evidence adduced or offered the effect of which was to overcome the presumption that the Board of Control in fixing the rates did so with reference to its statutory duty to do so on the basis of the per capita costs of maintenance.

The objection therefore that there was an absence of proof to sustain the rate of charge against the defendant is without substantial merit.

Accordingly the judgment of the district court is affirmed.

AFFIRMED.

L. E. SIMPSON, DOING BUSINESS AS RAVEN SALES COMPANY, APPELLANT, V. JOHN J. MEIER COMPANY, A CORPORATION, ET AL., APPELLEES.

63 N. W. 2d 158

Filed March 5, 1954. No. 33431.

1. **Negligence.** The rule in Iowa is that the burden is upon the plaintiff not only to prove that alleged negligence of defendant or defendants was the proximate cause of the accident but also that plaintiff's driver was free from negligence which proximately contributed thereto.
2. **Appeal and Error: Trial.** In that state the rule is that in determining the correctness of a trial court's ruling upon a motion to direct or dismiss, the court upon appeal therefrom must consider as true all of the facts established by plaintiff's evidence in the light most favorable to him, and give him the benefit of all reasonable inferences that may be drawn therefrom.
3. **Trial.** Further, when this is done and reasonable minds might reach different conclusions therefrom upon the issue of plaintiff's freedom from contributory negligence, then the issue is for the jury, otherwise it is for the court as a matter of law.
4. **Negligence.** In Iowa the rule is that if the alleged negligence of the injured party contributed in any way or in any degree directly to the injury there can be no recovery.
5. ———. Such contributory negligence must be causal but it need not be the sole or proximate cause of the injury.
6. ———. In that connection, plaintiff's alleged negligence must be such as contributes proximately to the injury, but if it does so in whole or in part in any manner or to any degree, there can be no recovery on his behalf.

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

LaRue Bowker and *Lawrence R. Brodkey,* for appellant.

Pilcher & Haney and *Joseph H. McGroarty,* for appellees.

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

CHAPPELL, J.

Plaintiff, L. E. Simpson, brought this action to recover

for damages to his truck which, while being operated in a southerly direction, collided with the rear of one owned and operated by defendant John J. Meier Company, which was concededly disabled upon its right side of the highway, headed in the same direction. Defendant Interstate Bakeries Corporation owned and operated a truck which at time of the accident was headed in a northerly direction on its right side of the highway, with the front end of its trailer a little ahead of or about even with the rear of the John J. Meier Company's truck. The parties will be designated herein as plaintiff and defendants or Meier and Interstate. Decision of the issues is entirely controlled by the statutes and decisions of Iowa.

Plaintiff's petition alleged inter alia that about 10:15 p. m., March 28, 1951, his truck, equipped with good and sufficient brakes and lights, while being operated by his employee without negligence upon paved U. S. Highway No. 6 in a southerly direction about 6 miles northeast of Council Bluffs, Iowa, collided with the rear of defendant Meier's disabled truck. In that connection, he alleged that about the same time defendant Interstate's truck was negligently stopped or parked, headed in a northerly direction on the east side of the pavement next to Meier's disabled truck, without dimming its lights, all in violation of the Code of Iowa, 1950, sections 321.354, 321.395, and 321.416. He alleged that the disabled truck belonging to defendant Meier was negligently stopped or parked headed in a southerly direction on the west side of the pavement, without lights or the setting out of fuses or flares, all in violation of the Code of Iowa, 1950, sections 321.354 and 321.448. He also alleged that the sole proximate cause of the accident was the joint, several, and concurrent negligence of defendants.

Insofar as important here, the separate answers of defendants denied generally and alleged that the accident was proximately caused by the negligence of plaintiff's driver, which, under the laws of Iowa, barred plaintiff's

recovery. During the trial it was conceded that the trucks involved were respectively driven by employees of the owners thereof in the course of their employment, and that the court should take judicial notice of applicable statutes and decisions of the State of Iowa which were controlling in the case.

At conclusion of plaintiff's evidence the trial court sustained defendants' separate motions to direct or dismiss, and dismissed the action primarily upon the ground that the evidence was insufficient to sustain a verdict for plaintiff, and that in any event it was: "a clear case of plaintiff's driver being negligent," which barred plaintiff's recovery. Plaintiff's motion for new trial was overruled and he appealed, assigning substantially that: (1) The trial court erred in the exclusion of certain evidence; and (2) in sustaining defendants' motions and dismissing the action. We conclude that the assignments should not be sustained.

With regard to the first assignment, it was only incidentally argued that the trial court erroneously excluded certain evidence, and the record discloses either that no required offer of proof was made after objection thereto had been sustained, or that the objection was properly sustained, or that the offered evidence was subsequently admitted, or that if any evident answers had been admitted they could not have changed the result. In other words, the negligence of plaintiff's driver would have barred plaintiff's right of recovery in any event.

As we view it, our inquiry here is narrowed to one proposition, to wit: Was the evidence adduced by plaintiff sufficient to require submission of the question of contributory negligence of plaintiff's driver to the jury, or was it a matter of law for the court? We conclude that it was a matter of law.

In that connection, the rule in Iowa is that the burden is upon the plaintiff not only to prove that alleged negligence of defendants was the proximate cause of the

accident, but also that plaintiff's driver was free from negligence, which proximately contributed thereto. In determining the correctness of the trial court's ruling we must of course consider as true all of the facts established by plaintiff's evidence in the light most favorable to him, and give him the benefit of all reasonable inferences that may be drawn therefrom. Shannahan v. Borden Produce Co., 220 Iowa 702, 263 N. W. 39. Further, when this is done and reasonable minds might reach different conclusions therefrom upon the issue of plaintiff's freedom from contributory negligence, then the issue is for the jury, otherwise it is for the court as a matter of law. Knaus Truck Lines v. Commercial Freight Lines, 238 Iowa 1356, 29 N. W. 2d 204. Concededly, such rules are applicable here.

In Iowa it is also the rule that: "* * * if the injured party contributed in any way, or in any degree, directly to the injury, there can be no recovery." Banning v. Chicago, R. I. & P. Ry. Co., 89 Iowa 74, 56 N. W. 277. See, also, Towberman v. Des Moines City Ry. Co., 202 Iowa 1299, 211 N. W. 854; Hoegh v. See, 215 Iowa 733, 246 N. W. 787.

Such contributory negligence need not be the sole or proximate cause of the injury, but, as stated in Jakeway v. Allen, 227 Iowa 1182, 290 N. W. 507: "It is true that such negligence must be causal." As stated in Rietveld v. Wabash R. R. Co., 129 Iowa 249, 105 N. W. 515, and quoted with approval in Towberman v. Des Moines City Ry. Co., *supra*: "Of course, the plaintiff's negligence must be such as contributes proximately to his injury; but, if it does so in whole or in part, in any manner or to any degree, there can be no recovery on his behalf."

In the light of such rules and others hereinafter discussed, we have examined the record. Insofar as important here, the evidence discloses to wit: Approaching and at the point of accident, U. S. Highway No. 6 was a dry, paved highway about 18 feet wide. Before the accident, which occurred on March 28, 1951, about

10:15 p. m., plaintiff's driver had approached from the northeast, traveling in a southwesterly direction along and around a 600 or 700 foot long sweeping curve slightly inclined, perhaps 3 percent. It was a clear but rather dark night. Plaintiff's driver, with many years experience as such, had traveled over the highway at that point more than 300 times previously. Plaintiff's truck, weighing 19,000 pounds, was not loaded with freight. It was equipped with lawful air brakes and lamps which would ordinarily light up the pavement and part of the shoulders thereof some 250 to 300 feet ahead. The Code of Iowa, 1950, section 321.431, required that his brakes should be adequate when traveling on dry concrete pavement at 20 miles an hour where the grade did not exceed 1 percent, to stop within 45 feet. Plaintiff's driver also testified that at the speed he was traveling when he first saw the Meier truck he could have stopped within 30 or 40, not to exceed 40 or 50, feet after his foot was applied to the brake, which required no pressure.

At the end of the long sweeping curve the highway turns south as it runs adjacent to a filling station on the west side which had a gravel or white rock driveway 150 to 200 feet long and 32 to 34 feet wide continuously from the pavement to the gas pumps.

Plaintiff's driver entered such long sweeping curve at about 40 miles an hour. When he had passed along about one-third thereof he saw the lights of the Interstate truck facing north in the vicinity of the south edge of the filling station driveway. By analogy, it was then about 400 to 450 feet from him. Plaintiff's driver then blinked his lights several times and, receiving no response, took his foot off the gas and kept it near the brake pedal to be prepared to use it if needed and to stop if there was something wrong. In that connection he said: "I knew there was something wrong or somebody would answer me when I signaled." His truck was permitted to coast and slow down for some distance.

He kept his foot near the brake pedal in case he was required to stop. When almost through the curve and traveling at about 25 miles an hour, he kept his foot on the brake pedal from then on, and started to ride his brakes because he anticipated that something was wrong and he might be required to stop.

He testified that bright lights of the Interstate truck coming from the side blinded his vision for some distance, but nevertheless he went on, and as he came out of the curve he saw the disabled Meier truck in his lane with no lights or flares, about 70 to 75 feet ahead of him, and another truck with no lights or flares some 12 or 15 feet north thereof facing northeast on the filling station driveway. At that time the Interstate truck was in the left lane opposite the Meier truck with the front end of its trailer about even with or a little ahead of the rear of the Meier truck. Whether the Interstate truck was then stopped a moment or so is speculative. Rather, the evidence more reasonably establishes that at the time of the accident it was moving slowly past the Meier truck and stopped for a moment or so after the accident. In such situation, it is only reasonable to conclude that plaintiff had two alternatives by which he could have avoided collision with the exercise of ordinary care, that is, with his foot already on the brake pedal he could have stopped as was his duty, or he could have turned right off into the driveway, since there was concededly plenty of room for him to have done so. However, he did neither. Rather, still traveling at 12 or 15 miles an hour, he turned right and attempted to go around or pass the Meier truck over the shoulder on the wrong side, between it and the truck parked in the driveway. Such attempt failed, and the left front and corner of his truck collided with the right rear and corner of the Meier truck when his right front wheel was possibly two feet off the pavement. Coincidentally, he also struck a log chain which had been attached between the rear of the Meier truck and the truck parked north thereof on the

driveway. In that connection he said: "I seen a log chain just about the time I hit it." In other words, there was no competent evidence that such chain caused him to collide with the truck. Plaintiff's truck collided with such force that it nosed under and moved the Meier truck down the highway 2 or 3 feet, swerved the front end of it to the left on the pavement, and damaged the left front of plaintiff's truck to such an extent that it required an expenditure of at least $643.08 to repair it.

Further, one of plaintiff's witnesses, a part-time employee at the filling station and otherwise employed by plaintiff, testified that about 10 p. m. the Meier driver came to the filling station, then closed, seeking assistance for removal of his disabled truck from the pavement. He and another party, who did not testify, responded. They then placed the truck on the driveway some 12 or 15 feet north of the Meier truck and attached a log chain from it to the Meier truck. The witness testified that there was then one kerosene flare ahead of the Meier truck on the left shoulder and one on the left side of the Meier truck in the center of the pavement, but there was none at the rear. When they were ready, but before they attempted to move the Meier truck, the flare in the center of the pavement was picked up by the witness so that it would not be run over, and he was holding it up at the front of such truck in the center of the pavement at the time of the accident, which occurred about 10:15 p. m. He estimated that the distance from the end of the long sweeping curve to the rear of the Meier truck was about 100 feet and that the long sweeping curve, looking in a northeasterly direction, commenced at about the north edge of the station driveway, which gave a driver vision straight ahead toward the south for 100 to 150 feet after he came out of the curve. Two photographs received in evidence illustrate the topography at point of the accident and some distance therefrom in both directions.

The Code of Iowa, 1950, § 321.285, reads in part: "Any

person driving a motor vehicle on a highway shall drive the same at a careful and prudent speed not greater than nor less than is reasonable and proper, having due regard to the traffic, surface and width of the highway and of any other conditions then existing, and no person shall drive any vehicle upon a highway at a speed greater than will permit him to bring it to a stop within the assured clear distance ahead, such driver having the right to assume, however, that all persons using said highway will observe the law."

In Central States Electric Co. v. McVay, 232 Iowa 469, 5 N. W. 2d 817, the court construed such section as meaning that: "* * * where a motorist, while in the exercise of ordinary care, unexpectedly comes upon a vehicle of which he is not aware and which is not lighted as required by law, and thereafter exercises such care in an attempt to avoid striking the vehicle, he is not to be held guilty of negligence as a matter of law in colliding with the obstruction." Plaintiff relies upon such rule, but as heretofore observed, under the facts in this case it can give him no relief since plaintiff's driver did not unexpectedly come upon the Meier truck and did not exercise ordinary care to avoid colliding with it after he timely observed it. He simply took a chance, or trusted to luck, and lost.

Also, as stated in Knaus Truck Lines v. Commercial Freight Lines, *supra:* "Compliance with statutes is not all the law requires of a motorist. Statutes prescribe only the minimum of prudent conduct. All motorists are also required to exercise the care of the ordinarily prudent person under the circumstances. Langner v. Caviness, 238 Iowa 774, 779, 28 N. W. 2d 421, 424."

If the vision of plaintiff's driver was obscured by the bright lights of the Interstate truck while he was still some distance from the Meier truck, it was his duty to slow down and stop until he could see that it was safe for him to proceed. Shannahan v. Borden Produce Co., *supra.* Further, if the headlights of the Interstate truck

obscured the vision of plaintiff's driver, such fact would not constitute a legal excuse for failure to drive at such speed as to be able to stop within the assured clear distance ahead. Lindquist v. Thierman, 216 Iowa 170, 248 N. W. 504, 87 A. L. R. 893. See, also, Annotation, 87 A. L. R. 900.

As stated in Kadlec v. Johnson Construction Co., 217 Iowa 299, 252 N. W. 103: "In Harvey v. Knowles Storage & Moving Co., 215 Iowa 35, loc. cit. 42, 244 N. W. 660, in reference to the assured clear distance ahead statute we said: 'A violation of, or noncompliance with, this statute, *without proof of legal excuse* for noncompliance, constitutes negligence.' (Italics ours.)

"A thorough consideration of this question is contained in an opinion written by Chief Justice Kindig, in Lindquist v. Thierman, 216 Iowa 170, 248 N. W. 504. In that case, and also in the Wosoba v. Kenyon case, 215 Iowa 226, 243 N. W. 569, the plaintiff was blinded by lights of the on-coming car. Under such circumstances, it was held that, when the driver of a car is blinded by the lights of an on-coming car, it is his duty to stop, and a failure so to do amounts to a violation of the 'assured clear distance ahead' statute, and constitutes contributory negligence, as a matter of law."

Also, as appropriately said in Richards v. Begenstos, 237 Iowa 398, 21 N. W. 2d 23, citing numerous cases: "He had a safe course to pursue which would have fully protected him, but he chose not to take it and voluntarily placed himself in a place of obvious danger, which his experience and knowledge of existing conditions should have told him would very probably and almost certainly result in injury to all concerned."

Further, contrary to plaintiff's contention herein, there was no emergency unless it was one created by his own driver's negligence. 1 Blashfield, Cyclopedia of Automobile Law and Practice, c. 15, § 669, p. 547.

As stated in Parrack v. McGaffey, 217 Iowa 368, 251 N. W. 871, citing numerous cases: "It is the settled rule

of law, where one voluntarily places himself in a position of danger which can be seen and appreciated, he is guilty of contributory negligence, as a matter of law."

As stated in 1 Blashfield, Cyclopedia of Automobile Law and Practice, § 785, p. 723, citing Shannahan v. Borden Produce Co., *supra,* and authorities from other jurisdictions: "Where the vision of a motorist is temporarily obscured or impaired, or he is blinded by lights, and he has sufficient time or opportunity, before the happening of the accident, to slow down or stop, it is his duty to do so, and to go ahead slowly or to remain stopped until it is apparent that he can proceed with safety." See, also, 2 Blashfield, Cyclopedia of Automobile Law and Practice, § 1221, p. 88, citing Lukin v. Marvel, 219 Iowa 773, 259 N. W. 782, and authorities from other jurisdictions.

As we view it, the authorities relied upon by plaintiff are entirely distinguishable upon the facts and rules applicable thereto. Further discussion thereof would serve no purpose except to unduly prolong this opinion. For reasons heretofore stated, the judgment of the trial court should be and hereby is affirmed.

AFFIRMED.

LUCY V. BARRETT, APPELLANT, V. VAUGHN HAND ET AL., APPELLEES.

63 N. W. 2d 185

Filed March 5, 1954. No. 33450.

1. **Highways.** A traveler actually hindered may personally remove an obstruction in a highway, as may anyone else if specially injured, but it is a condition to the exercise of the right that the removal does not involve a breach of the peace and that due care is exercised in effecting the removal.
2. **Highways: Injunctions.** The owner of land attempted to be taken for a public road may enjoin the use of the same for such purpose until his damages for the taking have been ascertained and paid, or provision made for their payment.

3. ———: ———. The same would be true even though the road being established is a section line.
4. **Highways.** A public highway, while being used as such, can only be vacated by the county board in the manner prescribed by law, a proper petition for that purpose being necessary.
5. **Highways: Evidence.** The records of the proceedings of the county commissioners pertaining to laying out a road, required by law to be kept and which are unambiguous, cannot be modified by parol testimony in a collateral proceeding.
6. **Highways: Injunctions.** An elector residing within 5 miles of a public road has such special interest therein, independent of that which he has in common with the public, as will enable him to maintain a suit to restrain the unlawful closing of such road to public travel.

APPEAL from the district court for Lincoln County: JOHN H. KUNS, JUDGE. *Affirmed in part, and in part reversed and remanded with directions.*

Edward E. Carr and *Crosby & Crosby,* for appellant.

Beatty, Clarke, Murphy & Morgan, for appellees.

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

WENKE, J.

Lucy V. Barrett brought this action in the district court for Lincoln County. Her purpose in bringing the action is to enjoin Vaughn Hand and Byron Otis from tearing down certain fences which she alleges are on her land. Defendants filed an answer wherein they alleged the fence to be in a public road and causing an obstruction therein. They asked that plaintiff be required to remove the fence and that she be enjoined from further obstructing this road. The court found generally for defendants and dismissed plaintiff's petition but denied defendant Hand any affirmative relief. Her motion for new trial having been overruled, plaintiff appealed and defendant Hand has cross-appealed. Since defendant Hand is the only defendant who is a real party in interest, he will be referred to as appellee.

When an action in equity is appealed it is the duty

of this court to try the issues de novo and to reach an independent conclusion without reference to the findings of the district court.

In a case wherein the oral evidence in respect to a material issue is so conflicting that it cannot be reconciled this court will 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.

It should be stated at the outset that the question of a road by prescription is not here involved. Appellant has at all times here material been, and still is, the owner of Section 27, Township 9 North, Range 27 West of the 6th P. M., in Lincoln County, Nebraska. Appellee bases his rights upon the claim that the board of county commissioners of Lincoln County established and opened a public road along the section line between Sections 27 and 34 in Township 9 North, Range 27 West of the 6th P. M., in Lincoln County, and that this road has never been vacated. In order to justify his removing appellant's fence therefrom appellee is required to prove, by a preponderance of the evidence, that the road had been established and opened at the place where he did so. Shaffer v. Stull, 32 Neb. 94, 48 N. W. 882.

Since reference will be made herein to various tracts of land, all of which are in the same township and range in Lincoln County as those tracts already referred to, we will not again repeat that part of the description when referring thereto.

The record shows that in the fall of 1950 the then owner of the northwest quarter of Section 35 constructed a fence along the north line thereof which extended to within 2 feet of the northwest corner of the section. Shortly thereafter appellant rebuilt her fence for some distance along the south and east sides of the southeast quarter of Section 27, commencing the rebuilding at the southeast corner thereof. Her corner post at the southeast corner of Section 27 was and is within 2 feet

of the corner. This resulted in the two corner posts, one on the northwest corner of Section 35 and the other on the southeast corner of Section 27, being within about 4 feet of each other and prevented appellee from traveling on the road along the south side of Section 27 and getting onto his farm, he being the owner of the south half of Section 26. Prior thereto appellee and others going to his farm had been able to do so by going over Section 35 or over the southeast corner of Section 27, appellant having permitted her fence at that point to be down. After these corner posts were put in appellee, or others going to his farm, on three different occasions removed the corner post on appellant's land and some of the fence adjacent thereto so he or they could travel this road. On each occasion appellant had the fence put back and, after the third instance, brought this action.

"A traveler actually hindered may personally remove an obstruction in a highway, as may anyone else if specially injured, but it is a condition to the exercise of the right that the removal does not involve a breach of the peace, and that due care is exercised in effecting the removal." 40 C. J. S., Highways, § 225, p. 222. See, also, Muir v. Kay, 66 Utah 550, 244 P. 901; Shaheen v. Dorsey, 208 Ky. 89, 270 S. W. 452.

As stated in Muir v. Kay, *supra*: "There are circumstances where at common law a private subject had the right to abate a public nuisance in a public highway, when to do so did not involve a breach of the peace, and where due care was exercised in abating it, such as removing a fence or other structure or obstruction unlawfully placed across the highway, and which obstructed its passage, but, unless the private subject had occasion to make use of the highway or if the obstruction did not impede his progress traveling on the highway, he was required to leave the public injury to be redressed by the public authorities. It was the existence of an emergency which justified interference by the in-

dividual, and the right of a private citizen to abate the encroachment or obstruction was limited by the necessity of the case."

The question then arises, did appellant obstruct a public road or highway?

The statute defines a public road as: "All roads within this state which have been laid out in pursuance of any law of this state, and which have not been vacated in pursuance of law, * * *." § 39-101, R. R. S. 1943.

Prior to August 16, 1921, there was an established north and south road across the west part of Sections 27 and 34 known as road No. 210. On that date a sufficient petition was filed by electors residing within 5 miles of the proposed road seeking to establish a road east from road No. 210 on the section line between these sections and thence north one-half mile on the section line between Sections 27 and 26. The road was described in the petition as follows: "Commencing at the northwest corner of the southwest quarter of section 26, thence south on section line to the northwest corner of Section 35, thence west on section line between sections 27 and 34 to canyon, thence in a southwesterly direction about 25 rods around head of canyon, thence in a northwesterly direction back to above described section line, thence west along said line to established road running north and south." Proper procedures were had in connection with this petition.

Pursuant to notice given appellant, on March 4, 1922, filed objections to the establishment of this road and also a claim for $856 for damages which she claimed she would suffer if the road was established. On November 27, 1922, the county commissioners allowed the road and awarded appellant damages in the sum of $100. On December 11, 1922, appellant appealed to the district court for Lincoln County from the decision of the county board which had reduced her claim for damages to the sum above set forth. In her petition on appeal filed in the district court she set forth that the

road had been established on November 27, 1922, and asked for damages in the sum of $856 which she claimed she suffered by reason thereof.

There are at least three grounds upon which it can be held the road was established: First, because all the statutory requirements for the establishment of a road were complied with; second, because no question could be raised by appellant as to the regularity of the proceedings of the county board in establishing the road after she filed her claim for damages; and third, because no petition is necessary for a county board to obtain jurisdiction to take such action when opening a road on a section line.

As to the second ground, see Lionberger v. Pelton, 62 Neb. 252, 86 N. W. 1067; Hoye v. Diehls, 78 Neb. 77, 110 N. W. 714; Davis v. Boone County, 28 Neb. 837, 45 N. W. 249. As stated in Lionberger v. Pelton, *supra*: "No question is raised as to the regularity of the proceedings of the board in establishing the road, nor could any such objections be raised by the plaintiff, in view of the fact that he filed his claim for damages."

As to the third ground, a county board may do so whenever, in its judgment, the public good requires it.

Section 39-122, R. R. S. 1943, provides: "The section lines are hereby declared to be public roads in each county in the state, and the county board may, whenever the public good requires it, open such roads without any preliminary survey and cause them to be worked in the same manner as other public roads; Provided, any damages claimed by reason of any such road shall be appraised and allowed in the manner provided by law."

As stated in Zyntek v. Board of County Commissioners, 120 Neb. 779, 235 N. W. 328: "A petition for the opening of a highway on a section line is not essential to jurisdiction of the county board to take such action."

And in Peterson v. Hopewell, 55 Neb. 670, 76 N. W.

451, it is stated: "The law also declared all section-lines to be public roads, and that they might be opened by the county board whenever the public good required it." See, also, Rose v. Washington County, 42 Neb. 1, 60 N. W. 352; Barry v. Deloughrey, 47 Neb. 354, 66 N. W. 410.

Of course, any damages caused by reason of any such road must be appraised and allowed in the manner provided by law. § 39-122, R. R. S. 1943. See, also, Rose v. Washington County, *supra*; Barry v. Deloughrey, *supra*. As stated in Barry v. Deloughrey, *supra*: "* * * the sole limitation being that damages shall be appraised as nearly as practicable in the manner provided for the opening of other highways. * * * in appraising damages section 46 requires the procedure in relation to other roads to be followed so far as practicable." In the syllabus it was stated: "The county board may, without petition or notice, make a preliminary order establishing a section line road, or declaring that it shall be opened; but before it can be actually opened there must be proceedings upon proper notice to ascertain damages."

Such proceedings were had and, as already stated, appellant appealed from the decision of the county board fixing her damages at $100.

We come then to the proposition that: "The owner of land attempted to be taken for a public road may enjoin the use of the same for such purpose until his damages for the taking have been ascertained and paid, or provision made for their payment, * * *." Kime v. Cass County, 71 Neb. 677, 99 N. W. 546.

As stated in Hodges v. Board of Supervisors, 49 Neb. 666, 68 N. W. 1027: "The question presented is whether, in view of the facts above set out, the road in question can be opened. Section 21, article 1, of the constitution declares that 'the property of no person shall be taken or damaged for public use without just compensation therefor.' It requires that where private property is

taken or damaged for public use, just compensation must be ascertained and paid before the appropriation. That this rule applies to counties and municipalities exercising the right of eminent domain has been frequently asserted by this court, and is too well settled to require discussion." See, also, Zimmerman v. County of Kearney, 33 Neb. 620, 50 N. W. 1126; Livingston v. Board of County Commissioners, 42 Neb. 277, 60 N. W. 555; Morris v. Washington County, 72 Neb. 174, 100 N. W. 144.

The same would be true even though the road being established is a section line. See, Rose v. Washington County, *supra;* Barry v. Deloughrey, *supra.*

When appellant appealed to the district court the amount due her remained uncertain and until determined no warrant for the payment thereof could be properly drawn. § 23-131, R. S. 1943. As stated in Hoye v. Diehls, *supra:* "That appeal is now pending in the district court for Dodge county, and therein plaintiff claims a greater amount than allowed by the county board. Plaintiff is only entitled to recover damages, and in that appeal he has an adequate remedy."

On November 24, 1925, appellant dismissed her appeal. Thereupon the county board was obligated to direct the county clerk to draw a warrant in payment thereof. § 23-131, R. S. 1943. However, this duty ceased when, on December 1, 1925, appellant filed with the county clerk of Lincoln County a release of her claim for damages arising out of the establishment of this road on November 27, 1922, and directed him not to issue any warrant to her in payment thereof. Certainly under this situation appellant cannot complain that she has not been paid or that no provision has been made therefor.

But appellant contends she dismissed her appeal and waived her claim for damages in consideration of the county commissioners orally agreeing they would allow her to keep her land fenced to the section line east, from

a point where a lane leading to the farm home on the northeast quarter of Section 34 joins the section line, to the southeast corner of Section 27; that she could leave it there until such time as the commissioners decided to open this part of the section line; and that when they decided to do so they would then have her damages appraised and payment made thereof. This agreement was, in effect, a vacation of a part of this section line road. It should here be stated that all proof of the above agreement was either admitted over objection or excluded on objection and thereafter proper offers of proof were made thereof.

The statutes in this regard provide as follows:

"Any person desiring the * * * vacation, * * * of a public road, shall file in the clerk's office of the proper county a petition signed by at least ten electors residing within five miles of the road proposed to be established or vacated, * * *." § 39-105, R. R. S. 1943.

"Except as otherwise provided by law, no public road or any part thereof shall be vacated or changed without the consent of the majority of the voters living within two miles of the road and not living in a village or city; * * *." § 39-102, R. R. S. 1943.

We have said: "A public highway, while being used as such, can only be vacated by the county board in the manner prescribed by law, a proper petition for that purpose being necessary. Rev. St. 1913, sec. 2857; McNair v. State, 26 Neb. 257." State ex rel. Enerson v. County Commissioners, 102 Neb. 199, 166 N. W. 554. See, also, Barry v. Deloughery, *supra;* Letherman v. Hauser, 77 Neb. 731, 110 N. W. 745; Koch v. County of Dakota, 151 Neb. 506, 38 N. W. 2d 397; Wright v. Loup River Public Power Dist., 133 Neb. 715, 277 N. W. 53; Feuerstein v. Saunders County, 110 Neb. 121, 193 N. W. 256; McNair v. State, 26 Neb. 257, 41 N. W. 1099.

On February 11, 1925, a sufficient petition by owners of land adjacent to the road established on November 27, 1922, was filed with the county clerk asking for a vaca-

tion of a part thereof. The part sought to be vacated is described as "Commencing at the Northwest corner of the Southwest Quarter of Sec. 26-9-27 running thence south to the Southwest corner of said Southwest Quarter of said Section 26; thence west along the south line of Section 27-9-27 about ⅜ of a mile to the lane north of the house located on the Northeast Quarter of Section 34-9-27 being a portion of road Extension to Road No. 210." However, the county board refused to grant the full request of the petitioners but did on November 9, 1925, vacate a part of said road described as follows: "Beginning at the ¼ section corner of the East line of section 27, T9 N, R27 W. and running thence South ½ mile to SE corner of said section 27, and against vacating that part of extension of Road No. 210 lying west of SE corner of said section 27."

We come then to the question of the oral agreement. It should be here stated that there is nothing in the proceedings of the county board relating thereto and it was apparently entered into after the order of November 9, 1925.

It is stated in 20 Am. Jur., Evidence, § 1164, p. 1017: "It has been stated to be a general rule that what ought to be of record must be proved by the record. The record cannot be contradicted or enlarged by parol evidence. * * * Parol evidence is not admissible to show a motive or intention contrary to the recorded action of the public body."

Section 39-116, R. R. S. 1943, provides: "After the road has been finally established, the plat of the road must be recorded and platted by the county surveyor in the road plat book of the county with a proper reference to the files in the county clerk's office where the papers relating to the same may be found. The county clerk must record the petition, damage claims, field notes, and all other papers relating to the road."

We think the correct rule is established in Flemming v. Ellsworth County Comm'rs, 119 Kan. 598, 240 P. 591:

"The records of the proceedings of the county commissioners pertaining to laying out a road, required by law to be kept, and which are unambiguous, cannot be modified by parol testimony, in a collateral proceeding." See, also, Big Sandy Ry. Co. v. Floyd County, 125 Ky. 345, 101 S. W. 354; Crommett v. Pearson, 18 Me. 344.

We said in Herzoff v. City of Omaha, 124 Neb. 785, 248 N. W. 314: "As to the due enactment of the ordinance, which plaintiff questions, it may be said that it was in effect stipulated at the trial that the records of the city show affirmatively the due passage of this ordinance, upon which the trial court in effect refused to permit the introduction of parol evidence to contradict the express recitals of the written records. This ruling was unquestionably correct. State v. Abbott, 59 Neb. 106."

The matter is well stated in Anderson v. Commissioners of Hamilton County, 12 Ohio St. 635: "It is also claimed as error, that the court refused to receive evidence of what would seem to be a contract between the county commissioners and the ancestor of the plaintiffs, by which the commissioners, in consideration of the right of way for another road, agreed to relinquish their alleged right to construct a road over the land in controversy under the authority of the proceedings shown by the record offered in evidence. If the record was valid and established the road, then it is quite clear that the commissioners could not, by a contract, alter or vacate it, but could only do so upon a petition and proceedings under the statute. This is shown by one of the authorities already cited. 11 Gill & J. 50, 56. For the purpose, therefore, of showing a contract binding on the commissioners and invalidating the effect of the record as establishing the road, the evidence was incompetent, and being offered for that purpose only, was properly rejected."

In the annotation of the subject of the "Admissibility of parol or extrinsic evidence to alter or supplement written records of local legislative bodies" found on page 1229

of 98 A. L. R., it is stated on page 1230: "Unquestionably the general rule with respect to admission in collateral proceedings, of parol or extrinsic evidence to alter or supplement written records of local legislative bodies, seeks always both to protect them from the attacks of outsiders, and to preserve them as against the uncertainty of individual memories. The reasons for the rule are generally stated to be the assurance of verity, safety, certainty, and permanence to those whose rights are fixed, or actions governed, in dealings with public bodies, and the avoidance of mischief, both to the governmental units and those whose rights and actions are affected by them, which might result from leaving evidence of public acts to shifting sources. 10 R. C. L. Evidence, § 220; 22 C. J. Evidence, §§ 1421-1427; 2 McQuillin, Mun. Corp. 2d ed. §§653-655."

We find the court was correct when it excluded evidence of such parol agreement and that evidence relating thereto, which was admitted over objection, should have been excluded.

We come then to appellee's cross-appeal. Appellee prayed: "That plaintiff be required to remove the obstruction and abate the nuisance she has set up and established in said highway and be enjoined from further obstructing said highway or erecting nuisances therein."

The evidence shows that east from the lane to the house on the northeast quarter of Section 34 appellant was at all times permitted to keep her fence within 2 feet of the section line. But appellant obtained no rights by reason thereof for, as provided by section 39-160, R. R. S. 1943: "No privilege, franchise, right, title, right of user, or other interest in or to any street, avenue, road, thoroughfare, alley or public grounds in any county, city, municipality, town or village of this state, or in the space or region under, through or above any such street, avenue, road, thoroughfare, alley or public grounds, shall ever arise or be created, secured, acquired, ex-

tended, enlarged or amplified by user, occupation, acquiescence, implication or estoppel."

As stated in Taylor v. Austin, 83 Neb. 581, 119 N. W. 1123: "A party cannot acquire prescriptive title to a public highway by possession and use of the ground included therein, however long continued." See, also, Donovan v. Union P. R. R. Co., 104 Neb. 364, 177 N. W. 159.

The evidence shows that at all times since this road was established that it has been open for travel except for a short time in 1950 when the then owner of the northeast quarter of Section 34 moved his fence on his north line up to within 2 feet of the section line. However, shortly after doing so he moved it back 25 feet from the section line, having been requested to do so by the county surveyor. The road established was 50 feet wide. As already stated the appellant never did move her fence back from the section line insofar as the section of road herein involved is concerned.

In this respect it is appellant's thought that appellee has an adequate remedy at law under the following principle announced in Burkhardt v. Cihlar, 149 Neb. 712, 32 N. W. 2d 197: "Where a highway has been legally established, mandamus will lie to compel the proper authorities to open it." See, also, State ex rel. Draper v. Freese, 147 Neb. 147, 22 N. W. 2d 556.

Here, however, where the road has in fact been at least partially opened, the following has application: "An elector residing within five miles of a public road has such special interest therein, independent of that which he has in common with the public, as will enable him to maintain a suit to restrain the unlawful closing of such road to public travel." Letherman v. Hauser, *supra.*

As stated in Burkhardt v. Cihlar, *supra:* "If road No. 225 across the northwest quarter of Section 2 had actually been opened, that is, worked or traveled, after it was established and thereafter the appellants had,

by means of fences, obstructed the use thereof then, under our holdings in Letherman v. Hauser, 77 Neb. 731, 110 N. W. 745, and Donovan v. Union P. R. R. Co., 104 Neb. 364, 177 N. W. 159, it would appear that appellees could maintain this action * * *."

We find the factual situation entitled the appellee to the relief for which he prayed and that the trial court was in error in denying him that relief.

We affirm that part of the trial court's decree dismissing appellant's petition but reverse that part denying appellee the relief for which he prayed with directions that such relief be granted him. Costs are taxed to appellant.

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

GLEN GILLILAND, AS ADMINISTRATOR OF THE ESTATE OF MARIAN ELAINE GILLILAND, DECEASED, APPELLEE, V. FRED WOOD, APPELLANT, IMPLEADED WITH LLOYD L. BICKEL, APPELLEE.

63 N. W. 2d 147

Filed March 5, 1954. No. 33495.

1. **Negligence.** Negligence is a question of fact and may be proved by circumstantial evidence and physical facts. All that the law requires is that the facts and circumstances proved, together with the inferences that may be properly drawn therefrom, shall indicate with reasonable certainty the negligent act charged.
2. **Trial: Appeal and Error.** The submission of issues to the jury, which are not pleaded and upon which there is no evidence, is erroneous, and, if prejudice results, requires a reversal of the judgment.
3. **Appeal and Error.** An immaterial or harmless error in the proceedings below is not a ground for a reversal on appeal.
4. **Automobiles: Trial.** Where the evidence shows that the operator of an automobile involved in an accident had a strong odor of intoxicating liquor on his breath, it is not error for the trial court to instruct with reference thereto.

APPEAL from the district court for Buffalo County: ELDRIDGE G. REED, JUDGE. *Affirmed.*

Chambers, Holland & Groth and *Dryden, Jensen & Dier,* for appellant.

Blackledge & Sidner, for appellee.

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

CARTER, J.

This is an action to recover damages for wrongful death resulting from an automobile accident. It was commenced by the administrator of the estate of Marian Gilliland against Fred Wood and Lloyd L. Bickel. The jury returned a verdict against the defendant Wood in the amount of $3,250 and judgment was entered thereon.

The evidence shows that Wood was driving an automobile owned by Bickel at the time of the accident. The trial court directed a verdict for Bickel at the close of all the evidence. No cross-appeal was taken from this ruling. The verdict was against Wood alone, and Bickel is no longer a party to the action.

The evidence shows that on March 24, 1952, Marvin A. Keith was driving east from Kearney towards Shelton, Nebraska, at about 7:20 p. m. He was accompanied by Lorraine Smith, who is now his wife, and the deceased, Marian Gilliland. All were riding in the front seat with Marian sitting on the right side and Lorraine sitting in the middle. Marian was killed in the accident and the Keiths, who suffered very severe injuries, are unable to recall anything that happened immediately preceding the collision. They did testify that they remember passing a certain cafe as they left Kearney, and that they were then driving east on the south side of the center line of the highway. From that time on they have no recollection of what occurred.

The defendant Wood testified that he was employed by Lloyd L. Bickel to feed and care for a herd of cattle

on the Kearney Air Base, approximately 5 miles east of Kearney. After completing his work for the day, Bickel permitted him to use his automobile to return to his home in Kearney. He testified that he drove to the south entrance of the air base and turned west on U. S. Highway No. 30. At a point about one-half mile west of the entrance he said he saw a car about 30 feet northwest of him which appeared to come out of the borrow pit on the north side of the road. He testified that the car was traveling about 10 miles per hour and that he had no opportunity to avoid the collision. All of the persons involved in the accident were unconscious when Don Slaughter, a farmer living close by, arrived on the scene.

Don Slaughter was the first to arrive at the place of the accident. He was standing in his farmyard about 100 feet north of the highway and 200 feet west of the point of the collision when it occurred. He testified that he got into his car and arrived at the wreck within a minute or two after it happened. He stated that no cars passed by prior to his arrival. The car driven by Wood was on the north side of the road on the shoulder, headed east, with the right front wheel barely on the pavement. The Keith car was headed northeast with its front wheels in the center of the south half of the highway. The Keith car was about 25 feet east of the Wood car. Defendant Wood was on the south shoulder with his head to the east about 25 feet west of the Keith car. The three people who were riding in the Keith car were east of it on the shoulder of the highway. There was a lot of debris such as dirt, chrome, and glass on the highway. Most of it was in the center and south portion of the road. The highway was clear of snow and ice but the fields and borrow pits were full of snow. There were no car tracks in the borrow pits on either side of the highway. No traffic passed the scene of the accident until the sheriff and the Kearney fire de-

partment emergency unit arrived. These facts were verified by the sheriff and other witnesses.

Sheriff Lloyd L. Frank testified that the Wood car had chains on the rear wheels. There were no chains on the Keith car. He testified to finding chain marks on the north side of the center line of the highway about 32 feet east of the front end of the Wood car. The east chain mark was about 6 inches from the center line and the west chain mark was from 18 inches to 2 feet north of the center line, the inference being that the front of the Wood car was necessarily south of the center line when the chain marks were made.

Photographs of the automobiles were placed in evidence. The right front and side of the Wood car were badly damaged. The bumper of the Keith car was wedged into the damaged portion of the Wood car at and above its damaged right front wheel. The Keith car appears from its picture to have been hit almost head-on. The damage to the right front side of the Wood car supports the inference drawn from the chain marks that it had crossed to its left across the center line and had been struck on its right side.

There is evidence in the record that there was a strong odor of intoxicating liquor on Wood's breath when he was picked up. Three members of the emergency unit crew testify to this fact. Wood denied that he had a drink that day. There was a cafe known as the Mystery Cafe, on the route taken by Wood, where intoxicating liquors were sold. There was a discrepancy of more than an hour in the time Wood said he started home and the time of the accident, which was not accounted for.

Sheriff Frank testified in rebuttal that he talked with Wood about 11:30 p. m. on the night of the accident and that he then said that he could not remember anything about it. He talked with Wood again in a Lincoln hospital on April 10, 1952, and he then said he remembered stopping at the Mystery Oil Station on the way home,

but he did not remember seeing any car at any time immediately prior to the collision.

The physical facts demonstrate that the Keith car did not come onto the highway from the north. Several witnesses testified that there were no car tracks in the north borrow pit. We think the facts here recited furnish a basis for a conclusion by a jury that Wood crossed over the center line and that his car was struck on the right front by the Keith car. The evidence was sufficient to support a verdict. Gutoski v. Herman, 147 Neb. 1001, 25 N. W. 2d 902.

Negligence is ordinarily a question of fact which may be proved by circumstantial evidence and established physical facts. If such facts and circumstances, and the inferences that may be drawn therefrom, indicate with reasonable certainty the existence of the negligent act complained of, it is sufficient to sustain a verdict by the jury. Simcho v. Omaha & C. B. St. Ry. Co., 150 Neb. 634, 35 N. W. 2d 501; Rocha v. Payne, 108 Neb. 246, 187 N. W. 804. Undisputed physical facts, which demonstrate the negligence or nonnegligence of a party, alone are sufficient to sustain a verdict of a jury. Hessler v. Bellamy, 128 Neb. 571, 259 N. W. 514.

Defendant complains of an instruction containing references to the law governing the speed of automobiles on the public highways. The petition contained no allegation of excessive speed on the part of the defendant. We think it was error for the court to have so instructed the jury. An examination of the evidence reveals that the case was tried on the theory that defendant crossed the center line into the path of the Keith car and that Wood was intoxicated at the time of the accident. No evidence of excessive speed apears in the record and we fail to see how a jury could have been mislead by quoting the speed provisions in connection with other proper statements in the statute governing the rules of the road. The part of the instruction complained of should not have been given, but it clearly was not prejudicial to the

rights of the defendant under the circumstances here shown. Rocha v. Payne, *supra.*

Defendant complains that the evidence was insufficient to warrant the submission of the question of defendant's intoxication to the jury. There is evidence by three witnesses that there was a strong odor of intoxicating liquor on defendant's breath immediately following the accident. The instruction as given stated: "With reference to the allegation of plaintiff's petition that the defendant, Fred Wood, was under the influence of intoxicating liquor at the time of the accident in question, you are instructed that if you find from a preponderance of the evidence that said allegation is true, that, in and of itself, and standing alone, would not be proof of negligence; and before you would be justified in finding against the defendant because of intoxication you must further find by a preponderance of the evidence, from all the facts and circumstances shown by the evidence, that his condition of intoxication manifested itself in physical acts of omissions in the operation of his automobile which would constitute negligence, and that said physical acts or omissions in the operation of his automobile, caused by such alleged intoxication, were negligent, and were proximate causes of the injury to and death of Marian Elaine Gilliland."

We think the instruction was properly given. It was made clear that the evidence of intoxication standing alone was insufficient upon which to find a verdict for the defendant. The jury was told that this evidence, when taken in connection with other manifestations of acts or omissions constituting negligence, was proper to be considered in determining whether the defendant was negligent. This, we think, correctly states the rule applicable to a situation of this kind. They could properly be considered in connection with the testimony of the defendant that he did not see the Keith car until he was within 30 feet of it, that it appeared to come up out of the borrow pit when the physical facts show that

it did not do so, and in connection with the chain marks and debris on the pavement indicating that defendant's car did cross the center line of the highway into the path of the oncoming Keith car. There was no error in giving the instruction under the circumstances shown. Hackbart v. Rohrig, 136 Neb. 825, 287 N. W. 665.

Other objections to the instructions are assigned as error. An examination of the instructions as a whole convinces us that they contain no prejudicial error. No contention is made that the court erred in instructing the jury on the question of damages, or that the verdict returned is excessive. The case appears to have been tried with due regard to the rights of the defendant.

We find the judgment to be free from prejudicial error, and it is affirmed.

AFFIRMED.

THE BOARD OF TRUSTEES OF YORK COLLEGE AT YORK, NEBRASKA, ET AL., APPELLANTS, V. E. M. CHENEY ET AL., APPELLEES.

63 N. W. 2d 177

Filed March 5, 1954. No. 33509.

1. **Trial: Appeal and Error.** If plaintiff is required in the district court to produce evidence to establish his cause of action when the defendants are in default of pleading to the petition, the plaintiff on appeal to this court from a judgment of dismissal of the case is entitled to the advantage of the facts well pleaded by him and any additional material facts shown by the evidence received without objection in testing the correctness of the judgment of dismissal.
2. **Charities: Trusts.** A charitable trust is a fiduciary relationship with respect to property arising as a result of a manifestation of an intention to create it, and subjecting the person by whom the property is held to equitable duties to deal with the property for a charitable purpose.
3. ———: ———. A gift upon condition to a charitable corporation to further the purposes of the corporation is governed by the same principles of law as a gift to a charitable trust.

4. ———: ———. If a definite function or duty cannot be performed in exact conformity with the scheme of the person who provided therefor, under cy pres doctrine, the function or duty must be performed with as close approximation to such scheme as is reasonably practicable.
5. ———: ———. The cy pres doctrine, that a gift for charity having become impossible of application according to the intent of the donor shall be applied as nearly as may be according to that intent, has no existence or operation when the donor himself declared how the gift should be used in the event of the failure of the charitable use to which he, in the first instance, directed it should be devoted.
6. ———: ———. If the dominant purpose of a charitable trust is certain, it will not be denied execution because of absence of perfection of detail or the presence of immaterial and inappropriate language in the instrument creating the trust.

APPEAL from the district court for York County: HARRY D. LANDIS, JUDGE. *Affirmed.*

Perry & Ginsburg, for appellants.

Clarence S. Beck, Attorney General, *Homer L. Kyle,* and *John L. Riddell,* for appellees.

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

BOSLAUGH, J.

Appellants by this suit seek the aid of equity to have eliminated from a deed a condition therein prohibiting the encumbrance or alienation of real estate constituting the campus of York College at York, Nebraska, and described in and conveyed by the deed to The Board of Trustees of York College at York, Nebraska, in trust for the Church of the United Brethren in Christ for school purposes; to have the title to the real estate quieted in fee simple in the board of trustees for and on behalf of York College with authority to deviate from the terms and conditions of the deed as it was at the time of its delivery to and acceptance by the board of trustees of the college; to mortgage, encumber, and convey the real estate as the trustees believe is advisable for the opera-

tion and support of the college; and to have appellees barred from having or claiming any interest in or to the real estate. The trial court found that no legal reason was shown by appellants for the removal of the restriction in the deed, denied them any relief, and dismissed the case. The parties to this case will be identified as follows: York College at York, Nebraska, as the college; the board of trustees of York College at York, Nebraska, as trustees; Church of the United Brethren in Christ, as the church; The Evangelical United Brethren Church of Dayton, Ohio, as the evangelical church; the County of York, as the county; and E. M. Cheney, as donor or settlor.

The Attorney General of the state was a defendant. He appeared by general demurrer to the petition. It was denied. He elected to stand on his demurrer. There was no appearance in the case by any other defendant. When the case was reached for disposition in the district court all of the defendants were in default but the court required the plaintiffs to introduce evidence of their claims. In this condition of the record appellants are entitled to the advantage of the facts well pleaded and any additional material facts established by the evidence received without objection in testing the legality of the judgment of dismissal. In Eicher v. Eicher, 148 Neb. 173, 26 N. W. 2d 808, it is said: "Under the provisions of section 25-852, R. S. 1943, power is given the court to conform the pleadings to the proof, when the amendment does not substantially change the claim or defense. A judgment based upon such proof will not be reversed for the reason that such amendment has not actually been made. If the evidence, admitted without objection, clearly proves a claim or defense, the pleading will upon appeal be considered amended accordingly."

The facts pleaded by appellants and shown by evidence offered by them are as follows: The college was organized as a corporation on August 26, 1890. Its char-

ter has at all times contained the declaration that its purpose was the promotion of education by the establishment and maintenance of a college at York under the auspices of the church. By amendment dated August 17, 1920, the charter of the college was made to state that the business affairs of the college should be controlled and conducted by a board of trustees. On February 29, 1892, E. M. Cheney, trustee, and his wife conveyed by warranty deed specifically described real estate in York, Nebraska, referred to therein as the York College campus to the board of trustees of York College at York, Nebraska, in trust for the Church of the United Brethren in Christ for school purposes. The deed contained this language: "All the above described property is the York College Campus. No Mortgage shall ever be put upon the Campus or the Buildings thereon, nor shall the same ever be alienated or encumbred (encumbered), and in case this restriction is violated, the property shall revert to the County of York, and the Court of said County shall appoint five trustees to receive and hold said property for school purposes * * *." The deed was delivered to and accepted by the trustees. The college took and has since had possession and occupancy of the real estate and it has been exclusively used as the campus of the college and all its activities have been conducted thereon.

The college has been since its organization an eleemosynary corporation offering education of collegiate grade to all qualified persons who desired to enroll therein. Its principal financial support has been contributed by the public of the city and county of York; the church, the evangelical church, and their members; and affiliated and subordinate organizations throughout the United States. The church from the creation of the college until recent years and the evangelical church thereafter have sponsored and aided the college in the performance of its services to the public in offering education of collegiate grade. The trustees have managed and operated the college under the auspices of the

church in harmony with the grant of the real estate to the trustees. The conveyance of the real estate mentioned above was in effect a grant to a public charity. The maintenance and operation of the college and the grant of the real estate constitute a public charity.

The college has never been self-sustaining. It has been largely financed by donations and contributions. The greater part of these have been made by the members, friends, and the annual conferences of the churches mentioned above. The principal building of the college was known as the administration building. It was constructed and maintained on the campus until the year 1951, when it was totally destroyed by fire. It contained classrooms, library, laboratories, and other facilities for collegiate instruction. The college cannot be maintained and operated unless the destroyed building is replaced. The college does not have resources sufficient to permit it to construct such a building. The church and the members thereof have since about the time of the destruction of the building refused to further contribute to the support and maintenance of the college or to the cost of construction of a new building because they and the conferences of the church claim the trustees do not have sufficient title to the real estate, constituting the campus of the college, to give the trustees authority to raise necessary funds for the maintenance of the college in the future as the necessity therefor arises. It was decided by The Board of Christian Education of the evangelical church on March 28, 1952, that the evangelical church would not sponsor or contribute further to the college unless the restriction in the deed against encumbering or alienating the real estate was eliminated and the title to the real estate conveyed by the deed was quieted in fee simple in the trustees. The college was soon thereafter advised of that conclusion. The absence of the sponsorship of and support by the evangelical church of the college would result in the complete and permanent destruction of the college. The real estate

and improvements thereon are usable only for college purposes. The college has about 200 students. The employed personnel consists of about 40 persons. The college has contributed in a material and desirable way to the educational, economical, cultural, and spiritual welfare of the public and especially to the county and city of York. The destruction of the college would be contrary to the desire and intention of the donor of the real estate conveyed by the deed and inconsistent with the purpose and intent of the public charity created by the donor.

The provisions of the deed were made for the purpose of contributing to the establishment and continuance of a college on the real estate conveyed by it for the benefit of the public generally and specifically for the advantage of the people of the city and county of York, but conditions have changed since the deed was made and the prohibition thereof does not now protect or serve the necessity or best interests of the college but creates the occasion of its destruction. The primary intention of the donor and the persons interested in the real estate as beneficiaries of the trust upon which it was held at the time of execution of the deed was the creation and operation of a college at York sponsored by the church and that intention cannot be carried out unless the restrictions of the deed against encumbering or alienating are removed. The situation confronting the trustees of the college permits and requires the application of the cy pres doctrine and the rules applicable to the administration of a public charitable trust as recognized and enforced in a court of equity.

The Church of the United Brethren in Christ merged with The Evangelical Church and the organization resulting from the merger is The Evangelical United Brethren Church. It is successor in all things to the Church of the United Brethren in Christ and the last-named church has since the merger had no existence.

In an action in which the trustees were plaintiffs and

the county was defendant to have removed the cloud cast upon the title of the trustees to the real estate described herein "by the apparent provision for reverter to the County of York," to quiet title to the real estate in the trustees, and to bar the defendant of any right, title, or interest in or to the real estate a decree was rendered therein by the district court for York County granting the relief asked therein.

The evangelical church has assured the trustees that if the condition contained in the deed of the donor above described prohibiting the trustees from encumbering or alienating the real estate is eliminated the evangelical church will continue its benefactions to and support of the college, will continue indefinitely to make appropriations for and contributions to the college as it and its predecessor have done in the past so that the college may continue its activities as an educational institution at York, Nebraska, and in that event the evangelical church will continue to sponsor the college and will aid it in every way it can within the limits of its capacity, opportunity, and ability.

The amount of the contributions to the operating budget of the college by the evangelical church in the period commencing May 10, 1940, until about the time of the trial of this case September 8, 1953, was $409,373.55. The amount of the contributions for capital improvements made to the college by the evangelical church during about the same period of time was $399,331.96. The contributions from all other sources to the operating budget of the college during that period of time was $94,062.85, and the amount of contributions from all other sources for capital improvements during about that same period of time was $112,559.06. The approximate annual operating budget of the college is from $185,000 to $200,000. The amount thereof required to be raised from sources other than income from students is between $75,000 and $85,000 a year. If the college is to continue this must be contributed by the evangelical

church through what is known as the missions and benevolence budget and from local churches and conferences "out here in the west." It is not possible for the operating budget of the college to be made available in the absence of contributions from the church and the church-affiliated institutions.

The hypothesis of appellants that the trust involved herein is a charitable trust may be accepted. The conveyance of the real estate was to the trustees in trust for the church for school purposes. The object was to furnish the college a campus and to assure its establishment and continuance in York under the sponsorship of the church so that it could and would conduct educational activities on a collegiate level. The sole object of the college as declared by its charter was the promotion of education by the establishment and maintenance of a college in the city of York under the auspices of the church for school purposes. A gift for school purposes is a charitable gift. Restatement, Trusts, § 348, p. 1095, says: "A charitable trust is a fiduciary relationship with respect to property arising as a result of a manifestation of an intention to create it, and subjecting the person by whom the property is held to equitable duties to deal with the property for a charitable purpose." This is of small importance in this case because a gift upon condition to a charitable corporation to promote its purposes is governed by the same principles as a gift upon a charitable trust. Therefore such a gift to a charitable corporation is equivalent to a gift upon a charitable trust and is governed by the same rules. In re Estate of Harrington, 151 Neb. 81, 36 N. W. 2d 577; School District v. Wood, 144 Neb. 241, 13 N. W. 2d 153; Stork v. Evangelical Lutheran Synod, 129 Neb. 311, 261 N. W. 552; 10 Am. Jur., Charities, § 64, p. 631.

The theory of the case of appellants is definite. It is disclosed by the allegations of their petition that the situation confronting the appellants calls for an application of the cy pres doctrine or, what is in essence the

same thing, the application of the rules appropriate to the administration of a public charitable trust. School District v. Wood, *supra;* In re Estate of Harrington, *supra.*

An extended discussion of the powers of a court of equity with reference to a charitable trust is not justified. It is sufficient for this case to say that the state courts of equity are invested by the Constitution with the jurisdiction of the chancery courts of England as it existed at the time of the separation from that country and this includes authority to administer charitable trusts. The power in this regard is entirely judicial. Equity does not itself administer the trust but acts through a trustee appointed by the donor or in the instance of failure thereof the court will appoint a trustee. The judicial cy pres doctrine permits a court of equity to direct the use of property given to a charity to as nearly the same purpose as possible when the original plan becomes impossible or inexpedient if a general charitable intent is disclosed in the instrument creating the trust. The principles of construction applied to public charities evolved the judicial cy pres doctrine and in appropriate circumstances the court is required to look beyond the institution or trustee particularly designated to administer the property given and the specific manner in which it is to be administered to those for whose benefit it is to be administered. If it appears that the latter were the real objects of the bounty of the donor the trust will survive the failure of the particular trustee and the specified method of administering the trust if the court can carry into effect as near as may be the dominant purpose of the donor. Hobbs v. Board of Education, 126 Neb. 416, 253 N. W. 627; Rohlff v. German Old People's Home, 143 Neb. 636, 10 N. W. 2d 686; School District v. Wood, *supra;* In re Estate of Harrington, *supra.*

The doctrine that a gift for charity having become impossible of application according to the intent of the donor, because conditions or restrictions imposed by him

cannot be respected or any other cause shall be applied as nearly as may be according to that intent, obviously can have no existence when the donor himself declares how the gift shall be used in the event of the failure of the charitable use to which he, in the first instance, provided that it should be devoted. In re Estate of Harrington, *supra,* concerned a gift by will of one-fifteenth of a fund "'* * * to the Presbyterian Theological Seminary at Omaha, Nebraska, if in existence; but if not in existence at the death of the survivor of said testators, then to said Board of National Missions of the Presbyterian Church, U. S. A. * * *.'" It was determined that the Presbyterian Theological Seminary at Omaha, Nebraska, was not in existence within the meaning of the will at the time of the death of the last of the two testators of the will. This court said: "It is elementary that cy pres does not apply until it clearly appears that the will or wish of the donor cannot be given effect, and, of course, the doctrine can have no existence when the donor himself, as in the case at bar, has provided for application of the bequest in the event of failure of the charitable use to which he in the first instance directed that it should be devoted. * * * To permit plaintiff to recover herein would be a violation of the latter rule." In Larkin v. Wikoff, 75 N. J. Eq. 462, 72 A. 98, it is said: "* * * the doctrine of cy pres, that is, the doctrine that a fund for charity impossible of application according to the intention of the donor shall be applied as nearly as may be according to his intention, obtains in this state; but the doctrine cannot be applied where the donor himself has directed what disposition shall be made of the trust property in the event of the failure of the charitable use to which he directed it should be devoted * * *." See, also, Imbrie v. Steen, 96 N. J. Eq. 190, 124 A. 155; Hartford Nat. Bank & Trust Co. v. Oak Bluffs First Baptist Church, 116 Conn. 347, 164 A. 910; Rhode Island Hospital Trust Co. v. The American Nat. Red Cross, 50 R. I. 461, 149 A. 581; Bowditch v. Attorney General, 241

Mass. 168, 134 N. E. 796, 28 A. L. R. 713; Annotation, 74 A. L. R. 671; 2A Bogert, Trusts and Trustees, § 431, p. 318; 3 Scott, Trusts, § 399.2, p. 2104; 14 C. J. S., Charities, § 52, p. 516; 10 Am. Jur., Charities, § 124, p. 676. The judicial cy pres doctrine is of no importance to the case of appellants, if the donor provided how the gift should be used in the event the college could not for any reason continue to have the use and advantage of it.

The college was created to promote education by means of a college at York, Nebraska, with the cooperation, assistance, and sponsorship of the church. Its existence was only for school purposes. This was declared by the public records of the county as early as August 27, 1890, more than a year and a half before the conveyance was made which is important to this case. The deed was acknowledged in York County. It may be assumed that the settlor of the trust knew at least the facts concerning the college shown by the public records of the county. The real estate comprising the campus of the college was conveyed to the trustees in trust for the church for school purposes subject to the condition that no mortgage or encumbrance should ever be put on the real estate or any buildings thereon and the real estate should never be alienated. In case the restriction or condition was violated the real estate should "revert to the County of York" and five trustees should be appointed to receive and hold the property for school purposes. The general intention and dominant purpose of the settlor were that the subject of the trust should be devoted to a charitable use, that is, that it should be used without exception for school purposes. This was to be accomplished by the utilization of the facilities and activities of the college at York, Nebraska, so long as these were available and the restriction or condition imposed by the donor as expressed in the grant was respected. The church was a mere conduit for the devotion of the property to a general charitable purpose. If and when this could not be continued because of a violation of the condition

exacted by the donor, or for any other reason, the trust property should pass to the county and the court should appoint five trustees to receive and hold the trust property for school purposes. In the latter event the use of the property for school purposes was to be realized by the equity court administering the trust by and through trustees appointed by it because of the failure of the donor to name or designate them. The county was in that event only a mere conduit and not an indispensable necessity to the subjection of the property to school purposes in York County by the intervention of the court of equity and the trustees called to service by it. The property in any event was not to revert to the grantor or to his successor. The major characteristic of the trust was that the subject of it should, without qualification, be used for school purposes by the college at York, but if and when that was prevented by any cause the trust property should be received, held, and administered for school purposes in the county by five trustees appointed by the court.

Appellants argue that the reversion in favor of the county, in case of violation of the restriction or condition stated in the deed, has been eliminated by the decree of the district court for that county; that the deed in question must be construed as though "no reverter clause was in the deed at all"; and that the deed is simply a conveyance to the trustees of the college in trust for the church for school purposes with the restriction against alienation or encumbrance. The information concerning the action in which the decree referred to was rendered is quite meager. No part of the record of the case is exhibited. The statements in the petition of appellants in this case are the sole source of knowledge of this court of the prior case. These are that the trustees brought an action against the county to have removed the cloud upon the title of the trustees to the real estate referred to herein "by the apparent provision for reverter to the County of York"; to quiet title to the real estate

in the trustees; to bar York County of any right, title, or interest in or to the real estate or the trust; and that a decree was rendered therein by the district court against the county granting the relief asked by the trustees. The basis of the decree in that case is not alleged. It is not claimed that the validity and effectiveness of the expressed desire of the settlor that in the event the college could not continue to enjoy and use the subject of the trust that it should be received and held by trustees appointed by the court and administered for school purposes was assailed and adjudicated in that case as legally offensive and insufficient. It is only said that the county was adjudged to have no right or interest in the trust or the subject thereof and that it was barred from claiming any. This may have been induced by some believed inherent incapacity of the county to be concerned in a trust. In any event the naming of York County in the deed, as it was done, was only a detail in an attempt to have the property, in case a certain contingency should come about, devoted to the general charitable purpose and use designated by the settlor. It was not necessary or useful that the county or any person or organization be named as the county was in this instance. The instrument creating the trust imposed no duty upon, created no right or interest in, and conferred no advantage upon the county. The most that can be said of the mention of the county is that it was intended as a mere conduit for the application of the trust property to the general charitable purpose designated by the donor. The meaning and substance of this part of the deed are that if the college could not for any reason continue to use the subject thereof for the charitable purpose required then the property should be received, held, and administered for school purposes in York County by trustees appointed by the court. It would be difficult to successfully maintain that this is legally objectionable or that it is an insufficient declaration by the donor of how the gift is to

be used in the event the college cannot continue to use it upon the condition required by the grant.

The principles applicable to public charities require courts to look beyond the institutions or trustees designated to take or administer the property given and the particular manner of its administration to those for whose benefit it is to be administered. The instances are numerous in which the organization to which the gift was to go and by whom it was to be administered would not or could not accept or perform the trust but it did not fail because the machinery for carrying it into effect was deficient. If the dominant purpose of a charitable trust is certain, as it is in this instrument, it will not be denied execution because of the absence of perfection of detail or the presence of unnecessary and immaterial inappropriate language in the instrument evidencing the trust.

The decree of the district court should be and it is affirmed.

AFFIRMED.

YEAGER, J., concurring in the result.

PETERSON & COMPANY, INC., APPELLEE, V. NELSON JAY DOING BUSINESS AS NELSON JAY POTATO COMPANY, APPELLANT.

63 N. W. 2d 174

Filed March 12, 1954. No. 33453.

1. **Trade Names.** A party having adopted a brand name for potatatoes which he buys, processes, and sells to consumers may file such brand for record with the Secretary of State.
2. ———. The filing of such brand protects against wrongful infringement upon the use of the brand.
3. ———. The filing of a brand name with the Secretary of State does not protect against infringement unless the infringement is wrongful.
4. ———. In order to entitle a party to claim wrongful infringement of a brand name it must be made to appear with reason-

able certainty that his adoption of the name was prior in time to that of his adversary; that he adopted and made use of it in such manner as would reasonably apprise the public that he intended it as a distinctive appellation for his trade, commodity, or place of business; and that it was not, at the time of his attempted appropriation of it, in common or general use in connection with like business or commodities in the particular locality.

5. ———. A condition of the right to prevent the use of an adopted brand name by another is that it must be established that there is competition in fact and that the use is calculated to deceive and cause the public to be confused.

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

Mothersead, Wright & Simmons, for appellant.

Torgeson, Halcomb & O'Brien, for appellee.

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

YEAGER, J.

This is an action in equity by Peterson & Company, Inc., a corporation, plaintiff and appellee, to enjoin Nelson Jay, doing business as Nelson Jay Potato Company, defendant and appellant, from using the name "Big Chief" as a brand in marketing potatoes.

A trial was had to the court at the conclusion of which a decree was rendered enjoining the defendant from using the name. The defendant filed a motion for new trial which was overruled. From the decree and the order overruling the motion for new trial the defendant has appealed.

The action is based on a claimed prior use and prior registration of the brand by the plaintiff and a claim that by use of the brand by the defendant he came into competition with plaintiff and that plaintiff lost business on account thereof. The petition charged that there was an intention on the part of the defendant to enter

into competition with plaintiff to mislead its customers, and cause them to buy potatoes from the defendant instead of the plaintiff.

The claims of plaintiff were denied except that the defendant admitted the use of the name "Big Chief" in his business of selling potatoes. He alleged on information and belief that he started use of "Big Chief" before the plaintiff. He prayed for the right to use the name, not exclusively, but along with the plaintiff.

The facts upon which the determination herein must depend are not substantially in dispute.

Prior to 1948 for several years Peterson & Company, a partnership, was engaged in the business of buying, processing, and selling potatoes at Kimball, Nebraska. The partners were Petrus Peterson and Mayme Peterson. Donald Peterson was described as a silent partner. At least from 1943 the partnership marketed potatoes under the brand name "Big Chief." On or about March 17, 1948, the members of the partnership organized the plaintiff corporation and continued the same character of business as had been conducted by the partnership. It used the brand name "Big Chief" in the marketing of potatoes from the date of incorporation.

There is testimony that the assets of the business, the machinery, and the good will of the partnership were assigned to the corporation. The witness testifying in this regard did not know whether the assignment mentioned brand names or not. The assignment was not produced.

The defendant started his business of buying, processing, and selling potatoes at Minatare, Nebraska, in September 1947.

Thus on the record made, the use of the brand by defendant preceded use by the plaintiff. It may be that the plaintiff had the right by assignment to claim and to be protected in the use of the brand on account of prior use by the partnership but it did not so plead and neither did it so prove.

Neither of the parties became aware of the use of the brand by the other until perhaps the autumn or early winter of 1949. Neither had previously registered the brand with the Secretary of State. After acquiring the information each registered the brand. The plaintiff registered it on January 26, 1950, and the defendant on February 3, 1950.

The statute permits and authorizes the filing of brands such as this with the Secretary of State. § 87-108, R. R. S. 1943. It also protects the registrant and permits injunction against wrongful infringement upon the use of the brand. § 87-109, R. R. S. 1943.

The protection however is not substantially different from that granted to one who has adopted and used a brand name but has not recorded it with the Secretary of State. The remedy in each instance is for wrongful infringement or a use which presents a reasonable likelihood of deception.

The applicable rules in such instances are that to entitle a party to relief it must be made to appear with reasonable certainty that his adoption of the name was prior in time to that of his adversary; that he adopted and made use of it in such manner as would reasonably apprise the public that he intended it as a distinctive appellation for his trade, commodity, or place of business; and that it was not, at the time of his attempted appropriation of it, in common or general use in connection with like business or commodities in the particular locality. Chadron Opera House Co. v. Loomer, 71 Neb. 785, 99 N. W. 649; Regent Shoe Mfg. Co. v. Haaker, 75 Neb. 426, 106 N. W. 595, 4 L. R. A. N. S. 447; Riggs Optical Co. v. Riggs, 132 Neb. 26, 270 N. W. 667.

Where a name is in common use by more than one no one may claim the right to its exclusive use. Regent Shoe Mfg. Co. v. Haaker, *supra.*

Also where a party has acquired a trade name in a particular locality he is entitled to protection against unfair competition in his particular line of business by

the use of a competitor of a name of such similar import as to probably deceive the public. Regent Shoe Mfg. Co. v. Haaker, *supra;* Basket Stores v. Allen, 99 Neb. 217, 155 N. W. 893; Riggs Optical Co. v. Riggs, *supra.*

As a condition of the right to have injunction to prevent the use of a trade name by another it is necessary that it be established that there is competition in fact and that the use is calculated to deceive and cause the public to be confused. Riggs Optical Co. v. Riggs, *supra;* Personal Finance Co. v. Personal Loan Service, 133 Neb. 373, 275 N. W. 324.

On the facts it is not made to appear that plaintiff used the brand in question in such manner as to apprise the public of its use. No publicity was given in the locality of its processing area. The only place that the name was used was upon sacks containing processed potatoes and the publicity was in advertising media going to the purchasers of processed potatoes. It is reasonable to say, we think, that the brand name was scarcely known beyond its customers. Further it does not reasonably appear that any of its sales depended upon the brand.

There is no evidence that there ever was any competition in fact between the plaintiff and defendant. The two marketed a different quality and grade of potatoes under the trade name and the evidence does not indicate that their marketing was in the same area. There is no evidence that defendant has ever attempted or will attempt to enter the market of the plaintiff. At least since 1947 until late in 1949, these two parties used in common the brand in question on potatoes.

The evidence in this case fails to establish any reasonable likelihood that deception did or would result by reason of the use of the name "Big Chief" by the defendant. In the absence of proof of reasonable likelihood of deception the court could not properly enjoin its use. Personal Finance Co. v. Personal Loan Service, *supra.*

We conclude therefore that the district court was in error in enjoining the use of the trade name or brand of "Big Chief" by the defendant.

The decree of the district court is reversed and the cause is remanded with directions to dismiss plaintiff's petition.

REVERSED AND REMANDED WITH DIRECTIONS.

IN RE ASSESSMENT OF REAL ESTATE AND BUSINESS PROPERTY IN THE STATE OF NEBRASKA FOR 1953. COUNTY OF GRANT, APPELLANT, V. STATE BOARD OF EQUALIZATION AND ASSESSMENT, APPELLEE.

63 N. W. 2d 459

Filed March 12, 1954. No. 33478.

1. **Appeal and Error.** On appeal from a final order of an administrative board, the review by the appellate court is ordinarily limited to questions of law and whether or not the evidence is sufficient to sustain the order. The sole question is whether such order was arbitrarily made.
2. **Taxation.** It is the function of the State Board of Equalization and Assessment to examine the assessment rolls of the various counties and, by the process of equalization, raise or lower the valuations therein contained to conform to the requirement that taxable property shall be assessed at fifty percent of its actual value.
3. ———. The statute does not require any particular method of procedure to be followed by the State Board of Equalization and Assessment in equalizing the assessment of property, real, personal, or mixed. It may adopt any reasonable method for that purpose.
4. ———. The notice sent out by the State Board of Equalization and Assessment, a copy of which is substantially set forth in the opinion, examined and held sufficient.
5. ———. The State Board of Equalization and Assessment has the power, in equalizing assessments, to increase or decrease the assessed valuation of any class, classes or kinds of property, personal, real, or mixed in any county or tax district.
6. ———. The presumption is that when the State Board of Equalization and Assessment values any class, classes or kinds

of property, real, personal, or mixed for assessment purposes it acts fairly and impartially in fixing such valuation.

7. **Taxation: Appeal and Error.** Where a county appeals from the action of the State Board of Equalization and Assessment in the matter of the assessment of property for taxation, the burden is upon the county to show that the decision of the State Board of Equalization and Assessment is arbitrary.
8. **Taxation.** It is not the function of the State Board of Equalization and Assessment to deal with assessments of individuals, either directly or as a board of review; that is the function of the county board of equalization.

APPEAL from the State Board of Equalization and Assessment. *Affirmed.*

Lester C. Hungerford, C. Russell Mattson, and *Donald R. Kanzler,* for appellant.

Clarence S. Beck, Attorney General, and *C. C. Sheldon,* for appellee.

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

MESSMORE, J.

The County of Grant gave notice of its intention to obtain a review of the decision of the State Board of Equalization and Assessment with respect to the valuations of real and personal property in the county as provided for in section 77-510, R. R. S. 1943. In accordance therewith, the county perfected its appeal to this court. The State Board of Equalization and Assessment increased the valuations returned by the county board of equalization of Grant County in the manner hereinafter shown.

For convenience, and unless otherwise required, we shall refer to the appellant county as the County, and the State Board of Equalization and Assessment as the State Board.

The County has set forth several assignments of error. Instead of separately stating these assignments of error we will determine the same deemed pertinent to this appeal in chronological order.

The county abstract of assessment for 1953 was forwarded to the State Board as provided for in section 77-1514, R. R. S. 1943, and contained a showing of the values as equalized and corrected by the county board of equalization, and the information as to the taxable property in the county as required by said section.

Section 77-505, R. R. S. 1943, provides: "The State Board of Equalization and Assessment shall, on the first Monday of July each year, meet at the State Capitol for the purpose of equalizing assessments on both real and personal property."

The State Board met as required by section 77-505, R. R. S. 1943, on July 6, 1953, and at this meeting adopted a resolution to the effect that the State Board had examined and considered the abstracts of property assessed for taxation in the various counties of the state previously submitted to said board, together with other pertinent data and information submitted by the State Tax Commissioner. Based upon and in consideration of such abstracts, data, and information, together with other matters within the general knowledge of the members of said board, it appeared that a just, equitable, and legal assessment of property in the state could not be made without increasing or decreasing the valuations of property, or some classes or kinds thereof, as returned by the various counties. The board deemed that all counties were either undervalued or overvalued; that hearings should be held before said board at which the legal representatives of such counties should be given an opportunity to show cause why the valuations of property of their respective counties should not be increased or decreased; and that notice should be given each county of the time and place of hearing.

Pursuant to section 77-508, R. R. S. 1943, notice was mailed to the county clerk, county assessor, and chairman of the county board of Grant County. This notice was to the effect that the State Board would meet in the Governor's hearing room in the State Capitol Building,

Lincoln, Nebraska, on July 13, 1953, at 9:30 a. m., for the purpose of considering the equalization of the valuations in Grant County for the year 1953. Then the notice provided: "Representatives of your county may appear at the aforesaid time and place and such representatives will be given an opportunity at said meeting to show why the assessed valuations of any or all class, classes or kinds of property, personal, real or mixed, in your county, as shown by the 1953 abstract of assessment rolls heretofore submitted to this Board, should not be increased or decreased as may be found necessary to equalize the assessments of the various counties of the state in such a manner as to make such assessments conform to law." This notice was dated July 6, 1953, and signed by the Tax Commissioner, secretary of the State Board.

On July 13, 1953, at 9 a. m., the State Board met as indicated in the above notice. Appearing in behalf of the County were three county commissioners and an attorney representing the County. The chairman of the board of county commissioners reported that all land in the county was classified and appraised for assessment purposes in 1942. The three principal classes were: (1) Hay land, (2) grazing land, and (3) swamp land. Valuations ranging from approximately $2.50 to $21 an acre had been placed on these classes of land. The 1946 sales ranging from $8 to $15 an acre were represented as actual values. Confidence was expressed in these latter figures because they were based on Federal Land Bank appraisals, reflecting long-term normal values. Two exhibits were offered by the County and made a part of the record before the State Board, one of which will be discussed later in this opinion.

On July 27, 1953, the State Board met in the office of the State Tax Commissioner in the State Capitol Building at Lincoln, Nebraska, and proceeded to a further examination of the abstracts returned by each of the counties, including that of Douglas County which had

been received by the State Board on that date. Further consideration was given to the showings and presentations made by the various counties at the hearing previously held, and of other evidence and records. The State Board found that in order to make the assessments as returned by the individual counties conform to law, and in order to arrive at a just, equitable, and legal assessment of the real and personal property in the state, the following increases should be made in the assessed valuations as returned by Grant County for 1953:

Item or Class of Property	Actual Value Shown on 1953 Abstract	Actual Value as Adjusted by State Board	Assessed Value as Equalized by State Board	Percent Incr. or Decr.
Lands and Improvements	$4,221,415	$9,920,310	$4,960,155	135% Incr.
Lots and Improvements	391,245	884,210	442,105	126% Incr.
Business Schedules	215,913	291,480	145,740	35% Incr.
Total Household Goods & Personal Equipment	53,245	53,245	26,625	

The County contends that the State Board failed to follow the law in the equalization of the property for 1953 equalization and assessment.

In determining this appeal, we may not substitute our judgment for that of the State Board. We review the record to determine if the State Board has complied with the requirements of the statutes in exercising the powers granted to it by legislative authority and, where the record is clear that it has, it is then our duty to hold its actions to be in accordance with the law.

The County asserts that when the abstracts of assessment are forwarded to the State Board on or before July 1, as required by section 77-1514, R. R. S. 1943, the State Board is then in a position to have complete information at its disposal as to all of the counties in the state when it meets as required by section 77-505, R. R. S. 1943.

The County further asserts that under the provisions

of section 77-506, R. R. S. 1943, the State Board shall proceed to examine the abstracts of real and personal property assessed for taxation in the several counties of the state, and shall equalize such assessment so as to make the same conform to law. For that purpose it shall have the power to increase or decrease the assessed valuation of the real or personal property of any county or tax district. Such increase or decrease shall be made by a percent, and the percent of increase or decrease when made shall be certified to the county clerk of the proper county.

Attention is directed to section 77-508, R. R. S. 1943. Under the provisions of this section, to comply with the procedure the State Board is required to find out if it appears that a just, equitable, and legal assessment of the real or personal property in the state cannot be made without increasing or decreasing the valuation of such real or personal property as returned by any county, then the State Board shall issue a notice as hereinbefore mentioned.

The County argues that the State Board did not have before it all of the abstracts of real and personal property assessed for taxation in the several counties of the state at its meeting held on July 6, 1953, in accordance with section 77-505, R. R. S. 1943; that it did not receive the abstract containing such subject matter from Douglas County until July 27, 1953; and that under notice dated July 28, 1953, the County was informed of the increase applied to it. Therefore, the State Board was not in a position to know whether a just, equitable, and legal assessment could be made in this state for 1953.

In support of this contention the case of Hacker v. Howe, 72 Neb. 385, 101 N. W. 255, is cited as follows: "When the board has before it the abstracts of assessment of the different counties, such as are required to be formulated and furnished for its information under the law, it is in a position to proceed in the discharge of its

duties pertaining to the equalization of assessments of the different counties, * * *."

As we view sections 77-505 and 77-506, R. R. S. 1943, neither of such sections makes any requirement that the State Board have before it all of the abstracts of assessment of the various counties in the state either before convening its annual meeting or before the commencement of its hearings. Nor do sections 77-508 and 77-509, R. R. S. 1943, make any such requirement. Section 77-509, R. R. S. 1943, refers to section 77-508, R. R. S. 1943, to the effect that legal representatives of the counties may appear and show cause why the valuation or valuations of real or personal property of their county should not be increased or decreased by the State Board, and, after a full hearing, the State Board shall enter its order and certify the same to the county clerks of the proper counties as set forth in section 77-506, R. R. S. 1943. Nowhere in section 77-506, R. R. S. 1943, nor any other section of the statute, is there a mandate as to when the State Board shall have completed its examination of such abstracts of assessment rolls.

The language quoted by the County in Hacker v. Howe, *supra,* as it appears in the opinion constitutes a discussion by the court concerning the type of evidence upon which the State Board may base its final action as to increases and decreases in valuations. The matter of whether the State Board had received all abstracts before holding hearings was not involved in the case. As we read the opinion, no language therein can be interpreted as requiring examination of abstracts of all of the counties, as opposed to examination of only the abstract of the particular county being heard. The opinion does point out that the abstracts of assessments as returned by the various counties are proper subjects for consideration by the State Board, and that a final determination based upon such abstracts, with or without other knowledge or information, is sufficient basis for final orders by the State Board increasing or decreasing

property values. The language appearing in the opinion to the effect that the State Board is in a position to proceed in the discharge of its duties when it has before it the abstracts of assessment of the different counties, means nothing more than that the State Board is then in a position to make a final decision as to what increases or decreases in valuation, if any, are necessary to make equalization, and to enter its orders accordingly.

The statute contemplates that the abstract of assessment rolls should be prepared and forwarded to the State Board on or before July 1. The mere fact that the statute is not complied with in such respect does not create a deadline that invalidates a subsequent preparation and filing, for the reason that section 77-511, R. R. S. 1943, provides a method whereby the State Board is empowered to secure the abstract of assessment rolls where the county assessor fails to transmit it, and section 77-1515, R. R. S. 1943, fixes the penalty for a refusal or neglect to do so. Clearly, the above statutes contain no requirement that the State Board adjourn until the assessment rolls of all of the various counties are before it.

The County contends that the notice sent out by the State Board did not inform it as to whether or not it, by its representatives, should appear to show cause why the valuations should be increased or decreased, and that it would be necessary to inform the County so that it could be prepared to present any subject matter that might be necessary to show either that there should be an increase or a decrease in valuations for equalization purposes.

The County in the instant case was notified in effect that its valuations were being called in for questioning with respect to possible need of adjustment in order to make the same conform to law, and that the County be given an opportunity to demonstrate the truth and accuracy of their valuations.

In the case of Boyd County v. State Board of Equalization & Assessment, 138 Neb. 896, 296 N. W. 152, the sufficiency of the notice was directly in issue. The notice did not advise the county which it was deemed to be, overvalued or undervalued. The court, commenting on the essentials of the notice, said: "This notice informed the county that a hearing would be had and that it would be given opportunity at such meeting to show why its valuation of farm property should not be increased or decreased as might be found necessary to equalize the assessment of the different counties. The statute does not require more. * * * The notice was sufficient to inform the county that its assessment was questioned and that if the county desired it could defend the same at the hearing." We believe this case is a complete answer to the contention of the County with respect to the sufficiency of the notice, and its contention cannot be sustained.

The County contends that in the ordinary course of trade for ranch land in the county, there is no market, therefore the county board of equalization was required to resort to and to use other means and guides to arrive at the actual value of such property, and the State Board was in error in not accepting the values made by the county board of equalization as the actual value of ranch land in the county.

The County refers to evidence given by its representatives before the State Board to the effect that the last real sale of ranch land was in 1944, when the Carruthers ranch was sold on the market; that purchases of ranch land in the county are once-in-a-lifetime sales, and not sales with willing buyers; that most of the land is controlled by older families and kept in the families and now occupied by the second or third generations; and that it is not possible to just buy a ranch, it requires waiting for a period of time until an owner desires to sell.

Taking the foregoing into consideration, the method used by the county board of equalization in arriving at

actual values is based upon the formula of what the ranch land will produce by way of income. Each member of the county board of equalization being a rancher, made the determination of the actual value, and in support thereof, considered the values of ranch land as determined by the Federal Land Bank and insurance company records which demonstrated the value placed by these loaning agencies to conclude the basis upon which a loan might be made on particular ranch land. The county board of equalization had visited every ranch in the county in 1942, and since that time. Federal Land Bank values are based upon what the land will produce by way of income over a 10-year period.

The County cited the case of Schmidt v. Saline County, 122 Neb. 56, 239 N. W. 203, and certain quotations from 26 R. C. L., §§ 322, 324, p. 367, appearing in the opinion. The case of Schulz v. Dixon County, 134 Neb. 549, 279 N. W. 179, 119 A. L. R. 1294, overruled and rescinded the doctrines announced in Schmidt v. Saline County, *supra,* and set forth the following from 26 R. C. L., § 324, p. 367: " 'When property has a known and determinate value ascertained by commerce in it, as in many kinds of personal property and in certain classes of real estate, there can be no difficulty in ascertaining its value for purposes of taxation. In many cases, however, the assessor has no such satisfactory guide, and must value the property by other means. In such cases, if the property is devoted to the use for which it was designed, and is in a condition to produce its maximum income, one very important element for ascertaining its present value is the net profits derived therefrom. In such a case the tax is not levied upon the earnings as such, but the earnings are treated as a guide to the capital value. The value of the property is arrived at by capitalizing the net income therefrom at the rate of return prevailing in the same section of the country upon investment of a similar character. In determining the net income of any item of property as a basis for valuation for the purpose

of taxation, the average net income for a number of years should be considered, rather than the earnings of a single year standing alone.' "

The court went on to say: "It is obvious that the first sentence of the paragraph just above quoted is in strict harmony with the Nebraska statute, and is the controlling rule to be followed in the valuation of the farm lands here in suit." Likewise, it is the controlling rule to be followed in the valuation of ranch and grazing land in this state. The court then accepted the conception of the text only so far as the same was supported by adjudicated cases, and noted that the cases were occupied with questions arising out of assessment of railroads and an express company. The court also noted that the revenue act of this state recognized the peculiar nature of these businesses and properties, and provided for a special method of assessing the same, and that the rule did not pertain to the assessment of farm lands (nor would it pertain to the assessment of ranch or grazing land), but was limited in its application to the special classes of property such as railroads, toll bridges, express companies, and special constructions, all in strict harmony with the principles announced in 26 R. C. L., § 324, p. 367.

In the case of Laflin v. State Board of Equalization & Assessment, 156 Neb. 427, 56 N. W. 2d 469, this court held: "A 20-year average of farm sales in a county is not competent evidence of the actual value of farm lands and improvements in such county. Such evidence is too remote." The court further said, in referring to section 77-201, R. R. S. 1943: "Actual value was therein defined as 'its value in the market in the ordinary course of trade.' We have repeatedly stated in effect that farm lands for purposes of taxation, as provided by this statute, shall be valued and assessed at their actual value, their value in the market in the ordinary course of trade. Schulz v. Dixon County, 134 Neb. 549, 279 N. W. 179, 119 A. L. R. 1294; Homan v. Board of Equalization, 141

Neb. 400, 3 N. W. 2d 650; Swanson v. Board of Equalization, 142 Neb. 506, 6 N. W. 2d 777."

We are unable to reason that where a county board takes as a guide to determine actual value the records of Federal Land Bank and insurance companies over a period of 10 years, that the same would have any evidentiary value in an attack upon the State Board. As stated in Laflin v. State Board of Equalization & Assessment, *supra:* "It is the duty of the Board to fix the value of farm lands and improvements (and this would apply to ranch lands and grazing lands) at their actual value at the time they are appraised for assessment purposes. Any attempt to depart from this provision of the statute by averaging values during past periods of time which are too remote to have evidentiary force, constitutes a noncompliance with legislative direction and any relief from this requirement, if relief is required, must come from the Legislature."

The fact that sales of land are traditionally infrequent does not mean nor imply that such sales as do occur do not represent the ordinary course of trade, but, in fact serve to affirmatively demonstrate that the traditional situation of infrequent sales is the ordinary course of trade. The County's contention cannot be sustained.

The County contends that the State Board was in error in not treating the ranch land of the state as a separate class of property. The County makes reference to Article VIII, section 1, of the Constitution of the State of Nebraska, which need not be set out.

Section 77-507, R. R. S. 1943, provides that the State Board shall have power, in equalizing assessments, to do so as to classes or kinds of property, personal, real, or mixed, in any county or tax district. In support of the above contention, the County asserts that, taking the state as a tax district, the State Board should treat the ranch land of the county and other counties that were named in the County's brief in close proximity to the county here involved, as a separate class or kind of

property under the law, which the State Board did not do. In this connection, the County takes the position that at the time the State Board convened it had before it the percentage comparisons between the assessed values of real property placed by the county assessor, and the actual prices real property sold for; and that the purpose of such figures was to show the manner by which the county assessor and other counties, for a 5-year period, had been evaluating real property for assessment purposes, and to enable the State Board to arrive at a lawful equalization for 1953.

There appears in the record a newspaper article containing a map showing how all of the counties for the past 5 years have done the job of assessment as estimated by the State Tax Commissioner's office. The figures appearing on the map are percentage comparisons between the valuation placed on real estate by the county assessor and the actual prices received when the property was sold. For example, taking Grant County, the upper figure appearing on the map representing town property on the average was assessed at about 29 percent of what it sold for. The lower figure representing, we might say, ranch land, on the average was assessed for about 23 percent of what it sold for. All of the counties in the state are shown on the exhibit in similar manner.

The County sets forth in its brief the percentage of increase as determined by the State Board for several counties in the state, and concludes that the disparity as shown by the 5-year average figures showing the assessed values of the lands of the respective counties and the increase in value of said lands therein as determined by the State Board, discloses that the State Board did not treat ranch lands in the state in the area of the County as a separate class of property.

From an examination of the exhibit and the comparisons therein shown as above indicated, it is conclusive that the exhibit has no value as evidence.

By the language in Laflin v. State Board of Equali-

zation & Assessment, *supra,* as heretofore appears, it is indicated in the opinion that the average sale price of land over any extended period of time may be entirely different from the actual market price, and any attempt to employ such average as a basis for tax assessments is improper in the absence of a showing that market conditions remained wholly constant during the entire period from which the average was taken, up to and including the assessment date.

We find no requirement in the law that the State Board make separate adjustments with respect to ranch lands and tilled or farming lands, as opposed to making adjustments with respect to a general all-inclusive class of lands and improvements. The presumption is that the State Board has acted fairly and impartially in determining what percentum adjustment should be made with respect to the general class of property known as "lands and improvements" and has taken cognizance of the different types of land which are included within the general classification. See Hacker v. Howe, *supra.*

The County contends that the State Board erred in not bringing property values to a uniform standard, and in particular as applied to Grant County, in all classes of property. The County argues that the 1953 equalization as shown by the record in the instant case was not made by the State Board using any reasonable method or upon any basis of a uniform standard, therefore, it was not made according to law. The County refers to Hacker v. Howe, *supra,* to the effect that the values of property of different counties in the aggregate as thus determined may be adjusted and equalized by the State Board to the end that all property of the different counties may contribute a just and equitable proportion of public revenue.

The County also refers to State ex rel. Sorensen v. State Board of Equalization & Assessment, 123 Neb. 259, 242 N. W. 609, which held: "One of the duties of the state board of equalization is that of equalizing assess-

ments, that is, changing assessments by increasing or decreasing the same, to the end that all the property in the state shall bear its just proportion of the burdens of taxation. * * *."

As heretofore stated, the County, in its brief, made extensive comparisons as shown by the 5-year average figures. The only comparisons we deem relevant to prove a disparity between adjustments in various counties would be comparisons of the ultimate valuations which result from the application of such adjustments and the relationship thereof to actual value within the meaning of the revenue laws.

As to other property here involved, no discussion is necessary in view of our determination of the adjustments of real estate as heretofore appears, which is equally applicable to other classes of property.

The statute does not require any particular method of procedure to be followed by the State Board in equalizing the assessment of range and grazing lands between the various counties. It may adopt any reasonable method for that purpose. The State Board, in equalizing the value of range and grazing land as between the various counties, may act upon the abstracts of assessments returned by the various counties, the knowledge of its own members as to value, or any other information satisfactory to it. See Boyd County v. State Board of Equalization & Assessment, *supra*.

With reference to the foregoing, if on appeal from the State Board to this court it appears on the face of the record that the action of the State Board was arbitrarily made, then this court will so determine. See Laflin v. State Board of Equalization & Assessment, *supra*.

It is the function of the State Board of Equalization and Assessment to examine the assessment rolls of the various counties and, by the process of equalization, raise or lower the valuations therein contained to conform to the requirement that taxable property shall be

assessed at fifty percent of its actual value. See § 77-201, R. S. Supp., 1953.

On appeal from a final order of an administrative board, however, the review by the appellate court is ordinarily limited to questions of law and whether or not the evidence is sufficient to sustain the order. The sole question is whether such order was arbitrarily made. See Laflin v. State Board of Equalization & Assessment, *supra*.

From an examination and study of the record we believe the decision and final order of the State Board of Equalization and Assessment is not arbitrary or capricious, but is in accordance with the record and the law. It is ordered that the decision and final order of the State Board of Equalization and Assessment be, and is hereby, affirmed.

AFFIRMED.

IN RE ASSESSMENT OF REAL ESTATE AND BUSINESS PROPERTY IN THE STATE OF NEBRASKA FOR 1953. COUNTY OF DOUGLAS, APPELLANT, V. STATE BOARD OF EQUALIZATION AND ASSESSMENT, APPELLEE.

63 N. W. 2d 449

Filed March 12, 1954. No. 33479.

1. **Appeal and Error.** On appeal from a final order of an administrative board, the review by the appellate court is ordinarily limited to questions of law and whether or not the evidence is sufficient to sustain the order. The sole question is whether such order was arbitrarily made.
2. **Taxation.** It is the function of the State Board of Equalization and Assessment to examine the assessment rolls of the various counties and, by the process of equalization, raise or lower the valuations therein contained to conform to the requirement that taxable property shall be assessed at fifty percent of its actual value.
3. ———. The statute does not require any particular method of procedure to be followed by the State Board of Equalization

and Assessment in equalizing the assessment of property, real, personal, or mixed. It may adopt any reasonable method for that purpose.

4. ———. The notice sent out by the State Board of Equalization and Assessment, a copy of which is substantially set forth in the opinion, examined and held sufficient.
5. ———. The provisions of section 77-1514, R. R. S. 1943, which require a county assessor to prepare an abstract of the assessment rolls of his county and forward it to the State Board of Equalization and Assessment on or before July 1, do not invalidate a subsequent preparation and filing.
6. ———. The State Board of Equalization and Assessment has the power, in equalizing assessments, to increase or decrease the assessed valuation of any class, classes or kinds of property, personal, real, or mixed in any county or tax district.
7. ———. The presumption is that when the State Board of Equalization and Assessment values any class, classes or kinds of property, real, personal, or mixed for assessment purposes it acts fairly and impartially in fixing such valuation.
8. **Taxation: Appeal and Error.** Where a county appeals from the action of the State Board of Equalization and Assessment in the matter of the assessment of property for taxation, the burden is upon the county to show that the decision of the State Board of Equalization and Assessment is arbitrary.
9. **Taxation.** It is not the function of the State Board of Equalization and Assessment to deal with assessments of individuals, either directly or as a board of review; that is the function of the county board of equalization.
10. **Constitutional Law: Taxation.** The question of due process in respect to individual taxpayers is not involved in the process of equalization between the counties as performed by the State Board of Equalization and Assessment.
11. **Taxation.** The statute does not require the State Board of Equalization and Assessment to have a stenographer, nor to keep a complete and exact record of all of its proceedings. Unless the statute so required, it was not necessary for the board to do so.
12. **Taxation: Appeal and Error.** This does not prevent an interested party from having a reporter and making a bill of exceptions of all or any part of the evidence.

APPEAL from the State Board of Equalization and Assessment. *Affirmed.*

Eugene F. Fitzgerald, Robert C. McGowan, and *August Ross,* for appellant.

Clarence S. Beck, Attorney General, and *C. C. Sheldon,* for appellee.

Edward A. Mullery and *Robert K. Adams,* amici curiae.

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

MESSMORE, J.

The County of Douglas gave notice of its intention to obtain a review of the decision of the State Board of Equalization and Assessment with respect to the valuations of real and personal property in the county as provided for by section 77-510, R. R. S. 1943. In accordance therewith the county perfected appeal to this court. The State Board of Equalization and Assessment increased the valuations returned by the county board of equalization of Douglas County in the manner hereinafter shown.

For convenience, and unless otherwise required, we shall refer to the appellant county as the County and the State Board of Equalization and Assessment as the State Board.

Section 77-1514, R. R. S. 1943, provides in part: "The county assessor or county clerk where he is ex officio county assessor, not later than June 25 of each year, shall prepare an abstract of the assessment rolls of his county on blanks to be furnished by the State Tax Commissioner, showing the values as equalized and corrected by the county board of equalization, and forward it to the State Board of Equalization and Assessment on or before July 1."

The county abstract of assessment was forwarded to the State Board on July 27, 1953, and contained a showing of values as equalized and corrected by the county board of equalization, and the information as to the taxable property in the county as required by said section.

The State Board met on the first Monday in July as required by section 77-505, R. R. S. 1943, this date being

July 6, 1953, for the purpose of equalizing assessments on both real and personal property. At this meeting the State Board adopted a resolution to the effect that the State Board had examined and considered the abstracts of property assessed for taxation in the various counties of the state previously submitted to said board, together with other pertinent data and information submitted by the State Tax Commissioner. Based upon and in consideration of such abstracts, data, and information, together with other matters within the general knowledge of the members of said board, it appeared that a just, equitable, and legal assessment of property in the state could not be made without increasing or decreasing the valuations of property, or some classes or kinds thereof, as returned by the various counties. The State Board deemed that all counties were either undervalued or overvalued; that hearing should be held before said board at which the legal representatives of such counties should be given an opportunity to show cause why the valuations of property of their respective counties should not be increased or decreased; and that notice should be given each county of the time and place of hearing.

Pursuant to section 77-508, R. R. S. 1943, notice was mailed to the county clerk, county assessor, and chairman of the county board of Douglas County. This notice was to the effect that the State Board would meet in the Governor's hearing room in the State Capitol Building, Lincoln, Nebraska, on July 18, 1953, and the hearings would continue for the purpose of considering the equalization of the valuations of the counties notified. Douglas County was notified to have its representatives present on July 18, 1953, for such purpose.

The pertinent part of the notice to Douglas County was as follows: "Notice is hereby given that the State Board of Equalization and Assessment will meet at the Governor's Hearing Room, in the State Capitol Building, Lincoln, Nebraska, on the 18th day of July, 1953, for

the purpose of considering the equalization of valuations in your county for the year 1953.

"Representatives of your county may appear at the aforesaid time and place and such representatives will be given an opportunity at said meeting to show why the assessed valuations of any or all class, classes, or kinds of property, personal real or mixed, in your county, as shown by the 1953 abstract of assessment rolls heretofore submitted to this Board, should not be increased or decreased as may be found necessary to equalize the assessments of the various counties of the state in such a manner as to make such assessments conform to law." This notice was dated July 6, 1953, and signed by the secretary of the State Board.

On July 18, 1953, the State Board met as indicated in the above notice. The County was represented by the county assessor, a member of the Douglas County board of commissioners, a representative of the Tax Appraisal Board, and a representative of the Association of Omaha Taxpayers. We will make reference to the showing made by Douglas County later in the opinion in connection with the assignments of error raised by the County.

On July 27, 1953, the State Board met in the office of the State Tax Commissioner in the State Capitol Building at Lincoln, Nebraska, and proceeded to a further examination of the abstracts returned by each of the counties, including that of Douglas County which was received by the State Board on that date. Further consideration was given to the showings and presentations made by the various counties at the hearings previously held, and of other evidence and records. The State Board found, in order to make the assessments as returned by the individual counties conform to law, and in order to arrive at a just, equitable, and legal assessment of the real and personal property in the state, the following increases should be made in the assessed valuations as returned by Douglas County for 1953:

Item or Class of Property	Actual Value Shown on 1953 Abstract	Actual Value as Adjusted by State Board	Assessed Value as Equalized by State Board	Percent of Incr. or Decr.
Lands & Improvements	$ 35,544,920	$ 42,653,900	$ 21,326,950	Incr. 20%
Lots & Improvements	545,507,455	807,351,030	403,675,515	Incr. 48%
Business Schedules	96,357,097	134,899,930	67,449,965	Incr. 40%
Total Household Goods & Personal Equipment	6,309,440	9,464,160	4,732,080	Incr. 50%

The County was notified of the increases made in the valuations shown by the county's abstract of assessment on July 28, 1953.

The County sets forth the following assignments of error. We will determine the same in this appeal in the order in which they appear. (1) That the order of the State Board directing Douglas County to show cause why its valuations should not be increased or decreased was insufficient for the following reasons, to wit: (a) That at the time said order was issued the State Board did not have before it the abstract of Douglas County valuations and it therefore could not know whether Douglas County valuations should be increased or decreased, and (b) said notice did not specify whether the valuations as shown by the county abstract of assessment should be increased or decreased. (2) That no full hearing as contemplated by section 77-509, R. R. S. 1943, and as required by due process of law was had. (3) That the action of the State Board in increasing the valuations of Douglas County was unreasonable, arbitrary, and capricious.

In determining this appeal, we may not substitute our judgment for that of the State Board. We review the record to determine if the State Board has complied with the requirements of the statutes in exercising the powers granted to it by legislative authority and, where the record is clear that it has, it is then our duty to hold its actions to be in accordance with law.

The following is pertinent, with respect to the notice about which the County complains. Section 77-508, R. R. S. 1943, provides: "In the event it shall appear to the State Board of Equalization and Assessment that a just, equitable and legal assessment of the real or personal property in the state cannot be made without increasing or decreasing the valuation of such real or personal property as returned by any county, the board shall issue a notice to the counties which the board deems either undervalued or overvalued, and shall set a date for hearing at least five days following the mailing of such notice. The notice shall be mailed to the county clerk, county assessor and chairman of the county board."

Section 77-509, R. R. S. 1943, provides: "At the hearing provided by section 77-508, the legal representatives of the counties may appear and show cause why the valuation or valuations of the real or personal property of their county should not be increased or decreased by the State Board of Equalization and Assessment, and, after a full hearing, the board shall enter its order and certify the same to the county clerks of the proper counties as set forth in section 77-506."

We believe the case of Boyd County v. State Board of Equalization & Assessment, 138 Neb. 896, 296 N. W. 152, is a complete answer to the County's assignment of error that the notice sent by the State Board as required by section 77-508, R. R. S. 1943, was indefinite for the reason that it did not specify whether the valuations shown by the County's abstract of assessment should be increased or decreased. In the cited case the sufficiency of the notice was directly in issue. The notice did not advise the county which it was deemed to be, overvalued or undervalued. The court, commenting on the essentials of the notice, stated: "This notice informed the county that a hearing would be had and that it would be given opportunity at such meeting to show why its valuation of farm property should not be increased or decreased as might be found necessary to

equalize the assessment of the different counties. The statute does not require more. * * * The notice was sufficient to inform the county that its assessment was questioned and that if the county desired it could defend the same at the hearing."

The County makes no assignment of error based upon the fact that the Douglas County abstract of assessment had not been received by the State Board at the time of issuing notice of hearing. However, the County mentions such fact in its brief.

We have heretofore set forth section 77-1514, R. R. S. 1943, as it applies to the preparation of the abstract of assessment roll, and the time it shall be forwarded to the State Board. We have also noted the date the abstract of assessment of Douglas County was received by the State Board.

The County also invokes section 77-511, R. R. S. 1943, to the effect that it was the duty of the State Board to adjourn, as indicated in said section, until such time as it had all the abstracts of assessment of the various counties before it. The statute contains no such requirement. The County's assignments of error in such respect as above noted cannot be sustained.

As to the County's assignment of error No. 2, the County asserts that section 77-509, R. R. S. 1943, previously set out, requires a full hearing before the State Board before it is privileged to enter an order increasing or decreasing the valuations of property in any county, and that the County was allotted only one-half hour, and was limited to two spokesmen.

In this connection, there appears a letter in the transcript which accompanied the notice sent to the County. This letter contained the following language: "Each county will be given an opportunity for a full hearing. However, in view of the unusual magnitude of the equalization process this year, it will be necessary that certain reasonable rules of procedure be followed in the hearings. In the interest of orderly procedure at

the hearing, it is requested that each county have not more than two general spokesmen. * * * Furthermore, in order to expedite the functioning of the State Board, in the event representatives of your county choose to appear at the hearing, it is requested that you prearrange your presentation to the Board so that each county will not require more than one-half hour in time. In this connection, we suggest the possibility that you might find it desirable to submit written material. Such material will receive due consideration by the Board, subject only to the requirement that all factual matters be verified under oath."

The County asserts that a full hearing is one in which ample opportunity is afforded to all parties to make, by evidence and argument, a showing fairly adequate to establish the propriety or impropriety, from the standpoint of justice and law, of the step asked to be taken. There is no hearing when the party does not know what evidence is offered or considered, and is not given an opportunity to test, explain, or refute the same. 12 Am. Jur., Constitutional Law, § 608, p. 303, is cited.

The County further asserts that the State Board made no presentation of evidence in its own behalf at the hearing, but instead listened to the presentation made by the County and later announced its decision. The State Board, if it had an opinion that the valuations of the County should be increased, should be required to present whatever evidence it might have in support of its position, in order that the County might test or refute or explain the same.

Before proceeding further with this assignment of error, it appears from the record that there were three representatives who spoke in behalf of the County at the hearing before the State Board; that they were not limited as to time; and in addition, that an exhibit was offered by the executive director of the Association of Omaha Taxpayers. It appears, in fact, that there were seven written exhibits which were received in evidence.

The County's contention that due process requires that the State Board, at the statutory hearing, namely the hearing of July 6, 1953, submit all the evidence upon which its final determination may be based, is not in accord with the previous decisions of this court, as is evidenced by the following:

In Boyd County v. State Board of Equalization & Assessment, *supra,* the court said: "The statute * * * does not require any particular kind nor standard of evidence. The method to be used is left to the discretion of the state board. 61 C. J. 752. No formal hearing is required. In addition to the evidence mentioned in the record, the state board may take into consideration matters within the general knowledge of its members. * * * The case of the Northwestern Bell Telephone Co. v. State Board of Equalization and Assessment, 119 Neb. 138, 227 N. W. 452, is cited. The question in this case was the effect when no notice was given and sufficient opportunity to be heard was lacking. This case held that notice was necessary. While it was mentioned in the opinion that witnesses were not called and testimony was not taken, the case does not hold the state board of equalization must call witnesses and take sworn testimony in order to conduct a full and proper hearing."

In the Northwestern Bell Telephone Company case above referred to, the action there involved was the increase of the assessment of particular property, as opposed to a general equalization of values as to counties.

In the case of Lancaster County v. Whedon, 76 Neb. 753, 108 N. W. 127, this court made it clear that on appeals from the actions of boards of equalization, the burden falls upon the party seeking to disturb the actions of the board. The court said: "When the jurisdiction of a quasi judicial tribunal is once established, its subsequent proceedings are presumed to be regular. And so the rule is that, where a taxpayer appeals to the district court from the action of the board of equalization in the matter of the assessment of property for taxation,

the burden is on the appellant to show that the decision of the board is erroneous."

The above-cited case involved the action of the Lancaster County board of equalization in making certain blanket increases in the valuation of property within an entire precinct. The appellant therein urged the court to set aside the increases on the grounds that the board had offered no evidence to support its action. The language above quoted discloses the State Board is not obligated to offer evidence. See, also, Hatcher & Co. v. Gosper County, 95 Neb. 543, 145 N. W. 993; Borgnis v. Falk Co., 147 Wis. 327, 133 N. W. 209, 37 L. R. A. N. S. 489.

In the case of Chicago, R. I. & P. Ry. Co. v. State, 112 Neb. 727, 200 N. W. 996, which involved an appeal from the action of the State Board of Equalization and Assessment in making an original assessment of certain railroad property, the court said: "The burden of proof is upon the company to establish its contention that the value of its property has been fixed by the board at an amount greater than its actual value, or that its assessed value has not been fairly and properly equalized when considered in connection with the assessment of all other property, so that this disparity and lack of uniformity result in an unjust and unfair assessment." See, also, State ex rel. Kappa Sigma Bldg. Assn. v. Bareis, 226 Wis. 229, 276 N. W. 317, 113 A. L. R. 985.

The following language in the case of Hacker v. Howe, 72 Neb. 385, 101 N. W. 255, is also pertinent: "An owner is not deprived of his property without due process of law by means of taxation, if he has an opportunity to question its validity or the amount of such tax or assessment at some stage of the proceedings, either before that amount is finally determined, or in subsequent proceedings for its collection." See, also, People v. Pitcher, 61 Colo. 149, 156 P. 812, Ann. Cas. 1918D 1185; County of Howard v. State Board of Equalization & Assessment, *post* p. 339, 63 N. W. 2d 441.

Just recently this court, in the case of Laflin v. State Board of Equalization & Assessment, 156 Neb. 427, 56 N. W. 2d 469, held invalid the action of the State Board where it affirmatively appeared on the face of the record that the board failed to comply with the statutory requirement of assessment at actual value and no attempt was made to approach equality between the counties. Such action was held to be arbitrary on the part of the State Board. The decision was not based upon any theory that the State Board was under a burden to offer evidence to sustain its determinations. No mention was made in the opinion of any duty on the part of the State Board to produce evidence upon which to support its actions, or of failure to do so being violative of constitutional due process requirements.

In the light of the above, as shown by the record and the authorities cited, we conclude the County's assignment of error cannot be sustained.

As to the assignment of error that the action of the State Board in increasing the valuations of Douglas County was unreasonable, arbitrary, and capricious, a résumé of the showing made by the County before the State Board is appropriate. In this respect, the record shows that a county commissioner stated that the County had a "special situation" and as a result "found it difficult to abide by the law." The chairman of the local Tax Appraisal Board ventured the opinion that selling price does not represent actual value; and that current prices should be deflated to the level of some previous base period in which actual value was more accurately reflected by price. A representative of the Association of Omaha Taxpayers stated that he had recommended to the county officials an increase in valuation of town lots and improvements over the 1952 assessment. The County did not follow the recommendation.

The only documentary material appearing in the record was submitted by the executive director of the Association of Omaha Taxpayers. In a prepared state-

ment he asserted that industrial-commercial property in Douglas County was assessed at 50 percent of actual value. To sustain this claim he selected just a few transactions out of more than 10,000 real estate conveyances in the county in 1952. In addition, he admitted the calculations based upon his examples did not represent the overall average. Also in addition he submitted a purported comparison of assessments of all the counties in the state, upon the basis of which he contended that Douglas County led all others in the state with a 45 percent increase in valuations over the period 1946-1952, as compared with a 31 percent average increase of all other counties during the same period. This comparison assumes that accurate equalization had been obtained in both the years 1946 and 1952. Other parts of this showing need not be set out or discussed. From an examination, the showing made by Douglas County to justify the valuations returned by its authorities falls short of showing that the valuations returned conform to the law.

It must be presumed that local equalization exists, and the State Board has no power to remedy any lack of local equalization. See Hacker v. Howe, *supra.*

There should be some adequate showing as to the relationship of actual value at the time of the 1953 assessment. See Laflin v. State Board of Equalization & Assessment, *supra.*

The evidence thus submitted is inadequate and insufficient to warrant the conclusion that the action of the State Board in the instant case was arbitrarily made.

As previously stated, and shown by the authorities herein cited, the burden rests upon the County to produce evidence from which it can be demonstrated that the valuations returned by the County conform to law, and upon the basis of which showing it can be made to appear that any determinations of the State Board to the contrary are arbitrary. That is the issue here, but

the County has failed to show that the State Board has acted in an arbitrary manner.

Section 77-510, R. R. S. 1943, which has reference to an appeal from a final decision of the State Board to this court with respect to the valuation of any real or personal property, provides that the State Board, upon demand, shall prepare and certify a transcript of its records and proceedings involved in such decision, and then specifies the conditions by which the same may be obtained. The transcript in this case meets the necessary legal requirements. Had the County desired, it could have produced evidence at the hearing and caused the same to be preserved for examination at this time, in the form of a bill of exceptions. No such duty rests upon the State Board. See Boyd County v. State Board of Equalization & Assessment, *supra*.

The statute does not require any particular method of procedure to be followed by the State Board in equalizing real, personal, or mixed property as the case may be, between the various counties. It may adopt any reasonable method for that purpose.

The State Board, in equalizing the valuation of property, as heretofore mentioned, as between the various counties, may act upon the abstracts of assessment returned by the various counties, the knowledge of its own members as to value, or any information satisfactory to it. The values placed upon property by county authorities are not final and binding upon the State Board. See Boyd County v. State Board of Equalization & Assessment, *supra*.

With reference to the foregoing, if on appeal from the State Board to this court it appears on the face of the record that the action of the State Board was arbitrarily made, then this court will so determine. See Laflin v. State Board of Equalization & Assessment, *supra*.

It is the function of the State Board of Equalization and Assessment to examine the assessment rolls of the various counties and, by the process of equalization,

raise or lower the valuations therein contained to conform to the requirement that taxable property shall be assessed at fifty percent of its actual value. See § 77-201, R. S. Supp., 1953.

Section 77-112, R. R. S. 1943, provides: " 'Actual value' shall mean value in the market in the ordinary course of trade."

On appeal from a final order of an administrative board, however, the review by the appellate court is ordinarily limited to questions of law and whether or not the evidence is sufficient to sustain the order. The sole question is whether such order was arbitrarily made. See Laflin v. State Board of Equalization & Assessment, *supra*.

From an examination and study of the record, we believe the decision and final order of the State Board of Equalization and Assessment is not arbitrary or capricious, but is in accordance with the record and the law. It is ordered that the decision and final order of the State Board of Equalization and Assessment be, and is hereby, affirmed.

AFFIRMED.

IN RE ASSESSMENT OF REAL ESTATE AND BUSINESS PROPERTY IN THE STATE OF NEBRASKA FOR 1953. COUNTY OF HOWARD, APPELLANT, V. STATE BOARD OF EQUALIZATION AND ASSESSMENT, APPELLEE.

63 N. W. 2d 441

Filed March 12, 1954. No. 33481.

1. **Appeal and Error.** On appeal from a final order of an administrative board, the review by the appellate court is ordinarily limited to questions of law and whether or not the evidence is sufficient to sustain the order. The sole question is whether such order was arbitrarily made.
2. **Taxation.** It is the function of the State Board of Equalization and Assessment to examine the assessment rolls of the various counties and, by the process of equalization, raise or lower the valuations therein contained to conform to the requirement that

taxable property shall be assessed at fifty percent of its actual value.

3. ———. The statute does not require any particular method of procedure to be followed by the State Board of Equalization and Assessment in equalizing the assessment of property, real, personal, or mixed. It may adopt any reasonable method for that purpose.
4. ———. The notice sent out by the State Board of Equalization and Assessment, a copy of which is substantially set forth in the opinion, examined and held sufficient.
5. ———. The State Board of Equalization and Assessment has the power, in equalizing assessments, to increase or decrease the assessed valuation of any class, classes or kinds of property, personal, real, or mixed in any county or tax district.
6. ———. The presumption is that when the State Board of Equalization and Assessment values any class, classes or kinds of property, real, personal, or mixed for assessment purposes it acts fairly and impartially in fixing such valuation.
7. **Taxation: Appeal and Error.** Where a county appeals from the action of the State Board of Equalization and Assessment in the matter of the assessment of property for taxation, the burden is upon the county to show that the decision of the State Board of Equalization and Assessment is arbitrary.
8. **Taxation.** It is not the function of the State Board of Equalization and Assessment to deal with assessments of individuals, either directly or as a board of review; that is the function of the county board of equalization.
9. **Constitutional Law: Taxation.** The question of due process with respect to individual taxpayers is not involved in the process of equalization between the counties as performed by the State Board of Equalization and Assessment.
10. **Taxation.** The statute does not require the State Board of Equalization and Assessment to have a stenographer, nor to keep a complete and exact record of all of its proceedings. Unless the statute so required, it was not necessary for the board to do so.
11. **Taxation: Appeal and Error.** This does not prevent an interested party from having a reporter and making a bill of exceptions of all or any part of the evidence.

APPEAL from the State Board of Equalization and Assessment. *Affirmed.*

Richard H. Haggart, C. Russell Mattson, and *Donald R. Kanzler,* for appellant.

Clarence S. Beck, Attorney General, and *C. C. Sheldon,* for appellee.

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

MESSMORE, J.

The County of Howard gave notice of its intention to obtain a review of the decision of the State Board of Equalization and Assessment with respect to the valuations of real and personal property in the county as provided for by section 77-510, R. R. S. 1943. In accordance therewith the county perfected appeal to this court. The State Board of Equalization and Assessment increased the valuations returned by the county board of equalization of Howard County in the manner hereinafter shown.

For convenience, and unless otherwise required, we shall refer to the appellant county as the County, and the State Board of Equalization and Assessment as the State Board.

The county abstract of assessment for 1953 was forwarded to the State Board as provided for in section 77-1514, R. R. S. 1943, and contained a showing of values as equalized and corrected by the county board of equalization and the information as to the taxable property in the county as required by said section.

The State Board met on the first Monday in July as required by section 77-505, R. R. S. 1943, this date being July 6, 1953, for the purpose of equalizing assessments on both real and personal property. At this meeting the State Board adopted a resolution to the effect that the State Board had examined and considered the abstracts of property assessed for taxation in the various counties of the state previously submitted to said board, together with other pertinent data and information submitted by the State Tax Commissioner. Based upon and in consideration of such abstracts, data, and information, together with other matters within the general

knowledge of the members of said board, it appeared that a just, equitable, and legal assessment of property in the state could not be made without increasing or decreasing the valuations of property, or some classes or kinds thereof, as returned by the various counties. The board deemed that all counties were either undervalued or overvalued; that hearings should be held before said board at which the legal representatives of such counties should be given an opportunity to show cause why the valuations of property of their respective counties should not be increased or decreased; and that notice should be given each county of the time and place of hearing.

Pursuant to section 77-508, R. R. S. 1943, notice was mailed to the county clerk, county assessor, and chairman of the county board of Howard County. This notice was to the effect that the State Board would meet in the Governor's hearing room in the State Capitol Building, Lincoln, Nebraska, on July 15, 1953, and the hearings would continue for the purpose of considering the equalization of the valuations of the counties notified. Howard County was notified to have its representatives present on July 15, 1953, for such purpose.

The pertinent part of the notice to Howard County was as follows: "Notice is hereby given that the State Board of Equalization and Assessment will meet at the Governor's Hearing Room, in the State Capitol Building, Lincoln, Nebraska, on the 15th day of July, 1953, * * * for the purpose of considering the equalization of valuations in your county for the year 1953.

"Representatives of your county may appear at the aforesaid time and place and such representatives will be given an opportunity at said meeting to show why the assessed valuations of any or all class, classes or kinds of property, personal, real or mixed, in your county, as shown by the 1953 abstract of assessment rolls heretofore submitted to this Board, should not be increased or decreased as may be found necessary to

equalize the assessments of the various counties of the state in such a manner as to make such assessments conform to law." This notice was dated July 6, 1953, and signed by the secretary of the State Board.

On July 15, 1953, the State Board met as indicated in the above notice. The county clerk, county assessor, county attorney, and three county commissioners of Howard County appeared before the State Board. The following showing was made: "While farm real estate has been assessed at or near 50 per cent, there has been no classification for assessment purposes. Business inventories are reported to be especially well assessed. The major problem appears to be obtaining an equitable assessment of farm real estate." As to who made this statement to the State Board is not shown in the record.

On July 27, 1953, the State Board met in the office of the State Tax Commissioner in the State Capitol Building at Lincoln, Nebraska, and proceeded to a further examination of the abstracts returned by each of the counties, including that of Douglas County which had been received by the board on that date. Further consideration was given to the showings and presentations made by the various counties at the hearings previously held, and of other evidence and records. The State Board found that in order to make the assessments as returned by the individual counties conform to law, and in order to arrive at a just, equitable, and legal assessment of the real and personal property in the state, the following increases should be made in the assessed valuations as returned by Howard County for 1953. The State Board in no way disturbed the valuations of Howard County on lands and improvements.

Item or Class of Property	Actual Value Shown on 1953 Abstract	Actual Value as Adjusted by State Board	Assessed Value as Equalized by State Board	Percent Incr. or Decr.
Lots & Improvements	$3,276,310	$4,554,070	$2,277,035	Incr. 39%
Business Schedules	913,610	1,187,690	593,845	Incr. 30%

Total Household Goods and Personal Equipment	66,415	132,830	66,415	Incr.100%

The County sets forth several assignments of error, some of which are interrelated. For convenience and clarity we will take up the assignments of error deemed pertinent to a determination of this appeal in continuity.

The County contends the State Board failed to follow the law in the equalization of property for 1953 equalization and assessment, in that it failed to have before it the abstracts of real and personal property assessed for taxation of all counties of the state at its statutory meeting, and further failed to follow the law in such respect in that it notified various counties to appear before it to show cause why their valuations should not be increased or decreased, when the State Board itself did not know which it wanted shown, and could not know which it wanted shown, because it did not have before it the abstracts of all of the counties at its first meeting July 6, 1953.

In determining this appeal, we may not substitute our judgment for that of the State Board. We review the record to determine if the State Board has complied with the requirements of the statutes in exercising the powers granted to it by legislative authority and, where the record is clear that it has, it is then our duty to hold its actions to be in accordance with the law.

Section 77-1514, R. R. S. 1943, provides in part: "The county assessor or county clerk where he is ex officio county assessor, not later than June 25 of each year, shall prepare an abstract of the assessment rolls of his county on blanks to be furnished by the State Tax Commissioner, showing the values as equalized and corrected by the county board of equalization, and forward it to the State Board of Equalization and Assessment on or before July 1."

The County asserts that when the abstracts of assessment are forwarded to the State Board as required by

this section, the State Board is then in a position to have complete information at its disposal as to all of the abstracts in the state when it meets as required by section 77-505, R. R. S. 1943.

Section 77-506, R. R. S. 1943, provides that the State Board shall proceed to examine the abstracts of real and personal property assessed for taxation in the several counties of the state, and shall equalize such assessment so as to make the same conform to law. For that purpose it shall have the power to increase or decrease the assessed valuation of real or personal property of any county or tax district. Such increase or decrease shall be made by a percent, and the percent of increase or decrease when made shall be certified to the county clerk of the proper county.

Attention is directed to section 77-508, R. R. S. 1943, which provides that in the event it shall appear to the State Board that a just, equitable, and legal assessment of the real or personal property in the state cannot be made without increasing or decreasing the valuation of such real or personal property as returned by any county, the board shall issue a notice to the counties which the board deems either undervalued or overvalued, and shall set a date for hearing at least five days following the mailing of such notice.

Section 77-509, R. R. S. 1943, provides that at the hearing provided by section 77-508, R. R. S. 1943, the legal representatives of the counties may appear and show cause why the valuation or valuations of real or personal property of their county should not be increased or decreased by the State Board, and, after a full hearing, the board shall enter its order and certify the same to the county clerks of the proper counties as set forth in section 77-506, R. R. S. 1943.

The County contends that in considering the above sections of the statutes, the State Board did not have before it all of the abstracts of real and personal property assessed for taxation in the several counties of the state

at its meeting held on July 6, 1953, in accordance with section 77-505, R. R. S. 1943; that it did not receive the abstract containing such subject matter from Douglas County until July 27, 1953; and that under notice dated July 28, 1953, the County was informed of the increase applied to it. Therefore, since the State Board did not have all of the abstracts before it, it was not in a position to know whether a just, equitable, and legal assessment could be made in this state for 1953.

In support of this contention, the case of Hacker v. Howe, 72 Neb. 385, 101 N. W. 255, is cited as follows: "When the board has before it the abstracts of assessment of the different counties, such as are required to be formulated and furnished for its information under the law, it is in a position to proceed in the discharge of its duties pertaining to the equalization of assessments of the different counties, * * *." The County contends that the foregoing language in the cited case demonstrated that until the State Board has before it all of the abstracts from all of the counties in the state it is not in a position to proceed to the discharge of its duties as heretofore mentioned in connection with the sections of the statute cited. The language quoted in the cited case, as it appears with other language therein, constitutes nothing more than a discussion by the court concerning the type of evidence upon which the board may base its final decision as to increases and decreases in valuations. The matter of whether the board had received all of the abstracts before holding the hearings was not involved in the case. There is no language appearing therein that can be interpreted as requiring an examination of the abstracts of all of the counties, as opposed to the examination of only the abstract of the particular county being heard. The opinion does point out that the abstracts of assessment as returned by the various counties are proper subjects for consideration of the board, and that a final decision based upon such abstracts, with or without other knowledge or informa-

tion, is sufficient basis for final orders by the board increasing or decreasing property values. The language appearing in the opinion to the effect that the board is in a position to proceed in the discharge of its duties when it has before it the abstracts of assessment of the different counties, means nothing more than that the board is then in a position to make a final decision as to what increases or decreases in valuations are necessary, if any, to make equalization, and to enter its orders accordingly. The object of having the abstracts before the board is for the purpose of enabling the board to discern what percent of increases or decreases in the valuations of property in the various counties may be necessary to achieve equalization. There is no necessity for the board having before it all of the abstracts of assessment of the different counties until the time of making its final determination.

As we view sections 77-505 and 77-506, R. R. S. 1943, there is nothing in either section of the statutes making any requirement that the State Board have before it all of the abstracts of assessment of the various counties in the state either before convening its annual meeting or before the commencement of its hearings, nor do sections 77-508 and 77-509, R. R. S. 1943, make any such requirement.

The County refers to section 77-511, R. R. S. 1943, which provides that the State Board shall have power to adjourn from time to time until the equalization shall be completed, and contends that it was the duty of the State Board, under the circumstances here presented, to adjourn until such time as the abstracts of assessment of all of the counties were before the board. We are not in accord with this contention. Apparently the County was not sufficiently disturbed about this alleged injustice to make any appropriate objections or request continuance at the time of the hearing before the State Board.

Section 77-511, R. R. S. 1943, provides further that

the State Board is empowered to secure the abstract of assessment rolls where the county assessor fails to submit it. Section 77-1515, R. R. S. 1943, fixes the penalty for refusing or neglecting to do so. Clearly, the above statutes contain no requirement that the State Board adjourn until the assessment rolls of all of the various counties are before it.

Taking up the second part of the assignment of error being discussed, in the case of Boyd County v. State Board of Equalization & Assessment, 138 Neb. 896, 296 N. W. 152, the sufficiency of the notice was directly in issue. The notice did not advise the county which it was deemed to be, overvalued or undervalued. The court, commenting on the essentials of the notice, stated: "This notice informed the county that a hearing would be had and that it would be given opportunity at such meeting to show why its valuation of farm property should not be increased or decreased as might be found necessary to equalize the assessment of the different counties. The statute does not require more. * * * The notice was sufficient to inform the county that its assessment was questioned and that if the county desired it could defend the same at the hearing." We believe this case is a complete answer to the contention of the County with respect to the sufficiency of the notice, and the County's contention cannot be sustained.

The County assigns as error that the action of the State Board in increasing values in the county in the fashion in which it was done resulted in the property owners of the county bearing an unjust and unlawful burden in their share of state taxes. In this connection the County asserts the action of the State Board for 1953, as it ultimately affects the taxpayers of the County, and others in the state, is a deprivation of property without due process of law in violation of Article I, section 3, of the Constitution of Nebraska, which provides that no person shall be deprived of life, liberty, or property without due process of law.

It should be stated here that it is not the function of the State Board to deal with assessments of individuals either directly or as a board of review; that is the function of the county board of equalization. See, Scotts Bluff County v. State Board of Equalization & Assessment, 143 Neb. 837, 11 N. W. 2d 453; Laflin v. State Board of Equalization & Assessment, 156 Neb. 427, 56 N. W. 2d 469.

The question of due process with respect to individual taxpayers is not involved in the process of equalization between the counties as performed by the State Board. In Hacker v. Howe, *supra,* although this case did not involve an appeal from the State Board to this court, the following language appearing therein is pertinent to the instant case: "These are special officers and tribunals (persons and boards connected with the equalization of property for tax purposes) within themselves empowered to do and perform all acts necessary and essential in the accomplishment of the collection of the public revenues. Due process of law is observed if, in the different steps taken by the officers and tribunals created by statute, an opportunity is given to an individual taxpayer who may feel aggrieved to be heard with reference thereto, and power is given to redress such grievance as may be right and just. Personal notice is not always essential. Notice given by statute or by publication may be sufficient. An owner is not deprived of his property without due process of law if he has an opportunity to question its validity * * *."

The cited case pointed out that any taxpayer who deemed his property not fairly assessed with respect to other property in the county was privileged to resort to the county board of equalization for correction of such inequity. If the taxpayer failed to avail himself of such a remedy, then he had no ground for complaint of the subsequent action of the State Board in raising or lowering valuations of the county even though the result thereof might be the assessment of his individual

property on a basis in excess of actual value. See, also, People ex rel. Bracher v. Orvis, 301 Ill. 350, 133 N. E. 787, 24 A. L. R. 325; Kentucky Railroad Tax Cases, 115 U. S. 321, 6 S. Ct. 57, 29 L. Ed. 414. The latter two cases point to the proposition that there is an inherent distinction between boards of equalization and courts of law. Although the actions of the board of equalization are quasi judicial in character, due process is not involved in the same manner as is true with respect to proceedings in court. There are other cases from different jurisdictions too numerous to cite on the same point. The County's contention cannot be sustained.

The County contends that the only evidence available in this record is that contained in the transcript, wherein it appears that business inventories were reported to the State Board to be especially well assessed; that nothing appears to the contrary; and that this is true as to all classes of property except farm real estate, yet the State Board increased town lots and improvements, and household goods and personal equipment as heretofore shown.

The purpose of a statutory hearing is to afford the County an opportunity to offer evidence for the purpose of establishing that its returned valuations do in fact conform to law. The hearing is not for the purpose of affording the State Board an opportunity to demonstrate wherein the valuations returned by the county do not conform to the law. The County did not make any record in its hearing before the State Board. The statute does not require the State Board to have a stenographer, nor to keep a complete and exact record of all of its proceedings. Unless the statute so required, it was not necessary for the board to do so. This does not prevent any interested party from having a reporter and making a bill of exceptions of all or any part of the evidence. The County in these proceedings might have taken such a record of the evidence if it desired, but it apparently had no such desire, and cannot now as-

sign as error that the State Board did not do so. See Boyd County v. State Board of Equalization & Assessment, *supra*.

The record discloses that there is not the slightest indication of any evidence having been offered on behalf of the County as to the method or basis used by it in fixing valuations and the relationship of its valuations to actual value. In the event the County had offered evidence which tended to show that its valuations were fixed at actual value, this court would concern itself only with the matter of whether the adjustments ordered by the State Board were arbitrarily made. Insofar as evidence is concerned before the State Board, there is nothing upon which to predicate a finding that the action of the State Board was arbitrary.

While the case of Hatcher & Co. v. Gosper County, 95 Neb. 543, 145 N. W. 993, did not involve an appeal from the State Board to this court, the following language appearing in the opinion is pertinent to the instant case: "Where a taxpayer appeals from the action of the county board of equalization in fixing the value of his property for taxation, the presumption obtains that the board faithfully performed its official duties, and that in making the assessment it acted upon sufficient competent evidence to justify its action; and the burden is upon the appellant to plead and prove that the action of the board is erroneous."

In the case of Chicago, R. I. & P. Ry. Co. v. State, 112 Neb. 727, 200 N. W. 996, an appeal was taken from the action of the State Board in making an original assessment of certain railroad property. The Court said: "The burden of proof is upon the company to establish its contention that the value of its property has been fixed by the board at an amount greater than its actual value, or that its assessed value has not been fairly and properly equalized when considered in connection with the assessment of all other property, so that this disparity and lack of uniformity result in an unjust and

unfair assessment. * * * We cannot say the company has sustained the burden of proof that the assessment is so unjust and arbitrary that it ought to be set aside."

In the light of the decisions heretofore cited, the County's contention cannot be sustained.

On appeal from a final order of an administrative board, however, the review by the appellate court is ordinarily limited to questions of law and whether or not the evidence is sufficient to sustain the order. The sole question is whether such order was arbitrarily made. See Laflin v. State Board of Equalization & Assessment, *supra.*

The statute does not require any particular method of procedure to be followed by the State Board in equalizing the assessment of property, real, personal, or mixed. It may adopt any reasonable method for that purpose. In equalizing the valuation of property as between the various counties, the State Board may act on abstracts of assessments returned by the various counties, the knowledge of its own members as to value, or any other information satisfactory to it. See Boyd County v. State Board of Equalization & Assessment, *supra.*

With reference to the foregoing, if on appeal from the State Board to this court it appears on the face of the record that the action of the State Board was arbitrarily made, then this court will so determine. See Laflin v. State Board of Equalization & Assessment, *supra.*

It is the function of the State Board of Equalization and Assessment to examine the assessment rolls of the various counties and, by the process of equalization, raise or lower the valuations therein contained to conform to the requirement that taxable property shall be assessed at fifty percent of its actual value. See Laflin v. State Board of Equalization & Assessment, *supra.*

As provided for in section 77-112, R. R. S. 1943, "actual value" shall mean value in the market in the ordinary course of trade.

From an examination and study of the record, we believe the decision and final order of the State Board of Equalization and Assessment is not arbitrary or capricious, but is in accordance with the record and the law. It is ordered that the decision and final order of the State Board of Equalization and Assessment be, and is hereby, affirmed.

AFFIRMED.

IN RE ASSESSMENT OF REAL ESTATE AND BUSINESS PROPERTY IN THE STATE OF NEBRASKA FOR 1953. COUNTY OF BUFFALO, APPELLANT, V. STATE BOARD OF EQUALIZATION AND ASSESSMENT, APPELLEE.

63 N. W. 2d 468

Filed March 12, 1954. No. 33483.

1. **Appeal and Error.** On appeal from a final order of an administrative board, the review by the appellate court is ordinarily limited to questions of law and whether or not the evidence is sufficient to sustain the order. The sole question is whether such order was arbitrarily made.
2. **Taxation.** It is the function of the State Board of Equalization and Assessment to examine the assessment rolls of the various counties and, by the process of equalization, raise or lower the valuations therein contained to conform to the requirement that taxable property shall be assessed at fifty percent of its actual value.
3. ———. The statute does not require any particular method of procedure to be followed by the State Board of Equalization and Assessment in equalizing the assessment of property, real, personal, or mixed. It may adopt any reasonable method for that purpose.
4. ———. The notice sent out by the State Board of Equalization and Assessment, a copy of which is substantially set forth in the opinion, examined and held sufficient.
5. ———. The State Board of Equalization and Assessment has the power, in equalizing assessments, to increase or decrease the assessed valuation of any class, classes or kinds of property, personal, real, or mixed in any county or tax district.
6. ———. The presumption is that when the State Board of

Equalization and Assessment values any class, classes or kinds of property, real, personal, or mixed for assessment purposes it acts fairly and impartially in fixing such valuation.

7. **Taxation: Appeal and Error.** Where a county appeals from the action of the State Board of Equalization and Assessment in the matter of the assessment of property for taxation, the burden is upon the county to show that the decision of the State Board of Equalization and Assessment is arbitrary.
8. **Taxation.** It is not the function of the State Board of Equalization and Assessment to deal with assessments of individuals, either directly or as a board of review; that is the function of the county board of equalization.
9. ———. The statute does not require the State Board of Equalization and Assessment to have a stenographer, nor to keep a complete and exact record of all of its proceedings. Unless the statute so required, it was not necessary for the board to do so.
10. **Taxation: Appeal and Error.** This does not prevent an interested party from having a reporter and making a bill of exceptions of all or any part of the evidence.
11. **Taxation.** Section 77-508, R. R. S. 1943, which provides that notice shall be mailed to the county clerk, county assessor, and chairman of the county board, makes no requirement that each of said parties shall directly receive the notice. Substantial compliance with the statute is had when the notice is mailed.

APPEAL from the State Board of Equalization and Assessment. *Affirmed.*

R. L. Haines, for appellant.

Clarence S. Beck, Attorney General, and *C. C. Sheldon,* for appellee.

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

MESSMORE, J.

The County of Buffalo gave notice of its intention to obtain a review of the decision of the State Board of Equalization and Assessment with respect to the valuations of real and personal property in the county as provided for by section 77-510, R. R. S. 1943. In accordance therewith, the county perfected appeal to this court. The State Board of Equalization and Assessment increased

the valuations returned by the county board of equalization of Buffalo County in the manner hereafter shown.

For convenience, and unless otherwise required, we shall refer to the appellant county as the County, and the State Board of Equalization and Assessment as the State Board.

The county abstract of assessment for 1953 was forwarded to the State Board as provided for in section 77-1514, R. R. S. 1943, and contained a showing of the values as equalized and corrected by the county board of equalization and the information as to the taxable property in the county as required by said section.

The State Board met on the first Monday in July, as required by section 77-505, R. R. S. 1943, this date being July 6, 1953, for the purpose of equalizing assessments on both real and personal property. At this meeting the State Board adopted a resolution to the effect that the State Board had examined and considered the abstracts of property assessed for taxation in the various counties of the state previously submitted to said board, together with other pertinent data and information submitted by the State Tax Commissioner. Based upon and in consideration of such abstracts, data, and information, together with other matters within the general knowledge of the members of said board, it appeared that a just, equitable, and legal assessment of property in the state could not be made without increasing or decreasing the valuations of property, or some classes or kinds thereof, as returned by the various counties. The board deemed that all counties were either undervalued or overvalued; that hearings should be held before said board at which the legal representatives of such counties should be given an opportunity to show cause why the valuations of property of their respective counties should not be increased or decreased; and that notice should be given each county of the time and place of hearing.

With reference to the notice as set forth in section

77-508, R. R. S. 1943, the County makes an assignment of error with which we will deal later in the opinion. However, the notice was to the effect that the State Board would meet in the Governor's hearing room in the State Capitol Building, Lincoln, Nebraska, on July 15, 1953, and the hearings would continue for the purpose of considering the equalization of the valuations of the counties notified. Buffalo County was notified to have its representatives present on July 15, 1953, for such purpose.

The pertinent part of the notice to Buffalo County was as follows: "Notice is hereby given that the State Board of Equalization and Assessment will meet at the Governor's Hearing Room, in the State Capitol Building, Lincoln, Nebraska, on the 15th day of July, 1953, for the purpose of considering the equalization of valuations in your county for the year 1953.

"Representatives of your county may appear at the aforesaid time and place and such representatives will be given an opportunity at said meeting to show why the assessed valuations of any or all class, classes, or kinds of property, personal, real or mixed, in your county, as shown by the 1953 abstract of assessment rolls heretofore submitted to this Board, should not be increased or decreased as may be found necessary to equalize the assessments of the various counties of the state in such a manner as to make such assessments conform to law." This notice was dated July 6, 1953, and signed by the secretary of the State Board.

On July 15, 1953, the State Board met as indicated in the above notice. The county assessor of Buffalo County presented a showing for the county; stated his views with reference to the estimated actual value figures on farm real estate completed by the office of the State Tax Commissioner; and stated that the estimated actual valuation figures for Buffalo County were below current prices. He also believed this to be true with reference to hill land and valley land. Comparisons with

the appraisal totals submitted by E. T. Wilkins and Associates further substantiated the belief that the valuation estimates submitted by the office of the State Tax Commissioner were conservative. He further asserted that the business inventory assessments in Buffalo County needed more attention.

On July 27, 1953, the State Board met in the office of the State Tax Commissioner in the State Capitol Building at Lincoln, Nebraska, and proceeded to a further examination of the abstracts returned by each of the counties, including that of Douglas County which had been received by the board on that date. Further consideration was given to the showings and presentations made by the various counties at the hearings previously held, and of other evidence and records. The State Board found that in order to make the assessments as returned by the individual counties conform to law, and in order to arrive at a just, equitable, and legal assessment of the real and personal property in the state, certain increases should be made. The lands and improvements of Buffalo County were in no manner disturbed by the State Board. However, the following increases were found to be necessary as concerns Buffalo County:

Item or Class of Property	Actual Value Shown on 1953 Abstract	Actual Value as Adjusted by State Board	Assessed Value as Equalized by State Board	Percent of Incr. or Decr.
Lots & Improvements	$22,882,898	$32,722,540	$16,361,270	Incr. 43%

With reference to business schedules, total household goods and personal equipment, for the purpose of argument the County limited itself only to the matter above mentioned.

In determining this appeal, we may not substitute our judgment for that of the State Board. We review the record to determine if the State Board has complied with the requirements of the statutes in exercising the powers granted to it by legislative authority and, where the

record is clear that it has, it is then our duty to hold its actions to be in accordance with the law.

There is some intimation in the brief of the County that the notice given by the State Board did not properly advise the County of the object or purpose of the hearing to be held on July 15, 1953. No assignment of error is set forth by the County in this respect. However, the sufficiency of the notice has heretofore been determined in the case of Boyd County v. State Board of Equalization & Assessment, 138 Neb. 896, 296 N. W. 152, and as the notice appears in the instant proceeding, in the cases of County of Grant v. State Board of Equalization & Assessment, *ante* p. 310, 63 N. W. 2d 459, and County of Howard v. State Board of Equalization & Assessment, *ante* p. 339, 63 N. W. 2d 441, we have again determined the sufficiency of the notice and the same applies to the instant case.

The County set forth that the State Board erred in taking no action on the motion of the County for a further hearing.

On August 6, 1953, the County gave notice of its intention to appeal. On August 7, 1953, the County filed a motion for further hearing before the State Board. The State Board declined to entertain this motion. The County, in its brief, did not discuss or argue this assignment of error. Under rule 8a 2 (4), Revised Rules of the Supreme Court of the State of Nebraska, 1951, errors assigned but not argued will be considered as waived. See, Mason v. State, 132 Neb. 7, 270 N. W. 661; Maher v. State, 144 Neb. 463, 13 N. W. 2d 641. This assignment of error needs no further discussion.

The County assigns as error that the State Board is without jurisdiction in this proceeding for the reason that it failed to give the proper statutory notice to the chairman of the county board of supervisors of the County.

Section 77-508, R. S. 1943, insofar as pertinent here, provides that notice shall be mailed to the county clerk,

county assessor, and chairman of the county board. We have taken cognizance of the different affidavits appearing in the record with respect as to whether the chairman of the county board of supervisors of the County received notice or failed to receive the same, and the affidavits of the Tax Commissioner, the assistant tax commissioner, and employees of the tax commissioner's office. It is apparent that the notice was mailed to the county clerk, the county assessor, and the chairman of the county board. That is all that is required by the statute. Even in the event the notice was considered defective, the County made an appearance before the State Board by its legal representative, which demonstrated it had actual notice of the meeting and was not prejudiced in any manner. See Boyd County v. State Board of Equalization & Assessment, *supra*. The County's assignment of error cannot be sustained.

The County contends, upon appeal from the final order of the State Board, the review by the appellate court is ordinarily limited to questions of law and whether or not the evidence is sufficient to sustain the order. The sole question is whether such order was arbitrarily made. This rule is announced in Laflin v. State Board of Equalization & Assessment, 156 Neb. 427, 56 N. W. 2d 469.

In this connection the County asserts that the evidence appearing in the record is insufficient to sustain the findings of the State Board; that the record should show the manner by which the State Board arrived at its decision to raise the County's town lots and improvements by an increase of 43 percent; that the State Board should show the formula it used in doing so and as to whether it took into consideration sales for a period of 20 years, 10 years, 5 years, or 1 year; and that there is not a scintilla of evidence adduced by the State Board. The position of the County thoroughly indicates that the State Board is under an obligation to adduce evidence to show upon which basis it made its final decisions, and

is charged with the affirmative duty to have produced evidence and to have made a record thereof at the hearing. We are not in accord with the County's position in such respect as will appear later.

The case of Laflin v. State Board of Equalization & Assessment, *supra,* determined that in a situation wherein it affirmatively appears on the face of the record that property has not been valued according to the actual value or that property has not been valued uniformly and proportionately between the various counties, the court will then interfere for the purpose of directing such appropriate action as may be required by law. The record in the Laflin case showed conclusively that the State Board was in violation of the revenue laws, and explained the reason therefor; that the State Board endeavored to equalize valuations on the basis of 20-year sale prices; that the treatment accorded to Johnson County farm land was arbitrarily made; and there was a complete failure to approach equality between the various counties of the state. The decision was not based upon any theory of a requirement that the record contain all of the information, knowledge, and other matters upon which the final action of the State Board was made. The interpretation of the Laflin decision is in harmony with the principles that it will be presumed that the State Board acted fairly and in conformity with the law, in the absence of an affirmative showing to the contrary.

The County contends that it is the function of the State Board to examine the assessment rolls of the various counties and, by the process of equalization, raise or lower the valuations therein contained to conform to the requirement that taxable property shall be assessed at its actual value. In so doing, the objective is not only to assess taxable property at its actual value, but also to secure a uniform and proportionate valuation for taxation purposes as required by Article VIII, section 1,

of the Constitution of Nebraska, which need not be set out.

Again, in this assignment of error the County asserts that this court is faced with an insufficiency of evidence, and then points to the proposition that E. T. Wilkins and Associates, to the best of their professional ability, valued city lands and farm lands at what they judged to be actual value. There is no evidence in the record as to any valuations placed upon any property in the county by E. T. Wilkins and Associates.

To follow up what we have previously said with reference to the State Board being required to adduce evidence, the transcript contains the records and proceedings as heretofore indicated. The State Board is not required to prepare a bill of exceptions or any other manner of documentation of all matters which may have been considered in connection with its determinations. The County, if it desired, could have produced evidence at the hearing and caused the same to be preserved for examination at this time in the form of a bill of exceptions. Such a duty does not rest on the State Board. As stated in Boyd County v. State Board of Equalization & Assessment, *supra*: "The statute does not require the state board to have a stenographer, nor to keep a complete and exact record of all its proceedings. Unless the statute so required, it was not necessary for the board to do so. * * * This does not prevent any interested party from having a reporter and making a bill of exceptions of the evidence, * * * or any part of the evidence. The county in these proceedings might have taken such a record of the evidence if it desired, but it apparently had no such desire, and cannot now assign as error that the state board did not do so."

The foregoing language indicates that the burden is upon the County to establish the correctness of its valuations, rather than any burden resting upon the State Board to establish the incorrectness of such valuations. The only matter presented to the State Board by the

County was a categorical statement by its county assessor.

Further in this connection, on the proposition that the burden is upon the party assailing the action of the board of equalization, in the case of Hatcher & Co. v. Gosper County, 95 Neb. 543, 145 N. W. 993, this court said: "Where a taxpayer appeals from the action of the county board of equalization in fixing the value of his property for taxation, the presumption obtains that the board faithfully performed its official duties, and that in making the assessment it acted upon sufficient competent evidence to justify its action; and the burden is upon the appellant to plead and prove that the action of the board is erroneous." While the Hatcher case involved an appeal from the county board of equalization, the reasoning of the language quoted is equally appropriate to an appeal from the State Board of Equalization and Assessment.

To like effect is the case of Chicago, R. I. & P. Ry. Co. v. State, 112 Neb. 727, 200 N. W. 996. This case involved an appeal from the action of the State Board in making an original assessment of certain railroad property. The court said: "The burden of proof is upon the company to establish its contention that the value of its property has been fixed by the board at an amount greater than its actual value, or that its assessed value has not been fairly and properly equalized when considered in connection with the assessment of all other property, so that this disparity and lack of uniformity result in an unjust and unfair assessment. * * * Approximation both as to value and uniformity is all that can be reached. We cannot say the company has sustained the burden of proof that the assessment is so unjust and arbitrary that it ought to be set aside."

In the case of Lancaster County v. Whedon, 76 Neb. 753, 108 N. W. 127, this court made it clear that in appeals from the actions of boards of equalization the burden falls upon the party seeking to disturb the action of

the board. The court said: "When the jurisdiction of a quasi judicial tribunal is once established, its subsequent proceedings are presumed to be regular. And so the rule is that, where a taxpayer appeals to the district court from the action of the board of equalization in the matter of the assessment of property for taxation, the burden is on the appellant to show that the decision of the board is erroneous." See, also, Borgnis v. Falk Co., 147 Wis. 327, 133 N. W. 209, 37 L. R. A. N. S. 489.

The State Board is not required to follow any particular method in the equalization of values between the counties, but may adopt any reasonable method for such purpose. In equalizing the values of property as between the various counties, the State Board may act upon abstracts of assessments returned by the various counties, the knowledge of its own members as to value, or any other information satisfactory to it. See Boyd County v. State Board of Equalization & Assessment, *supra.*

In the event the record discloses on its face, as in the case of Laflin v. State Board of Equalization & Assessment, *supra,* that the action of the State Board is arbitrary, then the abstracts of assessment of the various counties, the knowledge of the members of the State Board as to value, and other information satisfactory to it would not prevail.

We conclude that the assignments of error predicated by the County as heretofore set out cannot be sustained.

From an examination and study of the record, we believe the decision and final order of the State Board of Equalization and Assessment is not arbitrary or capricious, but is in accordance with the record and the law. It is ordered that the decision and final order of the State Board of Equalization and Assessment be, and is hereby, affirmed.

AFFIRMED.

SAMUEL FREEMAN, APPELLANT, V. CLYDA ELDER ET AL., APPELLEES.

63 N. W. 2d 327

Filed March 12, 1954. No. 33498.

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. ———. In passing on a demurrer to a petition, the court will consider an exhibit attached thereto and made a part thereof, if the allegations stated therein either aid the petition in stating a cause of action or charge facts going to avoid liability on the part of the defendant.
4. **Specific Performance.** Where, by the terms of a contract, the conditions to be performed by the respective parties are concurrent, the plaintiff, in an action for specific performance, must allege and prove performance, or a tender of performance, of the conditions on his part to be performed, or such facts as will show that such tender would have been unavailing.
5. **Vendor and Purchaser: Specific Performance.** Where the vendor is unable to convey the property which he has agreed to convey because of a defect in the quality or quantity of the estate which he possesses and the vendee has entered into the contract without knowledge or notice of the deficiency or defect in the vendor's title, he may ordinarily have specific performance of the contract as to whatever interest the vendor has with such abatement of the purchase price as shall be proportionate to the diminution in value of the subject matter, to be determined by the court from competent evidence adduced with relation thereto.
6. ———: ———. On the other hand, specific performance with abatement will not be enforced where it would be productive of inequity or would have the effect of making a new contract between the parties, or it is patent that the nature of the subject matter, the terms of the contract, or the kind and extent of the defect are such that they furnish no basis upon which to ascertain the amount of the compensation or abate-

ment with any degree of certainty, and the fixing thereof would therefore be a mere matter of speculation.

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

Melvin Moss, for appellant.

Walter C. Weiss, John L. Richards, and *Keenan & Corbitt,* for appellees.

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

CHAPPELL, J.

Plaintiff Samuel Freeman and defendants Clyda Elder, Edith Elder, Eugene E. Elder, and Betty Jane Elder entered into a written contract whereby plaintiff agreed to buy and defendants agreed to sell a described quarter section of land in Thayer County, Nebraska, free and clear of all encumbrances except a described mortgage. Plaintiff brought this action against defendants seeking specific performance of the contract with abatement of the purchase price because, upon conveyance of the land to defendants, their grantor, the Federal Land Bank, had reserved to itself "one half of minerals, oil and fissionable material until the year 1964." Defendants demurred generally to plaintiff's amended petition which had a copy of the contract attached thereto and made a part thereof. The demurrer was sustained, and upon plaintiff's refusal to plead further the action was dismissed at plaintiff's costs. Plaintiff then appealed to this court, assigning that the trial court erred in so doing. We sustain that assignment.

In In re Estate of Halstead, 154 Neb. 31, 46 N. W. 2d 779, it was held 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.

"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." See, also, Johnson v. Marsh, 146 Neb. 257, 19 N. W. 2d 366; Lincoln Federal Labor Union v. Northwestern Iron & Metal Co., 149 Neb. 507, 31 N. W. 2d 477.

Also, in Valentine Oil Co. v. Powers, 157 Neb. 71, 59 N. W. 2d 150, we reaffirmed that: "In passing on a demurrer to a petition, the court will consider an exhibit attached thereto and made a part thereof, if the allegations stated therein either aid the petition in stating a cause of action or charge facts going to avoid liability on the part of the defendant."

In the light of such rules and others hereinafter discussed, we have examined plaintiff's amended petition. The contract duly executed and acknowledged by the parties on September 12, 1947, agreed that defendants would sell and plaintiff would buy the aforesaid land. The consideration therefor was $4,250, payable $750 cash, receipt of which was acknowledged. Further, plaintiff agreed to assume and pay a balance of $2,770.71, still owing by defendants on a recorded mortgage to the Federal Land Bank, together with interest thereon from September 12, 1947, and pay defendants the balance of $729.29 on September 12, 1948, with interest at 4 percent from September 12, 1947, to date of settlement. Defendants agreed to pay the 1946 and all prior taxes and the parties agreed to each pay one-half of the 1947 taxes. It was agreed that defendants should have all income from the 1946 crops and other income, but plaintiff was given immediate possession of the land for all purposes, including the right to plow and seed wheat in the fall of 1947. Defendants agreed to forthwith execute a warranty deed to plaintiff for the premises and de-

posit same, together with a copy of the contract, with the Thayer County Bank of Hebron, Nebraska, as escrow holder, until final settlement.

On payment of the balance of $729.29 with interest, and compliance with other provisions, such deed was to be delivered to plaintiff. Defendants agreed to furnish an abstract brought down to date of final settlement, showing title in them free from all encumbrances except the mortgage and one-half of the 1947 taxes, and deliver same to plaintiff or his attorney for preliminary examination by November 15, 1947.

However, on September 13, 1948, a supplemental contract was duly executed by the parties agreeing that in consideration of payment by plaintiff of $400 on the balance of $729.29 and interest thereon due September 12, 1948, then the date for payment by plaintiff of the difference thereof remaining unpaid with interest thereon, would be extended until September 12, 1949. It was then provided: "Subject only to the provisions of this supplemental agreement, the parties hereby ratify all of the terms of said original contract of September 12, 1947."

Plaintiff's amended petition alleged execution of the aforesaid agreement attached to and made a part of the petition; summarized its relevant material terms; and alleged performance by plaintiff of all things required therein by him until submission of the abstract by defendants, whereupon by examination thereof he discovered prior to September 12, 1949, the time for final settlement, that the Federal Land Bank in its conveyance of the land to defendants had made a reservation to itself of "one half of minerals, oil and fissionable material until the year 1964."

Plaintiff alleged that upon discovery of such deficiency of title he took the matter up with defendant's attorney and assisted him in an effort to secure from the Federal Land Bank a release of said reservation or a conveyance of its interest in the premises, but they

were unsuccessful. He alleged that prior to September 12, 1949, he informed defendants that he was ready and willing to pay the balance due and required of him by the terms of the contract, whereupon defendants' attorney waived tender of the balance due and advised plaintiff to hold said money until they could clear the title to the premises.

Plaintiff alleged that he could not place himself in status quo by rescinding the contract and asking for damages, but to save himself from irreparable loss must take such title as defendants could offer, and seek recovery from them of $1,600, the difference between the reasonable value of the title that could be conveyed and that which defendants contracted to give as an abatement of the purchase price.

He alleged that the balance of the purchase price as provided in the contract had been ready and unproductive in his hands ever since September 12, 1949, completion date of the contract, and that defendants upon demand have failed, neglected, and refused to tender a deed to plaintiff with any abatement of the purchase price for the aforesaid deficiency of title. Therefore, he prayed for specific performance of the contract with abatement, together with interest on such balance of his purchase money, and equitable relief. He also prayed for an allowance of attorney's fees, but cites no authority which could justify any allowance thereof.

We are unable to determine from the record upon what ground the trial court sustained defendants' demurrer and dismissed plaintiff's action. However, the briefs filed herein present two questions, to wit: (1) Did plaintiff's amended petition sufficiently allege performance of his obligations under the contract, and (2) should the demurrer to plaintiff's amended petition have been sustained, and specific performance with abatement have been thus denied by dismissal because it was patent from the allegations thereof that the nature of the subject matter, the terms of the contract, or the kind and

extent of the alleged defect were such that they furnished no basis upon which to ascertain the amount of compensation or abatement which could be allowed with any reasonable degree of certainty, and fixing the amount thereof would therefore be a mere matter of speculation?

As stated in 81 C. J. S., Specific Performance, § 131, p. 691: "The plaintiff in a suit for specific performance must by his pleading show that he has performed, or offered or tendered performance, or show a sufficient excuse for nonperformance or failure to tender or offer performance of those terms and conditions of the contract on his part to be performed prior to, or concurrent with, the performance by the defendant of the terms and conditions of the contract to be performed by him." See, also, 58 C. J., Specific Performance, § 484, p. 1161; 49 Am. Jur., Specific Performance, § 161, p. 184; 4 Pomeroy's Equity Jurisprudence (5th ed.), § 1407, p. 1050, § 1407a, p. 1051.

An examination of plaintiff's petition with the contract attached thereto discloses that he sufficiently alleged performance of his obligations imposed by the terms thereof, in conformity with the foregoing rule. In Fisher v. Buchanan, 2 Neb. (Unoff.) 158, 96 N. W. 339, relied upon by defendants, it was held: "Where, by the terms of a contract, the conditions to be performed by the respective parties are concurrent, the plaintiff, in an action for specific performance, must allege and prove performance, or a tender of performance, of the conditions on his part to be performed, or such facts as will show that such tender would have been unavailing." However, decision therein denying specific performance was predicated primarily upon the proposition that plaintiff had failed, when the case was tried on the merits, to adduce any evidence that he had performed or offered to perform the conditions contractually imposed upon him or to adduce any facts which would excuse his failure in that regard. The holding in that case cor-

rectly stated the rule, but decision therein was not predicated upon a demurrer to plaintiff's petition for failure to plead performance.

The second question is not as simple of solution as the first, but clearly in situations such as that pleaded at bar, specific performance with abatement could not be foreclosed by demurrer. Rather, whether or not there was any basis upon which to ascertain the amount of the compensation or abatement with any reasonable degree of certainty is a question of fact dependent upon the character or quality of evidence which may be adduced by plaintiff with relation thereto upon the merits rather than by judicial fiat. 81 C. J. S., Specific Performance, § 162, p. 777, states generally that: "In awarding damages, compensation, or abatement in price for partial nonperformance, the court may apportion the price and damages in accordance with the evidence." See, also, 58 C. J., Specific Performance, § 601, p. 1247.

As stated in Pomeroy's Specific Performance of Contracts (3d ed.), § 448, p. 923: "When the nature of the subject-matter, the terms of the contract, or the kind and extent of the defects are such that they furnish no basis upon which to ascertain the amount of the compensation with any reasonable degree of certainty, and the fixing the amount would, therefore, be a mere matter of speculation, a partial specific performance with compensation must be refused, even when demanded by the purchaser. The court will not apply this rule except in cases of real necessity, and prefers to grant compensation even when its measure cannot be exact, and the estimate must be rather approximate than certain."

As stated in Pomeroy's Specific Performance of Contracts (3d ed.), § 438, p. 903: "The general doctrine is firmly settled * * * that a vendor whose estate is less than or different from that which he agreed to sell, or who cannot give the exact subject-matter embraced in his contract, will not be allowed to set up his inability as a defense against the demand of a purchaser who is willing

to take what he can get with a compensation. The vendee may, if he so elect, enforce a specific performance to the extent of the vendor's ability to comply with the terms of the agreement, and may compel a conveyance of the vendor's deficient estate, or defective title or partial subject-matter, and have compensation for the difference between the actual performance, and the performance which would have been an exact fulfillment of the terms of their contract." In that connection, it is said in § 440, p. 908: "The existence of easements upon the land in favor of third persons, or of other similar rights which conflict with those of the owner, and which would prevent a vendor from forcing an acceptance upon an unwilling vendee, will entitle the purchaser at his election to insist upon a conveyance of the land subject to these rights, with such compensation or abatement from the price as shall be proportionate to the diminution in the value of the subject-matter. As for example, when the land is found to be subject to a right in a third person to dig for minerals or ores, the purchaser can demand a specific performance with compensation." Numerous authorities are cited in support of the foregoing sections. See, also, Eppstein v. Kuhn, 225 Ill. 115, 80 N. E. 80, 10 L. R. A. N. S. 117, and annotation appended thereto; 58 C. J., Specific Performance, §§ 56 to 59, pp. 901 to 904, citing numerous cases.

In 49 Am. Jur., Specific Performance, § 105, p. 123, it is said: "In actions by a vendee for the specific performance of a contract for the sale of real estate, where it appears that the vendor is unable to make a complete or perfect title, or that there is a deficiency in the quantity of land contracted to be sold, the general rule is that the vendee, if he so elects, is not only entitled to have the contract specifically performed to the extent of the vendor's ability to comply therewith by requiring him to give the best title he can or convey what he has, but he may compel the vendor to convey his defective title or deficient estate, and at the same time have a just abate-

ment out of the purchase price for the deficiency of title, quantity, or quality of the estate to compensate for the vendor's failure to perform the contract in full. The vendee, in other words, may waive full performance and accept such title as the vendor is able to give, and if he chooses to do so, he has a right to that and to an abatement, and the court will not hear the objection, by the vendor, that the purchaser cannot have the whole."

Also, as stated in 81 C. J. S., Specific Performance, § 21, p. 448: "Where the vendor is unable to convey the property which he has agreed to convey because of a defect in the quality or quantity of the estate which he possesses and the vendee has entered into the contract without knowledge or notice of the deficiency or defect in the vendor's title, he may, as a rule, have specific performance of the contract as to whatever interest the vendor has with such restitution or abatement as to the purchase price as may be determined by the court; but this rule will not be enforced where it would be productive of hardship or inequity or would have the effect of making a new contract between the parties."

Authorities cited and relied upon by defendants are generally entirely distinguishable upon the facts and law applicable thereto.

For reasons heretofore stated, we conclude that plaintiff's amended petition did state a cause of action and that the trial court erroneously sustained defendants' demurrer and dismissed plaintiff's action. Therefore, the judgment of the trial court should be and hereby is reversed and the cause is remanded for further proceedings in conformity with this opinion.

REVERSED AND REMANDED.

BERNARD NAEGELE, APPELLANT, V. LOWELL DOLLEN ET AL., APPELLEES.

63 N. W. 2d 165

Filed March 12, 1954. No. 33506.

1. **Pleading.** A petition challenged by demurrer charges what by reasonable and fair intendment may be implied from the facts stated.
2. ———. A general demurrer admits the truth of all facts well pleaded as well as the intendments and inferences that may reasonably be drawn from the pleaded facts.
3. **Negligence.** 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.
4. ———. A person is charged with the knowledge that a loaded gun is a dangerous instrumentality, and in dealing with it he is charged with the highest degree of care to prevent injuries to others.

APPEAL from the district court for Douglas County: ARTHUR C. THOMSEN, JUDGE. *Reversed and remanded with directions.*

Mecham, Stoehr, Moore, Mecham & Hills and *John A. Rickerson,* for appellant.

Russell C. Anderson, John A. McKenzie, and *Joseph A. Troia,* for appellees.

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

YEAGER, J.

This is an action for damages by Bernard Naegele, plaintiff and appellant, against Lowell Dollen and D. H. Dollen as individuals and as a partnership, doing business as Dollen Hardware Company, and Walter Wasekowski, defendants.

By petition the defendants were charged with negligence resulting in damages to the plaintiff. To the petition the defendants Lowell Dollen and D. H. Dollen, as

individuals and as a partnership, demurred on the ground that it contained insufficient allegations of fact to constitute a cause of action. The demurrer was sustained and the petition was dismissed. From the order sustaining the demurrer and the judgment of dismissal the plaintiff has appealed. The defendant Wasekowski is not a party to the proceeding on appeal. The demurring defendants are appellees here.

The petition, to the extent necessary to be set forth herein, charges that the appellees own and operate a hardware store in Omaha, Nebraska, in which they have for sale to the public guns and ammunition for shotguns, plugs for shotguns, and other dangerous instrumentalities; that on October 28, 1951, plaintiff entered the store as a customer upon the invitation to the public to do so in order to buy merchandise; that as a customer he made a purchase and was leaving, but while in the store he was shot by a shotgun shell from a gun which was negligently, carelessly, and unlawfully discharged in the store; that the gun was discharged by Walter Wasekowski, also a customer, who was about to purchase a plug for his shotgun from the appellees; that the appellees through Lowell Dollen negligently, carelessly, and unlawfully permitted and encouraged Walter Wasekowski, while in the store, to place loaded shotgun shells in the magazine or chamber of the gun and to pump the mechanism thereof to eject the shells in order to ascertain whether or not the plug which the appellees were attempting to sell would fit the mechanism of the gun, and watched him do so; that while this was being attempted the gun was negligently, carelessly, and unlawfully pointed toward the plaintiff and discharged, in consequence of which plaintiff was shot in the rear of his right leg; and that appellees should have reasonably anticipated that the manipulations were highly dangerous to customers in the store, in consequence of which the appellees were guilty of negligence.

The alleged negligence of the appellees is also other-

wise detailed in the petition but the basic charges are contained in the foregoing summary from the petition.

Basic in the determination on whether or not a petition states a cause of action are two principles. One is that a petition challenged by demurrer charges what by reasonable and fair intendment may be implied from the facts stated. Farmers Union Cooperative Elevator Federation v. Carter, 152 Neb. 266, 40 N. W. 2d 870.

The other is that a general demurrer admits the truth of all facts well pleaded as well as the intendments and inferences that may reasonably be drawn from the pleaded facts. Farmers Union Cooperative Elevator Federation v. Carter, *supra.*

It is evident, if the allegations of the petition are true, that Wasekowski was guilty of negligence. The intent of the pleader was to say that the acts of Lowell Dollen were an inseparable and proximate part of an unbroken chain of incidents resulting in injury and damage to plaintiff, a thing which could not and would not have occurred in the absence of the furnishing of the loaded shells and their use with the advice and consent of Dollen.

If therefore the pleaded facts are sufficient to support the intent of the pleader it must be said that the petition states a cause of action and is not vulnerable to attack by general demurrer.

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

In the usual experience of mankind, was it not reasonable to exact of Lowell Dollen that he anticipate the possibility that in the manipulation of a shotgun in a place of business open to customers it might be discharged with resultant damages to customers in the

store? We think the answer to this question must be in the affirmative.

Certainly he was charged with the knowledge that a loaded gun is a dangerous instrumentality, and in dealing with it he was charged with the highest degree of care to prevent injuries to others. Skinner v. Ochiltree, 148 Fla. 705, 5 So. 2d 605, 140 A. L. R. 410; Charlton v. Jackson, 183 Mo. App. 613, 167 S. W. 670; Phillips v. D'Amico (La. App.), 21 So. 2d 748; Berry v. Harper (Tex. Civ. App.), 111 S. W. 2d 795; Corn v Sheppard, 179 Minn. 490, 229 N. W. 869.

In Corn v. Sheppard, *supra,* it was said: "Firearms are recognized as such dangerous instrumentalities that where a person has a gun in his hands and it is discharged, even accidentally and unintentionally, he is held liable for the injuries caused thereby, unless he shows that he took all reasonable precautions to guard against accidents and that the discharge of the weapon did not result from any careless act on his part."

This rule may appear severe but it may not be said to be unreasonable. It is but an application of the principle involved in the res ipsa loquitur rule.

It is difficult to find any reason to fail to apply the rule in a case where it is alleged that another person participated in an accidental discharge of a gun by furnishing the ammunition and by giving advice in the manipulation of the firearm.

The case of Berry v. Harper, *supra,* closely parallels the allegations of the petition filed herein. In that case a man who had purchased a gun at a second-hand store was allowed, in a store, as here, to see if loaded shells would work in the gun. The court, in the following language, held that the question of negligence was one to be determined by a jury: "However, should it be assumed that the firing of the gun was necessarily caused by either some mechanical defect in the gun or by some inaccurate manipulation of the gun by Woodruff (as distinguishable from a negligent manipulation), still

we think it was a proper matter for the jury to determine, as they did, from all the attending facts and circumstances, whether Summers in the exercise of ordinary care ought reasonably to have anticipated the intervention of either or both of such facts and foreseen that such an accident or a similar one would likely result from his permission to Woodruff to manipulate the gun with loaded shells * * *. Hence Summers had no special reason to rely on Woodruff's ability to accurately manipulate an automatic gun. * * * Hence Summers had no special reason to rely upon the gun as being free from mechanical defects."

In the light of what has been said herein we are of the opinion that the petition states a cause of action against the appellees.

The judgment of the district court is reversed and the cause is remanded with directions to overrule the demurrer.

REVERSED AND REMANDED WITH DIRECTIONS.

MAX FROMKIN, PLAINTIFF, V. STATE OF NEBRASKA ET AL., DEFENDANTS, MID-CONTINENT INVESTMENT COMPANY, A CORPORATION, INTERVENER.

63 N. W. 2d 332

Filed March 12, 1954. No. 33507.

1. **Taxation.** The provisions of section 77-1502, R. S. Supp., 1953, provide for "a session" of the county board of equalization of not less than 3 nor more than 40 days. The period of days defines the minimum and maximum term in days of a session. The statute contemplates one session to begin and end as provided in the act. Once started the time continues to run. The time limited in the act constitutes the term during which the county board can act for the purposes stated.
2. **Cases Overruled.** Farmers Co-operative Creamery & Supply Co. v. McDonald, 97 Neb. 510, 150 N. W. 640, on rehearing 97 Neb. 512, 150 N. W. 656, same title 100 Neb. 33, 158 N. W. 369; Hiller v. Unitt, 113 Neb. 612, 204 N. W. 208; Missouri P. R. R. Corporation v. Board of Equalization, 114 Neb. 84, 206

N. W. 150; and State v. Odd Fellows Hall Assn., 123 Neb. 440, 243 N. W. 616, insofar as they conflict with syllabus one are held not now applicable.

3. **Taxation.** The power given in section 77-1502, R. S. Supp., 1953, authorizing equalization of undervalued property, is limited to particular items and pieces of property. It does not extend to any equalization of aggregate values between taxing districts.
4. ———. The provision of section 77-1514, R. R. S. 1943, which requires a county assessor to prepare an abstract of the assessment rolls of his county and forward it to the State Board of Equalization and Assessment on or before July 1, does not invalidate a subsequent preparation and filing.
5. ———. The fact that the county board of equalization had no power to raise the values of property as fixed by the assessor does not affect the duty or power of the State Board of Equalization and Assessment.
6. ———. The State Board of Equalization and Assessment has the power, in equalizing assessments, to increase or decrease the assessed valuation of any class, classes or kinds of property, personal, real, or mixed in any county or tax district, whenever in its judgment it shall be necessary to make such assessment conform to law.
7. ———. The statutes do not require any particular kind or standard of evidence. The State Board of Equalization and Assessment may act upon whatever evidence it has before it and upon the general knowledge of its members without requiring other evidence.
8. ———. The ascertainment of the ultimate fact that all the property of the state has been brought, for taxation purposes, to its full cash value rests on the judgment of the State Board of Equalization and Assessment.

ORIGINAL ACTION. *Declaratory judgment rendered.*

Max Fromkin, pro se.

Clarence S. Beck, Attorney General, *C. C. Sheldon, Eugene F. Fitzgerald, August Ross, W. Ross King, Edward F. Fogarty, Wells, Martin & Lane, Herbert M. Fitle, Neal H. Hilmes,* and *Theodore L. Richling,* for defendants.

White, Lipp & Simon, for interveners.

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

SIMMONS, C. J.

This is an original action to secure a declaratory judgment.

The plaintiff brings the action as a taxpayer owning real estate representing himself and all other taxpayers similarly situated.

Plaintiff sought a judgment that a resolution of the Douglas County Board of Equalization of July 7, 1953, was null and void and that the lawful assessment of property in Douglas County was as found and fixed by the county assessor as of March 10, 1953. The County Board of Equalization will be referred to herein as the county board.

Mid-Continent Investment Company, as the owner of real estate, was given leave to intervene. It also sought a judgment that the resolution of July 7, 1953, was void.

The defendants are the State, the County of Douglas, the City of Omaha, the Douglas County Board of Equalization, the State Board of Equalization and Assessment, and various state and county officials, villages, and school districts of Douglas County.

The State Board of Equalization and Assessment will herein be referred to as the state board.

The answering defendants take the position that the resolution of July 7, 1953, is in all respects valid and proper and that the action of the state board is likewise valid and proper.

The matter is submitted here on a stipulation of facts.

The county assessor of Douglas County made an assessment of all real property subject to taxation as of March 10, 1953, and filed the same with the county clerk on May 18, 1953. See § 77-1315, R. S. Supp., 1953. The county board convened on May 18, 1953, and between that date and July 7, 1953, met a total of 24 days.

The county board on July 7, 1953, passed a resolution reciting that it was necessary to effect an equalization of the actual and assessed value of real and personal

property in the county and of real estate within some precincts as compared with other precincts. It then increased the actual and assessed value of real estate by precincts by percentages varying from 100 to 140 percent. This action was taken without notice to property owners and was not based on any complaint filed as to the valuation of any individual parcel of real estate. The abstract of assessments of Douglas County was not prepared by the county assessor prior to this resolution. It was prepared thereafter and forwarded to and received by the state board on July 27, 1953.

The state board on July 27, 1953, in order to make the assessment, as returned by the individual counties, conform to law and to arrive at a just, equitable, and legal assessment of the real and personal property in the state found that increases and decreases in the assessed value as returned by the counties should be made.

As to Douglas County it found that the actual value of "Land & Improvements" as shown by the 1953 abstract was $35,544,920. It determined the actual value to be $42,653,900. The assessed value was determined to be $21,326,950. The board determined that the percentage of increase was 20 percent. As to "Lots & Improvements" the actual value as shown on the 1953 abstract was $545,507,455. It determined the actual value to be $807,351,030. The assessed value was determined to be $403,675,515. The board determined that the percentage of increase was 48 percent.

The plaintiff and intervener challenge the validity of the resolution of July 7, 1953, and the increased assessments based thereon. The defendants assert the validity of that resolution and also assert the validity of the action of the state board in equalizing assessments and determining values on July 27, 1953.

We determine that the resolution of July 7, 1953, was void. We also determine that the action of the state board of July 27, 1953, in determining values, was valid

in all respects. We determine certain procedures which are required to be taken in the matter.

The first question presented here is the power of the county board to make the equalization which was here attempted on July 7, 1953.

The applicable statute is: "The county board of equalization shall hold a session of not less than three and not more than forty days, for the purpose contemplated in sections 77-1502 to 77-1507, commencing on the third Monday of May each year. It shall be authorized and empowered to meet at any time upon the call of the chairman or any three members of the board for the purpose of equalizing assessments of any omitted or undervalued property. The board shall maintain a written record of all proceedings and actions taken, which shall be available for inspection in the office of the county assessor." § 77-1502, R. S. Supp., 1953.

It is stipulated here that the county board met pursuant to this act on May 18, 1953, being the third Monday of May 1953. Thereafter it did not meet in continuous session; but between the period of May 18 and July 7, 1953, it met a total of 24 days. Obviously, the period between May 18, 1953, and July 7, 1953, is more than 40 days.

In our decisions in Farmers Co-operative Creamery & Supply Co. v. McDonald, 97 Neb. 510, 150 N. W. 640, on rehearing 97 Neb. 512, 150 N. W. 656, same title 100 Neb. 33, 158 N. W. 369; Hiller v. Unitt, 113 Neb. 612, 204 N. W. 208; and Missouri P. R. R. Corporation v. Board of Equalization, 114 Neb. 84, 206 N. W. 150, we had this same question before us under the statutes as they existed at that time. The contention was there made that the time should be calculated on an elapsed-time basis. We there held in effect that the 20-day period was not required to be calculated on a continuous-time basis but rather on a calculation of days when the board was actually in session. It was further held in those cases that jurisdiction to exercise its powers ter-

minated on the date the county assessor was required to have the abstract of the assessment rolls completed and forwarded to the state board. At that time the date was "on or before the tenth day of July." It is now "on or before July 1." § 77-1514, R. R. S. 1943. See, also, State v. Odd Fellows Hall Assn., 123 Neb. 440, 243 N. W. 616.

A study of those cases discloses that the conclusion there announced was reached because of the provisions of the act which gave the county board power to adjourn from time to time until the action of the state board was had and certified to the county clerk. By construction we held that the county board had jurisdiction until the date the abstract of assessment was to be sent to the state board.

In Hiller v. Unitt, *supra,* we recognized that the argument for a calculation on an elapsed-time basis was "persuasive," but adhered to our previous decisions.

However, since that time the statutes have been materially amended.

The provision for the county board to hold a session for not less than 3 nor more than 20 days became section 77-1502, R. S. 1943. The provision for adjournment from time to time became section 77-1601, R. S. 1943.

In 1947, the Legislature amended section 77-1502, R. S. 1943, so as to provide for a session of not less than 3 nor more than 50 days commencing on the first Monday of May of each year and added this sentence: "It shall be authorized and empowered to meet at any time upon the call of the chairman or any three members of the board for *purposes of reviewing and equalizing all assessments.*" Laws 1947, c. 251, § 36, p. 826. The same Legislature earlier in its session having re-enacted section 77-1601, R. S. 1943, so far as the provision for adjournment from time to time was concerned (Laws 1947, c. 250, § 30, p. 799), later reenacted section 77-1601, R. S. 1943, with that provision deleted (Laws 1947, c. 251, § 40, p. 828). It also provided that the abstract of as-

sessment should be forwarded to the state board on or before July 1. Laws 1947, c. 251, § 39, p. 827.

The 1949 Legislature amended section 77-1502, R. S. Supp., 1947, by changing the sentence above quoted so as to read: "It shall be authorized and empowered to meet at any time upon the call of the chairman or any three members of the board for the *purpose of equalizing assessments of any omitted or undervalued property.*" Laws 1949, c. 233, § 1, p. 644.

The 1953 Legislature enacted the provision now applicable by amending section 77-1502, R. R. S. 1943, so as to reduce the 50-day period to 40 days and to fix the beginning of the session the third Monday of May instead of the first Monday in May. Laws 1953, c. 274, § 1, p. 899.

So, as the act now stands the provision has been repealed which authorized adjournment from time to time. This provision as above pointed out was the foundation reason for our decisions that the 20-day period then in force was not a continuous-time session. That 20 days has now been extended to 40 days. The power to meet at any time is now limited to the purpose of equalizing assessments of any omitted or undervalued property.

Under the provisions of section 77-1601, R. S. Supp., 1953, the county board is to meet between August 2 and August 10 and levy taxes for the current year. As above pointed out the county board also is authorized to meet at any time "for the purpose of equalizing assessments of any omitted or undervalued property." § 77-1502, R. S. Supp., 1953. Accordingly, it is argued here that although the power of adjournment, specifically given, has been repealed, nevertheless the board has the implied power of adjournment and hence the power to act as it did here continues until action has been taken on the equalization made by the state board.

We see no merit in that contention. The question here is not the power of the county board to meet but

the power of the county board to do what it did here at the time it acted.

The provisions of section 77-1502, R. S. Supp., 1953, provide for "a session" of the county board of equalization of not less than 3 nor more than 40 days. The period of days defines the minimum and maximum term in days of a session. The statute contemplates one session to begin and end as provided in the act. Once started the time continues to run. The time limited in the act constitutes the term during which the county board can act for the purposes stated.

It is recognized that under the provisions of section 77-1514, R. R. S. 1943, the county assessor is required to prepare an abstract of the assessment rolls of his county "not later than June 25 of each year" and that under certain circumstances a period of 40 days cannot elapse between the "third Monday of May" (section 77-1502, R. S. Supp., 1953) and June 25. However, a 40-day maximum period will have elapsed in any event between the third Monday of May of any year and July 1, the date fixed for forwarding the abstract to the state board under the "on or before July 1" provision. The provision with reference to preparation of the abstract not later than June 25 was placed in the act by amendment in 1947. See Laws 1947, c. 251, § 39, p. 827. The question as to whether the June 25 provision has the effect of shortening the maximum 40-day period under some circumstances need not be determined here for obviously a 40-day period had fully elapsed between May 18, 1953, and July 7, 1953.

There remains for determination the question as to whether or not the power of the county board to "meet at any time" upon call "for the purpose of equalizing assessments of any omitted or undervalued property" authorizes the action which is here questioned.

Section 77-518, R. R. S. 1943, provides that the county assessor "may, at any time, add to the tax rolls any property omitted therefrom for the current year." See,

also, § 77-1507, R. R. S. 1943. Obviously, the power of the county board to equalize assessments of omitted property is a necessary act with reference to omitted property assessed subsequent to the regular time. Just as obviously, this statute refers to specific items and parcels of property.

The scope of the power as to equalizing as to "undervalued property" is not as definite. Obviously, it refers to property that has been assessed.

Sections 77-1503, 77-1504, and 77-1506, R. R. S. 1943, provide for the equalizing of the value of real and personal property. The county board did not purport to act under these provisions. It did attempt to act under the provisions of section 77-1505, R. R. S. 1943, and to exercise a power to increase the "aggregate valuation" of property by precincts.

The Legislature used the one word property. It used the qualifying words "omitted" and "undervalued" to define categories of property within the class of specific items and parcels of property.

The power given in section 77-1502, R. S. Supp., 1953, authorizing equalization of undervalued property, is limited to particular items and pieces of property. It does not extend to any equalization of aggregate values between taxing districts.

It necessarily follows that the action of the county board of July 7, 1953, came at a time when its power to act in the manner attempted had expired and its action was without authority and was void.

The resolution of July 7, 1953, was one which "raised * * * the actual and assessed valuations of the real estate as shown by the assessor of Douglas County." It follows that the amounts of the actual and assessed valuations of real estate as fixed by the assessor are determined amounts or amounts readily determinable by a clerical calculation.

It becomes the duty of the county assessor under the provisions of section 77-1514, R. R. S. 1943, to put aside

the resolution of July 7, 1953, and prepare and forward to the state board an abstract of the assessment rolls based on his revision of the assessment rolls, schedules, lists, and returns as prepared and filed under the provisions of section 77-1315, R. S. Supp., 1953, showing the values as equalized and corrected by the county board if any were validly made. As above pointed out there is no showing here of any such changes having been made. The language of the resolution of July 7, 1953, negatives any such conclusion. As above pointed out the statute contemplates that this abstract of assessment rolls shall be prepared and forwarded to the state board on or before July 1. However, that is not a deadline that invalidates a subsequent preparation and filing, for section 77-511, R. R. S. 1943, provides a method whereby the state board is empowered to secure the abstract of the assessment rolls where the county assessor has failed to transmit it and section 77-1515, R. R. S. 1943, fixes a penalty for his refusal or neglect to do so. The fact that the county board had no power, at the time it acted, to raise the values as fixed by the assessor does not affect the duty or power of the state board. See People v. Pitcher, 61 Colo. 149, 156 P. 812, Ann. Cas. 1918D 1185.

This brings us to the order of the state board of July 27, 1953. Does the percentage of increases, which the state board fixed, control or does the actual value as adjusted by the state board and the assessed value as equalized by the state board in dollar figures control? The State and certain other of the defendants contend that the actual and assessed value as fixed by the state board control, and that the percentage of increase is in error, but that it is a matter of mathematical calculation and subject to correction.

Under the provisions of section 77-506, R. R. S. 1943, the state board is given the broad "power to increase or decrease the assessed valuation of real or personal property of any county or tax district" for the purpose of equalizing assessments so as to make the same conform

to law. Section 77-507, R. R. S. 1943, gives the state board the broad "power, in equalizing assessments, to increase or decrease the assessed valuation of any class, classes or kinds of property, personal, real, or mixed in any county or tax district, whenever in their judgment it shall be necessary to make such assessment conform to law." Sections 77-508, 77-509, and 77-510, R. R. S. 1943, all refer to "valuation" of property in the determination and proceedings of the board. In this instance the state board made a specific determination of actual value and assessed value of various classes of property in Douglas County. It is not claimed that there is error in that determination.

"The board is not under the statute required to enter into a formal judicial investigation of the values of property to be affected by its action in the discharge of its duties as a board of equalization. It is its duty under the law to adjust and equalize the valuation of real and personal property in the different counties by a per centum of increase or decrease of the aggregate valuation of the county, with the view of apportioning equitably the burden of state government, and, in doing so, each member acts upon his own knowledge of the facts and without requiring other evidence. The fact that valuations are increased or decreased in any one county without the examination of witnesses is immaterial. When the board has before it the abstracts of assessment of the different counties, such as are required to be formulated and furnished for its information under the law, it is in a position to proceed in the discharge of its duties pertaining to the equalization of assessments of the different counties, and is authorized to act upon such infromation (sic) and the knowledge of its members as to values of property generally, without further or different information or greater formality." Hacker v. Howe, 72 Neb. 385, 101 N. W. 255.

"The statute above quoted does not require any particular kind nor standard of evidence. The method to

be used is left to the discretion of the state board. 61 C. J. 752. No formal hearing is required. In addition to the evidence mentioned in the record, the state board may take into consideration matters within the general knowledge of its members." Boyd County v. State Board of Equalization & Assessment, 138 Neb. 896, 296 N. W. 152.

In the above cases the state board had before it assessment rolls from the county assessor whose validity was not questioned. Here the state board had before it an assessment roll containing valuations based upon a void order of the county board, but nevertheless the assessment roll expressed the judgment of the county board as to valuations. The assessment roll was before the board as we said in the Hacker case "for its information." The state board had the right to consider that, and in addition thereto whatever matters were before it and in addition thereto may consider "matters within the general knowledge of its members" as we said in the Boyd County case. This does not mean that the state board has unlimited power to exercise its discretion. It is subject to the fundamental rule that if there be evidence before the state board which demonstrates that the order made was an arbitrary one, this court will on appeal set it aside. Laflin v. State Board of Equalization & Assessment, 156 Neb. 427, 56 N. W. 2d 469.

It follows that the determination by the state board of the actual and assessed values of the various classes of property in Douglas County is not, in a legal sense, affected by the void order of the county board.

It follows that two determinations involving discretion have been made, i.e., the actual and assessed value of the classes of property as made by the county assessor and the valuations made by the state board. As was said in People v. Pitcher, *supra:* "The ascertainment of the ultimate fact that all the property of the state has been brought, for taxation purposes, to its full cash

value rests on the judgment of the State Board of Equalization, not on the judgment of the judiciary."

Section 77-506, R. R. S. 1943, provides that "Such increase or decrease shall be made by a per cent, and the per cent of increase or decrease when made shall be certified to the county clerk of the proper county, who shall thereupon add to or deduct from the assessment of each item of personal property and of each piece or parcel of property in the county affected an amount equal to the per cent of increase or decrease fixed by the board." Section 77-507, R. R. S. 1943, provides for the method to be followed by the county clerk in extending the increase or decrease upon the tax rolls.

It is assumed by the parties here that the percent of increase as fixed by the state board is in error because calculated upon the values as shown by the assessor's abstract, which in turn appears to reflect the increases ordered by the county board on July 7, 1953. That, however, if an erroneous figure, is a matter of mathematics. The correct percentage can readily be calculated from the known or determinable totals fixed by the assessor and the known totals fixed by the state board. It is not an act involving the exercise of discretion. See MacGinnis v. Denver Land Co., 90 Colo. 72, 6 P. 2d 919.

Section 77-505, R. R. S. 1943, provides that the state board shall meet on the first Monday of July of each year for the purpose of equalizing assessments. Section 77-511, R. R. S. 1943, provides that the state board "shall have power to adjourn from time to time until the equalization shall be completed." Section 77-503, R. R. S. 1943, provides that the Tax Commissioner shall have authority to call special meetings of the state board at such times as its business may require.

As above determined it becomes the duty of the county assessor to prepare and forward to the state board an abstract of the assessment rolls setting out the information required by section 77-1514, R. R. S. 1943. It be-

comes the duty of the Tax Commissioner to call a meeting of the state board. It becomes the duty of the state board to meet and, if the county assessor has not forwarded the abstract of the assessment rolls, to send for and secure an abstract of the assessment rolls as provided in section 77-511, R. R. S. 1943. It then becomes the duty of the state board to calculate the percent of increase in the assessed valuation of the various classes of property in Douglas County involved in this action so as to bring the total of the assessed value to that determined by the state board in its action of July 27, 1953. It then becomes the duty of the state board to certify that percent of increase to the county clerk of Douglas County, and the duty of the county clerk to extend the same upon the tax rolls by adding to the assessment an amount equal to the percent of increase fixed by the state board, as provided in sections 77-506 and 77-507, R. R. S. 1943.

This determines the issues presented by the parties in this proceeding. Costs are taxed to plaintiff and intervener.

JUDGMENT ACCORDINGLY.

GLEN CULPEN, APPELLANT, V. HERBERT HANN, WARDEN, NEBRASKA STATE PENITENTIARY, APPELLEE.

63 N. W. 2d 157

Filed March 12, 1954. No. 33517.

1. **Habeas Corpus.** A petition for a writ of habeas corpus must state a cause of action, and if it does not the court should enter an order denying the writ.
2. **Criminal Law.** A court may properly sentence a convicted criminal to consecutive terms in the penitentiary for separate offenses.
3. ———. Where two sentences are imposed in the same court at the same time for two offenses, the sentences will run concurrently if the trial judge does not otherwise order.

APPEAL from the district court for Lancaster County: HARRY A. SPENCER, JUDGE. *Reversed.*

Glen Culpen, pro se.

Clarence S. Beck, Attorney General, and *Richard H. Williams,* for appellee.

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

CARTER, J.

The appellant filed a petition for a writ of habeas corpus in the district court for Lancaster County on October 8, 1953, in which he asserted he was improperly held in the State Penitentiary. The trial court refused to issue the writ for the reason that the petition failed to allege facts sufficient to state a cause of action. The petitioner appeals.

It is fundamental that a petition for a writ of habeas corpus must state a cause of action, and if it does not the court may properly enter an order denying the writ. Howell v. Hann, 155 Neb. 698, 53 N. W. 2d 81, certiorari denied 343 U. S. 981, 72 S. Ct. 1083, 96 L. Ed. 1372; Stapleman v. Hann, 155 Neb. 410, 51 N. W. 2d 891. A writ of habeas corpus will issue as a matter of right only when the petition states a cause of action.

The petition alleges that in May 1947, the petitioner was sentenced to the State Penitentiary for a term of 3 years. On October 6, 1947, petitioner escaped custody while serving this sentence. On October 14, 1947, he was charged with escaping custody and with automobile theft. He pleaded guilty to both charges and was sentenced to serve 3 years in the penitentiary for each offense. It appears to be the contention of petitioner that these two 3-year sentences are to be treated as concurrent sentences irrespective of the court's order to the contrary.

This contention of the petitioner has no merit. The trial court may properly sentence a convicted criminal

to consecutive terms in the penitentiary for separate offenses. In re Walsh, 37 Neb. 454, 55 N. W. 1075; Luke v. State, 123 Neb. 101, 242 N. W. 265. It is the rule, however, that where two sentences are imposed in the same court at the same time for two offenses, the sentences will run concurrently if the trial judge does not otherwise order. Luke v. State, *supra;* State ex rel. Allen v. Ryder, 119 Neb. 704, 230 N. W. 586. We gather from the petition that the trial court failed to specify whether the two 3-year sentences were to run consecutively or concurrently. If this be true, the writ should issue where the petition alleges that one of the 3-year sentences has been served. Petitioner alleges that he commenced serving the two 3-year terms on April 1, 1950. Consequently his allegation that the two 3-year terms run concurrently would indicate that these sentences terminated on or before April 1, 1953.

The petition for the writ of habeas corpus was evidently prepared by the petitioner himself. It lacks much in the way of clarity, but, giving it the most favorable construction possible, we think it states a cause of action and warrants the issuance of a writ. If the commitments under which he is held do not show that the court imposed sentences to be consecutively served, as petitioner alleges, it would appear that he is entitled to relief.

We think the trial court erred in not issuing the writ as prayed. The judgment is reversed.

REVERSED.

VERTIE HAKANSON, APPELLANT, V. ELIZABETH B. MANDERS, APPELLEE.

63 N. W. 2d 436

Filed March 19, 1954. No. 33472.

1. **Boundaries: Adverse Possession.** A suit brought to establish a boundary line by recognition and acquiescence is separate and distinct from a claim of title by adverse possession.

2. **Boundaries.** The establishment of a boundary between adjacent lots by recognition and acquiescence involves the idea that the adjacent owner, with knowledge of the line so established and the possession so taken, assents thereto, or that circumstances exist from which assent may be reasonably inferred.
3. ———. The planting of a row of trees on one's own property, even though done under a belief that it was on the boundary line, is insufficient to establish it as the boundary line when mutuality of recognition and acquiescence of the adjacent owners is not shown for the statutory period of 10 years.
4. **Adverse Possession.** Where there is no evidence that a claimant and his predecessors in title have been in open, notorious, hostile, and uninterrupted possession of land for 10 years or more, his claim to title by adverse possession necessarily fails.

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

Charles A. Fisher, for appellant.

Albert W. Crites, for appellee.

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

CARTER, J.

This is a suit brought under section 34-301, R. R. S. 1943, to establish the boundary line between Lots 16 and 17, Block 8, Original Town of Chadron, Nebraska. The defendant denied plaintiff's right to any relief under the foregoing section, asserted that the boundary line as shown by the recorded plat and the calls of the respective deeds of the parties was the true line, alleged that defendant and her predecessors in title have been in open, notorious, continuous, hostile, uninterrupted, and adverse possession of Lot 17 as platted for more than 50 years, and prayed that title to Lot 17 be quieted and confirmed in her as against the plaintiff. The trial court found for the defendant, and plaintiff appeals.

Across the north end of Block 8 there are 13 lots facing north on Second Street which are numbered 9 to 21 from west to east. The plaintiff Hakanson is the owner of Lot 16, and the defendant Manders is the

owner of Lots 17, 18, and the west 7 feet of Lot 19. The plaintiff acquired her title through Thomas B. Augustine, who became the owner on May 23, 1925. Plaintiff acquired title from Augustine on October 16, 1943. The defendant acquired the title to Lots 17, 18, and the west 7 feet of Lot 19 from Stella Muzzey on March 11, 1949. Stella Muzzey acquired her title to Lots 17 and 18 from Roy Hampton on May 31, 1944, the latter having been the owner since 1925.

This action was brought by the plaintiff under section 34-301, R. R. S. 1943, for the purpose of having the common lot line between Lots 16 and 17 determined. The pertinent part of that statute provides: "When one or more owners of land, the corners and boundaries of which are lost, destroyed or in dispute, desire to have the same established, they may bring an action in the district court of the county where such lost, destroyed or disputed corners or boundaries, or part thereof, are situated, against the owners of the other tracts which will be affected by the determination or establishment thereof, to have such corners or boundaries ascertained and permanently established. * * * Either the plaintiff or defendant may, by proper plea, put in issue the fact that certain alleged boundaries or corners are the true ones, or that such have been recognized and acquiesced in by the parties or their grantors for a period of ten consecutive years, * * *."

The purpose of this statute is to authorize the district court to ascertain and establish corners or boundaries which are lost, destroyed, or in dispute. Either party is permitted to assert that certain alleged corners or boundaries are the true ones, or that they have been recognized and acquiesced in by the parties or their grantors for the prescriptive period of 10 consecutive years. The rule of recognition and acquiescence may be the means of determining the corner or boundary, but it is separate and distinct from establishment by adverse possession. Edmunds v. Sughrow, 233 Mich. 400, 206

N. W. 309. One may not assert a cause of action under a special statute and make proof under another.

The plaintiff alleges in her petition that defendant's predecessor in title, Roy Hampton, and plaintiff's predecessor in title, Thomas B. Augustine, during the year 1925 or 1926, orally agreed to the boundary line between Lots 16 and 17 and that, pursuant to such agreement Hampton planted a row of trees and a hedge on such agreed-upon boundary line. The evidence does not sustain a finding that such an agreement was ever made. Hampton testified that he never had any conversation with Augustine with reference to the boundary line between their properties. He testified that he planted a row of trees on the west side of Lot 17 and another row along the east side of Lot 18. He had no survey made and located the lines for the trees by measuring 25 feet each way from the center of the house located on the two lots. In so doing, it is evident that he made a mistake and each of the two rows of trees were approximately 7 feet east of the true lot lines as measured from the true northeast corner of Block 8. This error was subsequently discovered by the owner of Lot 19. Any difficulty with the owner of Lot 19 was subsequently adjusted by the purchase by Hampton's grantees, the Muzzeys, of the west 7 feet of Lot 19.

Thomas B. Augustine testified that he had never occupied Lot 16 during the time he owned it. He stated that he never discussed the location of the lot line with Hampton at any time and that they had never had any trouble about it. There is evidence that the water-meter box was north of Lot 17 and that Augustine crossed the corner of Lot 17 with his water line. Hampton testified that he consented to the arrangement. It is clear that the use of Lot 17 to carry Augustine's water line was permissive and that it is immaterial to the issues here involved. There is no evidence of an agreement, oral or written, fixing the boundary other than as measured out by the surveyors.

The record shows that two surveyors located the true line between Lots 16 and 17 to be at the place contended for by the defendant. The defendant constructed a picket fence on this line which the plaintiff contends is 7 feet 6 inches over on her property. The evidence shows that the fence is inside of defendant's line as established by the surveyors. There being no agreement established which determined the location of the boundary as contended by plaintiff, the only question remaining is the contention of plaintiff that the boundary line was along the row of locust trees by recognition and acquiescence.

"It is well settled that where the boundary lines of adjoining landowners are not definitely known or their location is in dispute, such owners may establish the lines either by a written or by a parol agreement; such boundary lines may also be established by their mutual recognition of, and acquiescence in, certain lines as the true boundary lines, the courts being reluctant to interfere therewith after the lines have been permitted to exist over such a peroid of time that satisfactory proof of the true lines is difficult." 8 Am. Jur., Boundaries, § 72, p. 797.

"It is well established that if adjoining landowners occupy their respective premises up to a certain line which they mutually recognize and acquiesce in for a long period of time—usually the time prescribed by the statute of limitations—they are precluded from claiming that the boundary line thus recognized and acquiesced in is not the true one. * * * The cases approving the doctrine of acquiescence generally do not differentiate between cases where the boundary was uncertain or in doubt at the time it was first acquiesced in and cases where it was known and certain. However, in the second case, only adverse possession can avail the person claiming under the boundary so recognized." 8 Am. Jur., Boundaries, § 80, p. 802.

In Griffin v. Brown, 167 Iowa 599, 149 N. W. 833,

the question of acquiescence is ably discussed as follows: "It is apparent that one party cannot acquiesce in a line created by himself, and bind the other party by his acquiescence, even though he acts in good faith, believing it to be the boundary line. * * * Acquiescence involves more than a mere establishment of a line by one party, and the taking of possession by him. It involves the idea that the other, with knowledge of the line so established and the possession taken, assents thereto, and this may be shown by his conduct, by his words, or even by his silence. There must, however, be something in the record to show that the party, charged with acquiescence, consented to the act of the other in establishing the line and assuming possession. Acquiescence means a consent to the conditions, and involves knowledge of the conditions. No one can be said to have acquiesced in a line until it is shown first that he had notice or knowledge of the claimed line. Acquiescence involves the idea of notice or knowledge of conditions, and the evidence must disclose that with such notice and knowledge he did something that indicated an assent to such conditions and an acquiescence therein." See, also, Dwight v. City of Des Moines, 174 Iowa 178, 156 N. W. 336.

It seems clear to us that the act of Hampton in placing a row of trees on his own property, even under the impression that it was on the boundary line, does not of itself indicate recognition and acquiescence. In the absence of a showing of mutuality of recognition and acquiescence on the part of both parties, plaintiff fails to make a case.

It will be noted from the foregoing that recognition of and acquiescence in a boundary line to be binding, in the absence of an agreement determining the same, requires mutuality of recognition and acquiescence by the parties. It partakes of the nature of an estoppel and, under our statute, it must exist for a period of 10 consecutive years. In the case at bar plaintiff's grantor,

Augustine, stated that he purchased Lot 16 pursuant to the description in the deed and that he sold it the same way. Plaintiff maintained a woven wire fence for many years along the east line of the rear of her lot as that line was determined by the survey. Hampton said that he thought the row of locust trees was on the line, a statement induced, no doubt, by the error he made when he planted them. The fact remains that the true line was at all times ascertainable by measurement and, until defendant undertook to place a fence on her west line, no reason existed for determining the true line. The evidence is in irreconcilable conflict as to which party used and maintained the disputed area. It appears to have been used to some extent by both and maintained in a very limited manner by each. Under such circumstances we consider the fact that the trial judge saw the witnesses and accepted the evidence of one party rather than that of the other. The evidence fails to show a mutual recognition of and acquiescence in the row of locust trees as the boundary line between Lots 16 and 17.

In Kennedy v. Gottschalk, 138 Neb. 842, 295 N. W. 813, we said: "In the instant case, there is no evidence of any agreement that the county road should constitute the boundary, and in fact there is no evidence that Stull Brothers, the then owners, had accepted or acquiesced in any given point as the boundary line. It is true that their agent testified that he assumed the road was the boundary line, but he further stated that the matter was never discussed by him with any one and there was never any question raised about it. Neither was there any conduct on the part of the owners or their agent which would indicate that they accepted the road as the dividing line. They rented the quarter-section as one tract. Nearly all of it was in pasture. There was no overt act on their part that would indicate a recognition of the road as a dividing line." The situation was little different in the case before us. Hampton thought the row of locust trees was the line, but the evidence

does not show that he told Augustine or the plaintiff that he had any such belief. There does not appear to have been any mutuality of understanding as to any boundary line different than that established when the lots were platted and which could be and were measured out from established corners.

The defendant asserts that she has been in open, notorious, hostile, and uninterrupted possession of Lot 17 as plotted and marked out on the ground from established corners for more than 10 years. Plaintiff contends in her brief that she and not the defendant has held the disputed strip of ground adversely for the statutory period of 10 years. Assuming that the question of adverse possession is in issue by the pleadings, the evidence does not sustain any such contention on the part of the plaintiff. The evidence is no different than that offered by the plaintiff in her attempt to show that she and her predecessor in title had occupied the ground west of the boundary line she claimed by recognition and acquiescence. There is no evidence at all of any adverse holding of the disputed strip of ground by her predecessor in title prior to the time plaintiff acquired it in 1943. This suit was commenced on December 12, 1951; consequently, plaintiff could not gain title by adverse possession except by tacking the adverse holding of her predecessor in title. There being no such adverse holding by her predecessor in title, her claim of adverse possession for the period of 10 consecutive years necessarily fails.

The decree of the trial court is in conformity with the determinations that we have here made. It is therefore affirmed.

AFFIRMED.

H. R. BEDFORD, DOING BUSINESS AS BEDFORD TRUCK LINES, APPELLANT, V. MABEL C. HERMAN, DOING BUSINESS AS HERMAN OIL TRANSPORT COMPANY, ET AL., APPELLEES.
63 N. W. 2d 772

Filed March 19, 1954. No. 33493.

1. **Negligence.** Negligence is never presumed or inferred from the mere happening of an accident.
2. ———. Circumstantial evidence sufficient to submit an issue of negligence to a jury must be such that a reasonable inference arises showing that the person charged was negligent and that such inference is the only one that can be reasonably drawn therefrom.
3. **Evidence.** A photograph is properly admissible as evidence if it be shown that it is a true and correct representation of the place or subject it purports to represent at a time pertinent to the inquiry.
4. **Evidence: Appeal and Error.** The wrongful refusal of the trial court to admit photographs into evidence is not prejudicial error if they, together with evidence received, fail to establish a cause of action.
5. **Set-Off and Counterclaim.** Where defendant pleads a counterclaim and upon the conclusion of plaintiff's evidence moves for and procures a dismissal of plaintiff's cause of action without first withdrawing his counterclaim, he thereby waives it.

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

Dryden, Jensen & Dier, L. R. Bowker, and *Lawrence R. Brodkey,* for appellant.

Gross, Welch, Vinardi & Kauffman, for appellees.

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

CARTER, J.

Plaintiff brought this action against the defendants for damages resulting from a highway accident. The trial court directed a verdict for the defendants and plaintiff appeals.

The plaintiff was the owner of a tractor and refrigerator trailer. The defendant Herman was the owner of

a tractor and tank trailer. On October 9, 1951, plaintiff's tractor and trailer was being driven north on U. S. Highway No. 275 by Pete Klassen, plaintiff's driver. An alternate driver, Norman Raymond, was sleeping at the time of the accident. The Herman tractor and trailer was being driven south on the same highway by Othe Middaugh. For convenience we shall refer to plaintiff's tractor and trailer as the refrigerator transport and that of the defendant Herman as the oil transport.

The collision occurred about 4:30 a. m. The pavement was 18 feet 4 inches wide and free from snow, ice, or moisture. Plaintiff's refrigerator transport was 47 feet 3 inches long. Its tractor had two driving axles with eight wheels on its rear. It appears that in some manner the left driver wheels on the refrigerator transport tractor collided with the rear-wheel-trailer assembly on the oil transport. It was dark at the time of the accident, plaintiff's driver testifying that each was driving with dimmed lights.

The accident happened 9 miles south of Council Bluffs, Iowa. Plaintiff's refrigerator transport came down a long hill at the foot of which the road curves to the right and straightens out on a comparatively level terrain. The driver said he saw the oil transport approaching about 200 feet away as he came around the curve. He saw nothing unusual as they approached each other. The front ends of the transports met and passed without mishap. There is no evidence by plaintiff's driver that defendant's transport crossed the center of the road. There is no evidence by the drivers that either violated any rule of the road. The damage to the two transports shows, however, that the driver wheels of plaintiff's tractor collided with the tandem wheels on the rear of defendant's trailer.

Plaintiff produced evidence of the location of the transports after the accident and the location of various tire marks at the time of and immediately following the

collision. In construing the evidence most favorable to the plaintiff, the tire marks indicate that the refrigerator transport did not approach closer than 9 to 12 inches of the center line of the highway. Plaintiff's evidence also indicates by the tire marks on the pavement that the oil transport did not cross the center line. It did parallel it as close as 4 inches on its own side of the road for some distance at and following the point of impact. There is no evidence that the transport was wider than its wheels to the extent that it played any part in the accident.

The evidence in the record can be summed up as follows: No eye witness testified that either vehicle crossed over the center line of the highway immediately before or at the time of the accident. The physical facts, consisting of marks on the pavement, are not such that a reasonable inference could be drawn therefrom that either vehicle crossed to the left of the center line of the highway. Such evidence will not sustain a finding of negligence on the part of either driver.

Negligence is never presumed and it cannot be inferred from the mere fact that an accident occurred. Laurinat v. Giery, 157 Neb. 681, 61 N. W. 2d 251; Westman v. Bingham, 230 Iowa 1298, 300 N. W. 525.

In order for circumstantial evidence to be sufficient to require the submission of an issue of negligence to a jury it must be such that a reasonable inference of negligence arises from the circumstances established. If such evidence is susceptible to any other reasonable inference, inconsistent with the inference of negligence on the part of the party charged, it is insufficient to carry the case to the jury. Ulrich v. Batchelder, 143 Neb. 697, 10 N. W. 2d 637; Gilliland v. Wood, *ante* p. 286, 63 N. W. 2d 147. See, also, Cable v. Fullerton Lumber Co., 242 Iowa 1076, 49 N. W. 2d 530; Potter v. Robinson, 233 Iowa 479, 9 N. W. 2d 457.

The appellant complains of the action of the trial court in refusing to admit photographs into evidence

taken at the scene of the accident. The rule is that if it be shown that a photograph is a true and correct representation of the place or subject it purports to represent at a time pertinent to the inquiry, it is properly admissible as evidence. We think the trial court should have admitted the photographs offered in the present case. We fail to see, however, that the plaintiff was prejudiced by the court's action. Witnesses had already testified to all the facts represented by the photographs. A directed verdict would have been required even if they had been admitted into evidence. They tend only to explain and make clear the evidence of witnesses which was already before the court. Thomas v. Estate of Thomas, 64 Neb. 581, 90 N. W. 630; Weitz v. United States Trust Co., 143 Neb. 703, 10 N. W. 2d 623.

The trial court directed a verdict against both parties on the theory that both were guilty of such negligence as to bar a recovery. The result was correct but the reason given was not. A verdict was properly directed against the plaintiff for the reason that he failed to prove any negligence on the part of the driver of the truck belonging to the defendant Herman. The counterclaim of the defendant Herman was properly dismissed for the reason that she waived it when she moved for and procured a dismissal of plaintiff's cause of action without first moving to withdraw the counterclaim. Harbert v. Mueller, 156 Neb. 838, 58 N. W. 2d 221; Lucas v. Lucas, 138 Neb. 252, 292 N. W. 729; Miller v. McGannon, 79 Neb. 609, 113 N. W. 170.

We find no prejudicial error in the record. The judgment is affirmed.

AFFIRMED.

CLARA KRAMER ET AL., APPELLANTS, V. MARY LARSON ET AL., APPELLEES, IMPLEADED WITH RICKA HANSON ET AL., APPELLANTS.

63 N. W. 2d 349

Filed March 19, 1954. No. 33511.

1. Wills. A patent ambiguity in a will must be removed by interpretation according to legal principles and the intention of the testator must be found within the four corners of the will.
2. ———. In searching for the intention of the testator the court must examine the entire will, consider each of its provisions, give words their generally accepted literal and grammatical meaning, and indulge the presumption that the testator understood the meaning of the words used.
3. ———. The intention of the testator as determined from the will must be given effect if it is not inconsistent with any rule of law.
4. ———. The intention within the ambit of this rule is the one the testator expressed by the language of the will and not an entertained but unexpressed intention.
5. ———. It is a rule of construction generally recognized that a devise or bequest to heirs, without more, designates not only the persons who are to take but also the manner and proportions in which they will take, and if there are no words to control the presumption of the will of the testator, the law presumes his intention to be that they take by the law of intestate succession.
6. ———. If the testator gives and devises property to his heirs at law share and share alike, or if other words importing an equal division are used, his heirs at law, although related in different degrees of consanguinity to the testator, are considered as one class of beneficiaries and they each take an equal amount per capita and not per stirpes unless the will contains language showing the testator had a contrary intention.
7. ———. There is a presumption that a person who makes a testamentary disposition of his property did not intend it to be divided as though he died intestate.
8. ———. The fact that the testator disposed of his residuary estate to his heirs at law share and share alike except that he excluded from participation in the distribution of it two of his heirs, a nephew one of four children of a deceased brother, and a niece one of two children of a deceased sister, is persuasive that the testator did not intend that there should be a distribution of the residue of his estate per stirpes to the children of his deceased brother and to the children respectively of the five deceased sisters of the testator.

APPEAL from the district court for Dawson County: JOHN H. KUNS, JUDGE. *Affirmed.*

W. A. Stewart, for appellants.

Beatty, Clarke, Murphy & Morgan, for appellees.

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

BOSLAUGH, J.

Jacob F. Duis, a resident of Dawson County, died testate. He was the owner of a large amount of property, principally real estate. The dispositive provisions of the duly probated will of the deceased are as follows: A devise of a quarter section of land in Custer County to the trustees of a named church in trust for its benefit subject to the condition that if it ceased to perform the functions of a church for more than a year the real estate should revert to the estate of the testator and in that event it was devised to George A. Duis for his life and the remainder to the issue of his body who survive his death; a devise of about 1,000 acres of land in Custer County to George A. Duis for his life and the remainder to the issue of his body who survive his death; a devise of about 1,500 acres of land in Lincoln County to Mary E. Koster for her life and the remainder to Evelyn Koster and her heirs; a devise of land owned by the testator in Frontier County to Floyd Baalhorn for his life with remainder to the issue of his body who survive his death, but in case of default of such issue then the real estate should revert to the estate of the testator and in that event it was devised to George A. Duis and Mary E. Koster for the life of each and the remainder one-half to Evelyn Osborne and one-half to the issue of George A. Duis who survive his death, share and share alike; and a devise of 320 acres of land in Lincoln County to Ricka Hanson for her life and remainder to her heirs at law. The residuary estate of the deceased was disposed of by the part of the will designated "SEV-

ENTH" as follows: "All the rest, residue and remainder of my estate, both real and personal, wheresoever situated, I give, devise and bequeath to my heirs at law and next of kin, share and share alike, to have and to hold forever; excepting my beloved Niece, MARY E. KOSTER and my beloved NEPHEWS, GEORGE A. DUIS and FLOYD BAALHORN, for the reason I have already devised certain property to them and they shall not share in this residuary clause."

The persons described by the testator as "my heirs at law and next of kin" are Ricka Hanson, his sister, and his nephews and nieces, the 25 children of his deceased brother and his five deceased sisters, living at the time of the death of the testator. Four children of the deceased brother survived the death of the testator and the number of the children of the five deceased sisters who survived his death were respectively two, nine, six, one, and three. The beneficiaries of the residuary estate are Ricka Hanson and 23 of the nephews and nieces of the deceased. George A. Duis, a son of Fred Duis a deceased brother of the testator, and Mary E. Koster, a daughter of Mary Deafenbach a deceased sister of the testator, were excluded from participating in the residuary estate of the deceased.

There is no issue of fact. The controversy concerns the meaning and interpretation of the part of the will above set out disposing of the residuary estate of which the real estate involved in this case is a part. It is conceded that the sister and the 23 nephews and nieces of the deceased described above are the beneficiaries of the residuary estate, but the parties disagree as to the proportions in which they own and are entitled to take it. Appellants argue that it should be divided into seven parts; that one part should go to Ricka Hanson, the living sister of the deceased, and one part should go to the children of each of the deceased sisters and the children of the deceased brother by right of representation. In other words that the division of the residuary estate

should be per stirpes. The appellees insist that the residuary estate was devised and that it should be divided and distributed to the sister and the 23 nephews and nieces of the deceased, share and share alike, to each a 1/24th thereof. That it should be distributed per capita. The trial court sustained the position of appellees and adjudicated accordingly. This appeal is from that determination.

There is no latent ambiguity in the will of the deceased. The use of the words "to my heirs at law and next of kin" are definite in meaning. The statute of descent and distribution defines their meaning. The part of the statute important in this respect is: "If the deceased shall leave no issue, nor father nor mother, the estate shall descend in equal shares to his brothers and sisters, and to the children of any deceased brother or sister, by the right of representation * * *." § 30-102, R. R. S. 1943. The controverted provision of the will "All the * * * residue * * * of my estate * * * I give, devise and bequeath to my heirs at law and next of kin, share and share alike, * * * excepting * * * MARY E. KOSTER * * * GEORGE A. DUIS and FLOYD BAALHORN * * *" is written in and is a part of the instrument. Whatever uncertainty there is inheres in it and is patent. The information this court has concerning the testator and his will is confined to admissions made by the pleadings which include the contents of the will. The will must in this situation be interpreted according to legal principles and the intention of the testator must be found within the four corners of it. Dumond v. Dumond, 155 Neb. 204, 51 N. W. 2d 374. In searching for the intention of the testator, the court must examine the will in its entirety, consider its every provision, give words used their generally accepted literal and grammatical meaning, and indulge the presumption that the testator understood the meaning of the words used. Jacobsen v. Farnham, 155 Neb. 776, 53 N. W. 2d 917, 33 A. L. R. 2d 543; In re Estate of Pfost, 139 Neb. 784, 298 N. W.

739. The intention of the testator as determined from the will must be given effect if it is not inconsistent with any rule of law. Jacobsen v. Farnham, *supra*. The intention within the ambit of this rule is the one the testator expressed by the language employed in his will and does not refer to an entertained intention not expressed therein. In re Estate of Zents, 148 Neb. 104, 26 N. W. 2d 793; Prather v. Watson's Executor, 187 Ky. 709, 220 S. W. 2d 532.

The problem is whether the testator intended that Ricka Hanson, the sister, and the 23 nephews and nieces of the deceased should take the residuary estate per capita or per stirpes. There is nothing in the other provisions of the will that furnishes any substantial indication of the intention of the testator as to the distribution of the residuary estate. His intention must be deduced from the language of the part of the will identified as "SEVENTH." The words per stirpes and per capita as used herein relate solely to the mode of distribution of property of a decedent. Distribution per capita is an equal division of the property to be divided among the beneficiaries, each receiving the same share as each of the others, without reference to the intermediate course of descent from the ancestor. A distribution per stirpes is a division with reference to the intermediate course of descent from the ancestor. It is literally a distribution according to "stock." It gives the beneficiaries each a share in the property to be distributed, not necessarily equal, but the proper fraction of the fraction to which the person through whom he claims from the ancestor would have been entitled. The gist of this is expressed in the words of the statute quoted above "by the right of representation." 3 Page on Wills (3d ed.), § 1070, p. 267. Specifically this contest results from the words "All the * * * residue * * * of my estate * * * I * * * devise and bequeath to my heirs at law * * * share and share alike * * *."

In re Estate of Pfost, *supra,* concerned a provision of

the will of a deceased by which a fund of $12,000 was required to "'* * * be divided equally, in equal shares, share and share alike between my son Hugh Pfost, and my twelve (12) grandchildren, said grandchildren being the eight (8) children of my daughter Iva L. Foss, and the four (4) children of my son Hugh Pfost.'" This court said: "The sole question here is to determine whether the testator intended that on the distribution of the trust fund set up in the will it should be divided into thirteen equal parts, or if he intended that it should be divided into two equal parts with one going to Hugh Pfost and the other going, share and share alike, to the twelve grandchildren. * * * The controversy centers around the interpretation to be placed upon the preposition 'between' used in the quoted portion of the will. * * * There is nothing in law or in fact from which we can determine, without question, the intention of the testator. * * * The only resort then is to examine what is found in the will and to construe it according to its tenor and give to the word 'between' its generally accepted literal and grammatical meaning. In doing so it becomes necessary to hold that the testator intended that Hugh Pfost should have, on distribution, one-half of the trust fund in question, and that the twelve grandchildren should participate equally in the other half." It is significant that the words "share and share alike" induced a conclusion that the grandchildren should participate in one-half of the fund there in question per capita and not per stirpes.

The more acceptable and better reasoned view is that if property is given or devised to heirs of the testator without naming them that this requires a reference to the statute of descent and distribution to determine who will take by virtue of the provisions of the will; that the beneficiaries take in the proportion prescribed by the statute; and that if the beneficiaries are not of equal degree they will take per stirpes in the absence of a declaration in the will to the contrary. The basis of this

is that the testator having made a resort to the statute necessary to ascertain who are his beneficiaries intended that it should also govern the proportion which they should take unless he expressed in the will a different intention. This is not true if the testator directs the mode of distribution, as he did in this case, and it must be made as his will provides. The testator of the will in question by the phrase "my heirs at law" designated his residuary beneficiaries and by the words "share and share alike" he prescribed the manner in which they should take. The language used is appropriate to make the intention manifest. He thereby definitely indicated the quantum of the estate which each of his residuary beneficiaries should have. He did not intend that his "heirs at law" should have the residue of his estate in the proportions provided by the statute as they would have taken if he had died intestate. That would not have been "share and share alike." This is well stated in Wooley v. Hays, 285 Mo. 566, 226 S. W. 842, 16 A. L. R. 1, as follows: "It is well established that where the testator devises his property to 'my heirs,' or to 'my lawful heirs,' without more, they take per stirpes or per capita the same as if the testator had died intestate. But where the devise is to the testator's heirs or lawful heirs, 'share and share alike,' or where other words importing an equal division are used, the 'heirs' or 'lawful heirs,' although related in different degrees of consanguinity to the testator, as brothers and sisters and nieces and nephews, are treated as constituting but one class of devisees, who will take per capita, unless by the will they are separated into different classes, or it uses other expressions showing a different intent." See, also, Ramsey v. Stephenson, 34 Or. 408, 56 P. 520; Miller v. Smith, 179 Or. 214, 170 P. 2d 583; Will of Bray, 260 Wis. 9, 49 N. W. 2d 716; Parker v. Foxworthy, 167 Iowa 649, 149 N. W. 879; Coppedge v. Coppedge, 234 N. C. 173, 66 S. E. 2d 777; Mellen v. Mellen, —— Me. ——, 90 A. 2d 818; Dodge v. Slate, 71 R. I. 191, 43 A. 2d 242; Dyslin v.

Wolf, 407 Ill. 532, 96 N. E. 2d 485; Peoples Nat. Bank v. Harrison, 198 S. C. 457, 18 S. E. 2d 1; Estate of Rauschenplat, 212 Cal. 33, 297 P. 882, 78 A. L. R. 1380; Will of Asby, 232 Wis. 481, 287 N. W. 734, 126 A. L. R. 151; Cuthbert v. Laing, 75 N. H. 304, 73 A. 641; Apgar v. Hoffman, 113 N. J. Eq. 233, 166 A. 159; In re Thomson's Estate, 168 Wash. 32, 10 P. 2d 245; Annotations, 16 A. L. R. 15, 31 A. L. R. 799, 78 A. L. R. 1385, 126 A. L. R. 157. It is believed that the testator attached to his words "my heirs at law" and "share and share alike" their usual legally established meaning, and that his purpose was that his sister and the 23 nephews and nieces should each receive an equal share of his residuary estate. It is concluded that the meaning of the residuary clause of the will is that the testator intended to have his lawful heirs, therein designated as beneficiaries, take equally per capita as a single class of beneficiaries and that there is nothing in any provision of the will to the contrary.

The will prevents a stirpital distribution of the residuary estate. It excludes two of the heirs of the testator from participation in the residue, that is, George A. Duis, a nephew and one of the four children of the deceased brother of the testator, and Mary E. Koster, a niece and one of the two children of Mary Deafenbach, a deceased sister of the testator. They would have taken by such a division 1/28th and 1/14th respectively. By excluding them the testator negatived any intention that there should be a distribution per stirpes within the six families of the deceased brother and the five deceased sisters. The language of the will prevents a conclusion that the testator intended that his residuary estate should be divided as though he had died intestate. This conclusion is aided by the presumption that one who makes a will does not intend his property to be divided as though he died intestate. A will is made to avoid not to carry into effect the statute of descent and distribution. Bran-

deis v. Brandeis, 150 Neb. 222, 34 N. W. 2d 159; Cuthbert v. Laing, *supra.*

The judgment of the district court should be and it is affirmed.

AFFIRMED.

THE OMAHA NATIONAL BANK, TRUSTEE, A CORPORATION, APPELLANT, V. WEST LAWN MAUSOLEUM ASSOCIATION, A CORPORATION, ET AL., APPELLEES.

63 N. W. 2d 504

Filed March 26, 1954. No. 33393.

1. **Cemeteries.** A mausoleum association in this state is formed and governed by sections 12-601 to 12-605, R. S. 1943.
2. ———. The powers of a mausoleum association organized under legislative statutes are such only as the statutes confer.
3. ———. Any powers with which the trustees of a mausoleum association are charged by virtue of the statutes cannot be delegated to others, except under the exceptions noted in such statutes.
4. ———. Section 12-509, R. S. 1943, provides and authorizes a mausoleum association to create a perpetual care fund and appoint a trustee of such fund for the purposes as provided for in said section, and that only.
5. **Cemeteries: Executions.** Section 12-605, R. S. 1943, exempts from taxation, execution, attachment, or any other lien or process whatever, crypts, lots, tombs, niches, or vaults sold by a mausoleum association for the purpose of interment and expenses incident thereto.
6. **Cemeteries.** Crypts, lots, tombs, niches, or vaults that are not sold or contracted for are not exempt from payment of indebtedness as provided for in section 12-604, R. S. 1943.
7. **Cemeteries: Pledges.** Section 12-604, R. S. 1943, empowers a mausoleum association to issue bonds and other evidences of indebtedness, to an amount, including all indebtedness of whatever nature, not exceeding ninety percent of the actual value of the realty of the association and improvements thereon or to be placed thereon from the proceeds thereof, not including the parts sold to individual owners, and to pledge the unsold crypts, rights, or lots, and the future receipts of the association, such obligations to be paid out of the future receipts of the association.

8. **Cemeteries: Receivers.** When it is apparent that the trustees of a mausoleum association have failed to perform their duty with reference to indebtedness as provided for by section 12-604, R. S. 1943, the district court may appoint a receiver to operate and manage the business of the association and pay the indebtedness of the association as specified in section 12-604, R. S. 1943.

APPEAL from the district court for Douglas County: JACKSON B. CHASE, JUDGE. *Affirmed in part, and in part reversed and remanded with directions.*

Fraser, Connolly, Crofoot & Wenstrand, for appellant.

Silverman & Silverman, Collins & Collins, Tesar & Tesar, and Richard A. O'Connor, for appellees.

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

MESSMORE, J.

The Omaha National Bank, plaintiff, as trustee of the perpetual care fund of the West Lawn Mausoleum Association, brought this action in the district court for Douglas County against the West Lawn Mausoleum Association, a corporation, Anson H. Bigelow, John W. Koutsky, Julia A. Koutsky, and Walter L. Anderson, trustee. The West Lawn Mausoleum Association entered no appearance and was adjudged to be in default. John W. Koutsky, now deceased, had only a marital interest which terminated at his death. Julia A. Koutsky claimed a reversionary interest. Anson H. Bigelow, now deceased, had one sole heir at law, Lucille Paige, who in this appeal claimed a reversionary interest. The purpose of the action was to obtain authority to sell tombs in the mausoleum under the provisions of the perpetual care fund agreement dated July 28, 1930, the funds received from the sale of the tombs to be used to repair the mausoleum and to build up an adequate perpetual care fund, to pay costs and expenses of prosecuting this suit, and to determine the rights of the defendants and to find the same, if any, to be inferior to the rights of this plaintiff.

Walter L. Anderson, the mortgage trustee, denied generally in his answer that the plaintiff's rights or the rights of the other defendants were superior to any right of the mortgage trustee; prayed that such rights be subject to the right of the mortgage trustee; and, by cross-petition, prayed for foreclosure of the mortgage trust deed dated March 1, 1937.

The district court entered a decree finding that the rights and interests of the defendants, with the exception of defendant Walter L. Anderson, trustee, were subject to the rights of plaintiff as provided for in the trust agreement; that the perpetual trust agreement should be amended to broaden the trustee's investment powers; that the rights of the defendant Walter L. Anderson, mortgage trustee, were superior to those of the plaintiff and the other defendants; that the mortgage and deed of trust dated March 1, 1937, constituted a first lien on the real estate here involved and the personal property covered by the instrument; and that this mortgage was in default.

The trial court further decreed that the defendant, West Lawn Mausoleum Association, was indebted to the defendant Walter L. Anderson, mortgage trustee, in the sum of $15,900, together with interest in the aggregate amount of $12,204.25; that the West Lawn Mausoleum Association be required to pay to such defendant $5,206 in cash in possession of the designated mausoleum association; that from this fund the defendant Walter L. Anderson, trustee as aforesaid, and his attorney should be paid reasonable compensation, and the balance of the fund paid to Walter L. Anderson, trustee, should be held by him to apply on any deficiencies that might be due the bondholders after a sale of the property; that upon default of payment for a period of 20 days from and after the entry of the decree, the mortgaged premises be sold; and that the plaintiff and defendants be foreclosed of all right, title, interest, or equity in or to the mortgaged premises.

The plaintiff filed a motion for a new trial which was overruled. From this order, the plaintiff appeals.

Walter L. Anderson, trustee for the bondholders, made application to be appointed receiver of the West Lawn Mausoleum Association property. He was appointed receiver of the property, both real and personal, and authorized to enter upon the duties of looking after and supervising the care of the mausoleum, to take charge of the mausoleum and operate it, and to report to the court the need for repairs. In addition, the West Lawn Mausoleum Association was required to turn over funds in its possession in the amount of $5,206 to the receiver. The receiver gave a bond of $4,000 and qualified.

The trustee receiver filed an application for an allowance to be paid out of funds of the West Lawn Mausoleum Association for attorney's fees and court costs in defending this appeal to the Supreme Court for the benefit of the bondholders. The trial court entered an order on the application granting the request made therein. The plaintiff moved to vacate and set aside this order. This motion to vacate and set aside the order was overruled. The plaintiff predicates error on the part of the trial court in appointing the receiver and also in awarding fees to Walter L. Anderson, mortgage trustee and receiver, and his attorney, but does not discuss or argue this assignment of error. Under rule 8a 2 (4), Revised Rules of the Supreme Court of the State of Nebraska, 1951, errors assigned but not argued will be considered as waived. See, Mason v. State, 132 Neb. 7, 270 N. W. 661; Maher v. State, 144 Neb. 463, 13 N. W. 2d 641. This assignment of error needs no further discussion.

Primarily this appeal involves the question as to whether or not the rights of the plaintiff under the perpetual care fund trust agreement are superior to the rights of receiver trustee appointed by the trial court for the benefit of the bondholders to pay the obligation

created by bonds issued and sold by the West Lawn Mausoleum Association.

The plaintiff will hereinafter be referred to as the appellant, the West Lawn Mausoleum Association as the Association, and the receiver trustee for the bondholders as the appellee.

The appellant assigns as error that the trial court erred in finding the lien of the mortgage dated March 1, 1937, was a first lien, in entering a decree of foreclosure, and in ordering the mausoleum property sold.

We set forth the substance of the stipulation of facts by the parties and other evidence adduced at the trial. The parties stipulated that the Omaha National Bank is a corporation organized under the banking laws of the United States with its principal place of business in Omaha, Nebraska; that the West Lawn Mausoleum Association is a nonprofit corporation organized under the laws of this state with its principal place of business in Omaha, Nebraska; that Walter L. Anderson is the successor trustee under a certain mortgage and trust deed dated March 1, 1937, filed of record with the register of deeds of Douglas County; and that this mortgage and trust deed were given by the West Lawn Mausoleum Association, John F. Kincaid president of the association, Anson H. Bigelow, now deceased, beneficiary under covenants contained therein, Julia A. Koutsky also beneficiary under covenants contained therein, and John W. Koutsky husband of Julia A. Koutsky, to the Conservative Securities Company for the purpose of securing payment of the principal of first mortgage bonds of the West Lawn Mausoleum Association of the face value of $35,000. This mortgage sets forth that the West Lawn Mausoleum Association is a corporation organized and existing under sections 13-601 to 13-605, Comp. St. 1929, now known as sections 12-601 through 12-605, R. S. 1943, and is now the equitable owner of the West Lawn Mausoleum situated approximately in the center of West Lawn Cemetery.

The property here involved and as set forth in the several instruments appearing in this litigation including the mortgage, may be described as follows: "A certain parcel of land in Section 5 of the Plat of West Lawn Cemetery, on file in the *officeof* said Cemetery, more fully described as follows: Commencing at a point 4 feet Northerly along the west line of Lot 48 in Section 5, thence 10 feet easterly at right angles with said line, thence North 68 degrees West 100 feet; thence Northerly at right angles 150 feet; thence Easterly and at right angles 100 feet; thence Southerly and at right angles 150 feet to the place of begining (beginning), all situate in the N 30 acres of the Southeast Quarter, Section 30, Township 15, Range 13, East, in Douglas County, Nebraska; the said point of beginning being 618.6 feet South and 1,510.1 feet East of the Northwest corner of SW¼ of the SW¼ of Section 30-15-13 E of the 6th P.M."

On July 28, 1930, Anson H. Bigelow (then the record title holder of the mausoleum property), the West Lawn Mausoleum Association, and this appellant entered into a trust agreement creating a perpetual care fund. In the trust agreement creating the perpetual care fund the West Lawn Mausoleum Association was designated as the vendee company. This trust agreement recited that the owner and the vendee company desired to set aside from the sale of tombs in the mausoleum certain sums of money to be invested in safe, interest-bearing securities and from time to time the income or interest therefrom to be paid to the vendee company or its successors. However, this money was to be used to the extent necessary to operate and keep the mausoleum building permanently and perpetually in good condition and repair. The remainder of the money was to be used for corporate purposes as the trustees of the vendee company might determine. The Omaha National Bank, as trustee, was to receive 10 percent of all the money collected by it in payment for tombs sold by the vendee company, less its charge as fiduciary. The bank was to hold said

funds as trustee for the individual owners of tombs located in the mausoleum building, and for future purchasers and owners of burial space in the building.

At the time this trust agreement with the bank was executed it was contemplated that the perpetual care fund was to be built up and increased by deposits in said fund by the West Lawn Mausoleum Association of a specified percentage of 9½ percent of the proceeds of sales of tombs. There had been paid and left in the custody of the bank as trustee since July 28, 1930, an amount of $8,317.80, which amount constituted the principal and undistributed income of the perpetual care fund.

Article IV of the perpetual care fund trust agreement provides, in substance, that the West Lawn Mausoleum Association agreed that so long as the mausoleum continued to be used as such, and as a place for burial or keeping of the dead, it would operate the same, keep it permanently in such good condition and repair as was usual with well-conducted mausoleums, and would use and apply for said purposes the income so received as far as it might be required and necessary, and to so use and apply any other funds at its disposal from any source for such purpose. If the proceeds from the perpetual care fund and funds received from the sale of tombs by the West Lawn Mausoleum Association proved insufficient to keep the mausoleum permanently in such good condition and repair as was usual in well-conducted mausoleums, or if the West Lawn Mausoleum Association was in default in maintaining the mausoleum in such condition and repair, then and in that case, upon 90 days notice given by the trustee bank, the owner, Anson H. Bigelow, and the West Lawn Mausoleum Association agreed and consented that the trustee could exercise its option and sell tombs in the mausoleum at such prices as it chose for the purpose of securing sufficient funds for the upkeep of the mausoleum.

Pursuant to the above trust agreement the plaintiff bank notified the defendants and each of them that as of

the date of service of process (which would be May 31, 1951, the date the plaintiff filed its petition), the bank proposed to exercise its option in accordance with the provisions of article IV of the trust agreement. The bank further notified the defendants and each of them, that upon confirmation of its authority to do so, on the expiration of 90 days from the service of process the bank would sell further tombs at prices which it might choose, and retain the entire proceeds of such sales, less reasonable charges and expenses, until the perpetual care fund reached an amount which in the judgment of the plaintiff bank, trustee, was sufficient to earn an annual return sufficient to provide funds necessary to properly manage, maintain, operate, and preserve the mausoleum property.

On March 1, 1937, Anson H. Bigelow, Julia A. Koutsky, and John W. Koutsky conveyed by warranty deed the real estate constituting the mausoleum property to the West Lawn Mausoleum Association. This deed was filed of record March 27, 1937, reserving from said conveyance certain tombs. The conveyance was subject to the right of the bank as trustee of the perpetual care fund for West Lawn Mausoleum Association.

On March 1, 1937, the West Lawn Mausoleum Association, Anson H. Bigelow, Julia A. Koutsky, and John W. Koutsky mortgaged the property constituting the West Lawn Mausoleum to the Conservative Securities Company as heretofore mentioned. The mortgage bonds for which this mortgage was given to secure were dated March 1, 1937, due 10 years thereafter, and issued in $500 and $100 denominations. These bonds were issued under the provisions of what is now section 12-604, R. S. 1943.

It was further stipulated that Walter L. Anderson was duly appointed as successor mortgage trustee and qualified as such.

On the date of trial 229 tombs and 15 niches or apartments had been sold, making a total of 244 units sold.

There remained to be sold space in the mausoleum of 421 tombs and 45 niches or apartments.

The president of West Lawn and Walnut Hill Cemeteries, privately owned, testified that the mausoleum property was located in the center of West Lawn Cemetery and, because of the similarity of the names and the location, the West Lawn Cemetery Association was interested in having the mausoleum repaired. The West Lawn Cemetery Association has no financial interest in the mausoleum association. He further testified that the value of the mausoleum building should be between $250,000 and $300,000; that it would require a perpetual care fund of $150,000 with a minimum of 30 percent of the proceeds of sales to go to such fund; and that under the present circumstances the mausoleum building has no particular value.

The manager of the West Lawn and Hill Crest Cemeteries testified that he had been familiar with the West Lawn Mausoleum Association since 1926. He was its superintendent and manager. He described the manner in which the mausoleum had deteriorated. He further testified that in the past 5 years he had sold 15 or 20 tombs for which he received a commission of from 5 to 10 percent, and that $15,000 would be required for emergency repairs to the building.

John F. Kincaid testified that he had been president of the West Lawn Mausoleum Association since 1933; that the association paid a 20 percent commission, 5 percent secretary's fee, and 15 percent to the Omaha National Bank, of which 10 percent went into the perpetual care fund, the other 5 percent was paid to the bank as a collection fee; that the roof of the mausoleum building leaked which caused many complaints; and that no income had been withdrawn from the perpetual care fund since Anson H. Bigelow left Omaha in 1950.

It is apparent that Anson H. Bigelow, as secretary of the West Lawn Mausoleum Association, conducted the business of the association to the exclusion of the offi-

cers or trustees up to the time that he left the city of Omaha in 1950, then the business of the association was conducted by trustees or officers up to the time that Walter L. Anderson was appointed trustee receiver.

An officer of the bank testified that there was in the perpetual care fund $179.12 in the income account, $5,938.68 in the principal cash account, and $2,200 in government bonds, making a total of $8,317.80.

There is also the evidence of a contractor who estimated the necessary cost of repairs to the mausoleum building to be approximately $40,000.

In the case of Bigelow v. Bigelow, 131 Neb. 201, 267 N. W. 409, in referring to this Association this court said: "This was a tax-free, nonprofit organization, organized under the law now found in section 13-601, to section 13-605, inclusive, Comp. St. 1929, created to manage the property."

The Association was organized under what is now section 12-601, R. S. 1943, which provides: "It shall be lawful for any number of persons not less than five, who are residents of the state of Nebraska, to form themselves into a mausoleum association, and to elect not less than three nor more than five trustees, who shall conduct the business of the association, except as may be directed by a majority of all the members of the association, at a meeting called by personal notice through the mail, where addresses of members are known, and by publication, or both, when addresses are in part unknown, at least fifteen days prior to said meeting. Said trustees shall be elected at a meeting of the members called as above provided, for a term to be fixed by the by-laws, and shall require a plurality vote of all members present. The trustees shall immediately thereafter organize by the election of the necessary officers from their own membership."

Section 12-602, R. S. 1943, provides in substance that before such organization commences business the trustees shall cause to be filed in the office of the county

clerk of the county of which the association shall have its principal place of business, a certificate showing the names of the incorporators and officers authorized to conduct its business. Upon the filing of the certificate, the trustees and their association members and successors shall be invested with full powers. See, also, State ex rel. Craig v. Offutt, 121 Neb. 76, 236 N. W. 174.

The powers of an association organized under legislative statutes are such only as the statutes confer. Any powers with which the trustees of the association are charged by virtue of the statutes cannot be delegated to others, except under the exceptions noted in such statute, and to do so would constitute a breach of trust and be in opposition to the law under which the association is formed.

The management of a mausoleum association is to be exercised by its officers and trustees chosen in accordance with, and possessing the powers limited by, governing statutory and charter provisions. See 14 C. J. S., Cemeteries, § 10, p. 70.

The powers of a mausoleum association are limited by the statute under which it is organized and incorporated. See 10 Am. Jur., Cemeteries, § 5, p. 488.

Unless expressly authorized so to do by statute, a cemetery association or a mausoleum association cannot deprive itself of the right to select its own officers and control its own affairs. See, 14 C. J. S., Cemeteries, § 10, p. 70; In re North Forest Cemetery Assn., 19 Pa. Dist. 730; Oakland Cemetery Co. v. Peoples Cemetery Assn., 93 Tex. 569, 57 S. W. 27, 55 L. R. A. 503.

Ordinarily, the management of a cemetery association is vested in a board of trustees who are appointed or elected and act with such authority as the statutes under which the association is organized vests in them. See, Bonynge v. Frank, 89 N. J. L. 239, 98 A. 456, Ann. Cas. 1918D 211; Close v. Glenwood Cemetery, 107 U. S. 466, 2 S. Ct. 267, 27 L. Ed. 408.

The following authorities are also applicable.

The powers of a corporation organized under legislative statutes are such, and such only, as the statutes confer. The charter of a corporation is a measure of its powers, and the enumeration of these powers implies exclusion of all others. See State ex rel. Leese v. Atchison & N. R. R. Co., 24 Neb. 143, 38 N. W. 43, 8 Am. S. R. 164.

The power of a corporation to make valid contracts is measured by its charter; and the scope of the authority of its officers and agents acting for it is limited, and a person dealing with such corporation is chargeable with notice of such limitations. See Sturdevant Bros. & Co. v. Farmers & Merchants Bank, 69 Neb. 220, 95 N. W. 819.

Under section 12-509, R. S. 1943, the Association is authorized to create a perpetual care fund. This section reads as follows: "Such association shall have the power to establish a fund to be known as the 'Perpetual Care Fund,' placing therein such moneys as it may from time to time determine, out of its general funds; and it shall have the authority to receive gifts or bequests of money and other personal property, and devises of real estate and interests therein, to be placed in the perpetual care fund. The principal of the perpetual care fund shall be forever held inviolate as a perpetual trust by said association, and shall be maintained separate and distinct from any other funds. The principal of the perpetual care fund shall be invested and from time to time reinvested and kept invested in securities authorized by the laws of Nebraska for the investment of trust funds, and the income earned therefrom shall be used solely for the general care, maintenance and embellishment of the cemetery, and shall be applied in such manner as the association may from time to time determine to be for the best interest of the cemetery."

The Omaha National Bank was designated trustee of the perpetual care fund. In such capacity it had a right to maintain and manage the fund. The management of

the property of the Association remained with the officers and trustees of the Association, and their power to so manage the property of the Association could not be delegated to the bank. The power to sell crypts, tombs, lots, and apartments is a part of the power to manage, and constitutes business of the Association. This power cannot be delegated unless the statute so provides.

The appellant contends that the property of the Association is not subject to a mortgage-foreclosure sale.

In this case we are dealing with Chapter 12, article 6, Mausoleum Associations, sections 12-601 to 12-605, R. S. 1943, as distinguished from the law governing cemetery associations, except where the statutes of a cemetery association apply to mausoleum associations.

Section 12-605, R. S. 1943, provides: "Crypts, lots, tombs, niches or vaults sold by such associations or contracted therefor, shall be for the sole purpose of interment and expenses incident thereto, and shall be subject to the rules prescribed by the association. They shall be exempt from taxation, execution, attachment or any other lien or process whatever, if used or held for burial purposes only and in nowise with a view to profit."

Section 12-603, R. S. 1943, provides: "The association shall have all the powers and rights now conferred by law upon cemetery associations organized with no view to profit, and shall be governed by the provisions of law applicable to such associations, except as modified by the provisions of sections 12-601 to 12-605 or laws amendatory thereto."

It will be observed by the foregoing that crypts, lots, tombs, niches, or vaults, as specified in the statute, are not subject to taxation, execution, attachment, or any other liens or process whatever if sold or contracted for, used, or held for burial purposes. It is clear that the crypts, lots, tombs, niches, or vaults that are not sold or contracted for or held for burial purposes are not exempt under section 12-603, R. S. 1943, and the language

therein "except as modified by the provisions of sections 12-601 to 12-605 or laws amendatory thereto" clearly indicates that section 12-604, R. S. 1943, is a modification and is distinct and different from the laws governing cemetery associations. This section provides in part: "The association is empowered to issue bonds and other evidences of indebtedness, to an amount, including all indebtedness of whatever nature, not exceeding ninety per cent of the actual value of the realty of the association and improvements thereon or to be placed thereon from the proceeds thereof, not including the parts sold to individual owners, and to pledge the unsold crypts, rights or lots, and the future receipts of the association, such obligations to be paid out of the future receipts of the association." This section, read in conjunction with section 12-603, R. S. 1943, indicates that the unsold crypts, rights, or lots are subject to the payment of indebtedness as provided for in section 12-604, R. S. 1943.

It is a fundamental rule of statutory construction that the usual and ordinary meaning of words will be used in construing a statute. See State v. Chicago & N. W. Ry. Co., 147 Neb. 970, 25 N. W. 2d 824.

In interpreting the statutes here involved it is apparent that the Association was empowered to issue the bonds in question, and to pay the bonds the Association was empowered to pledge the unsold crypts, rights, or lots and the future receipts of the Association. As to the method of paying the bonds, the Association was empowered to pay such obligations out of future receipts of the Association. This clearly indicates that although a mortgage was given to secure the bonds, the Association property is not subject to sale by mortgage foreclosure. The bonds, however, are a bona fide indebtedness of the Association as set forth in section 12-604, R. S. 1943.

The parties hereto recognized at all times the statutory provisions under which the Association was formed,

and contracted with that fact in mind, and such sections of the statute become a part of such contracts, including the mortgage here involved. This being true, under section 12-604, R. S. 1943, the Association is empowered to pledge the unsold crypts, rights, or lots and the future receipts of the Association and pay this obligation out of the future receipts of the Association. The Association has no rights in this respect over and above those stated in the statute.

The duty of the trustees of the Association, after having created the debt by the issuance of bonds as provided for by section 12-604, R. S. 1943, was to pay the obligation as prescribed in said section. To hold otherwise and permit the foreclosure of the mortgage as decreed by the trial court would destroy the very purpose for which the Association was formed under sections 12-601 to 12-605, R. S. 1943, and would be against public policy. It is apparent that the trustees of the Association failed to perform their duties in this respect. The trial court obviously recognized this fact and appointed Walter L. Anderson, designated as mortgage trustee for the benefit of the bondholders, receiver, to take charge and manage the mausoleum property. Having been so appointed receiver, it is the duty of the mortgage trustee receiver for the benefit of the bondholders to pay the indebtedness of the Association evidenced by the issuance of bonds and the mortgage given to the Conservative Securities Company as security in accordance with and as specifically provided for in section 12-604, R. S. 1943.

For the reasons given herein, the decree of the trial court should be vacated and set aside insofar as it conflicts with this opinion, and the trial court is directed to modify its decree to conform to this opinion.

The total amount of the indebtedness will have to be computed by the trial court so that a proper judgment may be entered.

The judgment of the trial court is affirmed in part,

reversed in part, and the cause is remanded with directions to enter judgment in conformity with this opinion.

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

ELMER MICHELSEN, JR., ET AL., APPELLEES, V. D. O. DWYER ET AL., APPELLANTS.

63 N. W. 2d 513

Filed March 26, 1954. No. 33463.

1. **Municipal Corporations.** The right of a private party to occupy part of a public street in front of his place of business must yield to public necessity or convenience. Ordinarily the question of public necessity or convenience is for the governing body of the municipality.
2. **Highways.** The public is entitled, not only to a free passage along the highway, but to a free passage along any portion of it not in the actual use of some other traveler.
3. **Municipal Corporations: Nuisances.** An obstruction or encumbrance of a street in a city of this state by a structure or otherwise is a public nuisance unless it is authorized in a proper case by competent authority.
4. **Nuisances: Injunctions.** A private person seeking the aid of equity to restrain a public nuisance must show some special injury peculiar to himself aside from and independent of the general injury to the public. In the absence of such special and peculiar injury he will be denied an injunction, leaving the public to be redressed by suitable proceedings brought in behalf of the public.
5. ———: ———. However, if a private person shows damage which is special and peculiar to himself, and independent of any damage sustained by the public at large, a court of equity will grant him relief by injunction.
6. **Municipal Corporations.** The rights which an owner of abutting property possesses in a street are different in kind from those possessed by one whose interest is only that of a right-of-way along the street.
7. ———. Ordinarily the owners of property abutting upon a street wherein an obstruction has been or is being placed in the immediate vicinity of their property have a sufficient special interest therein to entitle them to maintain a proceeding to remove it therefrom.

8. **Equity.** The absence of a plain and adequate remedy at law affords the only test of equity jurisdiction; and the application of this principle to a particular case must depend altogether upon the character of the case as disclosed in the proceedings. It is not enough that there is a remedy at law; it must be plain and adequate, or, in other words, as practical and efficient to the ends of justice and its prompt administration as the remedy in equity.
9. **Injunctions.** The remedy by injunction is wholly preventative, prohibitory, or protective, and it will not issue to afford a remedy for what is past but only to prevent future mischief. Rights, if any, already lost, and wrongs, if such, already perpetrated, cannot be restrained or remedied by injunction.

APPEAL from the district court for Cass County: JOHN M. DIERKS, JUDGE. *Modified and Affirmed.*

D. O. Dwyer and *W. L. Dwyer,* for appellants.

Begley & Peck, for appellees.

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

WENKE, J.

Elmer Michelsen, Jr., Irene Michelsen, Elmer Michelsen, Sr., Troy R. Jewell, and Stella H. Jewell brought this action in the district court for Cass County against D. O. Dwyer, W. L. Dwyer, Dumke-Stohlman Company, and the city of Weeping Water, a municipal corporation. The purpose of the action is to have declared null and void the authority granted the defendants D. O. Dwyer and W. L. Dwyer by the city of Weeping Water to build a garage in the parking area in front of the Dwyers' property in Weeping Water, to enjoin Dumke-Stohlman Company and the Dwyers from constructing and erecting a garage on any part of the street in front of the Dwyers' property, to enjoin the Dwyers from using any part of the street for that purpose, and for an order requiring the Dwyers to remove from such area any building, or parts thereof, already constructed thereon. The trial court entered a decree perpetually enjoining all the de-

fendants from further construction on, and completion of, the garage building. Their motion for new trial having been overruled, the Dwyers and the city of Weeping Water have appealed. The Dumke-Stohlman Company took no appeal from the decree of the district court so will not be again referred to herein.

The area herein involved is in a residential section of Weeping Water located where H and East Streets join and terminate. H Street runs east and west and East Street runs north and south. The Dwyers own Lot 8 in Block 62, city of Weeping Water, which lot fronts south on H Street. The Elmer Michelsens, Jr., own Lot 1 in Block 63, city of Weeping Water, which fronts north on H Street and also to the east on East Street. Elmer Michelsen, Sr., owns Lot 2 in Block 63, city of Weeping Water, which fronts north on H Street and joins Lot 1, which lies to the east. Troy R. Jewell and Stella H. Jewell own Lot 9 in Block 2, Fleming and Race's Addition to the city of Weeping Water, which faces west on East Street and lies just east across East Street from the property of the Elmer Michelsens, Jr. The Dwyers and Michelsens live in the houses located on their several properties.

H Street is 66 feet wide with a 33-foot paved traveling surface, thus leaving a 16½-foot parking area on each side of the street between the curb and the lot lines. East Street is also 66 feet wide with a paved surface 33 feet wide, thus leaving a parking area of about 16½ feet on each side between the curb and adjoining lot lines. These parking areas were generally sown to grass with flowers, shrubs, and trees planted therein. As already indicated both H and East Streets terminate at the corner where they join.

The Dwyers' lot, at the point where the house is located thereon, is some 18 to 20 feet above the surfaced area of H Street and the north or back end of the lot is about 35 feet higher than the surface of the street. Because of this elevation it would be inconvenient to

drive a car into any garage built thereon and difficult, if not impossible, to do so in winter when, at times, there is ice or snow on the driveway. Consequently the Dwyers had always left their car parked on the street in front of their property. Because of this condition the Dwyers, on August 8, 1952, applied to the city for "* * * permission from the City to construct a garage of concrete blocks, with composition or cement roof, approximately 23 x 12 feet, on the parking in the corner where the steps from the sidewalk to the street are located."

On August 15, 1952, the city council granted the Dwyers permission to build a garage in front of their property in accordance with their request. The Dwyers caused the area in the parking, west from the steps leading from the curb to their sidewalk, to be excavated and, in March 1953, began construction of the garage. When the Dwyers began the construction thereof this action was brought, although the Jewells had previously objected to their putting a garage in the parking.

Section 28-1016, R. R. S. 1943, provides: "Whoever shall erect, keep up or continue and maintain any nuisance to the injury of any part of the citizens of this state shall be fined in any sum not exceeding five hundred dollars; and the court shall, moreover, in case of conviction of such offense, order every such nuisance to be abated or removed. * * * and the obstructing or encumbering of (by) fences, buildings, structures or otherwise, any of the public highways or streets or alleys of any city or village, shall be deemed nuisances."

However, the Legislature further provided:

"The city council or board of trustees shall have the care, supervision, and control of all public highways, bridges, streets, alleys, public squares and commons within the city or village, and shall cause the same to be kept open and in repair, and free from nuisances." § 17-567, R. S. 1943.

"Second-class cities and villages shall have the power to * * * require and regulate the planting and protec-

tion of shade trees in the streets, the building of bulkheads, cellar and basement ways, stairways, railways, window and doorways, awnings, hitching posts and rails, lamp posts, awning posts, and all other structures projecting upon or over and adjoining, and all other excavations through and under the sidewalks in the said city or village." § 17-555, R. S. 1943.

In City of Pierce v. Schramm, 116 Neb. 263, 216 N. W. 809, referring to the foregoing and other statutes, we held: " 'The right of a private party to occupy part of a public street in front of his place of business must yield to public necessity or convenience, and ordinarily the question of public necessity or convenience is for the governing body of the municipality, * * *.' Kenny v. Village of Dorchester, 101 Neb. 425."

Section 8, chapter 10, municipal code of the city of Weeping Water, provides: "It shall be unlawful for any person or persons within the corporate limits of the City of Weeping Water, Nebraska, to erect, maintain or suffer to remain on any street or public sidewalk or any portion of the area between the lot line and the curb line of any street, any stand, wagon, merchandise, machinery or any other obstruction injurious to, inconvenient or inconsistent with the public use of the same: * * *."

In Bischof v. Merchants Nat. Bank, 75 Neb. 838, 106 N. W. 996, 5 L. R. A. N. S. 486, we approved the following from Elliott on Roads and Streets (2d ed.), § 645: "* * * it is well settled that 'the public are entitled, not only to a free passage along the highway, but to a free passage along any portion of it not in the actual use of some other traveler.' "

And in Schroder v. City of Lincoln, 155 Neb. 599, 52 N. W. 2d 808, we said: "The streets of a municipality in this state belong to the public and an unauthorized obstruction or encumbrance of them by a structure or otherwise constitutes a public nuisance."

In view of the foregoing the city of Weeping Water,

or its council, could not authorize any one to use part of any of its streets for private garage purposes as such would be injurious to and inconsistent with the public use thereof. See, Schroder v. City of Lincoln, *supra;* World Realty Co. v. City of Omaha, 113 Neb. 396, 203 N. W. 574, 40 A. L. R. 1313; Bischof v. Merchants Nat. Bank, *supra*; 25 Am. Jur., Highways, § 276, p. 569.

An obstruction or encumbrance of a street in a city of this state by a structure or otherwise is a public nuisance unless it is authorized in a proper case by competent authority. See, Schroder v. City of Lincoln, *supra;* Bischof v. Merchants Nat. Bank, *supra;* Nebraska Telephone Co. v. Western Independent Long Distance Telephone Co., 68 Neb. 772, 95 N. W. 18.

The question then arises, can the appellants maintain an action to abate such a nuisance?

We have often said that a private person seeking the aid of equity to restrain a public nuisance must show some special injury peculiar to himself, aside from and independent of the general injury to the public. In the absence of such special and peculiar injury he will be denied an injunction, leaving the public to be redressed by suitable proceedings brought in behalf of the public. However, if he shows damage which is special and peculiar to himself, and independent of any damage sustained by the public at large, a court of equity will grant him relief by injunction. Bischof v. Merchants Nat. Bank, *supra;* World Realty Co. v. City of Omaha, *supra;* Schroder v. City of Lincoln, *supra;* Reed v. City of Seattle, 124 Wash. 185, 213 P. 923.

In this regard we approve the following quote from Smith v. Centralia, 55 Wash. 573, 104 P. 797, in Reed v. City of Seattle, *supra*: " 'The rights which an owner of abutting property possesses in a street are different in kind from that possessed by one whose interest is only that of a right of way along the street. * * *.' "

The Elmer Michelsens, Jr., who own the property immediately across H Street from the Dwyers' prop-

erty, have a modern two-story six-room frame residence thereon with a full basement. Across the north, or in front of their house, they have a screened-in porch which the family frequently uses. They valued their property at about $6,500. Elmer Michelsen, Sr., whose property abutts on H Street and joins the property of the Elmer Michelsens, Jr., on the west, has a modern two-story eight-room frame residence thereon which faces north. He valued his property at about $8,000. The Jewells, whose property lies southeast of the Dwyers' and faces on East Street, have converted a modern eight-room frame residence thereon into three apartments. They have also constructed a modern three-room cottage in the rear thereof. They valued their property at from $7,000 to $7,500.

Appellees either testified, or offered other evidence, to the effect that the garage would change and obstruct their view; that it would be unsightly and injuriously affect the appearance of the neighborhod, which is residential, particularly if used for purposes other than that of a private garage; that it would be hazardous for children since it would be a temptation for them to use it in their play; and that it would depreciate values. In fact, the several appellees testified it would depreciate each of their respective properties about $500. We think the appellees have established they will be damaged thereby in a manner special and peculiar to themselves and independent of any damages that the public at large will sustain by reason thereof.

But in any event we think that ordinarily the owners of property abutting upon a street wherein an obstruction has been or is being placed in the immediate vicinity of their property have a sufficient special interest therein to entitle them to maintain a proceeding to remove it therefrom. See Reed v. City of Seattle, *supra*.

Appellants contend appellees have an adequate remedy at law, particularly in view of the fact that they testified as to the extent their several properties would be

damaged if the garage was built in the parking area.

We said in Welton v. Dickson, 38 Neb. 767, 57 N. W. 559, 41 Am. S. R. 771, 22 L. R. A. 496: "The absence of a plain and adequate remedy at law affords the only test of equity jurisdiction; and the application of this principle to a particular case must depend altogether upon the character of the case as disclosed in the proceedings. It is not enough that there is a remedy at law; it must be plain and adequate, or, in other words, as practical and efficient to the ends of justice and its prompt administration as the remedy in equity."

And in World Realty Co. v. City of Omaha, *supra,* we said: " 'Irreparable injury, as used in the law of injunction, does not necessarily mean that the injury is beyond the possibility of compensation in damages, nor that it must be very great; * * *.' (Field v. Barling, 149 Ill. 556, 37 N. E. 850, 24 L. R. A. 406)."

We think what was held in Bischof v. Merchants Nat. Bank, *supra,* is applicable here. Therein we held: "We hold therefore that the nuisance is not to be regarded as a permanent nuisance, but one which is abatable, and that the court should interfere for the protection of the plaintiff's rights by injunction to prevent vexatious litigation and a multiplicity of suits."

We come then to the question of whether or not the fact that the garage has been completed pending this appeal will defeat appellees' right to have it removed. This has been fully answered by our opinion in Bischof v. Merchants Nat. Bank, *supra.* There the parties completed the obstruction in the meantime but this court caused it to be abated. Therein, under a comparable situation, this court properly directed the district court "* * * to enter a decree enjoining the defendant bank to abate said nuisance, and perpetually enjoining and restraining the defendants from a continuation, repetition or renewal thereof."

It is also contended that the district court should have sustained the city's motion to dismiss the action as to the

city. This is primarily based on the fact that it was neither alleged nor was any evidence adduced to show that the city was doing, or threatening to do, anything further in the matter after its action of August 15, 1952. As to this action of the city the following would be applicable insofar as injunctive relief is concerned: "The remedy by injunction is wholly preventative, prohibitory, or protective, and it will not issue to afford a remedy for what is past but only to prevent future mischief. Rights, if any, already lost, and wrongs, if such, already perpetrated, cannot be restrained or remedied by injunction." Leeman v. Vocelka, 149 Neb. 702, 32 N. W. 2d 274.

The city should not have been perpetually enjoined from further construction on and completion of the erection of the garage building upon the area of the public street in front of the Dwyer property because there is nothing to show that the city was engaged therein or that it intended to do so. However, the action should not be dismissed as to the city. As already stated, the appellees asked that the action taken by the city on August 15, 1952, be held for naught. In view of what we have already said herein this relief should have been granted as a basis for injunctive relief against the other appellants.

We hold that the order of the district court granting appellees injunctive relief against the Dwyers enjoining them to abate the nuisance should be affirmed; and that as to the city of Weeping Water the decree should be modified and the only relief that should be granted against the city is that the action of its city council of August 15, 1952, be set aside as void. All costs in this court and the district court are taxed to appellants Dwyer.

MODIFIED AND AFFIRMED.