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REPORTS OF CASES

DECIDED BETWEEN
MAY 15, 1953 AND JANUARY 15, 1954

IN THE

Supreme Court of Nebraska

JANUARY TERM 1953, SEPTEMBER TERM 1953,
AND
JANUARY TERM 1954

VOLUME CLVII

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SUPREME COURT

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CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

JANUARY TERM, 1953

IN RE APPLICATION OF EDGAR. PARK L. EDGAR, DOING BUSINESS AS EDGAR OIL COMPANY, APPELLEE, V. WHEELER TRANSPORT SERVICE, INC., ET AL., APPELLANTS.

58 N. W. 2d 496

Filed May 15, 1953. No. 33243.

1. **Public Service Commissions: Carriers.** As a condition precedent to the issuance of a certificate of convenience and necessity to a motor carrier by the Nebraska State Railway Commission, the commission must find that the service is or will be required by present or future public convenience and necessity.
2. ———: ———. The burden is on an applicant for a certificate of convenience and necessity to show that the operation under the certificate is and will be required by the present or future public convenience and necessity.

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

Swenson, Viren & Turner, Neal H. Hilmes, and *R. E. Powell,* for appellants.

Ginsburg & Ginsburg, for appellee.

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

YEAGER, J.

On June 19, 1951, Edgar Oil Company by Park L. Edgar, owner, of Ashland, Nebraska, filed an applica-

tion with the Nebraska State Railway Commission for permission to operate as a motor carrier for hire in intrastate commerce upon the highways of the State of Nebraska and for a certificate of convenience and necessity to so operate. By the application permission was sought to operate motor vehicles for the purpose of transporting refined petroleum products from all refining and distributing points in Nebraska to Ashland, Wilber, DeWitt, Unadilla, and Lincoln, Nebraska. The application was for the purpose of transporting property for the general public for hire.

It was set forth in the application that applicant's proposed service would be in direct competition with the following named motor carriers for hire: Transit, Inc., Herman Oil Transport Co., Pulec Transport, and Wheeler Transportation Service, Inc.

Wheeler Transport Service, Inc., and Charles D. Doher on August 8, 1951, filed a formal protest to the application and asked that it be dismissed.

On December 13, 1951, an examiner for the Nebraska State Railway Commission filed a report in which he recommended that the application be approved in part and to that extent a certificate of convenience and necessity be granted. The details of that report are not of importance herein.

On December 19, 1951, Wheeler Transport Service, Inc., and Charles D. Doher filed exceptions to the examiner's report. On December 22, 1951, Transit, Inc., Mabel C. Herman, doing business as Herman Oil Transport Company, and Ralph Darling, doing business as Darling Transport Service, also filed exceptions to the report.

The Nebraska State Railway Commission thereafter conducted a hearing on the application, the protest, and the exceptions to the examiner's report, and on February 1, 1952, rendered its opinion, its findings, and its order.

By this order the applicant was granted a certificate

of convenience and necessity to transport refined petroleum products in bulk in tank vehicles from the Great Lakes Pipe Line distribution point in Omaha, Nebraska, and points within a 10-mile radius from such point as point of origin to DeWitt, Wilber, and Ashland, Nebraska, as points of destination with return movements of rejected shipments authorized. Permission to move over irregular routes was authorized.

From this order the protesting parties and those excepting to the examiner's report have appealed. For the purposes of this opinion the applicant will be referred to as appellee and the other parties as appellants.

By their assignments of error the appellants substantially say that the order granting the certificate of convenience and necessity is arbitrary, unreasonable, and contrary to law; and that it is not sustained by evidence that public convenience and necessity requires the issuance of a certificate of convenience and necessity for the performance of this service.

Factually, there is little if any controversy involved herein. For some considerable period of time appellee under proper and legal authority was an interstate carrier of the products which he seeks by his application to carry in intrastate commerce. The point of origin of his interstate shipments was in the State of Kansas. The shipments were received there from the Skelly Oil Company for delivery to the named points in Nebraska. The Skelly Oil Company outlet has been moved to Omaha. It therefore has become necessary, if the appellee is to receive these products from the Skelly Oil Company for transportation to the named points in Nebraska, for him to have an intrastate certificate of convenience and necessity from the Nebraska State Railway Commission.

The evidence discloses that these named points in Nebraska are served by other legally authorized motor carriers and if appellee should be refused the permission sought that fact would not deprive the areas of any need-

ed or necessary service. Distributors at these locations desire but do not require the service of the appellee.

It appears that if this certificate of convenience is not issued to appellee he will be deprived of substantial and profitable operations which were formerly carried on under his interstate authority. If it is issued it reasonably appears that he would retain the operation and since the proposed certificate does not limit or restrict operations except as to points of origin, destination, and products to be handled, possibly he would in competition with other carriers increase them.

Under these facts the convenience that would be served by the certificate would be that of the appellee and that of the distributors at the destination points. The only necessity served would be that of the appellee.

Harsh as the rule may appear and in fact be, the Legislature has not seen fit to allow the Nebraska State Railway Commission to recognize this character and quality of convenience and necessity in determining whether or not permission shall be extended for engagement in the business of a common carrier in the State of Nebraska. It has permitted recognition of only public convenience and necessity. This is especially true when other carriers are already in the field.

This court said in In re Application of Canada, 154 Neb. 256, 47 N. W. 2d 507: "A provision of the statute is that as a condition precedent to the issuance of a certificate, the commission shall find that the service to be authorized is or will be required by present or future public convenience and necessity."

In the paragraph from which the foregoing quotation was taken, the following appears: "The question of the adequacy of service of existing carriers is implicit in the issue of whether or not convenience and necessity demand the service of an additional carrier in the field. Obviously the existence of an adequate and satisfactory service by motor carriers already in the area is complete negation of a public need and demand

for added service by another carrier." See, also, In re Application of Moritz, 153 Neb. 206, 43 N. W. 2d 603.

It was also said in In re Application of Canada, *supra:* "The burden was on appellee to show that the operation he proposed was and would be required by the present or future public convenience and necessity." See, also, In re Application of Richling, 154 Neb. 108, 47 N. W. 2d 413; In re Application of Moritz, *supra.*

Instead of the appellee herein sustaining the burden imposed upon him, his evidence indicates quite clearly that the service which his application contemplates can be well performed by other carriers operating in the area.

It must be said therefore that the order of the commission in granting the certificate of convenience and necessity to the appellee was unreasonable, arbitrary, and contrary to law, and it should be and is reversed.

REVERSED.

WENKE, J., dissents.

CARTER, J., dissenting.

For 16 years Park L. Edgar has been engaged in the transportation of petroleum products by motor vehicle under a permit from the Interstate Commerce Commission. This permit authorized Edgar to transport petroleum products from all refining and distributing points in Kansas to Wilber, DeWitt, Lincoln, Ashland, and Unadilla, Nebraska. The origin of the petroleum products transported was, until recently, from the Skelly Oil Company refinery at El Dorado, Kansas. The total gallonage hauled in 1950 is shown to be 2,159,200 gallons and the total gross revenue therefrom was $51,324.55. The applicant owns and operates three tractor units and two trailers in transporting the petroleum products described. No question is raised as to the ability of the applicant, either as to equipment, personnel, or other qualifying conditions, to carry on the business.

A short time prior to August 1951, the Skelly Oil

Company advised Edgar that its outlet at El Dorado, Kansas, would be removed to Omaha, Nebraska, and that the products formerly hauled would have to originate at the new pipe line terminal in Omaha. An application for a certificate of convenience and necessity was made to the Nebraska State Railway Commission in order that Edgar could continue to serve his customers as he had in the past. The Nebraska State Railway Commission granted the application "From the Great Lakes Pipe Line distribution point in Omaha, Nebraska; and points and places within a 10-mile radius of such point, as points of origin, to DeWitt, Wilber and Ashland, Nebraska, as points of destination, with return movements of rejected shipments authorized, over irregular routes." This court reverses the order of the commission on the theory that if a certificate-holder in the field can perform the service, an order of the commission granting a certificate of convenience and necessity is, under all circumstances, unreasonable, arbitrary, and contrary to law. I do not agree that this is the law.

There are cases where the public interest requires that common carriers in the field be protected against competition. This rule applies particularly to public utilities which are natural monopolies such as were involved in Furstenberg v. Omaha & C. B. St. Ry. Co., 132 Neb. 562, 272 N. W. 756, and In re Application of Effenberger, 150 Neb. 13, 33 N. W. 2d 296. The underlying principle in these cases is that competition among natural monopolies is wasteful economically and results finally in insufficient and unsatisfactory service and extravagant rates. It is required to furnish service in unprofitable areas as well as in the lush areas of the city. A new competitor under such circumstances will not ordinarily be permitted to skim off the cream of the business while the existing transportation system is required to render over-all service to the city as a whole at rates fixed by the railway commission. It is noteworthy that these cases were affirmances of findings by the Nebraska State

Railway Commission, the constitutional body having original jurisdiction over the subject matter.

It is my contention, however, that truck and bus lines are not natural monopolies and, as such, are not entitled to so favorable a position as the holding of the majority gives them.

I point out that the state railway commission was created by constitutional provision. The powers and duties of the commission include the regulation of rates, service, and general control of common carriers. Art. IV, § 20, Constitution. These powers are exclusive and self-executing except as the Legislature may implement them by statute. This necessarily means that the Constitution has lodged great discretionary powers in the commission, except to the extent that the Legislature sees fit to change the manner of their administration. The Legislature has provided that all common carriers shall obtain a certificate of convenience and necessity before they may operate upon the highways of this state. The statute provides "that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity; * * *." § 75-230, R. R. S. 1943.

Motor carriers were subjected to control and regulation by the railway commission in 1937. The declaration of policy contained in the act recites these pertinent provisions: "It is hereby declared to be the policy of the Legislature to (1) regulate transportation by motor carriers in intrastate commerce upon the public highways of Nebraska in such manner as to recognize and preserve the inherent advantages of, and foster sound economic conditions in, such transportation and among such carriers, in the public interest; (2) promote adequate, economical and efficient service by motor carriers, and reasonable charges therefor, without unjust discrimination, undue preferences or advantages, and unfair or destructive competitive practices; * * * and (6) cooperate with the Interstate Commerce Commission in

the administration and enforcement of the federal 'Motor Carrier Act, 1935,' approved by the President on August 9, 1935. * * *." § 75-222, R. R. S. 1943.

The purpose of the Nebraska Motor Carrier Act was regulation for the public interest. Its purpose was not to stifle legitimate competition but to foster it. Its purpose was not to create monopolies in the transportation industry but to eliminate discrimination, undue preferences or advantages, and unfair or destructive competitive practices. Legitimate competition is a normal attribute of our free enterprise system. It must be permitted to exist and the law contemplates that it shall. When we assume that new licenses are precluded under any and all circumstances as a matter of law, whenever there is a willing and able operator in the field, we are in effect granting a monopoly to the first occupant without fear of competition.

By a series of cases this court has by a process of gradual encroachment arrogated unto itself, under the guise of statutory interpretation, the determination of what constitutes the public interest in this type of case. I shall cite only two that indicate the trend of our decisions: In re Application of Moritz, 153 Neb. 206, 43 N. W. 2d 603; In re Application of Canada, 154 Neb. 256, 47 N. W. 2d 507. The rule as to natural monopolies, where the public interest required the restraint or elimination of competition, has been erroneously applied to this type of case. The court completely overlooks the fact that it is the public interest and not the protection of carriers in the field that constitutes the fundamental basis for commission regulation and control. The determination of the public interest is a legislative question that has been lodged with the commission and not this court. In each of the foregoing cases the findings of the commission on the matter of the public interest have been reversed and the court has substituted its judgment for that of the commission.

What public interest requires that these interveners

be first given an opportunity to carry the petroleum products formerly hauled by Edgar? He is taking none of their business and proposes to haul only that which he has transported for 16 years. What public interest requires this court to declare, contrary to the findings of the commission, that the business of Edgar must be completely destroyed by the order of this court? Since when have courts been authorized to enter into the legislative field and perform purely legislative functions in the stead of the body to which those functions are given by the Constitution? A rule of this court is cited by the majority which holds to the effect that a certificate of convenience and necessity cannot be issued unless there is a preliminary finding that the carriers occupying the field are unable to perform the needed service. What statute or constitutional provision so limits the power of the commission or confers any such power upon this court to enter into the regulatory field and destroy the business of a citizen who has violated no law or regulation? The railway commission having determined that it was in the public interest to issue the certificate of convenience and necessity, admittedly in a field within its jurisdiction and upon evidence offered at a public hearing, I submit that this court has no authority to intervene.

The only statute that could possibly limit the commission is section 75-230, R. R. S. 1943. Its context does not provide the conditions precedent which this court says it contains. The statute leaves it to the commission to determine the question of public interest. The announced rule is of judicial origin. It was not one imposed by the commission or the Legislature. It is clearly not within the contemplation of the constitutional provision or of legislation on the subject. As such it is nothing more than judicial legislation which deprives the commission of its plain function to determine the public interest in this field. Similar provisions appear in the motor carrier acts of other jurisdictions including

the Federal Motor Carrier Act. There is not a decision among these jurisdictions which sustains the interpretation of section 75-230, R. R. S. 1943, as made by this court. I submit that they are to the contrary.

In United States v. Detroit & Cleveland Navigation Co., 326 U. S. 236, 66 S. Ct. 75, 90 L. Ed. 38, where an identical provision was involved, the court said: "If the Commission were required to deny these applications unless it found an actual inability on the part of existing carriers to acquire the facilities necessary for future transportation needs, a limitation would be imposed on the power of the Commission which is not found in the Act. The Commission is the guardian of the public interest in determining whether certificates of convenience and necessity shall be granted. For the performance of that function the Commission has been entrusted with a wide range of discretionary authority."

In Lang Transportation Corp. v. United States, 75 F. Supp. 915, the court in dealing with this subject aptly said: "* * * the Lang Transportation Corporation takes the position that the Commission had consistently followed the principle that, in the absence of evidence of specific deficiencies in existing service, or of a showing of benefits from a new service, existing carriers should be accorded the right to transport all traffic which they can handle adequately, efficiently and economically in the territory served by them; but this line of reasoning is unsound and an adherence thereto would forever stifle healthy competition. * * * it was clearly proper for that expert body in the case at bar, to exercise its discretion and judgment and come to its conclusion, instead of adopting the arbitrary rule that an applicant should never be permitted to institute new service unless existing carriers already in the field had first been accorded an opportunity to furnish such additional service themselves. * * * It is clear that under Federal law the carriers first in the field within a particular area do not enjoy legal protection against competition subsequently

arising. The Interstate Commerce Commission has power to authorize any number of different carriers to operate within the same territory. * * * It has been expressly held that the Commission may authorize new service for the very purpose of providing the public with the benefits of competition. * * * Moreover, it has been pointed out that 'one of the weapons in the Commission's arsenal is the right to authorize competition,' and that there is 'no merit in the contention that if additional service is required the Commission must impose the duty of supplying such additional service upon existing carriers.' * * * An increase in competition is not a reason for denying the Commission's authority to issue a certificate. * * * 'This case precludes any suggestion that carriers initially in a field are immune against additional and competitive carriers in the face of public convenience and necessity. * * *.'"

In Interstate Commerce Commission v. Parker, 326 U. S. 60, 65 S. Ct. 1490, 89 L. Ed. 2051, the court aptly said: "In protestants' view a certificate of convenience and necessity should not be granted to railroads for motor truck operation when existing motor carriers are capable of rendering the same service. * * * Since, however, on adequate evidence the Commission found that the motor service sought was of a different character from the existing motor service and not directly competitive or unduly prejudicial to the already certificated motor carriers, * * * we hold that the Commission had statutory authority and administrative discretion to order the certificate to issue. * * * Where that improvement depends in the Commission's judgment upon a unified and limited rail-truck operation which is found not 'unduly prejudicial' to motor carrier operations, the Commission may authorize the certificate even though the existing carriers might arrange to furnish successfully the projected service. * * * It must be expected, however, that the Commission will be as alert to perform its duty in protecting the public in the maintenance

of an efficient motor transportation system as it is in protecting that same public in the successful operation of its rail system. The Commission is trusted by Congress to guard against the danger of the development of a transportation monopoly."

The following language from United States v. Pierce Auto Freight Lines, Inc., 327 U. S. 515, 66 S. Ct. 687, 90 L. Ed. 821, is particularly applicable: "We think the court misconceived not only the effects of the Commission's action in these cases but also its own function. It is not true, as the opinion stated, that '* * * the courts must in a litigated case, be the arbiters of the paramount public interest.' This is rather the business of the Commission, made such by the very terms of the statute. The function of the reviewing court is much more restricted. It is limited to ascertaining whether there is warrant in the law and the facts for what the Commission has done. Unless in some specific respect there has been prejudicial departure from requirements of the law or abuse of the Commission's discretion, the reviewing court is without authority to intervene. It cannot substitute its own view concerning what should be done, whether with reference to competitive considerations or others, for the Commission's judgment upon matters committed to its determination, if that has support in the record and the applicable law."

In Motor Transport Co. v. Public Service Commission (Wis.), 56 N. W. 2d 548, the court in dealing with this subject under statutes providing that the commission shall "prevent unnecessary duplication of service" and in granting a certificate that it "shall take into consideration existing transportation facilities in the territory proposed to be served, including common and contract motor carriers * * *", said, as stated in the syllabus: "Whether public convenience or necessity will be better served by licensing additional common motor carrier or by permitting those already licensed to extend their facilities to absorb demand for service is question for

Public Service Commission rather than court, and commission may authorize certificate even though existing carriers might arrange to furnish successfully the projected service."

I submit that the law generally as it applies to situations of this kind is correctly stated in the foregoing cases. Their logic is unanswerable and their reasoning is consistent with an economy based on the free enterprise system. Legitimate competition should not be stifled except when the public interest requires that it be done and, under the Constitution and statutes of this state, it is the commission and not the court that determines the public interest in this field. I submit that Edgar is not a newcomer to the field. It is true that his point of origin has been changed from Kansas to Nebraska, but the territory that he proposes to serve is the same that he has served for the past 16 years. The public interest surely requires, as the commission found, that he should be permitted to continue to do so. What public interest requires that he should not? Interveners are not injured because Edgar is performing a service which they have never performed, for he has performed it for 16 years himself. Does the public interest demand the destruction of Edgar's business and that petroleum carriers in Omaha, who are now in the field, be given a monopoly on all petroleum hauling originating at that point? I contend that the public interest requires no such result. In any event, the question of public interest is peculiarly for the commission to determine. This it has done, and I respectfully contend that this court has no right, although it may assume the power to do so, to set itself up as the guardian of the public interest in this field. The court assumes that carriers in the field must be permitted to perform the service if they are able to do so when this is simply one of several factors which the commission may consider in arriving at a decision. Where the applicant has been performing the service in a satisfactory man-

ner, without violating any statute or regulation, and where the public interest does not require that the service be performed by carriers in the field, the basis for the issuance of a certificate of convenience and necessity by the commission clearly exists. The commission acted within the scope of the authority conferred upon it after a hearing of the evidence. Its order is not therefore arbitrary and unreasonable, and therefore not within the authority of this court to reverse.

I am in full accord, of course, with the theory of the division of powers of government. This includes the conception that the courts are required to interpret the law and are charged with the duty of keeping the branches of government within their respective spheres. This duty not only requires this court to restrain the legislative and executive branches, but it requires the judicial branch to restrain itself that it may not encroach upon powers that are reposed elsewhere. It is not sound argument to say that an asserted power is judicial in its nature merely because the Legislature has not undertaken to restrain it. The Legislature is not a House of Lords charged, as in England, with the duty of reviewing judicial pronouncements. But the situation becomes more serious still when we consider the fact that an unlawful encroachment of power can be justified in the second instance with just as much semblance of correctness as in the first. But even if such a course would be effective as a restraint, it could not serve to do justice to the applicant Edgar. His business will have been destroyed and the petroleum carrier monopoly, hauling with Omaha as its point of origin, will be further entrenched in a corresponding degree.

The foregoing states no new principles. They have been recognized and applied by this court. We have recited the dangers of encroachment by the court into the field of common carrier regulation and control in a case which is most prophetic and meaningful. We said:

"The grant or denial of a certificate of convenience and necessity is the exercise of an administrative or legislative power as distinguished from judicial power. On an appeal to the supreme court from an order of the railway commission administrative or legislative in nature, the only questions to be determined are whether the railway commission acted within the scope of its authority and if the order complained of is reasonable and not arbitrarily made. Where the action of the railway commission is not unreasonable or arbitrary and does not exceed its powers or violate a rule of law, this court will not interfere with its findings of fact for the reason that they involve administrative and legislative rather than judicial questions. * * * The facilities of administrative law with the combination of administrative, legislative, and judicial powers such as the railway commission have been developed by the people of this state and in the country generally for the purpose of providing direct, swiftly-moving, effective, nonpolitical protection of the public. The primary object of the regulation of public utilities by the railway commission is not to establish a monopoly or to guarantee the security of investment in public service corporations, but, first and at all times, to serve the interests of the public. Nothing is more injurious to the public from every standpoint than a law which is not capable of working out tangible results. Therefore, in its administrative and legislative sphere, if the railway commission acts within the law and not arbitrarily, the courts should not, under the guise of judicial action, interfere and thereby unlawfully usurp administrative and legislative powers constitutionally reposed elsewhere. Courts should review or interfere with administrative and legislative action of the railway commission only so far as is necessary to keep it within its jurisdiction and protect legal and constitutional rights. The policy or wisdom of its action in this field ordinarily cannot be reviewed by the courts except where unlawfully exercised. This court

has no power to regulate public utilities. That power is constitutionally vested in the legislature and the railway commission. 'The Constitution is still recognized as the supreme law of the state and as a limitation of power of all departments and all officials.' * * * This court has no business in the field of making legislation, and it is not an administrative body. Powers conferred upon an appellate court should be construed as intended to include only powers consistent with the discharge of its inherent judicial functions. The intended effective control of public utilities by the railway commission is dependent upon this attitude of the court in that field." Furstenberg v. Omaha & C. B. St. Ry. Co., *supra.*

I am convinced that Chapter 75, R. R. S. 1943, creates no presumption in favor of, or against, either monopoly or competition, and that the commission is free to determine which of the two will best serve the public interest. The statute, section 75-230, R. R. S. 1943, providing for the issuance of certificates of convenience and necessity is not subject to the interpretation which this court puts upon it. Nothing is found therein which makes it a mandatory condition precedent to the issuance of a new license that carriers in the field shall first be given opportunity to perform the service. The announced rule is arbitrary and unreasonable, and has the effect of eliminating legitimate competition as an arm of the commission in procuring an adequately sustained service. Every decision of other jurisdictions that has come to my attention is contrary to the majority holding. It is the public interest which should control the result, a matter that is exclusively for the commission to determine upon evidence. Publix Cars, Inc. v. Yellow Cab & Baggage Co., 130 Neb. 401, 265 N. W. 234. I submit that the evidence amply supports the finding of the commission that Edgar should be granted a certificate of convenience and necessity. Certainly it is not in the public interest to destroy a man's business where no one is injured by his continuing to do that only which he has done over

the years. This court has merely substituted its judgment for that of the commission in a matter that is legislative and administrative in nature and has, in effect, usurped a power reposed solely in the commission and the Legislature. It has placed the commission in a strait jacket in the granting and denying of certificates of convenience and necessity where none is intended. The assertion of the majority that a mandatory condition precedent is contained in section 75-230, R. R. S. 1943, which protects carriers already in the field is not borne out by the language of the act and such an assertion made under the guise of a judicial interpretation of an act in which no basis can be found for it, is nothing more than an unlawful assumption of legislative or administrative power by the court. The majority opinion does not even refer to any statute which requires that the commission give any such recognition to carriers in the field and, in the absence of such a prohibitive statute, the power of the commission is exclusive and self-executing in determining the public interest. The policy or wisdom involved is legislative in character and cannot be reviewed here. Logic and reason, as well as the authorities generally, do not support the majority opinion. If the powers of the commission were viewed in the light of their over-all origin and purpose, the grant of the certificate by the commission would be sustained and there would be no occasion for the court to comment upon the harshness of the rule that it imposes. It is more than harsh. It not only destroys Edgar's business but it destroys all new competition forever. I submit that the order of this court in reversing the findings of the commission is arbitrary and unreasonable, and is not sustained by law or the fundamental principles of justice and right. In my opinion the commission acted within the scope of its powers upon evidence justifying the order which it made. I would affirm the order granting the certificate of convenience and necessity.

CHAPPELL, J., concurs in the dissent.

YEAGER, J. (In response to dissent)

As the writer of the majority opinion in this case I claim the right to respond to the dissenting opinion. I respond to it for the reason that, as I believe, it contains fallacies which if not pointed out would lead readers to a mistaken understanding of the true purport of the majority opinion in its exposition of the law as it is, which law neither the State Railway Commission nor this court may with propriety disregard or nullify.

I have no quarrel with the philosophical phases, as such, of the dissent, but I am stating only a truism recognizable and recognized by all profound students of American law and American government when I say that where in the legal examination of a controversy law and philosophy conflict, the law and not philosophy should prevail. This is a country whose government is of laws.

The provision of law which is basic in the creation and functioning of the State Railway Commission is Article IV, section 20, of the Constitution. It is, to the extent of importance in this case, as follows:

"* * * The powers and duties of such commission shall include the regulation of rates, service and general control of common carriers as the Legislature may provide by law. But, in the absence of specific legislation, the commission shall exercise the powers and perform the duties enumerated in this provision."

The dissent contains the following statement: "These powers are exclusive and self-executing except as the Legislature may implement them by statute." I find no real fault with this statement. I think however that the following carries more comprehensively the meaning of the provision: These powers are designed to be and remain self-executing unless and until the Legislature by action destroys them.

The Legislature did pursuant to the power granted to it by the provision itself destroy to the extent applicable

to the case at bar this self-executing power. It enacted section 75-230, R. R. S. 1943, as follows:

"Subject to section 75-237, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if it is found that the applicant is fit, willing and able properly to perform the service proposed, and to conform to the provisions of sections 75-222 to 75-250 and the requirements, rules and regulations of the State Railway Commission thereunder, and that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied."

A portion but not all of this provision has been quoted in the dissent. The last clause of it is not quoted. I think that this clause must be accorded much significance in the determination in this case. It is in specific terms a mandate to the State Railway Commission to deny an application for a certificate unless the facts disclose that the proposed service is or will be required by the present or future *public* convenience and necessity.

In any case where there is a factual dispute as to whether or not the issuance of a certificate will respond to the present or future *public* convenience and necessity the finding of the State Railway Commission and the issuance of a certificate should not be disturbed by this court unless it is abundantly clear that it is unreasonable and arbitrary or contrary to law.

There is no such factual dispute in this case. The record conclusively demonstrates that the certificate here *does not respond* to any requirement of present or future *public* convenience and necessity. It responds only to the *private* convenience of the appellee herein. The record makes it clear that the appellee had certain customers at the locations in question which he desired to continue to serve and also that the customers desired a continuance of his service, but the evidence discloses

affirmatively that in this connection no *public* convenience and necessity is involved.

This being true it appears to me that the unavoidable conclusion is that the issuance of the certificate by the State Railway Commission was violative of the mandate of the statute. It therefore becomes necessary, regardless of what may be said or thought of the harshness of the ruling, for this court to reverse the action of the State Railway Commission.

It is a prerogative of this court when such a question is presented to inquire into the power of the Legislature to act but it may not properly inquire into its wisdom.

The power of the Legislature in this instance is not brought into question. If therefore this legislation is harsh and unwise, correction and alleviation can properly come only from the Legislature.

REA HINES, APPELLEE, V. PURCY J. HINES, APPELLANT.
58 N. W. 2d 505

Filed May 15, 1953. No. 33294.

1. **Divorce.** A decree of divorce cannot be granted solely on the declarations, confessions, or admissions of the parties. There must be corroborative evidence of the facts necessary to be established as required by section 42-335, R. R. S. 1943.
2. ———. In determining the sufficiency of the evidence in a divorce case the degree of corroboration required necessarily relates itself to the facts of the particular case. But this does not eliminate the statutory requirement of corroboration of the essential facts.

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

William S. Padley, for appellant.

Smith Brothers, for appellee.

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

CARTER, J.

This is a suit for a divorce brought by Rea Hines against Purcy J. Hines. Defendant denied the allegations of the petition and filed a cross-petition praying that a divorce be granted to him. The trial court found for the plaintiff and granted her a divorce, alimony, and costs. Defendant appeals.

The parties were married at Grand Island, Nebraska, on May 11, 1951. Plaintiff was a resident of Kentucky at the time of the marriage, 55 years of age, and had been previously married. Defendant was a resident of Dawson County, Nebraska, 61 years of age, and had been married twice previously. Plaintiff alleges cruelty as grounds for divorce in that defendant refused to provide her with adequate funds, refused to take her to entertainments or introduce her to his neighbors and friends, refused to permit her to visit her relatives who lived nearby, and induced a nervous condition by his continual arguing and sulking over these matters. The defendant in his cross-petition alleges that plaintiff carried on a continual course of arguing and nagging, that she left the home in a rage on several occasions, and deported herself in public in such a manner as to embarrass defendant before his friends and neighbors.

Each party recites facts in support of his respective allegations. We fail to find any competent evidence in the record, however, to corroborate the allegations of cruelty by either.

The grounds for a divorce are statutory. It is provided by section 42-335, R. R. S. 1943, that no decree of divorce and of the nullity of a marriage shall be made solely on the declaration, confessions, or admissions of the parties, but the court shall, in all cases, require other satisfactory evidence of the facts alleged in the petition for that purpose. This statute means that corroborative evidence is required of the acts or conduct asserted as grounds for a divorce. Other witnesses were called and examined in the present case, but not one, nor all col-

lectively, supports the elements necessary to be established to entitle either to a divorce. A divorce case is tried de novo in this court and we are familiar with the rule that where the evidence is in irreconcilable conflict, this court will, in determining the weight of the evidence, consider the fact that the trial court saw and heard the witnesses and accepted one version of the facts over the other. Hild v. Hild, 135 Neb. 896, 284 N. W. 730; Killip v. Killip, 156 Neb. 573, 57 N. W. 2d 147. But this rule does not operate to eliminate the necessity for evidence corroborating the facts essential to the obtaining of a divorce.

The degree of corroboration required in a divorce suit necessarily relates itself to the facts of the particular case. But where there is no evidence which corroborates a statutory ground for divorce a case is not made and a divorce must be denied. Spray v. Spray, 156 Neb. 774, 57 N. W. 2d 926.

The record fails to disclose any evidence corroborating the allegations and testimony of either party that would entitle either to a divorce within the requirements of the controlling statute. The trial court therefore erred in granting a divorce to the plaintiff and in entering a decree for alimony and a division of the property.

The decree of the district court is reversed and the petition of plaintiff and the cross-petition of the defendant are dismissed.

REVERSED AND DISMISSED.

THE OMAHA NATIONAL BANK, EXECUTOR OF THE ESTATE OF JAMES ROBERT CAIN, DECEASED, APPELLEE, V. CARL W. JENSEN, TREASURER OF DOUGLAS COUNTY, NEBRASKA, APPELLANT.

58 N. W. 2d 582

Filed May 15, 1953. No. 33297.

1. **Corporations.** "Organize," or "organization," as used in refer-

ence to corporations, has a well-understood meaning, which is the election of officers, providing for the subscription and payment of the capital stock, the adoption of by-laws, and such other steps as are necessary to endow the legal entity with the capacity to transact the legitimate business for which it was created.

2. ———. Generally speaking, a corporation as either foreign or domestic is determined by the place of its origin, without reference to the residence of its stockholders or incorporators, or the place where its business is transacted.

3. **Statutes.** In case of doubt as to the meaning of a statute, resort may be had to the title as an aid to discover the legislative intent, but by no means to enlarge the scope of the statute so as to include a subject not fairly expressed in the body of the act.

4. **Evidence.** The court takes judicial notice of the contents of the journals of the houses of the Legislature.

5. **Corporations.** A domesticated foreign corporation, although becoming a body corporate in the state of domestication, nevertheless remains a foreign corporation as distinguished from a corporation organized under the laws of the state of domestication.

6. **Statutes.** That construction of a statute of doubtful meaning given it by those whose duty it is to enforce it, and which construction the Legislature has by its continued noninterference for a number of years acquiesced in, will be approved, unless as thus construed it contravenes some provision of the Constitution, or is clearly wrong.

7. ———. When the court of last resort has judicially construed a statute, the rule permitting recourse to contemporaneous construction of the statute by administrative or executive officials, charged with the enforcement of such statute, is inapplicable.

8. **Taxation.** Statutory provisions for the levy of a tax are imperative.

9. **Estoppel.** Public policy, to prevent loss to the state through the negligence of public officers, forbids the application of the doctrine of estoppel to the state, growing out of the conduct and representations of its officers.

10. **Taxation.** Taxation and the collection of taxes are strictly governmental activities as distinguished from private and proprietary activities, and the public as to such activities cannot be estopped.

11. **Corporations: Taxation.** Section 77-722, R. R. S. 1943, is the applicable statute for the valuation for taxation of the shares of stock of a foreign corporation, domesticated in this state under the provisions of section 21-1,150, R. S. 1943.

APPEAL from the district court for Douglas County: JACKSON B. CHASE, JUDGE. *Reversed and remanded with directions.*

Clarence S. Beck, Attorney General, *Bert L. Overcash,* and *Eugene F. Fitzgerald,* for appellant.

Flansburg & Flansburg and *Wells, Martin & Lane,* for appellee.

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

SIMMONS, C. J.

This is an action in equity to enjoin the collection of a tax on intangibles. The intangibles are stocks in domesticated foreign corporations, held by plaintiff as executor.

The action presents the question as to whether the stocks are to be valued for taxation under the provisions of section 77-706, R. R. S. 1943, relating to stocks "of corporations organized under the laws of this state" or under the provisions of section 77-722, R. R. S. 1943, relating to shares of stock of a "foreign corporation." The trial court enjoined the collection of the tax and ordered cancellation. Defendant appeals. We reverse the judgment of the trial court and remand with directions.

The plaintiff as the executor of an estate is the holder of the stocks that were assessed. The defendant is the county treasurer.

The stocks involved are those of four corporations, organized under the laws of Delaware, domesticated under the provisions of section 24-222, Comp. St. 1929, which as amended is section 21-1,150, R. S. 1943. The domestication occurred between January 13, 1930, and March 22, 1941. The tax involved was levied for the year 1951. The parties stipulated as to the testimony of witnesses. No witnesses were called. There is no particular dispute as to the testimony so stipulated.

Accordingly, we treat the stipulation as a stipulation of the facts so recited.

Plaintiff contends here that by domestication the corporations became corporations organized under the laws of this state. Defendant contends that for the purpose of the taxing statutes involved the corporations are foreign corporations. Plaintiff further contends that there has been a long-standing administrative and legislative construction of the statutes that sustains its position. Defendant contends that the statutes involved are clear and require no extrinsic aids to construction.

Section 77-706, R. R. S. 1943, provides: "The value of the shares of stock of corporations organized under the laws of this state shall be determined for the purpose of taxation by deducting from the actual value of the paid-up capital stock, surplus and undivided profits of such corporation available for stock dividends, the assessed value of the property of the corporation, both intangible and tangible, listed and taxed in this state and the actual value of the property of the corporation outside of this state. The corporation shall furnish the county assessor or State Tax Commissioner such proof of the value of its property outside of the state as they may require. The corporation shall pay the tax assessed upon its stock or shares, and shall have a lien thereon for the tax paid."

Section 77-722, R. R. S. 1943, provides: "If any foreign corporation is taxed in this state upon any tangible or intangible property, then the value of its gross shares of stock shall be ascertained by deducting from the actual value of the foreign corporation's paid-up capital stock, surplus and undivided profits, the assessed value of its property taxed in this state; and thereafter the taxing officials of counties in which shares of stock of any such foreign corporation may be owned, shall determine, in relation to such net value of the gross shares of stock, the value for assessment and taxation pur-

poses of any such individual shares of stock in the hands of the resident owners."

The valuation must be upon the stock either as stock "of corporations organized under the laws of this state" or as stock of a "foreign corporation." There is no other classification so far as the tax here involved is concerned.

The term organize is defined as follows: "'Organize,' or 'organization,' as used in reference to corporations, has a well understood meaning, which is the election of officers, providing for the subscription and payment of the capital stock, the adoption of by-laws, and such other steps as are necessary to endow the legal entity with the capacity to transact the legitimate business for which it was created." 18 C. J. S., Corporations, § 63, p. 448. See, also, 13 Am. Jur., Corporations, § 42, p. 190. We seem to have considered organization of a corporation in this sense in Abbott v. Omaha Smelting & R. Co., 4 Neb. 416, and in Capps v. Hastings Prospecting Co., 40 Neb. 470, 58 N. W. 956, 42 Am. S. R. 677, 24 L. R. A. 259.

A foreign corporation is defined as: "Generally speaking, a corporation as either foreign or domestic is determined by the place of its origin, without reference to the residence of its stockholders or incorporators, or the place where its business is transacted." 20 C. J. S., Corporations, § 1784, p. 10. See, also, 23 Am. Jur., Foreign Corporations, § 3, p. 18.

Plaintiff contends that the corporations, whose stocks are involved here, meet the test of "corporations organized under the laws of this state" because of their compliance with the domestication statute.

The domestication statute was originally passed in 1889. See Laws 1889, c. 42, p. 407. Its title was "AN ACT to enable foreign corporations to become domestic corporations of this state." It consisted of one principal section as follows: "That any corporation organized under the laws of any other state or states, territory or

territories, which has filed, or may hereafter file with the secretary of state of this state a true copy of its charter or articles of association, shall on filing with the secretary of state a certified copy of a resolution adopted by its board of directors, accepting the provisions of this act, be and become a body corporate of this state."

It provided that the corporation "accepting the provisions of this act, be and become a body corporate of this state." The Legislature did not undertake to define the powers conferred or duties assumed by domestication. By a second section it repealed "All acts or parts of acts inconsistent" with it without reference to any such acts. It declared that an emergency existed and that the act should be in effect from and after its passage. What did the Legislature mean by "body corporate of this state"? We are asked to refer to this title as an aid to determine the legislative intent. The rule is: "In case of doubt as to the meaning of a statute, resort may be had to the title as an aid to discover the legislative intent, but by no means to enlarge the scope of the statute so as to include a subject not fairly expressed in the body of the act." State ex rel. Marrow v. City of Lincoln, 101 Neb. 57, 162 N. W. 138.

The act itself suggests no answer to the meaning of either "domestic" corporations or "body corporate."

The rule is: "The court takes judicial notice of the contents of the journals of the houses of the legislature." Day v. Walker, 124 Neb. 500, 247 N. W. 350. See, also, Elmen v. State Board of Equalization and Assessment, 120 Neb. 141, 231 N. W. 772; Moeller, McPherrin & Judd v. Smith, 127 Neb. 424, 255 N. W. 551.

The Nebraska House Journal of 1889 shows that the act was introduced as a bill on March 13, 1889 (p. 1545), and passed the House on March 15, 1889 (p. 1629). It was passed by the Senate and returned to the House on March 18, 1889 (p. 1670), and was approved and signed by the Governor on March 19, 1889 (p. 1684). The House

Journal contains one suggestion as to the purpose of the bill. A member voting no offered the following explanation of his vote: "Existing law relative to the incorporation of railroads in this state having been well settled by the decision of the supreme court and this bill being an original measure, yet repealing all acts and parts of acts inconsistent therewith, I regard this bill dangerous in its effects, unwise legislation, and I vote, no." Nebraska House Journal 1889, p. 1630.

The Constitution then provided as it does now: "No railroad corporation organized under the laws of any other state, or of the United States and doing business in this State shall be entitled to exercise the right of eminent domain or have power to acquire the right of way, or real estate for depot or other uses, until it shall have become a body corporate pursuant to and in accordance with the laws of this state." Art. X, § 8, Constitution.

State v. Scott, 22 Neb. 628, 36 N. W. 121, was decided in 1888. We there applied the Constitution to a railroad corporation "organized under the laws of any other state" saying: "Our laws are liberal in promoting the organization of railroad companies and the construction of railways in the state. But such corporations must be under our own laws—the creature of our statutes and not of the laws of other states." Trester v. Missouri P. Ry. Co., 23 Neb. 242, 36 N. W. 502, was decided also in 1888. It involved, as did the Scott case, an attempt of a foreign railroad corporation to exercise the right of eminent domain. We there held: "There is no provision of the constitution, nor any statutory enactment thereunder, authorizing corporations, other than those created under the laws of this state, to exercise the right of eminent domain, or to acquire real estate for the purpose of right of way." We followed the Scott case and said: "If defendant desired to exercise the right of eminent domain, it could do it in one way only, and that would be by

becoming 'a body corporate pursuant to and in accordance with the laws of this state.' "

State v. Chicago, B. & Q. R. R. Co., 25 Neb. 156, 41 N. W. 125, 2 L. R. A. 564, was decided also in 1888. That case involved the power of a railroad corporation to exercise the right of eminent domain. There a foreign corporation had consolidated with a domestic corporation "that is one organized under the laws of this state." At that time the statute, set out in the opinion, authorized such a consolidation, although it appears that the consolidation occurred prior to the enactment of the statute. See Rogers v. Cosgrave, 98 Neb. 608, 153 N. W. 569. The effect of that opinion is that such a consolidated corporation was a domestic corporation and as such a "body corporate" within the meaning of the constitutional provisions. It did not hold that all "bodies corporate" were corporations organized under the laws of this state.

In Vaughan v. Nashville, C. & St. L. Ry., 192 Ky. 137, 232 S. W. 411, 18 A. L. R. 124, the Supreme Court of Kentucky had before it a claim of a domesticated railroad corporation that it was not required to pay an organization tax levied against every corporation which may be incorporated under the laws of the state. There the constitutional provision is quite similar to ours and contained the language "until it shall have become a body-corporate pursuant to and in accord with the laws of this Commonwealth." There the domestication statute applied to foreign railroads which could become organized as a corporation under the laws of that state and which "it" may do by filing articles of incorporation in certain state offices. Ours requires the filing of a true copy of "its" charter or articles of association. The court then held: "All the references to a foreign corporation in each of the sections, and to what 'it' must do, and to the powers which 'it' will receive thereafter, can have no meaning unless it was the intention to recognize 'it' as a continuing foreign corporation. It must, further-

more, not be overlooked that the section of the Constitution and of the statutes now under consideration propose only to confer upon the corporation the limited powers above referred to. They do not pretend to confer all of the corporate powers usually given to and exercised by newly created corporations."

Williams v. Continental Const. Corp., 168 Okl. 510, 34 P. 2d 254, presented the contention of a foreign corporation, licensed to do business in that state, that it had the power of eminent domain. The constitutional provision is substantially like ours including the language "until it shall have become a body corporate pursuant to or (ours is "and") in accordance with the laws of this state." The court held: "* * * inasmuch as the corporation had complied with every provision of the Constitution and statutes relating to foreign corporations, we are of the opinion that plaintiff corporation thereby became a body corporate pursuant to and in accordance with the laws of this state, * * *."

The above decisions clearly hold that a domesticated foreign corporation, although becoming a body corporate in the state of domestication, nevertheless remains a foreign corporation as distinguished from a corporation organized under the laws of the state of domestication. The Legislature in the domestication act used the constitutional language "become a body corporate" and did not use the language "organized under the laws of this state."

The plaintiff calls our attention to the constitutional provision and State v. Chicago, B. & Q. R. R. Co., *supra*, and the consolidation statute therein set out, and argues that the intent of the domestication act was to extend the rights of consolidated railroad corporations to corporations generally. Had that been the purpose the obvious approach would have been to enact a general statute along the lines of the consolidation statute.

The above analysis of the act leads to the conclusion that an immediate purpose of the domestication act was

to make it easier for a foreign railroad corporation to meet the constitutional requirements as to the power of eminent domain and other powers named in that provision. Whether or not it did or could have accomplished that purpose does not appear to have been tested. We are not here required to determine that question.

It is common knowledge that the domestication act has not been so limited to foreign railroad corporations in its application but rather has been recognized as a provision applicable to foreign corporations generally.

In the 1913 revision the word "That," being the first word of the first sentence of the 1889 act, was omitted and the word "act" was changed to "article." § 586, Rev. St. 1913. It so appears in section 24-222, Comp. St. 1929, and was the provision under which the corporations domesticated whose stocks are here involved. We do not deem the 1913 revision change material here, for the statute clearly continues the legislative recognition that the domesticated corporation is a foreign corporation.

In 1941 the Legislature adopted the general corporation laws of the state. Laws 1941, c. 41, p. 158. In that act it repealed section 24-222, Comp. St. 1929, and adopted in the act new provisions which are now sections 21-1,150, 21-1,151, and 21-1,152, R. S. 1943. Although these provisions were adopted subsequent to the domestication of the corporations whose stocks are involved here, plaintiff states that these amendments became applicable to these corporations after the passage of the 1941 act.

Section 24-222, Comp. St. 1929, became, as amended, section 21-1,150, R. S. 1943. There were certain language changes not material here. The new section changed the "accepting the provisions of this article" to "accepting and agreeing to be bound by the provisions of this act with respect to its property and business operations within the state of Nebraska." This is a clear legislative recognition of the prior status of the domesti-

cated corporations as a foreign corporation and a recognition of the continuation of that status. It is a more definite statement of the obligations that the foreign corporation assumes by domestication.

Section 21-1,151, R. S. 1943, provides: "Any foreign corporation which has so domesticated, may cease to be a domesticated corporation by filing with the Secretary of State a certified copy of a resolution adopted by its board of directors, renouncing its domestication and withdrawing its acceptance and agreement aforesaid." This appears to be a new provision. It gives a "foreign corporation" which has domesticated in this state the right to withdraw and resume its status, so far as this state is concerned, as a foreign corporation not domesticated here. It recognizes the foreign corporation, as such, having rights by reason of domestication, which it may renounce. It obviously would have no application to a corporation organized under the laws of this state.

Section 21-1,152, R. S. 1943, provides: "If a foreign corporation which has domesticated under the provisions of section 21-1,150 surrenders its foreign corporate charter, and files, records and publishes notice of amended articles of incorporation in the manner, time and places required by sections 21-105, 21-106, 21-109, 21-148 and 21-1,147, such corporation shall thereupon become and be a domestic corporation organized under this act."

Section 21-101, R. S. 1943, defines "domestic corporation," as used in the act to mean "a corporation organized under the laws of this state" and "foreign corporation" to include "every corporation not organized under the laws of this state." Reading section 21-1,152, R. S. 1943, in the light of these definitions, it provides that a domesticated foreign corporation, by compliance with certain provisions which includes surrendering "its foreign corporate charter," may become a corporation organized under the laws of this state. Here again is a clear legislative recognition of the fact that a domesti-

cated foreign corporation remains a foreign corporation with a domesticated status in Nebraska.

The Legislature here used the identical language of section 77-706, R. R. S. 1943, to wit—"organized under the laws of this state." There is no contention that the corporations whose stocks are here involved have complied or attempted to comply with the provisions of section 21-1,152, R. S. 1943, so as to become such domestic corporations. Consistent with this analysis of the statute is In re Estate of Sautter, 142 Neb. 42, 5 N. W. 2d 263. We there held: "A foreign corporation which complies with section 24-222, Comp. St. 1929, thereby becomes a body corporate of this state, and, while such corporation may become a domestic corporation in many respects and treated as such for local purposes, in other respects it retains the character of a foreign corporation, and its status within the state is not equivalent to that which it would have had, were the same created a separate corporation therein.

"* * * By such domestication, it does not become a domestic corporation, with the same legal rights, powers and advantages in all respects as a domestic corporation."

In In re Estate of Halstead, 154 Neb. 31, 46 N. W. 2d 779, we cited the Sautter case and pointed out that the devisees and legatees therein named were all "foreign corporations * * * as distinguished from Nebraska corporations." The 1941 amendments do not change the above construction given in the Sautter case. They do not change the clear legislative intent evident from the beginning of the 1889 domestication act that a domesticated foreign corporation remains a foreign corporation. They merely supplement existing provisions so as to meet the requirements of the extensive use of corporations in the conduct of business in the state. The conclusion is inescapable that based on these acts the stocks here involved are to be valued for the purpose of taxation under the provisions of section 77-722, R. R. S. 1943, and not section 77-706, R. R. S. 1943.

Plaintiff, however, contends that there exists within the taxing statutes themselves a demonstrated legislative intent and determination that negatives the above conclusion.

The intangible tax act was passed in 1921. Laws 1921, c. 133, art. VIII, § 1, p. 582. It provided for the listing and taxation of corporate shares of stock and contained a proviso, which as amended is now section 77-706, R. R. S. 1943, providing a method for determining the value of shares of stock of corporations organized under the laws of this state, and that "such" corporations should pay the tax assessed upon its stock or shares.

The 1921 act also contained a provision requiring certain corporations organized under the laws of any other state to file with the Tax Commissioner the names and addresses of Nebraska residents who owned any of its stocks. Laws 1921, c. 133, art. VIII, § 3, p. 584. The 1925 Legislature amended that provision. Laws 1925, c. 173, p. 454. The title of the amending act is: "AN ACT to amend Section 5886, Compiled Statutes of Nebraska for 1922, relating to revenue; providing for the filing of statements by foreign corporations with the tax commissioner; defining the method of ascertaining the value of stock of such corporations for purposes of assessment and taxation; to repeal said original section; and to declare an emergency." The body of the act is: "Every corporation organized under the laws of any other state or country transacting business in Nebraska or offering for sale in Nebraska any of its securities, *and not having complied with the requirements of the laws of Nebraska providing for the domestication of foreign corporations,* shall, on or before the fifteenth day of April of each year, file a statement with the tax commissioner, giving the name and post office address of each person residing in Nebraska owning any of such stock or shares, together with the number of shares held by each person and the par and market value as of April first of that year. If any foreign corporation is

taxed in this state upon any tangible or intangible property, then the value of its gross shares of stock shall be ascertained by deducting from the actual value of such foreign corporation's paid up capital stock, surplus and undivided profits, the assessed value of its property taxed in this state, and thereafter the taxing officials of counties in which shares of stock of any such foreign corporation may be owned shall determine, in relation to such net value of the gross shares of stock, the value for assessment and taxation purposes of any such individual shares of stock in the hands of the resident owners."

The italicized language in the first sentence is the new provision inserted in the former provision. This is now, as amended, section 77-721, R. R. S. 1943. The second sentence above quoted is new and is now section 77-722, R. R. S. 1943.

Plaintiff contends here that the italicized amendment shows a legislative intent to exclude the domesticated foreign corporation stock from the provisions of section 77-722, R. R. S. 1943, and of necessity shows an intent that the stock should be valued for taxation under section 77-706, R. R. S. 1943, because there the corporation and not the owner is assessed, and hence a list of owners would be of no value to the Tax Commissioner whereas such a list would be of value under section 77-722, R. R. S. 1943, where the owner is assessed. We find nothing in the act, or in the history of its passage, to sustain such a conclusion. The reason for the insertion of the exception in what is now section 77-721, R. R. S. 1943, is not disclosed or suggested.

There is nothing in the title of the act to indicate a purpose to make such an exception. The "foreign corporations" mentioned in the title clearly refers to corporations "organized under the laws of any other state or country." Just as clearly the Legislature in the act recognized that the domesticated corporation was within the class of a foreign corporation. Just as clearly that

exception applies to the statement which the act required of those foreign corporations named in the act. Just as clearly the "any foreign corporation" referred to in what is now section 77-722, R. R. S. 1943, includes the domesticated corporation. The exception contained in section 77-721, R. R. S. 1943, is not in section 77-722, R. R. S. 1943, either as it exists now or as it was enacted. The first sentence, now section 77-721, R. R. S. 1943, applies to foreign corporations "transacting business in Nebraska or offering for sale in Nebraska any of its securities." The second sentence, now section 77-722, R. R. S. 1943, applies to "any" foreign corporation that is taxed in this state upon any tangible or intangible property. The "stock of any such foreign corporation," relates obviously to the latter classification of foreign corporations. It is in the same sentence with it and in the sentence which provides for the deduction of "the assessed value of its property taxed in this state."

At the time the original bill, which is now sections 77-721 and 77-722, R. R. S. 1943, was introduced there was pending in this court the case of Bute v. Hamilton County, 113 Neb. 230, 202 N. W. 616. The case was argued February 10, 1925. On February 19, 1925, the legislative committee reported a substitute bill, and the committee bill was passed in the House on March 12, 1925. (House Journal 1925, pp. 625, 895.) In the meantime, on March 6, 1925, our opinion in the Bute case was filed wherein we held: "Shares of stock in a foreign corporation, owned and in possession of a resident of this state, are taxable under section 5820, Comp. St. 1922, and not under section 5884, Comp. St., 1922, which latter provides for taxation of domestic corporations only." Section 5820, Comp. St. 1922, mentioned above, is now section 77-201, R. R. S. 1943, and section 77-112, R. R. S. 1943. Section 5884, Comp. St. 1922, mentioned above, is now section 77-706, R. R. S. 1943. The words "domestic corporations" as used in the above quote

are related in the opinion to mean "organized under the laws of this state."

To accept the argument of plaintiff we would have to infer that the Legislature by providing that the domesticated foreign corporation was not required to report the names of its resident stockholders thereby intended to except the shares of stock of such corporations from the provisions that it was then enacting applicable to "any foreign corporation."

But we could not stop there. To reach the conclusion for which the plaintiff contends we would also be required to put an inference on an inference, and hold that the Legislature intended to require that the stock of a domesticated foreign corporation was to be valued for taxation under what is now section 77-706, R. R. S. 1943. We had then clearly held in the Bute case that that provision applied only to corporations organized under the laws of this state. An amendment of section 77-706, R. R. S. 1943, would be required to make it applicable to the stocks of domesticated foreign corporations. Article III, section 14, of the Constitution provides: "* * * no law shall be amended unless the new act contain the section or sections as amended and the section or sections so amended shall be repealed." The 1925 act makes no reference to what is now section 77-706, R. R. S. 1943, but limited its amending and repealing provisions to what is now section 77-721, R. R. S. 1943. Obviously that inference cannot be accepted. There would remain an alternative inference on an inference that the Legislature intended to exempt domesticated foreign corporations' stock from all taxation. But that inference likewise cannot be accepted because of the constitutional provision that "No property shall be exempt from taxation except as provided in this section." Art. VIII, § 2, Constitution. Plaintiff does not contend that the Legislature intended this latter result.

It is agreed here that since the enactment of the intangible tax law domesticated foreign corporations have

filed returns upon their capital stock on forms used by domestic corporations and that generally owners of stock of domesticated foreign corporations have neither returned such shares nor paid any intangible tax upon their shares; that for at least 20 years prior to 1951 the county assessor's office of Douglas County considered such shares to be free from the intangible tax in the hands of the owners and that such stock was not to be assessed against the owner; and that since 1926 the county assessor's office of Lancaster County had a comparable view of the law and acted accordingly.

There appears to have been doubt in the minds of the taxing officials on that question. In 1930, the Attorney General advised a county attorney that in his opinion the shares of stock of a domesticated foreign corporation were taxable as shares of stock in a corporation organized under the laws of this state. He went further and stated that "if" regarded as a foreign corporation, its stocks were to be valued under the provisions of chapter 173, being the 1925 act, now section 77-722, R. R. S. 1943, and that in any event they were taxable as intangible property. The last conclusion was obviously correct. The first conclusion was erroneous. If not demonstrated as error at that time, the error was clearly apparent when the 1941 amendments were enacted and the Sautter opinion filed. This rather inconclusive opinion by the Attorney General was reported in the Report of the Attorney General, 1929-1930, p. 91, and probably gave support to the general administrative construction of the act.

Also in 1930, the Attorney General rendered an opinion holding that a domesticated foreign corporation was a "domestic" corporation and required to pay an occupation tax on the total amount of its paid-up capital stock. He based his opinion on the language of the domestication act. This opinion was reported in the Report of the Attorney General, 1929-1930, pp. 197, 198. The opinion does not cite the occupation tax statute

but the parties agree that the reference was to what is now section 21-303, R. S. Supp., 1951, which now includes an amendment of 1947.

The plaintiff argues here that the 1947 amendment confirmed the interpretation of the Attorney General. Even if that be so, it does not follow that it confirmed the reason for the conclusion reached. The title of the 1947 act is: "* * * to provide for the amount of occupation tax fees for corporations whether incorporated under the laws of this state or incorporated under the laws of any other state when such corporations shall have domesticated in this state; to provide how the par value of stock, issued without par value, of corporations organized under the laws of any other state and domesticated in this state shall be determined for such occupation tax purposes; * * *." Laws 1947, c. 55, p. 185. Prior to the amendment the beginning of section 21-303, R. S. 1943, provided that it shall be the duty of "every corporation, for profit incorporated under the laws of this state, to pay * * *." The Legislature inserted "whether" before "incorporated" and added "or incorporated under the laws of any other state, when such corporations shall have domesticated in this state." This amendment would have been unnecessary if the Legislature had considered that a domesticated corporation was a corporation organized under the laws of this state as plaintiff contends. But the Legislature went further and attached a proviso which reads as follows: "Provided, for the purpose of determining the tax, the stock of corporations incorporated under the laws of any other state, which corporations shall have domesticated in this state, and which stock is without par value, shall be deemed to have a par value of an amount equal to the amount paid in as capital for such shares at the time of issuance thereof." Here again is a legislative recognition of the fact that a domesticated foreign corporation is not a corporation organized under the laws of this state. It illustrates the necessity for that distinc-

tion. It recognizes that domesticated foreign corporations may have stock which is without par value. But the Constitution provides "all stock shall have a face par value." Art. XII, § 6, Constitution. That provision, applicable to corporations organized under the laws of this state, would prevent a foreign corporation whose "stock is without par value" becoming such a corporation. This is clear from the provision of Article XII, section 1, Constitution, that "Foreign corporations transacting or seeking to transact business in this state shall be subject, under general law, to regulation, supervision and general control, and shall not be given greater rights or privileges than are given domestic corporations of a similar character." We held in State ex rel. Beatrice Creamery Co. v. Marsh, 119 Neb. 197, 227 N. W. 926, that this provision refers to the granting of franchises and corporate privileges.

We refer back now to the provisions of section 21-1,152, R. S. 1943, which sets out what shall be done by a domesticated foreign corporation to become a corporation organized under the laws of this state. It is required, among other things, to file, record, and publish amended articles of incorporation as required by, among others, section 21-105, R. S. 1943. That section (in clause 8) calls for "the par value of each of such shares."

As showing a similar legislative intent it may be well here to refer to chapter 118, Laws 1947, page 349, which provided a method for computation of fees for filing articles of incorporation of a foreign corporation having stock without par value that domesticates in this state.

In 1942 the Tax Commissioner submitted a request for an opinion to the Attorney General on the question as to whether the individual owners of stock in a domesticated foreign corporation were required to list the stock as class B intangibles. See section 77-701, R. R. S. 1943. The Attorney General referred to section 77-701, Comp. St. 1929 (now as amended sections 77-701 to 77-707, R. R. S. 1943), as containing a formula for determining the

value of the shares of stock of a domestic corporation. He then referred to the 1941 amendments, now sections 21-1,150, 21-1,151, and 21-1,152, R. S. 1943; ruled that those amendments made no change in the status of the domesticated corporation; that it was still to be treated as a domestic corporation; and "may still, we believe, pay the taxes upon its shares of stock at the source." That opinion was dated March 2, 1942. See Report of Attorney General, 1939-1942, p. 199. Our opinion in In re Estate of Sautter, *supra,* was filed July 31, 1942. It does not seem to have had any impact upon the opinion of the Attorney General, nor the Tax Commissioner. It does not appear that thereafter any further inquiry was made into the matter until 1951, when on March 9, the Attorney General, in an opinion in response to a request of the Tax Commissioner, ruled that the assessment of shares of stock of a foreign corporation domesticated in Nebraska were not to be determined in the statutory manner prescribed for the shares of stock of a domestic corporation. Report of Attorney General, 1951-1952, p. 85.

The Tax Commissioner under section 77-305, R. R. S 1943, furnished approved forms for the listing and assessment of personal property. Prior to 1952, these forms provided one entry for a return of the "Value of Capital Stock Nebraska and Domesticated Corporations." A corporation return form was to the same effect. Just when these forms were first approved does not appear. They are submitted to show administrative application of the law to have been in accord with the contention of the plaintiff.

This brings us to plaintiff's contention that if its interpretation of the domestication statute is not clear and conclusive, then its construction is a reasonable one, but if the act is also capable of the construction put on it by defendant, then an ambiguity results which has been set at rest by long-standing administrative construction

and by legislative acts confirming and approving such interpretation.

Plaintiff here relies upon such cases as State ex rel. Village of Dakota City v. Bryan, 112 Neb. 692, 200 N. W. 870, followed in Chicago & N. W. Ry. Co. v. Bauman, 132 Neb. 67, 271 N. W. 256, wherein we held: "That construction of a statute of doubtful meaning given it by those whose duty it is to enforce it, and which construction the legislature has by its continued noninterference for a number of years acquiesced in, will be approved, unless as thus construed it contravenes some provision of the Constitution, or is clearly wrong."

Properly construed the domestication statute from the beginning recognized that the domesticated foreign corporation remained a foreign corporation. Whatever lack of definiteness there was in the original act was set at rest by the 1941 amendments modifying and supplementing the original act and by our opinion in In re Estate of Sautter, *supra.*

We have examined and analyzed herein the other statutes which plaintiff contends support its theory of legislative sanction. We find neither legislative noninterference nor legislative confirmation of the administrative construction. The legislative acts and judicial interpretation do not sustain but rather are directly contrary to plaintiff's contentions. They demonstrate that the administrative construction before the 1951 opinion of the Attorney General is "clearly wrong."

In Ehlers v. Farmers Mutual Ins. Co., 130 Neb. 368, 264 N. W. 894, we said in the body of the opinion: "* * * construction of a statute by an administrative or executive department of the state may be resorted to as an aid to the court in determining its meaning, but only where the court of last resort of the state has not previously interpreted the statute. After the court of last resort has placed an interpretation thereon, it is unthinkable that its ruling should be overturned by a construction placed thereon by an administrative or execu-

tive body. If such were the rule, then the decision of a court of last resort might, in effect, be overruled and overturned by showing that an administrative or executive department, charged with the administration of a statute, had previously given it a different construction." We there stated the rule: "When the court of last resort has judicially construed a statute, the rule permitting recourse to contemporaneous construction of the statute by administrative or executive officials, charged with the enforcement of such statute, is inapplicable." We followed this decision in City of Lincoln v. First Nat. Bank, 146 Neb. 221, 19 N. W. 2d 156. Considering our decision in In re Estate of Sautter, *supra,* the above rule also bars consideration of the administrative construction as in anywise controlling here.

It is stipulated that foreign corporations have domesticated in this state since the enactment of the intangible tax law; that the interpretation of the statutes that the shares of stock in such domesticated corporations are not taxable here in the hands of owners has been advertised by brokers, and has been an inducement to the purchase of such stocks; that purchasers have relied thereon; and that a holding that such stock is to be returned for taxation by the owners and subject to the intangible tax to be paid by the owners will reduce the market value of the stock with resulting damage to such owners. This is urged here as a basis for a holding in favor of plaintiff.

The above seems to be an argument that the state should be estopped to enforce the tax laws because of the error of administrative officials in construing the law.

The imperatives of a tax law cannot be set aside because of hardships on a taxpayer. We have held: "Statutory provisions for the levy of a tax are imperative." Howard v. Jensen, 117 Neb. 102, 219 N. W. 811.

We have held: " 'Public policy, to prevent loss to the state through the negligence of public officers, forbids

the application of the doctrine of estoppel to the state, growing out of the conduct and representations of its officers.' People v. Brown, 67 Ill. 435." Volker v. McDonald, 120 Neb. 508, 233 N. W. 890, 72 A. L. R. 1267.

We followed this rule in Goble v. Zolot, 144 Neb. 70, 12 N. W. 2d 311. There the question was one of classification of property for taxation. Was it personal property or a part of the real estate as fixtures? There it was claimed that the county board had advised that it considered the property to be a part of the real estate. We held it to be personal property. There we held: "Taxation and the collection of taxes are strictly governmental activities as distinguished from private and proprietary activities, and the public as to such activities cannot be estopped."

The parties here are in agreement that the stocks here involved are to be valued for taxation either under section 77-706, R. R. S. 1943, or under section 77-722, R. R. S. 1943. We conclude that they are to be valued for the purpose of taxation under the provisions of section 77-722, R. R. S. 1943. The trial court erred in decreeing otherwise.

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

REVERSED AND REMANDED WITH DIRECTIONS.

CARTER, J., dissenting.

This case involves the question as to the proper method of taxing the stock of Delaware corporations which domesticated in this state prior to August 24, 1941. The specific issue is whether section 77-706, R. R. S. 1943, or section 77-722, R. R. S. 1943, controls the result. If the former section is applicable the corporation is required to pay the tax assessed upon its stock for the owners thereof; if the latter is controlling, the tax is required to be paid by the resident owners.

The intangible tax law was enacted in 1921 and so far as applicable here it provided: "Moneys, gross

credits, including corporation shares or stocks, * * * shall be taxed on the basis of twenty-five per cent of the mill rate levied upon tangible property * * *. Such corporation shall pay the tax assessed upon its stock or shares and shall have a lien thereon for the same, * * *." Laws 1921, c. 133, art. VIII, § 1, p. 582. It was clearly the intention of this act that all corporate stock, whether that of a foreign corporation, a domesticated foreign corporation, or a domestic corporation, was to be taxed under the act. The foregoing statute, except for the amendment of 1925, remains unchanged insofar as the issues in the present case are concerned. Since its adoption foreign corporations which have domesticated under the laws of this state have been taxed in the same manner as domestic corporations under this act, which is now section 77-706, R. R. S. 1943.

In 1925 (Laws 1925, c. 173, § 1, p. 454) the Legislature enacted an amendment providing for the filing of statements by foreign corporations with the Tax Commissioner which in part provided: "Every corporation organized under the laws of any other state * * *, and not having complied with the requirements of the laws of Nebraska providing for the domestication of foreign corporations, shall, * * * file a statement with the tax commissioner, * * *." This portion of the amendment now appears as section 77-721, R. R. S. 1943. The only other sentence in the 1925 amendatory statute provides the manner of valuing such stock under the intangible tax law. Such sentence now appears as section 77-722, R. R. S. 1943. I submit that the exception contained in the first sentence of the 1925 act (section 77-721, R. R. S. 1943) excluding corporations organized under the laws of any other state *"not having complied with the requirements of the laws of Nebraska providing for the domestication of foreign corporations,"* applies to the whole paragraph in which it is contained in the 1925 act and that it does not lose its exclusionary characteristics merely because the Statute Commission saw fit to break

it up into two sections (sections 77-721 and 77-722, R. R. S. 1943) in the 1943 revision. The exclusionary provision inferentially applies to section 77-722, R. R. S. 1943, just as it expressly does to section 77-721, R. R. S. 1943. Unless it has this meaning it has no meaning at all. It is a familiar rule of statutory construction that no sentence, clause, or word should be rejected as meaningless or superfluous if it can be avoided. Only one meaning can be gleaned from the exclusionary language in the 1925 act,—that foreign corporations which have domesticated under the laws of Nebraska are not within the 1925 amendatory act and were intended by the Legislature to be treated the same as domestic corporations under the intangible tax law. An examination of the majority opinion on this point is sufficient to establish the validity of this contention. With reference to this exclusionary provision in the 1925 act the majority opinion says: "The reason for the insertion of the exception in what is now section 77-721, R. R. S. 1943, is not disclosed or suggested." By an arbitrary refusal to give the exception the one meaning that it has, the fundamental rule of construction referred to is heedlessly ignored. I submit that the generally accepted rules of statutory construction apply in all applicable cases. To make use of them in one case and to ignore them in another constitutes them a rule of man and not of law and gives credence to the false assertion that the law is what the Supreme Court says it is.

But for the purposes of this dissent I shall assume that there is grave doubt that the Legislature intended the exception to apply to both sentences in the 1925 act. From 1921 to 1951, a matter of 30 years, such has been the construction placed on it. An examination of the stipulation upon which this case was tried reveals the following facts which were agreed to: That, since the enactment of the intangible tax law in 1921, domesticated foreign corporations have filed returns for intangible tax upon their stock on the same forms used

by domestic corporations and that the owners of such stock have never returned it for taxation or paid any intangible tax thereon. That this method of handling by the taxing authorities has been specifically approved by opinions of the Attorney General under dates of April 4, 1930, and March 2, 1942, and that no opinion to the contrary was ever issued by such officer until March 9, 1951. That on November 25, 1930, the Attorney General ruled in part with reference to the corporation occupation tax statute as follows: "However in the enacting clause of Section 479 it is provided that the foreign corporation upon compliance with the provisions of said Section 479 shall be and become a body corporate of this state. This language appears to us to be a plain, direct and unambiguous declaration that foreign corporations so complying with Section 479 are domestic corporations required to pay an occupation tax on the total amount of its paid-up capital stock as definitely ruled in Beatrice Creamery Co. v. Marsh, 227 N. W. 926, and since affirmed without opinion by the Supreme Court of the United States." Pursuant to this opinion domesticated foreign corporations have been required to pay an annual occupation tax on their entire paid-up capital stock as do domestic corporations, instead of on that portion of the capital of the company employed in the state as paid by nondomesticated foreign corporations. These provisions were carried forward into the act as amended in 1947. Laws 1947, c. 55, § 1, p. 185. It is also stipulated that the interpretation of the intangible tax law to the effect that the shares of stock of such domesticated foreign corporations are not taxable in the hands of the owners has been made public through advertisements and through brokers in making sales of stock, and has been an inducement to the purchase thereof by investors with the understanding and belief that such stock is not taxable in the hands of the owners. It is likewise stipulated that a present holding that such stock is taxable in the hands of owners would reduce

the market value of such stock and work a resulting damage and injury to the owners thereof.

In addition to the foregoing stipulated facts I point out that in 1941 the Legislature enacted a new general corporation law in this state in which a domestic corporation is defined as a corporation organized under the laws of this state. Laws 1941, c. 41, p. 158; C. 21, a. 1, R. S. 1943. It defines a foreign corporation as including every corporation not organized under the laws of this state. § 21-101, R. S. 1943. Section 21-1,150, R. S. 1943, provides the method by which a corporation organized under the laws of another state shall become and be a body corporate in this state. Section 21-1,156, R. S. 1943, provides that all corporations now organized under articles 1, 2, or 3, of Chapter 24, Comp. St. 1929, shall operate under and be subject to the provisions of this act; provided, that no rights, privileges, and immunities vested or accrued by and under prior statutes and no duties, restrictions, liabilities, and penalties imposed or required by and under such statutes shall be impaired, diminished, or affected thereby. Any corporation organized under the laws of any other state which has domesticated in this state is within the purview of this saving clause, it being a corporation organized under Chapter 24, article 2, Comp. St. 1929. Instead of supporting the position of the majority it shows clearly the intent of the Legislature when it placed this saving clause in the act to continue, rather than change, the interpretation which had been placed upon the intangible tax act for 20 years prior thereto. It is strong evidence that the Legislature, after 20 years of operation of the act, intended that it should continue to be administered in the future as it had in the past. And it so continued to be administered until this suit was commenced 10 years later.

We have many cases handed down by this court where the administrative construction of a statute for a long period of time has been adhered to, particularly where

property rights have been acquired on the basis of such construction. I shall cite only a few.

In Douglas County v. Vinsonhaler, 82 Neb. 810, 118 N. W. 1058, we said: "It is conceded that the statute of 1877 has been construed by the administrative officers, whose duty it was to enforce the same, so as not to give a county judge the right to charge a fee for performing a marriage ceremony, or, at least, so as not to require any compensation which such county judge may have received for such performance of that ceremony, as the fees of his office, to be accounted for under the statute. It is one of the principles governing the interpretation and construction of statutes that, where the meaning of a statute is dubious, long usage is a just medium by which to expound it. * * * We think the operation of such a rule is just and salutary; and this court has gone so far as to hold that a construction so made will in some cases be regarded as adopted by the legislature, although the language of the statute would indicate a different meaning."

In State ex rel. Village of Dakota City v. Bryan, 112 Neb. 692, 200 N. W. 870, we said: "Section 5874 was enacted in 1907 as part of an entire act, and remained without change until 1921, when it was amended by repealing a part thereof. However, this amendment in no manner modified or changed the section as to matters here under consideration. Thus we conclude that the action of the legislature approved the correctness of the interpretation placed upon these statutes by the board." See, also, Chicago & N. W. Ry. Co. v. Bauman, 132 Neb. 67, 271 N. W. 256; State ex rel. Case Threshing Machine Co. v. Marsh, 117 Neb. 832, 223 N. W. 126.

In Mogis v. Lyman-Richey Sand & Gravel Corp., 189 F. 2d 130, the court said: "Administrative construction of a statute by the highest officer of an executive department charged with its enforcement, especially if it has long been adhered to, is also entitled in Nebraska to great weight in the judicial appraisal of the statute's

meaning. * * * And this is especially true in instances where such construction has been left undisturbed through several successive legislative sessions, * * *." See, also, Massachusetts Mut. Life Ins. Co. v. George & Co., 148 F. 2d 42.

It is noteworthy that the Legislature has seen fit to assess domesticated foreign corporations with an occupation tax on the same basis as domestic corporations, which is much higher than that assessed against nondomesticated foreign corporations. It is reasonable to believe that the Legislature intended also that intangible taxes should be assessed against such domesticated corporations in the same manner as domestic corporations. Such a construction of the statute would eliminate any question of unconstitutional discrimination between domesticated foreign corporations and domestic corporations. See Wheeling Steel Corp. v. Glander, 337 U. S. 562, 69 S. Ct. 1291, 93 L. Ed. 1544. I submit that a valid construction is legally required as against an invalid one.

For 30 years the taxing authorities of this state have assessed the stocks of domesticated foreign corporations under section 77-706, R. R. S. 1943. For 30 years the Attorneys General of this state have advised that this was the applicable statute. Fifteen regular sessions of the Legislature have been held without any attempt to change the administrative construction and application of the act. No court up to this time has held that such construction was not the correct one. The stocks of domesticated foreign corporations have been advertised and sold with the understanding that the intangible taxes thereon were paid up by the corporations and that the stocks in the hands of the owners were free from these taxes. Investments have been made and property interests acquired in such stocks on the basis of this contemporaneous and practical construction of the statute over the years, and owners will be damaged and injured by the change in meaning announced by the

majority. All the facts and circumstances indicate that the construction placed upon the act has been in good faith, with a full belief that the spirit of the law was being observed. In every instance under similar circumstances our decisions have adopted such contemporaneous, uniform, and long-continued construction of the law. It seems to me that if such construction is now to be changed after 30 years of bona fide reliance thereon, to the serious injury and damage of those who in good faith relied upon it, it ought to be inaugurated by the Legislature and not by the court. The decree of the trial court conforms with the previous holdings of this court, and in my opinion we should adhere thereto.

I am authorized to say that Chappell and Boslaugh, JJ., concur in this dissent.

ELEANORA MILLER, ADMINISTRATRIX OF THE ESTATE OF CARL J. MILLER, DECEASED, APPELLANT, V. LIVESTOCK BUYING CO., INC., APPELLEE. CONSOLIDATED WITH: ELEANORA MILLER, WIDOW, APPELLANT, V. LIVESTOCK BUYING CO., INC., APPELLEE.

58 N. W. 2d 596

Filed May 22, 1953. No. 33327.

1. **Workmen's Compensation.** On any appeal to this court in a workmen's compensation case the cause will be here considered de novo upon the record.
2. ———. The burden of proof is upon the claimant in a compensation case to establish by a preponderance of the evidence that personal injury was sustained by the employee by an accident arising out of and in the course of his employment.
3. ———. A compensation award cannot be based on possibilities or probabilities, but must be based on sufficient evidence that the claimant incurred a disability arising out of and in the course of his employment.
4. ———. The rule of liberal construction of the Workmen's Compensation Act applies to the law, not to the evidence offered to support a claim by virtue of the law. The rule does not dispense with the necessity that claimant prove his right to compen-

sation within the rules above set out, nor does it permit a court to award compensation where the requisite proof is lacking.

APPEAL from the district court for Douglas County: JACKSON B. CHASE, JUDGE. *Affirmed.*

George Evens, for appellant.

Edwin Cassem and *Kennedy, Holland, DeLacy & Svoboda,* for appellee.

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

CHAPPELL, J.

This appeal involves two workmen's compensation cases. One action was by plaintiff as administratrix of the estate of her husband Carl J. Miller, deceased, hereinafter called decedent, to recover compensation from defendant Livestock Buying Company, Inc., a division of Safeway Stores, Inc., for the period accruing prior to death of decedent, and the other was by the widow as plaintiff to recover from defendant any amounts accruing to her after decedent's death. Recovery in both cases was denied by the workmen's compensation court where rehearing was waived, and upon appeals to the district court they were by stipulation consolidated for trial de novo with one decree to dispose of both cases. Concededly there was but one issue ultimately presented to the trial court for decision in both cases. That issue was whether decedent's death on August 19, 1948, was caused by accidents suffered by him on October 17, 1945, and October 16, 1946, or whether his death was caused by bronchiogenic carcinoma or cancer of the lungs.

After trial whereat evidence was adduced, the trial court rendered a decree which found and adjudged the issue generally in favor of defendant and against plaintiff in each case, and dismissed each cause of action upon the ground that plaintiff therein had "failed to sustain the burden of proving that the death of plain-

tiff's decedent was the result of any accident and injuries sustained in the employ of the defendant." Plaintiff's consolidated motion for new trial was overruled, and she appealed, assigning that the trial court erred in finding that decedent's death was not the result of his injuries. We conclude that the assignment should not be sustained.

It is now well established that: "On any appeal to this court in a workmen's compensation case the cause will be here considered de novo upon the record." Schneider v. Village of Shickley, 156 Neb. 683, 57 N. W. 2d 527.

In that connection, other rules applicable here are: "The burden of proof is upon the claimant in a compensation case to establish by a preponderance of the evidence that personal injury was sustained by the employee by an accident arising out of and in the course of his employment.

"A compensation award cannot be based on possibilities or probabilities, but must be based on sufficient evidence that the claimant incurred a disability arising out of and in the course of his employment.

"The rule of liberal construction of the Workmen's Compensation Act applies to the law, not to the evidence offered to support a claim by virtue of the law. The rule does not dispense with the necessity that claimant prove his right to compensation within the rules above set out, nor does it permit a court to award compensation where the requisite proof is lacking." Hassmann v. City of Bloomfield, 146 Neb. 608, 20 N. W. 2d 592. See, also, Kuhtnick v. Carey, 124 Neb. 762, 248 N. W. 89; Kuhtnick v. Carey, 124 Neb. 761, 248 N. W. 92.

Plaintiff relied primarily upon the holding in Reitz v. Petersen, 131 Neb. 706, 269 N. W. 811, and other cited cases, to the effect that: "A fact, relation or state of things once shown to exist may be presumed to continue as long as such fact, relation or state would naturally continue; and especially where subsequent events,

disclosed in evidence, are entirely in harmony and consistent with the continuance of such fact, relation or state." In that connection, however, as hereinafter observed, the presumption relied upon by plaintiff was overcome by evidence appearing in the record, and plaintiff adduced no evidence except the conclusion of decedent's wife that death was caused by personal injuries resulting from any accident arising out of and in the course of decedent's employment. In other words, plaintiff offered no competent evidence that decedent's death was caused by injuries sustained in the employ of defendant.

In that regard, the record substantially discloses the following material situation: Decedent was employed by defendant in 1943 as a cattle buyer and yard man. He was then in good health. On October 17, 1945, while loading cattle, he was kicked by a steer and thrown several feet. He landed on his buttocks and allegedly suffered therefrom a transverse fracture through the lower segment of his sacrum and contusion of his buttocks. There is evidence that X-rays were taken at that time, but they allegedly could not be found and were not produced at the trial. Decedent was thereafter off duty at home for 2 weeks and 4 days, during which period a physician made 5 visits to see him, and he made 4 visits to the physician's office. He was able to return to work November 12, 1945, and was paid $46.28 as compensation for temporary total disability covering a period of 2 weeks and 4 days.

Again on October 16, 1946, decedent was kicked by another critter in the lower abdomen and scrotum, which caused him to remain off duty a couple of days. In 1947, after the first of the year, his work routine was changed, and he went out on the road to buy livestock and make cattle surveys. Plaintiff adduced evidence that on many such trips, especially long ones, a driver went with decedent because he tired easily and complained of pains in his back. During the early part

of 1948 he did only light work. In February 1948, he took a cold and remained at home for a couple of weeks. Toward the last of March he was unable to work any longer. Some time in April he was taken to a physician at a hospital for examination and subsequent daily treatment. Thereafter, on June 1, 1948, and August 16, 1948, he was respectively examined by a second and third physician.

The first physician was physically unable to be present at the trial, so it was stipulated that if he were present he would testify substantially as follows: That about April 17, 1948, decedent came to his office for treatment, suffering pain in the lower lumbar and upper sacral regions of his body. Such physician was given a personal history of the two prior accidents aforesaid, subsequent events, and resulting complaint of pain and suffering in his back. No X-rays were taken, but by physical examination the physician allegedly discovered ankylosis of the vertebrae which by irritation produced pain in the lower lumbar and upper sacral regions of decedent's body with disturbances in the region of the rectum, bladder, and prostate, which caused a debilitated and run-down condition accompanied by nervousness. The physician testified that there was no place from which tissues might be resected whereby a biopsy examination for cancer could be made; therefore, according to the best of his knowledge and belief, from general physical findings, decedent did not have cancer.

The second physician, a surgeon who examined decedent on June 1, 1948, at the request of defendant's insurance carrier, for the purpose only of determining any disability which decedent might have in his lower back as a result of injury, testified for defendant substantially as follows: He was given a history of the two prior accidents, subsequent events, and decedent's complaints as aforesaid, and that decedent had been under medical treatment for a lung and throat condition. His throat was red and infected, and he complained that

sometimes he had distress in his right shoulder which he thought was due to his cold. Otherwise decedent appeared to be normal. X-rays were taken of his lower back which disclosed some deviation of the lower sacral canal toward the right with slight irregularity appearing to transverse the sacrum at about the fourth and fifth segment, which could have been a healed fracture or merely a congenital configuration, since there were no physical findings which could account for his claimed back distress. Such surgeon concluded and reported that decedent then had no disability in his back, but that he had other worries pertaining to his physical condition which alarmed him.

In that connection, the third physician, a chest specialist who examined decedent at plaintiff's request on August 16, 1948, testified for defendant substantially as follows: He made a fluoroscopic X-ray examination of decedent's chest from which he adduced specific findings warranting a diagnosis of "far advanced inoperable bronchiogenic carcinoma," commonly referred to as cancer having its origin in the bronchial tubes, which had grown to such extent that nothing in the way of operating procedure could be of value in its treatment. On August 18, 1948, such specialist regretfully so reported in writing to decedent's wife, adding also: "It is not expected that Mr. Miller will last very many months." Strange as it may seem, Mr. Miller died on August 19, 1948, the very next day after the making of such report.

Assuming the existence of such physical findings of "advanced inoperable bronchiogenic carcinoma" aforesaid, the surgeon testified that any previous injury to decedent's lower back could not have been even remotely connected therewith. In that regard, plaintiff makes no contention that it was or could have been. Such surgeon also testified that in view of the known characteristics with respect to the time development of bronchiogenic carcinoma, there was no inconsistency

between the findings made June 1, 1948, and decedent's death from such disease 11 weeks later.

The evidence in this record makes it necessary for us to conclude that the death of plaintiff's decedent was caused by cancer and not by personal injuries suffered by him in any accident arising out of and in the course of his employment. Clearly plaintiff did not sustain the burden of proof imposed upon her by law.

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

AFFIRMED.

NELLIE C. E. NOWKA ET AL., APPELLEES, V. FRANK NOWKA ET AL., APPELLANTS, IMPLEADED WITH J. E. VAN ORSDEL, APPELLEE.

58 N. W. 2d 600

Filed May 22, 1953. No. 33334.

1. **Divorce: Limitation of Actions.** A decree awarding alimony and child support in an action for divorce does not become dormant by lapse of time and the defense of the statute of limitations is not available to defeat recovery of delinquent payments.
2. **Divorce: Fraudulent Conveyances.** A conveyance of real estate by a husband to his wife with the intent to avoid payments under a decree of divorce obtained by a former wife is a fraudulent conveyance as to the former wife.
3. ———: ———. A conveyance of real estate by a husband to his wife where there are delinquent payments under a decree of divorce obtained by a former wife is presumptively fraudulent and the burden is on the transferee to establish the good faith of the transaction.
4. **Judgments: Liens.** A judgment becomes a lien upon a judgment debtor's equitable interest in real estate with the commencement of a creditor's action to subject the equitable estate to the payment of the judgment and continues as such while the cause is pending.
5. ———: ———. An action to foreclose a judgment lien is

appropriate and may properly be entertained when it appears that the judgment creditor has no adequate remedy at law.

6. ———: ———. The costs and expenses of the foreclosure of a judgment lien become a part of the amount to be recovered.

7. ———: ———. In an action for the foreclosure of a judgment lien against the equitable interest of a judgment debtor in real estate where foreclosure is decreed and sale ordered, it should be required that the proceeds of sale be first applied to the satisfaction of the judgment, costs, and expenses and that the balance, if any, be held subject to the further order of the court.

APPEAL from the district court for Adams County: STANLEY BARTOS, JUDGE. *Affirmed in part, and in part reversed and remanded with directions.*

J. E. Willits, for appellants.

Stiner & Boslaugh, for appellees Nowka.

Harry F. Russell, for appellee Van Orsdel.

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

YEAGER, J.

This case as originally instituted was by Nellie C. E. Nowka and Iolagene Schmidt, plaintiffs, against Frank Nowka and Ida M. Nowka. J. E. Van Orsdel was later made a defendant. By the petition it was alleged that Frank Nowka and Nellie C. E. Nowka were formerly husband and wife but that they were divorced on September 27, 1928; that Iolagene Schmidt was the daughter of these parties; that by the decree Nellie C. E. Nowka was granted alimony and an award for child support and that under the decree there is due and owing in excess of $6,000 including interest; that the defendants Frank Nowka and Ida M. Nowka are the title owners of Lot 4 in Block 2 of Birdsall's Addition to Hastings, Nebraska; that the amounts due under the decree of divorce are a lien on the interest of Frank Nowka in this property; and that J. E. Van Orsdel has or claims an interest in the property but that his in-

terest if any is inferior and subject to the lien of the amounts due under the divorce decree. The prayer was for a first lien in favor of plaintiffs upon the interest of Frank Nowka in the property, for an accounting of amounts due under the decree, for a sale of the interest of Frank Nowka and application of the proceeds to payment of the amounts due under the decree, and for costs and attorney's fees.

Certain dilatory pleadings were filed by the defendants Frank Nowka and Ida M. Nowka which were ruled upon adversely to the said defendants. The rulings were preserved in the record and assignments of error are based thereon in the brief.

Under the rules of this court the consideration of a cause will be limited to errors assigned and discussed, subject however to the further rule that the court may at its option notice a plain error not assigned. Linder v. State, 156 Neb. 504, 56 N. W. 2d 734.

The matters involved in the rulings on dilatory pleadings have not been discussed in the brief either by reference to assignments of error or otherwise. They will therefore not be considered here.

To the petition the defendant Van Orsdel filed an answer and cross-petition. To the extent of importance here, it was alleged therein that Frank Nowka and Ida M. Nowka are the owners of the real estate described; that this defendant claims an interest therein by virtue of a contract of purchase from Frank Nowka and that his interest is superior to any claims or lien of plaintiffs; that the contract representing his interest is in writing and was entered into on July 12, 1950: that the agreed purchase price was $6,500 of which $100 had been paid; that payment of the balance was conditioned upon Frank Nowka furnishing a merchantable abstract of title on August 12, 1950, which was never furnished; that this defendant was placed in actual possession of the property; that this defendant has been ready and willing at all times to complete the purchase; and that this de-

fendant has been desirous of selling the property but because Frank Nowka has not performed under his contract he has been unable to do so to his damage in the amount of $2,500.

By his prayer this defendant prays for a lien superior to that of plaintiffs but that if the court finds the lien of plaintiffs to be superior that he be awarded a judgment for nonfulfillment of the contract in the amount of $2,500 with costs, and for equitable relief.

The defendants Frank Nowka and Ida M. Nowka filed an answer and cross-petition responding to the petition of plaintiffs. The pertinent parts are that the amounts claimed to be due under the decree were not recoverable for the reason that they were barred by the statute of limitations relating to judgments; that recovery was barred by laches; and that the real estate in question could not be subjected to the payment of the amounts in any event since it was held in joint tenancy by these defendants. They prayed judgment in their favor.

To this answer and cross-petition the defendant Van Orsdel filed a reply in which he renewed the prayer of his answer and cross-petition. The plaintiffs filed an answer and reply in which they reasserted the claims and the prayer of their petition.

Later the defendants Frank Nowka and Ida M. Nowka filed an answer to the answer and cross-petition of the defendant Van Orsdel in which they alleged that the contract between Frank Nowka and Van Orsdel had expired and that Ida M. Nowka is not a party thereto.

On the issues presented by these pleadings the case was tried and a decree rendered. By the decree Frank Nowka was declared to be the equitable owner of the real estate in question. The decree for alimony and child support was decreed to be in full force and effect in favor of the plaintiff Nellie C. E. Nowka. The amount due on account of alimony as of the date of rendition of the decree was found to be $2,498.82 with interest at

5 percent. The amount due as of the same date for child support was found to be $4,925.32 with interest at 7 percent. These amounts together with costs in the amount of $297.60 and an attorney's fee in the amount of $250 were decreed to be a first lien upon the real estate in question. The defendant Van Orsdel was awarded a judgment against the defendant Frank Nowka in the amount of $1,013.33 with interest at 6 percent. This judgment was decreed to be a lien against the real estate in question junior and inferior only to the lien in favor of Nellie C. E. Nowka, but superior to any interest of Ida M. Nowka therein. The decree required payment of the named amounts within 20 days and for failure in that respect that the real estate be sold as upon execution and the proceeds applied first to the payment of costs, second to the payment of the first lien, and third to the payment of the second lien.

Following the rendition of decree the defendants Frank Nowka and Ida M. Nowka filed a motion for new trial which was duly overruled. From the decree and the order overruling the motion for new trial these defendants have appealed.

In their brief the appellants have set forth 16 assignments of error and 43 propositions of law. Only those are discussed in the brief which assert that the statute of limitations has run against the obligation to make the payments of alimony and child support provided for in the divorce decree, and those which declare the real estate being in joint tenancy enforcement of payment may not be had out of it. No question is raised in the discussion as to the accounting of the amounts due under the divorce decree.

As to the question of whether or not the statute of limitations bars a recovery there cannot be the slightest question. The statute of limitations is not a bar.

In 1947 the Legislature adopted what now appears as section 76-623, R. R. S. 1943, as follows: "Where no execution has issued on a judgment for five years, other

than a judgment for child support alone or a judgment for child support which is accompanied by any part of a judgment allowing alimony, the judgment ceases to be a lien and should not be treated as a defect in title."

This court, in 1950, in Lippincott v. Lippincott, 152 Neb. 374, 41 N. W. 2d 232, without reference to section 76-623, R. R. S. 1943, but with reference only to the general provision relating to dormant judgments (sections 25-1420 and 25-1515, R. R. S. 1943), held that a decree for alimony in a divorce action was not a judgment within the meaning of these general provisions and that the statute of limitations was not available as a defense against the recovery of delinquent alimony payments.

The pronouncement in this case was approved in Miller v. Miller, 153 Neb. 890, 46 N. W. 2d 618.

These provisions are as follows:

Section 25-1420, R. R. S. 1943: "If a judgment becomes dormant, it may be revived in the same manner as is prescribed for reviving actions before judgment; *Provided,* no judgment shall be revived unless action to revive the same be commenced within ten years after such judgment became dormant."

Section 25-1515, R. R. S. 1943: "If execution shall not be sued out within five years from the date of any judgment that now is or may hereafter be rendered in any court of record in this state, or if five years shall have intervened between the date of the last execution issued on such judgment and the time of suing out another writ of execution thereon, such judgment, and all taxable costs in the action in which such judgment was obtained, shall become dormant, and shall cease to operate as a lien on the estate of the judgment debtor."

In the case of In re Application of Miller, 139 Neb. 242, 297 N. W. 91, a case decided before the adoption of section 76-623, R. R. S. 1943, this court arrived at the same conclusion as in the two cited later cases.

Therefore by statute and by legal decision it is declared that a decree awarding alimony and child support in an action for divorce does not become dormant by lapse of time and the defense of the statute of limitations is not available to defeat recovery of delinquent payments.

The subject for determination as to the other question discussed in the brief is that of whether or not the taking of the deed to the real estate in the names of Frank Nowka and Ida M. Nowka as joint tenants was void as being in fraud of Nellie C. E. Nowka, an existing creditor.

It is unquestionably true that the deed to Frank Nowka and Ida M. Nowka was on its face joint. The effect of the deed as between the two of them in the absence of any intervening right of Nellie C. E. Nowka as a creditor of Frank Nowka we are not required to and do not consider. We consider only the right of this plaintiff as a creditor.

She was a creditor in the nature of a judgment creditor before the deed was received by Frank Nowka and Ida M. Nowka. Factually the money used to purchase the real estate was a part of the price obtained from the sale of other land title to which had been held in joint tenancy. The money was held in a bank in the name of Frank Nowka. There is no evidence that Ida M. Nowka participated in the arrangements for the purchase. There is nothing to indicate that Ida M. Nowka knew at the time that joint title to the property was taken. The indications are that the real estate was treated by Frank Nowka as his own and not as joint property. The representations of the contract to sell to the defendant Van Orsdel are of sole ownership in Frank Nowka. There is no evidence of an understanding or agreement between these two that this property was to be acquired in joint tenancy.

On the other hand the record discloses that prior to the acquisition of this property these parties had other

real estate and that in each instance the title was taken in joint tenancy. Also the money which was in each instance invested was accumulated through their combined efforts while living together as husband and wife. Neither had any money or property at the time they were married and there is no evidence of inheritance by either of them.

If this may be regarded as a conveyance of property by Frank Nowka to his wife with the intent to avoid payments under the divorce decree it was fraudulent and properly declared invalid by the decree of the district court. Luikart v. Bosse, 142 Neb. 157, 5 N. W. 2d 128; Van Steenberg v. Nelson, 147 Neb. 88, 22 N. W. 2d 414.

Moreover, if it amounted to a conveyance it was presumptively fraudulent as to Nellie C. E. Nowka and the burden was on Ida M. Nowka, she being the wife of Frank Nowka, to establish the good faith of the transaction. Luikart v. Bosse, *supra.*

This of course was not in terms a conveyance from Frank Nowka to his wife. The only reasonable inference to be drawn however from the evidence is that this was a conveyance made by direction of Frank Nowka without any agreement or understanding with his wife in relation thereto. The evidence makes clear that the money used to make the purchase was regarded and held as funds of Frank Nowka. Further it is clear that he treated the real estate as his own after the purchase. As pointed out he contracted in his sole name with the defendant Van Orsdel.

If this is to be treated in the same manner as a direct conveyance then it must be said that the burden of overcoming the presumption that the transaction was fraudulent has not been sustained.

We can think of no valid reason for regarding this transaction as less fraudulent than a direct conveyance of any interest in the real estate would have been. Debtors may not be permitted to make investments in

this manner and take title in joint tenancy and thus find an escape from the payment of their existing legal obligations. The assignments of error in this respect are without merit.

As pointed out but two propositions have been discussed by appellants in their brief. These have been decided adversely to them. There is however a plain error not discussed which should receive attention and consideration.

As pointed out the plaintiffs prayed for the declaration and establishment of a judgment lien against the real estate in question and in effect for a foreclosure of that lien. The defendant Van Orsdel prayed for declaration and establishment of a lien, or in the alternative a judgment for damages. By the decree costs were directed first to be paid and the alimony and child support judgments were decreed to be a first lien payable after costs. The defendant Van Orsdel was awarded a judgment which was decreed to be a second lien. In effect strict foreclosure of the judgment liens was decreed.

There can be no doubt of the propriety of the declaration that the judgments for alimony and child support became liens upon the real estate in question once the real estate was declared to be equitably owned by Frank Nowka.

The declaration of priorities contained in the decree however cannot be sustained. The lien which was first in time, if there was more than one, of course was first in priority.

At the time of commencement of this action the title of Frank Nowka as an individual was equitable. Prior thereto no lien for the judgments for alimony and child support existed against it. The lien came into existence with the service of summons in this action.

It is a rule of law in this jurisdiction that a judgment of the district court is not a lien upon the judgment debtor's equitable interest in real estate. Nessler v. Neher, 18 Neb. 649, 26 N. W. 471; Flint v. Chal-

oupka, 72 Neb. 34, 99 N. W. 825, 117 Am. S. R. 771; Hilton v. Clements, 137 Neb. 791, 291 N. W. 483.

However the beginning of a creditor's action to subject an equitable estate to the payment of a judgment gives a specific lien upon the property which it is sought to reach and this lien continues while the cause is pending. Hilton v. Clements, *supra.*

Thus it becomes clear that the judgments for alimony and child support were a lien and prior to other liens if there were others.

We think that under well-recognized principles the costs which were declared to be a first lien must be regarded as incidental to and to be recovered along with the alimony and child support.

In 31 Am. Jur., Judgments, § 888, p. 367, it is said in part: "As long as a judgment lien may be enforced by an execution sale, an equitable action to foreclose it is not required. * * * However, where the remedy at law becomes inadequate, and special grounds for the interposition of a court of equity arises, the aid of a court of equity in the enforcement of a judgment may be secured."

In 49 C. J. S., Judgments, § 587, p. 1074, it is said in part: "Ordinarily it is presumed that the court which renders a judgment is competent to enforce it, and equity cannot be invoked to obtain satisfaction. This rule, however, is subject to numerous exceptions under which the power of a court of equity may properly be invoked, as where the object is to reach equitable interests in land, not subject to execution, * * *."

In Rich v. Cooper, 136 Neb. 463, 286 N. W. 383, this court said: "A petition to foreclose a judgment lien is properly entertained when it appears that the judgment creditor has no adequate remedy at law."

The action here is in essence to foreclose a judgment lien and it is clear that no adequate remedy at law was available.

Reasonably it must follow that the costs of prosecution of the action in equity to enforce the judgments

shall be added to and be recovered along with the judgments.

We do not think that under the pleadings of the defendant Van Orsdel and under law the district court has proper power to impress a lien in favor of Van Orsdel and to decree a foreclosure thereof. Van Orsdel may eventually be entitled to proceeds made available by the foreclosure of the judgments for alimony and child support but that eventuality has not arisen.

The decree in propriety should have directed payment of the amounts due under the alimony and child support and costs and that for failure of payment the real estate should be sold and the proceeds brought into court and to the extent necessary applied to the payment of these amounts. If there was a surplus then it would have been appropriate for the court to entertain an application for the distribution of the surplus upon notice being given to all parties necessary to the determination of the ownership of such surplus. Mauzy v. Elliott, 146 Neb. 865, 22 N. W. 2d 142.

It is readily conceivable that there may be others, not parties to this action, who might have a right to this surplus superior to that of Van Orsdel, whose rights would be destroyed if the decree in this respect is affirmed.

The decree therefore to the extent that it declares that Frank Nowka is the equitable owner of the real estate in question is affirmed. It is affirmed as to the accounting, costs, attorney's fees, and the judgment in favor of the defendant Van Orsdel.

It is also affirmed as to the foreclosure of the lien in favor of Nellie C. E. Nowka. As to foreclosure of the lien of the judgment, if any, of the defendant Van Orsdel, it is reversed and the cause to that extent remanded with directions to the district court to decree that if Frank Nowka shall fail to pay the amounts due on the decree for alimony and child support the real estate shall be sold as provided by the decree and the pro-

ceeds paid into court which proceeds shall be first applied to the payment of the amounts due under the decree for alimony, child support, costs, and attorney's fees and that the excess, if any, shall be held subject to the further order of the court. Costs on appeal to be taxed to appellants.

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

MAY V. ARTERBURN, APPELLEE, V. NEIL C. VANDEMOER ET AL., APPELLANTS, IMPLEADED WITH JAMES WARREN WILLIAMS ET AL., APPELLEES.

58 N. W. 2d 606

Filed May 22, 1953. No. 33336.

1. **Public Assistance.** The application for, and grant of, old age assistance benefits under Chapter 68, article 2, R. R. S. 1943, creates a relationship between the recipient and grantor which is contractual in its nature, imposing an obligation for reimbursement of all payments made.
2. **Public Assistance: Liens.** The filing for record of a certificate of award of old age assistance benefits pursuant to section 68-215.01, R. R. S. 1943, creates a lien upon any real estate owned by the recipient of such benefits for all amounts received subsequent to the effective date of such statute.
3. **Statutes.** A legislative act will operate prospectively only unless the legislative intent and purpose that it should operate retrospectively is clearly disclosed.

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

Clarence S. Beck, Attorney General, *Homer L. Kyle, E. D. Warnsholz,* and *William B. Rist,* for appellants.

Hubka & Hubka, for appellee.

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

CARTER, J.

Plaintiff brought this suit to quiet the title to two lots in Beatrice, Gage County, Nebraska. Neil C. Vandemoer, Director of Assistance and Child Welfare for the State of Nebraska, Gage County Assistance Committee, and Gage County filed an answer. All other named defendants failed to answer and defaults were entered against them. The answering defendants claim a lien on the property in the amount of $2,159.95 by virtue of a certificate of award for old age assistance payments to May V. Arterburn, dated October 1, 1941, which was filed for record on October 5, 1951, as a notice of lien. The trial court determined the lien to be in the amount of $787.75. The answering defendants appeal.

On June 27, 1941, Maggie J. Harman Bennett became the owner of the two lots involved herein. On July 21, 1948, Maggie J. Harman Bennett executed and delivered a warranty deed conveying the lots to her sister, May V. Arterburn. The deed was held in escrow and delivered to plaintiff by the escrow agent sometime in August or September 1951. The foregoing deed was filed for record on October 3, 1951. Maggie J. Harman Bennett died on February 8, 1951. She was a recipient of old age assistance from September 7, 1947, and continuously until her death, in the amount of $1,298.20. This amount was found to be a lien against the lots. No appeal has been taken from this portion of the decree. The plaintiff was also a recipient of old age assistance prior to September 7, 1947, and continuously thereafter until on or about October 17, 1951. She received $373.80 from September 7, 1947, to July 21, 1948, and $1,786.15 from July 21, 1948, until on or about October 17, 1951, the total being $2,159.95. The certificate of award was made to plaintiff on October 1, 1941, which was filed for record on October 5, 1951. The evidence shows that these answering defendants had no knowledge of the deed conveying the lots from Maggie J. Harman Bennett to plaintiff until October 2, 1951. It is stipulated that plain-

tiff received old age assistance payments after the death of Maggie J. Harman Bennett in the amount of $787.75.

The amendment to the old age assistance act providing for a lien against the property of old age assistance recipients became effective on September 7, 1947. The answering defendants contend that they are entitled to a lien for all old age assistance payments made to the plaintiff since that date. Plaintiff contends that these defendants are entitled to a lien for payments of old age assistance made to her after the death of her sister Maggie J. Harman Bennett on February 8, 1951, in the amount of $787.75.

The controlling statute provides in part: "The assistance benefits any recipient of old age assistance shall receive shall be a lien on any real estate owned by the recipient of such assistance from and after the date of the filing of the certificate as provided in this section." § 68-215.01, R. R. S. 1943. It appears clear to us that it was the intention of the Legislature to secure the repayment of old age assistance benefits by a lien upon any real estate the recipient might possess. The obligation to repay exists. It is contractual in its nature. Boone County Old Age Assistance Board v. Myhre, 149 Neb. 669, 32 N. W. 2d 262. The statute providing for a lien on the real estate of recipients of old age assistance benefits became effective on September 7, 1947. While the lien did not exist until the certificate of award was filed, the statute does not limit the amount of the lien to future payments of assistance benefits only. All payments made are within its purview. It is clear to us that any such benefits received subsequent to the enactment of the lien statute were subject to the statute and could properly be made the basis for a lien against any real estate the recipient then had, or subsequently acquired. The lien statute does not even infer that such lien shall be effective only as to benefits received after the real estate is acquired. Nor does it carry any inference, as plaintiff contends, that the amount of the

lien is limited to payments made after the certificate of award is filed for record. It contemplates a lien for the full amount owing. The lien statute must be treated as prospective in its operation and it applies therefore to any benefits received subsequent to its enactment. If the requirements of the statute are met the lien attaches to any real estate the recipient had or acquired subsequent to that date for all amounts received subsequent to the enactment of the lien statute. State ex rel. City of Grand Island v. Union Pacific R. R. Co., 152 Neb. 772, 42 N. W. 2d 867; War Finance Corp. v. Thornton, 118 Neb. 797, 226 N. W. 454.

The trial court was therefore in error in holding that the lien was valid only as to old age assistance payments made to the plaintiff after the death of her sister on February 8, 1951. The lien is valid for all old age assistance payments made to the plaintiff subsequent to the enactment of section 68-215.01, R. R. S. 1943. The portion of the decree fixing the lien in favor of Gage County and other political bodies contributing to old age assistance payments made to plaintiff from February 8, 1951, to on or about October 17, 1951, in the amount of $787.75, is reversed and set aside. The cause is remanded with directions to enter a decree in favor of the answering defendants for a lien in the total amount of all old age assistance payments made to plaintiff from September 7, 1947, to approximately October 17, 1951, which are shown by the record to be $2,159.95.

REVERSED AND REMANDED WITH DIRECTIONS.

THE VALENTINE OIL COMPANY, A CORPORATION, ET AL., APPELLANTS, V. ROY R. POWERS ET AL., APPELLEES.
59 N. W. 2d 150

Filed June 5, 1953. No. 33259.

1. **Pleading.** An order or decree sustaining a demurrer will be

affirmed if any one ground of demurrer is well taken, even though the ground on which the ruling is based is not well taken or the order or decree sustaining the demurrer is general and does not indicate the ground on which it is based.

2. ———. 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.

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. **Escrows.** The grantor or obligor of an instrument held as an escrow is entitled to its return when the grantee or obligee fails to perform the conditions of the escrow contract, or the contingency specified has not occurred.

5. ———. Upon performance of the condition the grantee or obligee is entitled to delivery, which will be enforced by a decree of court. But a breach of the escrow agreement by the grantee may preclude him from bringing an action to enforce the terms of the agreement; thus where the grantee is in default, he cannot enforce a delivery of the instrument to him by the depositary.

6. ———. In the law governing performance of escrow agreements, there is no doctrine of substantial compliance, and full performance only can discharge a condition precedent to valid delivery by the escrow holder. The question involved is one of performance of the escrow agreement, not of the ability of the parties to perform it, since such ability, without full performance, cannot amount to compliance.

7. ———. The conditions on which instruments are deposited as escrows are ordinarily to be performed by the grantee or obligee, and performance by a person other than the one specified in the escrow contract is insufficient to entitle such other person to delivery of the instrument; but the necessity of action by a specified party may be obviated by his transfer of interest to another, or satisfied by the act of the depositor.

8. ———. The grantor or depositor loses control over an instrument placed in escrow, although he retains legal title and its concomitants until performance of the conditions; but, where the escrow is abandoned, it becomes ineffectual for any purpose.

9. ———. Where time is of the essence of an escrow agreement, the depositary has no authority to allow one of the parties to perform the conditions after the expiration of such time.

10. **Mines and Minerals.** The obligations between the assignor and assignee of an oil and gas lease are what the contract of assignment makes them in the light of the provisions of the lease assigned.

11. **Estates: Mines and Minerals.** The term "special limitation" denotes that part of the language of a conveyance which causes the created interest automatically to expire upon the occurrence of a stated event, and thus provides for a terminability in addition to that normally characteristic of such interest.

12. **Mines and Minerals.** An oil and gas lease, providing that, unless a well is commenced by a certain time, or unless the lessee timely pays a stated rental to renew the lease, it shall terminate, confers an optional right upon the lessee and should be strictly construed in favor of the lessor and against the lessee.

13. ———. Such a delay rental clause is a special limitation, time is of the essence of the contract, and failure of the lessee or his assigns to tender or pay rentals within the specified time automatically terminates the lease without any affirmative action by the lessor, or any one else, for that purpose.

14. **Equity: Specific Performance.** Based on the general equitable doctrine that equity will not render a decree which it is impractical to carry out, and because equity will not do a vain thing, a decree for specific performance of a contract will not be granted if it would be, or could be made, nugatory and useless, or if it would be ineffectual or not beneficial to plaintiff.

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

Eugene D. O'Sullivan, Eugene D. O'Sullivan, Jr., and *A. Marvin Lungren,* for appellants.

Edwin D. Crites, for appellees.

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

CHAPPELL, J.

The Valentine Oil Company, a corporation, and C. M. Valentine as alleged trustee therefor, brought this action as plaintiffs, seeking specific performance of an oil and gas lease escrow agreement, together with equitable relief and damages.

Defendants Joseph V. Webster, the depositary, and

Edwin D. Crites, who was a lessor and allegedly acted as agent for all lessors in executing the escrow agreement, together with other lessors named as defendants in plaintiffs' amended and supplemental petition, demurred thereto, specially upon the ground among others that there was a defect of parties defendant, and generally upon the ground that plaintiffs' petition did not state facts sufficient to constitute a cause of action. The trial court sustained the demurrer "generally" and, upon failure of plaintiffs to plead further, dismissed the action at plaintiffs' costs. Thereafter plaintiffs appealed, assigning that the court erred in sustaining the demurrer and dismissing the action. We conclude that the assignment has no merit.

In that connection, the rule is that: "An order or decree sustaining a demurrer will be affirmed if any one ground of demurrer is well taken, even though the ground on which the ruling is based is not well taken or the order or decree sustaining the demurrer is general and does not indicate the ground on which it is based." 5 C. J. S., Appeal and Error, § 1464, p. 80. In the light of such rule, we conclude that the mere fact that the trial court sustained the demurrer "generally" could not make it only a general demurrer, or require reversal of the judgment.

At the outset, it should be noted that two of the lessors and the wives of two of them who joined as lessors were not named as parties defendant. On the other hand, the lessee of all the leases, Roy R. Powers, and his agent, A. A. Kennedy, were named as defendants, each of whom, as alleged in plaintiffs' petition, was "a citizen and resident of Casper, Natrona County, Wyoming" who had been "advised in writing of the commencement and pendency of this case." As a matter of course, such notice was not service of process, and their special appearance was sustained. In that connection, it is argued that upon plaintiffs' theory of recovery such persons were all indispensable parties within the purview

of Local Union v. Western Public Service Co., 140 Neb. 186, 299 N. W. 531, and our supplemental opinion, Cunningham v. Brewer, 144 Neb. 218, 16 N. W. 2d 533. Be that as it may, we dispose of the case upon the merits as upon general demurrer, rather than upon such ground.

We have examined plaintiffs' petition, keeping in mind the rule 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." In re Estate of Halstead, 154 Neb. 31, 46 N. W. 2d 779.

It is also the rule 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." Carson v. City of Hastings, 81 Neb. 681, 116 N. W. 673.

The petition is voluminous and can only be summarized. After identifying the parties and describing their respective capacities or positions in the litigation, plaintiffs alleged that on or about April 8, 1947, C. M. Valentine, acting as trustee for Valentine Oil Company, entered into a written contract with Roy R. Powers who was then engaged in the purchase of oil and gas leases and drilling operations in connection therewith. A copy of such agreement, marked exhibit A, was attached to and made a part of the petition. Therein, C. M. Valentine and Roy R. Powers agreed to start a leasing program within 10 days, time being of the essence. Valentine agreed to provide the necessary geological data in his possession, and Powers agreed to procure leases in certain Sheridan and Dawes County townships. Such leases were to be taken in the name of one or the other of the parties, and subsequently divided and assigned equally between them upon a designated formula, giving due consideration to the geological value

of each. It was also agreed that simultaneously with conclusion of such leasing program, a mutually agreeable drilling contract for a test well would be entered into between Powers and Valentine Oil Company, of which C. M. Valentine was president. In that connection, plaintiffs alleged as a conclusion that all conditions precedent in such agreement were performed by them. It will be noted, however, that none of its terms make any mention of an escrow agreement. Concededly, however, all leases here involved were made with Powers as lessee and he as such subsequently executed a written escrow agreement with Edwin D. Crites, who in so doing allegedly acted as agent for lessors.

Such escrow agreement was executed on April 28, 1947. A copy thereof, marked exhibit B1, was attached to and made a part of plaintiffs' petition. Its provisions appointed Joseph V. Webster as escrow officer and agreed that certain attached oil and gas leases should be deposited with him to be held in escrow and disposed of by him on the following terms and conditions: "If the said Powers, or his assigns, shall install a competent rotary drilling rig at a location as hereinafter provided, shall set his *surfact* (surface) casing, and shall commence or cause to be commenced the drilling of a test well for oil and gas, on or within one mile from the outer border of the following described lands to wit: * * * (the drilling of said test well thereafter to be continued, with all due diligence, and without interruption, and to be completed until the same has reached the granite or a depth of 4500 feet, which ever is the lesser depth, or until oil, petroleum or gas shall have been produced from said well in paying quantities), on or prior to the 1st day of August, 1947, then the said Webster is hereby authorized and directed to deliver over the aforesaid leases to the said Powers, upon his having installed such rotary drilling rig, at such location and having set his surface casing and having commenced the drilling of said test well.

"If, however, the said Powers or his assigns shall fail so to install such competent rotary drilling rig, at such location and so to set his surface casing, and so to commence or cause to be commenced the drilling of said test well for oil and gas on or prior to the 1st day of August, 1947, and as hereinabove provided, the said Webster is hereby authorized and directed to return all of the said oil and gas leases to the said Edwin D. Crites, without any notice to the said Powers being required, and without it being necessary to obtain the consent of the said Powers thereto, and thereupon this agreement, and the said leases shall be and become null and void, and all rights, obligations and liabilities thereunder shall forthwith cease, determine and be at an end as to the said Crites, the said respective lessors the said Powers, and the said Webster.

"IT IS FURTHER AGREED: That time of performance is of the essence of this contract; * * *

"It is particularly agreed that said Webster as escrow party herein shall be under no liability whatever to the parties to this contract, except to dispose of the said escrowed leases in conformity to the terms hereof."

Plaintiffs then alleged that the leases were deposited in conformity with such escrow agreement. Copies of such leases, marked exhibits B2, B3, B4, B5, B6, and B7, respectively, were attached to and made a part of plaintiffs' petition. Three of them were dated April 19, 1947, two were dated April 22, 1947, and one was dated May 2, 1947. In all other material respects they were identical except one lease, which specifically provided for absolute termination thereof if no well was commenced within a designated area prior to August 1, 1947, and such lessor therein was not made a party to this action. Each lease respectively recited a consideration of $10, and each ran for a primary period of 3 years from *"this date, and as long thereafter as oil or gas, or either of them, is produced from said land by the lessee."* However, *"If no well be commenced on said land on or be-*

*fore one year from date this lease shall terminate as to both parties, unless the lessee on or before that date shall pay or tender to the lessor, or to the lessor's credit in The First National Bank of Chadron, Chadron, Nebraska or its successors * * * the sum of * * * DOLLARS, * * *.*" Preceding the word "DOLLARS" a substantial sum was typed in each lease, payment of "*which shall operate as a rental and cover the privilege of deferring the commencement of a well for twelve months from said date.*" (Italics supplied.)

Also attached to plaintiffs' petition and made a part thereof was exhibit D, a copy of a written drilling contract entered into on July 18, 1947, between Valentine Oil Company, by C. M. Valentine, president, and Roy R. Powers. The recited consideration was one dollar and "the competent, diligent and faithful performance of the covenants, conditions and requirements herein stipulated and provided for * * *." Therein Powers agreed to drill a test well within a designated location in Sheridan County to the approximate depth of 3,500 feet (1,000 feet less than that required by the escrow agreement) unless oil and gas were found at a lesser depth in commercial quantities, and Valentine Oil Company agreed to pay Powers substantial designated sums "when surface pipe has been set and cemented in" and again each time such well progressed to six respective designated graduate foot scales of depth. Powers agreed to drill such well and commence it with sufficient size tools and pipe, not later than August 1, 1947. The agreement specifically provided: "Due consideration shall at all times be given to the conditions, terms and requirements provided for within and by a certain *escorw* (escrow) agreement entered into on April 28th, A. D. 1947, by and between Edwin D. Crites, of Chadron, Nebraska, and Roy R. Powers, of Casper, Wyoming, whereby certain oil and gas leases are being held in escrow by one J. V. Webster * * * and which escrow agreement concerns various leases in the aforesaid town-

ships and Range." A supplemental agreement, executed by the same parties on the same date, was attached thereto and made a part thereof, which clarified the manner, the time and place of deposit, and payment of the first and succeeding installments to be made by Valentine Oil Company, and then provided that within 24 hours after reaching any pay-off depth provided for, said second party, Powers, should have the option of removing his equipment from said lease and drill site if the funds for the next successive pay-off were not deposited by Valentine Oil Company in the Bank of Chadron in advance, as specifically required by the agreement.

Exhibit E, attached to plaintiffs' petition, and made a part thereof, was a written agreement dated August 7, 1947, between Roy R. Powers and C. M. Valentine, and insofar as important here provided that in consideration of "One Dollar, and performance of other prior agreements between these parties" Powers agreed to give Valentine an assignment of an undivided one-half interest in all oil and gas leases that he then had or might thereafter record, including certain designated leases then held and those then in escrow which had been acquired on or before August 7, 1947. In that connection, it will be noted that plaintiffs were not parties to the escrow agreement or the leases, and that none of the lessors or the depositary were parties to or privy with any of the other agreements heretofore set forth.

Plaintiffs alleged that after making the drilling contract, a rig of the kind and character provided in the escrow agreement was set up for operation at a designated point; that the drilling requirements provided for therein were complied with, and that oral and written demands were made upon defendants to turn over the leases so that they could be subsequently divided between the lessee and plaintiffs; but lessee, acting in concert with defendants, refused to take affirmative action and turn certain leases over to lessee so that such division could then be made. In that connection, by whom

or when such demand was made was not alleged except it appears from exhibit C, attached to and made a part of plaintiffs' petition but stricken therefrom by the trial court, that on August 22, 1947, plaintiffs' attorney wrote a letter to lessee Powers demanding that he take the necessary steps, legal or otherwise, to compel the depositary and others directly or indirectly involved, to turn over to him forthwith all the escrow leases so that plaintiffs might receive their contractual portion thereof. In such letter it was said: "I am sending copies of this letter by 'Registered Mail' to Attorneys Edward D. Crites and Charles A. Fisher, and to Mr. J. V. Webster, The First National Bank of Chadron, Nebraska, and your Mr. A. R. Kennedy, with the hope that you will do voluntarily that which I am sure I can make you do if all of you still persist in your present refusals to carry out your agreements."

Plaintiffs also alleged as a conclusion that they had fully performed all conditions as required by their agreements, but in the next paragraph admitted that they ran out of money with which to pay the lessee Powers as provided in the drilling contract, whereupon lessee exercised his option, removed his drilling rig, equipment, and supplies, and abandoned the drilling operations.

The crux of plaintiffs' contention in their brief is that the grantors under an escrow agreement, as well as the depositary, are liable to an assignee of the grantee for delivery of the subject of the escrow agreement, when it has not been delivered to such assignee because of acts of the grantors and depositary. In that connection, plaintiffs contend that they were assignees of the lessee, but their petition discloses that in fact they were not. They simply had an agreement with lessee that after performance by them of prior agreements, he would assign to them a one-half interest in such oil and gas leases as had been acquired by lessee on or before August 7, 1947, but the leases here involved were never so acquired, and plaintiffs did not perform prior agree-

ments. The theory of plaintiffs' case in that regard is that the depositary should be required to deliver the leases in escrow to lessee, who should then be required to assign a one-half interest therein to plaintiffs.

In that connection, however, the petition does not disclose that any proper demand was ever made by lessee upon the depositary for their delivery. Further, with regard to timely performance of conditions of the escrow agreement, the petition discloses that lessee, on some date not disclosed, commenced the drilling of a well at a designated location, but he concededly did not continue such operations with all due diligence and without interruption as provided in the escrow agreement, because plaintiffs did not perform their drilling contract with lessee by providing funds to complete the well.

It is generally the rule, as stated in 21 C. J., Escrows, § 39, p. 893, that: "Upon performance of the condition the grantee or obligee is entitled to delivery, which will be enforced by a decree of court. * * * But a breach of the escrow agreement by the grantee may preclude him from bringing an action to enforce the terms of the agreement; thus where the grantee is in default, he cannot enforce a delivery of the deed to him by the depositary." See, also, 19 Am. Jur., Escrow, § 20, p. 438, where it is said: "In the law governing performance of escrow agreements, there is no doctrine of substantial compliance to be found. Compliance must be full and to the letter, or else it constitutes merely noncompliance. Strict and full performance only can discharge a condition precedent to valid delivery by the escrow holder. The question involved is one of performance of the escrow agreement, not of the ability of the parties to perform the agreement, since such ability, without full performance, cannot amount to compliance."

As stated in 30 C. J. S., Escrows, § 10, p. 1211: "The conditions on which instruments are deposited as escrows are ordinarily to be performed by the grantee or obligee, but a condition resting on such party may be satisfied

by the act of the depositor. It has been held that performance by a person other than the one specified in the escrow contract is insufficient to entitle such other person to delivery of the instrument; but the necessity of action by a specified party may be obviated by his transfer of interest to another." Also, as stated in 30 C. J. S., Escrows, § 9, p. 1206: "The grantor or depositor loses control over the instrument placed in escrow, although he retains legal title and its concomitants until performance of the condition; but, where the escrow is abandoned, it becomes ineffectual for any purpose."

It is also true, as here, that: "Where time is of the essence of a contract, the depositary has no authority to allow one of the parties to perform the conditions after the expiration of such time." 21 C. J., Escrows, § 24, p. 879. Further: "The grantor or obligor of an instrument held as an escrow is entitled to its return when the grantee or obligee fails to perform the conditions of the escrow contract, or the contingency specified has not occurred." 30 C. J. S., Escrows, § 12, p. 1215. It is also the rule that: "An action for specific performance of the contract will not be sustained if there is a want of certainty in respect of the persons to whom the conveyance is to be made." 30 C. J. S., Escrows. § 15, p. 1220.

We can only conclude from plaintiffs' petition that lessee and plaintiffs as well failed to perform, and abandoned the escrow agreement, and that plaintiffs, even assuming for purposes of argument only that they were assignees, acquired nothing until all conditions of the escrow agreement were performed. See, Henderson v. Ferrell, 183 Pa. 547, 38 A. 1018; Dayle L. Smith Oil Co. v. Griffin (Tex. Civ. App.), 104 S. W. 2d 167.

Plaintiffs also alleged, as a conclusion, that defendants colluded to defeat the agreements plaintiffs had made with the lessee, thus preventing them from securing their one-half of the leases in order to sell them or obtain financial aid therewith and obtain money with which

to complete the test well, thereby attempting to work a termination of all such leases for failure to drill a well or pay delay rentals. It appears without question that no well was ever commenced or continued with all due diligence and without interruption as contemplated by the escrow agreement, the assignment agreement, the drilling agreement, or the leases. Also, it is conceded that although lessee and plaintiffs at all material times well knew the entire situation, neither of them has ever tendered in court or out, or paid all or any part of the annual delay rentals which had accrued and were due and payable as respectively provided in said leases on or before April 19, 1948, April 22, 1948, or May 2, 1948, or those which have since annually accrued. Plaintiffs' petition simply "tenders and offers to pay to a proper party designated by the Court, the Valentine Oil Company's proper or proportionate share of said first annual rentals to become due to said lessors, or if that be in any way or manner inadequate or improper, all of said annual rentals, so as to prevent the voiding of said leases herein referred to."

In that connection, it will be noted that on March 5, 1949, the date of the original filing of plaintiffs' petition, all of said leases had already terminated as to all parties, lessor, lessee, or assignee, for failure to tender or pay the annual delay rentals already accrued and unpaid. Further, almost a year before plaintiffs' amended and supplemental petition was filed on April 4, 1951, which is the one here involved, the primary term of 3 years provided in each lease had expired, and said leases were also terminated thereby.

The effect of simple assignments, assuming for purposes of argument only that plaintiffs had such, would be to put plaintiffs in the shoes of Powers, the lessee, with just his rights and obligations as respects the lessor. Collins v. Atlantic Oil Producing Co., 74 F. 2d 122. As stated in that opinion: "The obligations between assignor and assignee are what the contract of assignment

makes them in the light of the provisions of the lease assigned." See, also, Wickham v. Skelly Oil Co., 106 F. Supp. 61.

The oil and gas business is still in its infancy in this state, but this court has already written opinions in two cases involving delay rental provisions. The delay rental clause here involved has been heretofore set forth in italics and will not be repeated again. Lincoln Land Co. v. Commonwealth Oil Co., 109 Neb. 652, 192 N. W. 219, involved a somewhat different clause, but in the opinion it was said: "A lease for oil and other minerals may be terminated or abandoned by failure of lessee to perform his agreements to prospect for and produce oil or other minerals in paying quantities or otherwise pay stipulated rentals. (Citing cases) * * * The petition pleads facts showing defendant terminated the lease or abandoned all rights under it."

Fritsche v. Turner, 133 Neb. 633, 276 N. W. 403, involved a delay rental clause almost identical with that presented in this case. Therein this court held: "An oil and gas lease, providing that, unless work is commenced by a certain time, or unless the lessee pay a rental stated to renew the lease, it shall terminate, confers an optional right upon the lessee and should be strictly construed in favor of the lessor and against the lessee." In so holding, the opinion cited and quoted with approval from McKinley v. Feagins, 82 Okl. 193, 198 P. 997, wherein it was said: "* * * 'Held, a failure on the part of the lessee to commence the drilling of a well or to pay the rental as stipulated automatically terminated the lease contract.

"'An oil and gas lease containing the "unless" clause confers an optional right upon the lessee, and should be strictly construed in favor of the lessor and against the lessee, and time is of the essence of the contract.'" As stated in our opinion: "The foregoing case is typical of the almost unanimous holding in all the states where gas and oil are found." An extensive note citing and discuss-

ing the aforesaid opinions and numerous other related cases will be found in 31 Nebraska Law Review, p. 374.

Generally, courts have treated such delay rental provisions as a special limitation. As stated in Restatement, Property, § 23, p. 55: "The term 'special limitation' denotes that part of the language of a conveyance which causes the created interest automatically to expire upon the occurrence of a stated event, and thus provides for a terminability in addition to that normally characteristic of such interest."

Such clauses do not obligate the lessee to either drill or pay delay rentals, but if he does neither, the lease terminates without any action being required by the lessor or the lessee. In other words, its termination is automatic and self-operating. See, Weiss v. Claborn (Tex. Civ. App.), 219 S. W. 884; Bailey v. Williams (Tex. Civ. App.), 223 S. W. 311; Phillips Petroleum Co. v. Curtis, 182 F. 2d 122; Ellison v. Skelly Oil Co., 206 Okl. 496, 244 P. 2d 832; 2 Summers, Oil and Gas, Perm. Ed., § 452, p. 494. As stated in Humble Oil Co. v. Davis (Tex. Comm. App.), 296 S. W. 285: "It was a limitation upon the term or period of the grant, and, upon the failure to drill or pay as aforesaid, the estate created by the lease ceased and reverted to the lessors." See, also, Guerra v. Chancellor (Tex. Civ. App.), 103 S. W. 2d 775.

Courts generally have strictly construed such special limitation clauses. In doing so, they have held that time is of the essence of the contract, and that failure to pay within the time specified in the lease automatically terminates the lease without the necessity of any affirmative action by the lessor. See, Ford v. Barton (Tex. Civ. App.), 224 S. W. 268; Ford v. Cochran (Tex. Civ. App.), 223 S. W. 1041; Weiss v. Claborn, *supra;* Bailey v. Williams, *supra;* Phillips Petroleum Co. v. Curtis, *supra;* Vaughan v. Doss, 219 Ark. 963, 245 S. W. 2d 826; McLaughlin v. Brock (Tex. Civ. App.), 225 S. W. 575; Waggoner Estate v. Sigler Oil Co., 118 Tex. 509, 19 S. W. 2d 27; Empire Gas & Fuel Co. v. Saunders, 22 F. 2d 733;

Coker v. Benjamin (Tex. Civ. App.), 83 S. W. 2d 373; Guerra v. Chancellor, *supra*.

In that connection, also, it is noted that it is essential that the lessee or his assignee fulfill all of the requirements and pay or make a proper tender of such delay rentals, which should be continuous, and if litigation results, then proper tender should be made in the pleadings. Hamilton v. Baker, 147 Tex. 240, 214 S. W. 2d 460; White v. Dennis (Tex. Civ. App.), 220 S. W. 161.

Further, the responsibility of properly construing the lease and making timely payment or tender of delay rentals is imposed upon the lessee or his assignee, and in that regard he is responsible for the failure of his agents. See, Appling v. Morrison (Tex. Civ. App.), 227 S. W. 708; Keeler v. Dunbar, 37 F. 2d 868; Humble Oil & Refining Co. v. Mullican, 144 Tex. 609, 192 S. W. 2d 770; Hill v. Stanolind Oil & Gas Co., 119 Colo. 477, 205 P. 2d 643; Superior Oil Co. v. Stanolind Oil & Gas Co., —— Tex. ——, 240 S. W. 2d 281.

Exceptions have been made to some of the foregoing conclusions in a few cases where delay rental provisions in the lease were materially ambiguous or the lessor was estopped by his own conduct which was such as to require the application of equitable principles, but none of such exceptions have any application in this case.

In the light of such rules and the situation here presented, we conclude that the respective leases involved each automatically terminated at the end of the first year for failure of lessee or plaintiffs to commence a well in good faith within a year or any time thereafter, or to timely tender or pay delay rentals as required therein. In that situation, there were no leases existent when this action was commenced by plaintiffs or since. As stated in 58 C. J., Specific Performance, § 35, p. 881: "Based on the general equitable doctrine that equity will not render a decree which it is impractical to carry out, and because equity will not do a vain thing, a de-

cree for the specific performance of a contract will not be granted if it would be, or could be made, nugatory and useless, or if it would be ineffectual or not beneficial to plaintiff." See, also, Conrad v. Kaup, 137 Neb. 900, 291 N. W. 687; Franklin v. Zarmstorf, 145 Neb. 21, 15 N. W. 2d 190. Such statement is also controlling here.

The escrow leases having terminated through plaintiffs' own failure to tender or pay delay rentals or perform the contracts made by them, any allegations of collusion to defeat plaintiffs' rights fall of their own weight, and there is no basis for the awarding of any relief.

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

AFFIRMED.

VALENTINE OIL COMPANY, A CORPORATION, ET AL., APPELLANTS, V. ROY R. POWERS ET AL., APPELLEES.
59 N. W. 2d 160

Filed June 5, 1953. No. 33258.

1. **Principal and Agent.** Agency is the relationship which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act.
2. ———. The distinguishing features of agency are its representative character and its derivative authority. Whether a particular relationship is an agency depends on the relations of the parties as they in fact exist, without regard to what they call their relationship.
3. ———. It is the duty of an agent, in all transactions concerning or affecting the subject matter of the agency, to act with the utmost good faith and loyalty to further the principal's interests.

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

Eugene D. O'Sullivan, Eugene D. O'Sullivan, Jr., and *A. Marvin Lungren,* for appellants.

Edwin D. Crites and *Charles A. Fisher,* for appellees.

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

CHAPPELL, J.

This case is a companion to and was originally a part of Valentine Oil Co. v. Powers, *ante,* p. 71, 59 N. W. 2d 150. Because of misjoinder of causes of action it was docketed separately with an amended and supplemental petition. Named as defendants were Charles A. Fisher, Roy R. Powers, and A. A. Kennedy, but in the same manner as in the other action the last two named defendants were concededly never served with process, and their special appearance was sustained. Therefore, actually the only defendant is Charles A. Fisher, who will hereinafter be generally designated as defendant. He demurred to plaintiffs' petition specially upon the grounds that there was a defect of parties defendant and that several causes of action were improperly joined, and generally upon the ground that plaintiffs' petition did not state facts sufficient to constitute a cause of action. The demurrer was sustained "generally" and plaintiffs did not elect to plead further, whereupon their action was dismissed at plaintiffs' costs, and they appealed, assigning that the trial court erred in sustaining the demurrer and in dismissing the action. We conclude that the assignment has no merit, and, as was done in Valentine Oil Co. v. Powers, *supra,* we dispose of the case as upon general demurrer.

The allegations of plaintiffs' petition and the issues presented thereby are in all material respects, except as hereinafter noted, identical with those in Valentine Oil Co. v. Powers, *supra,* and are controlled by that opinion except in the respects hereinafter discussed. In that regard there is no escrow agreement here directly

involved, but plaintiffs' case is predicated primarily upon the contention that defendant Charles A. Fisher was a gratuitous bailee who undertook to deal with certain oil and gas leases in a manner not warranted by his agreement as to their use, and that said defendant should be held liable for violation thereof. Plaintiffs prayed for injunctive relief to prevent the leases involved from being secreted or becoming less valuable for failure to have them recorded and to prevent the leases from terminating for failure to pay delay rentals as required therein, or for any other reason. They also prayed for specific performance of the agreements involved, together with equitable relief and damages if said leases were found to be terminated.

Insofar as important here, plaintiffs' petition substantially alleged that on August 9, 1947, Roy R. Powers executed and delivered to C. M. Valentine an assignment of "all of his right, title, interest, claim and demand of any kind, character and nature, whatsoever" in certain designated oil and gas leases dated April 24, 1947, which assignment plaintiffs recorded. When they did so is not alleged. A copy of such assignment is marked exhibit G, attached to plaintiffs' petition, and made a part thereof. The consideration therein recited was: "One Dollar and other good and valuable consideration," but as disclosed by other allegations of the petition and exhibits attached thereto, the other good and valuable consideration for making the assignment was "performance of other prior agreements between these parties."

In that connection, plaintiffs alleged that defendant Charles A. Fisher, a lawyer admitted to practice in this state during all of the times involved "was employed by the defendants, Roy R. Powers and A. A. Kennedy, as an attorney and counsellor, in reference to matters pertaining to the taking, assigning and recording of certain oil and gas leases, hereinafter mentioned, which leases * * * were taken in the name of said Roy R.

Powers; and that said Charles A. Fisher, after the assignments to the plaintiff of approximately one-half of the acreage set forth in certain of the oil and gas leases had been made to the plaintiff herein said Fisher, in addition to filing of record the leases allotted to said Powers, promised and agreed as agent of the plaintiff to keep safely for plaintiff and duly file of record with the proper recording authorities in the counties where the leased lands were situated the leases which had been apportioned to the plaintiff herein."

Plaintiffs further alleged in substance that after exhibit G, the assignment, had been executed and acknowledged by Roy R. Powers before Charles A. Fisher as notary public, who also signed as a witness, that all of the gas and oil leases, including those belonging to Roy R. Powers and plaintiffs, were left, but just when is not alleged, with defendant "for the purpose of having them filed of record in the proper counties" as aforesaid, but "that after the plaintiff had filed said Assignment of Leases, Exhibit 'G', of record," just when is not alleged, "he discovered that said leases and his share thereof had never been recorded but had been returned to the defendant Powers." Further, just when they were so returned is not alleged. In that connection, plaintiff well knew at all times that defendant Charles A. Fisher was employed as attorney by Roy R. Powers and A. A. Kennedy for the purpose of taking, assigning, and recording the very leases here involved.

In such situation, as a matter of course, defendant Charles A. Fisher was at all times the attorney and as such the agent of Roy R. Powers, and plaintiffs' allegation that defendant Charles A. Fisher was their agent was simply a conclusion of law which the alleged facts do not support. There is no allegation that the leases were ever delivered to plaintiffs by Roy R. Powers or in their possession, or that possession thereof was ever delivered to defendant Charles A. Fisher by plaintiffs for the purpose of recording and then redelivery thereof to

plaintiffs. The leases were simply "left with the defendant, Charles A. Fisher, for the purpose of having them filed of record" by him, who was at all times Roy R. Powers' agent. Clearly, Charles A. Fisher's possession was Roy R. Powers' possession, so that Charles A. Fisher was not a bailee or agent for plaintiffs but was simply the attorney for and agent of Powers and under his control at all times, to whom Charles A. Fisher owed an undivided allegiance and fidelity. Plaintiffs were cognizant of such facts and relations at all times and recognized their controlling importance by failing to allege directly that any demand was ever made by them upon Charles A. Fisher to record the leases or perform any alleged agreement with them.

As said in Restatement, Agency, § 1, p. 7: "Agency is the relationship which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act." In comment d, p. 10, it is said: " 'Agent' is a word used to describe a person authorized by another to act on his account and under his control."

As stated in 2 C. J. S., Agency, § 2, p. 1026: "The distinguishing features of agency are its representative character and its derivative authority. Whether a particular relationship is an agency depends on the relations of the parties as they in fact exist, without regard to what they call their relationship." Also, "It is the duty of an agent, in all transactions concerning or affecting the subject matter of the agency, to act with the utmost good faith and loyalty to further the principal's interests." 3 C. J. S., Agency, § 138, p. 6. Such statements are controlling here. In that regard, also, the distinctions between an agent and a bailee will be found in 2 C. J. S., Agency, § 2, p. 1027.

Plaintiffs also alleged as a conclusion that Charles A. Fisher, Roy R. Powers, and A. A. Kennedy colluded together to thereby prevent plaintiffs from obtaining possession of their share of the leases, and made it impos-

sible for them to sell or otherwise use the same to obtain aid with which to complete a test well then being drilled by Roy R. Powers under his drilling contract with plaintiff, Valentine Oil Company, which required it to pay for drilling same in installments upon a graduated scale of depth as the well progressed. In that connection, it is conceded that plaintiffs almost from the beginning defaulted in the payment of such installments, whereupon Roy R. Powers exercised his option as provided in such drilling contract, removed his drilling equipment, and abandoned drilling the well. We find nothing in any agreement even suggesting that the money for payment of such installments by plaintiffs was to be raised in any such manner. They were simply required to be paid, which plaintiffs failed to do.

In the light of such situation, we conclude that no well was commenced within a year from date of the leases, as required therein. Further, it is conceded that neither Roy R. Powers as lessee, nor plaintiffs as assignee of the leases here involved, whose duty it was to do so, ever paid or tendered any annual rentals to the lessors on April 24, 1948, or thereafter, as required by the leases here involved. Thus, as pointed out in Valentine Oil Co. v. Powers, *supra,* they were thereby each and all of them automatically terminated and were void when this action was commenced, which will not permit equity to award relief as prayed by plaintiffs.

The mere failure to record the leases did not of itself invalidate or terminate them. If they had been recorded, as was the assignment thereof, it would only have made operative Chapter 57, article 2, R. R. S. 1943, and under the circumstances presented here defendant Charles A. Fisher was not responsible in any event for any loss suffered by plaintiffs' own failure to commence a well within a year or to pay or tender delay rentals as required in order to give the leases continued validity.

For reasons heretofore stated, and related reasons stated in Valentine Oil Co. v. Powers, *supra,* we con-

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

AFFIRMED.

VERN STEWART, APPELLEE, V. SPADE TOWNSHIP, APPELLANT, IMPLEADED WITH ELMER HALVORSEN ET AL., APPELLEES.

58 N. W. 2d 841

Filed June 5, 1953. No. 33263.

1. **Principal and Agent.** The apparent authority of an agent which will bind his principal is such authority as the agent appears to have by reason of the actual authority which he has.
2. **Damages.** Nominal damages may be recovered where a cause of action for a legal wrong is established, but there is no proof of actual damages.
3. ———. The failure to allow nominal damages is reversible error where it affects a substantial right of plaintiff or prevents him from recovering costs. The rule, however, is otherwise where plaintiff is not thus injured.

APPEAL from the district court for Knox County: LYLE E. JACKSON, JUDGE. *Affirmed in part, and in part reversed and remanded.*

Leo M. Williams and *Roscoe L. Rice,* for appellants.

W. Keith Peterson, for appellee Stewart.

Merritt C. Warren and *A. L. Burbridge,* for appellees Halvorsen.

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

SIMMONS, C. J.

In this action plaintiff, an operator of road-building machinery, sued to recover the reasonable value of work and labor performed in building the approaches to a culvert on a township road, and the reasonable value of building a length of new road on private property adjoining the township road. He alleged that the

amount due him was $572.50. He joined the township and three individuals as parties defendant. The three individual defendants filed general denials. The defendant township admitted its liability for the reasonable value of the work done in building the fill or approaches to the culvert. It denied other liability. By counterclaim it sought to recover $820 for damages to the culvert and its road. The trial court sustained a demurrer to the evidence on the counterclaim.

The cause was tried to a jury. The trial resulted in a verdict and judgments against each of the individual defendants in the sum of $25 each and against the township in the sum of $497.50.

The township appeals and will be hereinafter referred to as the defendant.

Issues as to the liability of the other defendants are not presented by this appeal.

We deem it necessary to determine two assignments of error.

In summary, plaintiff's evidence shows the following as the basis of his claim to recover from the defendant. The defendant's board in April of 1951, verbally agreed with users of the road to build a culvert in the township highway and to make the necessary fill or approaches so as to make the road passable across the culvert. One member of the board authorized one of the individual defendants to employ someone with dirt-moving machinery to make the fill. About a week before July 9, 1951, that authority was exercised, and plaintiff was employed to make the fill. Plaintiff testified that he was so employed. That individual defendant had no part in the conversations that produce the dispute here.

Also about the same time one member of defendant board employed a Mr. Warner to build the culvert. Plaintiff testified that he knew Warner was so employed. There is evidence by one member of the defendant board that Warner was "road boss" on that job.

On July 9, 1951, Warner and two of the defendants,

who were interested in improving this road, started to build the culvert. Plaintiff brought his machinery to the job. The question of getting dirt for the fill arose. One member of defendant's board testified that he expected them to get the dirt from the right-of-way. Two of the individual defendants bought and paid for dirt from the land of an adjoining neighbor. Some one of those there at that time apparently conceived the idea of building a new road extending from the culvert, parallel to the township road and on the land of the adjoining neighbor. The owner seems to have agreed. Plaintiff did not testify as to which of the three men (including Warner who was not a defendant) told him to build the new road. He testified only that "they" did. We find no evidence that any of the three men told the plaintiff that they had authority or spoke for the defendant in giving instructions to build the new road.

The fence was taken down and the work commenced. Warner finished building the culvert the second day and was not thereafter on the job. Thereafter during the week's time that followed (time being taken out on account of rain) plaintiff made the approaches and built the new road. He estimated that about half the work done was on the approaches and half on the new road. The defendant's evidence indicated that the value of making the fill was a lesser amount than one-half the total work performed.

The court instructed the jury that if they found that the two defendants who were present when the work began, or Warner, or any of them had apparent authority to bind the township and authorized and directed plaintiff to do the work necessary to build the new road, that the township would be liable for the reasonable value of plaintiff's services.

It is obvious from the verdict that the jury found that some one of these men had the apparent authority to direct plaintiff to build the new road.

We held in Creighton v. Finlayson, 46 Neb. 457, 64 N. W. 1103, that: "The apparent authority of an agent which will bind his principal is such authority as the agent apears to have by reason of the actual authority which he has."

The first question then is, what is the actual authority of the agent? The one man had actual authority to employ someone to build the approach to the culvert. The other man had actual authority to build the culvert. Plaintiff knew the actual authority of each of the men. No actual authority was given to anyone to do more than that. No one contemplated the building of a new road when the actual authority was given, nor when the authority to employ someone to build the approaches was exercised. We see no basis upon which it can be held that the agents of the defendant had apparent authority to authorize the building of a new road. The trial court erred in submitting the issues to the jury in the manner above set out. The error requires a reversal.

Defendant by counterclaim sought to recover $120 for damages to the culvert and $700 for the cost of removing dirt and debris placed on the road by plaintiff and for "rebuilding a proper township road."

At the close of all the evidence the court sustained a demurrer by the plaintiff to the evidence of the defendant and did not submit the issues of the counterclaim to the jury. Defendant assigns that as error. The question submitted here is whether or not defendant proved recoverable damages.

The evidence is that some days after the work was completed the posts of the culvert were out of perpendicular and in a slanting position and some of the planks pulled loose from the places where they had been attached, although later a part at least of these conditions had been remedied by someone. Defendants offered evidence as to the estimated cost of removing dirt from the culvert and repairing it. We find no evidence that

the damage to the culvert, if any, was caused by anything done by plaintiff. The trial court did not err in not submitting that part of the counterclaim to the jury.

There is evidence that there was dirt and debris on the highway before plaintiff began the work. There is also evidence from which it might be inferred that other dirt there was the result of slides, not connected with plaintiff's work. There is evidence of dirt on the highway which was there as the result of slides caused by plaintiff's work. There is evidence of dirt put there properly by plaintiff as the result of his employment by defendant and dirt put there by plaintiff as a result of making the connection between the culvert fill and the new highway. The most positive statement of damages, offered by defendant, which we find is that "it would cost in the neighborhood of $700.00 probably to put it back where it was before."

At most defendant would not have been entitled to more than nominal damages under this evidence. The rule is: " 'Nominal damages may be recovered where a cause of action for a legal wrong is established, but there is no proof of actual damages.' 25 C. J. S. 466." Larson v. Marsh, 144 Neb. 644, 14 N. W. 2d 189, 153 A. L. R. 101.

The question then is, did the trial court err in failing to submit the issue to the jury? The rule is: "The failure to allow nominal damages is reversible error, where it affects a substantial right of plaintiff or prevents him from recovering costs. * * * The rule, however, is otherwise where plaintiff is not thus injured." Braun v. Peet, 97 Neb. 443, 150 N. W. 256.

Applying the language of the Braun case to the case here: From the proofs, the jury could not have estimated any substantial damage to defendant and the trial court properly refused to submit that question to them. For the court's failure to allow nominal damages the defendant is not entitled to a reversal for the following reasons: Not having adduced evidence of actual damages, no substantial right of defendant was affected by

sustaining the demurrer to the evidence. It is patent, under this record, that plaintiff was entitled to judgment in a substantial amount for the work done in moving dirt to the approaches to the culvert. That judgment would have carried costs under the provisions of section 25-1708, R. R. S. 1943. Defendant, accordingly, would not have recovered costs had a judgment for nominal damages on the counterclaim been awarded. It follows that the failure to submit the issues of the counterclaim to the jury is not reversible error.

The judgment of the district court is reversed and the cause remanded for further proceedings as to plaintiff's petition. The judgment is affirmed as to the counterclaim.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED.

BUELL S. BORDEN ET AL., APPELLEES, V. GENERAL INSURANCE COMPANY OF AMERICA, A CORPORATION, APPELLANT.
59 N. W. 2d 141

Filed June 5, 1953. No. 33265.

1. **Witnesses: Evidence.** The owner of personal property is qualified to express an opinion of the value thereof solely because of his status as owner of it.
2. ———: ———. A witness who is shown to be acquainted with property and its reasonable market value is qualified to testify to his opinion of such value.
3. ———: ———. The qualification of a witness to give testimony of the value of personal property is committed to the sound discretion of the trial court and its ruling thereon will only be disturbed when clearly erroneous.
4. **Insurance.** The phrase not exceeding a specified amount in a policy of insurance denotes that uncertainty of amount which is the chief characteristic distinguishing an open from a valued policy.
5. ———. A provision of an insurance policy that the insured is indemnified to the extent of the actual cash value of the property at the time of the loss not exceeding an amount therein

stated constitutes merely a limitation upon the amount of the recovery and is not a substantive measure of damages which the insured may invoke.

6. ———. A policy of insurance indemnifying the insured against loss because of damages to or destruction of property designated therein not exceeding a specified amount is no evidence of the value of the property or the extent of the loss.

7. **Principal and Agent.** An admission by an agent to be admissible in evidence against his principal must have been a statement of fact within his own knowledge and not the expression of an opinion.

8. ———. The local agent of an insurance company may not bind his principal by his statements to the owner of property as to the value thereof made during negotiations for the writing of insurance resulting in the issuance of an unvalued policy thereon to the owner. Such statements of the agent are inadmissible as original evidence of value in a suit on the policy to recover a loss.

9. **Evidence: Appeal and Error.** The proof in a trial of a jury case must be confined to legal evidence tending to prove or disprove an issue made by the pleadings and the admission of improper evidence is prejudicial error if it may have influenced the verdict.

10. ———: ———. If it does not appear from the record that evidence wrongfully admitted in the trial of a jury case did not affect the result of the trial unfavorably to the party against whom it was admitted its reception must be considered prejudicial error.

11. **Trial.** The trial court must correctly instruct the jury the proper method of determining the amount that the plaintiff may recover.

12. **Attorney and Client.** A litigant may not have an allowance of an attorney fee by the court unless it is authorized by statute or a uniform course of procedure.

13. **Attorney and Client: Insurance.** The court has no authority to award an attorney fee in favor of the plaintiff upon rendition of judgment in his favor in a suit on a fire insurance policy concerning only personal property.

APPEAL from the district court for Lincoln County: JOHN H. KUNS, JUDGE. *Reversed and remanded.*

Maupin & Dent, for appellant.

Beatty, Clarke, Murphy & Morgan, for appellees.

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

BOSLAUGH, J.

This is an action on a contract of fire insurance brought by appellees against appellant for recovery of a loss resulting by the destruction by fire of the property insured.

The claims of appellees are that appellant, for a premium paid, issued and delivered to appellees a policy of fire insurance and thereby indemnified them against damage by fire of their stock of groceries and meats and the fixtures, furniture, and equipment, located and used in their retail grocery store and meat market in North Platte to the extent of the actual cash value of the property at the time of the loss not exceeding $20,000; that during the term of the policy the property was destroyed by fire; and that the actual cash value of it was in excess of the maximum indemnity provided by the policy.

The appellant admitted the issuance and delivery of the policy by it to appellees for a consideration; that it protected them against loss as defined therein to the extent of the actual cash value of the property described in the policy at the time of the loss to an amount not exceeding $20,000; that the property insured was the stock, fixtures, furniture, and equipment above described; that it suffered some loss and damage by fire while the insurance was effective; and appellant denied the other claims of appellees.

The jury made special findings of the actual cash value of the stock of merchandise and of the fixtures, furniture, and equipment of appellees on the date of the loss. It deducted from the value of the latter the salvage as the trial court required it to do and it returned a general verdict for appellees consistent with the special findings. The motion of appellant for a new trial was denied and judgment was rendered for the appellees.

The contending parties as shown by the record are Buell S. Borden, appellee, the owner of the property

destroyed by the fire, and the appellant. Claribel L. Borden, named as one of the appellees, will not be again mentioned herein. The merchandise consisting of groceries and meats referred to in the policy of insurance will be identified as the stock, and the fixtures, furniture, and equipment will be described as fixtures.

A part of the answer of appellant alleges that the business of appellee on the date of the fire and for a considerable time before it was unprofitable, in a failing condition, and was subject to sure liquidation and forced sale, and at the time of the fire that it was not possible to sell it as a going concern; that the store was conducted in a rented building and the tenancy was only from month to month; that a decree of foreclosure had been rendered in the district court for Lincoln County against appellee 6 days before the fire in an amount greater than $2,700 which was a first lien on the fixtures of appellee used in the operation of his business, and sale thereof had been ordered to satisfy the decree; that the fixtures were designed and constructed for use only in the building where they were at the time the insurance contract was made effective and where they were at the time they were destroyed, and they were not available for use in any other building or place of business; that the stock of groceries and meats had been reduced, unsalable merchandise had accumulated until the store could not supply its normal trade, and the stock and fixtures were not salable as a unit; and that appellee was estopped by virtue of his sworn evidence in prior litigation to contend or attempt to support any theory that the actual cash value of the property destroyed by the fire was other than what it could at that time have been sold for at a forced or liquidation sale. These matters were by the court, on motion of appellee, stricken from the answer. This is the basis of an assignment of error by the appellant.

The appellant denied the allegations of appellee concerning the value of property at the time it was de-

stroyed. The issue joined by the pleadings was the actual cash value of the property within the limitations of the policy. The appellant was entitled to show by competent evidence every available fact and circumstance that affected or tended to show the value of the property and this the law accorded it without further pleading than the denial it had made of the value claimed by appellee. There were many improper matters in the part of the answer that was eliminated. These invited evidence and contention on many matters foreign and immaterial to the issue of the case. Appellee had and was conducting a retail store at the time of the fire. The appellant was bound by contract to indemnify him to the amount of the actual cash value of the property destroyed as it existed at the time of the fire within the maximum amount provided by the contract. The issue was, what was that value. The poverty or wealth of appellee did not affect it. The ruling of the court in this respect did not prejudice appellant.

It is said by appellant that there is no competent proof of the merchandise destroyed or the value thereof. The only testimony offered and received as to the stock was that of Buell S. Borden, appellee. There was an absence of evidence of the character, quantity, quality, or other descriptive detail of the merchandise destroyed. The witness, the owner of the insured property and the operator of the store, was asked if he had an opinion of the actual cash value of the property on the date of the fire. and he said he had. Upon further inquiry he stated his opinion. Objections of appellant to the witness being permitted to place his estimate of value in evidence were that proper foundation therefore had not been laid; that it was an improper method of attempting to value the property destroyed as a basis of recovery on the policy of insurance; that the inquiry called for the statement of a conclusion; and that the evidence was incompetent and irrelevant.

The witness identified, and there was received in evi-

dence, a detailed statement of the items of fixtures, but there was no foundation for the opinion of the witness concerning the value of the stock except that he was the owner of it at the time of the fire; that he had owned and operated the store for more than 3 years; and that he had prior thereto been employed and worked in the grocery business for about 20 years. Appellant insists that before the owner of property may testify to his estimate of its value there must be evidence of the character, nature, and description of it which the jury may consider in weighing the testimony of the owner on the issue of value. The appellant has incorrectly appraised the situation.

It has long been established in this state that the owner of personal property is qualified to express his opinion of the value of the property solely by his status as owner. In the early case of Western Home Ins. Co. v. Richardson, 40 Neb. 1, 58 N. W. 597, a member of the firm insured gave his opinion of the value of the stock of goods covered by the contract of insurance at the time of the fire as a unit and without stating any particulars concerning it. It was objected that it was not competent for him "to state in this wholesale way" the value of the goods, but that he should enumerate the articles. This court observed: "* * * it was competent for the witness to state the value of the stock in the store. Such evidence was not the statement of a conclusion, but of a fact. If the defendant desired, he could, on cross-examination, have interrogated the witness as to the value of the different articles and kind of goods." In Jensen v. Palatine Ins. Co., 81 Neb. 523, 116 N. W. 286, it was said: "It is contended by the defendant that there was no competent proof of the value of the goods destroyed * * *. The plaintiff Jensen testified to the value of the goods. He had purchased the same, they were in his personal charge, for a long time he had been selling from the stock at retail, and was undoubtedly competent to speak of the

value of any particular article. In proving the value of personal property, it is usually held that the owner is allowed to estimate its value, whether he is qualified as an expert or not." In Lincoln Supply Co. v. Graves, 73 Neb. 214, 102 N. W. 457, a husband and his wife testified as to the value of personal property owned by them. The court said this was permissible and observed: "The degree of their competency and the weight of their testimony being, of course, left to the determination of the jury as in other cases." A recent case, McGuire v. Thompson, 152 Neb. 28, 40 N. W. 2d 237, states the rule: "The owner of chattels is qualified by reason of that relationship to give his estimate of their value." See, also, Cox v. Greenlease-Lied Motors, 134 Neb. 1, 277 N. W. 819; Sprague v. Allied Mills, Inc., 129 Neb. 394, 261 N. W. 892; Folken v. Union Pacific R. R. Co., 122 Neb. 193, 239 N. W. 831; Miller v. Drainage Dist., 112 Neb. 206, 199 N. W. 28. It was decided in Baltimore American Ins. Co. v. Pecos Mercantile Co., 122 F. 2d 143, that: "* * * an owner who is familiar with property * * * connected with and used in a business may testify concerning its value, although he is not an expert * * *. And his estimates of value may be given either item by item or in gross amounts." See, also, Chicago & E. R. R. Co. v. Ohio City Lumber Co., 214 F. 751; Shook v. Beals, 96 Cal. App. 2d 963, 217 P. 2d 56, 18 A. L. R. 2d 919. The owner of the property was a competent witness to give evidence of the value of it.

Appellee called W. J. Bradford, J. R. Snyder, and Carl Brodbeck to testify concerning the value of the fixtures at the time they were destroyed. Appellant unsuccessfully contested the qualifications of each of them to express an opinion on this subject. The reception of their testimony is assigned as prejudicial error because it is said the trial court abused the discretion given it in regard thereto. The validity of this

assignment must be resolved by what the record shows concerning these men.

Mr. Bradford had lived in North Platte for 21 years, was then and had been in the grocery and meat business for 30 years, had known and been familiar with the store owned by appellee at the time of the fire since it was established in 1941, had been in it once or twice, by it many times, and had observed the fixtures therein. He had bought and sold this class of property and was able to form and express an opinion as to the value thereof. He had examined a list of the fixtures destroyed by the fire, had gone over the items thereof, and knew the extent and nature of them.

Mr. Snyder of North Platte was and had been for 24 years engaged in the retail grocery and meat business. He was co-owner of and active in the Snyder Food Market, a store 44 feet by 100 feet, which maintained a complete stock of groceries and meats, and a complete set of fixtures, furniture, and equipment for its operation. He had bought, sold, and traded property of this kind. He had kept himself informed as the the value thereof. He was familiar with the store owned by appellee. He was in it frequently before appellee became the owner. He had observed its contents on many occasions. It was comparable in size to the store of the witness. He had examined the list of the fixtures as they were at the time of the fire.

Mr. Brodbeck was a resident of North Platte for 59 years and had been in the retail grocery and meat business for 25 years. He had been in the Borden Market on infrequent occasions, knew its situation, and the fixtures therein. He was familiar with the property necessary for the operation of such a store and the value of property of this character. He had been shown and looked over a list of the fixtures of the Borden Market destroyed by the fire.

The books and records of the store were destroyed by the fire.

In Jensen v. Palatine Ins. Co., *supra*, it is said: "Where the value of a stock of merchandise is a relevant fact, and no more accurate evidence is under the circumstances obtainable, * * * witnesses acquainted with the value of the different articles of which it is composed, and who have observed the same for the purpose of estimating the value thereof, may give their opinion of such value." In Langdon v. Wintersteen, 58 Neb. 278, 78 N. W. 501, complaint was made of the admission of the testimony of a witness as to the value of the goods in controversy on the ground of lack of qualification. It was shown that she had frequently priced and bought similar articles at retail and in a general way knew their value. This court said: "This was sufficient. The weight of her testimony was for the jury. No very precise or extended knowledge of values of articles of common use is essential to justify the trial court in admitting opinion evidence of this character." It is recognized in Hansen v. Village of Ralston, 145 Neb. 838, 18 N. W. 2d 213, that: "One who is shown to be acquainted with property and its fair and reasonable value in the market is competent to testify as to such value." See, also, 20 Am. Jur., Evidence, § 894, p. 751; Penn-National Hardware Mutual v. Griffin, 174 Ark. 627, 296 S. W. 66, 53 A. L. R. 1106.

The qualifications of a witness to give testimony as to the value of personal property is a matter committed to the sound discretion of the trial court and its ruling thereon will only be disturbed when clearly erroneous. Hansen v. Village of Ralston, *supra;* Aurora Hotel, Inc. v. Board of Equalization, 140 Neb. 511, 300 N. W. 419; Jensen v. Palatine Ins. Co., *supra;* Langdon v. Wintersteen, *supra;* 20 Am. Jur., Evidence, § 891, p. 748. The action of the court in receiving the testimony of the witnesses named above was not clearly erroneous. In this situation their credibility and the significance to be given their testimony was for the consideration of the jury.

Appellee was permitted to testify that about April 10, 1949, he told the local agent of appellant at North Platte that he had maintained and then had $25,000 of fire insurance on his stock and fixtures; that he was discontinuing the insurance at its expiration; and that he could not afford to have more than $20,000 of insurance. They were then in the store of appellee. He was asked if the agent examined the contents of the store and his reply was: "* * * I can't say that he did, other than that he more or less just looked over the lay-out." The agent had at times been in the store as a customer. The agent said he thought appellee should have the amount of insurance he then had in force, but appellee maintained he could only afford $20,000 of coverage. Sometime after this conversation, the date not being shown more definitely than that it was in the spring of 1949, appellant acting by the agent issued its policy of fire insurance to appellee for a term of 1 year. Appellee did not have the policy but said the amount of it was $20,000.

Appellee also said that on about March 25, 1950, he had a conversation with the agent in which he said that if appellee had a loss under the 90 percent coinsurance clause and did not have enough insurance, and if the loss was partial and as much as 10 percent more than the face value, the company would only stand its share of the loss and the insured would lose the balance, and that he wanted appellee to have enough protection and suggested $25,000. Appellee stated that $20,000 was all that he could afford. Thereafter a policy for the period of April 10, 1950, to April 10, 1951, was issued and delivered to him by appellant. This policy was offered and admitted in evidence.

Appellee further stated that on about March 1, 1951, he talked with the agent about insurance for the ensuing yearly period and the agent discussed replacement costs and values of merchandise; he said these had increased; and he solicited appellee to increase his insurance to $25,000. Appellee refused to commit himself to any

figure but said he would consider it. About 10 days later he told the agent he had not made a decision. The agent saw him again about 2 weeks after the second conversation. They talked about increased costs and the Korean situation, and the agent made a proposal to increase the insurance but appellee said that he would only take the same amount he then had. The policy involved in this case was made a few days later. It was put in evidence. All of this evidence and each part of it was timely and properly challenged by objections of appellant. These were denied and the action of the court is assailed as erroneous and prejudicial.

Appellant by its contract indemnified appellee against loss by fire of the property described to the extent of the actual cash value of it at the time of the loss, but not exceeding the amount which it would cost to repair or replace the property with material of like kind and quality, and not in any event exceeding the sum of $20,000. The single issue in this case was the amount of the actual cash value of the property at the time of the loss.

The policy in suit is an open one. Insurance policies for the purpose of valuation in the event of a total loss of the property involved are two kinds, open and valued policies. An open policy is one in which the value of the interest at risk is not fixed by it, but in the event of a loss it must be ascertained by mutual understanding or by proof. In Gerhard v. Boston Ins. Co., 99 F. Supp. 247, it is said: "A 'valued' policy is one which places a valuation upon the underwritten property by way of liquidated damages for the purpose of avoiding a subsequent valuation of the property in case of loss. * * * Such a phrase (not exceeding), in a policy of insurance, 'denotes that uncertainty of amount which is the chief characteristic distinguishing an 'open' from a 'valued' policy."

Lighting Fixture Supply Co., Inc. v. Fidelity Union Fire Ins. Co., 55 F. 2d 110, discussed an open policy in

this language: "We come now to the question of damages. The policy was an open one. It is a fundamental principle that such a policy of insurance is a contract of personal indemnity. The property is not insured against destruction, but the insured is guaranteed against loss, to the extent of his insurable interest, not exceeding the amount stipulated." See, also, Voges v. Mechanics Ins. Co., 119 Neb. 553, 230 N. W. 105; Linch v. Hartford Fire Ins. Co., 138 Neb. 110, 292 N. W. 27, 129 A. L. R. 1063; Lion Fire Ins. Co. v. Starr, 71 Tex. 733, 12 S. W. 45; Christiansen v. Bankers & Shippers Ins. Co., 49 S. D. 225, 207 N. W. 108; 6 Appleman, Insurance Law and Practice, § 3823, p. 169.

The amount of an open policy of insurance indemnifying the insured against loss because of damage to or destruction of property designated therein is no evidence of the value of the property or the extent of the loss. Such a policy of insurance is not even prima facie evidence of the extent of the loss. The very terms of the contract exclude such a conclusion. The amount stated in a policy of this class is not a substantive measure of damages, but is only a limitation upon what might be otherwise recovered under the terms of the policy. The exact and important language of the policy in suit is: "* * * to an amount not exceeding Twenty Thousand and No/100 _____Dollars, does insure Buell S. Borden * * * to the extent of the actual cash value of the property at the time of loss, but not exceeding the amount which it would cost to repair or replace the property with material of like kind and quality * * * against all direct loss by fire * * * to the property described * * *." Voges v. Mechanics Ins. Co., *supra,* considered a similar policy provision and determined it: "* * * To be a valid stipulation and determinative of the rights and liabilities of the insurer and insured and applicable to losses not within the scope of the Nebraska valued policy act; * * * That, when applicable, 'the loss or damage shall be ascertained or estimated according to

such actual cash value * * *;' and * * * That the provision, 'the loss or damage * * * shall in no event exceed what it would then cost the insured to repair or replace the same with material of like kind and quality,' constitutes merely a limitation upon the amount of the recovery, and is not a substantive measure of damages which the insured can invoke." See, also, Clouse v. St. Paul Fire and Marine Ins. Co., 152 Neb. 230, 40 N. W. 2d 820, 15 A. L. R. 2d 1008.

The syllabus of Standard Fire Ins. Co. v. Wren, 11 Ill. App. 242, states: "In an action upon a policy of insurance for a loss thereunder, upon a question of the amount or value of the goods destroyed, the policy is no evidence, and an instruction to that effect correctly states the law and its refusal is improper." The tendered instruction was: " 'The jury are instructed that the amount of the policy is no evidence of the amount or value of the stock, furniture or fixtures, at the time the policy was issued.' " In the opinion the court said: "There can be no doubt, we think, that this instruction states the law correctly. The policy is not a valued, but an open one and no value was placed upon the property in any form, either in the policy itself, or in any application or other paper executed by the parties at the time the insurance was effected. By its terms, the policy insured the plaintiff 'against loss or damage by fire to the amount of $1,500,' that amount being distributed in various sums on the several items of property insured, 'the amount of loss or damage to be adjusted according to the actual cost value of the property at the time of the loss.' Here was no admission either express or implied, that at the date of the policy, the property insured was worth the sum named in the policy or any other sum, but the value was left to be determined by evidence after a loss."

The language of Lion Fire Ins. Co. v. Starr, *supra*. is: "A policy of insurance on personal property is a contract on the part of the insurer to indemnify the insured

to the extent of the loss actually sustained, upon such conditions stated in the contract as are reasonable. A loss being shown, then the prime object of inquiry is the extent of the loss. The amount of the policy is not even prima facie evidence of the extent of the loss, for, by the terms of the contract, strict and particular proof of the extent of damage or amount of loss sustained is required to be made by the insured." See, also, Martin v. Capital Ins. Co., 85 Iowa 643, 52 N. W. 534; Joy, Wright & Hudson v. Security Fire Ins. Co., 83 Iowa 12, 48 N. W. 1049; Annotation, 56 A. L. R. 1155; 29 Am. Jur., Insurance, § 1184, p. 890.

There is an absence of evidence as to the value of the stock and fixtures owned by appellee at the time the policies were issued in 1949 and 1950, respectively, or at the time the conversations were had between the agent and appellee concerning insurance covering them. The policy issued in 1950, and the testimony of appellee concerning conversations with the agent and as to the contents of the policy made in 1949 were inadmissible. These were foreign to the issue on trial. The policies were not evidence of the value of the property when they were made or of the extent of the loss occasioned by the fire. A statement by an agent as to the value of the property, under the circumstances of this case, is inadmissible as original evidence of value. Murray Co. v. Gilbert (Tex. Civ. App.), 80 S. W. 2d 805; Smith v. Emporium Mercantile Co., Inc., 190 Minn. 294, 251 N. W. 265; 31 C. J. S., Evidence, § 343, p. 1113.

Any statement made by the agent as claimed by appellee in the testimony referred to above to the extent it purported to indicate the value of the property in the store of appellee was the expression of an opinion by the agent and was not the statement of a fact. It was not within an exception to the hearsay rule and was not binding upon appellant. An admission by an agent to be admissible in evidence against his principal must have been based on his own knowledge and must

have been a statement of fact and not an expression of an opinion. Wert v. Equitable Life Assurance Society, 135 Neb. 654, 283 N. W. 506; Shiman Bros. & Co. v. Nebraska National Hotel Co., 143 Neb. 404, 9 N. W. 2d 807; Wood River Bank v. Kelley, 29 Neb. 590, 46 N. W. 86.

Proof in the trial of a jury case should be confined to legal evidence which tends to prove or disprove the issues made by the pleadings. Evidence erroneously received in such a case may not be considered without prejudice against whom it is admitted if it may have influenced the result as to him. If it does not appear from an examination of the record that the evidence wrongfully received did not affect the result of the trial its reception must be considered prejudicial error. In Thompson v. Wertz, 41 Neb. 31, 59 N. W. 518, it is said: "The proof must be confined to the issues as made by the pleadings, and the admission of irrelevant testimony in a case tried to a jury is prejudicial error where it may have influenced the verdict." See, also, Bee Publishing Co. v. World Publishing Co., 62 Neb. 732, 87 N. W. 945; Exchange Bank v. Gifford, 102 Neb. 324, 167 N. W. 69; Macke v. Wagener, 106 Neb. 282, 183 N. W. 360; In re Estate of Parvin, 131 Neb. 853, 270 N. W. 470.

A consideration of the record prevents a conclusion that the jury was not influenced by the wrongfully admitted evidence. The purpose of producing it in the trial is obvious and is freely admitted. Appellee asserts that his design was to obtain a verdict for $20,000. The jury missed this amount by only $10. It cannot be said that the inadmissible evidence summarized above contributed less to the amount of the verdict than the other evidence. It was both inadmissible and prejudicial.

The evidence as to the value of the property at the time of its destruction was estimated by witnesses on the basis of their opinion as to the actual cash value or their opinion as to its fair reasonable market value. The terms actual cash value or fair reasonable market

value were used substantially interchangeably. The instruction of the court on the measure of the recovery stated in one part that actual cash value of the property is its market value and in another part that actual cash value is fair value. It also permitted the jury if it could not find market value of any part of the property from the evidence to find the fair value of it by considering its condition, its original cost, the amount by which it may have been depreciated by use or obsolescence, the current cost of replacement, its usefulness to the owner for the purposes for which it was intended, and any other matter bearing on the question of value. Fair value was not otherwise defined or explained. There was no like mention or specification of the matters which the jury could or should consider in determining market value of any of the property except the general charge that the case should be decided from a consideration of the evidence. The effect of this was that the jury was told that actual cash value was market value, and that actual cash value was fair value, and therefore indisputably fair value was market value, but that it should consider many things in arriving at fair value that were not required or permitted to be considered in arriving at market value. This instruction was incorrect and prejudicial. Linch v. Hartford Fire Ins. Co., *supra;* Chard v. New York Life Ins. Co., 145 Neb. 429, 16 N. W. 2d 858; Umberger v. Sankey, 151 Neb. 488, 38 N. W. 2d 21, on rehearing, 151 Neb. 625, 38 N. W. 2d 551; Lynn v. City of Omaha, 153 Neb. 193, 43 N. W. 2d 527.

The jury should have been instructed, in the condition of the record, that actual cash value of property, as the words are used in this case, means the market value of it; that market value is the amount for which property may be sold by a willing seller who is not compelled to sell it to a buyer who is willing but not compelled to buy it; that the verdict should be for Buell S. Borden in the amount the jury found from the evidence was the market value of the stock of groceries and meats and

the fixtures, furniture, and equipment owned by him in his store and destroyed by fire on May 13, 1951; and that the jury in deciding the market value of the property should consider the situation and condition of the property as it was at the time and all the other facts and circumstances shown by the evidence that affected or had a tendency to establish its value. Clouse v. St. Paul Fire and Marine Ins. Co., *supra;* Voges v. Mechanics Ins. Co., *supra.*

The jury should also have been advised by the court, as the appellant requested, that the policy of insurance in force at the time of the fire was no evidence of the value of the property insured at the time the contract of insurance was made or at the time the property burned; that the amount stated in it is only a limitation of the maximum liability of the insurance company and has no bearing on, and is no proof of, the amount of the loss caused by the fire; and that the burden was on appellee to establish the actual cash value of the property by a preponderance of the evidence.

The cross-appeal contests the correctness of the order of the trial court which denied the application of appellee for an allowance as compensation of his counsel for services rendered in this case. It is argued that section 44-359, R. R. S. 1943, authorized such an allowance. The contract of insurance sued upon in this case relates only to indemnity for loss of personal property by fire. It has been determined that this section does not authorize an allowance to a plaintiff as compensation of his attorney for services in a case of this class. Security State Bank v. Aetna Ins. Co., 106 Neb. 126, 183 N. W. 92.

The additional contention is that it has been the uniform course of procedure to allow counsel fees in actions on insurance policies. This claim rests in assertion only. The sole case of this jurisdiction in which there was such an allowance referred to by appellee was resolved in this respect on the basis of "statutory power to allow such a fee" in a suit on a contract of insurance

providing against loss of personal property by fire. Johnson v. St. Paul Fire & Marine Ins. Co., 104 Neb. 831, 178 N. W. 926. The statutory power therein referred to was withdrawn by subsequent enactments. Laws 1919, c. 190, Title V, art. 4, § 46, p. 604 (§ 44-359, R. R. S. 1943); Laws 1919, c. 190, Title V, art. 5, § 1, subd. 5, p. 606 (§ 44-201, R. R. S. 1943). Neither statutory authority nor uniform course of procedure permits the recovery of an attorney fee in this case. Security State Bank v. Aetna Ins. Co., *supra;* Fulk v. School District, 155 Neb. 630, 53 N. W. 2d 56; Hawkeye Casualty Co. v. Stoker, 154 Neb. 466, 48 N. W. 2d 623. The cross-appeal is denied.

The judgment should be and it is reversed and the cause is remanded to the district court for further proceedings.

REVERSED AND REMANDED.

ROBERT WILLIAM LOSIEAU, ALIAS ROBERT WILLIAM BREVET, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.

58 N. W. 2d 824

Filed June 5, 1953. No. 33317.

1. **Indictments and Informations.** The district court in its discretion may before trial permit the county attorney to amend a criminal information, provided the amendment does not change the nature or identity of the offense charged, and the information as amended does not charge a crime other than the one on which the accused had his preliminary examination.
2. **Indictments and Informations: Criminal Law.** The charge that one is an habitual criminal is not the charge of a distinct offense or crime, but is a direction of attention to facts which under the statute and the crime charged in the information are determinative of the penalty to be imposed.
3. **Criminal Law.** It is not error for the district court, in its discretion, before hearing on a count of an information charging that one is an habitual criminal, to allow an amendment to such count unless actual prejudice is shown.
4. **Juries.** By statute, in the absence of a great emergency, when

for any reason the panel of petit jurors shall not be full at the opening of court or at any time during the jury term the jury commissioner shall, when ordered, draw and summon in the same manner as the first drawing such number of jurors as shall be ordered to fill the panel.

5. ———. Also by statute, in a great emergency the court shall direct the jury commissioner to summon from the bystanders or the body of the county a sufficient number of persons having the qualifications of jurors to fill the panel in order to try a cause.
6. **Juries: Appeal and Error.** The finding of the trial court as to qualifications of a juror will not be set aside unless error is manifest or unless there has been a clear abuse of discretion.
7. ———: ———. The finding of the trial court that a great emergency existed which permitted the calling of bystanders or persons from the body of the county having the qualifications of jurors in order to try a cause will not be treated as error in the absence of a showing that the finding was manifestly erroneous or that there was a clear abuse of discretion.
8. ———: ———. In a case where the method pointed out by statute for securing jurors is disregarded and the defendant objects thereto and his objection is overruled, prejudicial error will be presumed.

ERROR to the district court for Douglas County: CARROLL O. STAUFFER, JUDGE. *Affirmed.*

Adolph Q. Wolf and *Joseph M. Lovely,* for plaintiff in error.

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

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

YEAGER, J.

This is a criminal action prosecuted in the name of the State of Nebraska by the county attorney of Douglas County, Nebraska, in which Robert William Losieau was defendant. The information was in two counts. The first count charged that the defendant was guilty of the crime of burglary. By the second count it was charged that he was, within the meaning of law, an

habitual criminal. He was tried to a jury on the first count.

The jury found the defendant guilty of the charge contained in the first count of the information. After conviction the trial court, pursuant to procedures prescribed by this court (Haffke v. State, 149 Neb. 83, 30 N. W. 2d 462), found that he was an habitual criminal as charged in the second count and sentenced him to serve a term of 20 years in the State Penitentiary.

By proceedings in error he seeks a reversal of the conviction and sentence. In this court he is plaintiff in error but for convenience he will be referred to as defendant and the State of Nebraska, defendant in error, will be referred to as the State.

There are but two errors assigned in the briefs as grounds for reversal. These have no relation to the question of guilt of the crime of burglary charged in the information. They are as follows:

"1. The Court erred in calling talesmen to serve as jurors instead of calling a special venire.

"2. The Court erred in overruling defendant's objection to any proposed amendment to Count II of the Information."

Count II of the information did not contain any part of the charge of burglary. It contained alone the charge that the defendant was an habitual criminal. Originally it charged two instances of previous convictions and sentences on felony charges. The county attorney was allowed to add by amendment a third instance of previous conviction and sentence.

It was the addition of this third instance which is the basis of the second assignment of error.

It should be pointed out here that as to neither assignment of error does the defendant assert or in any manner seek to show that actual prejudice flowed from these claimed departures from proper procedures.

The contention of the State is that though an amend-

ment was allowed as charged no departure from proper procedure was involved.

The rule is well recognized that the court in its discretion may before trial permit the county attorney to amend a criminal information, provided the amendment does not change the nature or identity of the offense charged, and the information as amended does not charge a crime other than the one on which the accused had his preliminary examination. Razee v. State, 73 Neb. 732, 103 N. W. 438; Wilson v. State, 120 Neb. 468, 233 N. W. 461; Hoctor v. State, 141 Neb. 329, 3 N. W. 2d 558.

This rule relates to the charge of the crime itself and the theory of it is that no prejudice can reasonably be presumed to flow from such allowance and therefore it may not be treated as error.

The rule should apply as well here where, no actual prejudice having been shown, the amendment allowed is not to a count of an information charging a crime but only informative on a matter which the court is required to take into consideration in fixing the penalty on conviction of the offense charged.

This court said in Jones v. State, 147 Neb. 219, 22 N. W. 2d 710: "The charge that one is an habitual criminal is not the charge of a distinct offense or crime. It is but a direction of attention to facts which under the statute and crime charged in the information are determinative of the penalty to be imposed." See also, Kuwitzky v. O'Grady, 135 Neb. 466, 282 N. W. 396; Davis v. O'Grady, 137 Neb. 708, 291 N. W. 82, 311 U. S. 682, 61 S. Ct. 59, 85 L. Ed. 440; Rains v. State, 142 Neb. 284, 5 N. W. 2d 887; Gamron v. Jones, 148 Neb. 645, 28 N. W. 2d 403.

In Haffke v. State, *supra,* it is further pointed out that the question of whether or not one is an habitual criminal is not an issue in a criminal prosecution and that question may not be submitted to a jury. It is pointed out therein that if a prior conviction becomes an element of a charge being presently tried it must be pre-

sented by the complaint, information, or indictment and proved as any other element. We, however, are not confronted here with such an exceptional situation.

We are confronted here only with the matter of enhancement of penalty because of previous convictions of other criminal offenses, which is a subject cognizable by the court only after conviction of the charge contained in the first count of the information.

In view of the holdings that the facts constituting a charge that one is an habitual criminal may not be regarded as elements of a criminal offense and in the light of the fact that no actual prejudice has been shown, it must be said that the second assignment of error is without merit.

As to the first assignment of error the factual reason for calling talesmen instead of a special venire does not appear. The entire factual record in this respect is as follows:

"(At 10:10 o'clock A. M. on July 7, 1952, after eleven veniremen had been called to the jury box, the following proceedings were had:)

"DEPUTY CLERK THOMAS E. CONLEY: Your Honor, this concludes the number of tickets and names in the cylinder box at this time.

"THE COURT: There are eleven jurors in the box, and it becomes necessary at this time for the Court to issue an order for talesmen; so, at this time, ladies and gentlemen, we will recess until two o'clock. You are now excused until two o'clock."

Thereafter the court entered the following order:

"The regular panel of Petit Jurors now having been exhausted and the jury in the trial of this cause being incomplete, and a case of great emergency exists, it is, therefore, by the Court ORDERED that the Jury Commissioner of this said County of Douglas summon forthwith from the bystanders or body of the county 18 persons having the qualifications of jurors to fill the panel

in order that the jury to try this case may be completed therefrom

Omaha, Nebraska, July 7, 1952.

By the Court,
Carroll O. Stauffer,
Judge."

The record discloses that the following occurred:

"THE COURT: Let the record show that there are eleven prospective jurors in the jury box and that prior to the noon adjournment the Court issued an order to the Jury Commissioner to go out and pick up eighteen talesmen. The talesmen have now reported, and there are now sixteen on hand in the court room at this time. We are now ready to proceed to trial.

"MR. WOLF: If it please the Court, before we go into the calling of the jury, the defense, at this time, wishes to object to calling any more prospective jurors, for the reason that the said prospective jurors have not been obtained in the ordinary, prescribed legal manner; that the method of their calling is contrary to law; that such procedure is prejudicial to the constitutional rights of the defendant and deprives him of his right to trial by a fair and impartial jury.

"THE COURT: Do you wish to be heard?

"MR. WOLF: No.

"THE COURT: The objection is overruled. We will proceed with the trial."

Nothing further appears factually except that in support of the motion for new trial testimony of the jury commissioner was adduced to disclose the manner of the selection of the talesmen. Regularity in the matter of selection of talesmen as such however is not brought into question here. This situation therefore has no significance in the determination of any matter herein involved.

The point made by the brief of the defendant is that when the court found that there were but eleven veniremen remaining on the panel it should have directed the jury commissioner to draw, in the same manner as the

original panel was drawn, a sufficient number of jurors to fill the panel instead of ordering that he draw talesmen.

Section 25-1634, R. R. S. 1943, provides that if for any reason the panel of petit jurors shall not be full at the opening of court or at any time during the jury term the jury commissioner shall, when ordered, draw and summon in the same manner as the first drawing such number of jurors as shall be ordered to fill the panel.

It is clear that in this instance this provision of the statute was not followed. The reason for this failure is not disclosed. No showing as to this was made in the objection of the defendant to the use of talesmen or otherwise. It must be said that the assignment of error rests solely and alone on the statements of the deputy clerk and of the court which pointed out that after eleven jurors were called there were no more veniremen subject to call.

Section 25-1634, R. R. S. 1943, also provides that in great emergency the court shall direct the jury commissioner to summon from the bystanders or the body of the county a sufficient number of persons having the qualifications of jurors to fill the panel in order to try a cause.

It was in conformity with this latter provision of the statute that talesmen were summoned. This is apparent from the order itself. It is to be observed that in the order is a finding of fact that a great emergency existed, which is by statute made a condition upon which the right to summon talesmen shall depend. In support of defendant's objection to proceeding, no effort was made to contradict or impeach this finding.

In McColley v. State, 116 Neb. 512, 218 N. W. 129, which is not in point on particular facts, but which does announce a principle involved here, it was said: "The finding of the trial court as to the qualifications of a juror will not be set aside unless the error is manifest or unless there has been a clear abuse of judicial discretion."

Here there was no apparent manifest error or clear abuse of discretion. Factually, to the extent of disclosure by the record, a great emergency existed. This emergency empowered the court to order the calling of talesmen in the manner in which they were called.

The State urges substantially also that the situation here is controlled by the general rule that error will not be presumed but must be affirmatively established by the record. This general rule has no application where the complaint is that the statute relating to drawing of juries has been violated. If the facts here demonstrated, as they do not, that the statute in this respect was violated it would be the duty of this court to presume that there was prejudicial error.

In Russell v. State, 77 Neb. 519, 110 N. W. 380, it was said: "If the method pointed out by the statute for securing jurors is disregarded, no doubt the defendant may object to being tried upon a criminal charge before the jury so obtained. In such case the law will presume prejudice."

This appears to be a sound and salutary rule which should be retained as a safeguard to the rights of those charged with violations of the criminal laws of our state. However the rule is not available to the defendant herein under the factual and legal situation as presented by the record.

The first assignment of erorr is without merit.

The judgment of the district court is affirmed.

AFFIRMED.

IN RE APPRAISEMENT OF SECTION SIXTEEN (16), TOWNSHIP TWENTY-SIX (26) NORTH, RANGE FOURTEEN (14), HOLT COUNTY, NEBRASKA. EDGAR JUNGMAN ET AL., APPELLANTS, V. ELMER COOLIDGE ET AL., APPELLEES.

58 N. W. 2d 828

Filed June 5, 1953. No. 33326.

1. **Appeal and Error.** The right of appeal in this state is statu-

tory, and unless a statute provides for an appeal from the decision of a quasi-judicial tribunal, such right does not exist.

2. ———. Where no method of review by appeal or otherwise is provided, proceedings in error afford the remedy to determine and correct errors of a quasi-judicial tribunal.

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

Francis D. Lee and *Van Pelt, Marti & O'Gara,* for appellants.

Julius D. Cronin, for appellees.

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

CARTER, J.

This is an appeal from the district court for Holt County. It involves the determination of the value of the improvements on school lands under lease in a situation provided for by section 72-240.06, R. R. S. 1943.

The record shows that Elmer Coolidge and Harry Coolidge were the owners of two school land leases on the north half and the south half, respectively, of Section 16, Township 26, Range 14, Holt County, Nebraska, which expired prior to May 12, 1952. On May 12, 1952, the Board of Educational Lands and Funds issued a new lease to Edgar and Elsie Jungman. The parties were unable to agree upon the value of the improvements and an appraisal was made by three county supervisors in accordance with section 72-240.06, R. R. S. 1943.

The appraisement fixing the value of the improvements at $2,996 was duly filed with the county treasurer of Holt County on or about June 2, 1952.

A petition designated as an appeal from appraisement was filed by the appellants Jungman on July 1, 1952. The appellees Coolidge filed a cross-appeal in which they asserted the value of the improvements to

be $3,500. The jury returned a verdict for $3,500, and the present appeal followed.

We point out that the statute, section 72-240.06, R. R. S. 1943, provided that the lessee or the new lessee, if dissatisfied with the appraisement, could appeal to the district court within 30 days after the filing of the appraisement. No mode or manner for perfecting such an appeal was provided by the Legislature. This defeats the right to an appeal for the reason that an appeal is a statutory right and the failure to provide a procedural method for lodging jurisdiction in the district court defeats any intention the Legislature may have had to grant an appeal. This identical question was determined in From v. Sutton, 156 Neb. 411, 56 N. W. 2d 441. The trial court therefore erred in treating the proceeding as an appeal. This being so, it was not proper to proceed by jury trial, and prejudicial errors, if any, committed during the course of the jury trial are therefore unimportant in the disposition of the case.

Where no method of review by appeal or otherwise is provided, proceedings in error afford the remedy. From v. Sutton, *supra*. In the instant case the procedure was not followed to secure a review by petition in error. See sections 25-1901 to 25-1910, R. R. S. 1943. Under such circumstances the district court did not have jurisdiction to hear and determine the case on appeal or by error proceedings. This court, likewise, is without jurisdiction to hear and determine the matter.

The judgment of the district court is reversed and the cause remanded with directions to the district court to dismiss the proceedings in that court in accordance with the holdings of this opinion.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

FRANK HORN, APPELLANT, V. GOOCH FEED MILL COMPANY, A CORPORATION, APPELLEE.

58 N. W. 2d 626

Filed June 5, 1953. No. 33362.

Workmen's Compensation. Where, on appeal in a compensation case from a judgment of the district court, the record contains no bill of exceptions and the pleadings are sufficient to support the judgment, it will be affirmed.

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

Johnston & Grossman, for appellant.

Davis, Healey, Davies & Wilson and *Robert A. Barlow, Jr.,* for appellee.

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

CARTER, J.

This is a workmen's compensation case originally filed on April 30, 1952, by plaintiff, Frank Horn, a general laborer, against defendant, Gooch Feed Mill Company, a corporation, to recover for alleged permanent injuries suffered while in defendant's employ on October 15, 1950, when after working in and cleaning dust and refuse from feed pits plaintiff developed a severe rash or skin infection, which greatly improved under local medication but subsequently reappeared, grew increasingly worse, did not respond to medical treatment, and allegedly became a chronic, incurable, and permanent disability. Plaintiff also alleged that defendant had knowledge thereof on or about October 19, 1950.

Defendant admitted in its answer that on or about October 8, 1950, plaintiff had been working in feed pits for defendant, and that a rash appeared upon his skin which thereafter continued. Defendant then denied generally and alleged that if plaintiff suffered any disability, same arose from an inherent condition within

plaintiff not attributable to accident arising out of or in the course of his employment, or to occupational disease. Defendant also alleged that any claim of plaintiff was barred by reason of lapse of time, that no claim for compensation benefits was made within 6 months, and that more than a year had elapsed since plaintiff suffered any disability, either due to an inherent condition within plaintiff or otherwise.

The issues were first tried by one judge in the compensation court, where specific findings were made and plaintiff's cause of action was dismissed as barred by the statute of limitations. Plaintiff filed a request for rehearing, and upon rehearing before the three-judge compensation court it was found and adjudged on October 9, 1952, that the findings and order theretofore made dismissing plaintiff's cause of action was in all respects supported by the evidence and in conformity with law, thus should be sustained and affirmed, and that plaintiff's action should on rehearing be dismissed.

Thereupon plaintiff appealed to the district court where, after hearing, a decree was rendered which affirmed the order of dismissal on rehearing rendered by the Workmen's Compensation Court on October 9, 1952, and disallowed plaintiff's petition on appeal.

Plaintiff's motion for a new trial was overruled and he appealed to this court, assigning substantially that the findings of fact did not support the judgment and that the judgment was not supported by the evidence, but contrary thereto and contrary to law.

In that connection, pursuant to an appropriate motion filed herein by defendant to quash the bill of exceptions, this court sustained such motion and quashed the same upon the authority of Adkisson v. Gamble, 143 Neb. 417, 9 N. W. 2d 711, Ratay v. Wylie, 147 Neb. 201, 22 N. W. 2d 622, and Gilmore v. State, 148 Neb. 10, 26 N. W. 2d 296.

An examination of the judgment discloses that the findings of fact therein support the judgment. Plain-

tiff does not argue otherwise in his brief, but points out that the only question for determination by this court is whether or not the plaintiff is barred from recovering compensation under section 48-137, R. R. S. 1943, for failure to file his petition within 1 year from the date of his injury.

As stated in Adkisson v. Gamble, *supra*: "With the bill of exceptions quashed, it must be presumed that the evidence supports the findings of fact made by the trial judge."

The controlling rule here is that: "Where on appeal in a compensation case from a judgment of the district court the record contains no bill of exceptions and the pleadings are sufficient to support the judgment, it will be affirmed." Ratay v. Wylie, *supra*. See, also, Adkisson v. Gamble, *supra;* Gilmore v. State, *supra*.

In other words, such cited cases are authority for the conclusion that in the absence of a valid bill of exceptions the sole issue presented for consideration on appeal to this court is whether or not the pleadings are sufficient to support the judgment.

An examination of the pleadings clearly discloses that they are sufficient to support the judgment. For reasons heretofore stated the judgment should be and is affirmed.

AFFIRMED.

HERMAN F. CROWELL, APPELLEE, V. HARLAND S. MILLIGAN, ADMINISTRATOR OF THE ESTATE OF RENA S. MILLIGAN, DECEASED, APPELLEE, IMPLEADED WITH VIOLA MAE MILLIGAN ET AL., APPELLANTS.

59 N. W. 2d 346

Filed June 12, 1953. No. 33215.

1. **Gifts.** The essential elements of a gift inter vivos are donative intent, delivery, and acceptance. Once it is ascertained that it was the intention of the donor to make a gift inter vivos of an undivided interest in a chattel or chose in action, and all is done under the circumstances which is possible in the matter of

delivery, the gift will be sustained. In such cases, the delivery may be symbolical or constructive if as nearly perfect and complete as the nature of the property and the attendant circumstances will permit.

2. ———. Where the intention to make a gift is not clearly manifested, subsequent acts may aid in clarifying that intention, but where the intention is clear, inquiry must be confined to what occurred at the time of the transaction.
3. **Joint Tenancy: Tenancy in Common.** Since the passage of section 76-118, R. R. S. 1943, when read in connection with the definition of "property" in section 76-101, R. R. S. 1943, there remains no question of the right of an owner of property to convey to himself and another and thereby create a joint tenancy, tenancy in common, or tenancy in partnership.
4. ———: ———. If a right of survivorship is attached either to a joint tenancy or a tenancy in common, it will be carried out in accord with the intent expressed to the extent that it can be made effective.
5. **Banks and Banking: Joint Tenancy.** One of two joint owners of money, deposited in a joint account payable to either or the survivor, cannot divest the survivorship right in the jointly owned account by withdrawing the money and depositing it in his individual account, without the knowledge and consent of the other.
6. ———: ———. Where one joint tenant without consent withdraws the whole or part of the fund of a joint bank account during the life of both tenants the joint tenancy is not destroyed, the proceeds retain the joint tenancy character wherever they can be traced unless the character is changed by agreement of the parties and the deprived tenant can exercise his right of survivorship as to the entire fund which has retained the joint tenancy character.
7. **Gifts.** Where property is delivered by a donor to his agent with authority to deliver to a donee, and the donor dies before delivery to the donee, the attempted gift fails for want of delivery.

APPEAL from the district court for Douglas County: JACKSON B. CHASE, JUDGE. *Reversed and remanded with directions.*

George B. Boland and *Harry N. Larson,* for appellants.

Spear & Lamme and *Swarr, May, Royce, Smith & Story,* for appellees.

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

SIMMONS, C. J.

Plaintiff in this action is the president of the Crowell Elevator Company, a corporation.

One of the defendants is the administrator of the estate of Rena S. Milligan, deceased. The deceased was a maiden lady, who lived to advanced years and accumulated a considerable estate. She was frugal with her expenditures so far as she herself was concerned. She was quite generous with relatives and friends. She directed her own business affairs. She consulted with and trusted the plaintiff on many matters of business.

She died intestate October 24, 1950.

The defendant Viola Mae Milligan was a sister-in-law of deceased. The defendant Elizabeth M. Mathewson was an old friend of deceased and a beneficiary, at least on one occasion, of deceased's generosity.

Plaintiff brings this action as a stakeholder to determine the ownership of three items of personal property which he holds. The issues go to whether or not the property belonged by gift inter vivos to the two women defendants or to the administrator for the estate.

For convenience we will refer to the deceased as Rena, to the alleged donees as Viola and Elizabeth, and to the administrator by that designation.

The trial court decreed that the property belonged to the estate. Viola and Elizabeth appeal. We affirm in part and reverse in part.

There is evidence that plaintiff discussed with Rena the matter of making a will, and she declined, stating that she would have all of her property disposed of at the time of her death.

Viola was the second wife of Rena's brother. He died intestate. There is evidence that Rena considered that Viola did not receive her proper share of the property of her husband's estate.

Rena had for years paid money to the Crowell Elevator Company to be held for her. The company mingled these funds with its own and paid out funds at Rena's direction. It was a debit and credit account on the company books.

Rena was the owner of a block of stock of the elevator company.

At different times Rena discussed this money and the stock and its disposition with plaintiff. After such a conversation in late October 1947, plaintiff dictated a letter directed to the elevator company which contained the following two paragraphs: "Will you please transfer all stock of your company now issued in the name of Rena S. Milligan to 'Rena S. Milligan and Viola M. Milligan as Joint Owners with Rights of Survivorship.' Will you please transfer any funds that now stand to my credit on the books of Crowell Elevator Company to account which is to be known as 'Rena S. Milligan and Viola M. Milligan as Joint Owners with Rights of Survivorship.' " This was prepared for Rena's and Viola's signatures. It was mailed to Rena. She did not return it at once.

On December 1, 1947, plaintiff wrote Rena calling her attention to the matter and stating: "We would have to have these before we can transfer your stock or your account into joint ownership. We have heard nothing from you and wonder if you still want to put this into effect." Thereafter, in late December 1947, Rena and Viola came to the office of the plaintiff and Rena signed the letter. Viola signed below: "Approved: Viola M. Milligan." The letter, so signed, was delivered to the plaintiff. Thereafter a new certificate of stock was issued reciting that "Rena S. Milligan and Viola M. Milligan as Joint Owners with Rights of Survivorship are the owner of" the shares involved. This stock was mailed to Rena January 14, 1948. She receipted for it and returned it to plaintiff. On January 30, 1948, plaintiff, signing as "President," acknowledged receipt of the

stock and that it was being held "subject to your instructions." Viola never had the stock in her possession. Dividends were thereafter paid to Rena. Rena signed the proxy authorizations for the annual meetings. After Rena's death a dividend check was issued payable to Rena and Viola and held by the company pending the disposition of this action. Our determination herein as to the ownership of the stock includes that dividend.

Plaintiff testified that he had Viola sign the approval of the letter of October 25, 1947, as "a good idea, seeing she had an interest in those bonds at the time." He also testified that Rena "intended" to control the property during her lifetime and to handle and treat it as her own during her lifetime. These were obviously his conclusions. Viola testified that she never claimed any share of the dividends and considered they were Rena's property, and that she took it for granted that Rena meant the stock was to remain hers (Rena's). She testified that Rena said, "if anything happens to her it would go to me and if anything would happen to me it would go back to her."

At the end of October 1947, Rena had a credit balance with the company of $7,513.53. On January 6, 1948, after the execution and delivery to it of the letter of October 25, 1947, this account was set up on the books of the company under the heading: "Rena S. Milligan and/or Viola M. Milligan."

On September 16, 1949, plaintiff wrote a letter to Rena with reference to Rena's agreement to pay him $50 a month for his services. The letter contained this statement: "As I understand it, you wish to deposit certain funds with me from time to time, which I will carry for you in a special bank account. Also, from time to time you will instruct me to pay out funds from this account on your order." Also, on the same day, Rena signed a letter directed to plaintiff, the body of which is as follows: "This will be your authority to transfer the funds now held by Crowell Elevator Company in an

account known as 'Rena S. Milligan and/or Viola May Milligan as Joint Tenants and not as tenants in common, with rights of survivorship', to an account in the Omaha National Bank known as 'Herman F. Crowell, Agent'. Deposits to this account and charges against it will be in accord with your letter to me of September 16, 1949, and accepted by me. The funds in this account at the Omaha National are for 'Rena S. Milligan and/or Viola Mae Milligan as Joint Tenants and not as tenants in common, with rights of survivorship', but can only be drawn out on your signature while the agreement in the aforesaid letter remains in force." As to this letter plaintiff testified: "Yes. That is the funds that we had held, joint account, that we had held, Rena Milligan and Viola Milligan on Crowell, Elevator Company books; they wanted that transferred to the bank account as confirmed in the other letter."

On September 22, 1949, the balance in that account was $3,719.36. On that day the account was balanced and that amount deposited in the Omaha National Bank under the name of "Herman F. Crowell, Agent." Thereafter the funds were deposited and handled through that account. At the time of Rena's death an amount in excess of $11,000 was in the account. The plaintiff kept a ledger account of it under the name of "Herman F. Crowell, Agent Bank account of Rena S. Milligan and Viola M. Milligan, as joint tenants."

There is evidence that all funds paid into or out of this account were done by and at the direction of Rena. Viola testified that she did not have knowledge of the fund in the bank until after Rena's death. However, without question she had knowledge of the fund while it was being held in the elevator company accounts.

We have held in In re Estate of Scott, 148 Neb. 182, 26 N. W. 2d 799: "The essential elements of a gift inter vivos are donative intent, delivery, and acceptance.

"Once it is ascertained that it was the intention of the donor to make a gift inter vivos of an undivided interest

in a chattel or chose in action, and all is done under the circumstances which is possible in the matter of delivery, the gift will be sustained.

"In such cases, the delivery may be symbolical or constructive if as nearly perfect and complete as the nature of the property and the attendant circumstances will permit."

As of the time of the writing of the letters and the action taken by plaintiff immediately thereafter there was a patent donative intent as to the elevator stock and the money. The question comes as to whether or not the separate actions of Rena subsequent to the writings, the reissue of the stock, and the transfer of the funds; the construction later placed by the plaintiff on the rights of the parties; and the views of Viola as to her rights are to be considered on the question of intent.

The rule is that where the intention to make a gift is not clearly manifested, subsequent acts may aid in clarifying that intention, but where the intention is clear, inquiry must be confined to what occurred at the time of the transaction. In re Chapple's Estate, 332 Pa. 168, 2 A. 2d 719, 121 A. L. R. 422; Glessner v. Security-Peoples Trust Co., 156 Pa. Super. 56, 39 A. 2d 165; Dinslage v. Stratman, 105 Neb. 274, 180 N. W. 81, 14 A. L. R. 702; Annotations, 1 A. L. R. 1241, 105 A. L. R. 402.

As of the time of the letter of October 25, 1947, and immediately thereafter, there was also a delivery of the stock and money to Viola and Rena jointly with rights of survivorship as the circumstances required. By endorsing her approval on the letter Viola accepted the gift.

There is a contention made that plaintiff held the stock and the money as Rena's agent solely. Whatever plaintiff's status was before reissue of the stock and the book transfer of the funds is not material. After that time it is patent that he held for both Rena and Viola.

In the letter dated October 1947, it is noted that the designation "Joint Owners with Rights of Survivorship"

is used as to both the stock and the money. We need not decide whether by the use of "joint owners" a joint tenancy or tenancy in common was created. Since the passage of section 76-118, R. R. S. 1943, when read in connection with the definition of "property" in section 76-101, R. R. S. 1943, there remains no question of the right of an owner of property to convey to himself and another and thereby create a joint tenancy, tenancy in common, or tenancy in partnership.

It is clear that it was intended that the right of survivorship exist. That was the real object in view. That right of survivorship is to be carried out in accord with the intent of the donor. Anson v. Murphy, 149 Neb. 716, 32 N. W. 2d 271.

Accordingly we hold that there was a complete gift inter vivos, and the title to and right of possession of the Crowell Elevator stock, held by plaintiff, vested absolutely in Viola upon the death of Rena, and that judgment should be entered accordingly, and that the trial court erred in holding otherwise.

We also hold that there was a completed gift inter vivos of the funds standing to the credit of Rena with the Crowell Elevator Company in 1947 and that Viola thereby became a "joint owner" of that chose in action, with rights of survivorship. The gift transaction was consummated in both instances when the transactions involving the gift had been completed.

The administrator contends, however, that in the event we reach that conclusion, that relationship and interest was severed by Rena when in September of 1949, she, without the knowledge or consent of Viola, directed that the funds there held in the account be transferred to a bank, to be there deposited in the name of "Herman F. Crowell, Agent," to be paid out only on the order of Rena. It is to be remembered that at that time Rena directed that those funds were for Rena "and/or" Viola as "Joint Tenants and not as tenants in common, with rights of survivorship."

There was obviously no intent on Rena's part to cut Viola out of her interest in the fund. Quite clearly she intended that that interest, theretofore existing, should continue. Rena did not destroy the fund. She directed its deposit in a bank instead of with the elevator company. She did not undertake to divest Viola's interest, but rather recognized that it continued. She did not claim exclusive ownership of the fund. She recognized Viola's interest in the fund.

The question then comes, did she have the power to divest Viola's interest in the fund by the act of claiming the right to withdrawals of money from the fund.

The administrator cites no authority for his contention that Rena severed the interest of Viola by the 1949 directions as to the fund.

It is patent if Viola's interest in the fund was that of a tenant in common, Rena could not ex parte divest that interest. If we treat it, as Rena did in the 1947 letter, as a joint tenancy, then the same result follows.

It is to be remembered that we are here dealing with a case where one of the two joint owners, of a fund held with rights of survivorship, is dead. We are not dealing with a case involving the rights of each in the fund while both are living.

The courts of other jurisdictions have considered the question and arrived at the rule that: One of two joint owners of money, deposited in a joint account payable to either or the survivor, cannot divest the survivorship right in the jointly owned account by withdrawing the money and depositing it in his individual account, without the knowledge and consent of the other.

O'Connor v. Dunnigan, 158 App. Div. 334, 143 N. Y. S. 373, affirmed in 213 N. Y. 676, 107 N. E. 1082, presented these facts. Money was originally deposited "Payable to 'Mary Guilfoyle or Joseph Guilfoyle. Pay to either or the survivor of either.' " Mary withdrew the money, without the knowledge or consent of Joseph, and deposited it in her own name. She made a will, and then

died. Her executrix claims the property as against Joseph. There existed an evident intent to divest the joint ownership. Here such an intent is negatived by the letter of Rena of September 1949. The court held that the original source of the money was immaterial and that the form of the deposit indicated an intent to create a joint ownership with right of survivorship. The court further held: "As between the bank and Mary Guilfoyle she had the right with the possession of the book to withdraw the moneys from the account. Her change of the moneys, however, from this account to another in her individual name, in the absence of and as far as appears without the consent of Joseph Guilfoyle, could not divest Joseph Guilfoyle of his joint ownership in the property. It would be preposterous to claim that an appropriation of personal property by one joint owner to his personal use could divest the interest of the other joint owner, or could in any way be presumed to have been by the consent of his co-owner. In order to change the joint ownership which presumptively existed defendant was required to show that the ownership of Joseph Guilfoyle has been voluntarily surrendered."

State v. Gralewski's Estate, 176 Or. 448, 159 P. 2d 211, 161 A. L. R. 66, presented this set of facts. There a father deposited money in two banks in the joint accounts of himself and his son. The agreement in one instance provided that the money " 'shall be paid * * * to us or either of us, or the survivor of us,' " in the other " 'payable to the undersigned or the survivor.' " The son caused the two joint accounts to be withdrawn and re-deposited in his own name. The father was insane at that time and could not consent. The son made a will, then died, the father surviving and died later. The state claimed the money as belonging to the father and on the ground that it had escheated to the state, it being undisputed that the father died intestate and without heirs. The court held that the property escheated to the state. It held: "* * * the codepositors became each vested with a

joint and equal interest in the deposits with the right in the survivor to succeed to the full ownership of the balance in the accounts at the death of his cotenant." The court held that to sustain the position of the beneficiaries of the son's will "would be to approve the unauthorized invasion by one of another's legal rights" and that the son "could not by his unilateral action divest his father of his interest." The court quoted from O'Connor v. Dunnigan, *supra,* reviewed and cited the decisions of other states, and held: "We think that the rule announced in New York, and followed in some of the other states, is consonant with justice and principles of fair dealing, and will serve to protect the legitimate property interests of the parties to joint bank accounts. Although we have spoken of those interests as those of joint tenants, it is obvious that a joint bank account does not have all the incidents of a joint tenancy at common law. 'But it likens itself to a joint tenancy, for the transaction of a joint deposit such as that with which we are here concerned creates a joint ownership with the right of survivorship': (citing authorities) That right is its 'grand incident,' and in our opinion the withdrawal by one depositor, without the other's consent, of the entire deposit, and for the manifest purpose of defeating his codepositor's survivorship right, is a violation of the understanding between the parties, as evidenced by the deposit agreement, and an attempted invasion of such codepositor's title. It does not effect a severance of the joint tenancy, but, as the authorities upon which we rely hold, results only in a change in the form of the deposit, while its joint character and the rights therein of the respective parties remain unaltered."

Moskowitz v. Marrow, 251 N. Y. 380, 167 N. E. 506, 66 A. L. R. 870, presented, as to two of four deposits there considered, this set of facts. There a grandmother, with substantial accounts in two banks, directed that the money be transferred to a new account payable to "'either or the survivor of them.'" The pass books

were delivered to the granddaughter. Later the grandmother revoked the "'privilege'" accorded the granddaughter and instructed the banks to honor no signature other than her own for any withdrawals. After the grandmother's death a controversy arose as to the ownership of the deposits. The question was whether or not the order to permit no withdrawals was effective to divest the rights of the granddaughter. The court held first that under their earlier decision the mere delivery of the pass book was insufficient to effectuate delivery since the delivery of the pass book could be an equivocal act either to consummate a gift or satisfy the purposes of convenience.

The court then turned to the provisions of their statute. The statute considered has substantial analogy to our section 8-167, R. S. 1943, which provides: "When a deposit in any bank in this state is made in the name of two or more persons, deliverable or payable to either or to their survivor or survivors, such deposit, or any part thereof, or increase thereof, may be delivered or paid to either of said persons or to the survivor or survivors in due course of business."

Under this provision we have held: "Section 8046, Comp. St. 1922, relating to the payment by a bank of deposits entered as payable to any one of two or more persons named therein, not only is intended for the protection of the bank, but also fixed the property right of the persons named, unless the contrary appears from the terms of the deposit." We also said: "While it may be conceded the husband in fact made the deposit, he certainly, by that deposit, gave his wife an indivisible and unseverable interest in the deposit. It must, therefore, be an interest in the nature of a joint tenancy with the attendant right of survivorship." In re Estate of Johnson, 116 Neb. 686, 218 N. W. 739.

We followed that decision in Kehl v. Omaha Nat. Bank, 126 Neb. 695, 254 N. W. 397, and there held: "Where a wife deposited money in a bank payable to

herself or husband as joint tenants with a right of survivorship, and not as tenants in common, a completed gift is consummated by the wife to the husband, notwithstanding the fact that the husband never had manual possession of the pass-book.

"A deposit of money in a bank by a wife and made payable to herself and husband, with the express provision that it was a joint tenancy with survivorship, and not as tenants in common, is presumed to have been made by the wife with donative intent and for the benefit of the husband with the intention of giving to him, if he survives, the complete title to the funds * * *."

In McConnell v. McCook Nat. Bank, 142 Neb. 451, 6 N. W. 2d 599, we removed the "close relationship of the parties" as a determining element. We followed these cases in Young v. McCoy, 152 Neb. 138, 40 N. W. 2d 540, and again in Scriven v. Scriven, 153 Neb. 655, 45 N. W. 2d 760.

Returning to the Moskowitz case the court analyzed their statute as follows: "* * * we find that section 249 in terms declares that, where a deposit is made by one person in his name and that of another person, payable to either or the survivor, the deposit and any additions thereto 'shall become the property of such persons as joint tenants;' that they 'shall be held for the exclusive use of such persons;' that they 'may be paid to either during the lifetime of both or to the survivor after the death of one of them.'" The court held: "That the purpose and effect of the enactment was to reverse the common-law rule and to make a deposit in the statutory form presumptive evidence of an intent to make a gift presently to take effect * * *. Assuming that, upon the making of the deposits by Fannie Manheimer, in the joint names of herself and Pearl Harris, the two became 'joint tenants,' it is immaterial whether Pearl Harris then acquired an interest in a moiety or an interest in the whole of the funds deposited. If she received the former, rather than the latter, to that extent at least

the deposit was irrevocable, since she had acquired a vested property interest. Even if Fannie Manheimer possessed the power, by transferring her interest to another, thereby to sever the joint tenancy, and prevent survivorship, in fact this was never done, so that the title to the balance would have passed to Pearl Harris, as survivor." It, however, was contended: "* * * that even though the deposits in the joint account, to the credit of Fannie Manheimer and Pearl Harris, payable to either or the survivor, constituted a joint tenancy, the transfer possessed a tentative character and, not being completed until survivorship ensued, was meanwhile revocable by the original depositor." The court then cited and quoted from O'Connor v. Dunnigan, *supra,* and said of that case: "It was decided upon common-law principles without reference to the provisions of that section which had been enacted prior to the decision. It is important upon this issue, however, as a holding that a joint tenancy, which may result from a deposit in joint account, is a true joint tenancy, the transfers involved in the creation of which are irrevocable at the instance of either depositor, to the extent of the funds by him deposited. If this be true of common-law deposits to joint account, it must be equally true of deposits made under the provisions of the statute."

The court then held that "for all these reasons" the grandmother, "in originally making the joint deposits, transferred to" the granddaughter "a present property interest in the moneys deposited, which was not subject to cancellation at the instance of" the grandmother "and was not destroyed or in the least affected by the notice not to pay * * * served upon the banks." There was a concurring opinion by Cardozo, C. J., in which five other members joined. In the course of that opinion it was said: "If the form of the deposit was an expression of the true agreement, there could be no change of ownership thereafter by an ex parte declaration. As to what the true agreement was, the door to contro-

versy was open during the joint lives of the depositors. It was closed upon the death of either. * * * title to the accounts was unaffected by the notice of withdrawal in the absence of a showing that by implication, if not otherwise, the privilege of withdrawal was one of the terms of the deposit. Such a showing was permissible during the joint lives, for it was then opposed by nothing except a presumption to the contrary. It was no longer permissible after either depositor was dead, for it was then opposed by a presumption declared to be conclusive."

In re Culhane's Estate, 334 Pa. 124, 5 A. 2d 377, involved this fact situation. Two joint owners had a deposit in a trust company which failed. The receiver made percentage distribution to one of the joint owners who deposited the money in a safety box. When she died $1,900 from that source remained in the box. The other joint owner was awarded the sum so deposited. The court held: "The account—a chose in action—belonged to both as in joint tenancy. The provision in the contract that 'either of us may draw and receipt for the whole or any part thereof' meant that either had authority as agent for the joint owners to withdraw and receipt on behalf of both exactly as if they had appointed some third party to be their agent for the purpose."

Daniels v. Harney, 111 Cal. App. 2d 400, 244 P. 2d 773, involved three bank accounts held in joint tenancy. One joint tenant withdrew the funds and then died. The proceeds were in the hands of the administrator. The court held that the surviving joint tenant was entitled to the money. The court said: "The settled rule in this state is that upon the death of one holding a joint tenancy in personal property, which is the case here, the whole interest vests in the surviving tenant, not by descent, but by the fact of survivorship alone. * * * Applying the principle to the facts of this case the rule is that were (where) one joint tenant without consent withdraws

the whole or part of the fund of a joint bank account during the life of both tenants the joint tenancy is not destroyed, the proceeds retain the joint tenancy character wherever they can be traced unless the character is changed by agreement of the parties and the deprived tenant can exercise his right of survivorship as to the entire fund which has retained the joint tenancy character."

Applying these rules to the facts here we hold that the rights of Viola, in the money held by the Crowell Elevator Company, was not destroyed by the act of Rena in directing that it be deposited in the Omaha National Bank, and that Viola has the right to trace that money and to be awarded that which has retained the joint-ownership character.

As hereinbefore pointed out there was $3,719.36 so transferred. As a result of additions and withdrawals from the Omaha National Bank fund the amount on deposit there was in excess of $11,000 at the time of Rena's death.

As to the additions made to the fund by Rena's deposits, although a donative intent appears, Rena held control of this money so that the requisite delivery to complete the gift is negatived. It appears from evidence in the record that, as a result of withdrawals, this fund on December 30, 1949, was reduced to the sum of $2,061.41, and that thereafter while the balance fluctuated it was at all times in excess of that amount. Viola's right in the fund is limited to that part of the jointly owned money which can be traced to and shown to have remained in the Omaha National Bank at the time of Rena's death. That sum is $2,061.41. Accordingly, we hold that Viola is entitled to be awarded that sum from the funds on deposit in the Omaha National Bank, and that the remainder is an asset of Rena's estate.

The third item of property involved here is some railroad bonds of a Republic of Mexico company. It appears that many years ago, as a result of a bank fail-

ure, Elizabeth's home was sold. Rena bought it and gave it to Elizabeth. Elizabeth in 1931 gave Rena bonds in the same company of an equal amount to that here involved, to compensate in part for the home.

In December 1944, Rena brought these bonds to plaintiff and said: "I don't know if they are any good, but if they are, if you ever get anything, give them to Mrs. Mathewson of Wakefield, she is a friend of mine, and I would like to do something for her." As a result of that conversation Rena signed a letter to plaintiff reciting that: "I hand you herewith twenty-four (24) first mortgage gold bonds of the Pan-American Railroad Company numbered 337 to 360 inclusive for $1,000 each. When and if you collect interest on these bonds, please forward the money to Mrs. Elizabeth Mathensen, Wakefield, Nebraska. Please hold the bonds until Mrs. Mathensen requests them, when you have my permission to deliver them to her." It is not disputed that the defendant was meant, although the last name was misspelled.

The bonds were left with plaintiff under that direction. At the time Rena said she had not told Elizabeth about what she was doing and instructed him not to tell Elizabeth of it. Elizabeth did not know about it until after Rena's death.

At the time of this delivery or shortly thereafter Rena asked plaintiff to get an idea as to the value of the bonds. Plaintiff did that and advised Rena thereof by letter dated January 13, 1945.

The bonds were bearer bonds. Pursuant to "Presidential Decree of the United States of Mexico" and at Rena's direction, plaintiff sent the bonds to a New York bank for registration "for exclusion from their assumed status under Mexican Law as 'Enemy Bonds'." They were there registered in Rena's name. However, that registration was one on the books of the bank. The payable-to-bearer provision of the bonds was not changed. The bonds were thereafter returned to plain-

tiff and held by him. No interest was paid on the bonds.

There is no question here as to donative intent of Rena as to these bonds. The question is one of delivery so as to make the gift effective inter vivos. It appears from the record that plaintiff was Rena's agent with instructions to deliver to Elizabeth when delivery was requested. Elizabeth did not know of the delivery to plaintiff. Rena, for a reason not disclosed, directed that plaintiff not tell Elizabeth. The bonds remained in plaintiff's hands when Rena died.

The rule is stated by the authorities as follows: "While delivery may be made by an agent of the donor, delivery to the agent is not enough. The gift is not complete until there is an actual delivery to the donee or to someone for him, and until the gift is completed by delivery, the donor may reassert title to the property. Moreover, since the authority of an agent is revoked by the death of his principal, the death of the donor before the actual delivery of the property to the donee terminates the authority of the agent to make such delivery, and works a revocation of the gift." 24 Am. Jur., Gifts, § 30, p. 747. "While a delivery may be made to a third person in order that the latter may deliver the subject of the gift to the donee as agent of the donor, the gift is not complete until there is an actual delivery to the donee; and until the gift is completed by delivery the donor can revoke the agent's authority and resume possession of the gift. As the authority of an agent is revoked by the death of his principal, the death of the donor before the actual delivery of the property to the donee terminates the authority of the agent to make such delivery, and the gift, therefore, fails for want of delivery, * * *." 38 C. J. S., Gifts, § 25, p. 804.

The above rule was cited with approval in Ladman v. Farmers & Merchants Bank, 130 Neb. 460, 265 N. W. 252. Accordingly, it is held that the attempted gift of the bonds to Elizabeth failed for want of delivery in

the lifetime of Rena. The trial court did not err in so deciding.

The judgment of the trial court is affirmed in part, and in part reversed and the cause remanded with directions to enter a decree that the elevator stock held by plaintiff passed by right of survivorship to Viola and that it be delivered to her; also that of the money on deposit in the Omaha National Bank $2,061.41 be paid to Viola and the balance be paid to the administrator; and that the railroad bonds be delivered to the administrator.

All costs are taxed to the administrator.

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

CARTER, J., dissenting.

The deceased died on October 24, 1950, at the age of 80 years, leaving an estate valued in excess of $465,000. She was unmarried and, according to the evidence, eccentric to the extent that she did not trust bankers and lawyers. This evidently accounts for her failure to patronize banking institutions and to make a will. The property here involved can readily be divided into three groupings: (1) 205 shares of stock in the Crowell Elevator Company, (2) a cash balance of $11,163.12 on hand in the Omaha National Bank at the time of the death of Rena S. Milligan, and (3) 24 first mortgage gold bonds issued by the Pan-American Railroad Company. I shall deal only with items 1 and 2, as I agree with the disposition made of item 3 by the majority opinion.

The deceased wrote a letter to Crowell requesting that the elevator stock and her money in the hands of the Crowell Elevator Company be transferred to "Rena S. Milligan and Viola M. Milligan as Joint Owners with Rights of Survivorship." This letter was approved by Viola M. Milligan. A new stock certificate was issued in the form requested and mailed to deceased individually. She returned the stock certificate to Crowell, who in receipting for it by letter said in part: "(I) ac-

knowledged the instructions she gave me to hold it in our vault for further instructions." Crowell still held the stock on the death of the deceased, subject to her instructions. Dividends were paid on this stock to Rena S. Milligan in 1948, 1949, and 1950 by checks paid to her individually. Voting proxies were mailed to Rena S. Milligan during this period and voted by her. Crowell testified that he dealt solely with Rena S. Milligan and that she intended to retain control during her lifetime and to handle and treat it as her own until her death. He said that only Rena S. Milligan told him what to do with the deposits, the stock, and the bonds, and that no other person attempted to do so. According to the evidence of Crowell, the stock certificate was never delivered to Viola M. Milligan, nor was he ever directed to do so by Rena S. Milligan during her lifetime. Viola M. Milligan testified that she never saw the stock certificate nor had it in her possession and that it was her understanding that if anything happened to Rena S. Milligan it would go to her; that she would get it after Rena S. Milligan passed away.

With respect to the money in the hands of Crowell, the record shows that after the account with the Crowell Elevator Company had been changed to "Rena S. Milligan and/or Viola May Milligan as Joint Tenants and not as tenants in common, with rights of survivorship," Rena S. Milligan directed them to be transferred to an account in the Omaha National Bank identified as "Herman F. Crowell, Agent." The directions provided that these funds could be drawn out only on the signature of Rena S. Milligan while the agreement contained in the letter of September 16, 1949, was in force. That letter, signed by Crowell and Rena S. Milligan, said in part: "As I understand it, you wish to deposit certain funds with me from time to time, which I will carry for you in a special bank account. Also, from time to time you will instruct me to pay out funds from this account on your order." The bank account was thereafter estab-

lished in the name of "Herman F. Crowell, Agent." There was $3,719.36 in the account when the "Herman F. Crowell, Agent" bank account was established. There was $7,489.53 in the account when the alleged joint account was set up on the books of the Crowell Elevator Company. There was $11,163.12 in the account when Rena S. Milligan died. All funds deposited were those of Rena S. Milligan, and Crowell followed Rena S. Milligan's instructions regarding the account. Viola M. Milligan never drew on the account nor requested permission to do so. She said she never knew of the existence of this bank account until Crowell told her about it after the death of Rena S. Milligan.

The controlling rule is set out in First Trust Co. v. Hammond, 140 Neb. 330, 299 N. W. 496, in the following language: "To make a valid and effective gift inter vivos, there must be an intention to transfer title to the property, and a delivery by the donor and acceptance by the donee, and the transfer must be so complete that if the donor again resumes control over it without the consent of the donee he becomes liable as a trespasser."

There is, of course, evidence of a donative intent to become operative at her death. This constitutes it a testamentary disposition of the property which can be lawfully accomplished only by compliance with the statute of wills. But in each of the three groupings of property presently before the court, Rena S. Milligan never lost dominion over or control of the property. She never intended to lose control of it during her lifetime, and the evidence of Crowell and Viola M. Milligan affirmatively so shows. There was never an attempt by the donee to take control of the property because the deceased very carefully saw to it that it was to be hers and under her control until her death. As to the stock in the Crowell Elevator Company, she caused the certificate to be changed, but she alone retained its custody and placed it in Crowell's care subject to her instructions. She collected the dividends

personally, she voted the stock in corporate elections, she alone dealt with Crowell with reference to it, and Crowell testified that she at all times treated it as her own. The purported donee, Viola M. Milligan, said she claimed no interest in the stock or dividends during the lifetime of the deceased and that she considered that it belonged to Rena S. Milligan until her death. Clearly, there was no delivery of a present interest in the property, constructive or otherwise. With reference to the cash account, the record shows that Rena S. Milligan at all times during her lifetime retained control of it. Crowell, admittedly her agent, handled the account in accordance with written instructions which definitely provided that the funds could be drawn out only by Rena S. Milligan. All funds deposited were hers and all withdrawals were by her. The purported donee never knew about the account and never drew upon it, nor requested or insisted upon any right to do so. Control never passed and, necessarily, a gift inter vivos was not made.

We have said: "One of the essential elements of a gift is the intention to make it. A clear and unmistakable intention on the part of the donor to make a gift of his property is an essential element of the gift, and this contention must be inconsistent with any other theory. * * * While the theory of a gift has been presented and counsel has assumed that the transfer of the legal title might be sufficient to effectuate a gift, still the person asserting it must prove all the essential elements by clear, direct, positive, express and unambiguous evidence." Hild v. Hild, 135 Neb. 896, 284 N. W. 730. I submit that the evidence in this case does not come close to meeting these requirements.

I point out also that a transfer of stock on a corporation's books does not of itself constitute a delivery of the stock. § 21-201, R. S. 1943. See, also, Figuers v. Sherrell, 181 Tenn. 87, 178 S. W. 2d 629, 152 A. L. R. 420, wherein it is stated:

"It may be conceded that Sherrell had the intention of giving these shares of stock to his nephew at some future time when he procured the certificate to be issued in the name of the latter. All the subsequent conduct of Sherrell however negatived the idea that he had any intention of giving to his nephew a present interest in the stock and a transfer of the present interest is necessary to the completion of a gift inter vivos. Chandler v. Roddy, *supra.*

"We think that Sherrell never parted with his dominion and control over these certificates of stock issued in the name of the complainant but delivered to Sherrell and retained all the while by him."

It is asserted however that there was a constructive delivery of the property. I do not question that under certain circumstances there can be a constructive delivery of property in order to make a gift inter vivos complete. The most common instances of constructive delivery are where the alleged donor retains an interest in the property. The donor in the present case, assuming the correctness of the positions of the alleged donee, retained an interest in the Crowell Elevator stock and the bank account. In order to have a constructive delivery the evidence must show that all the elements of a gift inter vivos were present except a manual delivery, and that a manual delivery was not made simply because it involved only a partial interest. A constructive delivery of a partial interest in property requires proof that the transfer of a present interest was intended. But where, as here, all the evidence shows an intent to transfer an interest only on the death of the donor, there can be no delivery, either actual or constructive, sufficient to complete a gift inter vivos. A constructive delivery arises when every essential element of a gift inter vivos has been established and actual delivery is not made because of an impossibility to do so. I submit that all the evidence shows the intent of Rena S. Milligan to make a gift effective at her death. The subse-

quent conduct of the donor and donee sustains this conclusion. In addition thereto the donee of the elevator stock and the bank account expressly testified that this was the intention of the parties and that any right she had in them was to arise on the death of Rena S. Milligan. No gift inter vivos can be established by such evidence. The majority opinion states that the statements of Crowell to the effect that the donor intended to control the property in her lifetime and to treat it as her own until her death "were obviously his conclusions." Crowell was a witness called by the alleged donee. No objection was made to this evidence. It is clear, also, that his conclusions, if such they be, were sustained by the evidence as a whole and the admitted conduct of the parties over the years after the gift inter vivos was alleged to have been made. The majority opinion sustains the gift, in part at least, on statements made by the donee. I submit that if a gift inter vivos can be so established, a method is provided for the defrauding of estates that has been heretofore forcibly barred by our decisions. It is very obvious that these statements of the donee were her conclusions for the reason that the record shows she knew nothing of the details of the purported gift until after the death of the alleged donor. It is evident also that the alleged admissions of the donor were as consistent with a testamentary disposition of her property as with a gift inter vivos.

My position can be summarized in the language of the court in Mercantile Bank v. Haley (Mo. App.), 179 S. W. 2d 916, wherein it is said: "It is no doubt true that Wamsley wished to avoid an administration of his estate and sincerely thought that he had arranged his affairs in such a way as to accomplish that result. Likewise, we appreciate the fact that such a desire would have been entirely consistent with an intent to create a joint tenancy in the account. The trouble is, however, that in his misunderstanding of the situation, he hoped to avoid an administration while at the same time re-

serving to himself the power to make a testamentary disposition of his estate. The latter, of course, was entirely inconsistent with an intent to create a joint tenancy in the account; and we must therefore hold that for the want of a completed gift to Mackey of a present joint interest in the account, no joint tenancy was created, and the balance remaining on Wamsley's death, instead of belonging to Mackey as the surviving codepositor, became a part of Wamsley's estate, * * *." See, also, Young v. McCoy, 152 Neb. 138, 40 N. W. 2d 540.

The record clearly shows, in my judgment, that Rena S. Milligan never intended to convey a present interest in items 1 and 2 to the alleged donee. While the letter of October 25, 1947, might indicate it, the record clearly shows her intent was otherwise. Surely a letter has no greater dignity in court as evidence than a formally executed and delivered deed, or bill of sale, which we have repeatedly held to be subject to investigation upon competent evidence as to the intent of the grantor in making delivery. I do not doubt that Rena S. Milligan had a donative intent,—an intent to give at the time of her death,—but not an intent to give a present interest in the property to the donee during her lifetime. The fact that she did not deliver the railroad bonds to the alleged donee when all parties agree that she retained no interest therein is some evidence of her overall intent to make a testamentary disposition of her property in violation of the will statute.

Having these views I respectfully dissent from the contrary holdings of the majority opinion and I would affirm the judgment of the trial court.

IN RE ESTATE OF WILLIAM H. SMOKE, DECEASED. ANNA PAXTON, APPELLANT, V. GREYDON L. NICHOLS, ADMINISTRATOR OF THE ESTATE OF WILLIAM H. SMOKE, DECEASED, APPELLEE.

59 N. W. 2d 184

Filed June 12, 1953. No. 33293.

1. **Trial.** A motion for directed verdict or its equivalent, or for judgment notwithstanding the verdict, must be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed, and such party is entitled to have every controverted fact resolved in his favor and have the benefit of every inference that can reasonably be deduced from the evidence.
2. **Automobiles.** A person riding in a motor vehicle is a guest if his carriage confers only a benefit upon himself and no benefit upon the owner or operator except such as is incidental to hospitality, social relations, companionship, or the like, as a mere gratuity.
3. **Automobiles: Trial.** If the evidence is undisputed, or such that minds of men could not reasonably arrive at any other conclusion, the question of whether or not a person riding in a motor vehicle is a guest is one for decision by the court as a matter of law; otherwise, it is a question for the jury to decide as other issuable facts in the case.
4. **Negligence.** Gross negligence means great or excessive negligence; that is, negligence in a very high degree. It indicates the absence of even slight care in the performance of a duty.
5. ———. What amounts to gross negligence in any given case must depend upon the facts and circumstances. What would amount to gross negligence under certain circumstances might, under different circumstances, be even slight negligence.
6. ———. A series of acts of ordinary negligence may, under certain circumstances, operate to produce gross negligence but not necessarily so.
7. **Negligence: Trial.** A verdict should not be directed, or a cause of action dismissed, or a judgment entered notwithstanding the verdict, unless the court can definitely determine that the evidence of defendant's negligence, when taken as a whole, fails to reach such degree of negligence that is considered gross.
8. ———: ———. When evidence is resolved most favorably toward the existence of gross negligence, and thus a fixed state of facts had, the question of whether or not such facts will support a finding of the existence of gross negligence is a question of law.

9. **Negligence: Automobiles.** An automobile host may be liable for injuries to a guest proximately caused by a defective condition of his automobile, if he knew of such defect and realized or should have realized that it involved an unreasonable risk to his guest; if the defect was so concealed or hidden as not to be reasonably obvious or patent to his guest; if the defect and the risk involved were in fact unknown to the guest; and if the host failed to warn the guest as to the defective condition and the risk involved therein.

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

R. R. Wellington and *Charles A. Fisher,* for appellant.

Edwin D. Crites, for appellee.

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

CHAPPELL, J.

Plaintiff, Anna Paxton, a sister-in-law of the wife of William H. Smoke, deceased, filed a claim against his estate in the county court to recover damages for personal injuries allegedly sustained while riding in a 1935 LaSalle sedan automobile owned and operated in an alleged grossly negligent manner by William H. Smoke during his lifetime. The claim was disallowed by the county court, and plaintiff appealed to the district court. There the issues were presented to a jury and at conclusion of plaintiff's evidence, defendant moved for directed verdict upon the ground that plaintiff's evidence established that she was a guest in the automobile and as a matter of law her evidence was insufficient to establish gross negligence by the driver. Such motion was overruled, whereupon defendant rested and renewed his motion for directed verdict, which was overruled. The issues were then submitted to the jury, which returned a verdict for plaintiff, awarding her $2,417. Thereafter, defendant filed motion for judgment notwithstanding the verdict or in the alternative for new trial. The trial court sustained defendant's motion for

judgment notwithstanding the verdict, and dismissed plaintiff's action. Therefrom she appealed to this court, assigning that the trial court erred in concluding as a matter of law that plaintiff was a guest, and in sustaining defendant's motion for judgment notwithstanding the verdict. We conclude that the assignments should not be sustained.

It is now elementary that a motion for directed verdict or its equivalent, or for judgment notwithstanding the verdict, must be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed, and such party is entitled to have every controverted fact resolved in his favor and have the benefit of every inference that can reasonably be deduced from the evidence. Long v. Carpenter, 154 Neb. 862, 50 N. W. 2d 67.

Plaintiff did allege in her petition that she was not a guest, but a careful examination of the undisputed evidence adduced by her with relation thereto discloses that reasonable men could not arrive at any other conclusion except that she was a guest. Therefore, the trial court properly so assumed as a matter of law.

In Van Auker v. Steckley's Hybrid Seed Corn Co., 143 Neb. 24, 8 N. W. 2d 451, relied upon by plaintiff, we held: "The question of whether a person riding in a motor vehicle is a guest, or engaged in a joint enterprise, or other relationship, is generally one for determination in the individual case. It must be ascertained from facts establishing the identity of the persons advantaged by the carriage, the relationship between the parties, and the purposes to which the transportation is incident.

"If the evidence is undisputed, or such that minds of men could not reasonably arrive at any other conclusion, the question is one for decision by the court as a matter of law; otherwise, it is a question for the jury to decide as other issuable facts in the case.

"A person riding in a motor vehicle is a guest if his

carriage confers only a benefit upon himself and no benefit upon the owner or operator except such as is incidental to hospitality, social relations, companionship, or the like, as a mere gratuity." Such case is entirely distinguishable from that at bar upon the facts and conclusions required thereby, but such rules are conversely applicable and controlling here.

In the case at bar plaintiff was simply a member of the family making a hospitable family visit. The day before the accident, which occurred on October 1, 1948, she met William H. Smoke up town and rode in the same LaSalle automobile out into the country about a mile and a quarter to his home. She did not know the car's model, but did know who formerly owned it. She concededly paid the driver nothing for so taking her out in the car or taking her back to Chadron the next day. When they arrived, Mrs. Smoke was there and they talked, among other things, about the Smokes renting and moving into plaintiff's house for the winter. The next day plaintiff assisted some with the housework and helped Mrs. Smoke pack up some fruit jars and other things to take to plaintiff's home in Chadron. They had dinner and supper together, and Mrs. Smoke gave plaintiff a basket of jars of fruit. A Mr. Hawkins was also there for supper, and about 6 o'clock they loaded the basket of jars of fruit and other things in the LaSalle automobile and all of them started back toward Chadron with plaintiff's driver. Mrs. Smoke and plaintiff rode in the back seat and William H. Smoke and Mr. Hawkins rode in the front seat. The accident occurred just west of Chadron outside the city limits near the east fork of the "Y" where highways 19 and 20 join each other. William H. Smoke lost his life as a result of the accident.

Since plaintiff was riding as a guest, she could not recover unless the evidence adduced by her was sufficient to establish by a preponderance of the evidence that her driver was grossly negligent in some manner as alleged and that such negligence proximately caused

the accident and her injuries. See § 39-740, R. R. S. 1943.

In that connection, it is said in the opinion in Montgomery v. Ross, 156 Neb. 875, 58 N. W. 2d 340: " 'Gross negligence means great or excessive negligence; that is, negligence in a very high degree. It indicates the absence of even slight care in the performance of a duty.' * * *

" 'What amounts to gross negligence in any given case must depend upon the facts and circumstances. What would amount to gross negligence under certain circumstances might, under different circumstances, be even slight negligence.' "

In the syllabus in Montgomery v. Ross, *supra,* it is held: "A verdict should not be directed nor a cause of action dismissed unless a court can definitely determine that the evidence of defendant's negligence, when taken as a whole, fails to reach that degree of negligence that is considered gross." See, also, Komma v. Kreifels, 144 Neb. 745, 14 N. W. 2d 591; Thompson v. Edler, 138 Neb. 179, 292 N. W. 236. Further, as held in Pavlicek v. Cacak, 155 Neb. 454, 52 N. W. 2d 310, and reaffirmed in Montgomery v. Ross, *supra:* "* * * a series of acts of ordinary negligence may, under certain circumstances, operate to produce gross negligence but not necessarily so."

In Gosnell v. Montgomery, 133 Neb. 871, 277 N. W. 429, this court held: "When evidence is resolved most favorably toward the existence of gross negligence, and thus a fixed state of facts had, the question of whether or not such facts will support a finding of the existence of gross negligence is a question of law." In that connection, plaintiff alleged in substance that her driver was grossly negligent, proximately causing the accident, in that: (1) He failed to keep a proper lookout; (2) failed to drive at a speed which was reasonable and proper under the circumstances, but drove at a high and excessive speed; (3) failed to drive on the right side of the highway and give a vehicle approaching

from the opposite direction one-half of the main traveled portion thereof; and (4) "That said Smoke drove said motor vehicle, when the steering gear and steering appratus (apparatus) therein and thereon was in an unsafe, defective and dangerous condition, he being well aware of the condition of the same."

Defendant's answer denied generally, but among other things admitted that there was an accident at the time and place alleged and that plaintiff was riding in the driver's 1935 LaSalle sedan, but alleged that she was a guest therein, had ridden in said automobile on previous occasions when driven by such driver, and upon the occasion in question made no protest whatever to the manner of driving the same. In that regard, there was no evidence that plaintiff ever made any protest with regard to the manner of driving the car.

The undisputed evidence was in substance as follows: Highway 19 extends from the south in a wide curve, having a 750 foot radius toward the northeast, where it forks into or joins highway 20 extending east and west at a point directly south of the Chadron refinery, located just west and outside the city limits of Chadron. There is a cafe just east of the refinery near where the two highways eventually merge into each other, at the east fork of the highways. The accident occurred just east of that point.

It was about 6:30 p. m., and bad dusk or dark enough to require lights, which were on. The driver of an Oldsmobile proceeding west on highway 20 and slowly approaching, testified that he first saw the car in which plaintiff was riding as it came from the south about one-half way around the curve, but that he thereafter forgot about it because there was a car driving just close ahead of him, and as it suddenly turned off into the cafe he next saw plaintiff's driver coming along straight east, a little off center at an angle, directly in front of him on the wrong side of the highway, whereupon they collided practically head on. He estimated Smoke's

speed to be between 30 and 35 miles an hour when he first saw him.

A witness who was standing inside the door of the Tri-State building located across the street south of the cafe observed the Smoke car as it came from the south around the curve on its right side of the highway at a speed which he estimated to be from 30 to 40 miles an hour. He testified that there was a hogback or ridge on the pavement at the point where highway 19 joins highway 20, and just as plaintiff's driver got over that a short distance from the accident, he sort of dived from his right side to the north on the wrong side of the highway, and hit the Oldsmobile, which had almost stopped. There were no "Slow" or "Stop" signs on either highway at the point involved, and the amount of other traffic, if any, thereon at the time of accident cannot be ascertained from the evidence.

The man riding in the front seat with plaintiff's driver had ridden out to the Smoke home that morning in the same car. He testified that Smoke told him, sometime before the accident, that the car was kind of old and out of shape and he was trying to get some repairs for it but hadn't been able to obtain them yet. It was something about the steering. Such witness never drove the car, but testified that as near as he could tell, the car "would steer but it wouldn't take a hold till after awhile. You would pull on it and it would take a hold after a bit; and that was what throwed us out of line." They came over the highway past the refinery, and got along pretty good, always on their own side of the highway, until just a little bit before the accident the car kind of wobbled or wandered over toward the wrong side and the collision occurred. He first saw the other car right in front of them just as they hit. He testified that while they came around the curve, they could not have been going over 30 miles an hour because it was such an old car. He was positive that it could not be driven over 30 miles an hour at any time, and said that Mr.

Smoke was "a painfully slow and cautious driver," he "wasn't a fast driver because he couldn't have been."

In the light of such evidence, the question presented is whether or not the trial court erred in concluding as a matter of law that plaintiff's driver was not guilty of gross negligence. We conclude that the court did not err in so deciding.

In that connection, the speed at which the car was driven could not reasonably be found to be excessive or unreasonable under the circumstances. It could reasonably be concluded that plaintiff's driver was negligent in failing to keep a proper lookout, but in that regard we must consider the fact that the car just ahead of the Oldsmobile, coming from the east, turned out toward the cafe, just prior to collision with the Oldsmobile driving right behind it. We recently held in Kuska v. Nichols Construction Co., 154 Neb. 580, 48 N. W. 2d 682: "A traveler may ordinarily occupy and use any part of a public highway he desires when not needed by another whose rights thereto are superior to his own." It is true here that it could be reasonably concluded that plaintiff's driver was negligent when he drove on the wrong side of the highway and collided with another whose rights thereto were superior to his own. However, it could not be reasonably concluded that the negligence above recited was gross in character. The question then is whether or not it could be reasonably concluded that such negligence in the light of and in connection with the evidence relating to the driving of the vehicle with an alleged defective steering apparatus could be gross negligence. We conclude that it could not.

It will be noted plaintiff did not allege in her petition that the purported defect in the steering apparatus was not reasonably obvious to or unknown by her, or that her host failed to warn her thereof; and there was no evidence adduced from which it could be reasonably concluded that such defect was not reasonably obvious to

or was unknown to her or that her driver failed to warn her thereof. There was no evidence of the exact nature of the alleged defect or that the car was not in a reasonably safe condition, but was unsafe to drive, or that the driver realized or should have realized that there was a hidden or latent danger lurking in the automobile which plaintiff might avoid if she knew of it. There was no evidence that the driver had ever had any previous difficulty or accident with the car or that he realized or should have realized that the driving of it as he did involved any unreasonable risk to his guests. His lack of such realization is evidenced by the fact that he not only entrusted his own safety but also that of his wife, a sister-in-law, and another therein, and lost his own life in doing so. In that connection, as stated in O'Shea v. Lavoy, 175 Wis. 456, 185 N. W. 525, 20 A. L. R. 1008, cited with approval by this court in In re Estate of O'Byrne, 133 Neb. 750, 277 N. W. 74, hereinafter discussed: "There can be no stronger evidence of the belief of the ordinary well-meaning man in the sufficiency of the car to safely make the trip."

Except for the conclusion of plaintiff's witness who rode in the front seat with the driver, there was no evidence that a defect in the steering apparatus caused the car to wander or wobble over on the wrong side of the highway. It could as well have been caused by the hogback or ridge on the pavement, as indicated by another of plaintiff's witnesses, or by the driver's inadvertence or want of skill in driving.

In 4 Blashfield, Cyclopedia of Automobile Law and Practice (Perm. Ed.), § 2333, p. 448, it is said: "* * * the general rule respecting injuries attributable to defects in the condition of the automobile is that a gratuitous invitee riding therein as the guest of the owner, or driver, accepts the machine of his host as he finds it, subject to the limitation that the host must not in effect set a trap by knowingly or culpably exposing invitees to the risk created by a known or obvious defect

in the automobile or otherwise be guilty of active negligence in this connection contributing to the injury of guests. A trap, within the meaning of such rule, is a hidden danger lurking upon the premises, or in the automobile which is known to the host or should be known to him in the discharge of the duty for a passenger's safety which the law imposes on him and which the guest may avoid if he knows of it. * * * Of course if the defect does not cause the accident, there is no liability.

"The fact that the mechanical defect productive of the injury is one discoverable upon an inspection of the car does not show negligence on the part of the host nor authorize a recovery by the guest, and gross negligence cannot be predicated upon a failure to inspect the vehicle thoroughly before inviting another to ride; the motorist's duty in this connection, if any, being limited to the exercise of slight care. If he thinks the automobile is in good or reasonably safe condition, although it is not, that ordinarily relieves him from any liability for defects therein.

"In jurisdictions where automobile guest statutes control, negligence, in the sense of a failure of ordinary care, in respect to the maintenance of the mechanical equipment of an automobile, affords no foundation for recovery by a guest for injuries sustained by reason of the vehicle's state of disrepair." See, also, 5 Am. Jur., Automobiles, § 235, p. 630.

In re Estate of O'Byrne, *supra,* is of interest here. Therein this court reversed and dismissed an action where liability to a guest was predicated upon the driving of a car with an alleged defective steering apparatus. In that opinion it was said: "The cases are not entirely in accord regarding the liability of the owner or operator of an automobile for injuries to a guest caused by its defective condition. But it is generally held in the absence of guest statutes that one is liable to his guest for injuries caused by a defective latent condition of

which he is aware. The rule is stated in 4 Blashfield, Cyclopedia of Automobile Law and Practice, 150, as follows: 'He is answerable for injuries to guests caused by a defective or dangerous condition of the automobile of which he is or should be aware, which defect is not reasonably obvious to the guest and is unknown to him, if he should realize the unreasonable risk to the guest created by such defect.' * * *

"There is a question whether, under our 'guest statute,' the owner of an automobile is always grossly negligent if he knows of a latent defect, undiscoverable to his guest, and fails to warn him of the danger. He surely must realize the danger to which he subjects his guest. In Gifford v. Dice, 269 Mich. 293, 257 N. W. 830, it was held that a motorist under the circumstances of that case was only ordinarily negligent, and was not liable under their guest statute."

Waters v. Markham, 204 Wis. 332, 235 N. W. 797, cited with approval by this court in In re Estate of O'Byrne, *supra,* involved liability to a guest for ordinary as distinguished from gross negligence. Therein it was said: "It is our conclusion that an automobile host may be held liable for injuries to his guest, caused by a defective condition of his automobile, if he knew of such defect and realized, or should have realized, that it involved an unreasonable risk to his guest, and the defect was so concealed or hidden as not to be reasonably obvious or patent to the guest, and the defect and the risk involved were in fact unknown to the guest, and the host failed to warn the guest as to the defective condition and the risk involved therein." Olson v. Buskey, 220 Minn. 155, 19 N. W. 2d 57, arrives at like conclusion, citing numerous authorities, including Waters v. Markham, *supra.* See, also, Heesacker v. Bosted, 131 Neb. 42, 267 N. W. 177.

In the light of the rules heretofore stated and their application to such facts as were established by evidence adduced in plaintiff's behalf, we conclude that the

trial court did not err in concluding as a matter of law that plaintiff's driver was not guilty of gross negligence. In Gummere v. Mudd, 139 Neb. 370, 297 N. W. 622, this court said: "Authorities relied upon by plaintiff for reversal all disclose the ever present imminence of danger visible to, known by, or made known to the driver, together with a persistence in negligence apparently heedless of the consequences thereof; evidence of negligence far in excess of any appearing in the case at bar and from which different minds might reasonably draw different conclusions as to the factual question of gross negligence." Such statement is controlling here.

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

AFFIRMED.

JANE E. ROBERTS, APPELLEE, V. CARROLL P. ROBERTS, APPELLANT.

59 N. W. 2d 175

Filed June 12, 1953. No. 33299.

1. **Divorce.** 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 one upon whom they are inflicted or toward whom they are directed, or be such as to destroy the objects of matrimony.
2. ———. 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.
3. **Trial.** Where a default has been regularly entered it is largely within the discretion of the trial court to say whether the defendant shall be permitted to come in afterwards and make his defense and, unless an abuse of discretion be made to appear, this court will not interfere.
4. ———. It is the spirit and policy of the law to give every party an opportunity to prosecute or defend his case in court and

courts will never deny such right except for the fault or gross laches of such party or his authorized attorney.

5. **Divorce.** By section 42-340, R. R. S. 1943, either party to a divorce action may within 6 months of the date of entry of decree make application to have the decree set aside or modified.
6. ———. If a motion to set aside or modify a decree of divorce is made pursuant to statute, the court may in the exercise of a sound discretion grant it and vacate or modify the decree.
7. ———. The right to vacate or modify a decree of divorce within 6 months is not absolute but must be exercised within a sound judicial discretion.
8. ———. In order that it may be said that the court exercised a sound judicial discretion in vacating or modifying a decree of divorce, good reason therefor must be shown and it must also be shown that such action would not produce an unconscionable result.
9. ———. The general rule is that where permanent alimony is not asked or desired or brought before the court by any statement or claim therefor or evidence sufficient to support the same, and it is not thereby made an issue in a divorce action, the court is not warranted in making it an issue, deciding the matter as such, and allowing permanent alimony.

APPEAL from the district court for Lancaster County: HARRY A. SPENCER, JUDGE. *Affirmed as modified.*

D. O. Dwyer and *W. L. Dwyer,* for appellant.

Chauncey E. Barney, for appellee.

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

CHAPPELL, J.

Plaintiff, Jane E. Roberts, brought this action seeking a divorce from defendant, Carroll P. Roberts. Her petition, filed May 3, 1952, alleged extreme cruelty and prayed for an absolute divorce, restoration of her maiden name, suit money, costs, attorney's fees, and such other and further relief as may be just and equitable. On May 5, 1952, defendant signed and acknowledged a voluntary appearance, thereby specifically waiving issuance and service of summons or other notice of the pendency of such action, but reserving statutory time to

plead, which was filed May 8, 1952. However, defendant intentionally did not answer, whereupon his default was entered, and on June 18, 1952, evidence was adduced upon the issues presented by plaintiff's petition. Subsequently on June 19, 1952, a decree was rendered which awarded plaintiff an absolute divorce, $1,500 permanent alimony, restored plaintiff's maiden name, and taxed costs, including $150 attorney's fees, against defendant.

Thereafter, on June 26, 1952, defendant filed a motion to set aside the decree and give defendant leave to file answer allegedly tendered therewith but which does not appear in the record. The alleged grounds for such motion were substantially: (1) That the evidence was insufficient to support a decree of divorce; (2) that the judgment for alimony was not within the issues made by plaintiff, who repeatedly prior to answer date assured defendant that upon default she would not seek alimony; and (3) that defendant made no appearance in reliance upon such assurance by both plaintiff and her attorney, which fact was called to the attention of the court by plaintiff's attorney before decree was rendered. Such motion was supported by affidavits which were offered in evidence at a hearing thereon on September 6, 1952, whereat plaintiff's attorney also, without reservation, made full disclosure and offered in evidence all correspondence between the parties from inception of the action until the decree was rendered. The motion was overruled on the same date, and defendant appealed, assigning as error that the trial court erred: (1) In granting plaintiff a divorce; (2) in awarding plaintiff alimony; and (3) in overruling defendant's motion to set aside the decree. We conclude that the trial court did not err when it awarded plaintiff an absolute divorce, restored her maiden name, and taxed costs against defendant, including $150 attorney's fees as a part thereof, but that the award of $1,500 permanent alimony to plaintiff was erroneous, and the decree should be and

hereby is modified to set aside and vacate the allowance thereof.

This court recently, in Killip v. Killip, 156 Neb. 573, 57 N. W. 2d 147, reaffirmed the rule that: "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 one upon whom they are inflicted or toward whom they are directed, or be such as to destroy the objects of matrimony." See, also, Peterson v. Peterson, 153 Neb. 727, 46 N. W. 2d 126, wherein it was reiterated that: "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."

In the light of such rules we have examined the record. To recite the evidence relating to the marital difficulties of the two young people involved, who lived together less than 2 years, accumulated no property, and had no children, would serve no useful purpose. It is sufficient for us to say that the evidence adduced by plaintiff was amply sufficient to support and sustain the awarding of an absolute divorce to plaintiff from defendant. The fact is that defendant willfully defaulted, well knowing that such decree would and should be granted.

The applicable general rule is that: "Where a default has been regularly entered it is largely within the discretion of the trial court to say whether the defendant shall be permitted to come in afterwards and make his defense and, unless an abuse of discretion be made to appear, this court will not interfere.

"It is the spirit and policy of the law to give every party an opportunity to prosecute or defend his case in court and courts will never deny such right except for the fault or gross laches of such party or his authorized attorney." Barney v. Platte Valley Public Power & Irr. Dist., 147 Neb. 375, 23 N. W. 2d 335.

As stated in Benson v. General Implement Corporation,

151 Neb. 234, 37 N. W. 2d 223: "The application of the foregoing general rules, however, is dependent entirely upon the facts appearing in each particular case. In other words, the factual showing made by the parties determines whether or not the trial court has abused its discretion." Under the situation here presented, we conclude that the trial court did not abuse its discretion and properly refused to set aside or vacate that part of the decree awarding plaintiff an absolute divorce, restoring her maiden name, and taxing costs, including attorney's fees, to defendant.

The primary issue here, in any event, is validity of the allowance of alimony under the unusual circumstances presented, and the power of the court to grant relief therefrom.

In that connection, this court held in Reeker v. Reeker, 152 Neb. 390, 41 N. W. 2d 231: "By section 42-340, R. S. 1943, either party to a divorce action may within six months of the date of entry of decree make application to have the decree set aside or modified.

"If a motion to set aside or modify a decree of divorce is made pursuant to statute, the court may in the exercise of a sound discretion grant it and vacate or modify the decree." See, also, Pittman v. Pittman, 148 Neb. 864, 29 N. W. 2d 790, wherein it was held: "The right to vacate or modify a decree of divorce within six months is not absolute but must be exercised within a sound judicial discretion.

"In order that it may be said that the court exercised a sound judicial discretion in vacating or modifying a decree of divorce good reason therefor must be shown and it must also be shown that such action would not produce an unconscionable result."

An examination of the record in the case at bar discloses that plaintiff in her petition did not specifically pray for a recovery of alimony either temporary or permanent, or allege any necessity therefor, or state sufficient facts therein to sustain the award of such

relief, and defendant had no actual notice that it would be sought. In fact, defendant's attorney was informed by plaintiff's attorney that plaintiff did not seek the recovery of permanent alimony and defendant made no appearance, relying upon the fact that, as proposed by plaintiff's attorney, her petition would not be amended to provide the basis for a permanent alimony judgment if defendant defaulted, and that in such situation no alimony judgment would be sought. During the trial of the default case, the trial court asked: "Is she asking for any alimony?" Thereto plaintiff's attorney frankly replied, "No." Plaintiff as a witness volunteered: "Wouldn't it be *alright* (all right) for him to pay for the divorce and be rid of him?" Regardless of such situation, however, the trial court decided that plaintiff should be awarded alimony, and included a determination of that issue in the decree.

Further, we have searched the evidence adduced by plaintiff and find no competent evidence to support or sustain an award of permanent alimony. In such situation, a prayer for general equitable relief could not either make permanent alimony an issue upon which recovery could be predicated, or justify its allowance by the court. As provided by section 42-307, R. R. S. 1943: "Suits to annul or affirm a marriage, or for a divorce, shall be conducted in the same manner as other suits in courts of equity. The court shall have the power to find and determine the issues, decree costs and enforce its decrees as in other cases; * * *."

As held in Lincoln National Bank v. Virgin, 36 Neb. 735, 55 N. W. 218, 38 Am. S. R. 747: "A judgment of a court upon a subject within its general jurisdiction, but which is not brought before it by any statement or claim of the parties, and is foreign to the issues submitted for its determination, is a nullity." See, also, Branz v. Hylton, 130 Neb. 385, 265 N. W. 16; Hallgren v. Williams, 146 Neb. 525, 20 N. W. 2d 499. In citing such rule, we are not unmindful of the conclusions reached in Graham

v. Graham, 135 Neb. 761, 284 N. W. 280, but such case is distinguishable from that at bar upon the basis of allegations contained in the petition involved therein.

In that connection, it is generally the rule that where permanent alimony is not asked or desired, or brought before the court by any statement or claim therefor or sufficient evidence to support the same, and is not thereby made an issue in a divorce action, the court is not warranted in making it an issue, deciding the matter as such, or allowing permanent alimony. See, 27 C. J. S., Divorce, § 242, p. 1001; Chandler v. Chandler, 13 Ind. 492; Shaffer v. Shaffer, 135 Kan. 35, 10 P. 2d 17; Commissioner of Internal Revenue v. Tuttle, 89 F. 2d 112; Annotation, 152 A. L. R. 456.

We conclude, in the light of such authority and the record before us, that defendant established good reason for modifying the decree by vacating only that part thereof awarding permanent alimony to plaintiff; therefore, such part of the decree should be and hereby is vacated and set aside, but otherwise the decree should be and hereby is affirmed.

Our conclusions are based entirely upon well-established propositions of law and equity which require such modification of the decree as aforesaid in order to avoid an unjust, inequitable, and unconscionable result. In so concluding, however, it should be fully understood, and it is found, that plaintiff's attorney was not guilty of the slightest unethical conduct in any manner, but was perfectly frank with and made full disclosure to the trial court, and conducted himself as a lawyer should, in an entirely ethical and proper manner in every transaction before trial, at the trial, and thereafter.

For reasons heretofore stated, the decree should be and hereby is affirmed as modified herein. All costs are taxed to defendant, including $150 allowed for services of plaintiff's attorney in this court.

AFFIRMED AS MODIFIED.

CLYDE CUNNING, APPELLANT, V. GEORGE KNOTT, APPELLEE.
59 N. W. 2d 180

Filed June 12, 1953. Nos. 33315-33318.

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: Automobiles.** Violations of the provisions of section 39-7,108, R. R. S. 1943, as to speed and of section 39-729, R. R. S. 1943, as to stop signs are evidence of negligence.
3. ———: ———. Evidence as to drinking intoxicants within a reasonable time prior to an accident is a circumstance to be considered in determining whether or not a driver of a car is guilty of gross negligence.
4. ———: ———. When evidence in a guest case is resolved most favorably toward the existence of gross negligence, and a fixed state of facts thus obtained, the question whether such facts will sustain a finding of the existence of gross negligence is a question of law.
5. ———: ———. The burden of proof is upon a guest, riding in an automobile by invitation, to prove by a preponderance of the evidence, if he seeks to hold the owner or operator thereof liable for damages, that such owner or operator was guilty of gross negligence. Failure to so prove, or the fact that the operator of the automobile may have been guilty of ordinary negligence, is insufficient to warrant a recovery in favor of the guest.
6. **Negligence.** Gross negligence means great or excessive negligence; that is, negligence in a very high degree. It indicates the absence of even slight care in the performance of a duty.
7. ———. What amounts to gross negligence in any given case must depend upon the facts and circumstances. What would amount to gross negligence under certain circumstances might, under different circumstances, be even slight negligence.
8. ———. A series of acts of ordinary negligence may, under certain circumstances, operate to produce gross negligence, but not necessarily so.
9. **Negligence: Automobiles.** Excessive speed of a vehicle does not necessarily establish gross negligence, although it is a factor to be considered.

10. ———: ———. It is not necessary in all cases that the operator of a car be aware of impending danger in order to hold him guilty of gross negligence, but that is a circumstance which should be considered.

APPEAL from the district court for Dawson County: JOHN H. KUNS, JUDGE. *Reversed and remanded with directions.*

William S. Padley, for appellant.

Edward E. Carr and *Smith Brothers,* for appellee.

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

SIMMONS, C. J.

This is an action for damages.

Plaintiff, a guest, was riding in an automobile driven by the defendant when the accident happened. The cause was tried to a jury. At the close of plaintiff's case-in-chief defendant moved for a directed verdict on the ground, among others, that gross negligence was not proven. The motion was denied. This motion was renewed at the close of all the evidence. The motion was denied. The court submitted the issue of gross negligence to the jury, resulting in a verdict and judgment for the plaintiff. Defendant then moved for judgment notwithstanding the verdict for the reason, among others, that gross negligence was not proven. That motion was denied. Defendant then moved for a new trial. That motion was granted, the court finding error in instructions given.

Plaintiff appeals, assigning error in the granting of a new trial. Defendant cross-appeals, assigning error in denying his motion for judgment notwithstanding the verdict. We determine the cross-appeal. We find that the court erred in denying the motions for a directed verdict and in denying the motion for judgment notwithstanding the verdict. We reverse and remand with directions to render judgment for defendant.

We summarize the evidence in accord with the rule that: "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." Davis v. Spindler, 156 Neb. 276, 56 N. W. 2d 107.

The defendant was the operator of a beer parlor at Gothenburg. He desired to promote shuffleboard games. For that purpose he determined to go to Eustis and Farnam. Defendant did not know the road. Plaintiff did. Defendant and plaintiff left Gothenburg during the mid-morning of January 25, 1951. Before leaving Gothenburg the defendant purchased a one-half pint bottle of whiskey. On the road to Eustis the two men had a drink of whiskey from this bottle, consuming about one-third of it. They arrived at Eustis about 11:30 a. m. to 12 noon. They had lunch, remained there one and a half or two hours, during which time each of them drank four or five bottles of beer.

They then drove to Farnam where they remained an hour to an hour and a half during which time each of them drank five or six glasses of beer from 8-oz. glasses. In company with a third party they drove a short distance into the country where each of them drank a coke spiked with whiskey. After that there was about a third of the half pint left in the bottle of whiskey. They returned to Farnam, where the third party left the car. Plaintiff and defendant then drove north of Farnam, on a country road, came to a dead end, turned east, and drove to the scene of the accident which occurred about 4 p. m.

At all times the weather was clear and the road dry. The distances between the points mentioned do not ap-

pear in the record. The accident occurred about 11 miles south of Gothenburg.

Plaintiff testified that the speed of the defendant was "fast" and between 60 to 70 miles per hour for the entire trip. Two witnesses estimated defendant's speed at the time of the accident at 70 to 80 miles per hour.

At Farnam the parties showed signs of having "had something to drink," but not "excessive." They "walked and talked" all right. The evidence is that defendant drove rapidly but well at all times prior to the accident, did not show the effects of having consumed intoxicating liquor so far as his driving was concerned, had the automobile under control, and appeared to know what he was doing.

The accident occurred at the intersection of the west-to-east dirt road, on which they were traveling, with a graveled state highway. The country road came to a "dead end" at almost the apex of a curve in the state highway. On the east side of the road there was a bank of earth about 3 feet above the ditch and about on the level of the state highway. This bank was some 35 feet long, and at either side led down to a canyon on the land to the east. Sixty feet west of the bank, on the west side of the highway, and on the south side of the road was a "Stop" sign facing to the west. For 100 feet to the west of the bank the road to the west was on a slight incline and from there it was downhill for about 1,200 feet, a drop in elevation in that distance of about 88 feet. From there west there was another hill of about the same elevation.

Coming from the west the stop sign was visible for 400 feet, although obscured by weeds. It became more readily visible as one came closer to it. Defendant did not see the stop sign. A car was coming from the north on the highway. Parties in that car saw defendant's car as it was "coming up over the hill." Defendant did not see that car.

When defendant reached a point that he saw the road

ended, he put on his brakes, and skidded for 120 feet in almost a straight line. Defendant's car hit the bank with sufficient force to cause it to rise up on its front end, and then drop back on its wheels. The car was demolished. Plaintiff was seriously injured. The defendant did not know of the location of this intersection. Nothing on the trip caused plaintiff concern or alarm until defendant put on his brakes. The plaintiff looked up and saw what was going to happen. He put his arms up to shield his face.

The rate of speed testified to by plaintiff's witness was not lawful under the provisions of section 39-7,108, R. R. S. 1943. Section 39-729, R. R. S. 1943, provides that all vehicles entering or crossing highways where stop signs are erected shall come to a full stop as near the right-of-way line as possible. Violations of these statutory provisions are evidence of negligence. Tempero v. Adams, 153 Neb. 331, 44 N. W. 2d 604.

There is no contention here that defendant was driving under the influence of intoxicating liquor within the meaning of section 39-740, R. R. S. 1943. The evidence as to his drinking intoxicants, however, is a circumstance to be considered in determining whether defendant was guilty of gross negligence. See Howard v. Gerjevic, 128 Neb. 795, 260 N. W. 273.

We have then these ultimate facts to be considered as established for the purposes here. Defendant, after having consumed intoxicating liquor, drove his car in the daytime at an illegal and negligent rate of speed over the crest of a hill on a country road where he was unable to see what was ahead on the other side in time to avoid an accident, and in doing so did not see nor comply with the mandate of a stop sign. Does that constitute gross negligence under section 39-740, R. R. S. 1943, for which the defendant is liable for damages caused?

The rules are: "When evidence in a guest case is resolved most favorably toward the existence of gross negligence, and a fixed state of facts thus obtained, the

question whether such facts will sustain a finding of the existence of gross negligence is a question of law." Johnk v. Scanlon, 136 Neb. 187, 285 N. W. 488. See, also, Brown v. Mulready, 140 Neb. 500, 300 N. W. 421.

"The burden of proof is upon a guest, riding in an automobile by invitation, to prove by a preponderance of the evidence, if he seeks to hold the owner or operator thereof liable for damages, that such owner or operator was guilty of gross negligence. Failure to so prove, or the fact that the operator of the automobile may have been guilty of ordinary negligence, is insufficient to warrant a recovery in favor of the guest." James v. Krebek, 142 Neb. 757, 7 N. W. 2d 637.

"Gross negligence means great or excessive negligence; that is, negligence in a very high degree. It indicates the absence of even slight care in the performance of a duty." Komma v. Kreifels, 144 Neb. 745, 14 N. W. 2d 591.

"What amounts to gross negligence in any given case must depend upon the facts and circumstances. What would amount to gross negligence under certain circumstances might, under different circumstances, be even slight negligence." Komma v. Kreifels, *supra*. See, also, Johnson v. Jastram, 155 Neb. 376, 52 N. W. 2d 245.

"* * * a series of acts of ordinary negligence may, under certain circumstances, operate to produce gross negligence but not necessarily so." Pavlicek v. Cacak, 155 Neb. 454, 52 N. W. 2d 310.

Excessive speed of a vehicle does not necessarily establish gross negligence, although it is a factor to be considered. 60 C. J. S., Motor Vehicles, § 404, p. 1030.

"* * * it is not necessary in all cases that the operator of a car be aware of impending danger in order to hold him guilty of gross negligence, but that is a circumstance which should be considered." Thurston v. Carrigan, 127 Neb. 625, 256 N. W. 39.

As we weigh this evidence, under these rules, it did not rise to the degree of gross negligence and was not

sufficient to submit the issue of gross negligence to the jury.

It follows that the court erred in overruling the several motions for a directed verdict and in denying the motion for judgment notwithstanding the verdict. The judgment is reversed and the cause remanded with directions to render judgment for the defendant.

REVERSED AND REMANDED WITH DIRECTIONS.

RALPH BENNETT, APPELLANT, V. EMERALD SERVICE, INC., APPELLEE.

59 N. W. 2d 171

Filed June 12, 1953. No. 33332.

1. **Estoppel.** In an action for rescission a party who has given a reason for his conduct and decision concerning a matter involved in controversy cannot, after litigation has begun, change his position and place or explain his conduct upon a different consideration.
2. **Sales.** The rescission of a contract must be in toto and the parties must be placed in status quo so far as the circumstances will permit.
3. **Tender: Sales.** Ordinarily in rescission a formal tender of property is not required if it appears that it would have been futile.
4. ———: ———. However a tender may not be regarded as valid or sufficient, even if it appears that it would have been futile, unless it is made to appear that at the time the tender was made there was a present and immediate ability to make the tender good.

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

John McArthur and *Robert D. Zimmerman,* for appellant.

Perry & Perry, for appellee.

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

YEAGER, J.

This is an action at law by the plaintiff and appellant against the defendant and appellee for the recovery of the purchase price of a corn sheller purchased under a written warranty. The action was predicated upon a claimed rescission by plaintiff on account of an alleged breach of warranty.

The action came on for trial to a jury and at the conclusion of the evidence of the plaintiff the defendant moved for a directed verdict in its favor. This motion was sustained and the action was dismissed. The plaintiff thereafter filed a motion for new trial which was overruled. From the judgment of dismissal and the order overruling the motion for new trial the plaintiff has appealed.

Plaintiff has set forth in his brief four assignments of error as grounds for reversal. The first generally charges that the court erred in dismissing the action. The second asserts that the court erred in holding that the defendant was not placed in status quo by the tender of the corn sheller by the plaintiff. The third asserts that the court erred in holding that the plaintiff failed to make a valid tender of the corn sheller to the defendant. The fourth is substantially a contention that it was error to allow the defendant to assert as a defense on the trial that the tender was not valid and complete on the ground that the corn sheller was encumbered by a chattel mortgage in favor of a third party at the time the purported tender was made, for the reason that at the time the alleged tender back of the corn sheller was made the defendant did not refuse the tender on this ground.

The conclusion as to the first assignment, as is apparent, depends upon the determination made upon the other three, therefore it will not receive separate consideration.

The petition charges that on December 28, 1950, the plaintiff purchased the corn sheller from the defendant

for $2,227 with a written warranty. The warranty as it appears in an exhibit adduced in evidence is as follows:

"The Seller agrees to furnish free of cost at Seller's place of business a new part to replace any part which, with proper use, proves defective during the first ninety (90) days after delivery, provided the defective part is promptly returned.

"The Purchaser agrees to give each item of equipment a fair trial as soon as possible after receiving and within two (2) days after the first use. If it then fails to work properly and prompt notice is given, the Seller will send a man within a reasonable time to put it in order, the Purchaser agreeing to render friendly assistance. If it still fails to work properly and the Purchaser promptly returns it to the Seller at the Seller's place of business, the Seller will refund the amount paid, which shall constitute a settlement in full. Retention of possession or continued use shall constitute an acceptance and satisfaction of warranty and further assistance rendered the Purchaser shall not be considered a waiver of this provision. The Purchaser agrees to pay the expense of remedying any trouble due to improper handling.

"No agent of the Seller has authority to alter, add to or waive the above warranties, which are agreed to be the only warranties given and in lieu of all implied warranties.

"The Seller makes no warranty whatever in respect to tires, rims, ignition apparatus, starting devices, generators, batteries or other trade accessories, inasmuch as they are usually warranted separately by their respective manufacturers.

"The Seller agrees to deliver the equipment as ordered unless prevented by causes beyond his reasonable control.

"After delivery all of the equipment shall be held and used at the Purchaser's risk and expense, but title with right of repossession for default is reserved to the Seller until the full purchase price has been paid in cash."

The petition further charges that the plaintiff gave

the corn sheller a fair trial but it failed to work properly, whereupon the defendant was duly notified, and that the defendant attempted to fix it but was unable to do so. On January 26, 1951, after failure of the defendant to fix the sheller the plaintiff returned it to defendant at its place of business and demanded a return and refund of the purchase price. The prayer is for $2,227 with interest from January 26, 1951, and costs.

By answer the defendant admitted the sale of the corn sheller to plaintiff and the warranty but said that the sale price was $1,845 instead of $2,227. It denied that plaintiff gave the corn sheller a fair trial. It said that it promptly serviced the corn sheller and that thereafter it worked properly and met the requirements of the warranty. It said that the plaintiff waived his right to return the corn sheller by the extended retention and use of the corn sheller. It further said that there was no valid rescission for the reason that plaintiff had mortgaged the corn sheller to a third party for $1,845 which mortgage encumbered it at the time of the attempted rescission, thus preventing defendant from being placed in status quo.

A reply was filed which contained a general denial. Also the reply alleged that at the time of the attempted rescission the plaintiff was ready and willing to pay off the mortgage and obtain a release thereof.

It appears that the fourth assignment of error should be considered first. The basic contention of this assignment is that when the plaintiff made his tender the defendant refused and declined it on grounds other than that the plaintiff could not make a valid tender because of the fact that the corn sheller was encumbered by a chattel mortgage, thus precluding a defense that no valid tender was made because of the existence of the mortgage.

The rule that a person who has given a reason for his conduct and decision concerning a matter involved in controversy cannot, after litigation has begun, change

his position and place or explain his conduct upon a different consideration is applicable in cases of rescission. Garbark v. Newman, 155 Neb. 188, 51 N. W. 2d 315.

The record discloses that the plaintiff delivered the corn sheller to the premises of the defendant and that the tender made was refused. What occurred on the date of the tender is reflected in the following questions propounded by plaintiff's attorney and the answers thereto of plaintiff: "Q- Now what did you do with the machine after you finished out there at the O'Brien place? A- I took the machine back to the Emerald Service and I pulled it into their yard at the back of their building and then I went in to Mr. Becker and I told him that 'there was the cornsheller' and he said 'all right.' Q- Was that all that happened at that time? A- Yes." Becker was the representative of the defendant.

No one contends that this response of Becker amounted to an acceptance of the tender. It was treated as a refusal.

It becomes clear therefore that at the time the tender was made no specific reason was given on behalf of the defendant for refusal of the tender.

Two or three days later the plaintiff called upon Becker. The plaintiff testified as follows as to what occurred: "* * * and Mr. Becker said no he wouldn't have anything to do with it and the warranty was no good because it didn't apply to any machine that wasn't International, and it should have been written up on a used-machinery form." There was other testimony of like purport relating to the warranty.

At the same time plaintiff gave testimony in response to questions by his attorney relating to the chattel mortgage as follows: "Q- When you asked for your money, was anything said about this mortgage? A- No. I said he could make the check out to State Securities, if he wanted to. Q- The mortgage was still on the machine, wasn't it? A- Yes. Q- What did he say about that? A- He said he wasn't going to do nothing about it, he

wouldn't pay it off, and that the contract was no good."

From this record it becomes readily inferable that the defendant would have refused the tender if there had been no mortgage, but it cannot be said that the existence of the mortgage was not one of the grounds of refusal.

This specific refusal to accept the tender burdened with the condition with regard to the mortgage which the plaintiff testified that he imposed must be regarded as a permissible defense to the contention of plaintiff that he made a valid and sufficient tender.

From this it becomes apparent that the tender as made was not to the extent reasonably possible under the circumstances entire and complete and it did not place the parties in status quo. If the plaintiff had arranged with the holder of the mortgage for its release upon payment of a fixed sum which was within the amount owing to him if rescission was proper and which he was willing for the seller to pay to the mortgagee, there would have been a restoration to the extent reasonably possible insofar as the chattel mortgage is concerned. A seller is not required to take back property upon which a purchaser has placed a mortgage which the mortgagee may be unwilling to release and which cannot be immediately paid off according to its terms out of the purchase money or necessary additions thereto supplied by the purchaser. A contract of purchase cannot be rescinded in part and in part remain executed. The corn sheller remained encumbered to the extent of $1,845. The rescission of a contract must be in toto and the parties must be placed in status quo so far as the circumstances will permit. § 69-469, R. R. S. 1943; Alfree Mfg. Co. v. Grape, 59 Neb. 777, 82 N. W. 11; Perry v. Meyer, 110 Neb. 347, 193 N. W. 717; Rasmussen v. Hungerford Potato Growers Assn., 111 Neb. 58, 195 N. W. 469; Aron v. Mid-Continent Co., 141 Neb. 806, 4 N. W. 2d 884. The decision in Aron v. Mid-Continent Co., *supra,* was reversed in 143 Neb. 87, 8 N. W. 2d 682, but this legal principle was not disturbed.

This disposes of the second and fourth assignments of error adversely to the plaintiff and also his third assignment unless the facts and circumstances as disclosed by the record excused him from making a full and complete tender within the meaning of the decisions.

It is true that the law does not require vain things, and a formal tender of property is not required if it appears that it would have been futile. Garbark v. Newman, *supra.*

As already indicated, it is reasonable to infer from the record that if a sufficient tender had been made it would have been refused. This however is not sufficient upon which to base an adjudication that there was a valid rescission and to base an award for damages.

In addition, in order to sustain his case it was necessary that the plaintiff adduce evidence that at the time the tender was made he had the present and immediate ability to make his tender good. Baird v. Union Mutual Life Ins. Co., 103 Neb. 609, 173 N. W. 686, on rehearing, 104 Neb. 352, 177 N. W. 156; Linch v. Nebraska Buick Automobile Co., 120 Neb. 819, 235 N. W. 456; Garbark v. Newman, *supra;* Adams v. Adams, 156 Neb. 540, 57 N. W. 2d 131.

There was no such evidence as regards the mortgage. The showing that plaintiff authorized the defendant to satisfy the mortgage out of the demanded refund of the purchase price of the corn sheller did not satisfy the deficiency. The satisfaction of this mortgage was the burden of the plaintiff and he could not shift it to the defendant without its consent.

The facts and circumstances of this case did not excuse the plaintiff from making a full and complete tender. The third assignment of error is therefore without merit.

For the reasons herein set forth the judgment of the district court is affirmed.

AFFIRMED.

IN RE ESTATE OF VIRGIL L. RATHE. CLYDE E. LESOING, APPELLEE, V. MARTIN DIRKS, ADMINISTRATOR, APPELLANT.

59 N. W. 2d 164

Filed June 12, 1953. No. 33340.

1. **Executors and Administrators.** Where a person claiming to have a claim against an estate, having failed to present his claim within the time allowed therefor in the first instance by the probate court, makes application for that purpose within 3 months after the expiration of the time previously allowed, the court may, for good cause shown, allow further time not exceeding 3 months for the filing and determination of such claim.
2. ———. "Good cause," as employed in our statute of non-claim, is not definitely defined therein, and the proper interpretation and application thereof must depend upon the circumstances of each case.
3. **Courts: Executors and Administrators.** The jurisdiction of the county court to permit the filing of a belated claim against the estate of a deceased person depends upon good cause shown, and in the absence thereof there is no judicial discretion for the granting of such permission.
4. **Executors and Administrators.** A claimant against the estate of a deceased person is not entitled to have time extended beyond that duly fixed by the county court so that he might present his claim, where such claimant has been guilty of inexcusable inattention, neglect, or lack of diligence.
5. ———. Evidence in the instant case examined, and held to establish that good cause was not shown and applicant is not entitled to relief under the provisions of section 30-605, R. R. S. 1943.

APPEAL from the district court for Johnson County: VIRGIL FALLOON, JUDGE. *Reversed and remanded with directions.*

Davis, Healey, Davies & Wilson and *Raymond B. Morrissey,* for appellant.

Jack M. Pace and *Dwight C. Perkins,* for appellee.

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

MESSMORE, J.

This appeal is brought by Clyde E. Lesoing and involves permission to file a belated claim in the administration proceedings of the estate of Virgil L. Rathe, deceased, pending in the county court of Johnson County. The claim is for damages alleged to be due to the negligence of Virgil L. Rathe during his lifetime resulting in personal injuries to the claimant when the automobile owned and operated by Virgil L. Rathe collided with the automobile driven by Clyde E. Lesoing, with his wife Josephine Lesoing as a passenger. The county court disallowed the filing of the claim. The claimant appealed to the district court. After hearing on the claim, the district court, upon motions of the claimant and the administrator of the estate for summary judgments, entered judgment in favor of the claimant. The administrator of the estate perfected appeal to this court.

The record discloses that proceedings to administer the estate of Virgil L. Rathe, who died intestate on or about December 10, 1951, were begun in the county court of Johnson County December 18, 1951. Letters of administration were issued to Martin Dirks January 7, 1952, who qualified in that capacity. On the same day an order for notice to creditors was issued that all claims against the estate must be on file on or before May 7, 1952, or be forever barred. Hearing on the claims was set for May 8, 1952. Notice was properly published as provided by law, and proof of publication made. An order barring claims was entered May 8, 1952. The administrator filed a petition for final settlement of the account which was set for hearing on June 2, 1952. On May 24, 1952, the claimant filed an application to file his claim, to fix a date for hearing thereon, and to continue the hearing upon the administrator's final account until disposition of the claim.

This application contains several allegations as to the manner in which the claim arose, the effort made to ascertain the facts relative to the residence of the deceased, and the diligence asserted by claimant to progress his

claim. We will more fully cover this matter in a summary of the claimant's petition on appeal. The matter was heard in the county court on June 25, 1952. On August 12, 1952, the county court disallowed the claim and continued the hearing on the administrator's final report to September 15, 1952. Notice of appeal to the district court was filed September 3, 1952.

The petition on appeal was filed September 16, 1952. Insofar as necessary to be considered here, this petition alleged in substance that claimant was a resident of Hickman, Nebraska; that on December 10, 1951, he was driving his automobile, with his wife Josephine as a passenger, in a northeasterly direction on U. S. Highway No. 77 at a point just south of Cortland in Gage County; and that at that time and place decedent was driving his automobile in a southerly direction on the same highway and negligently, carelessly, and recklessly drove his automobile into and upon the claimant's automobile causing injuries and damages. The petition detailed the elements of negligence charged to Virgil L. Rathe, the injuries received, and the resulting damages which need not be set forth. The petition further alleged that decedent's death coincided with the accident of December 10, 1951, and related the proceedings had in the estate matter in the county court of Johnson County heretofore summarized; further alleged that the claimant, or his agents or representatives, did not have any knowledge or notice of any of the said proceedings or published notices in connection therewith, nor did they, or any of them, know or come into possession of facts which could be calculated to put a reasonable person upon inquiry until after the said order of May 8, 1952, barring claims had been entered; that lack of knowledge was due to mistake and accident, and not to inexcusable neglect; that claimant was not acquainted with decedent or any members of his immediate family; that claimant had been a lifelong resident of Hickman, Lancaster County, and vicinity, and did know in a gen-

eral way the Rathe family name and knew and believed that the Rathes lived for many years in and around and participated in community affairs of Adams in Gage County; that after the accident claimant learned from newspaper accounts of the accident and by inquiry that decedent resided on his father's farm located near Adams, and by reason of the foregoing, the claimant believed that the decedent at the time of his death was a resident of Gage County; that in truth and in fact the farm upon which the decedent resided is about 2½ miles northeast of Adams, and, although situated in Johnson County, its west boundary joins Gage County on the east; that a few days after the accident the claimant employed counsel to make claim for damages and was informed by counsel that such action must be commenced by filing a claim in the estate proceedings when the estate was filed; that counsel was instructed to learn of the time of the filing of the estate and to file a claim at the proper time; and that thereafter inquiries were diligently made, but due to mistake of fact, that is, the location of the decedent's residence, the inquiries were directed to the county court of Gage County as follows: January 16, 1952, long distance telephone call, February 8, 1952, inquiry in person, March 18, 1952, inquiry by mail, and March 28, 1952, inquiry by mail. The petition further alleged that the response to each inquiry was that no estate proceedings had been filed in Gage County; and that on March 28, 1952, claimant made further attempt to perfect his claim by filing a petition for the appointment of an administrator of the estate of the decedent in the county court of Gage County as a creditor, alleging the decedent to be a resident of that county. Notice was duly published in a legal newspaper of Gage County, and an administrator was appointed. Commencing on April 28, 1952, notice to creditors was duly published in Gage County, and not until May 16, 1952, 8 days after the order of the county court of Johnson County barring claims, did the claimant's counsel learn, and

then by accident while discussing another matter of business with an insurance adjuster, that an estate might be pending in Johnson County. A long distance call was made to the county judge's office in said county and the true facts were learned for the first time. It was then too late to file a claim without leave of court. On May 24, 1952, application was made in said county for additional time in which to file the claim. The petition further alleged that claimant's failure to file the claim during the period allowed therefor was entirely without fault on his part and due to mistake of fact as to the location of decedent's residence, which was a reasonable and natural mistake due to the proximity of the decedent's residence to Gage County and the association of the name of Rathe in the claimant's mind with the town of Adams; that claimant did not know facts which would challenge his attention to the actual situation; that said failure was not due to inexcusable neglect for the reason that the claimant exercised the greatest diligence in attempting to prosecute his claim which went for naught by reason of mistake of fact which had been made by claimant; that 3 months had not elapsed from May 7, 1952, the last day for filing claims, at the time the application for additional time was filed; and that final hearing had not yet been had. The prayer of the petition was for additional time for filing and determination of the claim, for setting a date for hearing, to continue the administrator's application for final account until disposition of the claim, and for such equitable relief as might be necessary.

The answer and objections in the county court to the application of claimant to file his belated claim admitted the occurrence of the accident on the highway as alleged by the claimant and that decedent's death coincided with the accident; set forth the proceedings in the county court of Johnson County; admitted that Virgil L. Rathe resided in Johnson County; and denied all allegations in the application not admitted. The answer

alleged in addition that the automobile driven by the decedent at the time of the accident was a 1951 Chevrolet two-door automobile registered in Johnson County, the license being issued by the county treasurer and designated 1951 license JN 105 C; that the license number was recorded on the state accident report made by the investigating officer and filed with the state and constituted a public record of the state; that the driver's license issued to Virgil L. Rathe, No. G 57-774, indicated upon its face that it was issued in Johnson County to a resident of that county; that the heirs of decedent resided at all times in Johnson County; that the residence of the decedent was at all times open, notorious, and located in Johnson County; that the insurance carrier of the automobile coverage carried by the claimant determined the residence of Virgil L. Rathe to be in Johnson County; that the file of the insurance carrier, the Western Mutual Insurance Company, was open and available for inspection by the claimant; that said investigators knew Johnson County was the residence of the decedent; that no inquiry was made of the heirs or relatives of the decedent as to his residence; that had such inquiry been made the investigators would have informed the claimant and he would have known Johnson County to be the residence of the decedent; that claimant did not use due diligence to determine the residence of Virgil L. Rathe at the time of his death; and that had diligent search been made said fact could have been determined by the claimant or his representative. The prayer was to deny the application, that hearing be held forthwith upon the final account of the administrator, and that he be discharged.

The administrator of the estate, in support of a motion for summary judgment, presented the following affidavits:

Affidavit by E. G. Ned Maxwell. the sheriff of Gage County, who, on December 10, 1951, in the course of his duty made an investigation and filed with the De-

partment of Roads and Irrigation of this state an investigator's traffic accident report on December 12, 1951. This report showed the registration number of Virgil L. Rathe's vehicle in Nebraska to be 1951 license No. JH 105 C, and the driver's license, No. G 57-774, to be issued to Virgil L. Rathe, showing place of issuance as Johnson County.

The affidavit of Paul D. Turner was to the effect that on or about December 10, 1951, he was an adjuster for the Farmers Mutual Automobile Insurance Company of Madison, Wisconsin, which insured Clyde Lesoing from liability arising out of an automobile accident. In the course of his duties as an adjuster he investigated an automobile accident involving the claimant and Virgil L. Rathe, deceased, which occurred on December 10, 1951. In the course of the investigation, during December 1951, he called on the father and brother of the decedent at the home of the decedent. He also talked to an attorney of Tecumseh, Johnson County, regarding the estate proceedings in Johnson County for the decedent. This was during December 1951, or January 1952. He examined a map of Johnson County which showed the place of residence of Virgil L. Rathe, deceased, as in that county. Between the date of the accident and May 1952, no inquiry was made of him by the claimant or his representative as to the residence of decedent.

William Rathe, the father of Virgil L. Rathe, deceased, resided on the same farm as the decedent, as shown by his affidavit. At no time between December 10, 1951, and May 1952, did the claimant or his representative contact him at his farm home personally, or by telephone, except Paul D. Turner, a representative of the claimant's insurance carrier who did talk to him during said time. He described the farm as being 2½ miles northeast of Adams, Nebraska.

The claimant offered the affidavit of Clyde E. Lesoing in which the affiant stated he was never informed by

Paul D. Turner, whom he believed to be an adjuster for the Farmers Mutual Automobile Insurance Company of Madison, Wisconsin, that the decedent was a resident of Johnson County, nor was he informed by Turner of the estate proceedings pending in Johnson County for decedent. He was never informed by Ned Maxwell, the sheriff of Gage County, about decedent's automobile being registered in Johnson County, or the driver's license issued to decedent as being issued in Johnson County. He never saw a copy of the investigator's traffic accident report filed by Ned Maxwell, he never saw the automobile being driven by the decedent on December 10, 1951, under circumstances whereby he was able to observe the motor vehicle license plates thereon, and never saw the license plates on this vehicle.

Josephine Lesoing, the wife of this claimant, made an affidavit to the same effect as her husband.

Both the claimant's counsel and counsel for the estate moved for a summary judgment. The trial court sustained the claimant's motion. On this matter of summary judgment, both parties having moved for the same, the court was obligated to determine to which of said parties a summary judgment should be awarded.

The administrator of the estate assigns as error the following: The district court erred in sustaining the claimant's motion for a summary judgment and in denying the estate's motion for a summary judgment. The district court erred in finding that the claimant did show good cause to file the claim.

The applicable statute is section 30-605, R. R. S. 1943, which provides: "Any creditor who has failed to present his claim within the time allowed, may, within three months after the expiration of such time, apply to the court for additional time for the filing and determination of his claim, and the court may, for good cause shown, allow such further time not exceeding three months, but notice of the time and place for the hearing on claims thus filed within the additional time shall

be given to all parties interested as prescribed in section 30-601."

In the instant case the application to file belated claim was made within 3 months from the last day for hearing on claims and from the rendering of the order barring claims.

In the cases of Nebraska Wesleyan University v. Bowen, 73 Neb. 598, 103 N. W. 275, Estate of Fitzgerald v. First Nat. Bank, 64 Neb. 260, 89 N. W. 813, and Burling v. Estate of Allvord, 77 Neb. 861, 110 N. W. 683, 8 months, 8 months, and almost 2 years, respectively, had elapsed after the time limited by the proper probate court for filing claims had expired. Relief was not sought, and under the facts in each case could not have been sustained, under the controlling statute in the instant case. However, the statute here involved has had a long history and has always required that good cause be shown to file the belated claim.

In In re Estate of Golden, 120 Neb. 226, 231 N. W. 833, which we cite for the reason that the principles of law announced therein are applicable here, the claimants were required by a formal order to present their claims within 3 months from March 22, 1928. On June 26, 1928, decree barring claims was entered. On September 12, 1928, certain merchants applied to the county court for permission to file their claim. This permission was granted on January 8, 1929. Finally the district court on appeal denied their application for permission to file the claim. An appeal was taken to this court. The court said: "The sufficiency of the showing by claimants is the controlling question. The jurisdiction of the county judge to permit the filing of a belated claim depends upon good cause shown. In absence of such a showing he has no discretion to grant such permission. In re Estate of Hoferer, 116 Neb. 254. The showing of good cause should be analogous to that required by a court of equity in granting a new trial in an ordinary case." The court also said: "The claim

against the solvent estate makes a strong appeal to morality, equity and justice, but the arbitrary bar of the nonclaim statute and the peremptory order of the county court pursuant thereto apply alike to just and unjust claims." The district court's order denying permission to file the claim was affirmed.

In re Estate of Yetter, 125 Neb. 763, 252 N. W. 202, made reference to section 30-605, Comp. St. 1929, now section 30-605, R. R. S. 1943, the statute being analogous to the present statute. In this case the claimant knew of the death of Albert O. Yetter, but did not know of any probate proceedings having been begun to administer his estate. Certain representations were made with reference to the filing of the claim by a third party, who was not authorized to represent the executrix of the estate, to the effect that no probate proceedings had been commenced. The promise by the executrix to a claimant before expiration of the time of filing claims that she would make a payment on his claim against her deceased husband at a time after the time had passed for filing claims was held not to be such a statement as to excuse the claimant for not filing his claim in proper time. Following In re Estate of Golden, *supra,* it was held there was no evidence of fraud, accident, mistake, unavoidable misfortune, excusable neglect, or diligence.

In re Estate of Tucker, 128 Neb. 387, 258 N. W. 645, is relied upon by the claimant and also by the administrator of the estate. In this case the court held: " 'Good cause,' as employed in our statute of nonclaim, is not definitely defined therein, and the proper interpretation and application thereof must depend upon the circumstances of each case and be determined by the court in the proper exercise of a sound judicial discretion." In this case the claimant was unaware of the decedent's death, and claimant's lack of knowledge of the proceedings to administer the estate of the deceased was not due to lack of diligence. The claimant relies on the following language contained in the cited case:

"It is also to be noted that usually, where a statute directs that a court may do a thing on 'good cause' shown, irrespective of the connection, the force of this language thus employed is to vest in the tribunal to which directed a judicial discretion in the matter or thing to which it relates." Cases are cited. And claimant also relies on language to the effect that it is quite evident from the consideration of these cases, arising under statutes relating to different subjects, in which the words "good cause" are incorporated, and wherein that which constitutes "good cause" is not stated nor definitely defined, the proper application thereof must depend on the circumstances of each case, and be determined by the sound discretion of the court. But such cases require the exercise of a proper judicial discretion.

In an appeal to this court where the county court denied the claim and the district court sustained permission to file it, this court has a right to pass upon the question under the statute as to whether or not good cause was shown for permission to file the belated claim.

We have set forth in detail the pleadings of the respective parties and the showings made by them as to why each should be entitled to a summary judgment. It appears from the record that the decedent and the claimant were involved in an automobile accident on December 10, 1951, and it is admitted that as a result of the accident Virgil L. Rathe, driver of one of the cars, was killed. The claimant made no inquiry of the sheriff of Gage County who investigated the accident. An examination of the sheriff's report of the accident filed with the Department of Roads and Irrigation, which is a public record, would have revealed the residence of the decedent. Any due diligence used at the place of the accident would certainly have revealed that the automobile driven by the decedent at the time of the accident was licensed in Johnson County and not in Gage County.

Any inquiry made by claimant to the insurance company which carried coverage on his automobile for liability in case of an accident, or to the insurance adjuster of that company, would have revealed the true residence of the decedent. Any inquiry made in the town of Adams, probably 16 or 18 miles distant from the town of Hickman where the claimant lived, would likewise have revealed the residence of the decedent. The place of decedent's residence was admittedly discovered accidentally.

From the record as we view it, the mistake made by the claimant in not knowing or ascertaining the residence of the decedent was not a mistake that could be excused under the facts and circumstances of this case. It is also apparent that the claimant did not use due diligence in attempting to ascertain the residence of the decedent. The fact that he made inquiry and instituted certain proceedings in the county court of Gage County is not a showing of due diligence in ascertaining the residence of the decedent. We conclude that the claimant failed to show good cause for permission to file the belated claim in the estate proceedings. Having failed to show good cause, judicial discretion of the trial court is not here involved.

We conclude the judgment of the trial court should be, and is hereby, reversed and the cause remanded with directions to enter a summary judgment in favor of the administrator of the estate.

REVERSED AND REMANDED WITH DIRECTIONS.

IN RE ESTATE OF VIRGIL L. RATHE. JOSEPHINE LESOING, APPELLEE, V. MARTIN DIRKS, ADMINISTRATOR, APPELLANT.
59 N. W. 2d 170

Filed June 12, 1953. No. 33341.

APPEAL from the district court for Johnson County:

VIRGIL FALLOON, JUDGE. *Reversed and remanded with directions.*

Davis, Healey, Davies & Wilson and *Raymond B. Morrissey,* for appellant.

Jack M. Pace and *Dwight C. Perkins,* for appellee.

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

MESSMORE, J.

This appeal is brought by Josephine Lesoing and involves permission to file a belated claim in the administration proceedings of the estate of Virgil L. Rathe, deceased, pending in the county court of Johnson County. The claim is for damages alleged to be due to the negligence of Virgil L. Rathe during his lifetime, resulting in personal injuries to the claimant when the automobile owned and operated by Virgil L. Rathe collided with the automobile driven by Clyde E. Lesoing, the husband of the claimant. She was riding as a passenger. The county court disallowed permission to file the claim. The claimant appealed to the district court. After hearing on the claim, the district court, upon motions of the claimant and the administrator of the estate for a summary judgment, entered judgment in favor of the claimant. The administrator of the estate perfected appeal to this court.

The pleadings in the instant case are analogous to the pleadings in case No. 33340 wherein the claimant, Clyde E. Lesoing, filed an application for permission to file a belated claim in the estate of Virgil L. Rathe, deceased, with the exception of the name of the claimant, the personal injuries sustained by her, and her claim for damages. In all other particulars this case is governed by case No. 33340, Lesoing v. Dirks, *ante* p. 183, 59 N. W. 2d 164.

The judgment of the trial court is reversed and the cause remanded with directions to enter summary judgment in favor of the administrator of the estate.

REVERSED AND REMANDED WITH DIRECTIONS.

IN RE GUARDIANSHIP OF HELEN HOWLAND FLETCHER, INCOMPETENT. ELIZABETH ANN HOWELL, APPELLEE, V. HELEN HOWLAND FLETCHER, APPELLANT.

59 N. W. 2d 359

Filed June 19, 1953. No. 33239.

1. **Statutes.** The basic rule of statutory construction is to ascertain and give effect to the intention of the Legislature as expressed in the statute.
2. ———. In construing a statute the legislative intent may be gathered from the reason for its enactment.
3. **Guardian and Ward.** The phrase "a law substantially similar," as used in section 38-801, R. R. S. 1943, refers to the substance of the remedy thereby afforded; that is, permitting a marshalling or collecting of the ward's assets, wherever located, without the necessity of having to commence and maintain independent guardianships in each state or territory where assets of the ward may be located.
4. **Judgments.** It is fundamental that a judgment of a sister state which does not meet the requirements of due process as required by section 1 of the Fourteenth Amendment to the Constitution of the United States has no validity in any state, even as a matter of comity.
5. ———. The rule in such cases is that when a judgment rendered in one state is challenged in another, a want of jurisdiction over either the person or the subject matter is open to inquiry. The party attacking the validity of the judgment has the burden of establishing its invalidity.
6. **Process.** The adequacy of substituted service so far as due process is concerned is dependent upon whether or not the form of substituted service is reasonably calculated to give the defendant actual notice of the proceedings and an opportunity to be heard.

APPEAL from the district court for Douglas County: ARTHUR C. THOMSEN, JUDGE. *Affirmed.*

Penelope H. Anderson and *W. W. Wenstrand,* for appellant.

Eugene D. O'Sullivan, Eugene D. O'Sullivan, Jr., David Lathrop, and *Warren C. Schrempp,* for appellee.

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

WENKE, J.

This appeal is from the district court for Douglas County. It raises the question, when is the law of another state or territory of the United States so substantially similar to section 38-801, R. R. S. 1943, as to make that section available to a resident guardian and his ward of such other state or territory?

Elizabeth Ann Howell filed a petition in the county court of Douglas County asking that she be appointed guardian of the person and property of her mother, Helen Howland Fletcher, a resident of Cook County, Illinois. Most of the property of which it is alleged she is the owner is located in Douglas County. As the basis for her appointment she attached to her petition a duly certified and authenticated transcript of the records of the probate court of Cook County, Illinois, showing her appointment and qualification as conservator of the estate of her mother. Helen Howland Fletcher appeared specially and objected to the jurisdiction of the county court of Douglas County of her person because no notice or summons of any kind had ever been served on her as required by the laws of the State of Nebraska. The county court sustained this special appearance and dismissed the petition, apparently on the basis that Illinois does not have a law substantially similar to our section 38-801, R. R. S. 1943.

Elizabeth Ann Howell appealed from this ruling to the district court for Douglas County. Therein Helen Howland Fletcher again appeared specially and objected to that court's jurisdiction over her on the ground that no notice or summons of any kind had ever been served

on her as required by the laws of the State of Nebraska. The district court overruled her special appearance and this appeal is from that ruling.

Primarily involved in this appeal is the question of whether or not the laws of Illinois on this subject are substantially similar to those of Nebraska, as evidenced by section 38-801, R. R. S. 1943. It was stipulated that: "* * * the issue presented to the Court was solely on the question of whether the statutes are similar; * * *." This section of our statutes does not require a notice or summons to be served on a nonresident ward when the parties otherwise bring themselves within the provisions thereof but does provide it shall only be available "to any resident of any state or territory in which a law substantially similar to this section" shall be in force.

"The basic rule of statutory construction is to ascertain and give effect to the intention of the legislature as expressed in the statute." Megan v. Boyd County, 133 Neb. 539, 276 N. W. 160. In construing a statute the legislative intent may be gathered from the reason for its enactment. Kearney County v. Hapeman, 102 Neb. 550, 167 N. W. 792; Anstine v. State, 137 Neb. 148, 288 N. W. 525.

"Guardianship depends for its validity and legal effect on the law of the jurisdiction by which it was created, and the guardian's authority does not extend beyond the limits of the state. * * * a guardian appointed by the courts of one state has no authority over the ward's person or property in another state, except so far as allowed by the comity of that state, as expressed through its legislature or its court. Thus, except as authorized by statute or the principle of comity, a guardian appointed in a foreign country, or in another state of the Union, cannot demand the control of the ward's person, maintain a suit as guardian, sell or lease the ward's property, collect debts due to him, or demand his distributive share of an estate." 25 Am. Jur., Guardian and Ward, § 215, p. 135.

There can be no doubt of the fact that the reason for enacting this legislation is fully stated in the above. What then is meant by the use of the language "a law substantially similar" as used in the act?

It was said in Smith v. Mitchell, 185 Tenn. 57, 202 S. W. 2d 979: "Now what is meant by statutes being 'substantially similar'? We think they are substantially similar when they effectuate the same result * * *." In Orr v. Wright (Tex. Civ. App.), 45 S. W. 629, where a like situation was involved, the court held: "It was not contemplated that the benefits of this statute should only apply to the residents of the state, territory, etc., having a statute exactly like ours. It was intended that the benefits of this statute should extend to the residents of any state, territory, district, or country in which a remedy was provided by the laws of such state, territory, district, or country for the removal of the estate of a nonresident ward of such state, etc., corresponding in its essential particulars to the provisions of our statute relating to nonresident guardians and wards."

The procedure that a nonresident guardian of a nonresident ward must follow in Illinois and Nebraska are not alike. See, Illinois Probate Act, Laws 1939, § 262, p. 63, appearing in Smith-Hurd Illinois Ann. St., ch. 3, § 416, p. 910; Illinois Probate Act, Laws 1939, § 264, p. 64, appearing in Smith-Hurd Illinois Ann. St., ch. 3, § 418, p. 913; Illinois Probate Act, Laws 1939, § 265, p. 64, appearing in Smith-Hurd Illinois Ann. St., ch. 3, § 419, p. 914; Illinois Probate Act, Laws 1939, § 266, p. 64, appearing in Smith-Hurd Illinois Ann. St., ch. 3, § 420, p. 916; Illinois Probate Act, Laws 1939, § 268, p. 65, appearing in Smith-Hurd Illinois Ann. St., ch. 3, § 422, p. 918; Illinois Probate Act, Laws 1939, § 269, p. 65, appearing in Smith-Hurd Illinois Ann. St., ch. 3, § 423, p. 918; § 38-801, R. R. S. 1943, of Nebraska. But we do not think the phrase "substantially similar," as found in our act, refers to procedure. We think it refers to the substance of the remedy thereby afforded;

that is, permitting a marshalling or collecting of the ward's assets, wherever located, without the necessity of having to commence and maintain independent guardianships in each state or territory where assets of the ward may be located, often at considerable expense, inconvenience, and difficulty. In this respect the laws of Illinois seem to be more liberal than our own. We find the laws of Illinois enacted for this purpose to be "substantially similar" to our own; that is, having a general likeness in purpose.

Appellant further contends the service had in the proceedings in Illinois did not constitute due process under either the Constitution of the State of Nebraska or the Constitution of the United States. See, Art. I, § 3, Constitution of the State of Nebraska; Fourteenth Amendment, § 1, Constitution of the United States.

Article IV, section 1, of the Constitution of the United States provides: "Full Faith and Credit shall be given in each State to the Public Acts, Records, and judicial Proceedings of every other State."

However, as stated in Repp v. Repp, 156 Neb. 45, 54 N. W. 2d 238: "It is fundamental, we think, that a judgment of a sister state which does not meet the fundamental requirements of due process as required by section 1 of the Fourteenth Amendment to the Constitution of the United States has no validity in any state, even as a matter of comity."

"The rule in such cases is that when a judgment rendered in one state is challenged in another, a want of jurisdiction over either the person or the subject matter is open to inquiry. The party attacking the validity of the judgment has the burden of establishing its invalidity." Repp v. Repp, *supra*. See, also, Darling & Co. v. Burchard, 69 N. D. 212, 284 N. W. 856; Old Wayne Life Assn. v. McDonough, 204 U. S. 8, 27 S. Ct. 236, 51 L. Ed. 345; Olson v. Mackolite Fire Proofing Co., 116 Ill. App. 573.

No attempt was made to prove want of jurisdiction

of the parties by extrinsic evidence. Therefore the question presented for determination is whether or not the transcript of the record of the probate court of Cook County, Illinois, shows a want of jurisdiction over the person of Helen Howland Fletcher.

The certified and authenticated record of the probate court of Cook County, Illinois, shows appellee filed her petition therein on September 12, 1951, asking that she be appointed conservator of the estate and of the person of appellant, whom she alleged was incapable of managing her estate because of physical incapacity. In this respect the laws of Illinois provide: "Probate courts and county courts of counties in which there are no probate courts have the power to appoint conservators as follows: * * * (c) Upon the filing of a verified petition by a reputable citizen of this state the proper court may adjudge a person as incompetent pursuant to this Act and appoint a conservator for him. The court may require such notice of the hearing on the petition as it deems expedient." Illinois Probate Act, Laws 1939, § 113, p. 33, appearing in Smith-Hurd Illinois Ann. St., ch. 3, § 265, p. 571.

On May 16, 1951, appellee filed an affidavit in the proceedings which she had instituted in the probate court of Cook County wherein she stated: "That said Helen Howland Fletcher's physical condition is impaired as the result of cerebral hemorrhage and a hypertensive encephalopathy; that she is under continuous medical care and has been attended by a companion or nurse for the past three years; that if summons is personally served on her the probable result will be to further seriously impair her condition."

This was done pursuant to the Illinois Probate Act, Laws 1939, § 117, p. 34, appearing in Smith-Hurd Illinois Ann. St., ch. 3, § 269, p. 580, which provides: "On the filing of a petition for the adjudication of incompetency and appointment of a conservator pursuant to Section 113 (c) of this Act, the court shall set the cause for

hearing, and summons directed to the alleged incompetent shall be issued. * * * Upon good cause shown supported by affidavit, the court may excuse service on him personally and substitute therefor any of the modes of service provided for in other civil cases."

The probate court of Cook County thereupon entered the following order: "IT IS HEREBY ORDERED that in accordance with the provisions contained in Section 117 of the Illinois Probate Act personal service on the alleged incompetent be and it is hereby excused and that any of the modes of service provided for in other civil cases be substituted therefor."

The following service was thereupon had upon appellant: "I certify that I served the within writ on the defendant HELEN HOWLAND FLETCHER by leaving a copy of the same at her usual place of abode in my county, with DELIA LUOMA (nurse) a person of her family of the age of ten years or upwards and informing such person of the contents thereof, on the 17th day of May, 1951, and also by sending through the United States Post Office, on the 17th day of May, 1951, a copy of the within writ in a sealed envelope, with postage fully prepaid addressed to the said defendant at such usual place of abode."

This was in accordance with the following statute: "Except as otherwise expressly provided herein, service of summons upon an individual defendant in any civil action shall be made * * * by leaving such copy at his usual place of abode, with some person of the family, of the age of ten years or upwards, and informing such person of the contents thereof, provided that the officer making such service shall also send a copy of the summons in a sealed envelope with postage fully prepaid, addressed to the defendant at such usual place of abode; the certificate of such officer that he has sent such copy in pursuance of this section shall be evidence that he has done so." Illinois Civil Practice Act, Laws 1933, § 13,

p. 788, appearing in Smith-Hurd Ann. St., ch. 110, § 137, p. 46.

On May 22, 1951, the probate court entered the following order: "It is therefore ORDERED that Elizabeth Ann Howell be and she hereby is appointed conservator of the estate (and person) of Helen Howland Fletcher, an incompetent, * * *."

"The most common method of service of process upon a person domiciled within the state, provided for by statute, is by leaving the summons at the last and usual place of abode of the defendant. The courts have upheld this method of acquiring jurisdiction. Any other method of service upon a person domiciled within the state is sufficient to give the courts jurisdiction over him, if it is one reasonably calculated under all the circumstances to give him notice of the action and an opportunity to be heard. An action will lie in other states upon the judgment. If, however, the method of service pursued is one which does not have a reasonable tendency to give the defendant notice of the action, the rendition of a judgment against him by the courts of any state of the United States is void, as a violation of the Fourteenth Amendment to the Constitution of the United States, since it deprives the defendant of property without due process of law. If such a judgment is rendered, no other state need give it faith or credit." 1 Beale, Conflict of Laws, § 75.1, p. 333.

"The adequacy of substituted service so far as due process is concerned is dependent upon whether or not the form of substituted service is reasonably calculated to give the defendant actual notice of the proceedings and an opportunity to be heard." Repp v. Repp, *supra.*

Proof of mailing a notice is prima facie proof that it was received. Meyer v. Krohn, 114 Ill. 574, 2 N. E. 495.

We think the form of substituted service provided by the statutes of Illinois is, on its face, sufficient so it can be said it would reasonably be calculated to give appellant actual notice of the proceedings that had been in-

stituted against her and to give her an opportunity, if she so desired, to be heard. It may be, as appellant contends, that if evidence of all the facts and circumstances were adduced that it would disclose that what was done did not have that effect, but that question is not here. It can only be adjudicated if and when such evidence is presented in the county court of Douglas County in this proceeding.

We find the order of the district court to be correct and therefore affirm its action with direction that the cause be returned by it to the county court for further proceedings in accordance herewith.

AFFIRMED.

MARTHA DEWEESE IVALDY, APPELLEE, V. FERNAND PHILIPPE IVALDY, APPELLANT.

59 N. W. 2d 373

Filed June 19, 1953. No. 33330.

1. **Process.** Statutes prescribing the manner of service of summons are mandatory and must be strictly complied with.
2. **Divorce.** Sections 42-305 to 42-305.03, inclusive, R. R. S. 1943, are special statutes relating to process in divorce actions and controlling therein.
3. ———. The provisions of these statutes require, except when the defendant enters his voluntary appearance or service by publication is authorized, the defendant to be personally served with summons.
4. **Appearances.** An appearance is special when its sole purpose is to question the jurisdiction of the court. It is general if the party appearing invokes the power of the court on any question other than that of jurisdiction.
5. ———. If the basis for the objection to jurisdiction is evident on the face of the record it must be raised before pleading to the merits; if the facts upon which the objection to the jurisdiction depend are not apparent upon the face of the record, but must be proved, then the right to raise the question of jurisdiction is not waived by failing to file a special appearance but it may properly be raised for the first time in the answer; however, whether the lack of jurisdiction does or does not appear

on the face of the record, it may be raised in the first instance by special appearance and error, if any, committed in any ruling thereon is not waived by subsequently answering if the objection to jurisdiction is preserved by pleading it therein.

6. ———. When a party has filed a special appearance challenging the jurisdiction of the court over his person but, before the court rules thereon, makes a general appearance he thereby waives his special appearance.

7. ———. Such general appearance does not relate back so as to validate the void proceedings. Its only effect is to confer jurisdiction over the person of defendant from its date.

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

Jack M. Pace and *Dwight C. Perkins,* for appellant.

Field & Ricketts and *Archer M. Bunting,* for appellee.

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

WENKE, J.

This is a divorce proceeding instituted in the district court for Lancaster County on February 19, 1952, by Martha Deweese Ivaldy against Fernand Philippe Ivaldy. At the time action was instituted plaintiff caused to be filed an affidavit to the effect that defendant was a nonresident of the State of Nebraska and that personal service of summons could not be had on him in this state. Pursuant to authorization by the sheriff of Lancaster County to do so, one Thomas R. Webb of 52 Avenue Des Champs Elysees, Paris, France, made service on the defendant on March 3, 1952, by leaving a copy of the summons at the residence of defendant at 2 rue Georges de Porto Riche, Paris, France. On April 16, 1952, no appearance having been made by defendant, a decree was entered by the district court for Lancaster County awarding the plaintiff an absolute divorce and granting her the custody of the parties' four minor children.

On April 24, 1952, defendant appeared specially and objected to the jurisdiction of the court over his person and, based thereon, moved the court to quash the pretended service of process upon him. This special appearance was based on three propositions: First, that the service made did not comply with the requirements of the statutes of Nebraska; second, that 2 rue Georges de Porto Riche, Paris, France, was not, on March 3, 1952, defendant's residence; and third, the service actually made by Thomas R. Webb at that address did not constitute leaving a copy of the summons thereat within the meaning of the statute. The special appearance and motion to quash was overruled on November 5, 1952. Motion to vacate the above order and grant a new trial was filed on November 12, 1952. This motion was overruled on November 15, 1952. Appeal was taken from that order on December 3, 1952.

The first question presented is, what did the Nebraska statutes require in regard to service on nonresidents in divorce actions at the time service was made on March 3, 1952? In Simon v. Simon, 148 Neb. 620, 28 N. W. 2d 393, 172 A. L. R. 517, released by this court on July 3, 1947, we said that section 42-305, R. S. 1943, was a special statute relating to process in divorce actions and controlling therein, and that service by leaving a copy of the summons at the usual place of residence of a defendant was sufficient within the meaning and intent thereof to give the court jurisdiction of the party so served.

We recognized in the opinion that: "Most courts hold that where, in judicial procedure or official act, a notice or summons is required to be served 'in person' or 'personally' that such notice or summons must be handed or delivered to the party individually."

However, we came to the conclusion that we did for the following reason:

"It will be noted that in order to obtain the right to have personal service out of the state the plaintiff or

his attorney must file an affidavit showing the defendant is a nonresident of the state and that personal service cannot be had on him in the state. Likewise, if service by publication is desired, an affidavit must be filed and the court satisfied that the petitioner does not know the address or residence of the defendant and has not been able to ascertain either.

"Thus, if a construction such as plaintiffs here contend for, that is, that the defendant must be served in person, is to be given to the act then a resident defendant, if he does not choose to enter his appearance, can avoid process by either absenting himself from the state or secreting himself within, and there would be no method available to bring him into court.

"However, it will be observed that service, other than that the defendant be personally served, if within this state, or enters his appearance in the case, depends upon his address or residence and not his whereabouts, thus clearly indicating that if his residence were known that service could be made there which would be adequate. We think such a construction gives the act the purpose for which it was enacted, that is, to provide for process in all divorce actions, and will carry out the intention of the Legislature."

Thereafter the Judicial Council proposed a bill that was submitted to the 1949 Legislature and identified by it as L. B. 153. Accompanying this bill, when the Judiciary Committee of the Legislature reported it for general file, was the following statement:

"The necessity for this bill arises out of the decision of the Supreme Court in Simon v. Simon, 148 Neb. 620, 28 N. W. 2d 393.

"It was there held that the words 'personally served with process' appearing in section 42-305, R. S. 1943, in an action for divorce, authorized service by leaving a copy of the summons at the usual place of residence of defendant. Otherwise, it was stated, the statute would contain no provision for service on known residents of

the state who were temporarily out of the state or the whereabouts of whom are unknown. To fill in these gaps and permit a construction of the statute that service in person is required where possible to obtain it, a bill is submitted to amend sections 42-305.01 and 42-305.03, R. S. Supp., 1947, to authorize service by personal notice on defendants who are residents of the state but are absent therefrom, and to authorize service by publication on defendants who are residents of the state but the whereabouts of whom cannot be ascertained after reasonable and diligent inquiry and search continued for three months after filing of the petition."

This bill was enacted into law by the 1949 Legislature, Laws 1949, c. 126, p. 333, and contains the following provisions to fill these gaps:

"42-305.01. If it shall appear to the satisfaction of the court by the affidavit of the plaintiff, or of his attorney, * * * (2) *that the defendant is a resident of this state and plaintiff has not been able to ascertain his whereabouts after reasonable and due inquiry and search continued for three months after the filing of the petition,* the court or judge in vacation shall authorize notice by publication of the pendency of the suit for divorce to be given in the manner provided in section 25-519.

"42-305.03. Personal notice as provided in subsection (2) of section 42-305 shall not be had without the plaintiff or his attorney filing an affidavit showing that the defendant * * * *if a resident of this state that the defendant is absent therefrom,* and that personal service cannot be had on the defendant in this state. Such notice shall be served upon the defendant in person by issuance and delivery of summons in the manner provided in section 25-521." (New provisions italicized.)

Thus it will be seen that the cause for coming to the conclusion that we did in Simon v. Simon, *supra,* no longer exists and there is no reason why the following specific provision of section 42-305, R. R. S. 1943, should not be carried out: "No person shall be entitled to a

divorce unless the defendant shall have either (1) been served with process in person if within this state, (2) been served with personal notice * * * if out of this state, * * *."

As stated in Nelson v. Robinson, 154 Neb. 64, 46 N. W. 2d 892: "Statutes prescribing the manner of service of summons are mandatory and must be strictly pursued. * * * This state has prescribed the manner of service of process by explicit statutory provisions. These provisions are mandatory and must be complied with."

Section 25-521, R. R. S. 1943, referred to in section 42-305.03, R. R. S. 1943, provides for the issuance and delivery of summons in such cases as follows: "* * * in all other cases where the defendants are nonresidents, and the cause of action arose in the state, suit may be brought in the county where the cause of action arose, and personal service of the summons may be made out of the state by the sheriff or some person appointed by him for that purpose. In all cases where service of a summons is made on a person without the state, proof of such service must be made by affidavit, stating the time and manner of service." This section also provides: "Such service shall be made in the same manner as summonses are served on parties residing within this state." This relates, insofar as the subject matter herein involved is concerned, to section 42-305, R. R. S. 1943, which is a special statute relating to process in divorce actions, and not to section 25-508, R. R. S. 1943, which is a general statute relating to service.

In view of the amendments made thereto by the 1949 Legislature the statutory provisions relating to the service of process in divorce actions now require, except where the defendant enters his voluntary appearance or service by publication is authorized, that the defendant must be personally served with summons. Any other type of service is unauthorized and of no force and effect.

This makes it unnecessary to consider the second and third propositions.

However appellee contends that while appellant, in the first instance, appeared solely for the purpose of objecting to the jurisdiction of the court over his person he did, subsequent thereto and before that question had been ruled on, appear generally by his motion filed on October 14, 1952. In this motion appellant set forth that he had a complete defense to the charges made against him by appellee and asked that the decree entered by the court on April 16, 1952, be vacated and a new trial granted so he might be given an opportunity to be heard thereon. In this motion appellant expressly sought to preserve the right to have a final determination of his challenge to the jurisdiction of the court over his person. This challenge he had previously made by special appearance filed April 24, 1952. It should be noted that one of the grounds of his special appearance appeared on the face of the record while the other two required proof.

The rules of this court in this regard are as follows: If the basis for the objection to the jurisdiction is evident on the face of the record it must be raised before pleading to the merits; if the facts upon which the objection to the jurisdiction depend are not apparent upon the face of the record, but must be proved, then the right to raise the question of jurisdiction is not waived by failing to file a special appearance but it may properly be raised for the first time in the answer; however, whether the lack of jurisdiction does or does not appear on the face of the record, it may be raised in the first instance by special appearance and error, if any, committed in any ruling thereon is not waived by subsequently answering if the objection to jurisdiction is preserved by pleading it therein. See, Barry v. Wachosky, 57 Neb. 534, 77 N. W. 1080; Gaines v. Warrick, 113 Neb. 235, 202 N. W. 866; Peters v. Pothast, 120 Neb. 208, 231 N. W. 805; Behr v. Duling, 128 Neb. 860, 260

N. W. 281; Enquist v. Enquist, 146 Neb. 708, 21 N. W. 2d 404.

But such is not the situation here for appellant, while originally making a special appearance only, did, before any ruling was had thereon, appear generally by his motion asking the court to vacate its decree and grant him an opportunity to have the cause heard on its merits.

" 'An appearance is special when its sole purpose is to question the jurisdiction of the court. It is general if the party appearing invokes the power of the court on any question other than that of jurisdiction.' South Omaha Nat. Bank v. Farmers & Merchants Nat. Bank, 45 Neb. 29." Behr v. Duling, *supra.* See, also, Bankers Life Insurance Co. v. Robbins, 59 Neb. 170, 80 N. W. 484; McKillip v. Harvey, 80 Neb. 264, 114 N. W. 155; Maxwell v. Maxwell, 106 Neb. 689, 184 N. W. 227.

In Enquist v. Enquist, *supra,* we said: "When one has filed a special appearance pro se, challenging the jurisdiction of the court, but remains in court and takes part in the trial, he thereby waives the failure of the court to rule on his special appearance, and has made a general appearance." The same would be true of any general appearance made under a similar situation. We find appellant appeared generally by his motion filed on October 14, 1952.

Appellant contends that even if the motion he filed constituted a general appearance it would only confer jurisdiction in all proceedings had subsequent thereto and would not relate back and validate what was, in fact, a void decree.

We think the correct rule is stated in Simensen v. Simensen, 13 N. D. 305, 100 N. W. 708, wherein the court, after holding "The statute was mandatory, and a failure to comply strictly therewith operated to confer no jurisdiction over the person of the defendant," said: "The fact that defendant has by this motion made a general appearance in the action, which she did by asking to be permitted to answer and proceed to trial on

the merits, will not avail respondent. Such general appearance did not relate back, so as to validate the void proceedings. Its only effect was to confer jurisdiction over the person of defendant from its date."

As stated in Godfrey v. Valentine, 39 Minn. 336, 40 N. W. 163, 12 Am. S. R. 657: "The course of the moving party in thus seeking to have a void judgment set aside, —to which relief he is entitled as a matter of right,— but at the same time consenting and asking that the court shall now hear and adjudicate upon the cause, may justify the court in entertaining the cause and proceeding as in an action pending in which the defendant has voluntarily appeared. But in thus urging his legal right, and thus invoking and consenting to the future action of the court, the moving party should not be deemed to have conferred jurisdiction retrospectively, so as to render valid the previous judgment, which, being unsupported by any authorized judicial proceedings, was not merely voidable, but void, and in legal effect a nullity."

And in Doyle v. Willcockson, 184 Iowa 757, 169 N. W. 241, the court stated: "We are constrained to hold that a judgment which is void for want of notice can no more be validated after entry of judgment by any waiver of notice than it could be by serving a proper notice after judgment."

And in State ex rel. Nevada Douglass Gold Mines, Inc. v. District Court, 51 Nev. 206, 273 P. 659, the court stated: "In this situation the judgment is void ab initio. But it is said in this connection that after the judgment was rendered the company appeared in the action. * * * it is self-evident that such an appearance could not relate back to date of the rendition of the so-called judgment so as to vitalize that which never had life."

See, also, Mills v. State, 10 Ind. 114; Bennett v. Supreme Tent of Knights of Maccabees, 40 Wash. 431, 82 P. 744, 2 L. R. A. N. S. 389.

Appellant, in his brief, states his willingness to submit

to the jurisdiction of the court in accordance with the foregoing and does not ask that the action be dismissed. The decree was rendered without the district court having jurisdiction of the defendant and is therefore void, without force and effect, and a nullity. However, since appellant made a general appearance in the action by his motion of October 14, 1952, the cause should not be dismissed but returned to the district court and there appellant given a reasonable time to answer and then the cause set down for trial so appellant may have his day in court. The action of the trial court is reversed and the cause remanded to the district court for further proceedings in accordance with the directions herein contained.

REVERSED AND REMANDED WITH DIRECTIONS.

MERLIN OLSON, BY HIS MOTHER AND NEXT FRIEND, APPELLANT, V. COUNTY OF WAYNE, NEBRASKA, APPELLEE.

59 N. W. 2d 400

Filed June 19, 1953. No. 33333.

1. **Trial.** A motion to instruct a verdict admits the truth of all material and relevant evidence, and the party against whom the motion was made is entitled to have it considered in the light most favorable to him and to have the benefit of all inferences reasonably deducible therefrom in testing the correctness of the action of the court in granting the motion.
2. **Counties: Highways.** A right of action against a county for the recovery of damages resulting from a defective highway or bridge was unknown to the common law.
3. ———: ———. The source of liability of a county in this state for such damages is statutory.
4. ———: ———. A county is obligated to use reasonable and ordinary care in the construction, maintenance, and repair of its highways and bridges so that they will be reasonably safe for a traveler using them while he is in the exercise of reasonable and ordinary caution and prudence.
5. ———: ———. The duty of the county in this respect will not

be extended beyond the words and fair implications of the statutory liability.

6. ———: ———. A county is not an insurer of the safety of a user of its roads and bridges or of the safety of the roads and bridges maintained by it for the use of the public.
7. ———: ———. The word insufficiency in the statute referred to in the opinion means inadequate to the need, use, or purpose of the highway.
8. ———: ———. The word repair as used in the road laws means to restore to a sound or good condition after decay, injury, dilapidation, or partial destruction.
9. **Counties: Negligence.** In an action to recover damages from a county by virtue of the statute the burden is on the plaintiff to establish negligence of the county and that the negligence was the proximate cause of the injury or that it was a cause that proximately contributed to it.
10. ———: ———. Negligence may not be predicated upon the crookedness of a county highway or the location of a bridge constructed in accordance with the general plans of the highway and adopted as a part of it.
11. ———: ———. A county is not obligated to erect and maintain safety warning signs along its highways apprising the public of conditions such as curves, turns, location of bridges, and similar situations that may be hazardous, unless the duty to exercise reasonable and ordinary care in the maintenance of its highways requires it to do so at a particular location.

APPEAL from the district court for Wayne County: LYLE E. JACKSON, JUDGE. *Affirmed.*

George B. Boland and *Harry N. Larson,* for appellant.

Charles E. McDermott and *H. D. Addison,* for appellee.

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

BOSLAUGH, J.

This case was brought by appellant to recover damages from appellee for injuries inflicted upon him as a result of the alleged insufficiency and disrepair of a public highway and bridge in Wayne County maintained by appellee for the use of the public upon which appellant was a traveler at the time of the accident in which he was injured.

The claims made by appellant are that appellee is a county of the state; that appellant was traveling towards the east by automobile in the nighttime on a highway and bridge of the county maintained by it for public use about 2 miles west and 2 miles south of Wakefield; that the highway and bridge were each insufficient, in disrepair, and unsafe for travel thereon; that appellee was negligent in these respects: Because it constructed and maintained a bridge on an angle from the southwest to the northeast over a deep ditch as a part of the highway which extended due west to east; that this required and there was a sharp turn in the highway immediately before and at the entrance to the bridge from the west which exposed any user thereof to the hazard and peril of going off the side of the bridge into the ditch; because the bridge did not have sufficient or reasonable guardrails, barriers, and abutments to protect travelers from the said hazard and peril, and the guardrails that were thereon were not in proper repair or painted so that they were easily visible; because there were no warning signs or devices to inform travelers of the dangerous situation at the bridge; and because appellee knew or was charged with knowledge that the bridge was unsafe for public travel upon the highway but failed to provide warning thereof to the public or to remedy the dangerous situation. It is further claimed that the insufficiency and disrepair of the highway and bridge and the negligence of appellee proximately caused the vehicle in which appellant was passing over the road and bridge to go off the right-hand side of the bridge, against the farther side of the ditch, and into the ditch; and that he was thereby seriously injured and is totally and permanently disabled. Appellee denied all the claims of appellant except it admitted that it is a county of the state; that there was an accident at about the time and place described by appellant; and that he sustained some injury.

The district court at the conclusion of the evidence

of appellant, on motion of appellee, directed a verdict for the county. A judgment of dismissal of the case was made and a motion for new trial was denied.

The manner of considering the evidence of the party against whom a verdict has been directed or a motion to dismiss the case has been sustained in determining the correctness of or the error in the action of a court in that regard does not require discussion. Armer v. Omaha & C. B. St. Ry. Co., 151 Neb. 431, 37 N. W. 2d 607; Weisenmiller v. Nestor, 153 Neb. 153, 43 N. W. 2d 568.

Appellant was on June 29, 1952, 16 years of age and was a member of the Wakefield Junior Legion baseball team. He and four other members of the team played in a night game of baseball with the Wayne Junior Legion team at Wayne. After the game four of them were returning to Wakefield in an automobile operated by Thomas Shellington, one of the Wakefield players, who was 17 years of age. Appellant sat on the right side of the rear seat of the car. They traveled out of Wayne on what is described as the Seventh Street road and continued until they were about 2 miles south and 2 miles west of Wakefield. That was the place of the accident involved in this case which occurred about 11:30 p. m.

The highway was a graded, dirt, county road. It was dry, quite smooth, and in reasonably good condition. It had one lane of travel, "room for two cars." It was about 20 feet wide. The road as it approached the place of the accident extended due west to east. The accident happened on a bridge that constituted a part of the highway. The road extended from due west to near the bridge and then made a slight curve to the southwest end of the bridge. The bridge is on an angle from the southwest to the northeast. The curve in the road commences just "west of the bridge." There is a turn in the road "Partly on and partly off" the bridge. "The road couldn't come square into the bridge * * *." For

about 50 rods west of the bridge it was level. The bridge was not easily visible to a person using the road while traveling this distance towards it. The traveler from the west could not see the bridge until he "was right on it." The width of the bridge was 24 feet. It was 28 feet long, had a concrete foundation, a cement floor, and was supported by a steel frame. It had a railing on each side consisting of two 3½-inch channel irons, the length of the bridge, fastened to 4 or 5 metal standards properly spaced on each side set in cement. The railings were unpainted, badly rusted, and dark in color. The railing on the right or southeast side had been for several years bent outward and downward at an angle from the bridge. Vehicles had run into it. At the southwest corner of the bridge it was substantially unfastened at the time of the accident. It was described as bent up and dilapidated, and at the southwest corner of the bridge it was "practically off." It had no effect in its condition of preventing a vehicle from going off the side of the bridge.

A bridge plank, unpainted and weather-beaten, 12 inches in width and 3 inches thick was placed along the right-hand side of the bridge. The west end was at the southwest corner and the plank extended eastward about 20 feet. It was fastened to the railing after it had been bent over in a previous accident. At the time in question one end of the plank was fastened so that the top of it was about 2½ feet above the floor of the bridge and the other end rested on the floor. The plank was not noticeable to one going eastward on the highway until he was close to it.

There is nothing to warn a traveler approaching from west of the bridge or of its situation in reference to the road. There had been at sometime before a warning sign on the right-hand side of the road west of the bridge and at other times there had been reflectors on or near its southwest corner. These had been removed before this accident.

The west and east road is intersected at the southwest end of the bridge by a road from the south and by a road from the north at the northeast end of the bridge. There have been several accidents on this bridge.

The weather the night of the accident was not stormy, "it was just dark. It wasn't raining * * * it was just awful dark that night."

The vehicle in which appellant was riding approached the bridge at a speed of 45 to 50 miles an hour on the right side of the road with its headlights on the high or bright beam. The driver of the car did not see the bridge until he was about 25 feet from it. The vehicle proceeded towards the east with its south or right-hand wheels about 2 feet inside the southwest corner of the bridge. The car struck and broke the bridge plank above-described, went off the southeast side of the bridge, traveled through space for about 45 feet, and struck the bank on the far side of the ditch 5½ feet lower than the bridge. It turned over and landed on its top 42 feet from where it contacted the bank of the ditch. It came to rest in the creek 85 feet from the bridge. The appellant sustained injuries resulting in permanent and total disability.

There was not at common law a right of action against a county for the recovery of damages resulting from a defective highway or bridge. The source and extent of liability of a county in this state for damages of this character are statutory. Hollingsworth v. Saunders County, 36 Neb. 141, 54 N. W. 79; Bryant v. Dakota County, 53 Neb. 755, 74 N. W. 313; Dickenson v. County of Cheyenne, 146 Neb. 36, 18 N. W. 2d 559. The applicable statute is section 39-834, R. R. S. 1943, and it contains these provisions: "If special damage happens to any person, * * * by means of insufficiency or want of repair of a highway or bridge, which the county or counties are liable to keep in repair, the person sustaining the damage may recover in an action against the county, * * * Provided, however, such action is commenced

within thirty days of the time of the injury or damage occurring; * * *."

A county is obligated to use reasonable and ordinary care in the construction, maintenance, and repair of its highways and bridges so that they will be reasonably safe for the traveler using them while he is in the exercise of reasonable and ordinary caution and prudence. The duty of the county will not be extended by construction beyond the words and fair implication of the statutory liability. A county is not an insurer of the safety of a person who uses its roads and bridges or the safety of the highways and bridges maintained by it for the use of the public. Wittwer v. County of Richardson, 153 Neb. 200, 43 N. W. 2d 505; Dickenson v. County of Cheyenne, *supra;* Brooks v. Thayer County, 126 Neb. 610, 254 N. W. 413; Frickel v. Lancaster County, 115 Neb. 506, 213 N. W. 826.

The word insufficiency in the statute has been defined as "inadequate to the need, use, or purpose of the highway." Dickenson v. County of Cheyenne, *supra.* It has been said that the word repair as used in the road laws means "to restore to a sound or good state after decay, injury, dilapidation, or partial destruction." Brown County v. Keya Paha County, 88 Neb. 117, 129 N. W. 250, Ann. Cas. 1912B 790.

In an action to recover damages from a county by virtue of the statute the burden is on the plaintiff to establish negligence of the county and that its negligent act or omission was the proximate cause of the injury to the plaintiff or that it was a cause that proximately contributed to it. Wittwer v. County of Richardson, *supra;* Bowerman v. Greenberg, 142 Neb. 721, 7 N. W. 2d 711.

Appellant charges as negligence of appellee that it constructed and maintained the bridge on an angle from the southwest to the northeast across a deep ditch as a part of the highway which extended from due west to east, and that this caused a sharp turn in the

highway immediately before and at the entrance to the bridge from the west which exposed a user of a road to the hazard and peril of going off the right side of the bridge. Generally negligence may not be predicated on a curve or variation in a dirt or county road or the location or dimensions of a bridge placed therein or adjacent thereto according to road plans unless it is so obviously dangerous that no reasonable or prudent man would approve the plans. The crookedness of a road duly located does not usually render a county liable for injuries resulting therefrom.

The facts in Brooks v. Thayer County, *supra,* were: The road was an ordinary north and south county road. A creek crossed it from southeast to northwest. The roadway of the bridge was about 16 feet. The county built the bridge at an abrupt angle to the road requiring a sharp turn to approach and get on it from the south. The angle was 40 degrees and 22 minutes east of a line due north. The bridge was almost northeast and southwest. An approach from the south required a turn of 43 degrees and 27 minutes toward the east. There was no warning sign indicating a bridge or change of direction in the road. There was nothing guarding the approach to the southwest corner of the bridge. The guardrail that had been there was removed by a traveler who went into the ditch at this point the night before the accident involved in this case. The plaintiff was traveling north in a truck during an evening in September, failed to keep the roadway, and went into the creek at the left of the bridge. He alleged insufficiency of the highway, absence of warning signs, lack of guardrails, and failure to use ordinary care to maintain the highway in a reasonably safe condition. Plaintiff appealed from a judgment and verdict against him. This court said: "Plaintiff assigns that the evidence is insufficient to sustain the verdict, that the verdict is contrary to law, and that the court erred in not directing a verdict for plaintiff. We think it will be of little value

to analyze the conflicting evidence. We satisfy ourselves by saying that to hold with the plaintiff on these points would be to declare in effect that the county is an insurer of the safety of those who travel its public roads. A county cannot be held to be an insurer of those who have occasion to use a county bridge or road."

The plaintiff in Tomjack v. Chicago & N. W. Ry. Co., 116 Neb. 413, 217 N. W. 944, claimed negligence because defendant failed to place its bridge in the line of travel when approaching it from the north and that the ditch west of the bridge was unguarded. This court in reversing a judgment for the plaintiff and directing a dismissal of the case said: "Where a culvert, adjacent to its tracks and on its right of way across a public highway, is built by a railroad company in accordance with the general plans of highway and has been adopted as a part of the highway, negligence will not be predicated upon it merely by reason of its location and dimensions."

Loehe v. Village of Fox Point, 253 Wis. 375, 34 N. W. 2d 126, considered a statute authorizing the recovery of damages resulting to any person or his property "by reason of insufficiency or want of repair of any highway which any village is bound to keep in repair." The accident in which the plaintiff was involved occurred in the early hours of a foggy morning. He was traveling east at a place where the street made a right-angle turn to the north. He failed to see the turn until he arrived at it. His car left the highway and struck a tree. He claimed insufficiency of the street. The court said: "The mere existence of a right-angle turn in the roadway is not per se an insufficiency in the highway. There was no duty on the part of the village to give any warning of road conditions which in and of themselves provide ample and timely notice to one using the highway with due care." See, also, Paul v. Faricy, 228 Minn. 264, 37 N. W. 2d 427; Wyant v. Faith Township, 49 S. D. 220, 207 N. W. 87; Watters v. City of Omaha, 76 Neb. 855, 107 N. W. 1007; Smith v. Wakefield, 105 Mass. 473; 29

C. J., Highways, § 447, p. 685. There was no insufficiency of the highway or bridge because of any of the matters set forth in the first specification of negligence.

It is alleged as negligence that appellee failed to maintain signs or devices to apprise the traveling public of the dangerous situation at the bridge. There was nothing of this nature west of the bridge to give warning of it or that there was any unusual situation which should be approached by a traveler with alertness and caution. There was a metal plate supported by a metal standard about 3½ feet above the surface of the road near the southwest corner of the bridge on which appeared this inscription: "10 Ton Cap." There was a bridge plank 3 inches thick, 12 inches wide, and about 20 feet long along the southeast or right side of the bridge. These, the bridge, and the roadway were indicative of the situation. The roadway was 20 feet wide until it came near the bridge and then it widened to 24 feet, which was the width of the bridge. The road west of the bridge was level for about 50 rods. The motor vehicle, including the lights, was in good condition. The headlights were on the bright or high beam. The bridge capacity sign and the plank on the bridge that constituted a guardrail were directly opposite the line of travel as the car proceeded towards the bridge. The roadway plainly showed the curve in the road. The driver of the car had been over this road and bridge on previous occasions, had been around it when hunting, and knew the situation as it existed. If he had followed the road there would have been no accident. There is no requirement of law that a county erect and maintain safety warning signs of conditions such as curves, turns, locations of bridges, and the like, unless the duty to do so at a particular location is dictated by reasonable and ordinary care in the maintenance of its highway.

Dickenson v. County of Cheyenne, *supra,* was a suit by a traveler injured while operating a vehicle on a county road. He was driving south at about 30 miles

an hour on a dead end road which required him to turn either east or west. He drove into the far side of a borrow pit and was seriously injured. There was no warning sign. It was dark and foggy at the time of the accident. Plaintiff did not see the intersection until he was on it. He charged the road was insufficient by reason of not having warning signs installed either along the road or across the dead end. The fact that the road turned could, under normal conditions, be seen for several hundred feet. This court reversed a judgment for the plaintiff and dismissed the case. It is stated therein: "We cannot believe that the failure to put up a sign showing that the road turns * * * is such an omission as would charge the county officers with negligence in their duty in that regard."

In Tomjack v. Chicago & N. W. Ry. Co., *supra*, the facts recited in the opinion show that a bridge across a river was nearly at a right angle to the highway and to meet this situation the road as soon as it crossed the railroad track in going from the north turned with a sharp curve to the right towards the southwest until about half way from the railroad crossing to the bridge, then it turned to the left. A few feet south of the railroad and as a part of the south approach the railroad company built a bridge or culvert parallel with the rails to carry water collected in the right-of-way ditch. It was 17 feet across and 31 feet long east and west and had a guardrail at either end. This bridge or culvert was built as a part of the public road. The plaintiff was riding in an automobile moving from the north across the railroad track in the nighttime, and the driver instead of keeping in the driveway and crossing the culvert or bridge drove into the ditch at the west end of the culvert. The claims of negligence were that the bridge was not placed in the line of travel when approaching it from the north, and that the situation was unguarded by warning of any kind. A judgment for the plaintiff was reversed and the case was ordered dis-

missed. The court said: "The second claim of negligence, as to the lack of guard or warning, is, it seems to us, equally as untenable as the first. If we hold that a 31-feet wide culvert is not sufficient crossing for a stream or ditch and that it must be guarded, or hold that every turn in the road is ground for actionable negligence, unless some one is stationed there with cap and bells to warn the wild and reckless, then we shall lay upon those who build and maintain roads a greater burden then we feel the law justifies. But that is exactly what the plaintiff asks us to do in this case. It was the duty of the driver of the car after dark on this road to proceed so that his headlights would mark out the traveled road * * *." See, also, Butcher v. City of Racine, 189 Wis. 541, 208 N. W. 244; Loehe v. Village of Fox Point, *supra*.

A specification of negligence concerns the guardrails on the bridge. The one here involved was on the southeast or right side. It is said that it was insufficient to protect a traveler from driving off the side of the bridge into the creek, and that it was out of repair, not painted, and not easily visible. Generally a guardrail need not be of sufficient strength to withstand the impact of the momentum of a rapidly moving motor vehicle. In Wasser v. Northampton County, 249 Pa. 25, 94 A. 444, L. R. A. 1915F 973, the court said: "There is no duty on the part of a municipality to erect a guard rail strong enough to prevent an automobile driven at a high speed from running over an embankment in close proximity to the highway. The presence of a guard rail gives notice that the place where it is erected is dangerous."

In Davison v. Snohomish County, 149 Wash. 109, 270 P. 422, the rule is stated that: "* * * as a practical proposition, municipalities cannot be required to protect long stretches of roadway with railings or guards capable of preventing an automobile, moving at a rapid rate, from leaving the road if the car be in any way deflected from the roadway proper and propelled against

the railing." See, also, Swain v. City of Nashville, 170 Tenn. 99, 92 S. W. 2d 405; City of Catlettsburg v. Sutherland's Administrator, 247 Ky. 540, 57 S. W. 2d 512; 5 Blashfield, Cyclopedia of Automobile Law and Practice (Perm. ed.), § 3263, p. 407; 60 C. J. S., Motor Vehicles, § 190, p. 528.

The guardrail or its condition could not have been the proximate cause of the accident. The driver of the car stated that his vision of the road in front of the vehicle was restricted to 25 feet, and that he did not see the bridge or anything about it until he was within 25 feet of the bridge. The minimum rate of speed at which the car was traveling at that time was at least 40 miles an hour. The time that elapsed between when he first saw the bridge and when the car went over the side of the bridge was obviously less than one-half of a second. The most perfect and appropriate bridge railing could not have been a factor in avoiding the accident under these circumstances. The fact that the course of the car continued directly to the east from where it left the traveled part of the road until it struck the railing and went off the bridge and that there was no evidence of an attempt to turn the vehicle to the left or to stop it is convincing that the driver was oblivious to the situation until the accident was inevitable and probably until it happened.

The evidence fails to establish negligence of the county. The district court was right in granting the motion for a directed verdict and in rendering a judgment of dismissal.

The judgment should be and it is affirmed.

AFFIRMED.

LYDIA MCGUIRE, APPELLEE, V. CHARLES W. MCGUIRE, APPELLANT.

59 N. W. 2d 336

Filed June 26, 1953. No. 33305.

1. **Divorce: Equity.** Where the marriage relation is being carried out without the husband and wife being separated or living apart from each other a wife may not successfully maintain a suit in equity against her husband for maintenance.
2. **Attorney and Client.** The practice in this state is to allow attorney's fees only in such cases as are provided for by statute, or where the uniform course of procedure has been to allow such recovery. Where there is no legal basis for an action, an allowance of attorney's fees is erroneous and not authorized.

APPEAL from the district court for Wayne County: FAY H. POLLOCK, JUDGE. *Reversed and remanded with directions to dismiss.*

Mark J. Ryan and *Charles E. McDermott,* for appellant.

H. D. Addison, for appellee.

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

MESSMORE, J.

The plaintiff, Lydia McGuire, brought this action in equity in the district court for Wayne County against Charles W. McGuire, her husband, as defendant, to recover suitable maintenance and support money, and for costs and attorney's fees. Trial was had to the court and a decree was rendered in favor of the plaintiff.

The district court decreed that the plaintiff was legally entitled to use the credit of the defendant and obligate him to pay for certain items in the nature of improvements and repairs, furniture, and appliances for the household in the amount of several thousand dollars; required the defendant to purchase a new automobile with an effective heater within 30 days; ordered him to pay travel expenses of the plaintiff for a visit to each of her daughters at least once a year; that the plaintiff be

entitled in the future to pledge the credit of the defendant for what may constitute necessaries of life; awarded a personal allowance to the plaintiff in the sum of $50 a month; awarded $800 for services for the plaintiff's attorney; and as an alternative to part of the award so made, defendant was permitted, in agreement with plaintiff, to purchase a modern home elsewhere.

The defendant filed a motion for new trial which was overruled. From this order the defendant perfected appeal to this court.

For convenience we will refer to the parties as they are designated in the district court.

The record shows that the plaintiff and defendant were married in Wayne, Nebraska, on August 11, 1919. At the time of the marriage the defendant was a bachelor 46 or 47 years of age and had a reputation for more than ordinary frugality, of which the plaintiff was aware. She had visited in his home and had known him for about 3 years prior to the marriage. After the marriage the couple went to live on a farm of 160 acres located in Leslie precinct, Wayne County, owned by the defendant and upon which he had lived and farmed since 1905. The parties have lived on this place ever since. The plaintiff had been previously married. Her first husband died in October 1914, leaving surviving him the plaintiff and two daughters. He died intestate, leaving 80 acres of land in Dixon County. The plaintiff and each of the daughters inherited a one-third interest therein. At the time of the marriage of the plaintiff and defendant the plaintiff's daughters were 9 and 11 years of age. By working and receiving financial assistance from the parties to this action, the daughters received a high school education in Pender. One daughter attended Wayne State Teachers College for 2 years and the other daughter attended a business college in Sioux City, Iowa, for 1 year. Both of these daughters are married and have families of their own.

On April 12, 1939, the plaintiff transferred her in-

terest in the 80-acre farm to her two daughters. The defendant signed the deed.

At the time of trial plaintiff was 66 years of age and the defendant nearly 80 years of age. No children were born to these parties. The defendant had no dependents except the plaintiff.

The plaintiff testified that she was a dutiful and obedient wife, worked and saved, and cohabited with the defendant until the last 2 or 3 years. She worked in the fields, did outside chores, cooked, and attended to her household duties such as cleaning the house and doing the washing. For a number of years she raised as high as 300 chickens, sold poultry and eggs, and used the money to buy clothing, things she wanted, and for groceries. She further testified that the defendant was the boss of the house and his word was law; that he would not tolerate any charge accounts and would not inform her as to his finances or business; and that he was a poor companion. The defendant did not complain of her work, but left the impression to her that she had not done enough. On several occasions the plaintiff asked the defendant for money. He would give her very small amounts, and for the last 3 or 4 years he had not given her any money nor provided her with clothing, except a coat about 4 years previous. The defendant had purchased the groceries the last 3 or 4 years, and permitted her to buy groceries, but he paid for them by check. There is apparently no complaint about the groceries the defendant furnished. The defendant had not taken her to a motion picture show during the past 12 years. They did not belong to any organizations or charitable institutions, nor did he give her money to make contributions to any charitable institutions. The defendant belongs to the Pleasant Valley Church which occupies about 2 acres of his farm land. At the time of trial there was no minister for this church so there were no services. For the past 4 years or more, the defendant had not given the plaintiff money to purchase

furniture or other household necessities. Three years ago he did purchase an electric, wood-and-cob combination stove which was installed in the kitchen, also linoleum floor covering for the kitchen. The plaintiff further testified that the house is not equipped with a bathroom, bathing facilities, or inside toilet. The kitchen is not modern. She does not have a kitchen sink. Hard and soft water is obtained from a well and cistern. She has a mechanical Servel refrigerator, and the house is equipped with electricity. There is a pipeless furnace which she testified had not been in good working order for 5 or 6 years, and she testified she was tired of scooping coal and ashes. She had requested a new furnace but the defendant believed the one they had to be satisfactory. She related that the furniture was old and she would like to replenish it, at least to be comparable with some of her neighbors; that her silverware and dishes were old and were primarily gifts, outside of what she purchased; that one of her daughters was good about furnishing her clothing, at least a dress a year, or sometimes two; that the defendant owns a 1929 Ford coupé equipped with a heater which is not efficient, and on the average of every 2 weeks he drives the plaintiff to Wayne to visit her mother; and that he also owns a 1927 Chevrolet pickup which is used for different purposes on the farm. The plaintiff was privileged to use all of the rent money she wanted to from the 80-acre farm, and when she goes to see her daughters, which is not frequent, she uses part of the rent money for that purpose, the defendant providing no funds for such use. The defendant ordinarily raised hogs on his farm, but the last 4 or 5 years has leased his farm land to tenants, and he generally keeps up the fences and the buildings. At the present time the plaintiff is not able to raise chickens and sell eggs. She has about 25 chickens. The plaintiff has had three abdominal operations for which the defendant has paid. She selected her own doctor, and there were no restrictions placed

in that respect. When she has requested various things for the home or personal effects, defendant has informed her on many occasions that he did not have the money to pay for the same. She would like to have a new car. She visited one daughter in Spokane, Washington, in March 1951 for 3 or 4 weeks, and visited the other daughter living in Fort Worth, Texas, on three occasions for 2 to 4 weeks at a time. She had visited one of her daughters when she was living in Sioux City some weekends. The plaintiff further testified that she had very little funds, possibly $1,500 in the bank which was chicken money and money which her father furnished her, he having departed this life a few years ago; and that use of the telephone was restricted, indicating that defendant did not desire that she make long distance calls, otherwise she had free access to the telephone.

It appears that the defendant owned 398 acres of land with 2 acres deeded to a church, the land being of the value of $83,960; that he has bank deposits in the sum of $12,786.81 and government bonds in the amount of $104,500; and that his income, including interest on the bonds and rental for his real estate, is $8,000 or $9,000 a year. There are apparently some Series E United States Savings Bonds listed and registered in the names of Charles W. McGuire or Lydia M. McGuire purchased in 1943, 1944, and 1945, in the amount of $2,500. Other bonds seem to be in the name of Charles W. McGuire, without a beneficiary or co-owner designated. The plaintiff has a bank account of $5,960.22. This account includes deposits of some $200 and $100 which the court required the defendant to pay his wife as temporary allowance during the pendency of these proceedings. One hundred dollars was withdrawn on the date of each deposit.

The facts are not in dispute.

The defendant assigns as error that the decree is not supported by sufficient evidence; that the decree is contrary to law; that the decree is an unwarranted

usurpation and invasion of defendant's fundamental and constitutional rights; and that the court erred in allowing fees for the plaintiff's attorney.

While there is an allegation in the plaintiff's petition to the effect that the defendant was guilty of extreme cruelty towards the plaintiff, and also an allegation requesting a restraining order be entered against the defendant for fear he might molest plaintiff or take other action detrimental to her rights, the plaintiff made no attempt to prove these allegations and the fact that she continued to live with the defendant is quite incompatible with the same.

The plaintiff relies upon the following cases from this jurisdiction which are clearly distinguishable from the facts in the instant case as will become apparent.

In the case of Earle v. Earle, 27 Neb. 277, 43 N. W. 118, 20 Am. S. R. 667, the plaintiff's petition alleged, in substance, the marriage of the parties, that one child was born of the marriage, and that the defendant sent his wife away from him, did not permit her to return, contributed to her support and maintenance separate and apart from him, and later refused and ceased to provide for her support and the support of his child. The wife instituted a suit in equity against her husband for maintenance and support without a prayer for divorce or from bed and board. The question presented was whether or not the wife should be compelled to resort to a proceedings for a divorce, which she did not desire to do, or from bed and board. On this question, in this state the statutes are substantially silent and at the present time there is no statute governing this matter. The court stated that it was a well-established rule of law that it is the duty of the husband to provide his family with support and means of living—the style of support, requisite lodging, food, clothing, etc., to be such as fit his means, position, and station in life—and for this purpose the wife has generally the right to use his credit for the purchase of necessaries. The court held that if

a wife is abandoned by her husband, without means of support, a bill in equity will lie to compel the husband to support the wife without asking for a decree of divorce.

In the case of Cochran v. Cochran, 42 Neb. 612, 60 N. W. 942, Mrs. Cochran was a school teacher in Wisconsin. Her husband came to Nebraska and decided to get a divorce. He did, secretly and fraudulently, on the theory that his wife abandoned him. The court held: "A court of equity will entertain an action brought for alimony alone, and will grant the same, although no divorce or other relief is sought, where the wife is separated from the husband without her fault."

In the case of Chapman v. Chapman, 74 Neb. 388, 104 N. W. 880, the wife brought an action for separate maintenance only. The court entertained the action saying there was enough in the record to show, and indeed it was not disputed, that defendant deserted his wife a short time after marriage and about 10 years before the action was brought.

In Price v. Price, 75 Neb. 552, 106 N. W. 657, the defendant abandoned the plaintiff, his wife, and refused and neglected to provide further for her support and maintenance. The court held: "It is the duty of the husband to provide for the reasonable support and maintenance of his wife during the continuance of the marriage relation; and, when the husband without just cause fails to provide for the support and maintenance of the wife, she may maintain an action against him for reasonable maintenance, unless by her own act of abandonment of the husband's domicile, or some other act wholly inconsistent with her duty as his wife, she has forfeited her right to such maintenance."

In the case of Brewer v. Brewer, 79 Neb. 726, 113 N. W. 161, 13 L. R. A. N. S. 222, the plaintiff lived with her husband and his mother. The mother dominated the household. The plaintiff went to her mother. She stated she would live in the same house with her husband and his mother if she could have control of her part of the

house. The defendant did not offer to accede to these conditions. The court held that a wife may bring a suit in equity to secure support and alimony without reference to whether the action is for divorce or not; that every wife is entitled to a home corresponding to the circumstances and condition of her husband over which she may be permitted to preside as mistress; and that she does not forfeit her right to maintenance by refusing to live under the control of the husband's mother.

The case of Rhoades v. Rhoades, 78 Neb. 495, 111 N. W. 122, 126 Am. S. R. 611, lends no support to the plaintiff's contention.

In Sinn v. Sinn, 138 Neb. 621, 294 N. W. 381, the court said that a wife living apart from her husband generally becomes entitled to alimony or separate maintenance when she offers in good faith to return to him and he refuses to accept the offer and receive his wife. The plaintiff left the defendant's home due to violent and indecent language he used, then subsequently made a bona fide offer to return, which he rejected. This court held that she had a right to maintain a suit for separate maintenance and support without seeking a divorce, in line with the previous cases here referred to.

The case of Scott v. Scott, 153 Neb. 906, 46 N. W. 2d 627, 23 A. L. R. 2d 1431, is to the same effect as the preceding cases with reference to the right of a wife to bring action in equity for separate maintenance where the husband has violated his legal duty to support her. We deem it unnecessary to cite the factual circumstances in this case. It is in no manner analogous to the facts in the instant case and clearly distinguishable.

The plaintiff also relies on the case of Bucknam v. Bucknam, 176 Mass. 229, 57 N. E. 343, 49 L. R. A. 735, and the following cases which we analyze. In this case there was a statute which enumerated three classes of cases in which the court might make an order concerning the support of a wife. In this state there is no

such statute. The condition pertinent to the decision in the cited case was as follows: When a husband fails, without just cause, to furnish suitable support for his wife, or has deserted her, or when the wife for justifiable cause is actually living apart from her husband. The facts disclosed that the parties did not occupy the same room or bed, did not eat together, nor have any conversation except such as was absolutely necessary, although she cooked the food furnished by him for both. The facts also showed that she was in great need of clothing, medicine, and other things which he refused to furnish. The court entertained the action under the statute.

In the case of Smith v. Smith, 172 Iowa 329, 151 N. W. 1085, the defendant's wife left home after a serious quarrel and after her husband struck her. There had been difficulty between the parties, the husband believing the wife to be untrue to him. Later the wife returned to the home. The parties never occupied the same bed. They continued to live under the same roof after suit was brought. Unpleasant instances occurred. The gulf between them was very wide, and the greatest obstacle to reconciliation was the belief of the husband imputing infidelity to his wife. The case was remanded and a monthly allowance was suggested with additional evidence to be taken in the district court. This evidence disclosed that the husband became violently angry, severely punished the children, struck the door near which the wife was standing several times with a poker splitting the door panels, and on another occasion he became convinced, without sufficient evidence, that the wife was untrue to him, communicated his distrust to various of his neighbors, made some investigation, and on trial admitted that he had adhered to such belief. On another occasion he struck his wife a blow in the face during a quarrel. She defended herself with a poker. The court entertained the action for separate maintenance and support without a divorce. The wife

had done her part in accruing the material things of life. This is a far different factual situation than in the instant case.

In the case of Polster v. Polster, 145 Mo. App. 606, 123 S. W. 81, the evidence disclosed that the husband drank considerably, came home under the influence of intoxicating liquor, abused his wife, and struck her with his fist several times, on occasion blacking one of her eyes. He became enamored of another woman and went with her frequently, telling persons he was a single man and intended to marry her. He spent money entertaining her and gave her presents. The evidence was held sufficient to render his wife's condition in life intolerable. The court said where the husband's conduct is such as to render the wife's condition unendurable in his home she may leave the home without forfeiting her right to maintain an action for maintenance against him under a statute which was in existence in the State of Missouri. The court went on to say that where the husband has been guilty both of maltreatment of his wife and refusal to support her, the wife does not forfeit her right of action for maintenance merely because she lives under the same roof with her husband, if she lives separate and apart from him; and that while there may not be an abandonment of the wife by the husband from a physical point of view, there is an abandonment of the obligation resting upon the husband to provide for the support of the wife. The court held the evidence sufficient to sustain a judgment for support of the child and wife on the ground of abandonment and failure to support, and entered a judgment accordingly. The parties did not live as husband and wife. They occupied separate apartments in the house. The wife continued to reside in the house constituting their home to the day the suit was instituted.

In the case of Randall v. Randall, 158 Fla. 502, 29 So. 2d 238, the court held that a wife, continuing to live in the same house as the husband, with whom she

owned it by entireties, after his last act of cruelty, because of which she brought suit for separate maintenance, but sleeping in separate rooms, eating no meals with her husband and discontinuing cohabitation with him, lived apart from him as required to obtain separate maintenance. Such a suit was authorized. The evidence disclosed that the husband on numerous occasions had brutally kicked, choked, and otherwise assaulted his wife. During several months immediately prior to the filing of this suit the defendant's mistreatment of the plaintiff had become progressively worse, and on several occasions he had inflicted great physical pain and injury upon his wife. The parties had become entirely estranged. The home they lived in was owned by them as an estate by the entireties. The plaintiff had no available money and had no place where she and her children could live. The court entertained the action for separate maintenance and support.

It becomes apparent that there are no cases cited by the plaintiff and relied upon by her from this jurisdiction or other jurisdictions that will sustain the action such as she has instituted in the instant case.

With reference to the proposition that the parties are living under the same roof, we have set forth the cases of Randall v. Randall, *supra*, Smith v. Smith, *supra*, Bucknam v. Bucknam, *supra*, and Polster v. Polster, *supra*. To these may be added other cases from foreign jurisdictions such as Anshutz v. Anshutz, 16 N. J. Eq. 162, in which it was said that while a wife had no right to the interference of the court for her maintenance until her abandonment or separation, there might be an abandonment or separation, within the sound construction of the statute, while the parties continued to live under the same roof, as where the husband utterly refused to have intercourse with his wife, or to make any provision for her maintenance, and thus he might seclude himself in a portion of his house, take his meals alone or board elsewhere than in his house, and so as

effectively separate himself from his wife and refuse to provide for her as in case of actual abandonment, although in whatever form it might exist there must be an abandonment. Other cases are cited from the same jurisdiction to the same effect. See, also, Sutton v. Sutton, 145 Wash. 542, 260 P. 1076.

There are also several cases, under statutes of various states, in which separate maintenance was refused the wife, where the husband and wife were living in the same house. These cases are to the effect that it is an indispensable requirement of a maintenance statute that the wife should be living separate and apart from her husband without her fault, and that therefore, a wife living in the same house with her husband, occupying a different room and eating at a different time, was not entitled to separate maintenance. See Lowe v. Lowe, 213 Ill. App. 607.

And, as said in Rathmann v. Rathmann, 196 Ill. App. 20, in a suit for separate maintenance it must appear that the parties were actually living separate and apart at the time the bill was filed, and that a finding that the parties were living apart was not sustained by the evidence that the wife was compelled to cease her relationship with the husband as his wife, although continuing to live under the same roof, each occupying a separate room, there being no evidence as to whether or not during this period the parties ate at the same table or met in the family living room, or that in any way the relationship was changed, save the fact that they did not occupy the same room. See, also, Jones v. Jones, 233 Ala. 642, 173 So. 49; Klemme v. Klemme, 37 Ill. App. 54; Bamberg v. Bamberg, 123 N. J. Eq. 570, 199 A. 54; Annotation, 10 A. L. R. 2d 525.

In the instant case the marital relation has continued for more than 33 years, and the wife has been supported in the same manner during this time without complaint on her part. The parties have not been separated or living apart from each other at any time. In the light

of the cited cases it is clear, especially so in this jurisdiction, that to maintain an action such as the one at bar, the parties must be separated or living apart from each other.

The living standards of a family are a matter of concern to the household, and not for the courts to determine, even though the husband's attitude toward his wife, according to his wealth and circumstances, leaves little to be said in his behalf. As long as the home is maintained and the parties are living as husband and wife it may be said that the husband is legally supporting his wife and the purpose of the marriage relation is being carried out. Public policy requires such a holding. It appears that the plaintiff is not devoid of money in her own right. She has a fair-sized bank account and is entitled to use the rent from the 80 acres of land left by her first husband, if she so chooses.

The next question to be determined is whether or not the plaintiff is entitled to recover attorney's fees as costs in this action.

It is said in Higgins v. Case Threshing Machine Co., 95 Neb. 3, 144 N. W. 1037: "It is the practice in this state to allow the recovery of attorneys' fees only in such cases as are provided for by law, or where the uniform course of procedure has been to allow such recovery. As a general rule of practice in this state, attorneys' fees are allowed to the successful party in litigation only where such allowance is provided by statute." See, also, State ex rel. Charvat v. Sagl, 119 Neb. 374, 229 N. W. 118; Voss v. Voss, 144 Neb. 819, 14 N. W. 2d 849; Shepard v. Shepard, 145 Neb. 12, 15 N. W. 2d 195; Hawkeye Casualty Co. v. Stoker, 154 Neb. 466, 48 N. W. 2d 623.

The case of Kiddle v. Kiddle, 90 Neb. 248, 133 N. W. 181, 36 L. R. A. N. S. 1001, Ann. Cas. 1913A 796, is relied upon by the plaintiff, wherein this court said: "It is the settled rule in this court that in a suit by a wife for separate maintenance, or for alimony alone, the court may at any time during the pendency of the

suit make allowance to the wife of a reasonable sum as suit money, including attorney's fees, to be paid by the husband as the court may direct." As authority for this statement, Earle v. Earle, *supra,* Cochran v. Cochran, *supra,* and Brewer v. Brewer, *supra,* are cited.

There being no legal basis for the plaintiff's action as required by the law of this jurisdiction, an allowance of attorney's fees is erroneous and not authorized.

For the reasons given in this opinion, the judgment rendered by the district court is reversed and the cause remanded with directions to dismiss the cause.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

YEAGER, J., dissenting.

I respectfully dissent. In doing so I do not question the correctness of the statement of facts set forth in the majority opinion. I, however, do not think some important considerations have received appropriate emphasis. Therefore I shall present the dissent as I think the opinion should be, including a statement of facts.

This is an action in equity by Lydia McGuire, plaintiff and appellee, against Charles W. McGuire, defendant and appellant, wherein the plaintiff seeks suitable maintenance from the defendant. The two are husband and wife.

The parties were married in 1919 and have lived ever since in the farm home provided by defendant in Wayne County, Nebraska. At the time of trial plaintiff was 66 and the defendant 79 years of age. No children were born of the marriage. Plaintiff has two daughters by a former marriage. At the time of the marriage defendant owned 160 acres of land and since that time he has accumulated by inheritance and by purchase 240 additional acres. Two acres are occupied by a church. The value of the land at the time of trial was about $84,000. The rental value was at least $6,000. At the time of the trial the defendant owned $104,500 worth of United States Government bonds. He had in certificates of

deposit and checking accounts $12,768.31. His other personal property was of negligible value. These values are not in dispute.

It appears well to point out here that in this record there is no factual dispute of any kind. The defendant has allowed every statement made by plaintiff on the trial as to his conduct and actions toward her and the testimony of her witnesses as to the value of property to stand unchallenged.

At the time of the marriage plaintiff had a one-third interest in 80 acres of land left by her former husband. Later this interest was transferred to her two daughters. At the time of trial she had a bank account jointly with one of her daughters in the amount of $5,960.22.

This accumulated amount did not come from any contributions made by the defendant. It doubtless came in large part, if not entirely, from eggs and chickens produced and sold by plaintiff and from the income from the 80-acre farm. It appears that she was in general charge of this farm for her daughters and was permitted to use the proceeds.

From the beginning of the married life of the parties the defendant supplied only the barest necessities and there was no change thereafter. He did not even buy groceries until the last 3 or 4 years before the trial, and neither did he buy clothes for the plaintiff.

As long as she was able plaintiff made a garden, raised chickens, did outside chores, and worked in the fields. From the sale of chickens and eggs she provided groceries, household necessities, and her own clothing. These things she is no longer able to do, but notwithstanding this the defendant does no more than to buy groceries. He buys her no clothing and does not give her any money at all to spend for her needs or desires. Only one incident is mentioned in the record of defendant ever buying plaintiff any clothing. He bought her a coat over 3 years before the trial.

The house in which the parties live is supplied with

electricity and there is a gas refrigerator, otherwise it is decidedly not modern.

On these facts the district court decreed that plaintiff was legally entitled to use the credit of defendant and to obligate him to pay for a large number of items, some of which were in the nature of improvements and repairs to the house and some of which were furniture and appliances to be placed in the home. The total cost of these improvements and additions, as is apparent from the decree, would amount to several thousand dollars. As an alternative to a part of this the defendant was permitted, in agreement with plaintiff, to purchase a modern house elsewhere. The defendant was ordered to purchase a new automobile with an effective heater within 30 days. He was ordered to pay traveling expenses of plaintiff for a visit to each of her daughters at least once each year. It was decreed that plaintiff was entitled in the future to pledge the credit of defendant for what may constitute necessaries of life. The plaintiff was awarded a personal allowance in the amount of $50 a month. An award of $800 was made for services for plaintiff's attorney.

As grounds for reversal necessary to be considered herein the defendant says that the decree is not supported by sufficient evidence; that the decree is contrary to law; that the decree is an unwarranted usurpation and invasion of the defendant's fundamental and constitutional rights; and that the court erred in allowing fees for plaintiff's attorney.

In support of these assignments the defendant urges that there is no legal or equitable basis or authority for the maintenance of this action or one such as this. Substantially he says that these parties are husband and wife; that they are living together as such; and that plaintiff is not seeking separation or separate maintenance, therefore no relief is available to the plaintiff through the court.

There is and can be no doubt that, independent of stat-

utes relating to divorce, alimony, and separate maintenance, if this plaintiff were living apart from the defendant she could in equity and on the facts as outlined in the record be awarded appropriate relief.

The principle supporting the right of a wife to maintain an action in equity, independent of statute, for maintenance was first announced in this jurisdiction in Earle v. Earle, 27 Neb. 277, 43 N. W. 118, 20 Am. S. R. 667. In the opinion it was said: "While the statute books of this and other states amply provide for the granting of divorces in meritorious cases, yet we do not apprehend that it is the purpose of the law to compel a wife, when the aggrieved party, to resort to this proceeding, and thus liberate her husband from all obligations to her, in order that the rights which the law gives her, by reason of her marital relations with her husband, may be enforced. Such a conclusion would not generally strike the conscience of a court of equity as being entirely equitable."

Further in the opinion and in determination of the question it was said: "But however that may be, we are of the opinion that courts of equity should have and do have the jurisdiction to grant relief in cases of this kind without reference to the statutes of the state, but by and through the jurisdiction growing out of the general equity powers of the court."

The principle involved was reannounced in the following cases: Cochran v. Cochran, 42 Neb. 612, 60 N. W. 942; Chapman v. Chapman, 74 Neb. 388, 104 N. W. 880; Price v. Price, 75 Neb. 552, 106 N. W. 657; Rhoades v. Rhoades, 78 Neb. 495, 111 N. W. 122, 126 Am. S. R. 611; Brewer v. Brewer, 79 Neb. 726, 113 N. W. 161, 13 L. R. A. N. S. 222; Sinn v. Sinn, 138 Neb. 621, 294 N. W. 381.

The Supreme Court of Appeals of Virginia, in an exhaustive opinion, has adopted the position taken in this jurisdiction. See Heflin v. Heflin, 177 Va. 385, 14 S. E. 2d 317, 141 A. L. R. 391.

If relief is to be denied to plaintiff under this principle it must be denied because of the fact that she is not living separate and apart from the defendant and is not seeking separation.

In the light of what the decisions declare to be the basis of the right to maintain an action for support, is there any less reason for extending the right to a wife who is denied the right to maintenance in a home occupied with her husband than to one who has chosen to occupy a separate abode?

If the right is to be extended only to one who is separated from the husband equity and effective justice would be denied where a wealthy husband refused proper support and maintenance to a wife physically or mentally incapable of putting herself in a position where the rule could become available to her.

It is true that in all cases examined which uphold the right of a wife to maintain an action in equity for maintenance the parties were living apart, but no case has been cited or found which says that separation is a condition precedent to the right to maintain action in equity for maintenance. Likewise none has been cited or found which says that it is not.

In primary essence the rule contemplates the enforcement of an obligation within and not without the full marriage relationship. The reasoning contained in the opinions sustaining this right declare that purpose.

In Earle v. Earle, *supra,* it was said: "The question is, whether or not the plaintiff shall be compelled to resort to a proceeding for a divorce, which she does not desire to do, and which probably she is unwilling to do, from conscientious convictions, or, in failing to do so, shall be deprived of that support which her husband is bound to give her."

This reasoning has received the approval of this court in the later cited cases.

If there may not be resort to equity in circumstances such as these then as pointed out in the following state-

ment from Earle v. Earle, *supra,* a dim view must be taken of the powers of a court of equity: "As we have already said in substance, there is not much to commend an alleged principle of equity which would hold that the wife, with her family of one or more children to support, must be driven to going into court for a divorce when such a proceeding is abhorrent to her, or, in case of her refusal so to do, being compelled to submit to a deprivation of the rights which equity and humanity clearly give her; that, in order to obtain that to which she is clearly entitled, she must institute her action for a divorce, make her grievances public, which she would otherwise prefer to keep to herself, and finally liberate a husband from an obligation of which he is already tired, but from which he is not entitled to be relieved."

Can a principle of equity which requires a wife to leave her home before becoming able to enforce the obligation of her husband to support and maintain her receive in reason a higher commendation than the hypothesis contained in this quotation? I think not.

It is thought that the following from the same opinion should be regarded as controlling here: "It seems to us that a declaration of such a doctrine as the law of the land would place it within the power of every man, who, unrestrained by conscience, seeks to be freed from his obligations to his wife and family, by withholding the necessary comforts and support due them, to compel her to do that for him which the law would not do upon his own application."

I conclude therefore that the conclusion of the decree that the district court had the power to entertain the action was not contrary to law.

I think however that the court was without proper power to make any of the awards contained in the decree for the support and maintenance of the plaintiff except the one of $50 a month.

From the cases cited herein it is clear that a husband

has the obligation to furnish to his wife the necessaries of life. These decisions make clear that for failure to furnish them the wife may seek allowances for her support and maintenance. However neither these decisions nor any others cited or found support the view contended for by plaintiff that the court may go beyond this and impose obligations other than that of payment of money for the proper support and maintenance of the wife.

There is no doubt that plaintiff had the right to charge her husband with her necessaries of life and that recovery could be had therefor. No award of a court of equity was necessary to establish this right. Nothing was accomplished by the declaration of that right. The provision relating thereto therefore had no proper place in the decree.

I am of the opinion that the power of the court in such instances as this should not be extended beyond the allowance of sufficient money to provide adequate support and maintenance.

This court, I think, has laid down a sound rule for the guidance of the court with regard to awards in such cases as this in Chapman v. Chapman, *supra,* as follows: "We think that the judgment of the district court should be reversed and the cause remanded with instructions to receive such additional competent evidence pertinent to the subject of alimony as may be offered by either party, and to award to the plaintiff such sums, to be paid to her periodically by the defendant, as shall appear to be within his ability to pay and be adequate for her suitable maintenance."

As pointed out the district court made an allowance of $50 a month. In the light of generally well-known present day economy the conclusion is inevitable that this award is insufficient for the maintenance of the plaintiff. The record before us however does not supply adequate information upon which this court could make a finding as to what would be sufficient.

The plaintiff has cross-appealed contending that the allowance is not sufficient. It is concluded that the cross-appeal has merit and accordingly this phase of the case should be remanded to the district court for the taking of evidence in order that finding may be made as to what would be adequate for plaintiff's suitable maintenance.

The next question is that of attorney's fee for plaintiff's attorney. The district court allowed a fee of $800. The objection is to this allowance in its entirety on the ground that courts are without power to award attorney's fees in cases of this character.

As to allowance of attorney's fees this court said in Higgins v. Case Threshing Machine Co., 95 Neb. 3, 144 N. W. 1037: "It is the practice in this state to allow the recovery of attorneys' fees only in such cases as are provided for by law, or where the uniform course of procedure has been to allow such recovery. As a general rule of practice in this state, attorneys' fees are allowed to the successful party in litigation only where such allowance is provided by statute." This pronouncement has received approval in State ex rel. Charvat v. Sagl, 119 Neb. 374, 229 N. W. 118; Voss v. Voss, 144 Neb. 819, 14 N. W. 2d 849; Shepard v. Shepard, 145 Neb. 12, 15 N. W. 2d 195; Hawkeye Casualty Co. v. Stoker, 154 Neb. 466, 48 N. W. 2d 623.

In the very nature of things, this not being a statutory proceeding or one whose procedure is controlled by statute, resort cannot be had to statute for authority for the allowance of attorney's fees. It becomes necessary to find the right, if at all, in some course of procedure.

In Kiddle v. Kiddle, 90 Neb. 248, 133 N. W. 181, 36 L. R. A. N. S. 1001, Ann. Cas. 1913A 796, it was said: "It is the settled rule in this court that in a suit by a wife for separate maintenance, or for alimony alone, the court may at any time during the pendency of the suit make allowance to the wife of a reasonable sum as suit

money, including attorney's fees, to be paid by the husband as the court may direct." As authority for this statement Earle v. Earle, *supra,* Cochran v. Cochran, *supra,* Rhoades v. Rhoades, *supra,* and Brewer v. Brewer, *supra,* are cited. Other cases are cited but they are not of importance on the point being made here.

The four cases cited can be regarded as being in point only on the theory that an award of maintenance in equity as here and an award of maintenance in a statutory action are to be regarded as alimony and that the power of the court to make allowances for costs and attorney's fees in the two instances is the same.

This being true, it follows that a uniform course of procedure has come into being whereunder attorney's fees are allowable in such cases as this. It must be said therefore that the district court did not err in making an award of attorney's fees for plaintiff's attorney. I do not under the facts and circumstances disclosed think that the fee is excessive.

The decree of the district court should be affirmed as to the award of a fee of $800 for plaintiff's attorney and as to costs. Otherwise it should be reversed and the cause remanded with directions to the district court to take evidence and to determine and make such allowances to plaintiff for her suitable support and maintenance as may appear proper in the light of such evidence and appropriate rules of law as set forth herein.

A suitable allowance should be made for the services of plaintiff's attorney in this court.

HARRY GROTHE, JR., DOING BUSINESS AS HARRY GROTHE CONSTRUCTION COMPANY, APPELLANT, V. THEODORE ERICKSON, SR., APPELLEE.

59 N. W. 2d 368

Filed June 26, 1953. No. 33316.

1. **Contracts.** A cost-plus contract as generally understood is one where the total cost to the contractor represents the whole payment to be made to him, plus a stated percentage of profit.
2. ———. In a cost-plus contract the performing party's profit is limited to the amount specified.

APPEAL from the district court for Burt County: WILLIAM A. DAY, JUDGE. *Affirmed in part, and in part reversed and remanded with directions.*

J. V. Benesch and *Fraser, Connolly, Crofoot & Wenstrand,* for appellant.

Paul W. Eagleton and *Keith Hopewell,* for appellee.

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

SIMMONS, C. J.

This is an action to foreclose a mechanic's lien.

Plaintiff is a contractor with headquarters in Omaha. He is a nephew of defendant's wife. Plaintiff alleged that on or about June 15, 1950, he entered into an oral contract with defendant to construct a dwelling house "at a cost of all materials, supplies and labor therefor plus 10%." The house was to be built at Craig, Nebraska.

Plaintiff alleged full performance on his part; that the total amount payable to him was $18,016.25; that the defendant paid thereon $16,972.97, leaving a balance due of $1,043.28, which the defendant refused to pay; that he had filed a lien claim of record within time; and plaintiff prayed for judgment in that amount together with interest and for a sale of the premises for the amount found due.

Defendant filed a general denial. By way of cross-petition he alleged that plaintiff represented to him that he could obtain labor and materials at a lower cost than could defendant and that relying on those representations he entered into an oral agreement whereby plaintiff "was to represent defendant in the construction" of the house; that plaintiff "would supervise the work, * * * obtain the best of labor, * * * and materials," and construct the house in accord with defendant's plans and instructions; that plaintiff was to be paid "a sum equal to ten per cent of the cost of the labor and materials he obtained"; that plaintiff was "to use his best efforts to obtain such labor and materials at the lowest cost possible and that defendant was to receive the benefit of any discounts or rebates, which plaintiff might receive"; and that on certain "lumber which defendant had purchased or was about to purchase" plaintiff would receive no compensation, nor was plaintiff to receive compensation on labor furnished by defendant. Defendant alleged payments of $16,500; and that after payments had been made that he discovered improper and excessive charges and overpayment in the sum of $4,000, more or less, and an inability to state the proper amount because plaintiff had all records. He prayed that plaintiff be required to furnish an accounting of the cost or reasonable value of the materials and labor furnished by him "under the contract for the construction of said dwelling house for which he has made claim by his petition"; and that he recover for all excessive charges and for equitable relief.

For reply plaintiff denied generally.

No objections to the sufficiency of the pleadings were made.

The trial court found that the pleadings and evidence established a principal-and-agent relationship; that plaintiff had violated his legal obligation as defendant's agent and should be denied all personal gain and compensation for the construction of the house; that plaintiff had

forfeited $2,135.78, in commissions charged; and that these commissions, with other items which the court allowed as credits to defendant, amounting in all to $3,162.42, should be set off against plaintiff's total bill. The petition for foreclosure was denied and judgment for the defendant against the plaintiff was entered in the sum of $2,119.14.

Plaintiff appeals, assigning error in the denial of the foreclosure of his lien and error in various credits given to defendant and in awarding judgment against the plaintiff. We affirm in part, reverse in part, and remand with directions.

Plaintiff testified that he was to be paid on a cost plus 10 percent profit; and that for the 10 percent he was to supervise, lay out, and see that the house was built. Defendant testified that plaintiff was "to supervise the construction, * * * was supposed to hire the help and supervise it and buy all this stuff at a discount for me in Omaha, which he led me to believe he could do better than I could," and that defendant agreed to give plaintiff 10 percent.

"The independent contractor on a 'cost-plus-a-percentage-of-cost' basis is one who undertakes the construction required by the contract and the owner reimburses him for the costs of materials, labor, etc., and the contractor's profit or gain is to be a certain percentage of the total cost of the project. These types of contractors are legally classified as independent contractors. * * * the contractor is certainly an independent contractor, if the provisions of the contract make him so and do not in any way indicate or state that the parties intended that it was a contract of employment or agency * * *." Standard Oil Co. of Louisiana v. Fontenot, 198 La. 644, 4 So. 2d 634.

"In a 'cost plus' contract the performing party's profit is limited to the amount specified and the paying party would get the advantage of any excess profit

earned." Paper Mill Supply Co. v. Container Corporation, 301 Pa. 62, 151 A. 588.

A cost-plus contract as generally understood is one where the total cost to the contractor represents the whole payment to be made to him, plus a stated percentage of profit. See A. W. Feeser, Inc. v. American Can Co., 2 F. Supp. 561.

An authoritative text states the rule as follows: "In a cost plus contract, the performing party's profit is limited to the amount specified, and the paying party gets advantage of all profits." 17 C. J. S., Contracts, § 10, p. 329.

We hold the oral contract here to be a cost-plus contract entered into between an owner and an independent contractor.

This case was tried by the parties, without objection, as an accounting action as to specific charges made by the plaintiff against the defendant. The right to charge, the amount of charges, and the amount of credits due defendant were the issues actually tried. They started with the base total charge of $18,016.25, and undertook to determine what, if any, specific charges should be deducted therefrom. It appears that as a result of negotiations preliminary to the filing of the lien plaintiff conceded erroneous charges in the sum of $429.98, which plus 10 percent, amounted to $472.97. This amount plaintiff credits as a payment in addition to the $16,500, concededly paid, and it reduced the amount of his claim to the $1,043.28, which he pleads as the amount due. We follow the procedure of the trial court.

The record shows that plaintiff submitted itemized bills as the work progressed and defendant made payments thereon from time to time. It appears that both parties contemplated a final settlement of the account as a whole when the work was completed.

We find nothing in the pleadings or evidence that justified the conclusion of the trial court that the plaintiff had forfeited and should be denied the commission

of 10 percent charged. We reverse the finding of the trial court that defendant is entitled to a credit of $2,135.78, for 10 percent commission charged.

In connection with commissions charged, plaintiff charged $526.61 on lumber and other material purchased from or through a lumber company in Craig. The evidence of defendant is that he had arranged for the purchase of lumber before making this contract with plaintiff. The total of the lumber bill was $5,265.61, and upon that basis plaintiff made the charge of 10 percent. Defendant paid the bill in full. Plaintiff testified that he was to receive a commisison on that lumber purchased by defendant. Defendant testified that no commisison was to be charged on lumber purchased by himself. The only way plaintiff knew how much commission to charge was by asking the lumber company the amount of the total bill. Plaintiff incurred no financial liability in connection with the lumber purchased by defendant. The defendant furnished considerable labor and other items upon which plaintiff made no claim to a commission. We think that the lumber purchased by defendant properly falls in the class of items upon which plaintiff was not to receive a commission. However, it appears that $1,802.66, of this total of $5,265.61, was for items of mill work, etc., purchased by plaintiff upon which it is conceded here he would be entitled to a commission of $180.26. Defendant then is entitled to a credit on that item of $346.35, it being an improper charge.

The trial court allowed the defendant a credit of $25 for house plans. It appears that preliminary to this contract defendant had secured a picture of a house, from a newspaper, with floor plans. He also had a blueprint of floor plans. He desired changes in those plans. Plaintiff made a penciled plan of the changes in floor arrangement, windows, etc. This was done about the time the contract was made. He charged this as a cost item and without a percentage added. This obviously was not a cost to the plaintiff and was an item which we

think, under the circumstances here, was an improper charge. As to that item the judgment of the trial court is affirmed. Defendant is entitled to a credit of $25 on that item.

Plaintiff made three charges for the services of an accountant in preparing statements to be submitted to defendant. These totaled $30, to which was added 10 percent, making a total of $33. There is no showing as to the cost of this service. This appears to be an item properly chargeable to the cost of plaintiff in doing his contracting business and not a charge properly made against the defendant. The trial court's disallowance thereof is affirmed. Defendant is entitled to a credit of $33 on that item.

The plaintiff charged the defendant with personal wages in the sum of $654, plus 10 percent or a total of $719.40. It appears from the evidence that plaintiff charged for all time put in on the job, on time spent going to and from the job, and in getting materials, labor, etc. Plaintiff testified that he told defendant he would charge $2.50 an hour for his time in addition to the 10 percent. This defendant denied. There is some evidence of work actually done on the job by plaintiff such as staking out the ground for excavation, helping build forms for the foundation, and pounding nails in cupboards. There is a charge of $13.75, consisting of 5 hours at $2.50 an hour, plus 10 percent, for work done in changing locks which the trial court did not disturb. It appears that plaintiff was at this time doing five or six jobs, concurrently. His time cards appear to have been in court and were examined by counsel but not put in evidence. Except as to the above 5 hours there is no showing of the time actually put in doing work on the job other than that which properly plaintiff was required to do under his cost-plus contract. This charge appears clearly to have been a charge whereby plaintiff sought compensation in addition to and for services included in his agreed 10 percent commission. It was

properly allowed the defendant as a credit on the account. Defendant is entitled to a credit of $719.40 on this item.

It appears from the evidence that plaintiff employed a plumber on this job whose total bill for labor and material was $3,376.14. Upon this plaintiff charged a commission of 10 percent. It further appears from the evidence that plaintiff received a rebate from the plumber of 5 percent on this bill for services in laying out and directing the work and that he did not give defendant credit for this amount. It appears then that plaintiff charged the defendant $168.81, more than the cost of this work to him, and upon that charged also 10 percent or a total of $185.69. The work done for the plumber was work which plaintiff was required to do for the defendant under his cost-plus contract. The trial court gave defendant a credit of $168.81 for this item. To that should be added the commission charged of 10 percent or a total of $185.69. Defendant is entitled to a credit for that item.

The trial court allowed defendant a credit of $13.50 for overcharges on wages paid a Mr. Harriger and $15.33 on wages paid a Mr. Watts. Plaintiff's exhibits show that there was charged for wages of Harriger a total of $987.25. An itemized breakdown of wages paid by plaintiff to Harriger shows a total of $973.75, or an overcharge of $13.50 in carrying forward the total of the labor items. Likewise the exhibits show a total of $897.55 charged for wages of Watts, and the itemized breakdown of these wages shows a total of $895.72, or an overcharge of $1.83. Plaintiff testified that these exhibits were correct. These appear to have been clerical errors, but nevertheless, overcharges. Defendant is entitled to a credit therefor of $15.33, plus 10 percent which was charged, or a total of $16.86 on these two items.

The trial court found that there had been an overcharge on stone delivered to the house by plaintiff in the sum of $60. The statements show stone hauled from

plaintiff's shop on September 27, without a charge being made, and a later charge of $112.50 for stone hauled from the shop. The evidence is that there were two loads delivered of approximately 2 tons and that the one charge covered the two loads. The charge appears to be a proper one for two loads. The trial court erred in allowing the $60 as an overcharge.

The evidence shows that there was a small cement mixer available at Craig to be used without cost to defendant. Plaintiff brought to Craig from Omaha on two trips, a larger and more efficient cement mixer which he owned. For use and hauling plaintiff charged defendant $60 to which he added a 10 percent commission. He also charged $2.74, plus 10 percent for gas furnished to the employee who hauled the mixer to Craig. The trial court allowed a credit to the defendant for this amount of $60. Plaintiff testified that the charge was reasonable and that he never rented it out for less than $35 a day; that it was worth $25 a day "if it is used"; and that he never told defendant he was going to charge for the use of the cement mixer. It seems clear from the evidence that plaintiff charged the defendant, not with the cost of the use of the mixer, but with its rental price, including a profit, and then charged in addition a commission thereon. We find no evidence as to the cost of this use, if any, to plaintiff. Under the circumstances the trial court properly allowed the defendant a credit therefor which together with the commission charged should have been $66. Defendant is entitled to a credit of $66 for that item.

We summarize the items which we find were improperly charged to defendant and for which the defendant is entitled to credit:

Overcharge on lumber commission	$ 346.35
House plans	25.00
Accounting	33.00
Plaintiff's labor	719.40
Plumbing - rebate not given	185.69

Cement mixer use	66.00
Overcharge Harriger and Watts wages	16.86
	$1,392.30
Less balance of bill submitted and not paid	1,043.28
Balance showing amount of overpayment by defendant	$ 349.02

The judgment of the trial court in denying a foreclosure of the mechanic's lien is affirmed. Because of the matters stated herein the judgment of the trial court is reversed and the cause remanded with directions to enter a decree releasing the plaintiff's lien of record and awarding defendant a judgment against the plaintiff in the sum of $349.02. All costs are to be taxed to the plaintiff.

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

WENKE, J., participating on briefs.

W. ALBERT RICE, APPELLEE, V. AMERICAN PROTECTIVE HEALTH & ACCIDENT COMPANY, A CORPORATION, ET AL., APPELLANTS.

59 N. W. 2d 378

Filed June 26, 1953. No. 33319.

1. **Insurance.** Willfully and knowingly false answers to questions in an application for health and accident insurance material to the risk and relied on by the insurer on issuance of the contract may defeat a recovery if timely objection is taken thereto.
2. ———. An instruction which defines confining illness within doors as illness the direct result of which was to render the plaintiff unable to do all of the substantial and material acts necessary to the prosecution of the insured's business or occupation in his customary and usual manner is prejudicially erroneous.
3. ———. Within the meaning of an insurance policy providing indemnity for confinement within doors the term shall receive a

reasonable rather than a literal application and the insured is not required to remain constantly within doors, but there must be a substantial confinement within doors.

4. **Trial.** It is the duty of the court to submit to the jury under appropriate instructions all issues presented by the pleadings and supported by evidence.
5. **Evidence: Appeal and Error.** The rule that ordinarily in order to predicate error upon a ruling of the court refusing to permit a witness to testify, or to answer a specific question, the record must show an offer to prove the facts sought to be elicited, applies to the proponent of the witness but not to cross-examination.
6. **Evidence.** What the proponent of a witness may and does properly go into in the examination-in-chief the cross-examiner may inquire into on cross-examination as a matter of right and a refusal to allow him to do so is error.

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

Edwin F. Dosek and *Chambers, Holland & Groth,* for appellants.

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

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

YEAGER, J.

This is an action at law by W. Albert Rice, plaintiff and appellee, against American Protective Health & Accident Company, a corporation, and Lincoln Bonding & Insurance Company, a corporation, defendants and appellants, on a health and accident insurance policy issued to the plaintiff by the first named defendant, which for convenience will be referred to hereinafter as the insurance company. The liabilities under the policy were assumed by the second named defendant, which hereinafter if reference to is required will be referred to as the bonding company, hence the action is against the two defendants. The propriety of the joinder is not brought into question. The action was for benefits claimed to be due under the policy.

Issues were joined and the cause was tried to a jury.

A verdict was returned in favor of plaintiff for $2,021.18. Judgment was rendered on the verdict and in addition plaintiff was awarded an attorney's fee in the amount of $469.55.

A motion for new trial was duly filed which was overruled. From the judgment and the order overruling the motion for new trial the defendants have appealed.

The brief of appellants contains nine assignments of error. Following a sufficient statement of the issues to present an intelligible consideration of the questions involved the assignments of error, to the extent necessary to consider them herein, will be considered in the order of convenience.

On April 12, 1950, the insurance company issued to plaintiff a contract of insurance which among other things insured the plaintiff against loss of time resulting from bodily injuries and also from sickness or disease.

Regarding sickness or disease indemnities the contract contains the following provisions:

"If such sickness shall confine the Insured continuously within doors for one day or more, the Company will pay - One hundred fifty and no/100—DOLLARS per month, beginning with the first medical treatment during confinement, but not exceeding sixty consecutive months for any one sickness, provided the Insured is under the regular and personal attendance of a licensed physician, surgeon, osteopath or chiropractor."

"If such sickness shall prevent the Insured from attending to a substantial part of his duties essential to his occupation or following a period of confining disability, the Company will pay, beginning with the first medical treatment during disability, for one day or more, not to exceed three consecutive months at the rate of fifty percent (50%) of the amount payable for confining sickness, provided the Insured is under the regular

and personal attendance of a licensed physician, surgeon, osteopath or chiropractor."

Regarding the definition of certain conditions as disease or sickness the contract contains the following:

"Disability or loss caused by ulcers, vertigo, lame or sprained back, overexertion, overheating, sunstroke, hernia, lockjaw, or any injury complicated with disease, shall be considered as a disease notwithstanding the original cause of such disability or loss, and settlement shall be made accordingly."

The petition alleges that on January 14, 1951, while the contract was in full force and effect, plaintiff became afflicted with sudden pain which disabled and has completely incapacitated him for the performance of his business of farming and ranching. The evidence conclusively discloses the condition from which the pain and disability flowed was in the lower back or lumbar-sacroiliac region and of course that there was lameness of the back. Thus within the meaning of the contract the claimed disability was on account of sickness or disease.

The petition further sets forth that claim was made for disability benefits but none were ever paid.

Action was then started and in the petition plaintiff claimed that he was entitled to $150 a month for the then period of his disability or $1,950.

In answer to the petition the defendants admitted the issuance of the contract of insurance. They denied generally the allegations of the petition. Then as an affirmative defense they alleged that in the application for the insurance contract the plaintiff made certain answers to questions asked which were material to the risk here which were willfully and knowingly false, thus the defendants were not liable for the payment of the benefits claimed.

The pleaded affirmative defense was by reply denied by the plaintiff.

At the close of plaintiff's evidence the defendants

moved for a dismissal on the ground that there was a total variance between the pleadings and proof. The motion was overruled. By the first assignment of error this question is presented to this court.

The point of the motion is that the claim under the pleadings is for indemnity on account of sickness or disease whereas the evidence supports a claim for accidental injury.

The assignment is without merit. By the terms of the contract of insurance heretofore quoted and as already pointed out herein in this opinion the plaintiff was required to treat and regard his condition as a disease or sickness and not as an accidental injury.

As pointed out the answer interposed a defense that the terms of the contract were not enforceable for the reason that the plaintiff gave false answers to questions regarding matters material to the risk. The court rejected this defense and refused to submit it to the jury. On the contrary the court by instruction No. 7 told the jury that the contract was in full force and effect. By their second assignment the appellants assert that this was error. The questions and answers were as follows: Q. "Are you now in good health?" A. "Yes" Q. "Are you maimed, crippled, or deformed in any way?" A. "No."

There can of course be no doubt that these questions and the answers thereto were material to the risk, but to defeat the contract they must have been false. There is no evidence in the record to indicate that these answers were knowingly or willfully false or even false. The second assignment of error is without merit.

The third and fourth assignments of error are of such similarity that they will be treated as one. Their effect is to say that the court in its instructions failed to properly define confining sickness.

From the statement hereinbefore made of the case including the quotations from the contract of insurance and the verdict and judgment it becomes apparent that

a proper legal definition of confining sickness is of vital concern. The action was predicated upon confining sickness and the verdict and judgment were for that character of sickness for the entire period for which recovery was allowed.

Such a definition is of further vital concern for the reason that the contract distinguishes confining sickness and non-confining sickness and provides for each, but the period of coverage and the rate of indemnity are different. It is disclosed by the quotations from the contract herein that the maximum period for confining sickness is 60 months and the rate of indemnity is $150 a month, whereas the maximum period for non-confining sickness is 3 months with the monthly rate one-half of that payable for confining sickness.

The definition of confining sickness which was given to the jury is the following from instruction No. 6:

"Ordinarily, terms in insurance policies relative to illness or disability must be given a liberal construction; and as far as applicable to this case the term, 'sickness which shall confine the insured continously (sic) within doors,' does not necessarily mean that the insured must have been constantly confined within his home or within some other building, that is, in a state of complete helplessness before he is entitled to the benefits of insurance involved herein.

"If the evidence shows, by a preponderance thereof, that the plaintiff became ill, and as a direct result of such illness the plaintiff was unable to do all the substantial and material acts necessary to the prosecution of the insured's business or occupation in his customary and usual manner, and further, that such inability was continuous during all times involved herein, then if you so find, plaintiff was continuously confined within doors under the terms of the policy involved herein, although you may find that he attempted at irregular times to perform certain duties relative to his business."

The portion of this definitive statement contained in

the first paragraph of the quoted portion of the instruction, it will be observed, is negative in character and as to it no fault may be found. It finds full support in Mutual Benefit Health & Accident Assn. v. Milder, 152 Neb. 519, 41 N. W. 2d 780.

The same thing however may not be said of the next or positive paragraph of the definition. There the jury was told that if the illness was such as to cause the plaintiff to be unable to do all of the substantial and material acts necessary to the prosecution of the insured's business or occupation in his usual and customary manner and that if such inability was continuous during all of the times involved, then plaintiff was confined within doors under the terms of the policy.

What the instruction did was to apply to the confining illness the proper definition of total disability under an accidental injury policy of insurance. McCleneghan v. London Guarantee & Accident Co., 132 Neb. 131, 271 N. W. 276.

Confining illness, to the extent reasonably possible, is defined and considered at length in Mutual Benefit Health & Accident Assn. v. Milder, *supra*. Numerous other cases are cited therein supporting the conclusion reached and they will not be repeated here.

In that opinion, among other related statements with regard to contract provisions substantially the same as those being considered here, it was said: "Mere total and permanent disability of the insured by disease or illness is not sufficient. The contract makes total disability and total loss of time from sickness or disease which confines the insured continuously within doors and regular visits therein of the insured by a legally qualified physician an indispensable criterion of disability which entitles the insured to the maximum indemnity."

It should be pointed out that by the contract here under consideration it is required that there shall be regular and personal attendance of a licensed physician,

surgeon, osteopath, or chiropractor but there is no requirement that the attendance shall be at the place of confinement.

Also in the opinion in definition of confinement within the meaning of the contract, it was said: "The condition imposed by the contract that continuous confinement within doors with regular medical attendance is a requirement of recovery of maximum indemnity for total disability and total loss of time occasioned by illness or disease should not be literally but reasonably applied, and the insured is not thereby required to remain within doors constantly, but there must be a substantial confinement within doors and regular medical attendance therein by reason of the illness. There may be needful and beneficial interruption of the confinement with the approval and advice of his physician in attempts to restore the health of the insured, and there may be necessary deviation from confinement indoors on account of occurrences or emergencies over which he has no control, but this does not mean that the requirement of confinement within doors may be ignored or disregarded, and recovery had under this provision of the policy merely because insured is totally disabled and suffers a total loss of time."

Instruction No. 6 was prejudicially erroneous and on that ground the defendant is entitled to a reversal of the judgment herein.

By the fifth assignment the appellants substantially assert that the court erred by failure to instruct so as to allow the jury to determine in the light of the provisions of the policy whether the plaintiff had a confining or a non-confining illness or disease.

This of course, in the light of Mutual Benefit Health & Accident Assn. v. Milder, *supra,* and what has already been said herein, was error. It was the duty of the court to submit to the jury under appropriate instructions all issues presented by the pleadings and supported by evidence. Roby v. Auker, 149 Neb. 734, 32 N. W. 2d

491; McKain v. Platte Valley Public Power & Irr. Dist., 151 Neb. 497, 37 N. W. 2d 923; Krepcik v. Interstate Transit Lines, 154 Neb. 671, 48 N. W. 2d 839.

By the pleadings and the litigated terms of the policy the character and quality of the plaintiff's condition was a basic issue.

The eighth assignment of error relates to the ruling of the court on an objection to a question propounded to plaintiff on cross-examination. The question, the objection, and the ruling are as follows: "Q—Albert, since January 14, 1951, how many days have you been confined to your home? MR. PERRY: I object to that as immaterial under the issues and not cross examination. THE COURT: Sustained."

In the light of the issues it is difficult to see how it could be concluded that the inquiry did not relate to a matter material under the issues. The basic matter for determination was that of plaintiff's confinement and the duration of such confinement. It is equally difficult to see how it could be concluded that the matter was not a proper subject of cross-examination. The testimony of the plaintiff as to the commencement of his condition and his conduct thereafter without question made of this a proper subject of cross-examination. The appellee in his brief does not seriously contend otherwise. His response is that the error may not be predicated upon the ruling since there was no offer to prove the facts sought to be elicited.

The rule relied on is stated as follows in In re Estate of Woodward, 147 Neb. 270, 23 N. W. 2d 75: "Ordinarily in order to predicate error upon a ruling of the court refusing to permit a witness to testify, or to answer a specific question, the record must show an offer to prove the facts sought to be elicited." See, also, Webber v. City of Scottsbluff, 150 Neb. 446, 35 N. W. 2d 110.

That rule is a valid one as applied to the proponent of a witness but it has no application where the question is on cross-examination and comes within the purview of

the material subjects inquired into on direct examination.

In Larson v. Hafer, 105 Neb. 257, 179 N. W. 1013, it was said: "When testimony is given by a witness on direct examination, from which an inference of fact arises favorable to the party producing him, anything within the knowledge of the witness tending to rebut that inference is admissible on cross-examination, and the opposing party is entitled to pursue that line of cross-examination as a matter of right." Also it was said: "A denial of that right of cross-examination, when the ruling is prejudicial, is sufficient ground for reversal."

In Langdon v. Loup River Public Power Dist., 142 Neb. 859, 8 N. W. 2d 201, it was said: "What the proponent of a witness may go into in chief, the cross-examiner may inquire into on cross-examination on the liberal terms extended to the cross-examiner, * * *."

The inquiry was proper and the court erroneously and prejudicially sustained the objection to the question propounded.

In the light of the determinations made upon the assignments considered herein, consideration of the other assignments is not required.

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

REVERSED AND REMANDED.

BARBARA SHIERS, THROUGH AND BY HER MOTHER AND NEXT FRIEND, IRENE SHIERS, APPELLEE, V. THEODORE T. COWGILL ET AL., APPELLANTS.

59 N. W. 2d 407

Filed June 26, 1953. No. 33322.

1. **Automobiles: Negligence.** When the undisputed physical facts demonstrate that defendant was not negligent in the operation of his automobile at the time of a collision the evidence is not sufficient to support a verdict for plaintiff.
2. **Evidence: Trial.** Physical facts may not be accepted as a

matter of law or as ground for refusal to submit a case to a jury as against the testimony of witnesses on a controverted question of fact unless they are demonstrable to a degree that reasonable minds cannot disagree as to their existence and unless the results flowing therefrom are demonstrable to the same degree agreeable to the known and immutable laws of physics, mechanics, or mathematics. If they fall short of this test, then they are to be considered by the jury along with all the other facts and circumstances proved.

3. ———: ———. When there is a reasonable dispute as to what the physical facts show, the conclusions to be drawn therefrom are for the jury. The credibility of the witnesses and the weight to be given their testimony are solely for the consideration of the jury.
4. **Trial.** 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, and where the judge has failed to instruct the jury, and it is apparent from the record that the jury probably took a wrong view of the law, a new trial will be awarded.
5. ———. Instructions given to a jury must be construed together and if, when considered as a whole, they properly state the law it is sufficient.
6. **Negligence: Trial.** Ordinarily contributory negligence is a question for the jury; but, where there is no basis in the evidence for a finding of contributory negligence, it is error to instruct on the subject and thereby to submit to the jury an issue which is outside the evidence.
7. **Trial: Appeal and Error.** The giving of erroneous instructions is not cause for reversal if the instructions are more favorable to the complaining party than he is entitled to under the law.
8. **Automobiles: Negligence.** Where the negligence of the driver of an automobile in which plaintiff is riding as a passenger is the sole proximate cause of a collision in which plaintiff is injured, plaintiff cannot recover from a third person for such injury.
9. **Trial.** The reading by the official reporter of the testimony of a witness examined on the trial is certainly within the spirit if not within the letter of section 25-1116, R. R. S. 1943, since the stenographic reporter's notes of the testimony are liable to be more accurate than the judge's recollection of what was testified to.
10. ———. The practice of allowing an official stenographer to read to the jury his notes of the testimony of a witness, upon the request of the jury, should not be encouraged.
11. **Damages: Trial.** The district court is vested with the power

to set aside a verdict if, from the evidence adduced, it appears that the verdict is so exorbitant and excessive as to indicate that it was the result of passion, prejudice, mistake, or some means not apparent in the record, or it is clear that the jury disregarded the evidence or rules of law.

12. ———: ———. In an action for damages, where the law furnishes no legal rule for measuring them, the amount to be awarded rests largely in the sound discretion of the jury and courts are reluctant to interfere with a verdict so rendered.

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

Everett L. Randall and *W. A. Stewart,* for appellants.

Ward W. Minor and *Smith Brothers,* for appellee.

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

WENKE, J.

This action was brought in the district court for Dawson County by Barbara Shiers, a minor, by and through her mother and next friend, Irene Shiers, against Theodore T. Cowgill and Maud Bryan. The nature of the action is tort based on alleged negligent conduct of defendant Maud Bryan while driving a truck owned by defendant Theodore T. Cowgill. The primary purpose of the action is to recover damages for injuries she suffered arising out of an accident which she alleges occurred as a result of such conduct. Plaintiff recovered a verdict of $10,000 on which judgment was entered. Defendants filed an alternative motion asking for either a judgment notwithstanding the verdict or for a new trial. It is from the overruling of this motion that this appeal was perfected by the defendants.

It is either admitted by the pleadings or conclusively established by the evidence adduced that an accident occurred on July 2, 1951, between 9 and 9:15 p. m. on the paved surface of U. S. Highway No. 30 at a point about 2.4

miles east of the east city limits of Overton, Nebraska, between a new 2-ton G.M.C. truck equipped with stock rack and a 1949 4-door Packard sedan; that the truck was, at the time of the accident, being driven west on U. S. Highway No. 30 by appellant Bryan, an employee of appellant Cowgill, the owner thereof; that she was driving it with his consent and at his direction; that the Packard sedan was, at the time of the accident, being driven east on U. S. Highway No. 30 by Mary Kerwood, one of the owners thereof; and that appellee, then a minor of the age of 8 years, was riding as a guest in the back seat of the car.

Appellants contend the verdict of the jury is not sustained by the evidence. This is based on the theory that the undisputed physical facts demonstrate that the collision could not have happened in the manner testified to by appellee's witnesses.

We have said: "Where the undisputed physical facts demonstrate that defendant was not negligent in the operation of his automobile at the time of a collision, the evidence is not sufficient to support a verdict for plaintiff. If the evidence essential to a recovery by plaintiff is clearly disproved by the physical facts and conditions, the trial court should direct a verdict against him." Hessler v. Bellamy, 128 Neb. 571, 259 N. W. 514. See, also, Moore v. Krejci, 139 Neb. 562, 297 N. W. 913; Jones v. Union P. R. R. Co., 141 Neb. 112, 2 N. W. 2d 624.

Appellee produced as witnesses the three persons who were, at the time of the accident, riding in the front seat of the Packard. They are Mary Kerwood, the driver, Irene Shiers, the mother of plaintiff, and Harry Peters, the father of Mrs. Shiers. They all testified that as Mrs. Kerwood approached the place of the accident she was driving her car on the south or right-hand side of the paved surface thereof; that as she saw the lights of the truck approach she drove as near the south edge of the paved surface as it was reasonably possible to do with safety; that as the truck approached

them from the east, at a point about 50 feet away, it crossed the center line marked on the paved surface of the highway and continued on into the south lane for traffic; and that as it continued in that direction it ran into the Packard car, striking it on the left side at about the point of the left-front door post. The physical damages to the car and truck fully support this theory of how the accident happened for the pictures of the car show it was hit on the left side at about the point of the left-front door post while the evidence as to the damage to the truck shows it was damaged at the left front. The damage to the left front of the truck consisted of a bent bumper, a damaged headlight and fender, a bent axle and tie rods, a bent wheel, and a flat tire.

On the other hand appellant Bryan, who was driving the truck, says she saw the right-front wheel of the car go off onto the wet and soft south shoulder of the highway at a point when the car was some 350 feet down the highway; that this caused the rear of the car to skid toward the center of the highway, which was wet and slippery from a heavy rain which had just ceased; that the car got back on the highway and did not right itself completely; that as this was occurring she drove the truck as far to the right as possible, getting over onto the north shoulder with the right wheels thereof; that after the car got back on the paved surface it came diagonally across the paved highway and ran directly into the truck which was then only about 12 to 18 inches on the paved surface, the balance being over on the shoulder. This theory of the accident is not supported by the physical condition of the car for there is no damage to the front end thereof, which there would have to be if it ran directly into the truck.

There are two significent facts relating to the accident. One is that both car and truck, after the accident, came to a stop north of the paved portion of the highway. The other relates to the evidence of the

safety patrolman as to where he found debris on the highway when he arrived at the place of the accident and made an investigation thereof. This he did about 10 p. m. While these facts are significant we do not think they are absolutely controlling.

As stated in Jones v. Union P. R. R. Co., *supra*: "Physical facts may not be accepted as a matter of law or as ground for refusal to submit a case to a jury as against the testimony of witnesses on a controverted question of fact, unless they are demonstrable to a degree that reasonable minds cannot disagree as to their existence, and unless the results flowing therefrom are demonstrable to the same degree agreeable to the known and immutable laws of physics, mechanics or mathematics. If they fall short of this test, then they are to be considered by the jury along with all the other facts and circumstances proved."

And in Moore v. Krejci, *supra*: "* * * where there is a reasonable dispute as to what the physical facts show, the conclusions to be drawn therefrom are for the jury. The credibility of the witnesses and the weight to be given their testimony are solely for the consideration of the jury."

Also in Rueger v. Hawks, 150 Neb. 834, 36 N. W. 2d 236: "It is the rule in this jurisdiction that physical fact may not be accepted as a matter of law or as ground for refusal to submit a case to a jury as against the testimony of witnesses on a controverted fact question, unless they are demonstrable to a degree that reasonable minds cannot disagree concerning their existence, and unless the results flowing therefrom are demonstrable to the same degree agreeable to the known and immutable laws of physics, mechanics, or mathematics."

We are unable to say that reasonable minds could not draw different conclusions as to the proximate cause of this accident. In view thereof we find the issue one for

determination by a jury. The trial court did not err in submitting it.

It is next contended the trial court erred in failing to include in its instruction No. 2, which related to appellant's answer, the fact that it included a general denial. In this respect the answer contains the following language: "COME NOW the defendants and for their answer to the petition of the plaintiff herein deny each and every allegation of the plaintiff's petition not hereinafter specifically admitted * * *."

"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, and where the judge has failed to instruct the jury, and it is apparent from the record that the jury probably took a wrong view of the law, a new trial will be awarded." York Park Bldg. Assn. v. Barnes, 39 Neb. 834, 58 N. W. 440.

" 'When, in consequence of a misstatement of the pleadings, an instruction has a tendency to confuse or mislead the jury, it is good ground for a new trial.' Howell and Gibson v. Sewing Machine Co., 12 Neb. 177, 10 N. W. 700." Diehm v. Dargaczewski, 135 Neb. 251, 280 N. W. 898.

In its instruction No. 2 the court advised the jury, in part, as follows:

"Defendants further allege that Mary Kerwood unlawfully drove said Packard sedan into the lane of traffic of Maud Bryan, Defendant and into the vehicle belonging to the Defendant Theodore T. Cowgill.

"3. Defendants allege that Mary Kerwood was negligent in the following respects: * * *

"(d) That said Mary Kerwood was careless and negligent in driving said automobile on these Defendants' side of the road at and immediately prior to said accident.

"(e) That the said Mary Kerwood carelessly and negligently failed to keep her car on the right side of the road upon meeting these Defendants' vehicle.

"(f) That the said Mary Kerwood suddenly and

without warning drove her vehicle into the Defendant Maud Bryan's side of the road at an excessive rate of speed, considering then the existing conditions of the highway and the traffic thereon.

"4. The Defendants allege that any damages or any injuries suffered by the Plaintiff was the direct and proximate result of the negligence of Mary Kerwood as above set forth."

In its instruction No. 9 the court advised the jury, in part, as follows: "The Jury are instructed that the Defendants in their Answer allege that the proximate cause of said injury of the Plaintiff, Barbara Shiers, was the negligence of Mary Kerwood."

" 'Instructions given to a jury must be construed together, and if, when considered as a whole, they properly state the law, it is sufficient.' Clausen v. Johnson, 124 Neb. 280, 246 N. W. 458." Suhr v. Lindell, 133 Neb. 856, 277 N. W. 381.

"Instructions must be considered and construed together, and if they are not sufficiently specific in some respects, it is the duty of counsel to offer requests for instructions that will supply the omission, and, unless this is done, the judgment will not ordinarily be reversed for such defects." Plumb v. Burnham, 151 Neb. 129, 36 N. W. 2d 612.

While it would have been desirable for the trial court to have informed the jury that appellants had denied all of the allegations of appellee's petition, except such as were set forth as admitted, we do not think appellants were prejudicially affected by its failure to do so. A reading of all the instructions, particularly Nos. 2 and 9, leaves no doubt that the jury fully understood that appellants denied appellee's contention that appellant Bryan drove the truck across the center line of the highway and into the car and that appellants claimed Mary Kerwood drove her car across the center line and into the truck and that this conduct on the part of Mary Kerwood was the proximate cause of the accident.

We find the contention to be without merit.

Appellants contend the court erred in submitting the issue of contributory negligence as it relates to the conduct of Mary Kerwood, the driver of the car in which plaintiff was admittedly riding as a guest.

"Ordinarily, contributory negligence is a question for the jury; but, where there is no basis in the evidence for a finding of contributory negligence, it is error to instruct on the subject and thereby to submit to the jury an issue which is outside the evidence." Hartford Fire Ins. Co. v. County of Red Willow, 149 Neb. 10, 30 N. W. 2d 51. See, also, Bay v. Robertson, 156 Neb. 498, 56 N. W. 2d 731.

There is no question of doubt that, under the situation here presented, Mary Kerwood's conduct could not be imputed to appellee and this issue should not have been submitted.

But, as stated in Webb v. Omaha & S. I. Ry. Co., 101 Neb. 596, 164 N. W. 564: "The giving of erroneous instructions is not cause for reversal, if the instructions are more favorable to the complaining party than he is entitled to under the law."

And in Holley v. Omaha & C. B. St. Ry. Co., 110 Neb. 541, 193 N. W. 710, we said: "Erroneous instructions to the jury will not work a reversal of a case unless they are prejudicial to the complaining party."

The only possible prejudicial effect that the erroneous submitting of this issue could have had would have been for the jury to either deny or diminish appellee's recovery. Certainly appellants are not in a position to complain of that advantage.

Appellants contend the court erred in giving instruction No. 9 in the form that it did. Instruction No. 9 is as follows:

"The Jury are instructed that the Defendants in their Answer allege that the proximate cause of said injury of the Plaintiff, Barbara Shiers, was the negligence of Mary Kerwood. The Defendants, having affirmatively

alleged this fact in their Answer, the burden is upon them to establish the same by a preponderance of the evidence.

"If you find, from all the evidence in this case, that it has been established by a preponderance of the evidence, that the *proximate cause* of Barbara Shiers' injuries was the negligence of Mary Kerwood, then your verdict should be for the defendants." (Emphasis ours.)

This contention is based on the fact that the court failed to place the word "sole" before the words "proximate cause" appearing in this instruction and which we have italicized to indicate.

We said in Bergendahl v. Rabeler, 133 Neb. 699, 276 N. W. 673: "Where the negligence of the driver of an automobile in which plaintiff is riding as a passenger is the sole proximate cause of a collision in which plaintiff is injured, plaintiff cannot recover from a third person for such injury."

However: "More proof and a greater burden of evidence is required to prove that an alleged act of negligence is a sole cause than merely showing it to be either a proximate cause or the proximate cause. 30 Tex. Jur. 694, § 42." Carter v. Ferris (Tex. Civ. App.) 93 S. W. 2d 504.

If there is any error because of the court's failure to properly use the words "sole proximate cause" in place of "proximate cause" in its instruction No. 9, it is certainly favorable to appellants for their burden under this issue was thereby appreciably lessened.

As already quoted from Webb v. Omaha & S. I. Ry. Co., *supra:* "The giving of erroneous instructions is not cause for reversal, if the instructions are more favorable to the complaining party than he is entitled to under the law."

Appellants claim the court erred when it gave instruction No. 14. This instruction was given in response to the following request made by the foreman of the

jury: "Could we have the testimony of the Safety Patrolman?"

Instruction No. 14 is as follows:

"You have sent a written request to the Court for the testimony of the safety patrolman who testified in this case.

"You are instructed that under the law the Court has no right or authority to give you this testimony."

Section 25-1116, R. R. S. 1943, as far as here material, is as follows: "After the jury have retired for deliberation, if there be a disagreement between them as to any part of the testimony, * * * they may request the officer to conduct them to the court where * * * the court may give its recollection as to the testimony on the point in dispute in the presence of or after notice to the parties or their counsel."

It is self-apparent from this statute that the court was in error as to its right or authority to give the jury this testimony. The statute clearly provides it may give them its recollection in regard thereto. This discretion has been construed to include the reading of the testimony by the court reporter.

As stated in Darner v. Daggett, 35 Neb. 695, 53 N. W. 608: "The reading by the official reporter of the testimony of a witness examined on the trial is certainly within the spirit if not within the letter of the statute. The stenographic reporter's notes of the testimony are liable to be more accurate than the judge's recollection of what was testified to."

However, in regard to doing so this same opinion, in referring to Jameson v. State, 25 Neb. 185, 41 N. W. 138, said: "Again, as was said by this court in Jameson v. State, 25 Neb., 185, while the practice of allowing an official stenographer to read to the jury his notes of the testimony of a witness, upon the request of the jury, should not be encouraged, a judgment will not be reversed for that cause."

In Bonawitz v. De Kalb, 2 Neb. (Unoff.) 534, 89 N. W.

379, under a similar situation, it was said: "This request appears to have been declined. The action of the trial court in recalling a jury and giving it further instructions after it has once retired for deliberation lies in the sound discretion of the trial judge; and unless the record discloses a manifest abuse of this discretion in this matter such action will not be reviewed by this court. Here the request was one for information on the testimony introduced, and while it is permissible for the court, after a jury has been sent out to deliberate on its verdict, to recall it and give his recollection of testimony in dispute, this practice has never been looked upon with great favor by this court. Jameson v. State, 25 Neb., 185; Darner v. Daggett, 35 Neb., 695; McClary v. Stull, 44 Neb., 175; Bartell v. State, 40 Neb., 233."

It was a matter within the discretion of the trial court. The trial was short, lasting only 2 days; the witness whose testimony was desired was, for all practical purposes, the last to testify; and his testimony was neither long nor complicated. In view of our previous holdings on this subject we do not think, under the situation here presented, that the trial court so abused its discretion as to require a reversal although it gave a wrong reason for so doing.

Finally appellants contend the verdict is excessive and given under the influence of passion and prejudice.

The rule in this regard is: "The district court is vested with the power to set aside a verdict if, from the evidence adduced, it appears that the verdict is so exorbitant and excessive as to indicate that it was the result of passion, prejudice, mistake, or some means not apparent in the record, or it is clear that the jury disregarded the evidence or rules of law." Dunn v. Safeway Cabs, Inc., 156 Neb. 554, 57 N. W. 2d 75. We, of course, have the same power on appeal.

Before overruling appellants' alternative motion for either a judgment notwithstanding the verdict or for a new trial the court stated: "* * * the verdict is excessive

and that there must have been contributory negligence in the case and that the verdict should be reduced in the amount of $2500.00 and remittur therefor made by the Plaintiff." It thereupon overruled the motion and ordered: "* * * that the verdict should be reduced by $2500.00 and remittur in that amount be made by the Plaintiff." In consequence of this reduction, judgment was entered in favor of appellee for $7,500, interest, and costs. Appellee has cross-appealed from the order reducing the verdict and we will consider the cross-appeal in connection with the contention made by the appellants that the verdict is excessive.

The trial court was clearly wrong when it considered the matter of contributory negligence in ordering this reduction.

We said in Remmenga v. Selk, 152 Neb. 625, 42 N. W. 2d 186: "In an action for damages, where the law furnishes no legal rule for measuring them, the amount to be awarded rests largely in the sound discretion of the jury and courts are reluctant to interfere with a verdict so rendered."

And in Banta v. McChesney, 127 Neb. 764, 257 N. W. 68, we said: "Where the verdict returned in an action for personal injuries is challenged on appeal solely because excessive, it will not be disturbed by the reviewing court, unless it can say as a matter of law that, upon consideration of all the evidence, the amount of such verdict is excessive."

Also in Plumb v. Burnham, *supra,* we held: "A verdict may be set aside as excessive by the trial court or on appeal only when it is so clearly exorbitant as to indicate that it was the result of passion, prejudice, mistake, or some means not apparent in the record, or it is clear that the jury disregarded the evidence or rules of law."

The record is entirely devoid of any indication that the verdict was the result of passion, prejudice, mistake, or that the jury disregarded rules of law. The

only question is one of whether or not it is clearly excessive or exorbitant in view of the extent of the injuries which the evidence shows the appellee suffered.

Prior to the accident appellee appears to have been a normal 8-year-old child. The immediate effect of the accident was to cause her to become unconscious as a result of severe bruises in the area of her left eye. Immediately following the accident she was taken to a hospital at Lexington, Nebraska. She arrived there in an unconscious condition and the doctor diagnosed her condition as a skull fracture, brain concussion, and contusion of the left eye. She was also bleeding from the nose, which blood was much diluted with what the doctor diagnosed as spinal fluid coming from within the skull. Her condition improved and by Thursday, July 5, 1951, she had regained consciousness. She was then taken by ambulance to a hospital at Kearney where she stayed until July 15, 1951, when she returned to her home, although thereafter she continued to need medical care.

At the time of trial, which was held on September 24 and 25, 1952, she had the following conditions which the evidence shows resulted from the accident: That, for all practical purposes, she had permanently lost the vision of the left eye, having therein only a slight vision of light; that she has frequent and often severe eye and head aches which extend over varying lengths of time; that she has a noticeable scar just outside her brow line; that the left eye is tending to turn outward, or to the left, which will require surgery to correct; that there is some drooping of the left eyelid which, if for appearance's sake it is desirable to have corrected, will require surgery; and there is still a bump on her head but what effect it may have is not shown.

The evidence shows appellee was seriously and permanently injured in a way that will affect and handicap her in all the days of her life in addition to the suffering which she necessarily went through. It would serve

no useful purpose to cite comparable cases for what is proper in any case must necessarily depend upon the facts thereof. Cases are cited by appellee in which greater amounts have been affirmed on appeal for what seems comparable injuries. We find, under all of the facts, that the verdict of $10,000 is not excessive and that the reduction made by the trial court should be restored.

We therefore reverse the action of the trial court in reducing the verdict from $10,000 to $7,500 but in all other respects its actions are sustained. We therefore remand the cause to the trial court with directions to enter judgment on the verdict in accordance herewith. All costs are taxed to appellants.

REVERSED AND REMANDED WITH DIRECTIONS.

MARIE MASON, APPELLANT, V. WALTER A. B. MASON, APPELLEE.

59 N. W. 2d 365

Filed June 26, 1953. No. 33329.

1. **Divorce: Appeal and Error.** An appeal lodged in this court from a decree rendered in a suit for divorce brings the case here for trial de novo.
2. **Divorce.** Upon the granting of an absolute divorce, the trial court may assign the property, both real and personal, acquired during the marriage by the joint efforts of the parties, between them as the demands of justice and equity may require.

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

Charles Ledwith, for appellant.

Homer L. Kyle, for appellee.

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

MESSMORE, J.

This is an action for divorce brought by Marie Mason

against Walter A. B. Mason, defendant. After hearing on the merits, the plaintiff was awarded an absolute divorce from the defendant on the grounds of extreme cruelty and nonsupport.

The plaintiff was awarded the custody of the four minor children of the parties, Frank age 15, at the time of trial in the Kearney Boys Training School, Janet age 12, Roger age 11, and Stanley age 8, living with their mother in Seward. The trial court also approved a personal property settlement arrived at between the parties. The trial court also ordered the parties to execute and deliver a deed of conveyance of the real estate occupied by the plaintiff and her children to a named trustee, to be held in trust by the trustee for the use and benefit of the children of the parties as a home during their minority, or until further order of the court. The decree further provided that the plaintiff and defendant each pay approximately one-half the sum reasonably necessary for the support of the children. The defendant was required to pay $75 a month beginning September 15, 1952, and to continue until the youngest child of the parties attained majority, the payments for child support by the defendant, if promptly paid, to be diminished by the amount which the plaintiff receives out of a fund for the support of the children held by the county judge of Seward County, this credit to be lost if the defendant is in default of payment of any of the court costs, including fees to the plaintiff's attorney.

It appears that previous to the bringing of this action the plaintiff sued the defendant for support money. As a result, the defendant's father deposited $1,000 with the county judge of Seward County, and $50 a month was paid to the plaintiff for the support of the children. This amount was not exhausted at the time the decree was rendered. This accounts for that part of the decree with reference to credit to be given the defendant under certain conditions.

The decree did not award alimony to the plaintiff, but required the defendant to pay all court costs, including a fee to the plaintiff's attorney.

The plaintiff filed a motion for new trial which was overruled. Thereafter the plaintiff perfected appeal to this court.

For convenience we will refer to the parties as designated in the district court.

The plaintiff's assignments of error are as follows: (1) The trial court erred in determining that the real estate of the plaintiff should be conveyed to a trustee, rather than determining that said real estate should be the property of the plaintiff absolutely; (2) the trial court erred in finding that the real estate standing in the name of the plaintiff as the owner of the record title was purchased from the joint earnings of both parties; and (3) the trial court erred in finding that the plaintiff was not entitled to alimony.

That the plaintiff was entitled to an absolute divorce and custody of the minor children of the parties is not in dispute in this appeal, nor is the personal property settlement, or the amount awarded as support money for the minor children of the parties in dispute.

It appears from the record that at the time of trial the plaintiff was 34 years of age, and that the parties were married at Tecumseh, Nebraska, on May 11, 1936. Four children were born to this union. Their names and ages are previously set out. The first 2 or 3 years after the marriage the parties lived with the defendant's parents and the defendant helped his father to operate a sale barn. In 1938 or 1939, the parties moved onto a 240-acre farm owned by the defendant's father, under an agreement to operate the farm on a 50 percent basis. This farm was near Gresham, Nebraska. They remained on this farm for a period of about 9 years. It was sold in 1947, and they moved in with the defendant's parents again. During the period in which the farm was operated, the accounting between the defendant's father

and the defendant and plaintiff seems to have been made in accordance with the agreement. During the early years while the parties were residing on the farm, the defendant would leave on business enterprises for a month, or possibly more, going into other states. In 1946, he left the farm and the plaintiff did not know where he was until April 1948. During this time she remained on the farm with the children, carrying out her part of the farming venture, apparently handling the money that belonged to the parties by virtue of the sale of crops and other farm produce. It is also apparent that the plaintiff had nothing from the farming operations prior to 1947, and there was no income prior to that time which could possibly be attributed to the defendant, other than from farming operations. She gave the defendant money on occasions which he used, and banked money for future use. While the defendant was absent from home he made no contributions to the family expenses. It appears that he was quite willing to let the plaintiff and his parents assume this responsibility. At the time of trial he was on parole for issuing an insufficient fund check. It also appears that he had had previous experience in matters of this nature. He was operating a gravel truck in Omaha, averaging about $50 a week. Suffice it is to say that any contribution he made for the support of the family during his absence or in recent years is nil.

In January 1948, the plaintiff obtained employment with the Elgin Watch Company in Lincoln, Nebraska, commuting from her home in Seward to her place of employment by automobile for a couple of years, and later riding with another employee to work. At the time of trial she worked from 7:30 a. m to 4 p. m. each day. Her earnings amount to between $220 and $240 a month. From this amount is deducted $10 to $20 a month for benefits which accrue to the employees. There is also withholding tax of about $25 a year. She claims the children as exemptions. The money she earns, to-

gether with what she gets for child support, is used for household expenses, clothing, and transportation.

In June 1948, the home that she and the children live in was purchased. The defendant was not present at the time, nor does the record show that he had any interest in this transaction. The purchase price was $3,000. A down payment of $1,500 was made. To make the down payment, $1,150 was withdrawn from the bank. This was crop money saved during the farming venture of the parties. In addition there was $350 earnings from plaintiff's wages. A $1,500 mortgage was executed and delivered to Sarah Mason, an aunt of the defendant who is now deceased. This mortgage draws interest at the rate of 3 percent per annum. A payment of this interest was due June 6, 1953. The books in the county treasurer's office disclose taxes due in the amount of $25.36, plus 37¢ interest for 1951, with all prior taxes paid. Apparently at the time of trial there was $1,716.88 due on the mortgage, interest, taxes, and interest on the taxes.

The house contains six rooms, three of which are bedrooms. It is equipped with electricity, but is not modern. There are five acres of land, and it is about one mile from the courthouse in Seward. The plaintiff testified that in the event she was awarded the real estate she intended to stay in it unless she could sell to advantage and obtain a place closer to her employment.

This appeal brings the case here for trial de novo under the provisions of section 25-1925, R. R. S. 1943. See, Eicher v. Eicher, 148 Neb. 173, 26 N. W. 2d 808; Westphalen v. Westphalen, 115 Neb. 217, 212 N. W. 429.

It is well established that in a divorce suit where the court has jurisdiction of the parties, it has power to adjust all of their respective property interests. Colick v. Colick, 148 Neb. 201, 26 N. W. 2d 820; Sims v Sims, 148 Neb. 771, 29 N. W. 2d 378.

Upon the granting of an absolute divorce, the trial court may assign the property, both real and personal,

acquired during the marriage by the joint efforts of the parties, between them as the demands of justice and equity may require. Johnsen v. Johnsen, 144 Neb. 208, 12 N. W. 2d 837. See, also, Bigelow v. Bigelow, 131 Neb. 201, 267 N. W. 409; Metschke v. Metschke, 146 Neb. 461, 20 N. W. 2d 238; Schrader v. Schrader, 148 Neb. 162, 26 N. W. 2d 617; Sims v. Sims, *supra;* § 42-321, R. R. S. 1943.

With the foregoing authorities in mind, and in the light of the record, we conclude that the decree of the district court, insofar as the property rights to the real estate are concerned, should be modified so that the plaintiff would be assigned and awarded the real estate heretofore described in the opinion which is in her name as record title holder, to be hers absolutely and entirely; that the plaintiff take the real estate subject to the mortgage in the amount of $1,500 executed and delivered to Sarah Mason; and that plaintiff be charged with the payment of the mortgage and the payment of interest due, or to become due thereon, and the taxes assessed or to be assessed against this real estate, and to make such repairs or upkeep as may be necessary to maintain the same. In all other respects the decree of the district court is affirmed.

For the reasons given in this opinion, the decree of the district court is affirmed in all respects except as directed to be modified as provided for in this opinion.

AFFIRMED AS MODIFIED.

FRANK H. PRUCKA ET AL., APPELLEES, V. EASTERN SARPY DRAINAGE DISTRICT, APPELLANT.

59 N. W. 2d 761

Filed July 3, 1953. No. 33230.

1. **Drains.** Where a transcript of objections to the apportionment of benefits is filed within the statutory time under the provisions of section 31-413, R. R. S. 1943, the district court acquires juris-

diction, even though the report of apportionment of benefits is not contained therein due to the mistake and act of the county clerk.

2. **Drains: Judgments.** Where a bona fide attempt has been made to organize a drainage district, the legality of its organization cannot be collaterally attacked for irregularities and defects not affecting the jurisdiction of the tribunal by which it was created, but if the proceedings were in fact void for jurisdictional defects, their nullity may be shown at any time in any character of action.
3. **Drains: Opinion Overruled.** Rudersdorf Drainage Dist. v. Chicago, R. I. & P. Ry. Co., 118 Neb. 43, 223 N. W. 639, is hereby overruled insofar as such opinion is in conflict herewith.
4. **Officers.** When an officer whose duty it is to approve a bond accepts the same for filing, places thereon his filing stamp, and records it in his office, it is presumed, in the absence of competent evidence to the contrary, that such officer performed his duty and approved the bond.
5. **Process: Time.** The requirement of publication of one notice once each week for three weeks in a newspaper is complied with by publication on one day of each of three weeks, that is, three successive weekly publications.
6. ———: ———. In such an instance the notice is complete upon the distribution of the last issue of the paper containing the notice, though three full weeks did not elapse after the first publication.
7. **Drains.** The organization of a drainage district and the operation thereof after its establishment subserve public interests and not the private advantage to be gained by any property owner.
8. **Officers.** The de facto officer doctrine does not rest upon a vindication of the right of one to occupy a position or to perform official acts but upon the principle of protection to the interests of the public and third parties.
9. ———. The acts of officers de facto with respect to matters affecting the public interests are to be regarded as valid and binding, as much so as if the same acts had been performed in the same manner by an officer de jure, and the legality of such acts may not be collaterally attacked.

APPEAL from the district court for Sarpy County: CARROLL O. STAUFFER, JUDGE. *Affirmed as modified.*

William R. Patrick and *Smith & Smith,* for appellant.

Tesar & Tesar and *Burbridge & Burbridge,* for appellees.

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

CHAPPELL, J.

Frank H. Prucka and Margaret Prucka, hereinafter called plaintiffs, filed a complaint with the county clerk as provided by section 31-413, R. R. S. 1943, objecting to any determination of units of benefits and assessments that might be levied against them on their described lands by Eastern Sarpy Drainage District, hereinafter called defendant. Insofar as important here, their objections were in substance: (1) That the district was not lawfully organized or existent as a drainage district under Chapter 31, article 5, Compiled Statutes of Nebraska, 1929, then applicable thereto, and thus had no authority to determine any units of benefit or levy any assesments against their lands; (2) that the pretended action taken by the district's board of directors was null and void for want of any authority to act, because they had failed to give proper bond and take proper oath as required by statute; and (3) that said board failed to give jurisdictional notice to the landowners of a hearing upon reapportionment of benefits as required by section 31-449, R. R. S. 1943.

An order of the trial court was entered consolidating seven other cases, specifically reciting the docket numbers thereof, for trial with the case named in the title of this opinion, and providing that all rulings and orders made in this case were to have equal force and effect in all of such cases. That order is not questioned, and this opinion disposes of all such cases.

After hearing, whereat voluminous evidence was adduced, the trial court rendered its decree, the effect of which was to sustain plaintiffs' objections aforesaid; conclude that the district had no legal existence as a drainage district; that its officers were neither de facto nor de jure officers; and that the attempt of the district to make determination of units of benefits, reapportion

same, and levy assessments therefor, was without jurisdiction, null and void. Such decree was rendered and ordered entered in each and every one of the consolidated cases with like force and effect.

Defendant's motion for new trial was overruled, and it appealed, assigning substantially that the trial court erred: (1) In permitting plaintiffs to file a supplemental transcript in the district court to include therein the report of reapportionment of benefits; (2) in allowing legal existence of the district to be litigated as an issue; (3) in depriving the district of substantial rights by concluding that it was not a legally existing district and had no jurisdiction to determine units of benefit or levy assessments; and (4) in concluding that the action of directors of the district in attempting to do so was null and void because they failed to give proper bond and take proper oath as provided by statute. We sustain the above third and fourth assignments, but conclude that assignments one and two have no merit. In that connection, however, defendant conceded that the district failed to give proper notice to landowners of hearing upon reapportionment of benefits as required by section 31-449, R. R. S. 1943, and that the trial court was correct in concluding that the purported reapportionment was null and void for that jurisdictional reason. Therefore, we affirm the judgment as modified herein.

Section 31-413, R. R. S. 1943, provides: "Any person claiming to be aggrieved by such apportionment of the benefits may file complaint thereof with the county clerk within twenty days after the third publication of the notice provided for by section 31-412, together with a bond running to the district, with surety or sureties to be approved by the county clerk, conditioned to pay all costs that may be adjudged against such complainant, if the appeal be not sustained. Thereupon the county clerk shall make a transcript of the objections and of the report of apportionment of benefits, and such appellant

shall, within ten days thereafter, file such transcript in the district court of the county, and such court shall hear and determine all such objections in a summary manner as in a case in equity, and shall increase or reduce the units of benefits on any tract where the same may be required in order to make the apportionment equitable. All objections that may be filed shall be heard and determined by the court as one proceeding, and only one transcript of the report of the apportionments shall be required." In that connection, as provided in section 31-449, R. R. S. 1943, when a reapportionment of benefits is attempted, "appeals may be taken therefrom as provided in the original apportionment."

Plaintiffs complied with such provisions, and filed their complaint with the county clerk, whereupon, at plaintiffs' request, the clerk prepared a transcript, and plaintiffs duly filed same in the district court. However, it was subsequently discovered that the county clerk had failed to include "the report of the reapportionment of benefits" in the transcript, and defendant filed objections to jurisdiction upon that ground. Plaintiffs thereafter made a proper showing that the omission was entirely due to the fault, mistake, and acts of the county clerk, whose duty it was to make the transcript "of the objections and of the report of apportionment of benefits," whereupon the trial court overruled defendant's objections and sustained plaintiffs' motion for permisison to have diminution of the record and file a supplemental transcript. That was done. Defendant's first assignment relates to such action.

In In re Estate of House, 144 Neb. 870, 15 N. W. 2d 56, this court held: "Where, as here, a duty is placed upon a public officer to perform acts necessary to per- to the litigant nor operate to defeat the appeal. In re Estate of Tagart, 119 Neb. 647, 230 N. W. 492." See, also, Dobesh v. Associated Asphalt Contractors, 137 Neb. 342, 289 N. W. 369; Schuyler v. Hanna, 28 Neb. 601, fect an appeal, his failure to perform cannot be chargea

44 N. W. 731, 11 L. R. A. 321. In that connection, Chicago, B. & Q. R. R. Co. v. Platte Valley Drainage Dist., 113 Neb. 49, 201 N. W. 648, is directly in point and controls a conclusion that defendant's contentions with regard to the transcript have no merit. By analogy, from the afore-cited cases, the applicable rule is that where a transcript of objections to the apportionment of benefits is filed within the statutory time under the provisions of section 31-413, R. R. S. 1943, the district court acquires jurisdiction even though the report of apportionment of benefits is not contained therein due to the mistake and act of the county clerk.

We turn then to defendant's second assignment to determine whether or not legality of the existence of the district or legal status of its officers could properly be litigated in the light of plaintiffs' objections. In that connection, we conclude that whether or not there was a legally existing district could be litigated in the light of plaintiffs' objections, but since we conclude that defendant was a de jure district, the status of its officers could not be so collaterally attacked.

The general rule is: "In accordance with general rules fully noticed elsewhere in this work, the courts are fully agreed that nonjurisdictional irregularities and defects in the formation of a drainage, sewerage, or reclamation district can be challenged only in a direct proceeding to test the validity of its organization, and cannot even be considered in a collateral suit. But if the proceedings were in fact void, their nullity may be shown in any character of action." 17 Am. Jur., Drains and Sewers, § 24, p. 793.

In Township of Lake v. Millar, 257 Mich. 135, 241 N. W. 237, it is said: "The rule is that errors and irregularities in drain proceedings must be taken advantage of by certiorari, but an entire want of jurisdiction may be taken advantage of at any time." See, also, Cordes v. Board of Supervisors, 197 Iowa 136, 196 N. W. 997, wherein legal existence of a district was raised for the

first time on appeal, but the court said: "Under the authority cited, we think the question was one that could properly be raised for the first time on appeal; * * *."

In Lightner v. Greene County, 145 Iowa 95, 123 N. W. 749, the landowner appeared before the district's board and filed objections to the proposed assessment, which were overruled. He then appealed to the district court and there moved to cancel the assessments, among other reasons because there never had been any legal establishment of the district and the board who made the assessment was thus never legally selected, and their return was void. In that opinion it is said: "From the record it is apparent that the trial court was of opinion that the board of supervisors had no jurisdiction of the proceedings and lacked power to make any assessment whatever. Being of that mind it concluded that the district court was also without jurisdiction and it therefore, in effect, dismissed the proceedings as having been void ab initio, and canceled and set aside the assessments. Now while the proceedings are somewhat unusual in that the statute provides for the filing of objections before the board, appeal to the district court, and a trial there as in equity * * * yet if the board of supervisors, for any reason, never acquired any jurisdiction or right to act at all in the premises, and this clearly appears from the record, doubtless the court might, on motion, at any time during the course of or even before the trial, dismiss the entire proceedings and cancel the assessment; but before such summary proceedings can be sustained it must appear that the board was without jurisdiction to act at all in the premises."

Drainage Dist. No. 1 v. Village of Hershey, 139 Neb. 205, 296 N. W. 879, was a suit by a district to collect taxes assessed by it upon lands which were not lawfully subject to assessment. The defense was that they were void for want of any authority or jurisdiction to levy the assessments. No appeal had been taken from the assessment. This court, assuming that the action of the

district's board was in the nature of an adjudication by an administrative body, affirmed the district court which had concluded that the judgment of such board was void and subject to collateral attack. In the opinion it is said: "The action of the plaintiff's board of supervisors in making the assessments in the instant case resulted in a judgment void on its face, and it requires only an inspection of the record to demonstrate such fact. Its status is that of a mere nullity and, in legal effect, no judgment at all, conferring no right and affording no jurisdiction. 1 Freeman, Judgments (5th ed.) 642, sec. 322. * * * The determination of a board of supervisors of a drainage district, levying or confirming a drainage assessment, is subject to collateral attack, where such assessment is absolutely void, as for fraud or demonstrable mistake of fact. See 19 C. J. 745." See, also, Campbell v. Youngson, 80 Neb. 322, 114 N. W. 415.

In State ex rel. Sheffer v. Fuller, 83 Neb. 784, 120 N. W. 495, no notice was given of change of boundaries of the district as required by law, and action of the directors was void for want of any jurisdiction to make the same. In the opinion it is said: "We are of opinion that landowners have a right to rely upon the district being formed, if created at all, in conformity with said notice, and, if the commissioners change those boundaries so that the notice does not truly describe them, any landowner who did not have knowledge of the change or participate in that election may, by timely appeal to the courts, successfully challenge the legal existence of said district. City of Atlanta v. Gabbett, 93 Ga. 266; Payson v. People, 175 Ill. 267."

O'Neill v. Leamer, 93 Neb. 786, 142 N. W. 112, affirmed in 239 U. S. 244, 36 S. Ct. 54, 60 L. Ed. 249, was a suit to enjoin the supervisors of a drainage district from proceeding further with construction of a ditch across plaintiff's land. In that opinion it is said: "The plaintiffs contend that the drainage district was not regularly organized, and seem to insist that the proceedings were

so defective that the court was without jurisdiction, and the district is not even a de facto corporation. The objections suggested, however, relate to supposed defects in serving of notice on some of the parties interested in the formation of the district, and other similar matters, none of which is of sufficient importance to affect the jurisdiction of the court or subject its judgment to this collateral attack. * * * Errors, if any, not affecting the jurisdiction of the court should have been corrected in that court or upon appeal."

In Scottsbluff Drainage Dist. v. Scotts Bluff County, 113 Neb. 187, 202 N. W. 455, the district apportioned units of benefit to certain county highways. The county made no objection thereto, and took no appeal therefrom. Assessments made were unpaid by the county and the district filed a claim therefor which was disallowed. Upon appeal therefrom to the district court, a judgment was rendered in favor of the district. Upon appeal to this court, we affirmed that judgment, holding: "If timely objection is not made, even serious irregularities which do not affect the jurisdiction of the board cannot be made matter of effectual defense after apportionment and assessment duly made." In the opinion it is said: "The errors which we are considering are irregularities not affecting jurisdiction. This view finds support in White v. Papillion Drainage District, 96 Neb. 241."

Haecke v. Eastern Sarpy County Drainage Dist., 141 Neb. 628, 4 N. W. 2d 744, cited and discussed the last two cases aforesaid. Such case was an appeal from an apportionment of benefits. In the opinion it is said: "The proper organization of the district under the provisions of chapter 31, art. 5, Comp. St. 1929, is not questioned." Nevertheless, the apportionment was held by this court to be void for failure of the district to precedently make "'detailed plans of the public work to be done'" in an appropriate manner as required by section 31-511, Comp. St. 1929. In that connection, we held: "The question of compliance with this condition

precedent and the sufficiency of plans adopted for that purpose may be presented to the district court on appeal from an order of apportionment of benefits." In other words, we concluded that such step was a jurisdictional requirement which could be presented to the district court on appeal from an order of apportionment of benefits. As logically, the legal existence of the district, a jurisdictional requirement, could also be litigated.

Chicago & N. W. Ry. Co. v. Payne Creek Drainage Dist., 148 Neb. 139, 26 N. W. 2d 607, supports that conclusion. It was an injunction suit challenging jurisdiction of the district to levy units of benefits or to otherwise proceed, for the reason that there were jurisdictional defects in procedure for organization of the district. Plaintiff had not appealed from any proceeding with reference to organization of the district. The trial court sustained a demurrer to plaintiff's petition, denied temporary injunction, and dismissed the action. We affirmed, holding and applying the rule that: "Where a bona fide attempt has been made to organize a drainage district, the legality of its organization cannot be collaterally attacked for irregularities and defects not affecting the jurisdiction of the tribunal by which it was created." In the opinion it is said: " 'Drainage proceedings may be collaterally attacked where they are not merely irregular, but are void for jurisdictional defects, * * *.' 28 C. J. S., Drains, § 36, p. 335.

"Defects on the face of the record showing want of jurisdiction are ground for collateral attack. See 19 C. J., Drains, § 45, p. 635, note 70 (b); Donner v. Highway Comrs., 278 Ill. 189, 115 N. E. 831.

"Appellant cites Haecke v. Eastern Sarpy County Drainage District, 141 Neb. 628, 4 N. W. 2d 744: " 'Statutory provisions authorizing assessments of special taxes against property benefited by public improvements are to be strictly construed, and it must affirmatively appear that the taxing authorities have taken all steps which the law makes jurisdictional; the failure of the

record to show such proceedings will not be aided by presumptions." Morse v. City of Omaha, 67 Neb. 426, 93 N. W. 734.' "

In 19 C. J., Drains, § 258, p. 742, it is said: "Only those objections made before the board or other tribunal, except those going to the jurisdiction of such tribunal, may be considered on appeal. * * * The court may, on appeal, reduce the amount of an assessment when it is inequitable and excessive, or it may set it aside for fraud, gross error, or apparent mistake, or for want of jurisdiction of the board making the apportionment."

Likewise, in 28 C. J. S., Drains, § 36, p. 333, it is said: "The legality of the organization of a drainage district ordinarily cannot be collaterally attacked, except for defects which show that it has no de facto existence or the organization is void for want of jurisdiction." As stated at page 334: "However, the rule prohibiting collateral attack does not preclude one from asserting that the district has no de facto existence, as that it was organized under a void statute; nor does such rule preclude one from asserting that the proceedings were void for want of jurisdiction." As stated at page 335: "Drainage proceedings may be collaterally attacked where they are not merely irregular, but are void for jurisdictional defects, such as want of proper notice, and if there is an entire want of jurisdiction it may be taken advantage of at any time."

The aforesaid citations sustain our conclusion that the legal existence of the district may be litigated in proceedings such as are here involved. In that connection, Baker v. Morrill Drainage Dist., 98 Neb. 791, 154 N. W. 533, is distinguishable because no objection was made therein that the district had no legal existence. Such case involved only alleged irregularities as distinguished from jurisdictional defects. In Rudersdorf Drainage Dist. v. Chicago, R. I. & P. Ry. Co., 118 Neb. 43, 223 N. W. 639, objection was made, among others, that: "The district was not organized according to law, * * *."

Therein, citing Baker v. Morrill Drainage Dist., *supra,* as authority, which was not in point or controlling, it was concluded, among other things, that the landowner, having made objection to the assessment of benefits ,and having appeared and opposed the levy of assessments by prosecuting an appeal from such assessment to the district court, waived the right to declare the assessment void. In such respect, and insofar as such opinion is in conflict herewith, it is overruled as erroneous.

The question then is whether or not the district was legally organized or had a de facto existence. We conclude that it was legally organized as a de jure district, and that its board of directors were at least de facto officers whose authority to act, as here, affecting the public interest and third persons, was not subject to collateral attack.

In that connection, it was stipulated at the trial that "the Eastern Sarpy Drainage District is a drainage district organized by landowners pursuant to petition filed with the County Clerk of Sarpy County, Nebraska, as provided by the statutes of the State of Nebraska in full force and effect." However, it is claimed by plaintiffs that such stipulation has other implications, so we discuss the issues upon their merits as presented to this court.

The district was organized in 1939, and has generally functioned as such ever since. Concededly the applicable statutes existent at the time of its organization will be found in Chapter 31, article 5, Comp. St. 1929. Section 31-501, Comp. St. 1929, insofar as important here, provided that: "Whenever it will be conducive to the public health, convenience or welfare, * * * a drainage district may be formed and may proceed as hereinafter provided, * * *." In that connection, section 31-502, Comp. St. 1929, provided for the filing of a petition by landowners with the county clerk praying for the formation of such district. No complaint was made herein with regard

to sufficiency of defendant's petition.

Section 31-503, Comp. St. 1929, provided: "At the time of filing the petition the petitioners shall also file a bond with surety or sureties to be approved by the county clerk which bond shall run to the said county and be conditioned to pay all expenses of the county by reason of such proceedings in case the district be not formed." Plaintiffs argued that the furnishing of such bond was a jurisdictional requirement and that the bond was invalid because it was not in proper form, was signed only by a petitioner as surety, and was never approved by the county clerk. The condition of the bond, running to the county, made a part of and tendered with defendant's petition, signed by 18 landowners, was that petitioners would "pay all expenses of the county by reason of such proceedings in case the district be not formed," which are the identical words used in the statute. Therefore, the bond was in proper form. Contrary to plaintiffs' contention also, the bond was in fact signed by the 18 petitioners and a surety, who was also a petitioner. It was also witnessed.

As stated in O'Brien v. Schneider, 88 Neb. 479, 129 N. W. 1002, appeal dismissed in 229 U. S. 629, 33 S. Ct. 774, 57 L. Ed. 1358: "The statute does not require the petitioners to sign the bond, but to file a bond. A document is filed with an officer when it is placed in his custody and deposited by him in the place where his official records and papers are usually kept. * * * Neither does the statute provide that the surety shall be other than a petitioner. Unless the petitioners sign the bond, they are not liable for costs, and there is no good reason why the clerk should not accept a solvent petitioner as surety on the undertaking."

Across the face of the bond appears the written and signed approval of the bond and surety thereon by all three county commissioners. On the back of it appear the words: "Filed Oct 16 1939 Besse Deter County Clerk." True, her written approval does not appear on

the bond, but the statute does not require it. As stated in 43 Am. Jur., Public Officers, § 405, p. 180: "An acceptance or approval of an official bond should be made in the manner prescribed by statute. In any case, of course, it may be in writing, but unless the statute requires a writing, it may be verbal, for no formal acceptance or approval seems necessary. As a practical matter, when delivered to the representative of the government it becomes a binding obligation, unless disapproved by him. Then, too, an implication of approval and acceptance may arise from the facts and circumstances, as where the officer or official body charged with the duty of approving and accepting it retains it without objection for a longer time than the statute requires."

In Seng v. Payne, 87 Neb. 812, 128 N. W. 625, this court said: "A bond conditioned that the makers thereof would 'pay all cost that may occur in case the bord (board) of commissioners find against such improvement,' signed by two of the petitioners, was produced by the county clerk as part of the files of his office in the matter of the location of the ditch. It appears that the bond was filed, but beyond this fact there is no record that the undertaking was approved. We are of opinion, however, that at this late day, in view of the action of the board in locating and constructing the ditch, the bond should be held to have been approved by the board, and that, although the board could have demanded sureties not petitioners for the ditch, yet they were not compelled to do so, and the bond under the circumstances of this case should be held sufficient." See, also, Cortelyou v. Maben, 40 Neb. 512, 59 N. W. 94; Less Land Co. v. Fender, 119 Ark. 20, 173 S. W. 407.

The applicable rule is that when an officer whose duty it is to approve a bond accepts the same for filing, places thereon his filing stamp, and records it in his office, it is presumed, in the absence of competent evidence to the contrary, that such officer performed his

duty and approved the bond. There is no merit in plaintiffs' contention that defendant did not furnish a proper bond as required by statute.

There is no contention that the county board did not comply in every material respect with section 31-504, Comp. St. 1929. In that connection, State ex rel. Harris v. Hanson, 80 Neb. 724, 115 N. W. 294, held that: "The establishment of the boundaries of a proposed drainage district is prima facie evidence that the county commissioners proceded regularly in the establishment thereof and that all conditions precedent have been complied with."

Section 31-505, Comp. St. 1929, insofar as important here, provided: "Thereupon the county clerk shall publish one notice once each week for three weeks in a newspaper published in the proposed district, * * * which notice shall state the filing of the petition; that it is filed under the provisions of this article, giving full title thereof in full; the boundaries of the proposed district as fixed by the county board; that an election will be held at a certain place in the proposed district, which place shall be named in said notice between the hours of 8 o'clock a. m. and 6 o'clock p. m. on a day named therein; that at said election the question of the formation of the proposed district shall be determined; and a board of directors elected, giving the number of such board, such board to take office contingently on the formation of the district."

The provisions of Chapter 31, article 5, Comp. St. 1929, were originally adopted as Chapter 153, Laws of Nebraska, 1907, p. 474, where the full title of the act appears. Section 5 thereof provided in part: "* * * which notice shall state the filing of *said petition;* that it is filed under the provisions of *this law,* giving the title hereof in full; * * *." (Italics supplied.) Since that time, by amendments or revision simply for the purpose of uniformity and clarity, such language has been changed to read, *"the petition"* and *"this article"* which

in legal effect never changed the meaning thereof.

In this case the county clerk concededly published the notice respectively on November 23, November 30, and December 7, 1939, in the Papillion Times, a legal weekly newspaper of general circulation in Sarpy County. Such notice read in part: "LEGAL NOTICE Notice is hereby given that a petition for the formation of a drainage district under the name of Eastern Sarpy Drainage District has been filed with the county clerk of Sarpy County, Nebraska, pursuant to the provisions of an act to provide for * * *." Thereafter the title of such act was recited in full, except for a few words which were an unnecessary duplication therein. Thereafter appeared the following: "* * * adopted by the Nebraska Legislature in 1907. That the board of commissioners of said county, in the manner required by law, have determined and fixed the boundary line of said proposed district as follows: * * *." Thereafter, such boundary line was minutely specified, defined, and recited, after which it was said: "* * * and have ordered that said district, if formed, shall have a board of five directors, who shall give bond in the sum of $1000 each.

"An election to determine whether such district shall be formed, and for the election of a board of five directors, to serve if said district is formed, will be held at the Fort Crook School House in School District No. 40 of said county, between the hours of eight o'clock a. m. and six o'clock p. m. on Saturday, the 9th day of December, 1939, such board of directors to take office contingently upon the formation of said district. Besse Deter, County Clerk."

Plaintiffs argued that the notice was invalid because it used the words "provisions of an act * * * adopted by the Nebraska Legislature in 1907" and did not specifically point out or use the words "Article 5" of the Compiled Statutes of 1929, in order that people in the district would know by what method the district was being organized. In that regard, the very language of the

notice itself gave notice that the district was being organized by vote of the landowners, and at such election there were 2,618 votes cast in favor of forming the district and 1,461 votes against doing so. Such contention has no merit. As stated in State ex rel. Sheffer v. Fuller, *supra*: "The statute does not direct that actual notice shall be given the landowners of the limits of the proposed district, but that notice shall be published once each week for three weeks in a newspaper published at the county seat of every county wherein any of the land of the proposed district is situated. The notice must contain the title to the act and a description of the boundaries of the proposed district as fixed by the county commissioners." The notice here involved did just that and more. In that respect it was not invalid, but met the requirements of the statute.

It was next argued by plaintiffs that the notice was invalid because not published for the period of time prescribed by section 31-505, Comp. St. 1929. In that connection, they rely upon section 25-2227, R. R. S. 1943, contending that 21 full days should have elapsed between the first publication and the election. It will be noted that the 1929 statute reads: "Thereupon the county clerk shall publish one notice once each week for three weeks" which is not a requirement of publication "for three weeks." The distinctions between such provisions will be found in State ex rel. Harris v. Hanson, *supra*, and Bancroft Drainage District v. Chicago, St. P., M. & O. Ry. Co., 102 Neb. 455, 167 N. W. 731. Recently, in Johnson v. Richards, 155 Neb. 552, 52 N. W. 2d 737, this court disposed of plaintiffs' argument by holding: "The requirement of publication of a notice in a newspaper three weeks successively is complied with by publication on one day of each of three weeks, that is, three successive weekly publications.

"In such an instance the notice is complete upon the distribution of the last issue of the paper containing the notice though three full weeks did not elapse after the

first publication." We conclude that the notice was properly published as required by statute.

The record discloses that five directors were duly elected at the election held in response to such notice, and each and all of them subsequently gave proper bonds which were approved by the county clerk and filed and recorded in her office, as required by section 31-505, Comp. St. 1929. Their oath of office was attached to and made a part of each director's bond.

We conclude that the district was and is a de jure public corporation which through its officers has been functioning as such. Also, concededly, its directors are to be considered as public officers vested with the power of carrying on the business of the district as prescribed by statute and charged with the responsibility of providing for and securing the lawful exercise of such powers and the protection of public and private interests. White v. Papillion Drainage Dist., 96 Neb. 241, 147 N. W. 218; Drainage Dist. No. 1 v. Suburban Irrigation Dist., 139 Neb. 333, 297 N. W. 645. In such respect, section 31-410, R. R. S. 1943, relating to directors' bonds, provides: "When so filed such person so elected shall take and hold office until his successor is elected and qualified."

Further, as said in State ex rel. Harris v. Hanson, *supra,* reaffirmed in 80 Neb. 738, 117 N. W. 412: "The organization under the act and the operation of the district once established will, as we have attempted to show, subserve public interests, and the property taken and taxes imposed by reason thereof will not be a violation of the constitution." In such opinion it was held: "The phrase, 'with a view to promoting the interests of said drainage district,' used in said act relative to the duties of the county commissioners in establishing the said district, means the public interest, and not the private advantage to be gained by any property owner." See, also, § 31-501, Comp. St. 1929.

In McCollough v. County of Douglas, 150 Neb. 389, 34

N. W. 2d 654, this court held: "An 'officer de jure' is one who is in all respects legally appointed and qualified to exercise the office; one who is clothed with full legal right and title to the office, in other words, one who has been legally elected or appointed to an office, and who has qualified himself to exercise the duties thereof according to the mode prescribed by law.

"A person is a de facto officer where the duties of the office are exercised (1) without a known appointment or election, but under such circumstances of reputation or acquiescence as were calculated to induce people, without inquiry, to submit to or invoke his action, supposing him to be the officer he assumed to be; (2) under color of a known and valid appointment or election, but where the officer had failed to conform to some precedent, requirement, or condition, as to take an oath, give a bond, or the like; (3) under color of a known election or appointment, void because the officer was not eligible, or because there was a want of power in the electing or appointing body, or by reason of some defect or irregularity in its exercise, such ineligibility, want of power, or defect being unknown to the public; (4) under color of an election or an appointment by or pursuant to a public, unconstitutional law, before the same is adjudged to be such.

"The de facto officer doctrine does not rest upon a vindication of the right of one to occupy a position or to perform official acts but upon the principle of protection to the interests of the public and third parties." In so holding, we relied upon and cited with approval 43 Am. Jur., Public Officers, § 471, p. 225, and § 470, p. 224 thereof. In the latter section it is said: "The law validates the acts of de facto officers as to the public and third persons on the ground that, although not officers de jure, they are, in virtue of the particular circumstances, officers in fact whose acts public policy requires should be considered valid."

In Freeman v. City of Neligh, 155 Neb. 651, 53 N. W.

2d 67, this court said: " 'The acts of a de facto officer are valid and binding, so far as the interests of the public or third persons are involved.' Magneau v. City of Fremont, 30 Neb. 843, 47 N. W. 280, 27 Am. S. R. 436, 9 L. R. A. 786. See, also, State v. Gray, 23 Neb. 365, 36 N. W. 577.

"As stated in 62 C. J. S., Municipal Corporations, § 493, p. 934: 'Offices are created for the benefit of the public, * * *. For the good order and peace of society their authority is to be respected and obeyed, until in some regular mode prescribed by law their title is investigated and determined. The de jure existence of corporate offices and officers may be determined only in a direct proceeding * * * and the title or right of a de facto officer to the office may not be collaterally attacked. * * * The acts of officers de facto with respect to public matters affecting the public interests are to be regarded as valid and binding; as much so as if the same acts had been performed in the same manner by an officer de jure, and the legality of such acts may not be collaterally attacked.' " See, also, 43 Am. Jur., Public Officers, § 495, p. 241, where it is said: "The general rule is that the acts of a de facto officer are valid as to third persons and the public until his title to office is adjudged insufficient, and such officer's authority may not be collaterally attacked or inquired into by third persons affected. The practical effect of the rule is that there is no difference between the acts of de facto and de jure officers so far as the public and third persons are concerned. The principle is placed on the high ground of public policy, and for the protection of those having official business to transact, and to prevent a failure of public justice."

In 43 Am. Jur., Public Officers, § 483, p. 234, it is said: "A person may also be a de facto officer when the only defect in his title is due to his failure to perform some step required to perfect his legal title to the office, such as taking an oath, giving of a proper bond, or the like.

Although the rule appears otherwise in some states under statutes to the effect that an office shall be vacant upon failure to qualify within a given time, such enactments have usually, it seems, been construed as not preventing a person from being a de facto officer." See, also, 43 Am. Jur., Public Officers, § 484, p. 235, where it is said: "The rule has been generally stated that where an officer under color of right or title continues in the exercise of the functions and duties of the office without legal authority after his term of office has expired, or after his authority to act has ceased, he is an officer de facto."

In the light of such applicable rules, we conclude that the directors of the district serving at the time here involved were at least de facto if not de jure officers, and that their authority to act as such could not be collaterally attacked in the respects here attempted. Whether or not, as a matter of fact, any of them failed and neglected to give proper bond and take proper oath as found by the trial court would not be controlling under the circumstances, and we are not required to discuss such issues at length in this opinion.

For reasons heretofore stated, we decide that the trial court erred in concluding that there was no legally existing district and that its directors had no authority to act either as de facto or de jure officers. However, the decree was concededly correct in adjudging that the reapportionment was null and void for want of notice, as required by section 31-449, R. R. S. 1943.

Therefore, the judgment of the trial court should be and hereby is affirmed as modified herein. All costs are taxed to plaintiffs.

AFFIRMED AS MODIFIED.

SIMMONS, C. J., dissenting.

I dissent from that part of the court's opinion which holds that the legal existence of the district and the legal status of its officers can be litigated in this proceeding.

It is to be remembered that this is an appeal in a special statutory proceeding under section 31-413, R. R. S. 1943. The question is not: Can the question of the legality of the organization of a drainage district be challenged collaterally? That, however, is the question which the court poses and answers. The court quotes the statute and thereafter pays no further attention to it. It being a statutory matter it is my thought that we should examine the statute to determine what jurisdiction the district court has been given *in this proceeding.* That is the question which this appeal presents.

An analysis of Chapter 31, article 4, Reissue Revised Statutes of Nebraska, 1943, answers the question here presented.

The first sections of the article deal with the organization of a district. Section 31-411, R. R. S. 1943, provides for the apportionment of benefits. Section 31-412, R. R. S. 1943, provides for a hearing on objections before the directors of the district, a determination by them of apportionment, a filing of their report, and a publication of notice of the action taken. Section 31-413, R. R. S. 1943, then provides that a person "claiming to be aggrieved by such apportionment of the benefits may file complaint thereof." The county clerk is then to make "a transcript of the objections and of the report of the apportionment of benefits." That transcript is to be filed in the district court of the county where "all such objections" are to be heard and determined by the court "in a summary manner as in a case in equity, and shall increase or reduce the units of benefits on any tract where the same may be required in order to make the apportionment equitable." Section 31-414, R. R. S. 1943, provides that the procedure of sections 31-411 to 31-413, R. R. S. 1943, shall apply if a change of plans or enlargement or extension of the work makes a different apportionment necessary. Section 31-449, R. R. S. 1943, provides for a reapportionment where a levy is invalid. It is quite apparent that these procedures

go to the general matter of apportionment and reapportionment of benefits. The proceedings of section 31-413, R. R. S. 1943, are somewhat akin to an equalization proceeding. At no point in the sections mentioned is there any suggestion of a right or power to go beyond the particular scope of these proceedings and to convert them into an action to test either the legality of the district or the legal status of its officers. This procedure is not designed to accomplish that purpose.

As a general rule, where a statutory remedy is prescribed for a particular purpose, it cannot be used for other purposes. 1 C. J. S., Actions, § 5, p. 973; 1 C. J., Actions, § 100, p. 988.

The statute, section 31-413, R. R. S. 1943, limits the scope of the proceedings and the remedy to be had in the district court. It provides for no pleadings, process, or proceedings as in an ordinary action. It provides for a "complaint" by one "aggrieved by such apportionment of benefits." It provides for a "transcript of the objections" to be filed in the district court. It provides that the district court "shall hear and determine all *such* objections in a *summary manner* as in a case in equity." It provides that the district court "shall increase or reduce the *units of benefit* on any tract where the same may be required in order to make the apportionment equitable." (Emphasis supplied.)

Obviously the "such objections" relates back to the claim that a party is aggrieved by the apportionment of benefits, and limits the scope of the proceedings to objections dealing with that question.

The statute prescribes the order which the court may enter in clear and unmistakable language.

The words "summary manner," as commonly employed in statutes, mean a short, concise, and immediate proceeding to determine issues within the narrow scope of the statutory remedy. Phil Hollenbach Co. v. Hollenbach, 181 Ky. 262, 204 S. W. 152, 13 A. L. R. 524; McKown v. Powers, 86 Maine 291, 29 A. 1079; Matlon v. Matlon,

92 Ind. App. 350, 175 N. E. 369; Goodwin v. Calumet Supply Co., 107 Ind. App. 487, 23 N. E. 2d 602.

We have held: "The board of equalization is simply what its name imports, a board for the equalization of values in certain cases. It possesses no powers save those conferred by statute, and its jurisdiction must appear on the face of the record of its proceedings." State ex rel. Goff v. Dodge County, 20 Neb. 595, 31 N. W. 117. See, also, Brown v. Douglas County, 98 Neb. 299, 152 N. W. 545. "Upon the appeal of a landowner from the findings and order of assessment made by the drainage board, the question of the amount of benefits to his land can always be tried, * * *." Drainage Dist. v. Bowker, 89 Neb. 230, 131 N. W. 208. "It will be observed that section 5901, Comp. St. 1922, is wholly devoted to the subject of the equalization of assessments and procedure prescribed therefor, including provisions for review of the final determinations therein made. It would seem, in view of all the provisions referred to, that the concluding portion of section 5901, Comp. St. 1922, must be limited to proceedings contemplated and regulated by this section." Elmen v. State Board of Equalization & Assessment, 120 Neb. 141, 231 N. W. 772.

Nebraska Telephone Co. v. Hall County, 75 Neb. 405, 106 N. W. 471, involved an appeal from the county equalization board to the district court. In the district court the taxpayer undertook to raise a new issue to the effect that it had erroneously reported its property and asked to raise that objection. The statute provided: "The court shall hear the appeal as in equity and without a jury, and determine anew all questions raised before the board which relate to the liability of the property to assessment, or the amount thereof, * * *." Comp. St. 1905, c. 77, art. I, § 124, p. 1311; Ann. St. 1903, § 10523. We held that the issues in the district court under that statute were limited to those questions raised before the board of equalization.

In Reimers v. Merrick County, 82 Neb. 639, 118 N.

W. 113, which was an appeal from a decision of the board of equalization, the taxpayer undertook to raise in the district court the question of constitutionality of the act. We held, citing the Telephone case, that: "Whenever the legislature provides for an appeal to a court from a decision of a board of equalization, that court, no matter what may be its grade, is one of limited jurisdiction for said purpose, and must keep strictly within the letter of the statute defining its power. * * * The legislature, in the section of the revenue law referred to, has seen fit to restrict the district court on such appeal to a consideration of the questions raised before said board, and the court is without power to adjudicate any other issue in that proceeding."

In Bute v. Hamilton County, 113 Neb. 230, 202 N. W. 616, there was an effort to raise questions here not presented to the board of equalization. We followed these two cases and held that that could not be done. See, also, Mid-Continent Airlines, Inc. v. State Board, 154 Neb. 371, 48 N. W. 2d 81; In re Turrell, 63 Misc. Rep. 502, 117 N. Y. S. 764; Self v. Indian Creek Drainage Dist., 158 Miss. 7, 128 So. 339.

Consistent with these decisions I would hold that in the proceedings provided by section 31-413, R. R. S. 1943, a party claiming to be aggrieved by an apportionment of benefits by a drainage district cannot properly challenge the legality of the organization of the district nor the legal status of its officers.

The court ignores the above decisions of this court which point directly to the correct answer here and quotes from cases and texts dealing with collateral attack generally.

Township of Lake v. Millar, 257 Mich. 135, 241 N. W. 237, was an action in equity for an injunction; Drainage Dist. No. 1 v. Village of Hershey, 139 Neb. 205, 296 N. W. 879, was a suit for judgment upon taxes assessed; State ex rel. Sheffer v. Fuller, 83 Neb. 784, 120 N. W. 495, was an action in quo warranto to dissolve a district

and oust its acting directors; O'Neill v. Leamer, 93 Neb. 786, 142 N. W. 112, affirmed in 239 U. S. 244, 36 S. Ct. 54, 60 L. Ed. 249, was an action to enjoin the construction of a ditch; Campbell v. Youngson, 80 Neb. 322, 114 N. W. 415, was an injunction action; Scottsbluff Drainage Dist. v. Scotts Bluff County, 113 Neb. 187, 202 N. W. 455, was a proceeding on a claim for assessments not paid; and Chicago & N. W. Ry. Co. v. Payne Creek Drainage Dist., 148 Neb. 139, 26 N. W. 2d 607, was an injunction action challenging the organization of the district.

Those cases do not deal with the construction or jurisdiction of a court in a special statutory proceeding.

The court quotes from certain of the standard texts. The first one is from 17 Am. Jur., Drains and Sewers, § 24, p. 793. The quote is correct. It is interesting to note, however, that the text cites no authority for the last sentence, which the court adopts in its syllabus point. Also, it should be noted that the court does not quote the next sentence which is: "The fact that the organizing tribunal acted without jurisdiction or that the proceedings were conducted under an unconstitutional statute may be brought up in a suit to recover an assessment or to enjoin a levy and may constitute a good defense or a good cause of action therein." Obviously the actions there mentioned do not deal with one such as we have here.

The court quotes from 19 C. J., Drains, § 258, p. 742. It fails to quote a prior sentence in the same section which is: "The questions to be determined on appeal from a drainage assessment are generally confined to those bearing on the making and correctness of the assessment, and the regularity of the prior proceedings cannot be reviewed." In this connection, see, also, 28 C. J. S., Drains, § 72, p. 441; 48 Am. Jur., Special or Local Assessments, § 184, p. 718.

The court quotes from 28 C. J. S., Drains, § 36, p. 333. The court does not quote this sentence appearing

in the text: "The legality of the organization of the district cannot be questioned by a landowner in assessment proceedings, * * *." The court quotes from a subparagraph entitled "Jurisdictional defects" appearing in the above text on page 335. The court fails to quote the next following sentence which is: "In case of jurisdictional defects, the party entitled to complain may sue to set aside or enjoin the collection of assessments, or to enjoin the construction of the drain, except where there is a plain and adequate remedy at law."

The above counterquotes are given to illustrate the inherent dangers and weaknesses involved in following statements in texts, as is here done, particularly in matters of statutory construction.

It appears to me that such statements of law taken from such decisions and applicable to the nature of the action being tried and statements from texts are not particularly persuasive or in point in determining the issues that may be tried under a special statutory proceeding such as we have here.

I have not overlooked the fact that the court quotes part of one sentence from Cordes v. Board of Supervisors, 197 Iowa 136, 196 N. W. 997, which in turn rests upon Lightner v. Greene County, 145 Iowa 95, 123 N. W. 749, from which an extended quote is made. The court, however, fails to note that the Iowa statute cited in the opinion is not analyzed or discussed. The statute provides: "The appeal herein provided for shall be tried in the district court as an action in equity * * *." § 1989-a14, Code of Iowa, Supp. 1907. The broad language of the Iowa code when compared with the restricted language of our statutes, hereinbefore quoted, removes the Iowa cases as persuasive authorities.

The court, by adopting general language from cases and texts, has effectively judicially amended our act, struck out the limiting clauses, and converted this special proceeding to "an action in equity."

Particular reference should be made to the court's use

as an authority of Haecke v. Eastern Sarpy County Drainage Dist., 141 Neb. 628, 4 N. W. 2d 744. We there held that compliance with the provision of section 31-511, Comp. St. 1929, as to the making of detailed plans of public work to be done, was a condition precedent to the apportionment of benefits and that the question of compliance with this condition precedent could be presented to the district court on an appeal from an order of apportionment of benefits.

The court now holds that we concluded that such a step was a jurisdictional requirement and "As logically, the legal existence of the district, a jurisdictional requirement, could also be litigated." I assume that it may be said that the legal existence of the district is a condition precedent to any subsequent act of the district including the apportionment of benefits, but from that it does not follow that in this special statutory proceeding that question can be raised.

The court overlooks the fact that this proceeding, by the very terms of the statute, deals with the equitable apportionment of benefits and nothing else. The Legislature presupposed the existence of a legally organized district, with legally qualified officers with power to act. It provided for a review of action taken by such a district and such officers. The court overlooks the fact that detailed plans were in fact, and made so by statute as demonstrated by the opinion, a condition precedent to the apportionment of benefits. That is a foundation element necessary to establish the correctness of the apportionment of benefits. The legal organization of the district is not such a foundation element. If it is, then proof of the legal organization of the district and the legal status of the officers becomes "a condition precedent" to proof of the correctness of the apportionment of benefits in all cases. I find no indication in the statute of such a requirement and the court cites none.

I would hold that the issue to be determined in this

proceeding is that which the Legislature said was to be determined. I would leave the question of the legality of the district and the legal status of its officers to be determined by the remedies which the law clearly furnishes for that purpose.

LEWIS J. MESSER, APPELLEE, V. BESSE F. MESSER, APPELLANT.

59 N. W. 2d 395

Filed July 3, 1953. No. 33278.

1. **Divorce.** 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. ———. 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 one upon whom they are inflicted or toward whom they are directed, or be such as to destroy the objects of matrimony.
3. ———. 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.

APPEAL from the district court for Lancaster County: HARRY A. SPENCER, JUDGE. *Affirmed in part, and in part reversed and remanded with directions.*

Charles L. Dort, Bernard S. Gradwohl, Elizabeth M. Axelrod, and *White, Lipp & Simon,* for appellant.

Chambers, Holland & Groth, for appellee.

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

SIMMONS, C. J.

In this action plaintiff, alleging extreme cruelty, sought a divorce from the defendant, and that defendant have no award of permanent alimony. The defendant answered, admitting the marriage and residence of the parties, and denied generally. Defendant by cross-petition alleged extreme cruelty and prayed for a decree of separate maintenance, or in the alternative, an absolute divorce, and for property divison, alimony, and attorney's fees. During the trial and here defendant sought an absolute divorce.

The trial court granted the plaintiff an absolute divorce, awarded the defendant $45,000 alimony payable in installments, and awarded the defendant all wedding gifts, jewelry, clothing, and personal effects, and an attorney's fee of $4,500. The court further ordered the defendant to surrender the home of the parties and a Cadillac automobile to the plaintiff.

Defendant appeals, assigning error in refusing her the decree of divorce, and contending that the award of alimony and attorney's fees is inadequate. Plaintiff joins issue as to those contentions here, and by cross-appeal contends that the award of alimony was excessive and that additional attorney's fees should not be allowed.

We affirm in part and reverse in part.

These parties were married in April 1946. Each had been previously married; each had a minor child. No children were born to this union. At the time of the marriage plaintiff owned a furnished home. There the parties began living together as man and wife. Almost from the beginning their married life was one of periods of tranquility and tumult. The disagreements and discords center around things said and written to each other and to third parties about each other, and

around things done in the presence of each other and third parties. Each party complains as to things not done or tardily done by the other. The periods of discord increased as the years passed, and culminated in a physical assault, by the defendant on the plaintiff. This event is amply corroborated. The separation came in December 1951.

For almost 1,000 pages of the bill of exceptions the parties and their witnesses detail these occurrences. At times there is agreement on things said and disagreement as to what was meant, and there is disagreement as to what was said and done. The trial court heard and saw most of the witnesses. We have the cold record. No proper purpose could be served by detailing the evidence.

The applicable rules are: "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." Killip v. Killip, 156 Neb. 573, 57 N. W. 2d 147.

"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 one upon whom they are inflicted or toward whom they are directed, or be such as to destroy the objects of matrimony." Killip v. Killip, *supra.*

Testing the evidence by these rules we reach the same conclusion as did the trial court. We affirm the decree of the trial court, granting an absolute divorce to the plaintiff.

This brings us to the question of alimony. At the time of the marriage plaintiff was the majority stockholder and in direct management and control of a corporation doing a substantial and successful business.

His net worth is shown at that time to be about $300,000. At the time of the trial his net worth is shown to be about $800,000. Defendant contributed little, if anything, to the successful conduct of the business. There is evidence that her conduct had the opposite effect; nevertheless, the net worth of plaintiff is not seriously disputed here.

The parties are each in early middle life. The plaintiff has had during these years a substantial and increasing salary from his business, which was, after income tax deductions, about the sum of $24,500 for the year 1947, increasing to about $35,000 for the year 1951. Plaintiff has some income from other sources.

Defendant was self-supporting prior to the marriage. Evidence as to her present earning ability was not developed. Defendant has a relatively small amount of personal property.

There is no particular showing of ill health on the part of the plaintiff. There is a showing of not too good health of the defendant, although it appears that she did have the health ability to go and do many of those things common to women of her age and station in life.

During the period of the marriage plaintiff paid for the education of defendant's child and furnished her a home and material benefits in a way consistent with his financial ability. About that defendant makes no complaint. Plaintiff made an allowance to his wife for home and personal use in the sum of $250 a month at the beginning of the marriage, which was increased from time to time to the sum of $550 a month during the last months of the marriage. To this should be added various expenditures during the years for labor-saving conveniences in the home, the use of an automobile by the defendant during the latter years, and throughout payments, in addition to the regular allowance, for extra purposes, clothing and vacation trips of defendant. Plaintiff maintained the home and the defendant on a standard of living consistent with his fi-

nancial ability, although not at all times in the manner desired by the defendant.

The rule is: "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." Killip v. Killip, *supra*.

This is not a rule that permits of mathematical certainty in arriving at the answer as to alimony or a division of property.

Considering all matters shown in the evidence we have concluded that the award of alimony made by the trial court was insufficient. The defendant is awarded alimony in the sum of $100,000, payable $20,800 on August 1, 1953, and the remaining $79,200, payable in payments of $600 on the first day of each and every month, commencing August 1, 1953, until said sum of $79,200 is paid.

The trial court awarded the home to the plaintiff. It is shown to be worth $25,000. The defendant is shown to have been dissatisfied with it, because of the problem of stairs in a two-story and basement home. The award of the home to the plaintiff is affirmed, together with all items of furniture and appurtenances therein. This award is taken into consideration in determining the amount of alimony above set out. The possession of the home, furniture, and appurtenances is to be surrendered by the defendant to the plaintiff on August 1, 1953.

The trial court awarded the defendant all wedding gifts and all jewelry, clothing, and personal effects customarily worn and used by the defendant. That award is affirmed.

It appears from the evidence that during the latter

years of this marriage, and during the pendency of this action, defendant has had the use of a Cadillac automobile. The trial court awarded the automobile to plaintiff. That part of the decree is reversed and it is awarded to the defendant.

The trial court awarded defendant an attorney's fee for $4,500. On motion here an award of $2,500 was allowed. An award of $10,000 is made to defendant as attorney's fees. This sum is to be inclusive of and not in addition to awards heretofore made. Any payments made on previous awards are to be credited on the $10,000 here made, and the difference only is to be paid. All costs are taxed to the plaintiff. Temporary awards heretofore made are to continue to August 1, 1953, and thereafter to cease.

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

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

MASTER LABORATORIES, INC., A CORPORATION, ET AL., APPELLANTS, V. GERTRUDE CHESNUT ET AL., APPELLEES.
59 N. W. 2d 571

Filed July 3, 1953. No. 33307.

1. **Appeal and Error.** An opinion of this court, when made a part of the mandate, should be examined in conjunction with the mandate to determine the nature and terms of the judgment to be entered, or the action to be taken thereon.
2. ———. The general rule is that a reversal of a judgment and the remand of a cause for further proceedings not inconsistent with the opinion, without specific direction to the trial court as to what it shall do, is a general remand and the parties stand in the same position as if the case had never been tried.
3. ———. Where on the retrial the facts relating to the issues upon which the findings were made are the same as those

adduced at the former trial, such findings are binding on the parties, the trial court, and this court as the law of the case. It is only where the findings on a retrial are made on facts relating to the issues which are materially and substantially different that the law of the case does not apply.

4. ———. Where all the new evidence adduced at the retrial is incompetent, the rule as to the law of the case applies.
5. **Landlord and Tenant.** A provision in a written lease to the effect that the lessees have an option to purchase the leased premises within 5 years from the date of the lease for a specified sum in cash is not ambiguous in the sense that parol evidence is admissible to explain the nature of the conveyance to be made if the option agreement is exercised.
6. **Contracts: Evidence.** For a contract to be ambiguous in order to permit parol evidence to explain it there must be a real uncertainty as to which of two or more possible meanings represent the true intention of the parties after pertinent rules of interpretation have been applied.
7. ———: ———. When the written agreement shows a complete legal obligation, without uncertainty or ambiguity as to the object and extent of the engagement, it is conclusively presumed that the whole agreement of the parties was included therein. The fact that a point has been omitted which might have been embodied therein will not open the door to the admission of parol evidence in that regard.
8. **Evidence.** The parol evidence rule is not merely one of evidence, but is a rule of substantive law, which declares that certain kinds of facts are legally ineffective, and forbids such facts to be proved at all.
9. **Vendor and Purchaser.** A tender of performance of an option agreement in accordance with its terms, made in a pleading for the first time after the expiration of the option, is ineffective as an exercise of such option.

APPEAL from the district court for Douglas County: JACKSON B. CHASE, JUDGE. *Affirmed.*

Kennedy, Holland, DeLacy & Svoboda, Yale C. Holland, and *L. J. Tierney,* for appellants.

Ben F. Shrier, Gray & Brumbaugh, and *Fischer, Fischer & Fischer,* for appellees.

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

CARTER, J.

This is a suit for the specific performance of an option to purchase real estate contained in a lease. The trial court denied specific performance and entered judgment against the plaintiffs for rentals that had accrued under the lease. The plaintiffs appeal.

On April 7, 1942, the plaintiffs entered into a written lease with the defendants for the use of a two-story building for a period of 10 years at the agreed rental of $110 per month. The lease contained an option to purchase which, so far as it is pertinent to this case, is as follows: "And it is further agreed that the party of the second part has the option to purchase said premises within 5 years from date hereof for $14,000.00 cash." Plaintiffs claimed an unconditional acceptance and offer of performance of the option. The defendants refused to accept the $14,000 and give a warranty deed to the property. This suit was commenced by the plaintiffs to enforce the option by specific performance. The trial court granted specific performance and an appeal was taken to this court. We reversed the judgment and remanded the cause for further proceedings not inconsistent with the opinion. Master Laboratories, Inc. v. Chesnut, 154 Neb. 749, 49 N. W. 2d 693. In the foregoing appeal we held that the purported acceptance was not unconditional in that it required a conveyance by warranty deed when the character of the conveyance was not specified in the option and, consequently, entitled the plaintiffs to a conveyance that would vest in them a good or marketable title only. The case was again heard in the district court where a decree was entered denying specific performance and awarding rentals due the defendants under the terms of the lease. From this decree the plaintiffs appeal, it being the appeal presently before the court.

Plaintiffs sought to retry the case and produce additional evidence concerning the nature of the conveyance required by the option agreement. This raises the

question as to the nature of the remand and the proceedings which could be had under it after the mandate was issued by this court. The rule is: Where material facts in issue in a former action were judicially determined, they are conclusively settled by a judgment rendered therein and they may not be again litigated in a subsequent action. But the rule that findings of this court on a first appeal become the law of the case on a retrial of the same issues is not available where the facts are materially different on the second trial. Callahan v. Prewitt, on rehearing, 143 Neb. 793, 13 N. W. 2d 660. The opinion of this court, which was made a part of the mandate, should be examined in conjunction with the mandate to determine the nature and terms of the judgment to be entered or the action to be taken. State ex rel. Johnson v. Hash, 145 Neb. 405, 16 N. W. 2d 734; Glissmann v. Bauermeister, 149 Neb. 131, 30 N. W. 2d 649. It is a general rule that a reversal of a judgment and a remand of the cause for further proceedings in accord with the opinion, without specific direction to the trial court as to what it shall do, is a general remand and the parties stand in the same position as if the case had never been tried. There are some exceptions to the rule, one being that if the undisputed and admitted facts are such that only one judgment could be rendered, the trial court should enter such a judgment notwithstanding a want of specific directions in the mandate. Bliss v. Livestock Nat. Bank, 124 Neb. 880, 248 N. W. 645. Another exception exists where on the retrial the facts relating to the issues upon which the findings were made are the same as those adduced on the former trial. Glissmann v. Bauermeister, *supra;* Anderson v. Union Stock Yards Co., 84 Neb. 305, 120 N. W. 1124; Johnston v. New Omaha Thomson-Houston Electric Light Co., 86 Neb. 165, 125 N. W. 153. When the evidence on the second trial is materially different from that adduced at the first, or where evidence upon a material point which is lacking at the first trial is produced upon the second, the doctrine

of the law of the case has no application. Nedela v. Mares Auto Co., 110 Neb. 108, 193 N. W. 345; Johnson v. Sherman County Irrigation, Water Power & Improvement Co., 71 Neb. 452, 98 N. W. 1096; Parish v. County Fire Ins. Co., 137 Neb. 385, 289 N. W. 765. We hold therefore that the remand in the former appeal in this case warranted a re-examination of the facts by the trial court and a new and different decree if there was new evidence of a material and substantial nature to support it. The burden is upon the party claiming such a difference in the evidence to establish it by competent evidence.

There was new evidence offered in the present case tending to show that such a difference in the evidence existed. The question for our determination is whether the new evidence produced was competent.

It will be noted that the option agreement was silent as to the nature of the conveyance to be made in the event the option to purchase was exercised. It was held in the former appeal that, unless differently agreed, a seller is required to convey a good and marketable title and that a warranty deed is not required to convey such a title. In the retrial of the case evidence was offered that there was a contemporaneous oral agreement by which the sellers agreed to convey by warranty deed in the event the option was exercised. This evidence was objected to as incompetent for the reason that it varied the terms of the written contract. The primary point in the appeal is the correctness of the trial court's ruling that this evidence was incompetent.

There was evidence by at least two witnesses to the effect that there was an oral agreement between the parties, made prior to or contemporaneous with the written option, to the effect that if the option to purchase was exercised the sellers would give a warranty deed. The oral agreement was not independent of the written agreement as it deals with the same subject matter. Since the agreement involved the conveyance of real

estate it was required by the statute of frauds to be in writing. We think, under such circumstances, that the evidence of the oral agreement was not admissible. The following cases appear to be controlling in deciding this issue.

In Theno v. National Assurance Corp., 133 Neb. 618, 276 N. W. 375, we said: "The parol evidence rule is not merely one of evidence, but is a rule of substantive law, which declares that certain kinds of facts are legally ineffective, and forbids such facts to be proved at all."

The correct rule is set forth in Telluride Power Transmission Co. v. Crane Co., 208 Ill. 218, 70 N. E. 319, as follows: "The rule is, that when the writings show, upon inspection, a complete legal obligation, without any uncertainty or ambiguity as to the object and extent of the engagement, it is conclusively presumed that the whole agreement of the parties was included in the writings. The fact that a point has been omitted which might have been embodied therein will not open the door to the admission of parol evidence in that regard. * * * The rule is too well recognized to require citation of authorities that all preliminary negotiations, whether oral or written, are merged in the written contract." The foregoing was cited with approval in Arman v. Structiform Engineering Co., 147 Neb. 658, 24 N. W. 2d 723, wherein the following was also set out: "'* * * where a written contract, signed by both parties, is complete in itself, and contains and expresses the mutual covenants and promises of both, without ambiguity or apparent omission; where the statement of the consideration therein is of a contractual nature, and not a mere acknowledgement of receipt, parol evidence is not admissible to contradict, vary or add to the consideration expressed in the instrument itself.'" See, also, Spiegal & Son v. Alpirn, 107 Neb. 233, 185 N. W. 415.

"Nor is a contract ambiguous within that sense merely because it may be even difficult to construe. The con-

struction of a contract, if needed, being a question of law for the court, as well as a duty that rests upon the court, there can be no ambiguity within the rule to which we have referred, unless and until an application of the pertinent rules of interpretation leaves it really uncertain which of two or more possible meanings represents the true intention of the parties." McCann v. Glynn Lumber Co., 199 Ga. 669, 34 S. E. 2d 839.

We conclude that there was neither ambiguity nor omission within the meaning of the foregoing rules. The option agreement requires the conveyance of a good or marketable title in the event the option is exercised. Parol evidence is not required to explain its meaning nor to supply evidence of an omission to give meaning to the agreement. Its meaning is clear. It is not therefore subject to construction or amplification. The evidence of the oral agreement was incompetent under the parol evidence rule.

Consequently, the controlling rule on this issue is that where, on retrial, the facts relating to the issues are the same as those adduced on the former trial, the doctrine of the law of the case is applicable and controlling. We hold, therefore, that the trial court correctly decided that the purported acceptance of the option to purchase was conditional and warrants the refusal of the remedy of specific performance.

The record shows that plaintiffs amended their petition and filed a reply immediately prior to the second trial in which it is stated in substance that the plaintiffs still are ready and willing to pay to the defendants the sum of $14,000 in cash, as is provided in said option agreement, and have been and are now ready and willing to receive a conveyance of said premises, but the defendants continue to refuse to receive said tender and to make said conveyance. The amendments to the petition were made just before the second trial. The reply was filed on March 5, 1952, 4 years and 11 months subsequent to the expiration of the option agreement. For

the first time plaintiffs offered therein to accept a conveyance as distinguished from their previous demands for a warranty deed. As an exercise of the option it clearly comes too late. The defendants were therefore under no obligation whatever to accept the tender of performance therein made.

Plaintiffs contend that the trial court erred in entering judgment for rentals due from the plaintiffs to the defendants in the total sum of $10,214.64 as provided in the decree. The pleadings and the evidence clearly sustain this portion of the decree. The lease provides that the rentals provided for by the lease will be paid "except when said premises are untenantable by reason of fire, from any other cause than carelessness" of plaintiffs or persons in their employ. There was evidence offered on this issue by the defendants. The trial court by the terms of the decree recited that the judgment entered was without prejudice to the rights of the defendants in another action pending in the district court wherein they claim damages from the plaintiffs as the result of the fire occurring on May 29, 1945, alleged to have been caused by the negligence of the plaintiffs and their agents. This action of the trial court is not assigned as error by the plaintiffs and no cross-appeal was taken by the defendants. There is nothing before this court, therefore, on this issue.

We find no prejudicial error in the record and the decree of the district court is therefore affirmed.

AFFIRMED.

GEORGE DIETZ, APPELLEE, V. STATE OF NEBRASKA, APPELLANT.

59 N. W. 2d 587

Filed July 3, 1953. No. 33352.

1. **Workmen's Compensation: Appeal and Error.** On any appeal to this court in a workmen's compensation case, the cause will

be here considered de novo upon the record, bearing in mind that where the evidence is conflicting and cannot be reconciled, this court will consider the fact that the district court that tried the cause de novo and observed the demeanor of witnesses gave credence to the testimony of some rather than to the contradictory testimony of others.

2. **Workmen's Compensation.** The burden of proof is upon the claimant in a compensation case to establish by a preponderance of the evidence that personal injury was sustained by the employee by an accident arising out of and in the course of his employment.

3. ———. The rule of liberal construction of the Workmen's Compensation Act applies to the law, not to the evidence offered to support a claim by virtue of the law. The rule does not dispense with the necessity that claimant prove his right to compensation within the rules above set out, nor does it permit a court to award compensation where the requisite proof is lacking.

4. **Witnesses.** Cogent reasons that strengthen the opinion of an expert witness as to a scientific fact in issue and tend to weaken opposite expert opinions not so supported may determine the issue.

5. **Workmen's Compensation.** An employee who, solely because of his injury, is unable to perform or obtain any substantial amount of labor, either in his particular line of work, or in any other for which he would be fitted except for the injury, is totally disabled within the meaning of the workmen's compensation law.

6 ———. An employee who has established by a preponderance of the evidence that he had an accident arising out of and in the course of his employment, which resulted in compensable injury, may be allowed compensation for neurosis if it was proximately caused by the injury and resulted in disability.

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

Clarence S. Beck, Attorney General, and *Clarence A. H. Meyer*, for appellant.

Max Kier, for appellee.

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

CHAPPELL, J.

This is a workmen's compensation case. After hear-

ing by one judge of the compensation court, it was found that plaintiff, George Dietz, who concededly was injured in an accident arising out of and in the course of employment by defendant, State of Nebraska, was totally disabled as of June 1, 1952, and entitled to compensation therefor so long as such total disability persisted. It was found that his earnings at time of accident were sufficient to entitle him to the maximum rate. Thus, he was awarded $26 each week for 300 weeks from and after June 1, 1952, or until total disability should sooner terminate, and should total disability continue more than 300 weeks from and after June 1, 1952, he was awarded $20 each week so long as total disability should thus persist. Defendant was also ordered to pay $55 for unpaid medical services rendered plaintiff. The award specifically ordered that proceedings for modification thereof might be had at any time by agreement of the parties or upon application of either party, at intervals of not less than 6 months from August 8, 1952, date of the award, for increase or decrease of incapacity, due solely to plaintiff's injury, in conformity with section 48-141, R. R. S. 1943.

Thereafter defendant waived rehearing and appealed to the district court where, upon trial de novo, a judgment was rendered, identical in all material respects with the award rendered by the compensation court, except that $125 additional unpaid medical expenses were also ordered paid by defendant, together with an allowance of $250 for services by plaintiff's attorney in that court.

Defendant's motion for new trial was overruled, and it appealed, assigning substantially that: (1) The trial court acted without or in excess of its powers in rendering the judgment, because the award in the compensation court was obtained in contravention of section 24-327, R. R. S. 1943; (2) the findings and judgment were contrary to law and not supported by the evidence; and (3) the findings of fact do not support the judgment.

We conclude that the assignments should not be sustained.

We decide that the first assignment has no merit. Under the factual situation presented here, it cannot be said that plaintiff practiced any fraud against the State in the proof, statement, establishment, or allowance of his claim which would ipso facto forfeit the same as provided by section 24-327, R. R. S. 1943.

In that connection, on June 25, 1952, plaintiff wrote his own counsel a letter. Therein, after reciting the facts with relation to happening of the accident and certain injuries resulting therefrom about which there is no dispute, and after reciting his then claimed physical disability, which is supported by the testimony of two physicians who examined and cared for him, plaintiff said: "As long as I am in my present condition, I feel that I will be unable to work full time or part time at any job." That letter and copy of a medical report of one of plaintiff's physicians supporting the same were transmitted by plaintiff's counsel in a letter to counsel for defendant before trial in the compensation court. Plaintiff was not present at that hearing, but one of his physicians testified that he was totally disabled as a result of the accident and injuries received therein, and the above letter was received in evidence, apparently without objection. In the district court both plaintiff's letter and the correspondence of his counsel transmitting it to counsel for defendant were offered in evidence by defendant and received without objection.

Defendant argued that plaintiff was guilty of fraud upon the State because he was doing some light guard work at the time his letter was written, and in his application for such work had reported that he had recovered from his disability. As hereinafter observed, plaintiff, in need financially, had a right to do or try to do some light work if he could, without waiving his claim of total disability. As a matter of fact, however, there is competent evidence in the record that he was physi-

cally unable to continue with the job, which only required him to sit and guard personal property of value. In any event, the primary issue in the compensation court, district court, and here, was and is the extent of plaintiff's disability caused by the accident. His statement aforesaid was simply a layman's opinion, which the testimony of his own physicians and the circumstances support. In Tucker v. Paxton & Gallagher Co., 153 Neb. 1, 43 N. W. 2d 522, a related situation was presented. Therein it is said: "That contention is without legal basis. Whether or not he received an injury as a result of the accident could be determined only through scientific investigation and examination, and he as an ordinary layman may not be charged with such obscure knowledge. Any statement therefore of his with regard to whether or not he sustained the injury complained of as the result of the accident in question may not be considered binding upon him and may not have the effect of defeating the scientific evidence in relation thereto. Flesch v. Phillips Petroleum Co., 124 Neb. 1, 244 N. W. 925; Keenan v. Consumers Public Power District, 152 Neb. 54, 40 N. W. 2d 261."

To hold that plaintiff was guilty of fraud in the manner here charged would defeat every compensation claim against the State, the justice of which was primarily dependent upon scientific investigation and examination rather than the opinion of the ordinary employee involved, with regard to his injuries received or the nature or extent of his disability. Rahfeldt v. Swanson, 155 Neb. 482, 52 N. W. 2d 261, relied upon by defendant, is entirely distinguishable from the case at bar.

We turn then to well-established rules of law applicable to the situation otherwise presented by the record. This court has recently reaffirmed that: "On any appeal to this court in a workmen's compensation case the cause will be here considered de novo upon the record.

"The burden of proof is upon the claimant in a compensation case to establish by a preponderance of the evi-

dence that personal injury was sustained by the employee by an accident arising out of and in the course of his employment. * * *

"The rule of liberal construction of the Workmen's Compensation Act applies to the law, not to the evidence offered to support a claim by virtue of the law. The rule does not dispense with the necessity that claimant prove his right to compensation within the rules above set out, nor does it permit a court to award compensation where the requisite proof is lacking." Miller v. Livestock Buying Co., *ante* p. 51, 58 N. W. 2d 596.

The evidence in this case, both lay and medical, adduced at trial de novo in district court, was irreconcilable, and directly conflicting in many respects with regard to the extent of plaintiff's disability. As stated in Sporcic v. Swift & Co., 149 Neb. 246, 30 N. W. 2d 891: "It is obvious that the evidence in the instant case is irreconcilable and in direct conflict. This being true, this court will consider the trial court's observation of the witnesses and their manner of testifying, and also that the trial court must have accepted one version rather than the opposite. See Peterson v. Winkelmann, 114 Neb. 714, 209 N. W. 499; Graham Ice Cream Co. v. Petros, 127 Neb. 172, 254 N. W. 869." As stated in Beam v. Goodyear Tire & Rubber Co., 152 Neb. 663, 42 N. W. 2d 293: "'"Where the evidence is conflicting and cannot be reconciled, this court, upon a trial de novo in a workmen's compensation case, will consider the fact that the district court observed the demeanor of witnesses and gave credence to the testimony of some rather than to the contradictory testimony of others." Cunningham v. Armour & Co., 133 Neb. 598, 276 N. W. 393.' Ames v. Sanitary District, 140 Neb. 879, 2 N. W. 2d 530." Also, as reaffirmed in Holtzendorff v. Eppley Hotels Co., 140 Neb. 525, 300 N. W. 411: "'Cogent reasons that strengthen the opinion of an expert witness as to a scientific fact in issue and tend to weaken opposite expert opinions not so supported may determine the

issue.' Flesch v. Phillips Petroleum Co., 124 Neb. 1, 244 N. W. 925."

In Sporcic v. Swift & Co., *supra,* it is said: "The fact that the plaintiff has been doing light work does not bar him from recovering compensation. In Elliott v. Gooch Feed Mill Co., on rehearing, 147 Neb. 612, 24 N. W. 2d 561, this court held: 'An employee may be totally disabled for all practical purposes and yet be able to obtain trivial occasional employment under rare conditions at small remuneration. The claimant's status in such respect remains unaffected thereby unless the claimant is able to get, hold, or do any substantial amount of remunerative work either in his previous occupation or any other established field of employment for which he is fitted.' " See, also, Elliott v. Gooch Feed Mill Company, 147 Neb. 309, 23 N. W. 2d 262, where this court held: "For workmen's compensation purposes, 'total disability' does not mean a state of absolute helplessness, but means disablement of an employee to earn wages in the same kind of work, or work of a similar nature, that he was trained for, or accustomed to perform, or any other kind of work which a person of his mentality and attainments could do.

"A workman who, solely because of his injury, is unable to perform or to obtain any substantial amount of labor, either in his particular line of work, or in any other for which he would be fitted except for the injury, is totally disabled within the meaning of the workmen's compensation law." See, also, Franzen v. Blakley, 155 Neb. 621, 52 N. W. 2d 833.

In that connection, also, it is the rule that an employee who has established by a preponderance of the evidence that he had an accident arising out of and in the course of his employment, which, as here, resulted in compensable injury, may be allowed compensation for neurosis if it was proximately caused by the injury and resulted in disability. Lee v. Lincoln Cleaning & Dye

Works, 145 Neb. 124, 15 N. W. 2d 330; Marler v. Grainger Bros., 123 Neb. 517, 243 N. W. 622.

Bearing in mind the foregoing rules, we have examined the evidence in order to determine the extent of plaintiff's disability, the only issue remaining in the case. Upon other issues the evidence is without dispute. On March 18, 1947, plaintiff, then in good health, was reemployed by defendant at the State Reformatory for Men as a guard in the cell block. Subsequently he served in other positions of responsibility. On October 23, 1951, date of the accident and injuries resulting therefrom, he was in good health and concededly a good, able, faithful employee, in charge of the entire institution from 11 p. m. until 7 a. m. At time of trial in district court he was 58 years old.

At about 5:15 a. m. on October 23, 1951, an escaping inmate struck plaintiff five times with a heavy angle iron upon and about his head. As a result, there were long, deep cuts on the left side of plaintiff's head. He received a concussion, his glasses were broken, and, bleeding profusely, he was knocked down, stunned but still conscious. He was first taken to the reformatory hospital, where his head was wrapped in towels. He was then taken out to his own car, and, as directed, proceeded to St. Elizabeth Hospital, where he fainted or blacked out. In the emergency room there at about 7 a. m. he was given medical care authorized by defendant. It required 16 sutures to close his head wounds, on the left side above his ear. X-rays taken disclosed no fractures of the skull. His physicians desired to keep him in the hospital longer because his injuries were severe, but plaintiff was conscious and reluctant to stay, so at about 10 a. m. he was permitted to go home. Thereafter treatment was continued for some time in the physician's office, and plaintiff was kept under observation until December 10, 1951.

He remained off duty 25 days, and was not then recovered or feeling well, but at the earnest solicitation of

the superintendent at the reformatory, where there was a shortage of competent help, he reported back to work. However, his physical condition did not improve and his physician saw him again in May 1952. At that time he was given a physical examination and found to be in a progressively worse condition. Therefore, his physician sent him to a neuropsychiatrist for further examination and treatment. There is competent evidence that at that time, as a result of the accident and injuries received therein, plaintiff was suffering from insomnia; throbbing or dull headaches on down his neck; nervousness; inability to concentrate; tension and anxiety; carried his head to one side; had tics or twitches of his head, face, and eyes; tremors of voice at times; and spasm or jerks of his muscles with intermittent pain, especially in his lower extremeties. His right leg and arm were weak, as defendant's own physicians concede. The fingers of his right hand would become numb and articles would drop from his grip. His right foot would become numb; he would become dizzy; and he would have short blackouts called by his physicians Jacksonian convulsions, or post-traumatic epilepsy, caused by injury to his brain. He was unable to continue his work with defendant so on June 1, 1952, he quit and filed his petition in the compensation court on June 3, 1952.

Thereafter, the people with whom he roomed were driving to California, so, being unable to drive his own car, he rode there with them where, in need of finances, he undertook to do some light guard work, but was unable to continue with it. There he had a black-out and fell on the loading platform of a hotel where he was so employed.

As we view it, there is ample competent evidence in this record to sustain the conclusion that plaintiff was on June 1, 1952, and at time of trial, totally disabled as a result of the injuries received by him on October 23, 1951. In that connection, two physicians testified for plaintiff and two for defendant, who both averred that

plaintiff was altogether fair and honest with them during their physical examination of him. All agree that plaintiff had a disability resulting from the accident and injuries. They differ mainly with regard to the extent of his disability, the name for it, and its prognosis. Plaintiff's physicians testified that he was totally and permanently disabled, with, among other things Jacksonian convulsions or post-traumatic epilepsy, which condition would in all probability grow progressively worse. Both of defendant's physicians testified that plaintiff doubtless suffered brain concussion, that his right arm and leg were weak, and that he had a permanent partial disability. One testified that such disability was from 10 to 20 percent. The other could not estimate it, but refused to say that it was not at least 50 percent. Both called it traumatic neurosis and one predicted a favorable prognosis, while the other refused to speculate on the question of prognosis. Such physicians, however, did not make use of the electroencephalogram as did plaintiff's neuropsychiatrist in order to diagnose or determine the existence of brain injuries. One of defendant's physicians admitted that use of the electroencephalogram was a recognized procedure for such purpose, but the other testified that it was not infallible and he did not approve of its use.

It is true, as held in Hamilton v. Huebner, 146 Neb. 320, 19 N. W. 2d 552, 163 A. L. R. 1, that: "The value of the opinion of an expert witness is dependent on, and is no stronger than, the facts on which it is predicated. The opinion has no probative force unless the premises upon which it is based are shown to be true." However, contrary to defendant's contention, that rule is not controlling here. In such case there was no competent proof that an accident ever occurred which caused any injuries. Here the opinions of plaintiff's experts were predicated not only upon physical observation, examination, and treatment of plaintiff, but also upon corroborative facts and circumstances otherwise appearing

in the record. Without dispute, plaintiff had an accident arising out of and in the course of his employment from which he suffered injuries and disability. The only question was how much.

We conclude that for the reasons heretofore stated the judgment of the trial court should be and hereby is affirmed. All costs are taxed to defendant, including an allowance of $350 for services of plaintiff's attorney in this court, as provided in section 48-125, R. R. S. 1943.

AFFIRMED.

LOYD BUTTS, APPELLEE, V. CECIL HALE, APPELLANT.
59 N. W. 2d 583

Filed July 3, 1953. No. 33355.

1. **Easements: Adverse Possession.** Where a claimant has shown open, visible, continuous, and unmolested use of land for a period of time sufficient to acquire an easement by adverse user, such use will be presumed to be under claim of right.
2. ———: ———. The presumption of use under claim of right which flows from open, visible, continuous, and unmolested use of land for a time sufficient to acquire an easement by adverse use prevails unless it is overcome by a preponderance of evidence.
3. **Highways.** Evidence of 10 years' or more use by the public of a road through cultivated land, without substantial variance, with knowledge and acquiescence of the owner, raises a presumption of implied dedication and acceptance of such road as a highway.
4. **Adverse Possession.** A right by adverse user over adjacent lands, having been established, passes in succession to subsequent grantees.
5. **Mortgages.** A mortgage is security in the form of a conditional conveyance.
6. ———. A mortgage which contains no exceptions conditionally conveys the entire estate of the mortgagor including appurtenances and easements extending over adjacent land.
7. **Mortgages: Judicial Sales.** The foreclosure and sale of lands passes to the purchaser every right or interest of the mortgagor including appurtenances and easements extending over adjacent lands.

APPEAL from the district court for Burt County: JACKSON B. CHASE, JUDGE. *Affirmed.*

John A. Young, Alfred D. Raun, Keith Hopewell, and *Van Pelt, Marti & O'Gara,* for appellant.

Ellenberger & Pipher, for appellee.

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

YEAGER, J.

This is an action by Loyd Butts, plaintiff and appellee, against Cecil Hale, defendant and appellant, for an injunction to enjoin the defendant from closing and destroying a road across certain land owned by the defendant in Burt County, Nebraska.

Trial was had to the court at the conclusion of which a decree was entered granting the injunction prayed for by the plaintiff. A motion for new trial was duly filed. This motion was overruled. From the decree and the order overruling the motion for new trial the defendant has appealed.

At the time this action was instituted, which was May 25, 1948, the plaintiff was the owner of a square quarter-section of land in Burt County, Nebraska. He had purchased this land in 1948. Immediately to the north and adjoining the defendant owned a square quarter-section of land except for about five acres which is cut off by a certain creek. He purchased this land in 1947.

There is a state highway extending from the southwest of defendant's northwest 40 acres generally in a northeasterly direction to the northeast corner of this 40 acres. From a point on this highway somewhat west of the center of this 40 acres what is referred to in the record as a road and a trail extends almost directly southward through the remainder of this 40 acres and onward through the adjoining 40 acres of defendant. From the south line of defendant's land it extends southeastward to the farm buildings of plaintiff and beyond

in a southeasterly direction. Plaintiff's buildings are in the southeast quadrant of his northwest 40 acres. The approximate length of this road or trail from the state highway to plaintiff's buildings is one-half mile.

In 1948, after acquiring his land, the defendant closed this road or trail from the state highway to the south line of his land. By the terms of a temporary injunction the plaintiff was permitted to reopen it pending a determination of the question of whether or not he had the right to have it remain open permanently.

By the decree herein it was determined that the plaintiff did have the right to have it remain open for his use permanently.

What we regard as the controlling facts are not in substantial dispute. Just when this road or trail came into being is not established. It is reasonably certain that it was established as early as 1888. It has been in continuous and uninterrupted existence from that time until 1948 when the defendant attempted to close it. How it came to be established or came into being is likewise not known.

The lands and buildings now owned by the plaintiff have never had an outlet, road, or trail to a public highway since 1888 except this one. The owners of these lands, and others in the vicinity for a long time, used this as their sole means of ingress and egress. Those of the public who had occasion to enter this area used this way freely and without interference.

At the north end is a gate and at the line where plaintiff's and defendant's land adjoin there is another gate. When the land of defendant adjacent to the roadway was being used for pasture the gates were kept closed and they had to be opened and closed with passage thereover. When the lands were not so used they were left open.

There is not now any other means of ingress to or egress from plaintiff's buildings.

It is true that plaintiff could travel to the southeast

corner of his quarter-section of land and from that point construct a roadway eastward for about a quarter of a mile to an existing township road. This he could do since he has an easement over the land to the east of his southeast corner.

The defendant insists that since the plaintiff may do this he has no right to use the road or trail now being used over defendant's land.

On the other hand the plaintiff substantially contends that he has an established right to use this road or trail which may not be interfered with or destroyed by defendant no matter whether he may or may not have available another possible means of ingress or egress.

To sustain his position the plaintiff relies on two rules. One of these rules relates to rights which are peculiar to the plaintiff himself and the other relates to a public right.

The one which is peculiar to himself is that where a claimant has shown open, visible, continuous, and unmolested use of land for a period of time sufficient to acquire an easement by adverse user, such use will be presumed to be under claim of right. This rule finds support in Majerus v. Barton, 92 Neb. 685, 139 N. W. 208, Dormer v. Dreith, 145 Neb. 742, 18 N. W. 2d 94, and Jurgensen v. Ainscow, 155 Neb. 701, 53 N. W. 2d 196.

Where such a situation is found to exist the presumption prevails unless it is overcome by a preponderance of the evidence. Majerus v. Barton, *supra;* Moll v. Hagerbaumer, 98 Neb. 555, 153 N. W. 560; Jurgensen v. Ainscow, *supra.*

There can be no question here that from 1888 continuously, for much more than the period of time necessary to acquire an easement by adverse user, open, visible, continuous, and unmolested use of this road or trail was shown. Also there was no evidence whatever to overcome the presumption that the use was under claim of right.

The other rule is that evidence of 10 years' or more

use by the public of a road through cultivated land, without substantial variance, with the knowledge and acquiescence of the owner, raises a presumption of implied dedication and acceptance of such road as a highway. Engle v. Hunt, 50 Neb. 358, 69 N. W. 970; Brandt v. Olson, 79 Neb. 612, 113 N. W. 151; Dormer v. Dreith, *supra.*

The evidence without question discloses that, to the extent that it desired, the public used this road and that such use was with the knowledge and acquiescence of the owner or owners. There was no evidence adduced to overcome the presumption of an implied dedication.

Thus under these rules the record discloses that long before the parties here became interested in the properties involved, in legal contemplation, this way became a road subject to uninterrupted use by the owner of what is now the Butts land and by the public.

The right over the Hale land which flowed to the owner of the Butts land at the time the right came into being passed in succession to subsequent grantees. Smith v. Garbe, 86 Neb. 91, 124 N. W. 921, 136 Am. S. R. 674; Dormer v. Dreith, *supra.*

It must follow then that the right to the use of the road continues unless somewhere along the line, as the defendant contends, the right was lost or extinguished.

The defendant in this connection contends that a time came when there became a common ownership of the Hale land and the Butts land which merged the easement with the title thus destroying and extinguishing the easement.

The facts in this connection are that prior to the date of her death the Hale land belonged to Almeda Connealy, the mother of J. W. Connealy. On December 28, 1923, J. W. Connealy received title to the Hale land from his mother subject to a life estate retained by the mother. The mother died in 1928 at which time her life estate expired.

In 1919, J. W. Connealy purchased the Butts land and thus became the owner of the right to the road over the Hale land.

Prior to the time that J. W. Connealy obtained title to the Hale land subject to the life estate of his mother he gave a mortgage on the Butts land to the Peters Trust Company which mortgage was duly assigned to the Connecticut General Life Insurance Company. The description of the land in the mortgage contained the following: "Together with all rights thereunto appertaining * * *."

The right to the use of the road over the Hale land was open and apparent and in fact was at the time being exercised the same as it had been since 1888.

Certainly at the time the mortgage was given there had been no merger. Connealy had an interest in the Hale land but he did not have full title or the right to the use thereof until after the death of his mother in 1928. From 1919 until 1928 J. W. Connealy himself used and obviously was entitled to use the road over the Hale land by virtue of its establishment as hereinbefore explained and on no other basis. This was his only outlet from the Butts land. Over this period he himself was an adverse user of the road.

Whatever right he had he conveyed to the Peters Trust Company by his mortgage. It is true of course that by the mortgage there was no absolute conveyance of title. There was however a conditional conveyance. This court has said that a mortgage is security in the form of a conditional conveyance. Barber v. Crowell, 55 Neb. 571, 75 N. W. 1109.

This being true it must follow that the conditional conveyance is of the very interest belonging to the estate conveyed, including appurtenances or easements extending over adjacent lands, all of which would pass to a purchaser in case of foreclosure and sale of the mortgaged land.

In Hart v. Beardsley, 67 Neb. 145, 93 N. W. 423, it was said: "A foreclosure sale of lands and tenements, unless the decree otherwise provides, transfers to the purchaser every right and interest in the property of all parties to the action."

In Swedish-American Nat. Bank v. Connecticut Mutual Life Ins. Co., 83 Minn. 377, 86 N. W. 420, it was said: "There can be no difference between the rights acquired under a deed and those granted and secured under a mortgage. While the mortgage is but a conditional sale and transfer of the incumbered estate, the sale becomes absolute, and all rights of the mortgagor pass to the mortgagee on foreclosure. * * *

"Every right or interest held by a mortgagor in and to the mortgaged property, together with all subsequently acquired rights, easements, and privileges, which are necessary and essential to the full enjoyment of the property, pass with the mortgage, and that, too, though reference is not specially made in the mortgage to anything further than the particular property conveyed. Under this rule it is held that an easement passes with the land to which it is appurtenant without express reference to it in the deed of conveyance."

The mortgage on the Butts land was foreclosed in 1932 and title passed to the Connecticut General Life Insurance Company. It thereby acquired all of the rights theretofore existing to the road in question.

Plaintiff's title flowed to him in due and direct course from the Connecticut General Life Insurance Company. Thus he acquired and is entitled to all of the rights to the road obtained by the Connecticut General Life Insurance Company, which is the right to the full, complete, and free use of the road.

It is our opinion that on the facts hereinbefore considered and the legal principles set forth it has been demonstrated that there has been an implied dedication of this road as a public road which dedication is in full force and effect, as well as a road peculiar to the plaintiff.

The prayer of the petition does not seek a determination of the question of dedication but the petition does tender it as an issue, therefore it has appeared proper to make a determination upon it.

For the reasons herein set forth the decree of the district court is affirmed.

AFFIRMED.

WENKE, J., participating on briefs.

EARL HAIGHT, APPELLANT AND CROSS-APPELLEE, V. VERNON NELSON, APPELLEE AND CROSS-APPELLANT.
59 N. W. 2d 576

Filed July 3, 1953. No. 33358.

1. **Automobiles: Negligence.** As a general rule it is negligence, as a matter of law, for a motorist to drive an automobile so fast on a highway at night that he cannot stop in time to avoid a collision with an object within the area lighted by his lights.
2. ———: ———. The basis of this rule is that a driver of an automobile is legally obligated to keep such a lookout that he can see what is plainly visible before him and that he cannot relieve himself of that duty. And, in conjunction therewith, he must so drive his automobile that when he sees the object he can stop his automobile in time to avoid it.
3. ———: ———. 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.
4. **Highways: Automobiles.** However, on unlighted streets and highways, and those lighted but where the light is obstructed, we have made exceptions to this general rule when the nature of the object or its condition, such as color, dirt, et cetera, in relation to the highway or road, affected its immediate visibility or when, because of the lights of oncoming traffic, the driver's attention is distracted or his vision impaired and his opportunity for immediate discernment thereby affected. In such cases we have held that the issue of the driver's negligence, if any, and the degree thereof is for the jury.
5. **Trial.** It is reversible error for the trial court to permit plaintiff, on his case in chief, to show that defendant is indemnified from loss by an insurance company where such proffered evidence is not relevant to any material issue in the case.

6. **Automobiles: Negligence.** Ordinarily where it appears from the evidence of a witness that, although he saw the car in movement immediately before the accident, but he had no reasonable length of time, movement in distance, or other means to use as a basis upon which to formulate an opinion as to the speed thereof, he should not be allowed to testify in regard thereto.
7. **Highways: Automobiles.** Section 39-757, R. R. S. 1943, prohibiting parking or the leaving of any vehicle, whether attended or unattended, upon the paved or improved or main traveled portion of any highway, outside of the business or residence district, when it is practicable to leave such vehicle off the paved or improved or main traveled portion of the highway, does not, by an express exception contained therein, apply to any automobile which is disabled, while on a paved or improved highway, in such manner and to such extent that it is impossible to avoid stopping and temporarily leaving such vehicle in such position.
8. **Trial.** 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.
9. **Negligence.** 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.

APPEAL from the district court for Kearney County: EDMUND P. NUSS, JUDGE. *Affirmed.*

George J. Marshall, for appellant.

William H. Meier, for appellee.

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

WENKE, J.

This is a tort action brought in the district court for Kearney County by Earl Haight against Vernon Nelson. It arises out of the fact that sometime between 11:15 and 11:30 p. m. on the night of June 21, 1951, defendant drove his car into the rear of plaintiff's car while the latter was standing on U. S. Highway No. 6 at a point

approximately 6¾ miles west of Minden, Nebraska, resulting in serious damage thereto. Several issues were raised by the pleadings but we shall mention them only in connection with our discussion of the different contentions made by the parties as they relate thereto. The cause was tried and submitted to a jury and it returned a verdict in favor of the defendant. Plaintiff thereupon filed an alternative motion asking for either a judgment notwithstanding the verdict or for a new trial. This motion having been overruled plaintiff appealed and defendant has cross-appealed.

The following facts are either admitted by the pleadings or conclusively established by the evidence: That appellant and his family, consisting of his wife and an 11-year-old son, had, on June 21, 1951, been to Lexington, Nebraska, to attend a meeting; that about 10 p. m. that evening they left Lexington in their car, a 1949 Hudson 2-door brougham, which appellant was driving, to return to their home at Riverton, Nebraska; that the car was apparently in good condition as no previous difficulty had been experienced therewith; that as they were returning to Riverton by way of Kearney, Nebraska, at a point approximately 1½ miles east of the intersection of State Highway No. 44 and U. S. Highway No. 6, which intersection is to the south of Kearney, appellant's car, due to mechanical failure, came to a stop on the oil mat surfaced area of Highway No. 6; that appellee, his family, and some relatives had been to Holdrege, Nebraska, on that day; that they left Holdrege that evening to return to their home at Minden, Nebraska; that they were traveling in appellee's car, a 1949 Mercury 2-door sedan, which appellee was driving; that this car was apparently in good working condition; that it had been raining hard; that although this rain had generally ceased it was still misting and raining slightly requiring both cars to have their windshield wipers working; that visibility for driving was satisfactory; that the oil mat surface of Highway No. 6, which at this point was 24 feet wide, was

wet; that Highway No. 6 at the place of the accident is straight and level; that appellee was driving from 40 to 50 miles an hour; that very shortly after appellant's car came to a stop appellee's car ran into the rear thereof causing substantial damage thereto as well as to appellee's car; and that injury was also caused thereby to some of the occupants of appellee's car.

Appellant's principal contention is that the court erred in not directing a verdict for him and in failing to submit to the jury only the question of the amount of the damage that his car had suffered. This is on the theory that the facts of this case bring it within the principle that:

"As a general rule it is negligence, as a matter of law, for a motorist to drive an automobile so fast on a highway at night that he cannot stop in time to avoid a collision with an object within the area lighted by his lamps." Buresh v. George, 149 Neb. 340, 31 N. W. 2d 106.

"The driver of a motor vehicle has the duty to keep a proper lookout and watch where he is driving even though he is rightfully on the highway and has the right-of-way or is driving on the side of the highway where he has a lawful right to be. He must keep a lookout ahead or in the direction of travel or in the direction from which others may be expected to approach and is bound to take notice of the road, to observe conditions along the way, and to know what is in front of him for a reasonable distance." Murray v. Pearson Appliance Store, 155 Neb. 860, 54 N. W. 2d 250.

As stated in Buresh v. George, *supra:* "The basis of this rule is that a driver of an automobile is legally obligated to keep such a lookout that he can see what is plainly visible before him and that he cannot relieve himself of that duty. And, in conjunction therewith, he must so drive his automobile that when he sees the object he can stop his automobile in time to avoid it."

And in applying this principle: "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." Murray v. Pearson Appliance Store, *supra.*

In determining this issue we apply the following rule in our consideration of the evidence: "A motion for a directed verdict must, for the purpose of a decision thereon, be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed, and said party is entitled to have every controverted fact resolved in his favor, and to have the benefit of every inference that can reasonably be deduced from the facts in evidence." Buresh v. George, *supra.*

There is evidence from which the jury could have found that appellant's car was of a dull dark green color; that it was spattered and begrimed from the wet oil mat surface over which it had been traveling; that it came to a stop in the east bound or south lane of travel of U. S. Highway No. 6; that it had no lights on it as it stood there; that its color caused it to blend into the color of the wet oil mat surface; that appellee's lights extended for at least 100 feet; that appellee was looking and watching ahead for traffic on the highway but did not see appellant's car until it was only about 50 feet ahead of him; that he was unable to turn and avoid hitting it, although there was plenty of room to the left or north thereof in which to pass; and that, because of the foregoing, appellee's car ran into the rear of appellant's car very shortly after it came to a stop.

We have qualified or made exceptions to the rule hereinbefore set out. In Buresh v. George, *supra,* we said: "However, on unlighted streets and highways, and those lighted but where the light is obstructed, we have made exceptions to this general rule when the

nature of the object or its condition, such as color, dirt, et cetera, in relation to the highway or road, affected its immediate visibility or when, because of the lights of oncoming traffic, the driver's attention is distracted or his vision impaired and his opportunity for immediate discernment thereby affected. In such cases we have held that the issue of the driver's negligence, if any, and the degree thereof is for the jury."

"Users of the highway are required to exercise reasonable care. What is reasonable care must, in each case, be determined by its own peculiar facts and circumstances." Murray v. Pearson Appliance Store, *supra.*

We think the factual situation here came within the foregoing and that the court was correct in submitting this issue to the jury. See, Plumb v. Burnham, 151 Neb. 129, 36 N. W. 2d 612. This the court did by its instruction No. 5. Consequently it did not err in refusing to give appellant's requested instructions Nos. 1 and 4. These requested instructions, insofar as proper, were sufficiently covered by the instructions given.

"Instructions should be considered together in order that they may be properly understood, and when, as an entire charge, they properly submit the issues to the jury, the verdict will not be set aside * * *." Blanchard v. Lawson, 148 Neb. 299, 27 N. W. 2d 217.

Appellant contends prejudicial error occurred when, over objection and motion to strike, the court allowed appellee to testify appellant told him, shortly after the accident, that: "You don't have to worry about your car because I have liability insurance on mine." We have said: "* * * it is reversible error for the trial court to permit plaintiff on his case in chief to show that defendant is indemnified from loss by an insurance company, where such proffered evidence is not relevant to any material issue in the case." Fielding v. Publix Cars, Inc., 130 Neb. 576, 265 N. W. 726, 105 A. L. R. 1306.

In discussing this question we said: "But, where the plaintiff shows that defendant carries liability insurance,

when it is not relevant to some issue in the case, we have come to the conclusion that it is inadmissible. Such evidence can have no relevancy to the question of negligence. It cannot be disputed that there are cases where liability insurance may be the subject of evidence, or the object of interrogatories, if the fact of insurance bears upon an issue in the case. In other words, if the evidence is properly admissible for any purpose, it cannot be excluded for the reason that it tends to prejudice the defendant because it shows or tends to show that he carries liability insurance." Fielding v. Publix Cars, Inc., *supra*. See, also, Lund v. Holbrook, 153 Neb. 706, 46 N. W. 2d 130.

This evidence was not relevant to any material issue in this case. It was clearly error to admit it. But all evidence erroneously admitted is not necessarily prejudicial. If the appellee's causes of action set forth in his cross-petition, wherein he sought to recover damages for injuries to himself, his car, and for loss of companionship and services of his wife, who was injured in the accident, and for the expenses, including those for medical and hospital services, which he necessarily had been required to pay because thereof, had been submitted to the jury it would clearly have been prejudicial. However, here appellant's right to recover can in no way be affected thereby as certainly the fact that he had liability insurance to protect others would in no way relate to his right to recover against appellee. We think it was error to admit this evidence but not prejudicial so as to require a reversal.

Appellant also contends the trial court erred in not permitting him to testify to the speed of appellee's car and of its ruling in striking out such testimony.

Appellant, who was sitting in his car, did not see appellee's car approach but did hear it as it did so and felt the immediate impact when it hit. Based on these facts, that is, what he heard, the immediate impact, and his observation of what happened as a result thereof,

appellant sought to testify as to the speed of appellee's car.

Ordinarily, where it appears from the evidence of a witness that, although he saw the car in movement immediately before the accident, but he had no reasonable length of time, movement in distance, or other means to use as a basis upon which to formulate an opinion as to the speed thereof, he should not be allowed to testify in regard thereto.

We have considerably modified the strict enforcement of this rule. See Koutsky v. Grabowski, 150 Neb. 508, 34 N. W. 2d 893; Kraft v. Wert, 150 Neb. 719, 35 N. W. 2d 786; Schluter v. State, 153 Neb. 317, 44 N. W. 2d 588. However, we have never eliminated the requirement that the witness must at least have observed the car in movement immediately before the accident. In the absence of such observation we do not think the witness is qualified to answer.

Some mention is made by appellant of the following rule: " 'The rule that a verdict will not be disturbed when there is evidence tending to support it does not apply where the verdict is opposed to the undisputed physical facts of the case, or is in flat contradiction of recognized physical laws, * * *.' Dodds v. Omaha & C. B. Street R. Co., 104 Neb. 692, 178 N. W. 258." Hill v. Interstate Transit Lines, 137 Neb. 110, 288 N. W. 508. We can see no application of that principle to the facts of this case.

Appellee's cross-appeal relates to the court's ruling sustaining appellant's motion, made at the end of the trial when both parties had rested, to direct a verdict in his favor on appellee's causes of action contained in his cross-petition and to withdraw from the jury the question of any contributory negligence on the part of the appellant.

In ruling on this motion the court said: "There is no evidence of any kind which shows that the plaintiff was at fault because of his car stalling on the highway.

He had a right to drive on the highway. And if his car stalled on the highway the law doesn't put him in a position of being liable if someone runs him down or causes damage to him."

In his answer and cross-petition appellee alleged appellant was negligent, which negligence was the proximate cause of the accident, in the following particulars:

"(a) in parking said automobile on the travelled portion of the highway so as to obstruct traffic thereon and be and become a hazard and without due regard for the weather and the condition of the road;

"(b) in failing to have the lights burning on his said automobile;

"(c) in failing to give any warning to the approaching vehicles that said automobile was obstructing traffic on the travelled portion of the road."

For the purpose of determining this issue, we apply to the evidence adduced the principle quoted from Buresh v. George, *supra,* which has already been set forth herein.

From the evidence adduced the jury could have found that appellant, on his return trip from Lexington to Riverton, started having trouble with his lights just before getting to Kearney; that the lights would dim; that he went through Kearney and started south from there on State Highway No. 44; that when about 2 miles south of Kearney he again started having the same trouble; that he returned to Kearney and there had a mechanic endeavor to fix the trouble; that the mechanic found what he thought was the trouble and advised appellant he had fixed it; that appellant again started south on Highway No. 44; that he had no trouble until he reached a point on Highway No. 44 about 2 miles north of where it intersects with U. S. Highway No. 6; that then the same trouble reoccurred and for the first time it affected his motor by causing it to cut out or miss; that he stopped his car and flagged down another car which was going in the same direction; that he made arrangements with the driver of this car to follow it into Minden, which was

east of the intersection on U. S. Highway No. 6; that he followed this car to the intersection and then east on Highway No. 6; that his car, during this time, continued to have the same trouble; that he was traveling about 20 miles an hour; that when he had traveled a distance of about 1½ miles east on Highway No. 6 his motor died out completely and the lights went out; that this was due to the fact that the battery in the car had burned out; that as it did so he pushed in the clutch and tried, while the car was still traveling, to get as far off the traveled surface as possible; that he did not get it completely off the traveled surface, the car stopping in the east bound or south lane for travel; that he then tried to start the motor of the car but the starter would not work; that the party whom he was following turned around and then, by agreement, was going west to turn around and come back and push his car into Minden; and that before he could do so, and very shortly after the car had stopped, it was hit in the rear by appellee's car. It should here be stated Lamoine Fern testified that appellant told him, after his car stalled, he tried to get the motor started but could not and in doing so ran down his battery.

This is not a case of operating or parking a car on a highway at night without appropriate lights as required by our statutes sections 39-778 and 39-7,112, R. R. S. 1943. It is a case where the operator thereof, because of reasons beyond his control, found it impossible to prevent his car from stalling on the highway without power or lights or to do anything in regard to moving it, after it had so stalled, before it was hit. See Pierson v. Jensen, 150 Neb. 86, 33 N. W. 2d 462.

Section 39-757, R. R. S. 1943, formerly section 39-1154, Comp. St. Supp., 1931, as far as here material, provides: "No person shall park or leave standing any vehicle whether attended or unattended, upon the paved or improved or main traveled portion of any highway, outside of a business or residence district, when it is practicable to park or leave such vehicle standing off the paved or

improved or main traveled portion of such highway; Provided, * * * The provisions of this section shall not apply to the driver of any vehicle which is disabled while on the paved or improved or main traveled portion of a highway in such manner and to such extent that it is impossible to avoid stopping and temporarily leaving such vehicle in such position."

We said of the statute in LaFleur v. Poesch, 126 Neb. 263, 252 N. W. 902, the following: "Section 39-1154, Comp. St. Supp. 1931, prohibiting parking or to leave standing any vehicle whether attended or unattended, upon the paved or improved or main traveled portion of any highway, outside of the business or residence district, when it is practicable to leave such vehicle off the paved or improved or main traveled portion of the highway, does not, by an express exception contained therein, apply to any automobile which is disabled, while on the paved highway, in such manner and to such extent that it is impossible to avoid stopping and temporarily leaving such vehicle in such position."

And in Plumb v. Burnham, *supra,* we said: "The mere stalling of a motor vehicle temporarily upon the highway, caused by an exhaustion of the gas supply, would not ipso facto constitute negligence as a matter of law, but a failure to use ordinary care in removing the stalled vehicle from the highway within a reasonable time when it was possible to do so, would be negligence."

It is appellee's thought that because appellant did not drive off of the paved surface of the highway and stop on the shoulder of the road, while his car was still able to operate, instead of trying to follow the car into Minden or because he used up his battery in trying to start the car, a jury could find he was guilty of negligence that contributed to the accident and was a proximate cause thereof. While this is not material, since the verdict on appellant's cause of action was for appellee, we shall briefly discuss the matter as it has some relation to

whether or not appellant could be found guilty of any negligence.

"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, 154 Neb. 268, 47 N. W. 2d 569.

"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, *supra*.

"Foresight, not retrospect, is the standard of diligence. It is nearly always easy, after an accident has happened, to see how it could have been avoided. But negligence is not a matter to be judged after the occurrence. It is always a question of what reasonably prudent men under the same circumstances would or should, in the exercise of reasonable care, have anticipated." 1 Shearman & Redfield on Negligence (Rev. ed.), § 24, p. 50.

We think the evidence shows that appellant did only what any reasonably prudent person would ordinarily have done under the circumstances and nothing that such a person would not have done. We find, as a matter of law, there is no evidence of any conduct on the part of appellant from which a jury could have found he was negligent. It should be remembered the accident happened so quickly after the car stalled that appellant did not have a reasonable time to remove it from the traveled portion of the highway.

From a consideration of all the contentions made by the parties we find neither has any grounds for reversal. We therefore affirm the action of the trial court.

AFFIRMED.

MERLE BECKER, ADMINISTRATRIX OF THE ESTATE OF ROBERT R. BECKER (ALSO KNOWN AS RUDOLPH R. BECKER), DECEASED, APPELLEE, V. MARGARET HASEBROOCK, APPELLANT, IMPLEADED WITH CONTINENTAL GRAIN COMPANY, A CORPORATION, APPELLEE.

59 N. W. 2d 560

Filed July 3, 1953. No. 33361.

1. **Negligence.** Where contributory negligence is pleaded as a defense, and there is no evidence to sustain it, it is reversible error to submit the issue to the jury.
2. **Automobiles.** In order to establish a violation of section 39-778, R. R. S. 1943, in driving an automobile without lighted front and rear lamps after a half hour before sunrise and before a half hour after sunset, there must be evidence to sustain a finding that there was not sufficient light to render persons or vehicles clearly discernible upon the highway at a distance of 500 feet ahead.
3. ———. An automobile driver may not violate the rules of the road and then invoke the doctrine of sudden emergency to relieve himself from liability to another who is injured as a result of his violation of such rules.
4. **Appeal and Error.** Errors in instructions not prejudicial to the complaining party do not require a reversal of a judgment otherwise correct.
5. **Damages: Evidence.** Funeral expenses cannot be recovered in the absence of proof that they represent the fair and reasonable value of the materials furnished and the services rendered.

APPEAL from the district court for Cuming County: LYLE E. JACKSON, JUDGE. *Affirmed in part, and in part reversed.*

Moodie & Burke and *Deutsch & Jewell,* for appellant.

Robert G. Fuhrman, Shrout & Brown, and *Morsman, Maxwell, Fike & Sawtelle,* for appellees.

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

CARTER, J.

This is an action to recover for the wrongful death of Robert R. Becker brought by his wife as the adminis-

tratrix of his estate. The jury returned a verdict for $15,000 on the cause of action for the wrongful death, and for $775.95 on the cause of action for funeral expenses. The defendant appeals.

The litigation arose out of an automobile accident. The evidence shows the following facts: The defendant, Margaret Hasebroock, was driving south on U. S. Highway No. 275 at about 10 a. m. on January 14, 1952, on her way from West Point to Lincoln. She testifies that for some distance out of West Point the highway was level and vision was good to the extent that she could see well for one-half mile. About 1 mile south of West Point she was following another automobile as it approached the crest of a hill. Both automobiles were proceeding at a speed of approximately 25 miles an hour. She speeded up her automobile at this point and turned into the left lane of the highway to pass the automobile ahead of her. As she came abreast of the latter car, it speeded up and both automobiles proceeded abreast down the other side of the hill. The evidence shows that a fog had settled over this section of the highway which impaired visibility. As the two automobiles approached the incline of the hill across the valley, her automobile collided with that of the decedent who was proceeding north. The decedent, Becker, was killed instantly in the accident. The two automobiles were found shortly thereafter by two members of the Nebraska Safety Patrol and others using the highway. After the accident the Becker automobile was on its right-hand side of the road with the right rear wheel just off the pavement and the right front wheel just on the pavement. Defendant's automobile was on its left-hand side of the road with its right rear wheel within a foot of the center of the highway and its left front wheel near the left edge of the pavement. The bumpers of the two cars were about 4 feet apart. It appears to have been a near head-on collision with the right front of each car appearing to have been damaged more than

the left. There was a yellow no-passing line restraining defendant from crossing into the left lane at the point of the accident which began 36 yards north of the front end of defendant's car. The concrete pavement was wet and the yellow restraining line was clearly discernible. The physical facts clearly show that the accident occurred on the east side of the highway on the left side of the yellow no-passing line restraining southbound traffic. Defendant testifies that she was driving with headlights and fog lights burning and that no lights were burning on the Becker car. There were no lights burning on either car after the accident. No persons other than the drivers were in the automobiles. The automobile which defendant attempted to pass did not stop and defendant has no information concerning the car or its occupants. Defendant testifies that she met a dozen or so cars before she entered the valley or hollow between the higher terrain on each side and that most of them had their headlights burning. It was about 1,000 feet from the end of the yellow line north of the crest of the hill to the beginning of the yellow line existing at the scene of the accident. In other words, defendant had 1,000 feet to pass the car ahead of her between the yellow no-passing lines restraining southbound traffic. Defendant says she looked to the south before starting to pass the car ahead and that she saw no car coming. She states that the Becker car came "out of nowhere" and "it was just right there in front of me." She did not know the speed at which she was driving at the time of the accident except that she was abreast of the other car which speeded up when she tried to pass. In one place in her testimony she says the Becker car was practically in the center of the road when she first saw it. She says she was blocked from turning right by the car she was attempting to pass and was forced to pull for the ditch on her left-hand side of the road. At another time she says with reference to the Becker car being in the center of the highway: "As I saw the picture in

that brief fleeting moment; that is what I saw."

With reference to visibility at the place of the accident, the evidence of the defendant is summarized in the following questions and answers from her testimony: "Q. Do you mean you could see ahead at the time? A. I could see a certain distance ahead. Q. How far could you see? A. I wouldn't know. Q. Very short distance, wasn't it, Mrs. Hasebroock? A. I don't know. Q. Or was it a long distance? A. I don't know." Other witnesses merely described the climatic condition at the scene of the accident as very foggy.

It was upon the foregoing that the jury returned a verdict for the plaintiff. It is undisputed that defendant was driving on the left-hand side of the road and was over the yellow no-passing line when the collision occurred. The Becker car after the accident was on the right-hand side of the road; in fact, the right rear wheel was off the pavement on the shoulder. It was a foggy day and defendant was driving at a speed she would not even estimate. Defendant was unable to state how far she could see in the fog, although she does say that headlights penetrated it. The evidence was clearly sufficient to sustain a finding by the jury that defendant was negligent. The question raised is whether or not the trial court erred in not submitting the question of contributory negligence to the jury.

It is fundamental that where contributory negligence is alleged as a defense and there is evidence in the record to sustain it, the trial court is required to instruct the jury on that issue whether requested to do so or not, and a failure to so instruct under such circumstances is reversible error. Lieb v. Omaha & C. B. St. Ry. Co., 119 Neb. 222, 228 N. W. 364. The defendant asserts that contributory negligence was pleaded and evidence in support thereof adduced. The evidence relied upon was the failure of the decedent to have his lights on, as testified by the defendant, under the conditions existing at the scene of the accident. The applicable statute, insofar

as it is here pertinent, provides: "Every motor vehicle upon a highway within this state during the period from a half hour after sunset to a half hour before sunrise, and at any other time when there is not sufficient light to render clearly discernible persons or vehicles upon the highway at a distance of five hundred feet ahead, shall be equipped with lighted front and rear lamps * * *." § 39-778, R. R. S. 1943. There is no evidence in the record that a vehicle was not discernible at a distance of 500 feet. The evidence shows only that it was a foggy day and that defendant could see some distance ahead; how far she did not know. Such evidence does not establish a violation of this statute for failure to have front and rear lights burning at 10 a. m. Contributory negligence, like any other fact, cannot rest upon speculation or conjecture. There must be competent evidence to sustain it. The evidence that plaintiff's decedent was driving in the center of the road is very fragmentary and in our opinion insufficient to sustain a finding to that effect. The defendant testifies that in the brief fleeting moment, when she observed the Becker car before the accident, it appeared that it was in or near the center of the road. She refused to say that it was over the center line. The car ahead of defendant did not strike decedent's car. This evidence when viewed in connection with the fixed location of the two automobiles immediately following the collision is insufficient to sustain a finding of contributory negligence on the part of the decedent Becker. The trial court did not err therefore in refusing to submit the question of contributory negligence to the jury. The rule is that where contributory negligence is pleaded as a defense and there is no evidence to sustain it, it is error to submit the issue to the jury. Remmenga v. Selk, 150 Neb. 401, 34 N. W. 2d 757. Under the conclusions of fact as the jury found them to be and as we have here considered them, the case of Bainter v. Appel, 124 Neb. 40, 245 N. W. 16, is particularly applicable. We there said: "Plaintiff, then,

as to the north half of this highway, had the exclusive statutory right of way as against eastbound traffic thereon. This being true, plaintiff, as driver of his car, had the right to assume that no one, in violation of the express command of this legislation, would pass over the center line of this highway with his motor vehicle, travel eastward on the north half thereof, project his car into a cloud of dust on plaintiff's own side of the road, and strike him. The fact that the accident occurred in this manner constitutes ample evidence to go to the jury on the question of defendant Appel's negligence, and fully sustains the inference that plaintiff was wholly free from contributory negligence."

The defendant asserts that the doctrine of sudden emergency applies in that she was pocketed by the car she was attempting to pass. The applicable rule is announced in Callahan v. Prewitt, 141 Neb. 243, 3 N. W. 2d 435, wherein the following is approved: "'An automobile driver may not violate the rules of the road, and then invoke the doctrine of sudden emergency to relieve himself from liability to another who is injured as a result of his violation of such rules.'"

The defendant alleges error in stating the issues to the jury when the trial court in setting forth the claim of the plaintiff said that defendant was traveling 65 miles an hour when there was no evidence to that effect. The evidence failed to disclose the speed of defendant's car. The jury was advised that the statement of the issues was not to be treated as evidence but simply as a statement of what the respective parties claim. Under such circumstances there was no error prejudicial to the rights of the defendant. Nama v. Shada, 150 Neb. 362, 34 N. W. 2d 650.

The defendant complains of that part of an instruction stating: "Any person who drives any vehicle in such manner as to indicate either a willful or wanton disregard for the safety of persons or property is guilty of reckless driving." We do not think the giving of this in-

struction was prejudicial error, although we fail to see any reason for giving it under the evidence in this case. The instructions when construed as a whole fairly submit the case to the jury. The portion of the instruction complained of did not affect the substantial rights of the defendant. Its giving was harmless error. Hardung v. Sheldon, 133 Neb. 427, 275 N. W. 586; McCown v. Schram, 139 Neb. 738, 298 N. W. 681.

It is urged that the judgment for $15,000 on the cause of action for wrongful death was excessive. The evidence shows that the deceased was 68 years of age and in excellent health. According to the expectancy tables offered in evidence, his life expectancv was approximately 10 years. These tables are not binding and the jury could have properly found his life expectancy to have been in excess of 10 years. The deceased was a traveling auditor for a grain company. He had an expense account to cover his living expenses while on the road. He had an earning capacity between $250 and $300 a month. His wife, age 57, was wholly dependent upon him. The deceased was survived by five children, all married, who were, from time to time, the recipients of his bounty. We think the evidence was sufficient to sustain the verdict of the jury for $15,000. The judgment on the cause of action for wrongful death in this amount is affirmed.

Defendant contends that the verdict and judgment for $775.95 for funeral expenses is not sustained by the evidence. The record shows that the funeral expenses were paid by the wife of the decedent in the amount of $775.95. The only evidence relating thereto was the receipted statement of the undertaker which was received in evidence over the objection of the defendant. There was no evidence of the fair and reasonable value of the materials furnished or the services rendered. Such proof is essential to a recovery. The objection to the admission of the receipted statement should have been sustained. Likewise, the motion for a directed verdict

made at the close of plaintiff's evidence should have been sustained as to this cause of action. The rule is stated in Oliverius v. Wicks, 107 Neb. 821, 187 N. W. 73, and requires a reversal of the judgment for $775.95 for funeral expenses for the reason that it is not sustained by sufficient evidence.

The judgment for the plaintiff for $15,000 for the wrongful death of plaintiff's decedent is sustained. The judgment for $775.95 for funeral expenses is reversed. The costs of the appeal are taxed against the defendant.

AFFIRMED IN PART, AND
IN PART REVERSED.

MARTIN WALL ET AL., APPELLEES, V. ARTHUR R. WALL ET AL., APPELLEES, ROLAND A. WERTH ET AL., INTERVENERS-APPELLANTS.

59 N. W. 2d 398

Filed July 3, 1953. No. 33366.

1. **Wills.** The intention of a testator is to be ascertained from a liberal interpretation and comprehensive view of all the provisions of a will.
2. ———. No particular words, no conventional forms of expression, are necessary to make an effective testamentary disposition of property.
3. ———. A court places itself in the position of the testator, ascertains his will, and, if lawful, enforces it.
4. ———. Where the language in a will is clear and unambiguous it is not subject to construction.

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

Edgerton & Powell, for appellants.

Charles F. Adams, for appellees.

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

SIMMONS, C. J.

This is an action for the partition of real estate. Plaintiff alleged that he, and nine-named defendants, are the owners of the real estate as tenants in common, basing the title on the will of Augusta P. Eberhard, which provides: "SECOND: After the payment of the debts and expenses as provided for in the first section hereof, I give and bequeath to my nieces and nephews, share and share alike, any and all property that I may have, including real estate, bonds or money:

"The nieces and nephews mentioned are as follows:

"Arthur Wall, Hampton, Nebraska, Martin Wall, Hampton, Nebraska, Harold Wall, Hampton, Nebraska, Mrs. Selma Brockman, Shoshone, Wyoming, Mrs. Lydia Serck, Bunieton, Missouri, Mrs. Clara Moellering, Cincinnatti, Ohio, Mrs. Florence Genz, Portland, Oregon, Mrs. Alma Otto, St. Carnas, Washington, Mrs. Mable Kohtz, Scottsbluff, Nebraska, and Elmer Kath, Kimball, Nebraska."

Roland A. Werth and Walter W. Werth intervened, alleging that testatrix had 15 nieces and nephews; that they (interveners) are among that number; that by naming 10, testatrix did not exclude the other 5; that all 15 are beneficiaries under the will; and accordingly, that interveners are each the owners of a one-fifteenth interest in the property. They pray for a construction of the will so declaring, and that upon the sale of the property they each be awarded a one-fifteenth share of the proceeds.

Plaintiffs demurred to the petition as failing to state facts sufficient to constitute a cause of action. The trial court sustained the demurrer. The interveners elected to stand on their petition. The court dismissed the petition in intervention. Interveners appeal. We affirm.

Interveners argue here that there is no irreconcilable conflict in the provisions of the will. We agree. We find no conflict of any kind.

Interveners argue that there is a repugnancy between the demise "to my nieces and nephews" and the clause

naming "the nieces and nephews mentioned"; that the testatrix in the devising clause intended all 15 of her nieces and nephews with certainty and then named 10 only and thereby created uncertainty and indefiniteness; and that hence the clause naming the beneficiaries should be rejected.

The fallacy of interveners' argument is in the assumption that the devising clause included all nieces and nephews. Obviously it did nothing of the kind. Clearly the testatrix intended to and did devise her property to the 10-named beneficiaries who were her nieces and nephews.

"No rule of law is better settled or more in accord with good sense than that which requires the intention of the testator to be ascertained from a liberal interpretation and comprehensive view of all the provisions of the will. No particular words, no conventional forms of expression, are necessary to make an effective testamentary disposition of his property. The court, without much regard to the canons of construction, will place itself in the position of the testator, ascertain his will, and, if lawful, enforce it." In re Estate of Combs, 117 Neb. 257, 220 N. W. 269. See, also, Dennis v. Omaha Nat. Bank, 153 Neb. 865, 46 N. W. 2d 606.

Where the language in a will is clear and unambiguous there is no room for construction. In re Estate of Nelson, 132 Neb. 376, 272 N. W. 219; Kenfield v. Dudek, 135 Neb. 574, 283 N. W. 209. Such is the general rule. 57 Am. Jur., Wills, § 1124, p. 719; 2 Schouler on Wills (6th ed.), § 849, p. 959; Thompson on Wills (3d ed.), § 210, p. 322; 2 Page on Wills (Lifetime ed.), § 916, p. 796.

The will here does not require the application of rules of construction.

There is no contention here that the intent of the testatrix as clearly expressed in her will is contrary to law. The trial court did not err in its ruling. Its judgment is affirmed.

AFFIRMED.

IRA O. PEEK, APPELLANT, V. AYERS AUTO SUPPLY, A COPARTNERSHIP, ET AL., APPELLEES.

59 N. W. 2d 564

Filed July 3, 1953. No. 33384.

1. **Workmen's Compensation.** A proceeding under section 48-141, R. R. S. 1943, to modify a previous award of the compensation or district court, payable periodically for more than 6 months on which payments have been completed as specified therein and to recover additional compensation for an increase in incapacity, can be brought any time within 1 year from the time the employee knows or is chargeable with knowledge that his condition has materially changed, and that there has been such a substantial increase in his disability as to entitle him to additional compensation.
2. ———. The statute restricts the basis for a modification of a previous award of compensation to the increase or decrease of incapacity that has occurred since the award and has been caused by the violence to the physical structure of the body of the claimant by the accident.
3. ———. Any increase or decrease in incapacity of the claimant the cause of which is not the injury received in the accident, the basis of the previous award, is insufficient to justify modification of the award.
4. ———. An application in the court which granted a previous award may be maintained to recover additional compensation for an increased disability after the payments required by the award have been completed and the award has been fully performed and discharged.
5. ———. The provisions of the Nebraska Workmen's Compensation Act that the contract of an insurance carrier is a direct promise to and is enforceable in the name of one entitled to compensation benefits makes the carrier a proper party defendant in a proceeding to recover benefits provided by the act.
6. ———. An application to modify an award of compensation should be made to the court and in the proceeding in which the previous award was made.
7. ———. An application by an injured workman for additional compensation because of increased incapacity is not a new proceeding but is only another step in the proceeding initiated by the filing of the original petition for an adjustment of his claim.
8. ———. The jurisdiction acquired by the compensation court by virtue of the Nebraska Workmen's Compensation Act of a

proceeding in which a petition for compensation is made continues, except as otherwise provided in the act, as long as the workman suffers disability the proximate cause of which may be traced to the injury for which claim was originally made and compensation was awarded.

9. ———. The jurisdiction of the district court to modify an award of compensation made therein is identical with that of the compensation court concerning a modification of an award made in that court.

APPEAL from the district court for Richardson County: VIRGIL FALLOON, JUDGE. *Reversed and remanded.*

Tesar & Tesar, for appellant.

Fraser, Connolly, Crofoot & Wenstrand, for appellees.

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

BOSLAUGH, J.

Appellant, an employee of Ayers Auto Supply Company of St. Joseph, Missouri, proceeded against as Ayers Auto Supply, was seriously injured in an accident arising out of and while he was engaged in the course of his employment. In proceedings instituted by him for the recovery of the benefits provided by the Nebraska Workmen's Compensation Act for total and permanent disability he was by this court, in an appeal from the district court for Richardson County, by trial de novo on the record determined not to be totally and permanently disabled by the injuries received in the accident but that he was entitled to and was granted compensation as follows: $18 a week for 105 weeks for temporary total disability; $17.90 a week for 175 weeks for 75 percent temporary partial disability; and $18 a week for 17½ weeks for 50 percent loss of his left ear and 20 percent loss of his right ear. He was also allowed additional amounts for medical expenses and services and for necessary traveling expenses incurred by him. Peek v. Ayres Auto Supply, 155 Neb. 233, 51 N. W. 2d 387.

Judgment was entered in the district court on March

20, 1952, as directed by this court. The period for which compensation had been awarded ended on January 13, 1952. The judgment in favor of appellant was paid to him in full on June 4, 1952.

Appellant filed on December 12, 1952, in the district court for Richardson County a petition in which Ayers Auto Supply and Consolidated Underwriters were named as defendants. It alleged the happening of the accident on May 1, 1946, the injury of appellant therein, his employment by the Ayers Auto Supply Company, the compensation paid to him as above stated, an increase in his disability since "the entry of the decision of the Supreme Court of Nebraska and mandate issued thereon," and that he was on the date of the filing of the petition totally and permanently disabled as a result of the injuries suffered by him in the accident of May 1, 1946. The service of process in this case on Ayers Auto Supply was defeated by an order of the court adjudging it insufficient and void. A demurrer of Consolidated Underwriters to the petition was sustained.

The district court on January 13, 1953, on motion of appellant consolidated the second case in which the petition was filed in that court on December 12, 1952, with the original compensation case; gave appellant leave to name Noble I. Ayers, Noble I. Ayers, Jr., John C. Ayers, and Consolidated Underwriters as additional parties defendant; and gave appellant permission to file a petition in the original compensation case. The petition filed was in substance similar to the one filed in the second case. A summons issued by the district court and a copy of the petition were served on Ayers Auto Supply, Noble I. Ayers, Noble I. Ayers, Jr., and John C. Ayers in Buchanan County, Missouri, an affidavit having been filed that they were each nonresidents of the State of Nebraska and were residents of the State of Missouri. They severally appeared and objected to the jurisdiction of the court over their person and the court sustained their special appearance. The Consolidated

Underwriters demurred to the petition and it was sustained by the court. Appellant elected not to plead further and his petition was dismissed.

Section 48-141, R. R. S. 1943, contains these provisions: "* * * the amount of any * * * award payable periodically for six months or more may be modified as follows: (a) At any time by agreement of the parties with the approval of the compensation court; or (b) if the parties cannot agree, then at any time after six months from the date of the agreement or award, an application may be made by either party on the ground of increase or decrease of incapacity due solely to the injury * * *. In such a case, the same procedure shall be followed as in sections 48-173 to 48-185, in case of disputed claim for compensation, except that after the district court has entered order, award or judgment in the case then the application shall be made to that court."

The requirements for a modification of a previous award of compensation and a recovery of an additional amount are an agreement of the parties approved by the compensation court or that the award was payable periodically for 6 months or more; an increase in incapacity due solely to the injury upon which the original award was based; and that application for additional benefits is made to the court in which the original award was granted more than 6 months after the award and within 1 year from the time the employee knew or was chargeable with knowledge that his condition had materially changed since the original award was made and that there had been such substantial increase in his disability as to entitle him to additional compensation. §§ 48-137 and 48-141, R. R. S. 1943; Scott v. State, 137 Neb. 348, 289 N. W. 367; Riedel v. Smith Baking Co., 150 Neb. 28, 33 N. W. 2d 287; Ludwickson v. Central States Electric Co., 142 Neb. 308, 6 N. W. 2d 65; Huff v. Omaha Cold Storage Co., 136 Neb. 907, 287 N. W. 764; Annotation, 165 A. L. R. 242.

The award of compensation made to appellant be-

cause of his injuries caused by the accident of May 1, 1946, was the judgment of the district court for Richardson County rendered on March 20, 1952. The amount thereof was payable periodically for more than 6 months. The application of appellant for additional compensation was filed in that court on January 13, 1953, more than 6 months from the date of the award and within less than 1 year from the time he alleges he knew his condition had changed since the original award, and he alleges there has been such a substantial increase in his incapacity resulting from the injuries on which the award was based as to entitle him to additional compensation. The application complies with the requirements of the law and entitles him to a hearing of it.

Appellees contend that the award was not payable at periodical times; that the compensation period expired January 13, 1952; that the decision of the court determining what the award should be was not made until February 1, 1952; and that the judgment was not entered in the district court as directed by this court until March 20, 1952. The fact that litigation delayed the final award did not prevent it from being an "award payable periodically for six months or more." The actual compensation period was 297½ weeks. It is true that the payments were all due when the judgment was finally rendered and it was fully paid and discharged on June 4, 1952, before the application was filed for additional benefits because of increased incapacity. It is said because of this the original case was exhausted and closed; that there was no case pending; and that there was no award that could be modified, increased, or decreased. There is much authority for the doctrine that an application for modification of a decree awarding compensation under a statute authorizing such application must be made while the jurisdiction of the court over the case continues, and that such jurisdiction no longer exists after all payments provided for in the original award have been made and the judgment fully satisfied.

Nelson v. Cambria Coal Co., 178 Tenn. 389, 158 S. W. 2d 717, 165 A. L. R. 1; Annotation, 165 A. L. R. 53. However, this jurisdiction has not accepted that doctrine. It has adopted a contrary view. In Scott v. State, *supra*, this court said: "We therefore hold that proceedings may be brought under section 48-142 (now § 48-141, R. R. S. 1943), to recover additional compensation for an increased disability, after the payments under a valid agreement or a previous award have been completed, but that * * * our compensation law requires that the limitation provided in section 48-138 (now § 48-137, R. R. S. 1943) be held to be as much applicable thereto as to a proceeding to recover compensation for a latent disability. And so, a proceeding under section 48-142 * * * to modify a previous * * * award of the compensation or district court, payable periodically for more than six months, on which the payments have been completed, and to recover additional compensation for an increase in disability, can only be brought within one year from the time the employee knows or is chargeable with knowledge that his condition has materially changed, and that there has been such a substantial increase in his disability as to entitle him to additional compensation."

An attempt is made to justify the action of the district court in sustaining the demurrer of Consolidated Underwriters, one of the appellees, to the petition for additional compensation, by stating there is no law in this state for making the insurance carrier of an employer a defendant in any proceeding by an employee to recover benefits under the Nebraska Workmen's Compensation Act. The petition alleged that appellee was at all of the times referred to in the petition the compensation insurance carrier of the Ayers Auto Supply. The demurrer admitted this assertion of fact to be true. Nelson v. Nelson, 152 Neb. 741, 42 N. W. 2d 654. The statute requires that each policy of insurance of this kind contain an agreement of the insurer that it will promptly

pay to the person entitled to the same all benefits conferred by the act; that it shall be a direct promise by the insurer to the person entitled to the compensation enforceable in his name; that every policy of this class shall be deemed to be made subject to the provisions of the act; that each policy shall provide that jurisdiction of the assured for the purposes of the act shall be jurisdiction of the insurer; and that the insurer shall be bound by the awards and judgments rendered against the insured. § 48-146, R. R. S. 1943. This court in Ramsey v. Kramer Motors, Inc., 155 Neb. 584, 52 N. W. 2d 799, considered this section and announced this rule: "The provision of the workmen's compensation law which makes the contract of an insurance carrier a direct promise enforceable in the name of one entitled to compensation benefits effectually makes of the carrier a proper party defendant in an action to recover benefits." See, also, Collins v. Casualty Reciprocal Exchange, 123 Neb. 227, 242 N. W. 457; Chilen v. Commercial Casualty Ins. Co., 135 Neb. 619, 283 N. W. 366. The general demurrer of appellee Consolidated Underwriters to the petition was improperly sustained.

Appellant showed by affidavit that Ayers Auto Supply was a Missouri copartnership with its office and place of business in St. Joseph, Buchanan County, Missouri; that Noble I. Ayers, Noble I. Ayers, Jr., and John C. Ayers were members thereof and nonresidents of Nebraska; and that service of summons in this proceeding could not be had on any of them in Nebraska. He procured a summons to be issued and served upon the partnership and each of the members thereof without the State of Nebraska. The sheriff of Buchanan County, Missouri, by appointment of the sheriff of Richardson County, Nebraska, delivered a copy of the summons and a copy of the petition filed herein to the partnership and to each of the members in Buchanan County, Missouri. The special appearance made severally by these appellees asserted the court acquired and had no jurisdiction of

the person of any of them in this proceeding. The trial court ruled that the attempted service upon them was void and sustained the objection to the jurisdiction. It may be conceded though not decided that the attempted service on them was void, but this does not mean under the circumstances of this case that the district court was without jurisdiction over them.

Ayers Auto Supply waived service and entered its appearance in the district court when the appeal was taken to it from the award of the compensation court in the original compensation proceedings in that court. Noble I. Ayers, Noble I. Ayers, Jr., and John C. Ayers filed an answer in that proceeding in the district court. They made themselves parties thereto and frequently referred therein to themselves as defendants in the case. The district court thereby acquired jurisdiction of the person of each of the appellees that made the special appearance. They were each delivered a copy of the petition of appellant filed in the district court for a modification of the original compensation award, and for additional compensation because of the increased incapacity of appellant caused by the injury he received in the accident of May 1, 1946. The appellees were also advised of the pendency of this proceeding by the fact that they have been at all times represented by counsel in it. It is unimportant that summons was attempted to be served in Missouri on the partnership and the individuals who were its members and the legality or futility of that effort need not be considered or decided.

The statute intends that an application to modify an award on the ground of increase or decrease of incapacity due to the injury because of which the award had been granted shall be made in the case and in the court in which the original award was entered. In Scott v. State, *supra,* it is said: "There may be some force in the contention made by defendant, that, from the language employed and the rule applied in parallel legal situations, the section is intended to have application only

to agreements or awards on which periodical payments are still being made at the time a modification is sought. Under such a construction, where the payments on a settlement agreement or an award, payable periodically for more than six months, have been completed, additional compensation for an increased disability could only be claimed, if at all, in an independent proceeding. We are not disposed, however, to take this narrow a view of the statute, for the process employed would in either event, for all practical purposes, be the same."

Such an application is not the beginning of a new or original litigation. It is another step in the proceeding initiated when the accidentally injured employee made his original application to the compensation court for adjustment of his claim for compensation. It seeks a hearing in the original case. It is a claim of right of additional recovery because of a new effect and result of the same injury caused by the accident, the basis of the previous award. The original recovery by appellant was compensation to him for his then disability, which was less than permanent, resulting from the injuries to him caused by the accident. The pending application is for total permanent disability alleged to have been the result of the identical injuries but manifested since the original award. In the Annotation in 165 A. L. R. 13, there is the following: "One of the basic problems, if not the one fundamental problem, involved in construing and applying the various statutes providing for the review, reopening, modification, or reinstatement of compensation awards and agreements, in order to determine when a previous award or agreement may be reviewed, is what is the nature of review or modification proceedings. The courts of most jurisdictions have been substantially in agreement in their determination of this problem * * *. Thus, it has repeatedly been held that a review or modification proceeding is not a new proceeding nor an original proceeding. It is nothing more than a reopening of the proceeding instituted by

the original petition or proceeding for compensation, and is merely another step in the proceeding which is initiated when the employee files his original application for adjustment of his claim. And when a hearing is conducted on an application for modification of a previous award, it is only another hearing on a new phase of the original case."

In Glassman v. Radtke, 177 Minn. 555, 225 N. W. 889, the court said: "The original award of compensation was on the basis of temporary total disability. It subsequently developed that the employee was permanently totally disabled. Held that his petition for a setting aside of the original award and a new one based upon his permanent total disability is a reopening of the original proceeding and not the institution of a new and independent one."

In Chebot v. State Industrial Acc. Com., 106 Or. 660, 212 P. 792, the rule is stated in this language: "An application by an injured workman for increased compensation on account of changed condition or increased disability is not the beginning of a new proceeding, but merely another step in the proceeding initiated by the filing of the original application for an adjustment of the claim. * * * Under the Workmen's Compensation Act, the jurisdiction acquired by the Industrial Accident Commission over a case as to which an application for compensation is filed continues so long as the workman suffers disability, the proximate cause of which may reasonably be traced to the injury for which claim was originally made and compensation awarded."

In Bosquet v. Howe Scale Co., 96 Vt. 364, 120 A. 171, it is said: "An application under G. L. 5805 to modify an agreement or award under the Workmen's Compensation Act is not a new proceeding, but is based upon a jurisdiction acquired through the original proceeding, either on application for an award of compensation under G. L. 5802, or on the filing of a memorandum of agreement in regard to compensation pursuant to G. L. 5801."

The court of Colorado speaking on this subject in London Guaranty & Accident Co. v. Sauer, 92 Colo. 565, 22 P. 2d 624, said: "In no sense does the later disability create a new right or cause of action. It is simply an element, or rather a manifestation, of the injury inflicted by the original accident. The actuality of that injury is established, once for all, in connection with the first disability proved or admitted."

See, also, United States Casualty Co. v. Smith, 162 Ga. 130, 133 S. E. 851; Utah Apex Mining Co. v. Industrial Commission, 77 Utah 542, 298 P. 381; Plowman v. State Ind. Acc. Com., 144 Or. 138, 23 P. 2d 910; Johnson v. Pillsbury Flour Mills Co., 203 Minn. 347, 281 N. W. 290; Schmidt v. Workmen's Comp. Bureau, 73 N. D. 245, 13 N. W. 2d 610; Norvell v. Barnsdall Oil Co., 41 N. M. 421, 70 P. 2d 150; Rock Island Improvement Co. v. Williams, 163 Okl. 297, 22 P. 2d 368; Independent Pier Co. v. Norton, 54 F. 2d 734; 71 C. J., Workmen's Compensation Acts, § 1415, p. 1446; 58 Am. Jur., Workmen's Compensation, § 499, p. 889.

A provision of some kind for reopening or modifying awards made in workmen's compensation cases exists in a large majority of the states. This is a recognition of the fact that a diagnosis of the condition and earning prospect of an accidentally injured employee at the time of a hearing had soon after the accident is of doubtful accuracy, and that the condition may later change markedly for the worse, may improve, or may entirely disappear. The objectives of the legislation are best accomplished, under an award for periodic payments for a specified period or during disability, if there is authority for the increase, decrease, or discharge of payments to correspond to the changed conditions of the claimant. To be useful and practical the jurisdiction in this regard must be, subject to reasonable exceptions, continuous and lasting to make benefits meet current conditions. This is what the Nebraska statute was designed to accomplish. It gives to the compensation court continuing

jurisdiction after an award of compensation has been made of the kind described in the statute to modify the award because of changed conditions caused by the injury, the basis of the award, any time from 6 months after it is made if an appropriate application is made therefor within 1 year of the time the claimant knows or is chargeable with knowledge that his condition has materially changed after the original award and that there has been such a substantial increase in his incapacity of a nature to entitle him to additional compensation. The identical authority is by the statute given to the district court if it has entered an award or judgment in a compensation case.

The judgment of the district court should be and it is reversed and the cause is remanded to the district court with directions for further proceedings.

REVERSED AND REMANDED.

PATRICIA SHUPE, A MINOR, BY BELVIN SHUPE, HER NEXT FRIEND AND NATURAL GUARDIAN, APPELLEE, V. COUNTY OF ANTELOPE, A MUNICIPAL CORPORATION, ET AL., APPELLEES, IMPLEADED WITH PENWELL & DECKERT CONSTRUCTION COMPANY, A COPARTNERSHIP, ET AL., APPELLANTS.

59 N. W. 2d 710

Filed July 10, 1953. No. 33296.

1. **Highways.** When one engaged in the lawful use of the highway causes an obstruction to be placed upon it in such a manner as to be dangerous to traffic, he must use ordinary care to prevent injury to others where he knows that said obstruction is calculated to do injury to travelers upon said highway.
2. ———. An obstruction, in the sense here used, includes anything which will interfere with the public's reasonable use of the highway easement.
3. **Negligence.** Negligence is the doing of something which an ordinarily prudent person would not have done under the same or similar circumstances, or the failure to do something which an ordinarily prudent person would have done under the same or similar circumstances.

4. ———. An act wrongfully done by the joint agency or co-operation of several persons, or done contemporaneously by them without concert, renders them liable jointly and severally.
5. ———. But if the acts or neglects were not concurrent in time, and the party last in fault was chargeable with some duty to the other which, if performed, would have prevented the injury, the law will attribute to his culpable conduct the injurious consequence, and refuse to look beyond it.
6. ———. Proximate cause, as used in the law of negligence, is that cause which in a natural and continuous sequence, unbroken by an efficient intervening cause, produces the injury, and without which the injury would not have occurred.
7. ———. An efficient intervening cause is a new and independent force which breaks the causal connection between the original wrong and the injury. The cause of an injury is that which actually produces it, while the occasion is that which provides an opportunity for the causal agencies to act.
8. ———. An alleged cause of an accident may sometimes be merely a condition and not the real cause. The activities of inanimate things are usually mere conditions and not causes.
9. ———. If the negligent act creates a condition from which injury flows only by a subsequent independent act of a third person, the two acts are not concurrent and the existence of the condition is not a proximate cause of the injury.

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

Deutsch & Jewell, for appellants.

Brogan & Brogan, for appellee.

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

WENKE, J.

This is a tort action instituted in the district court for Antelope County by Patricia Shupe, a minor, by and through her father and natural guardian, Belvin Shupe. It was brought against the County of Antelope, the Township of Grant, which is in Antelope County and a part thereof, Penwell & Deckert Construction Company, a copartnership consisting of Charles Penwell

and Lloyd Deckert, and Lloyd Deckert. By this action plaintiff seeks to recover damages arising from personal injuries which she suffered when an automobile in which she was riding as a passenger was driven onto a collapsed bridge.

The action was dismissed as to the County of Antelope and the Township of Grant. No appeal or cross-appeal was taken therefrom. It proceeded to trial against the defendants Penwell & Deckert Construction Company, a copartnership, and Lloyd Deckert. The plaintiff obtained a verdict against them in the sum of $1,000 on which judgment was entered. Defendants filed an alternative motion asking for either a judgment notwithstanding the verdict or for a new trial. This appeal was taken from the overruling thereof.

The collapsed bridge hereinbefore referred to resulted from a 12-ton caterpillar tractor being driven thereon which caused the east end thereof to collapse. This tractor belonged to the appellant copartnership and was being operated at the time by appellant Deckert, a member thereof. This bridge, which is 16 feet long and across a dry watercourse, is part of township road No. 202, which is a dirt road over which the board of Grant Township had general supervision. See § 39-401, R. R. S. 1943. It was the duty of the board to maintain and keep it in repair, including all bridges therein not over streams, so it would be fit for travel by the public. See § 39-803.05, R. R. S. 1943. In this regard the township did not have a road overseer nor, apparently, had they selected one of their members to be the township highway superintendent as provided for by section 39-401, R. R. S. 1943. It is apparent the members of the board, as such, performed these duties themselves.

The incident referred to happened about 1:30 p. m. on Wednesday, April 26, 1950. It resulted in the east end of the bridge resting upon the bottom of the dry watercourse some 4 feet below the level of the road. It happened when the tractor was being driven from one

field to another while being used to do some soil conservation work for Vernon Oelsligle, a farmer living adjacent thereto.

The rule adopted in this state is: "* * * when one engaged in the lawful use of the highway causes an obstruction to be placed upon it in such a manner as to be dangerous to traffic, he must use ordinary care to prevent injury to others where he knows that said obstruction is calculated to do injury to travelers upon said highway. The negligence in such a case consists of having placed an obstruction upon the street, and leaving it in such a manner as will be dangerous to others using the street." Simonsen v. Thorin, 120 Neb. 684, 234 N. W. 628, 81 A. L. R. 1000.

An obstruction, in the sense here used, includes anything which will interfere with the public's reasonable use of the highway easement.

Whether or not appellant Deckert was guilty of any negligence in the first instance is not here material for, as stated in Simonsen v. Thorin, *supra:* "Whoever places an obstruction in a public highway, even by an involuntary act and without negligence, is under an obligation to remove such a nuisance from the highway or is required to use ordinary care to warn the traffic on said highway of the dangers incident to said obstruction."

Appellants had no authority over the bridge and consequently no authority to remove the obstruction by repairing it. That was the duty of the board of Grant Township. See § 39-803.05, R. R. S. 1943. The first question is, did appellant Deckert use ordinary care to immediately warn the public using the road of the danger created by the collapsed bridge?

After the bridge collapsed appellant Deckert was able to and did remove the tractor therefrom. He then used his tractor to level off the ditch north of the road and bridge. He fixed it so this ditch could be used as a road and thus made it possible for the traffic on the road to

travel around the collapsed bridge. He and Vernon Oelsligle, for whom he was doing the conservation work, then placed a barbed wire across each end of the bridge by fastening it to the ends of the railings thereon, which railings were about 3½ to 4 feet high. They then fastened at least one greasy rag, approximately 8 by 10 inches, on each of these wires at about the center. They also placed a length of plank 3 by 12 inches in dimension in an upright position at the east end of the bridge and a piece of a similar dimensioned plank, about 6 inches wide, at the west end of the bridge. These pieces of plank, which were placed at about the center of each end of the bridge, extended some 3 to 3½ feet above the level of the road surface. Without question the warnings so placed immediately following the collapse of the bridge were adequate to warn all traffic traveling on this road in the daytime but could reasonably be found to be inadequate for that purpose for those traveling at night.

About 4 p. m. on the same day appellant Deckert looked for and found Frank Spiekermann, a member of the Grant Township board. He found him in Tilden, Nebraska, which is about 5 miles from the bridge. He advised Spiekermann of what had happened and what he had done. Spiekermann testified he told Deckert, "* * * we (meaning the township board) would take care of it" and that, "* * * we (meaning the township board) would put up something more proper." Deckert testified Spiekermann told him, "I'll go out and look at it, and get some steel posts and put up a barricade." The evidence is undisputed that by 4 p. m. of the day the bridge collapsed Spiekermann, a member of the township board, was fully informed of what had happened and, in his capacity as a member thereof, assured appellant Deckert that the board would take charge of the situation.

The evidence shows Spiekermann went out to the bridge sometime before 5 p. m. on the same day and looked over the situation. He then went to see and talk

with Fred Nelson, another member of the township board, on whose place most of the township's road material was kept. Spiekermann advised Nelson of the fact that the bridge had broken down. Nelson then advised Spiekermann he would go over as soon as he could. However, Nelson did not go over until after the accident occurred in which appellee was hurt, although Fred Lindahl, the other member of the township board, had called him in regard thereto prior to that time. The record shows that although all the members of the township board knew of the condition of the bridge long prior to the accident in which appellee was hurt there was nothing done by the township board, or any member thereof, to put up any additional warnings. Consequently, the only warnings put up were those appellant Deckert put up immediately following the collapse of the bridge.

Sometime between 8:15 and 8:30 p. m. on Sunday, April 30, 1950, more than 4 days after the bridge had broken down, appellee was riding in a 1934 Chevrolet coach which her father was driving. It was dark at the time. They were traveling east on township road No. 202 just west of this bridge. As already indicated there had been no barricades, flags, flares, or any other warnings placed to warn of the condition of the bridge other than those which appellant Deckert had placed there. In the absence of such warnings, appellee's father did not see the condition of the bridge until his front wheels were just on the west end thereof. He was not able to avoid crashing into the east bank. Appellee, who was riding in the back seat, received injuries as a consequence. Appellee could, under the situation here, not be charged with the conduct of her father if, by any standard, it could be said he was negligent.

As already stated, appellant Deckert did use ordinary care to prevent injury to others in the first instance because, without question, the warnings he put up were sufficient to notify the traveling public of the dangers

created by the collapsed bridge as long as it remained daylight. But, as said in Simonsen v. Thorin, *supra,* this is a continuing duty; that is, until he has done all that any ordinarily prudent person would have done under the same circumstances.

The primary question then is, was appellant's continuing duty to see that the public was adequately warned of an obstruction in a public road in the form of a broken-down bridge, which bridge had broken down while he was using it, satisfied when he notified the public officers, whose duties placed them in charge thereof, of its condition and after these officers had advised him they would take care of it and had had a reasonable length of time in which to do so before the accident happened out of which the injuries were received?

Negligence is the doing of something which an ordinarily prudent person would not have done under the same or similar circumstances, or the failure to do something which an ordinarily prudent person would have done under the same or similar circumstances. See, Murray v. Pearson Appliance Store, 155 Neb. 860, 54 N. W. 2d 250; Buchanan v. Rose, 138 Tex. 390, 159 S. W. 2d 109.

In this regard: "Foresight, not retrospect, is the standard of diligence. It is nearly always easy, after an accident has happened, to see how it could have been avoided. But negligence is not a matter to be judged after the occurrence. It is always a question of what reasonably prudent men under the same circumstances would or should, in the exercise of reasonable care, have anticipated." 1 Shearman & Redfield on Negligence (Rev. ed.), § 24, p. 50.

Appellant Deckert notified the public officers in charge of this road and bridge, and who had authority to act in regard thereto, of what had happened and what he had done. They told him they would take care of it and put up something more proper.

We have said: "It is a presumption of law that public

officers will perform their public duties." In re Application of Chicago, B. & Q. R. R. Co., 138 Neb. 767, 295 N. W. 389. See, also, In re Application of Chicago, B. & Q. R. R. Co., 152 Neb. 352, 41 N. W. 2d 157.

Appellant had a right to rely on this presumption and cannot be charged with the failure of these public officers to perform their duties.

As stated in 1 Shearman & Redfield on Negligence (Rev. ed.), § 24, p. 61: "Reasonable anticipation ordinarily permits reliance upon the care of others. A person is not negligent in failing to anticipate that another person will be negligent."

In regard to this continuing duty, we said in Simonsen v. Thorin, *supra:* "They had a positive, continuing duty to the public traveling the street to warn of this danger. The situation in such a case is not unlike that of a private contractor who opens up an excavation in the street, which is a lawful act and done without negligence, but he is required to use ordinary care in preventing injury to others."

But we have said of such private contractors that when there was an actual acceptance of the work this relieved him from any further duty in this regard. As stated in Haynes v. Norfolk Bridge & Construction Co., 126 Neb. 281, 253 N. W. 344: "We think, beyond question, this amounted to a tentative and actual acceptance and relieved the contractor from any further duty to maintain lights, guards or other warning signals after that date." See, also, 13 A. L. R. 2d 199. Certainly the same situation existed here when the officers of the township were informed of the situation and agreed to put up something proper and had a reasonable length of time in which to do so.

We find, as a matter of law, that when appellant Deckert contacted the public officials, who had supervision and control of this road and bridge, and advised them of what had happened and what he had done and they, in turn, advised him they would take care of the

situation and had a reasonable time in which to do so that he did all any reasonably prudent man would or should have done under the circumstances. It cannot be said that he could be found negligent because of his failure to anticipate these public officials would be negligent in the performance of their duties.

Appellee contends that there is evidence from which a jury could find that appellant Deckert was negligent in the first instance in causing the bridge to collapse and consequently, on the basis of joint liability, could be held liable although the township officials may have been negligent in failing to put up proper warning signs to warn those traveling at night of the dangerous condition.

As stated in Schweppe v. Uhl, 97 Neb. 328, 149 N. W. 789: "An act wrongfully done by the joint agency or co-operation of several persons, or done contemporaneously by them without concert, renders them liable jointly and severally." See, also, Bosteder v. Duling, 115 Neb. 557, 213 N. W. 809.

"But if the acts or neglects were not concurrent in time, and the party last in fault was chargeable with some duty to the other which, if performed, would have prevented the injury, the law will attribute to his culpable conduct the injurious consequence, and refuse to look beyond it." Cooley on Torts, § 52, p. 133.

However, this question is not material here for the duty to warn arises regardless of whether the obstruction in the highway was caused by conduct which was or was not negligent. See, Simonsen v. Thorin, *supra*. But assuming, for the sake of discussion only, that it could be found that appellant Deckert's actions in relation thereto could be found negligent they would still have to be a proximate cause of the accident in which appellee was injured.

We said in Anderson v. Byrd, 133 Neb. 483, 275 N. W. 825, in discussing proximate cause, that:

"Proximate cause, as used in the law of negligence,

is that cause which in a natural and continuous sequence, unbroken by an efficient intervening cause, produces the injury, and without which the injury would not have occurred.

"An efficient intervening cause is a new and independent force which breaks the causal connection between the original wrong and the injury. The cause of an injury is that which actually produces it, while the occasion is that which provides an opportunity for the causal agencies to act.

"An alleged cause of an accident may sometimes be merely a condition and not the real cause. The activities of inanimate things are usually mere conditions and not causes. Atlantic Coast Line R. Co. v. Daniels, 8 Ga. App. 775, 70 S. E. 203."

In Frerichs v. Eastern Nebraska Public Power Dist., 154 Neb. 777, 49 N. W. 2d 619, by quoting from Steenbock v. Omaha Country Club, 110 Neb. 794, 195 N. W. 117, we held: "'* * * It is not sufficient that the negligence charged does nothing more than furnish a condition by which the injury is made possible, and if such condition causes an injury by the subsequent independent act of a third person, the two acts are not concurrent and the existence of the condition is not the proximate cause of the injury.'" And then went on to say: "Under the rule if the negligent act creates a condition from which injury flows only by a subsequent independent act of a third person, the two acts are not concurrent and the existence of the condition is not a proximate cause of the injury."

As stated in Gordon v. Bedard, 265 Mass. 408, 164 N. E. 374: "The causal connection is broken if between the defendant's negligent act and the plaintiff's injury 'there has intervened the negligence of a third person who had full control of the situation and whose negligence was such as the defendant was not bound to anticipate and could not be said to have contemplated, which later negligence resulted directly in the injury

to the plaintiff.' Ladd v. New York, New Haven & Hartford Railroad, 193 Mass. 359, 363."

And as stated in Rulane Gas Co. v. Montgomery Ward & Co., 231 N. C. 270, 56 S. E. 2d 689: " 'Where a second actor has become aware of the existence of a potential danger created by the negligence of an original tort-feasor, and thereafter, by an independent act of negligence, brings about an accident, the first tort-feasor is relieved of liability, because the condition created by him was merely a circumstance of the accident and not its proximate cause.' Powers v. Sternberg, 213 N. C. 41, 195 S. E. 88."

Even assuming that appellant Deckert's conduct in driving his 12-ton tractor onto this bridge could be found to be negligent, which we seriously doubt but which we do not decide, it would not be sufficient, under the factual situation here present, on which to base a recovery in view of the foregoing principles.

In view of what we have herein said, we find the cause should never have been submitted to a jury and that therefore appellants' motion for a judgment notwithstanding the verdict should have been sustained. We reverse the judgment of the trial court and remand the cause to the district court with directions to sustain appellants' motion and dismiss the action.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

YEAGER, J., dissents.

SIMMONS, C. J., dissenting.

I dissent.

I see no reason to discuss the question of the sufficiency of the warnings placed by defendants so far as daylight is concerned, for this accident to plaintiff happened at night.

The court apparently concedes that the liability of the defendants as to sufficiency of warnings would normally be a jury question, but holds as a matter of law that that liability was severed, because of notice to members of

the township board and their agreement to put up adequate warnings and take care of the matter and the lapse of a reasonable time in which to do that before the accident happened; and that the failure of the township officials to do anything was an intervening independent act of negligence which, ipso facto, relieved defendants of liability.

Although I do not deem it as a law matter of controlling materiality here, yet we should keep our facts straight. The court says that the township officers advised the defendants "they would take care of it" and "agreed to put up something proper." The court's recital of facts shows that *one* township official, acting without concurrence of the others, and by defendants' testimony, speaking in the first person, singular, so advised the defendants, and that notice of the condition of the bridge was gotten to the other members before the accident.

I do not question the duty of the township officials to do something about the bridge—but the question here is the duty and liability of the defendants in the matter.

The court quotes from Simonsen v. Thorin, 120 Neb. 684, 234 N. W. 628, 81 A. L. R. 1000, and stops with that case. We there held:

"When one engaged in the proper use of a highway causes an obstruction to be placed upon it in such a manner as to be dangerous to traffic, he must use ordinary care to prevent injury to others where he knows that such obstruction is calculated to do an injury to travelers upon said highway.

"The negligence in such a case is, after having placed an obstruction in the highway, to leave it in such a manner as will be dangerous to others using the highway.

"Whoever places an obstruction in a public highway, even by an involuntary act and without negligence, is under obligation to remove such a nuisance from the highway or is required to use ordinary care to warn the

traffic on said highway of the dangers incident to said obstruction."

We there held that the creation of the obstruction was the creation of a nuisance and that the negligence consisted in having placed an obstruction upon the street and leaving it in such a manner as to be dangerous to others using the street. In Swinford v. Finck, 139 Neb. 886, 299 N. W. 227, we held that failure in a reasonable time to remove the obstruction, or failure to reasonably warn of the dangerous condition of the highway would be actionable negligence.

We followed Simonsen v. Thorin, *supra,* in Grantham v. Watson Bros. Transportation Co., on rehearing, 142 Neb. 367, 9 N. W. 2d 357, quoted with approval the rule first quoted above, and held that the defendant owed the duty of ordinary care to prevent injury.

In Kuska v. Nichols Construction Co., 154 Neb. 580, 48 N. W. 2d 682, we held: "A failure to so warn the traveling public is continuing negligence as distinguished from a condition, and if reasonable minds could conclude from the evidence that such negligence proximately caused an accident, then the issue should be submitted to a jury for its determination."

The court here recognizes that the rule is, as stated in Simonsen v. Thorin, *supra,* that this is a continuing duty. Obviously the continuing duty arises because the obstruction is continuing, and as we held in Kuska v. Nichols Construction Co., *supra,* "is continuing negligence as distinguished from a condition." The court now by three quotes from decisions dealing with "conditions" clouds the meaning of what heretofore has been a clearly stated rule.

We have then here a case where clearly under our holdings the negligence of the defendants was continuing, up to and including the time of the accident to plaintiff.

There is no attempt here to charge the defendants with the failure of the township officials to do their duty,

as the court infers. There is an attempt here to charge the defendants with the failure to do their own duty in the premises.

But the court holds that the fact that defendants gave notice to the members of the township board, had a promise by one of them to take care of it, and because the board had a reasonable time to do it, *as a matter of law* that constitutes all that any reasonably prudent man was required to do.

Obviously it is the lapse of time, in this instance 4 days including a Saturday and Sunday, which the court concludes is the controlling element which relieves the defendants of liability as a matter of law, and that in any event the failure of the township board to do anything in that 4 days was as a matter of law the proximate cause of this accident.

The court cites and quotes from Haynes v. Norfolk Bridge & Construction Co., 126 Neb. 281, 253 N. W. 344. In that case a contractor had performed his work of installing culverts and it had been accepted by the state. Thereafter plaintiff's car at night ran into the end of culverts not covered by dirt. Plaintiff's theory was that the defendant's work had not been accepted by the state and that the defendant had a duty to erect barriers or warnings. The case turned upon the question of acceptance. We held that the work had been accepted and that the contractor had no further duty to maintain warnings. We there specifically held: "There is no evidence in the record that there were any defects in the work performed by the Norfolk Company, or that it failed in any respect to comply with the plans and specifications of the contract." In short, we held that there was no negligence chargeable to the defendant which required it to continue to maintain warnings. That case is not this case.

Restatement of the Law states the applicable rule as follows:

"Failure of a third person to perform a duty owing

to another to protect him from harm threatened by the actor's negligent conduct is not a superseding cause of the other's harm.

"The fact that the third person has failed to perform his duty to protect the other from harm threatened by the actor's negligence, implies that, had the duty been performed, it would have prevented the actor's negligence from causing the harm which results from it. In order that there can be a failure of a duty of protection the person owing it must have either the opportunity to perform it or at least he should have had such an opportunity had he been reasonably attentive to his surroundings. The third person's failure to perform his duty in this respect makes him concurrently liable with the negligent actor for any harm which results from the actor's negligence and which would have been prevented by the performance of the third person's duty." Restatement of the Law, Torts, § 452, p. 1206. The following illustration of the rule is given: "2. A, the owner of a house abutting on a city street, employs B to dig a trench across the highway to make connection with a sewer. B does the work of replacing the sidewalk so negligently as to make the sidewalk dangerous for travel. A, though knowing of this, takes no steps to put the sidewalk in safe condition. Several weeks after B has left the job as completed, C, without negligence, is hurt by the bad condition of the pavement. A's failure to have the sidewalk repaired makes him liable to C but is not a superseding cause relieving B from liability to A."

38 Am. Jur., Negligence, § 67, p. 722, states the rule as follows: "The test of the sufficiency of an intervening cause to defeat recovery for negligence is not to be found in the mere fact of its existence, but rather, in its nature and the manner in which it affects the continuity of operation of the primary cause, or the connection between it and the injury. * * * In order to be effective as a cause superseding prior negligence, the

new, independent, intervening cause must be one not produced by the wrongful act or omission, but independent of it, and adequate to bring about the injurious result; a cause which interrupts the natural sequence of events, turns aside their course, prevents the natural and probable result of the original act or omission, and produces a different result, that reasonably might not have been anticipated. * * * The test is whether the intervening efficient cause was a new and independent force, acting in and of itself in causing the injury and superseding the original wrong complained of, so as to make it remote in the chain of causation, * * *."

In 65 C. J. S., Negligence, § 111, p. 693, the following rule is stated: "An intervening cause, in order to break the causal connection between the original negligence and the injury, must come into operation in producing the result after the negligence of the original actor; and, if the original negligence continues to the time of the injury, an intervening act will not relieve the original actor of liability."

1 Shearman & Redfield on Negligence (Rev. ed.), §§ 37 and 38, p. 101, states the rule as follows:

"If the force which causes the injury is put in operation or motion by what is the negligence of the defendant, and that force or motion is still in progress or operation and has not lost its identity and continuity as such when the injury occurs, then the negligence which puts the injurious force in operation is the proximate cause.

"In order to relieve the defendant of responsibility for the event, the intervening cause must be a superseding cause. It is a superseding cause if it so entirely supersedes the operation of the defendant's negligence that it alone, without his negligence contributing thereto in the slightest degree, produces the injury."

From the many cases cited in the texts I refer to three because of the factual situations involved.

Shewell v. Borough of Narbeth, 54 Montgomery Coun-

ty Law Reporter 375, is a decision of an intermediate court. I cite it because of the law cited and reasoning in it. In this case the owners of a truck broke off a wooden standard, allowing a stump to remain in a sidewalk. Two months and 17 days thereafter plaintiff fell over the stump and was injured. The question was as to the liability of the owners of the truck. The court held: "The mere passage of time will not relieve the wrongdoer from liability, * * *. It was the duty of the borough to keep the highway, including the sidewalk and the plot between the curb and sidewalk, in reasonably safe condition for use by the traveling public. If the stump of the standard constituted a dangerous hazard to the users of the highway, and the borough had actual or constructive notice of the existence of the nuisance, the borough would be guilty of negligence.

"Assuming as we must for our present purpose, that the stump created a dangerous condition in the highway, and that the borough had notice of the same; was the negligence of the borough in permitting the condition to remain, the proximate cause of the plaintiff's injury?" The court quoted Restatement of the Law, Torts, § 452, p. 1206, and then held: "* * * the negligence of Nepi Brothers in creating the dangerous condition in the highway, was the active negligence, and the negligence of the borough in permitting it to remain, the passive negligence."

In Diehl v. Fidelity-Philadelphia Trust Co., 159 Pa. Super. 513, 49 A. 2d 190, steam coming from a building owned by one defendant formed ice on the sidewalk in front of a building of a second defendant. The owner of the second building had notice of the ice and failed to remove it. The court held that the failure of the owner of the second building was a "clear breach of the duty" but that its failure to perform its duty was not a superseding cause of harm resulting from the negligence of the owner of the first building, that the negligence of the owner of the first building "was not

insulated" by the intervening negligence of the owner of the second building, and that both defendants were jointly and severally liable. The court quoted Restatement of the Law, Torts, § 452, and cited Restatement of the Law, Torts, §§ 440 and 447.

In Holmes v. T. M. Strider & Co., 186 Miss. 380, 189 So. 518, 123 A. L. R. 1190, the defendant had been hired to do work on a bridge. In doing it defendant removed certain hand or guardrails and posts. He was then in April 1937 ordered to replace the handrails, guards, and posts, open the bridge to traffic, and to discontinue work. He replaced the guardrails and posts in a negligent manner. In August the highway department did work on the bridge but did not alter the condition of the guardrails. Still later the plaintiff, a guest in an automobile, was injured because of the negligent work of defendant. The court, holding the defendant liable, followed the rule that: "* * * 'where an act of negligence is a substantial factor in bringing about an injury, it does not cease to be a legal and proximate cause thereof because of the intervention of a subsequent act of negligence of another which contributed to the injury, if the prior act of negligence is still operating, and the injury inflicted is not different in kind from that which would have resulted from the prior act.' "

On these authorities I would hold the duty of the defendants being a continuing one, as the court holds, that the question of whether or not defendants exercised due care to reasonably warn of the dangerous condition of the highway, which they created, was, at least, a jury question. On that feature of the case I would affirm.

JOHN P. MAINELLI, APPELLANT, V. JOHNNIE H. G. NEUHAUS ET AL., APPELLEES. CONSOLIDATED WITH JOHN P. MAINELLI, APPELLEE, V. JOHNNIE H. G. NEUHAUS, APPELLANT, IMPLEADED WITH ANNA C. NEUHAUS ET AL., APPELLEES.

59 N. W. 2d 607

Filed July 10, 1953. Nos. 33301, 33302.

1. **Vendor and Purchaser.** As a general rule the assignee of a purchaser's interest in a contract for the sale of real estate may maintain a suit in his own name against the vendor to enforce specific performance of the contract, if the vendee himself, but for the assignment, could have obtained such relief.
2. **Specific Performance.** When land, or any interest therein, is the subject matter of an agreement the power of a court of equity to enforce specific performance thereof is beyond question.
3. ———. But such equitable remedy is not a matter of right but one that may be granted by the court in its sound judicial discretion, controlled by established principles of equity and depending upon the facts and circumstances of the particular case. It is not a discretion in the sense that it may be granted or denied at the will or pleasure of the judge. It is governed by the elements, conditions, and incidents that control the administration of all equitable remedies.
4. ———. Specific performance will not be enforced unless the contract has been entered into with perfect fairness and without misapprehension, misrepresentation, or oppression, or where it will be unjust or inequitable to do so.
5. **Homesteads.** Any interest in real estate, either legal or equitable, that gives a present right of occupancy or possession, followed by exclusive occupancy, is sufficient to support a homestead right therein.
6. ———. Actual occupancy of lands or town lots, within the limits defined by statute, by a husband and wife at the time of the death of the fee-holding spouse will, in the absence of clear and satisfactory evidence to the contrary, be deemed a selection of the same from the separate property of the decedent spouse as the homestead of the husband and wife.
7. ———. Under the provisions of section 40-117, R. R. S. 1943, such homestead, upon the death of the fee-holding spouse, vests instantly in the surviving spouse for life.
8. ———. Under our statute, when the holder of the legal title of the homestead dies, the law creates new estates, a life estate in his widow and an estate in remainder in his children and heirs. It is immaterial whether the widow and children continue to

occupy the premises. Their estates do not depend upon the occupancy thereof after the death of the holder of the legal title, but vest in them absolutely on his death.

APPEAL from the district court for Douglas County: JACKSON B. CHASE, JUDGE. *Affirmed.*

White, Lipp & Simon and *Ralph W. Hetzner,* for appellants.

Leonard A. Hammes, for appellees.

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

WENKE, J.

John P. Mainelli brought this action in the district court for Douglas County against Johnnie H. G. Neuhaus, Anna C. Neuhaus, Harry Neuhaus, and Chris Dillon. The object of the action is to obtain an order of that court requiring defendants Anna C. Neuhaus and Johnnie H. G. Neuhaus to specifically perform their written contract whereby they sold to E. K. Corrigan their interests in certain real estate situated in Douglas County, which contract Corrigan had assigned to the plaintiff. Defendant Johnnie H. G. Neuhaus, by his answer, stated he was ready and willing to perform under the terms of the contract and asked for the same relief as was asked for by plaintiff by joining in the prayer of the latter's petition. The trial court, on the issues raised, found generally in favor of defendants Anna C. Neuhaus, Harry Neuhaus, and Chris Dillon and against the plaintiff and the defendant Johnnie H. G. Neuhaus. It thereupon dismissed the petition of plaintiff, denied the prayer of plaintiff and defendant Johnnie H. G. Neuhaus for specific performance, and cancelled of record the contract filed in the office of the Register of Deeds in Douglas County in book 259 of Miscellaneous Records at pages 241 and 242. Plaintiff and defendant Johnnie H. G. Neuhaus thereupon filed separate motions for new trial. These motions the court overruled and each of the par-

ties appealed therefrom. The appeals were consolidated in this court for the purpose of avoiding a duplication of the record and briefs. Since the relief asked for by the appellants is the same and since it arises out of the same contract the issues presented will be disposed of by one opinion.

"As a general rule, the assignee of the purchaser's interest in a contract for the sale of real estate may maintain a suit in his own name against the vendor to enforce specific performance of the contract, if the vendee himself, but for the assignment, could have obtained such relief, * * *." 49 Am. Jur., Specific Performance, § 150, p. 173.

The real estate involved is the northeast quarter of Section 7, and the south half of the northwest quarter of the northwest quarter of Section 8, consisting of 180 acres, all in Township 15, Range 12, in Douglas County, Nebraska. This land is located at 123rd and Maple Streets which is about 4 miles west of the city limits of Omaha, Nebraska.

The appellees Harry Neuhaus and Chris Dillon were made parties to this action because of any rights they might claim in and to the northeast quarter of Section 7 by reason of being in possession thereof under and by virtue of a written lease entered into with appellee Anna C. Neuhaus dated March 2, 1951. This lease is for 1 year, extending from March 1, 1951, to February 29, 1952. Since the question of the validity of this lease and the rights of these appellees thereunder do not become material to a determination of the rights of the parties to the agreement which is herein being sought to be enforced, they, and their rights thereunder, will not again be referred to.

For convenience we shall herein refer to appellant John P. Mainelli as Mainelli, to appellant Johnnie H. G. Neuhaus as Johnnie, and to appellee Anna C. Neuhaus as Anna.

This action, being equitable in its nature, will, on ap-

peal to this court, be tried de novo in conformity with section 25-1925, R. R. S. 1943. See, Kear v. Hausmann, 152 Neb. 512, 41 N. W. 2d 850; Sopcich v. Tangeman, 153 Neb. 506, 45 N. W. 2d 478.

By the terms of the contract, which is dated February 1, 1951, Anna and Johnnie sold their interests in this land to E. K. Corrigan for a consideration of $38,700. Therein they agreed to convey to the purchaser, by February 10, 1951, a good marketable title in fee simple and to give him possession thereof on or before February 15, 1951. The contract further provides that their interests are to be clear of all liens and encumbrances except "the interest of Edith Neuhaus as provided in the Will of John Neuhaus requiring payment of $800.00 a year to Edith Neuhaus during her lifetime and Edith Neuhaus is to pay the tax from said $800.00 during her lifetime." Of the purchase price only $50 was to be deposited upon the execution of the agreement. After Anna was asked to execute a deed in accordance with the terms of this contract, and refused, Corrigan, for a consideration of $50, assigned all his interests therein to Mainelli, who, at the time, was aware of Anna's refusal to perform.

The principal question involved by this appeal is whether or not under all of the facts and circumstances disclosed by the record a court of equity should decree specific performance of this purchase agreement.

When land, or any interest therein, is the subject matter of an agreement the power of a court of equity to enforce specific performance thereof is beyond question. See, Bennett v. Moon, 110 Neb. 692, 194 N. W. 802, 31 A. L. R. 495.

But such equitable remedy is not a matter of right but one that may be granted by the court in its sound judicial discretion, controlled by established principles of equity and depending upon the facts and circumstances of the particular case. It is not a discretion in the sense that it may be granted or denied at the will

or pleasure of the judge. It is governed by the elements, conditions, and incidents that control the administration of all equitable remedies. See, Garsick v. Dehner, 145 Neb. 73, 15 N. W. 2d 235; Wiiest v. Pounds, 142 Neb. 882, 8 N. W. 2d 211; Mercer v. Payne & Sons Co., 115 Neb. 420, 213 N. W. 813; Morgan v. Hardy, 16 Neb. 427, 20 N. W. 337.

We have said of this remedy:

"Specific performance will not be enforced unless the contract has been entered into with perfect fairness and without misapprehension, misrepresentation, or oppression, or where it will be unjust or inequitable to do so." Morgan v. Hardy, *supra*.

"Where it appears that a plaintiff, who brings a suit in equity to enforce a specific performance of a contract, has obtained such contract by sharp and unscrupulous practices, by overreaching, by concealment of important facts, even though not actually fraudulent, by trickery, or by any other unconscionable means, he will be denied affirmative relief." Blondel v. Bolander, 80 Neb. 531, 114 N. W. 574.

"We have frequently held that specific performance is not generally a legal right, but is directed to the sound legal discretion of the court, and it will not be granted where its enforcement will be unjust." Wineberg v. Baker, 123 Neb. 411, 243 N. W. 122.

"The specific performance of a contract by a court of equity is not generally demandable or awarded as a matter of absolute legal right but is directed to and governed by the sound legal discretion of the court, dependent upon the facts and circumstances of each particular case. It will not be granted where enforcement would be unjust, * * *." Johnson v. Norton, 152 Neb. 714, 42 N. W. 2d 622.

John Neuhaus, paternal grandparent of Johnnie, acquired this land in 1903. He died testate on August 3, 1924, still possessed thereof. During this time neither he nor his wife Edith ever occupied the premises. By

his will, which was duly admitted and allowed to probate by the county court of Douglas County on September 30, 1924, he disposed of his interest in this land by the following provisions thereof:

"Second, I give devise and bequeath to my beloved wife, Edith Neuhaus, a life Interest in all of my real Estate, she to have the income from same as herein provided, she also to pay the Real Estate taxes on same. * * *

"Fourth, I give devise and bequeath to my son Gustav Neuhaus the North East quarter (N. E. ¼) of Sec. 7 Township 15 Range 12 Douglas County Nebraska, subject however to the Life Interest of Edith Neuhaus as provided in section two or second section of this instrument, and also on the condition that he shall at my death pay to my wife Edith Neuhaus two thousand Dollars ($2,000.00) Cash, and Eight hundred Dollars ($800.00) each year to Edith Neuhaus during her natural life, I also give devise and bequeath to my son Gustav Neuhaus the South half (S½) of N. W. ¼ of N. W. ¼ of Sec. 8 Twp 15 Range 12 Douglas County Nebraska, subject however to the Life Interest of Edith Neuhaus as provided in second section of this instrument and also the conditional payment as provided in this section four, (Fourth)."

It will be noted that the testator did not give his wife, Edith Neuhaus, a life estate in this property but a "life interest" therein. The extent of the income of this life interest is, as stated in the second paragraph, provided in the will. It is fixed by the fourth paragraph at $800 a year during Edith's life and makes the land subject thereto. This amount is to be paid by his son Gustav, the devisee of this land. The provisions of the second paragraph charge her with the payment of the real estate taxes on this land. These provisions have been thus understood and applied by the parties during all of the years since John Neuhaus' death. Edith

Neuhaus was still living at the time of the trial and was then 80 years of age.

By his will we find John Neuhaus devised to his son, Gustav Neuhaus, the lands herein involved subject to a charge of $2,000 in favor of his wife Edith, which Gustav has paid, and subject to an annual payment of $800 to Edith, which has been paid to her each year up to and including the year 1951. Out of this sum she is required to and has paid the real estate taxes assessed against this land. The will created no possessory rights in Edith, nor has she ever asserted any. It provides for an annual payment to her which payment is a charge on this land as long as she lives.

Gustav and Anna were married on April 25, 1917. Johnnie, their son, was born on May 13, 1918. They moved onto the northeast quarter of Section 7 about March 1, 1920, and lived thereon continuously up until the death of Gustav on July 7, 1946. Gustav died intestate and his estate has been administered by the county court of Douglas County. He left surviving as his sole heirs at law his widow, Anna, and his son, Johnnie.

Any interest in real estate, either legal or equitable, that gives a present right of occupancy or possession, followed by exclusive occupancy, is sufficient to support a homestead right therein. See, Giles v. Miller, 36 Neb. 346, 54 N. W. 551, 38 Am. S. R. 730; Fisher v. Kellogg, 128 Neb. 248, 258 N. W. 404.

"Actual occupancy of lands or town lots, within the limits defined by statute, by a husband and wife at the time of the death of the fee-holding spouse will, in the absence of clear and satisfactory evidence to the contrary, be deemed a selection of the same from the separate property of the decedent spouse as the homestead of the husband and wife." Shearon v. Goff, 95 Neb. 417, 145 N. W. 855.

Under the provisions of section 40-117, R. R. S. 1943, such homestead, upon the death of the fee-holding

spouse, vests instantly in the surviving spouse for life. See, Shearon v. Goff, *supra*.

"'Immediately upon the death of the husband, the unincumbered homestead vested in his widow and could not be taken into account in the administration of his estate. In re Hadsell, 82 Neb. 587.' Dillon v. Dillon, 103 Neb. 322, 171 N. W. 917. See, also, Bartels v. Seefus, 132 Neb. 841, 273 N. W. 485; Hobson v. Huxtable, on rehearing, 79 Neb. 340, 116 N. W. 278." Horn v. Gates, 155 Neb. 667, 53 N. W. 2d 84.

"'Under our statute, when the holder of the legal title of the homestead dies, the law creates new estates, a life estate in his widow and an estate in remainder in his children and heirs. It is immaterial whether the widow and children continue to occupy the premises. Their estates do not depend upon the occupancy thereof after the death of the holder of the legal title, but vest in them absolutely on his death.' Naiman v. Bohlmeyer, 97 Neb. 551, 150 N. W. 829." Horn v. Gates, *supra*. See, also, Shearon v. Goff, *supra*.

We find Anna has a life estate in the northeast quarter of Section 7 of the lands herein involved.

Johnnie, who had been in the service, returned about December 26, 1945. In April 1946, he made arrangements with his father, Gustav, to farm this land for him on a 50-50 crop share basis. He was then married and he and his wife, Leona, moved out on the farm with his parents. His father died shortly thereafter. Johnnie then made financial arrangements with a bank at Millard, Nebraska, and purchased the machinery belonging to his father. He bought it from the representatives of the estate. Johnnie continued farming the place during the years of 1947, 1948, 1949, and 1950, under an oral arrangement with Anna, his mother. For some reason, not too clearly shown in the record, Johnnie did not make a financial success of farming. Sometime in July 1950, his wife left him and thereafter, on August 3, 1950, sued him for a divorce. Johnnie also left the

farm sometime in 1950, just when is not too clearly shown but apparently it was about when his wife left him. He thereafter lived in Omaha. After going to Omaha he first worked for the Peoples Ice Company and later for the Omaha Grain Exchange. While he did some of the farm work in 1950 and hired help to do the rest, he did, however, let the farm run down.

Anna had received very little rent during the years following her husband's death. Johnnie's farming difficulties came to a head when, in November 1950, Anna brought an injunction suit for the purpose of requiring the proceeds of the 1950 crop to be properly applied. The finish of Johnnie's farming operations came when, on May 8, 1951, the bank at Millard foreclosed the chattel mortgage it had on his farming equipment by selling it at a public sale. After the proceeds from the sale of the 1950 crops and these chattels had been applied, Johnnie was still owing these creditors and to secure the balance of his debts to them he gave mortgages on his interest in this land. In other words, as a result of his farming operations for the years of 1946 to 1950, inclusive, Johnnie ended up in financial difficulties.

Without going into too much detail in regard thereto, the testimony of Johnnie is to the effect that early in January 1951, Anna, who was then living in the house on this farm, told him she thought they should sell the farm as she was too old to live out there all alone and for him to find out if they could sell their interests and leave the grandmother's interest therein; that he did so and found out they could; that he informed her of this fact and that he had an offer of $215 an acre; that this would be net as there was to be no commission for selling it; that she said that price was all right; that his attorney then prepared the contract; that on February 1, 1951, he took the contract to the farm where she read and then signed it; that she did so of her own accord; that thereafter he signed it and then delivered

it to Boyle, who was agent for Corrigan; that on February 2, 1951, he delivered to Anna a check for $25, payable to her, as her half of the down payment; that they had discussed the division of the purchase price on a 50-50 basis; that they discussed obtaining an abstract for the property and that he did so; and that Anna made no protest to selling the property until about March 1, 1951, when she was asked to sign a deed thereto. Suffice to say, based solely on appellants' proof, especially the testimony of Johnnie, it could be found Anna freely and voluntarily entered into the agreement.

Anna testified that at the time of the trial she was 56 years of age; that she had a seventh grade education; that she could read and write; that she had very little business experience, especially in dealing in real estate; that Johnnie had left the farm home and it was unoccupied; that about December 26, 1950, she went back out there to live; that commencing in the forepart of January 1951, Johnnie started coming out to the farm to see her; that he came three or four times a week; that he told her he was boss of the farm and that she had no business there; that he was going to put her off; that he told her this every time he came out; that Johnnie was hard up financially; that he told her he wanted to sell the farm because of his financial condition; that she told him she did not want to sell; that he told her he was going to sell his interest in the farm and whoever bought it could move in with her as they would have equal rights; that he told her that grandma was going to raise her annual charge from $800 to $2,000 and if she could not pay that amount by March 1 she would only get $50; that all of these threats made her nervous; that because thereof she could not eat or sleep properly; that he came out on February 1, 1951, with the contract; that she was then in a highly nervous condition and felt sick; that she told him she did not want to sell; and that she signed the contract against her wishes because of this series of threats. It

would serve no useful purpose to set out any more of her testimony in detail because, if her testimony is to be believed, the contract was unfair, unjust, and certainly not her voluntary act and deed.

In this situation the following has particular application: "'* * * 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.' O'Brien v. Fricke, 148 Neb. 369, 27 N. W. 2d 403." Sopcich v. Tangeman, *supra.*

There is another bit of evidence that we call attention to and that is the fact that before the contract was filed for record a false acknowledgement was placed thereon by a notary. Anna never did acknowledge the contract as her voluntary act and deed before the notary whose seal and signature appears thereon. That fact was admitted by the notary.

As to the contention that Mainelli is not bound by what Johnnie said to Anna, we think what was said in Moore v. McKillip, 110 Neb. 575, 194 N. W. 465, where there was a comparable situation, is here applicable. Therein we said: "'However strong, clear and emphatic the language of the contract, however plain the right at law; if a specific performance would, for any reason, cause a result, harsh, inequitable or contrary to good conscience, the court should refuse such a decree and leave the parties to the remedies at law. * * *.' Kelley v. York Cliffs Improvement Co., supra."

We think there are many reasons why this contract should not be enforced because it would be unfair to Anna to do so. Among these is the fact that it has been her home for more than 33 years; that Johnnie's basis for division of the proceeds is not in accordance with their respective interests; and primarily because of the circumstances under which it was obtained, that

is, by threats and intimidations let alone her apparent misunderstanding of her rights therein. We find the whole scheme of things indicates a planned arrangement whereby Johnnie, who is one of, if not the sole, real party in interest, attempted to overreach Anna by unfair tactics. Such being true we can come to no other conclusion than that of the trial court. We therefore affirm its action.

AFFIRMED.

ARTHUR JENNINGS HANSON ET AL., APPELLANTS, V. CITY OF OMAHA ET AL., APPELLEES.

59 N. W. 2d 622

Filed July 10, 1953. No. 33311.

1. **Statutes.** Courts will not by interpretation or construction usurp the function of the lawmaking body and give to a statute a meaning not intended or expressed by the Legislature.
2. ———. In such cases, it is not the province of courts to read into a statute something not found therein or to give it a meaning not warranted by its legislative language.
3. **Municipal Corporations.** Exercise of discretionary power of municipality to which power has been delegated to vacate streets or alleys is not ordinarily subject to judicial review, unless there has been an abuse of discretion, fraud, or glaring informality or illegality in proceedings, or absence of jurisdiction.
4. ———. To overturn a city ordinance on the ground that it is unreasonable and arbitrary or that it invades private rights, the evidence of such facts must be clear and satisfactory.
5. ———. An owner or person claiming an interest in property not abutting upon streets or alleys proposed to be vacated by action of a city council is not entitled to recover damages unless he has sustained an injury different in kind, and not merely in degree, from that suffered by the public at large.
6. ———. The fact that property owners, or those having an interest in property that does not abut on streets or alleys proposed to be vacated by action of the city council, may have to go a more roundabout way to reach certain points does not bring such property owners or persons having such an interest an injury different in kind from the general public, but in degree only.

7. ———. Property owners or persons claiming an interest in property that does not abut on streets or alleys proposed to be vacated by a city council cannot restrain such vacation unless they suffer peculiar damages not common to the public.
8. **Injunctions.** A party seeking an injunction must establish by competent evidence every controverted fact necessary to entitle him to relief, and 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.
9. **Constitutional Law.** Generally, courts will not declare a statute unconstitutional at the suit of one who is not injuriously affected thereby.

APPEAL from the district court for Douglas County: JACKSON B. CHASE, JUDGE. *Affirmed.*

Swenson, Viren & Turner and *Neal H. Hilmes,* for *appellants.*

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

William R. King, amicus curiae.

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

MESSMORE, J.

This is an action for injunction to enjoin the defendants, and each of them, from enforcing ordinances Nos. 17054 and 17205 of the city of Omaha, a metropolitan city hereinafter referred to as city, the purpose of the ordinances being to vacate certain streets and an alley in the city. In addition, this action seeks to have the ordinances declared void and the action of the city council in adopting them to be declared arbitrary and unreasonable. Trial was had in the district court. The trial judge rendered judgment in favor of the defendants and against the plaintiffs to the effect that under the city charter, the applicable sections of the statutes relating thereto, and the decision of this court in Hanson v. City of Omaha, 154 Neb. 72, 46 N. W.

2d 896, the city council and public officials of the city acted within the authority granted to vacate the streets and alley in question, and the ordinances were held to be valid in all respects. The plaintiffs filed a motion for new trial. From the order of the trial court overruling the motion for new trial, plaintiffs perfected appeal to this court.

For convenience we will refer to the defendant Home of the Good Shepherd of Omaha, Inc., a corporation, as the home, the mayor and members of the city council as city council, and the city planning commission as planning commission.

The city is a home rule city governed by a city charter. In the opinion we will refer to the sections of the statute as the same appear in the Revised Statutes, 1943. Strictly speaking, such sections of the statute are not applicable to the city as such, but as provisions of the home rule charter.

Section 14-375, R. S. 1943, which is of importance here provides: "Upon the recommendation of the city planning commission, the city council may, by ordinance or resolution, vacate any street or alley within any such city, without any petition being filed therefor. Before any such street or alley shall be vacated, the council shall appoint a committee of at least three members thereof, who shall faithfully and impartially and after reasonable notice to the owners and parties interested in property affected by such vacation, assess the damages, if any, to such owners and parties affected. They shall take into consideration the amount of special benefits, if any, arising from such vacation and shall file their report in writing with the city clerk. Any owner or party interested in property affected by such vacation, who shall file a written protest with such committee, may appeal from the adoption by the council of such appraisers' report in the manner provided in section 14-379, but such appeal shall not stay the passage of the ordinance or resolution vacating such street or alley.

The award of appraisers shall be final and conclusive as the order of a court of general jurisdiction, unless appealed therefrom."

In Hanson v. City of Omaha, *supra,* most of the same parties plaintiff appear as in the instant case, and while there is some difference in the personnel of the city council due to an election, the city council is here in the same manner as in the cited case. The subject matter of the action and the prayer for relief were the same as in the instant case, except that section 14-375, R. S. 1943, is the one in controversy here. The cited case held, in referring to the provisions of the city charter designated section 14-324, R. S. 1943, and section 14-375, R. S. 1943, that compliance with the cited statutory provisions is an essential act to the valid enactment of an ordinance vacating a street or alley. Therefore, this court held, insofar as the power of the city to vacate streets and alleys is concerned, the city was vested with such power if compliance with the city charter was had.

The pertinent assignments of error to a determination of this appeal are: (1) The trial court erred in finding that the proper proceedings for such vacation were taken by the city council in accordance with the requirements of the city charter, the statutes applicable thereto, and the Constitution of Nebraska, and in finding that the ordinances in question were valid in all respects; (2) the trial court erred in finding that the city council acted within its discretionary power, and in failing to find that its action was arbitrary and unreasonable in adopting the city ordinances here in question; and (3) the trial court erred in finding that public need and benefit responsive to a public demand required the vacation of the streets and alley in question.

On June 12, 1951, it appears that the city council had before it a letter from the president of the home to the effect that the home owned the fee simple title to all the real estate abutting the areas hereinafter described and, as owner, waived any and all damages and claims for

damages by reason of the vacating of said areas. The council was requested to take such steps as might be necessary or proper under section 14-375, R. S. 1943, as interpreted by the Supreme Court of Nebraska in its opinion in Hanson v. City of Omaha, *supra*, to vacate the following described areas: That portion of the east-west alley in Parmenter Place, an addition to the city of Omaha, abutting Lot 7, Parmenter Place on the south; that portion of Thirty-ninth Street lying between the north line of Jones Street and the prolongation of the north line of the south 14 feet of Lot 1, Block 5, West Omaha, an addition to the city of Omaha; and that portion of Jackson Street lying between the east line of Thirty-ninth Street and the prolongation of the east line of Lot 11, Parmenter Place, an addition to the city of Omaha. This letter was referred by the city council to the planning commission for inspection. The planning commission returned this communication to the city council and informed the city council that it had a hearing on the same request on June 1, 1949, and on August 1, 1951, a subsequent hearing was held at a regular meeting of the planning commission. The attorney for the home and an attorney for some of the property owners who claimed to be affected by the request attended and were heard. Thereafter the planning commission, by motion, recommended the vacation of the streets and alley as requested.

It appears that all persons, various civic organizations, and others, under notice which is not questioned, who opposed the vacation of the streets and alley, were heard before the planning commission and the city council.

The city council adopted ordinances Nos. 17054 and 17205. Without repeating the substance of these ordinances, they conform to section 14-375, R. S. 1943, applicable to the city charter as aforesaid.

The properties of the appellants are described as follows: The west 15 feet of the north 165 feet of Lot 1, Block 4, West Omaha, an addition to the city, and the

east 75 feet of the north 165 feet of Lot 2, Block 4, West Omaha, an addition to the city, said properties being known as 3861-3-5-7 Dewey Avenue, owned of record by Arthur J. and Mildred P. Hanson; the east 55 feet of the north 100 feet of Lot 1, Block 5, West Omaha, an addition to the city, known as 3901 Dewey Avenue, and owned of record by Louis B. and Jack Drew; the north 68 feet of the south 87 feet of the east 155 feet of Lot 1, Block 5, West Omaha, an addition to the city, having no house number and being owned of record by Eugenie A. Whitmore one-half, and Louis B. and Jack Drew one-half; Lot 12, Parmenter Place, an addition to the city, known as 602 South Thirty-eighth Avenue, and owned of record by Jane R. Herrick, subject to a life estate to Blanche Burkett Herrick and her husband; and Lot 13, Parmenter Place, an addition to the city, known as 604 South Thirty-eighth Avenue and owned of record by Ralph S. Tully. The following described property is the property over which Arthur J. Hanson has an easement: The west 90 feet of the north 165 feet of Lot 2, Block 4, West Omaha, an addition to the city, known as 3873 Dewey Avenue, and owned of record by Louis B. Steiniger, now under guardianship.

The home was first established in the city April 4, 1894, and made its initial purchase in the area in controversy July 10, 1899, in a then suburban location. The appellants' respective purchases were made by Hanson June 16, 1942, by Drew September 2, 1941, and November 21, 1941, by Herrick October 4, 1941, and by Tully October 14, 1941.

The home conducts its work in a building consisting of several units. The value of its present grounds and building is in excess of one million dollars. The home is a religious, charitable, and educational institution and has been so conducted since its establishment. It is devoted exclusively to the maintenance, care, and training of underprivileged, delinquent, and problem girls, without regard to race, creed, social status, or ability

to pay. It is a nonprofit corporation, conducted by one of the sisterhoods of the Roman Catholic Church. The sole income of the home is derived from voluntary contributions by the general public. The girls are admitted to the home on their own voluntary applications, or on the request of their parents, guardians, relations, or friends, and in some instances from the juvenile court of Douglas County, Nebraska. There is regular daily instruction in grade and high school subjects, and other instruction that is beneficial to the girls when they leave the home, also some commercial work is done in the home. The educational facilities of the home are approved by the state authorities. On occasion the home is visited by public authorities to ascertain the welfare of the girls. The home is conducted under the supervision and subject to the requirements of the Nebraska Division of Child Welfare and Assistance. Monthly reports are made as required by law and the regulations adopted and promulgated by the Board of Control. At the time of trial there were 172 girls taught by 9 teachers, each of whom held a certificate required by the school laws of this state. The home gives free care to delinquent girls committed by the juvenile court of Douglas County, and since the establishment of the said court has averaged 40 to 50 such girls under constant care. The savings to the taxpayers of Nebraska for such girls alone is in an amount of about $45,000 per annum.

It is stipulated that the alley and parts of the streets proposed to be vacated under the ordinances of the city are intended to be used by the home for extension of its playgrounds and for such other purposes as shall be conducive to the promotion and welfare of the home and the girls cared for therein.

We deem it unnecessary to further state the facts with reference to the work of the home and its need, and what has been accomplished by it. The home serves the public, and a public need exists for it, especially

so at the present time due to the increase in the number of girls that come from broken homes, and the fact that they are, for the most part, younger in age than formerly.

The appellants contend that the action of the city council in entertaining the request of the home, in transmitting the same to the city planning commission, and the action of the commission taken thereon is without jurisdiction, void, and of no effect, and as a result renders ordinances Nos. 17054 and 17205 void and of no effect.

In this connection the appellants cite Wagner v. City of Omaha, 156 Neb. 163, 55 N. W. 2d 490: "The power conferred upon municipal corporations by their charters to enact ordinances on specified subjects is to be construed strictly, and the exercise of the power must be confined within the general principles of the law applicable to such subjects." See, also, Reid v. City of Omaha, 150 Neb. 286, 34 N. W. 2d 375; Interstate Power Co. v. City of Ainsworth, 125 Neb. 419, 250 N. W. 649.

The home rule charter adopted by the city of Omaha is a grant as distinguished from a limitation of power. Being a grant of power the charter is to be construed according to the same rules as a legislative act containing the same provisions in determining what authority is thereby granted the city government. See, Consumers Coal Co. v. City of Lincoln, 109 Neb. 51, 189 N. W. 643; Falldorf v. City of Grand Island, 138 Neb. 212, 292 N. W. 598; Wagner v. City of Omaha, *supra.*

A municipal corporation is a creature of the law established for special purposes, and its corporate acts must be authorized by its charter and other acts applicable thereto. It therefore possesses no power or faculties not conferred upon it, either expressly or by fair implication, by the laws which created it or by other laws, constitutional or statutory, applicable to it. Wagner v. City of Omaha, *supra.*

Section 14-375, R. S. 1943, does not specify the source from which the city planning commission may or must

receive a suggestion, request, or recommendation for its approval, nor does it forbid the city planning commission to act with or without such suggestion. The power to vacate streets and alleys is in the city council, and that power cannot be limited by reading into section 14-375, R. S. 1943, a meaning that the planning commission in the exercise of its advisory function must act solely on its own initiative.

The intention of the Legislature is obvious, that is, to permit vacation of streets or alleys either on petition of interested property owners, or without a petition, at the instance of any person who may be interested or who desires or sees fit to bring the matter to the attention of the planning commission. This may be by letter as was done in the instant case. The city council alone has the power to vacate streets. The following authority is applicable: Where an act is clear and unambiguous, courts will not by interpretation or construction usurp the function of the Legislature and give it a meaning not intended or expressed therein. In such a case it is not the province of courts to read into a statute something not found therein or to give it a meaning not warranted by its legislative language. See, City of Wayne v. Adams, 156 Neb. 297, 56 N. W. 2d 117; Ledwith v. Bankers Life Ins. Co., 156 Neb. 107, 54 N. W. 2d 409.

The appellants cite and call attention to certain provisions of the city charter and sections of the statute applicable thereto which have to do with eminent domain. The appellants contend that section 14-375, R. S. 1943, also deals with eminent domain, and that in said section provision for appeal is made from the adoption of appraisers' report as provided for in section 14-379, R. S. 1943. The appellants then direct attention to Chapter 76, article 7, R. S. Supp., 1951, which constitutes the complete uniform eminent domain act and provides for uniform methods for exercising eminent domain in connection therewith. With reference to sec-

tion 14-379, R. S. 1943, being repealed, as set forth by appellants, any appeal substituted for section 14-379, R. S. 1943, was available to the appellants in this action had they seen fit to pursue the same.

There is no language appearing at the heading of or in section 14-375, R. S. 1943, to indicate that this section in any manner has anything to do with the subject of eminent domain. It is apparent that the vacation of a public street on the recommendation of the planning commission is not analogous to an eminent domain proceeding to appropriate private property for public use. Both proceedings are essentially different in their scope and are treated separately in the city charter, although both proceedings are based on the police power. The appellants' contention is without merit.

The record discloses that when West Omaha became a part of the city of Omaha, the streets became known as Dewey Avenue, Jackson, and Jones Streets, running east and west, and Thirty-ninth Street running north and south. At the present time Thirty-ninth Street is not paved from Jackson Street to Leavenworth Street, and Jackson Street is not paved from Thirty-eighth Avenue to Thirty-ninth Street. The grade on Thirty-eighth Avenue from Leavenworth Street to Jones Street is 6.25 percent up; Thirty-ninth Street, Jackson Street to Jones Street is 6.13 percent down; and Thirty-ninth Street from Dewey Avenue to Jackson Street is 5.38 percent down. The grade of Thirty-ninth Street is less than the grade of Fortieth Street or Thirty-eighth Avenue running south from Dewey Avenue to Leavenworth Street.

The appellants are fee owners of real estate, or have an interest in real estate, in the immediate vicinity of the streets and alley proposed to be vacated. None of them, however, own or have an interest in real estate abutting the streets and alley proposed to be vacated.

Arthur Jennings Hanson testified that he is the owner

of No. 3863 Dewey Avenue upon which property are two duplexes facing Dewey Avenue with garages connected therewith. These are modern apartments, two apartments to each building, and there are two buildings between this witness's property and Thirty-ninth Street of the same type and character, constructed at the same time, and owned by someone else. The garages are accessible from Thirty-ninth Street only, that is, from that portion of Thirty-ninth Street that goes south from Dewey Avenue. The entrance to the garages is 30 to 40 feet from the point where the closing of the street is supposed to start, that is, from the end of the property line. This property is occupied by tenants, and the vacating of the streets and alley would deprive the owner and the tenants of facilities that they now enjoy in getting in and out of the garages. In slippery weather, Thirty-ninth Street being the only street that goes north to the garages from Leavenworth Street, that is the only way in which they could get to the garages because going up from Leavenworth on any other street for 6 or 8 blocks either way, it is impossible to get to the garages. Also, in slippery weather the only way to get out would be to go north to Dewey Avenue, and when the avenue is reached, at the turn there is a slight grade on Thirty-ninth Street. Mr. Hanson testified: "* * * my tenants and myself in slippery weather have to go south on 39th which is down hill and we do not have any trouble." A dead-end street will be created adjacent to the property which would create a hazard in the event children would play in the street. A tenant has threatened to vacate in the event the street is closed, however, he testified that tenants for his apartments were not hard to obtain.

Clyde W. Drew testified that he resides at 3901 Dewey Avenue on the southwest corner of the intersection of Thirty-ninth Street and Dewey Avenue and has since April 1942; that the property, in which he testified he had a life estate, is owned by Louis and

Jack Drew, his sons; that he drives an automobile and uses Thirty-ninth Street very often; and that the garage on his property sits on the south 68 feet, which is owned by his sons in connection with Eugenie Whitmore. The entrance is 140 to 150 feet south of Dewey Avenue. Thirty-ninth Street at the point of the proposed vacation comes to the south edge of his property. Closing Thirty-ninth Street would affect this property and place it on a dead-end street with a sinkhole that is bad for traffic. He makes more use of Thirty-ninth Street in inclement weather than at other times, that is, if the pavement is slippery at all.

E. R. Herrick and his wife Blanche Herrick live at 602 South Thirty-eighth Avenue, on the southwest corner of Thirty-eighth Avenue and Jackson Street. The property is in the name of Jane R. Herrick, a daughter. These witnesses have a life estate in it. They are in the real estate business, and testified that the closing of the streets and alley as proposed by the city would lessen the value of the property, because it would create a dead-end street, and property on such a street is of less value than on other streets. This dead-end street would be at the rear of their property. Closing of Jackson Street from a point midway between Thirty-eighth Avenue and Thirty-ninth Street would adversely affect this property and lessen its value; and would leave it on a dead-end street at the rear of this property. Jackson Street to Thirty-ninth Street, then Thirty-ninth Street south, is used for ingress and egress in the winter time when it is slippery. Thirty-eighth Avenue is very steep from Jones Street to Leavenworth Street.

Ralph S. Tully resides at 604 South Thirty-eighth Avenue on the west side of the street between Jones and Jackson Streets. The property is listed in the names of Madge M. Tully and Ralph S. Tully, and is residence property. The closing of Jackson Street, Thirty-ninth Street, and the alley would adversely affect this witness and his property. It would place him between a

dead-end street and a dead-end alley. He contemplated rebuilding his garage so that he would use the entrance on Jackson Street and the alley to the rear of his property. He uses Jackson Street to Thirty-ninth Street, and Thirty-ninth Street, particularly in inclement weather because the grade on Thirty-eighth Avenue from Leavenworth Street is steeper than the grade on Thirty-ninth Street.

Several witnesses engaged in business in the vicinity testified in behalf of the appellants. The effect of the testimony of these witnesses is that due to the grade on Thirty-ninth Street being less than that on the other streets in the immediate vicinity, Thirty-ninth Street is used continuously in bad weather as, when it is slippery, trucks and commercial vehicles can travel it much more easily. There is also some evidence that the vacation of the streets and alley in question would have a tendency to eliminate a certain degree of traffic that might ordinarily use Thirty-ninth Street to have access to some of these business enterprises. There is, in addition, evidence to the contrary.

In addition, there is evidence to the effect that there is an increase in automobile registrations in the city of Omaha that might create a traffic problem. However, it is apparent from the testimony that such problem has not affected the market value of the appellants' residences in this vicinity. There is also evidence to the effect that creation of a dead-end street lessens the value of the property and creates, especially, a traffic hazard to children. In opposition to this there is evidence of an experienced realtor and tax appraiser to the effect that the proposed vacation of the streets and alley would not affect the market value of appellants' property, and that there is access to other streets for ingress and egress that is commensurate with that of the public generally.

The appellants contend that the ordinances in the instant case serve a private corporation and not a public

need, therefore they are void and the city council, in adopting them, acted arbitrarily and unreasonably, and abused its discretion.

The stipulation of facts discloses that this home serves a public need, and has for years, and is a public, charitable, and educational institution as distinguished from a private institution.

The following authority is applicable: "Under the proofs appearing in the record, we are not able to say that the council acted arbitrarily, and abused the discretion vested in them by the statute, in vacating the streets, even though it may have resulted in benefit to the defendant. Such an institution as is maintained by the defendant has more than a mere personal pecuniary object. They are regarded as being of general benefit to the whole community, both city and surrounding country." Karlin v. Franciscan Sisterhood, 109 Neb. 711, 192 N. W. 122.

Exercise of discretionary power of municipality to which power has been delegated to vacate streets is not ordinarily subject to judicial review, unless there has been abuse of discretion, fraud, or glaring informality or illegality in proceedings, or absence of jurisdiction. See Roney Investment Co. v. City of Miami Beach, 127 Fla. 773, 174 So. 26.

"To overturn a city ordinance on the ground that it is unreasonable and arbitrary or that it invades private rights, the evidence of such facts should be clear and satisfactory." State ex rel. Krittenbrink v. Withnell, 91 Neb. 101, 135 N. W. 376, 40 L. R. A. N. S. 898. See, also, Bethel M. E. Church v. City of Greenville, 211 S. C. 442, 45 S. E. 2d 841.

The fact that the lot owner may be inconvenienced or that he may have to go a more roundabout way to reach certain points, it is generally held, does not bring him an injury different in kind from the general public, but in degree only. See 11 McQuillin, Municipal Corporations (3d ed.), § 30.194, p. 146.

It is well settled that an owner is not entitled to recover damages unless he has sustained an injury different in kind and not merely in degree from that suffered by the public at large. See 11 McQuillin, Municipal Corporations (3d ed.), § 30.192, p. 138; 18 Am. Jur., Eminent Domain, § 224, p. 856; Scully v. Central Nebraska Public Power & Irr. Dist., 143 Neb. 184, 9 N. W. 2d 207; City of Winchester v. Ring, 312 Ill. 544, 144 N. E. 333, 36 A. L. R. 520; Hebb v. City of Bartow, 142 Fla. 78, 194 So. 312; Van Valkenberg v. Rutherford, 92 Neb. 803, 139 N. W. 652; Enders v. Friday, 78 Neb. 510, 111 N. W. 140; Lee v. City of McCook, 82 Neb. 26, 116 N. W. 955.

A property owner whose property does not abut upon a portion of a street which it is proposed to vacate or which is obstructed has no right of action to restrain the vacation or prevent the obstruction unless the access to his property is interfered with and he suffers a special or peculiar damage differing in kind from that of the general public. The great majority of American courts hold that a property owner does not come within the rule of compensation unless his property abuts upon or touches that part of the street which is actually vacated, or a special or peculiar damage is made to appear, or, to state the proposition in its elementary form, unless his injury differs in kind rather than in degree from that suffered by the general public. See, Kemp v. City of Seattle, 149 Wash. 197, 270 P. 431; Hartwell Iron Works v. Missouri, K. T. R. R. Co. (Tex. Civ. App.), 56 S. W. 2d 922.

In Wilson v. Kansas City (Mo.), 162 S. W. 2d 802, the court said that an owner of land, not abutting on closed section of vacated street, so that his right of ingress and egress is not injured by vacation of street because he still has reasonable access to general system of streets, is not entitled to compensation for injury, caused by street vacation, to his property right in the street. Inconvenience in getting to other streets is not an in-

jury special and peculiar to the appellants but equally affects all who exercise their right to use it. So it is with any claimed potential uses to which the property might be put—other landowners on the street suffer the same potential loss or injury. Doubtless the vacation or discontinuation of a street may and often does result in depreciating the value of property on it but that does not of itself constitute such a special injury as entitles him to damages. Traffic, great or small, is merely incident of streets and highways and cannot be considered as element of damages or benefits to realty from vacation of street. See, also, Ponischil v. Hoquiam Sash & Door Co., 41 Wash. 303, 83 P. 316; Tomazewski v. Palmer Bee Co., 223 Mich. 565, 194 N. W. 571.

We believe the following authorities are also applicable.

A party seeking an injunction must establish by competent evidence every controverted fact necessary to entitle him to relief, and 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. See, Faught v. Platte Valley Public Power & Irr. Dist., 147 Neb. 1032, 25 N. W. 2d 889; Gering Irr. Dist. v. Mitchell Irr. Dist., 141 Neb. 344, 3 N. W. 2d 566.

We believe the rights of the owners and parties interested in property that may be affected by the vacation are protected by the clear language of section 14-375, R. S. 1943, which provides that a committee of three members of the council shall assess the damages after notice and file their report in writing with the city clerk. In addition, provision for appeal to the district court is made.

The appellants' right to injunction is not clear. They prove no irreparable damage or any special damage, and make no pretense of proving the remedy at law is inadequate. These nonabutting property owners' rights of ingress and egress are not taken away, and the injuries they suffer, if any, differ only in degree, and not in kind,

from that of the general public. They have suffered no irreparable damage under this rule.

Generally, the court will not declare a statute unconstitutional at the suit of one who is not injuriously affected thereby. See State ex rel. Ridgell v. Hall, on rehearing, 99 Neb. 95, 156 N. W. 16.

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

AFFIRMED.

ELLIS NOLEN PHILLIPS, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.

59 N. W. 2d 598

Filed July 10, 1953. No. 33346.

1. **Indictments and Informations.** A trial court may, in the exercise of its discretion, permit the names of additional witnesses to be endorsed upon an information before or after the trial has begun when there is no showing of prejudice to the rights of the defendant.
2. **Continuances.** An application for a continuance is addressed to the sound discretion of the trial court and its ruling thereon will not be disturbed unless it appears that the rights of the defendant were prejudiced thereby.
3. **Burglary.** When two persons are apprehended in the commission of a burglary, evidence of possession of burglarious tools by one is proper evidence against the other.
4. **Juries: Trial.** For the inspection of the scene of the alleged crime by a juror, which has not been authorized by the court, to be sufficient to vitiate the verdict it must be shown to have related to a matter in dispute and to have influenced the jury in arriving at a verdict. The ruling of the trial court thereon will not ordinarily be disturbed in the absence of a showing of an abuse of its discretion.
5. ———: ———. Misconduct on the part of a juror in discussing the case with a disinterested person will not vitiate the verdict where the discussion appears to have been casual and harmless, unrelated to any material issue on which the evidence was in conflict, and not calculated to influence the jury in arriving at its verdict.

ERROR to the district court for Douglas County: CARROLL O. STAUFFER, JUDGE. *Affirmed.*

Donald L. Knowles, for plaintiff in error.

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

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

CARTER, J.

Plaintiff in error was convicted of the crime of burglary and was sentenced to confinement in the State Penitentiary as an habitual criminal. He brings the case to this court on error proceedings.

The evidence shows that on March 27, 1951, at about 3 a. m., two officers of the Omaha Police Department discovered that a door to a service station at Park Avenue and Farnam Street had been entered. They investigated and captured one Donaldson on the inside. Another man was observed running to a window through which he escaped. The officer, by the aid of his flashlight, saw the man as he went through the window. The other officer searched at the rear of the building and found plaintiff in error coming from between two apartment houses. The officer gave chase and apprehended the man who proved to be the plaintiff in error. Donaldson's car was found parked a short distance away. A very large screw driver was found in the car which the State contends was a circumstance to show how the building was entered, the service station door having been "jimmied." The officer who saw the man going through the window recognized him as the man later apprehended in the alley. Upon this evidence plaintiff in error was found guilty. No contention is made that the evidence was insufficient to submit the case to the jury.

Plaintiff in error contends that the trial court erred in permitting the State to endorse the names of two wit-

nesses on the information just before the commencement of the trial. The witnesses endorsed were the manager of the service station, who testified to the layout of the station and the precautions taken the night before to prevent unlawful entries, and a police sergeant who measured and charted the premises where the crime was committed. The names of both witnesses could have been endorsed on the information when it was filed.

We think it is clear that plaintiff in error was in no way surprised by the evidence of these two witnesses. Testimony given by them was to be expected in this type of case. We fail to see how plaintiff in error was prejudiced by the endorsement of the names of these two witnesses at the beginning of the trial. The rule is: A trial court may in the exercise of its discretion permit the names of additional witnesses to be endorsed upon an information before or after the trial has begun when there is no showing of prejudice to the defendant's rights. McCartney v. State, 129 Neb. 716, 262 N. W. 679; Barnts v. State, 116 Neb. 363, 217 N. W. 591; Brunke v. State, 105 Neb. 343, 180 N. W. 560.

It is then urged that plaintiff in error's motion for a continuance should have been granted after the court permitted the names of the two witnesses to be endorsed on the information. The nature of their evidence was such that it should have been anticipated. No showing was made as to any prejudice that would result from the court's action in denying a continuance. Neither of them testified to any fact that constituted surprise, or which could in any manner prejudice the defense made. A continuance would have accomplished nothing other than a procrastinating delay. An application for a continuance is addressed to the sound discretion of the trial court. Its ruling thereon will not be disturbed unless it appears that prejudice resulted. Maher v. State, 144 Neb. 463, 13 N. W. 2d 641; Sundahl v. State, 154 Neb. 550, 48 N. W. 2d 689.

The trial court admitted in evidence a large, bent

screw driver which was found in Donaldson's car. There was evidence that the door to the service station had been "jimmied." The theory of the State was that Donaldson and the defendant were accomplices who were caught in the act of burglarizing the service station. Since the screw driver found in Donaldson's car was a circumstance that might be considered against him, it was likewise admissible against plaintiff in error. Where the evidence shows that a defendant was in the vicinity at the time a burglary was committed with the aid of burglarious tools, such possession may be admitted to show that defendant had the means to commit the offense in the manner that it was committed. It is a circumstance which the jury may consider. Also, when two persons are apprehended in the commission of a burglary, evidence of possession of burglarious tools by one is proper evidence against the other. 143 A. L. R. 1199, and cases therein cited. We find no error prejudicial to the defendant under the circumstances here existing.

At the hearing on the motion for a new trial it was developed by evidence that one of the jurors visited the scene of the crime during the course of the trial and later discussed to some extent the nature of the construction of a part of the building during the jury's deliberations. The information conveyed to the jury was that the window was not as high from the ground on the outside of the building as the evidence indicated. It also described the size of the window and the manner in which it opened. It was stipulated also that the trial court failed to admonish the jury not to go near the scene of the alleged crime. The juror testified that she, her husband, and their 6-year-old daughter drove out to the scene of the crime, inspected the building from the rear, and then left. It was quite evident that the juror conveyed no information to the jury which involved any material issue upon which there was any conflict in the evidence. There is no evidence to the

effect that any juror was influenced by the information related by this juror, or that it in any manner prejudiced the rights of the plaintiff in error. The whole episode appears to have resulted from the inadvertance of the trial judge in not properly admonishing the jury with respect to the conduct of jurors in this respect.

The correct rule in situations of this nature is set forth in Harris v. State, 24 Neb. 803, 40 N. W. 317, wherein we said: "I think it may further be said that the rule adopted by the greater number of courts, both in this country and in England, is, that affidavits of jurors will not be received in any case for the purpose of impeaching or avoiding their verdict, but to this there are a number of exceptions, and to our mind the opposite rule is much more reasonable and promotive of justice. This is confined to such overt acts as may be seen or heard, and about which all the jurors present may testify with equal knowledge. Thus, where a verdict for damages is ascertained by aggregation and division, without subsequent ratification, or where it is made to depend upon chance, or where a part of the jury become so intoxicated as to destroy their ability to deliberate and exercise reason and judgment, or where witnesses are surreptitiously called before them and permitted to detail the principal facts; or where it appears that one of the jurors was familiar with the facts of the case, and by reason of his suppression of the fact of such acquaintance he procures himself to be accepted as a juror, and in the jury room asserts such knowledge, and assumes the role of both witness and advocate, and procures a verdict, and the like; all of which, being matters of sight and hearing, are susceptible of proof or contradiction by the testimony of others. In such cases we can see no danger in permitting proof of the facts by the affidavits of the jurors themselves. As said by Mr. Justice Brewer, in Perry v. Vailey, supra: 'If the jury have been guilty of no misconduct, no harm has been done by permitting their testimony to be re-

ceived. If the jury has been guilty of misconduct, but such misconduct was not of such a nature as to prejudice the rights of the parties, the modern rule is to let the verdict stand, and simply punish the offending juror. But if such misconduct has wrought prejudice, not only should the juror be punished, but the verdict should also be set aside.' " Misconduct of a juror sufficient to vitiate a verdict must be shown to have influenced the jury in arriving at a verdict, and it must relate to a matter in dispute. Carpenter v. Sun Indemnity Co., 138 Neb. 552, 293 N. W. 400. The rule, concisely stated, is: It is not proper for a juror to inspect the place where the alleged crime occurred without the authorization of the court. Such an unauthorized inspection, however, will not vitiate the verdict where it is not shown to have affected the result of the verdict. Where the trial court has determined that an unauthorized inspection of the premises was not prejudicial to the rights of the defendant, its finding will not ordinarily be disturbed by the appellate court in the absence of an abuse of discretion on the part of the trial court.

The record fails to show that plaintiff in error was prejudiced by the juror's inspection of the premises in the present case and the trial court did not abuse its discretion in overruling the motion for a new trial on this assignment of error.

There is evidence that this same juror discussed some aspects of the case with her husband. The discussion appears to have been casual and harmless insofar as the rights of the defendant were concerned. Under such circumstances the determination of the trial court will not be disturbed on review. Such conduct on the part of a juror is to be condemned as improper, although innocently done. Proper admonitions to the jury by the trial court will ordinarily eliminate occurrences of this kind and possible error resulting therefrom. The misconduct in the present case was harmless in character, unrelated to a conflicting issue, and not calculated to

influence the jury in arriving at its verdict. It does not warrant a new trial. See 39 Am. Jur., New Trial, § 101, p. 114.

There being no prejudicial error in the record, the judgment of the district court is affirmed.

AFFIRMED.

MID-CONTINENT AIRLINES, INC., NOW BRANIFF AIRWAYS, INCORPORATED, PLAINTIFF, V. NEBRASKA STATE BOARD OF EQUALIZATION AND ASSESSMENT ET AL., DEFENDANTS.

59 N. W. 2d 746

Filed July 17, 1953. No. 33260.

1. **Taxation: Constitutional Law.** Statutes providing for the levy of an ad valorem personal property tax on flight equipment used in interstate commerce, when such flight equipment is wholly and continuously outside of the state of the owner's domicile during the tax year, is not violative of the Commerce Clause of the Constitution of the United States when such tax bears a fair and reasonable relation to the use of the property in the taxing state.
2. ———: ———. Sections 77-1244 to 77-1250, R. R. S. 1943, on the grounds here challenged, held not violative of Article I, section 9, clause 6, Article I, section 10, clause 3, or Article I, section 8, clause 3, of the Constitution of the United States.

Original action. *Action dismissed.*

William J. Hotz, William J. Hotz, Jr., William F. Dalton, and *Robert M. Kane,* for plaintiff.

Clarence S. Beck, Attorney General, and *C. C. Sheldon,* for defendants.

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

CARTER, J.

This is an original action for a declaratory judgment commenced in this court to test the validity of sections 77-1244 to 77-1250, R. R. S. 1943. Such sections of the

statutes authorize the assessment, levy, and collection of an ad valorem personal property tax against plaintiff's flight equipment used in interstate commerce. Plaintiff contends that such taxation violates Article I, section 8, clause 3, of the Constitution of the United States, commonly referred to as the Commerce Clause. The defendants deny the unconstitutionality of the Nebraska act and assert the right to impose an ad valorem personal property tax upon plaintiff's flight equipment which is used within the state as a part of a system of interstate air commerce over fixed routes on regular schedules, so long as the allocation of the proportionate part of the property value and the levy thereon bear a fair and reasonable relation to the use of such flight equipment within the state. Briefly this constitutes the issue before the court.

Plaintiff is a corporation organized and existing under the laws of the State of Delaware with its corporate place of business at Wilmington in that state. The main executive offices of the plaintiff were in Kansas City, Missouri, until the consolidation of plaintiff with the Braniff Airways, Incorporated, was effected on or about August 1, 1952, at which time such offices were moved to Dallas, Texas. It is stipulated that Braniff Airways, Incorporated, is substituted for Mid-Continent Airlines, Incorporated, as the party plaintiff. The home port to which all its fleet of planes must return is Minneapolis and St. Paul, Minnesota. Plaintiff is licensed by the Civil Aeronautics Board of the United States to engage in interstate transportation by air for hire under the provisions of Title 49, U.S.C.A., sections 401 to 705. Pursuant to such authority it operates a large number of aircraft upon regular schedules in trunk line flight from Minot, North Dakota, to New Orleans, Louisiana, making regular landings in North Dakota, South Dakota, Minnesota, Nebraska, Iowa, Illinois, Kansas, Missouri, Oklahoma, Arkansas, Texas, and Louisiana. No planes land in plaintiff's domiciliary state of

Delaware. Plaintiff operates over 7,336 of unduplicated route miles. Plaintiff's activities in Nebraska consist of making landings at Omaha and Lincoln on regularly scheduled stops on interstate flights. There are 14 of such flights in and out of Omaha each day and 4 such flights in and out of Lincoln. These stops are made to handle mail, express, freight, and passengers and are usually of short duration, generally from 5 to 20 minutes. The home port for all planes here involved is the Wold-Chamberlain Air Field at St. Paul, Minnesota, where hangars, repair shops, and equipment are maintained. Municipal and federal government facilities are used at Omaha and Lincoln. The flight distance from Omaha to Lincoln is 60 miles and from Lincoln to Rulo it is 90 miles, these being the only routes traveled by any of plaintiff's planes in Nebraska within the limits of aerial routes specifically assigned by the Civil Aeronautics Administration. It is not disputed that plaintiff's operations are interstate in character and are subject to regulation by the federal government as an interstate common carrier. The gross income of plaintiff for 1951 was $9,818,363, and the net profit was $135,941. The income from the carriage of passengers, mail, freight, express, excess baggage, chartered planes, and miscellaneous sources is set forth in the record by stipulation. Plaintiff pays for depot rental space at Omaha in the amount of $22,000 a year, and a tax of 2½ cents a gallon on gasoline used which amounted to $14,180 in 1951. The tax levied in 1950 was $4,280.44, and in 1951 it was $4,518.29.

The formula for the assessment of the tax on flight equipment, defined in the statute as aircraft fully equipped for flight and used within the continental limits of the United States, is set forth in section 77-1245, R. R. S. 1943, as follows: "Any tax upon or measured by the value of flight equipment of air carriers incorporated or doing business in this state shall be assessed and collected by the Tax Commissioner. The

proportion of flight equipment allocated to this state for purposes of taxation shall be the arithmetical average of the following three ratios: (1) The ratio which the aircraft arrivals and departures within this state scheduled by such air carrier during the preceding calendar year bears to the total aircraft arrivals and departures within and without this state scheduled by such carrier during the same period; Provided, that in the case of nonscheduled operations all arrivals and departures shall be substituted for scheduled arrivals and departures; (2) the ratio which the revenue tons handled by such air carrier at airports within this state during the preceding calendar year bears to the total revenue tons handled by such carrier at airports within and without this state during the same period; and (3) the ratio which such air carrier's originating revenue within this state for the preceding calendar year bears to the total originating revenue of such carrier within and without this state for the same period." It is the contention of the plaintiff that the taxing of its flight equipment is prohibited by the Commerce Clause in any amount whatsoever. The question to be determined, therefore, is whether or not the levy of any ad valorem personal property tax on the flight equipment of the defendant on an allocation basis contravenes the Commerce Clause of the Constitution of the United States.

In Northwest Airlines, Inc. v. Minnesota, 322 U. S. 292, 64 S. Ct. 950, 88 L. Ed. 1283, 153 A. L. R. 245, the court dealt with the taxation of airplanes by the State of Minnesota which were engaged in interstate commerce. The plaintiff was a Minnesota corporation, its principal place of business was in St. Paul, Minnesota, and the latter city was the home port of all its planes. All of its planes were continuously engaged in flying from state to state as interstate carriers except when laid up for repairs. The taxing authorities of Minnesota assessed a tax on the full value of the entire fleet of planes belonging to the plaintiff which came into the

state. In upholding the tax on the full value of all of the planes of Northwest Airlines in Minnesota, the court said: "Minnesota is here taxing a corporation for all its property within the State during the tax year no part of which receives permanent protection from any other State. The benefits given to Northwest by Minnesota and for which Minnesota taxes - its corporate facilities and the governmental resources which Northwest enjoys in the conduct of its business in Minnesota - are concretely symbolized by the fact that Northwest's principal place of business is in St. Paul and that St. Paul is the 'home port' of all its planes. The relation between Northwest and Minnesota - a relation existing between no other State and Northwest - and the benefits which this relation affords are the constitutional foundation for the taxing power which Minnesota has asserted. See State Tax Comm'n v. Aldrich, 316 U. S. 174, 180. No other State can claim to tax as the State of the legal domicile as well as the home State of the fleet, as a business fact. No other State is the State which gave Northwest the power to be as well as the power to function as Northwest functions in Minnesota; no other State could impose a tax that derives from the significant legal relation of creator and creature and the practical consequences of that relation in this case. On the basis of rights which Minnesota alone originated and Minnesota continues to safeguard, she alone can tax the personalty which is permanently attributable to Minnesota and to no other State." In so holding the court specifically stated that the taxability of any part of this fleet by any other state than Minnesota, in view of the taxability of the entire fleet by that state, was not before, or decided by, the court. It was on this latter point that differences arose over the proper disposition of the case. Interstate commerce may be required, of course, to pay its fair share of the property tax burden which the states, in which the interstate business is done, may lawfully impose generally

on property located in them. In other words, interstate commerce bears no undue part of the burden if the personal property tax imposed by a given state is exclusive of all other property taxes assessed by other states, or, what is more material to the case before us, if the tax on its personal property regularly used over fixed routes in interstate commerce, both within and without the taxing state, is fairly apportioned to its use within the state. The failure of the court in the Northwest Airlines case to decide whether or not the factors set forth, which permitted full taxation in Minnesota, had the corresponding effect of preventing any taxation in any other state where interstate business was transacted by Northwest Airlines by means of the fleet of planes there involved, was the cause of the major division of the court on the issues involved. The majority to be consistent would necessarily be required to deny the right of taxation to other states in which Northwest Airlines planes engage in interstate business, or depart from the court's numerous holdings that multiple taxation of property used in interstate commerce constitutes an unlawful burden thereon in compelling the carrier to pay the taxing states more than its fair share of taxes measured by the full value of the property. It is axiomatic, we think, that if one state may properly tax the full value of the property, other taxes levied by other states would be a multiple taxation of the property constituting an unconstitutional burden upon interstate commerce.

The essential facts in the present case do not bring it within any announced rule that would permit any one state to levy an ad valorem personal property tax for the full value of the planes involved. In the present case the corporation domicile is in Delaware, its general offices in Texas, and the home port of the planes in Minnesota. Under such a division of the factors announced and considered in the Northwest Airlines case we cannot say that the fleet of planes in the case at bar

has any taxable situs in any one state where the full value of such planes could be taxed. Under such a situation we think the Northwest Airlines case leaves the door open for a decision on the issue as to whether or not, in a case such as we have here in which no state has a right to tax the fleet at full value, each state through which the planes land and engage in interstate business may tax a part of their value, if it is fairly related to their use within the taxing state. The overall result of the Northwest Airlines case is that where the owner of a fleet of airplanes engaged in interstate commerce is a corporation of the state levying the tax with its principal place of business and the home port of all its planes within the same state, such state may tax the full value of the planes. Whether or not the taxing of the whole value in such state operates to exempt them from taxation in other states in which they engage in interstate business is specifically reserved by the opinion and casts serious doubt on the right of other states to do so unless, possibly, evidence of a tax situs in other states would have called for a different result. In any event, the authority of Minnesota to tax the full value of the fleet of planes rests upon the express presumption that in flying in interstate commerce on regular schedules through several states they had not acquired a permanent taxable status elsewhere, although some of them had actually been taxed in other states. Whether this means the result would have been different if it had been shown that there was a taxable situs in other states, or, whether it means that multiple taxation of tangible property is to be allowed even though the aggregate assessment exceeds the full value of the property, remains unanswered. We assume the former, in view of the many holdings of the United States Supreme Court relative to multiple assessments on property in interstate commerce which exceed the full value of the property as being an undue burden under the Commerce Clause.

In the later case of Ott v. Mississippi Valley Barge Line Co., 336 U. S. 169, 69 S. Ct. 432, 93 L. Ed. 585, the court sustained an apportioned ad valorem personal tax levy by the nondomiciliary state of Louisiana upon a fleet of vessels engaged in interstate commerce in inland waters. The facts show that the vessels in question came into New Orleans where they were left for unloading and reloading. They were then moved to ports outside the state. They were operated on no fixed schedule but the turn-arounds were made as quickly as possible. They remained only long enough to unload and take on cargo and to make necessary and temporary repairs. The State of Louisiana and the city of New Orleans levied ad valorem taxes on assessments based on the ratio between the total number of miles of lines in Louisiana and the total number of miles of all of the carrier's lines. In upholding the tax the court said: "It seems therefore to square with our decisions holding that interstate commerce can be made to pay its way by bearing a nondiscriminatory share of the tax burden which each State may impose on the activities or property within its borders. * * * We can see no reason which should put water transportation on a different constitutional footing than other interstate enterprises." Paraphrasing the latter statement, "We can see no reason which should put air transportation on a different constitutional footing than other interstate enterprises."

In the subsequent case of Standard Oil Co. v. Peck, 342 U. S. 382, 72 S. Ct. 309, 96 L. Ed. 427, 26 A. L. R. 2d 1371, the principle that vessels moving on inland waters in interstate commerce could be taxed by a state through which they passed on the basis of that portion of the value of the vessels represented by the ratio between the total number of miles in the taxing state and the total number of miles in the entire operation is adhered to as a proper method of tax allocation. The Peck case distinguishes Northwest Airlines, Inc. v. Minnesota, *su-*

pra, on the basis that it was not shown in the latter case that "'a defined part of the domiciliary corpus' had acquired a taxable situs elsewhere." The further statement in the Peck case to the effect that "The rule which permits taxation by two or more states on an apportionment basis precludes taxation of all of the property by the state of the domicile," appears to sustain an allocation tax in a case such as we have before us in which no part of the property taxed was in the domiciliary state during the tax year. The holding in the Northwest Airlines case that the tax in that case on the full value of the air fleet was valid is based on a premise that is wholly absent in the present one.

The case relied upon the most to sustain the allocation theory of taxing personal property used in interstate commerce is Pullman's Palace Car Co. v. Pennsylvania, 141 U. S. 18, 11 S. Ct. 876, 35 L. Ed. 613. It involved a tax on Pullman cars that were continuously moving in and out of the State of Pennsylvania. The fundamental concepts which support the allocation theory of taxing personal property used in interstate commerce are set forth in this case. The legal fiction that all personal property has its situs at the owner's domicile is abandoned, and the system of taxing it at the place at which it is used and by whose laws it is protected, when it is employed in a business requiring continuous and constant movement from one state to another, is plainly and definitely announced. That this case is relied upon in the Ott and Peck cases is clear. For reasons stated in the Pullman's Palace Car Company case, we think the inland water transportation cases are particularly applicable. The court in the Pullman case said: "No doubt commerce by water was principally in the minds of those who framed and adopted the Constitution, although both its language and spirit embrace commerce by land as well. Maritime transportation requires no artificial roadway. Nature has prepared to hand that portion of the instrumentality

employed. The navigable waters of the earth are recognized public highways of trade and intercourse." Air transportation likewise requires no artificial roadways other than port facilities. The rule as to one would appear to be fully applicable to the other.

The plaintiff relies primarily upon the following cases to sustain its position. Gibbons v. Ogden, 9 Wheaton 1, 6 L. Ed. 23; Smith v. Turner, 7 Howard 282, 12 L. Ed. 702; Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194, 26 S. Ct. 36, 50 L. Ed. 150; New York Central & H. R. R. Co. v. Miller, 202 U. S. 584, 26 S. Ct. 714, 50 L. Ed. 1155; Union Tank Car Co. v. McKnight, 84 F. 2d 421; Spector Motor Service, Inc. v. O'Connor, 340 U. S. 602, 71 S. Ct. 508, 95 L. Ed. 573; Johnson Oil Refining Co. v. Oklahoma, 290 U. S. 158, 54 S. Ct. 152, 78 L. Ed. 238; City of Chicago v. Willett Co., 344 U. S. 574, 73 S. Ct. 460, 97 L. Ed. 333. We do not consider these cases controlling in the issue before us. A careful reading of some of them, however, indicates that they support the theory of the defendant. Some announce principles which have been abandoned in the natural course of change in our economic and transportation systems. Others are based on facts which clearly distinguish them from the present case while others involve a tax in no way resembling an ad valorem tax on personal property. The plaintiff also cites Pullman's Palace Car Co. v. Pennsylvania, *supra,* Ott v. Mississippi Valley Barge Line Co., *supra,* Northwest Airlines, Inc. v. Minnesota, *supra,* and Standard Oil Co. v. Peck, *supra,* which in our opinion definitely sustain the position of the defendant as we have heretofore stated.

It seems clear, therefore, that Nebraska and other similarly situated states have the power to impose an apportioned ad valorem personal property tax upon the flight equipment of this plaintiff, which is engaged in interstate commerce within the taxing state, when it has been wholly and continuously outside the state of the owner's domicile, and the assessed value of the prop-

erty bears a fair and reasonable relation to the use made of it in such taxing state.

The petition alleges also that the statutes in question are unconstitutional in that they violate Article I, section 9, clause 6, and Article I, section 10, clause 3, of the Constitution of the United States. These questions appear to have been abandoned in the brief and oral argument. We hold, however, that the foregoing constitutional provisions were not violated on the basis of the authorities cited dealing with the alleged violation of Article I, section 8, clause 3, of the Constitution of the United States.

The foregoing disposes of the only question raised by the petition. Plaintiff in its brief states: "Plaintiff contends such taxation by defendants is in violation of Article I, Section 8, Clause 3, of the Constitution of the United States, which vests in Congress the exclusive right to regulate commerce among the states, and the levy of such tax by the defendants constitutes regulation. No state constitutional question or other legal issue is presented for the Court's decision." We consequently limit the issue strictly to that raised by the petition. The plaintiff does not allege that the formula set forth in the statute produces an assessed value that does not bear a fair and reasonable relation to the use of the property within this state. That issue was not alleged, briefed, or argued by the plaintiff. We do not deem this issue to be before the court for its determination.

We find that the act is not violative of Article I, section 8, clause 3, Article I, section 9, clause 6, or Article I, section 10, clause 3, of the Constitution of the United States, on the basis on which it is here challenged. The petition of the plaintiff is therefore dismissed.

DISMISSED.

JOE E. BENSON AND WILLIAM E. HARDESTY, DOING BUSINESS AS WM. HARDESTY HAY COMPANY, APPELLEES, V. ARCH WALKER, APPELLANT.

59 N. W. 2d 739

Filed July 17, 1953. No. 33312.

1. **Pleading.** The rule of law is inflexible that the allegations and the proof, allegata et probata, must agree.
2. ———. Under the code system of pleading, it is not necessary to state a cause of action or defense in any particular form. The facts are to be stated. All that the law requires is that there shall be a cause of action or defense.
3. **Trial.** Instructions must be considered and construed together. If they are not sufficiently specific in some respects, it is the duty of counsel to offer requests for instructions that will supply the omission. And, unless this is done, the judgment will not ordinarily be reversed for such defects.
4. **Sales.** Evidence examined and held sufficient to sustain the verdict of the jury.

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

Robert B. Waring and *John Riddell,* for appellant.

Kirkpatrick & Dougherty, Van Pelt, Marti & O'Gara, Warren K. Dalton, and *Robert D. McNutt,* for appellees.

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

MESSMORE, J.

The plaintiffs, a copartnership composed of Joe E. Benson and William E. Hardesty doing business as Wm. Hardesty Hay Company, brought this action at law in the district court for York County to recover the sum of $2,326.73, with interest, alleged to be due the partnership from Arch Walker, defendant. The action is based upon an oral agreement entered into between the parties. The case was tried to a jury, resulting in a verdict in favor of the plaintiffs and against the defendant in the amount of $1,551.15. The defendant filed a motion for new trial which was overruled. From the order over-

ruling the motion for new trial, the defendant appeals. For convenience we will refer to the parties as designated in the district court.

The partnership has its principal place of business in Chickasha, Oklahoma. Joe E. Benson resides at Blackwell, Oklahoma, and transacts business for the partnership from that point, while William E. Hardesty resides at Tuttle, Oklahoma, and transacts business for the partnership in that part of the state.

While certain proceedings were had with reference to the pleadings, the same are not of importance and will not be related here. The pleadings upon which the case was tried are, in substance, as follows:

The plaintiffs' amended petition alleges that during June 1946, the defendant called upon Joe E. Benson at Blackwell, Oklahoma, and entered into an oral agreement with the partnership. The terms of the agreement were as follows: The defendant was to supply No. 1 green leafy hay to the partnership, which hay was to conform to and be substantially identical in quality with a sample of hay displayed by the defendant to Joe E. Benson. The hay was to be shipped by the defendant to such consignee as the members of the partnership would direct, defendant to prepay the freight thereon. Each shipment of hay made in accordance with the agreement was to be made upon the order of one of the plaintiffs and in accordance with telegraphic shipping instructions sent to defendant by one of the plaintiffs after the receipt of notice by plaintiffs from defendant of the date upon which said hay would be ready to ship. Amounts due defendant in payment for such shipments of hay were to be credited to defendant's account with the partnership, and settlement of such account was to be made periodically by remittance to defendant of such amounts as were then due him. The defendant shipped certain cars of hay in accordance with shipping orders received from the plaintiffs. The plaintiffs paid the defendant $2,777.96 for the shipments, with the understanding that

the defendant would indemnify plaintiffs for any losses which the partnership might suffer by reason of the unsatisfactory condition of the shipped hay. The petition further alleged that such shipments of hay were not No. 1 green leafy hay, but the hay was unfit for use upon arrival at its destination and did not conform to the sample of hay shown to plaintiffs by defendant; and that pursuant to oral authority given to plaintiffs by defendant, the plaintiffs disposed of the hay for the freight charges thereon.

The petition contains the amounts paid to defendant and other amounts paid on his behalf to which the plaintiffs claim they are entitled to be indemnified. It is further alleged that the defendant had paid plaintiffs $571.75 on his account, and was credited for two cars of alfalfa shipped by the defendant to apply on his account, in the amount of $479.49, and $79.26 otherwise received; and that there remains due plaintiffs from defendant the sum of $2,326.73 on defendant's account with plaintiffs, for which amount, with interest from September 1, 1946, plaintiffs pray for judgment against the defendant.

The defendant's amended answer denied generally the allegations of the plaintiffs' amended petition, and alleged that on or about January 12, 1947, all demands and claims of plaintiffs for the year 1946 were settled and paid by check in the amount of $571.75. Defendant prays he may go hence without day and recover his costs herein expended.

The plaintiffs' reply to defendant's amended answer denied generally the allegations contained therein.

The record discloses that the partnership is engaged in the wholesale hay and grain business. The general nature of the business is to buy hay and grain from elevators and farmers and ship it to buyers for feeding cattle and for export. In January 1946, Benson was in the area of York, Nebraska, purchasing corn. He learned that there was a considerable amount of alfalfa

hay in the vicinity, and, being engaged in the business, he contacted the defendant and they discussed the hay situation in the area. He told the defendant if he ever had any hay to sell, to get in touch with the partnership. In May 1946, Walker made a trip to Blackwell, Oklahoma, accompanied by a friend. They arrived at Benson's house and he asked Benson to look over two bales of hay that he had brought along, which was grown in the York area. Benson did so. They discussed the quality of the hay and Benson told Walker he was only interested in No. 1 hay; that when they bought hay for shipment to the southland it had to be dry; and that Walker replied that if he shipped hay, that was the kind he would ship, green and ripe, good hay that would arrive dry on the other end of the line. Benson said that otherwise they could not use it. Benson described No. 1 hay as dry hay with a green color of 60 percent and 40 percent leaf generally. Benson also told Walker that in baling hay it should not be done when the weather was damp, for the reason that it would not get dry enough to ship on long hauls. The hay Walker was to ship was to be No. 1 hay, and the price was to be what he asked, and it must arrive to the buyer in merchantable condition. If the hay was not in good condition, it was still Walker's hay. Walker agreed to that. When Walker loaded his hay he was to call one of the members of the partnership and send a bill of lading with the price which had been agreed upon attached. Immediately upon arrival of such facts at the office, Benson would check the figures and weights and send Walker the amount that he was billed for. The partnership was to receive $2 per ton for handling the hay after it was accepted by the buyer. He was selling the hay for Walker as a broker, and the hay was shipped by Walker at Benson's direction.

In 1946, Walker had shipped in the neighborhood of 39 carloads of hay at Benson's direction. On July 22, 1946, Walker called Benson by telephone at Blackwell,

and told Benson that he had been notified by the railroad that they were in trouble at Columbus, Georgia, with some bad cars of hay. Benson told Walker that he, Benson, would go ahead and handle the hay as Walker suggested to the best advantage to protect the capital invested. Walker told him to do so. After Walker directed Benson to dispose of the hay, Benson got in touch with J. Thomas Morgan who was acting as an agent for the partnership at Columbus, Georgia, and directed Morgan to see that the hay was unloaded and stored, and when it was dry enough, to notify Benson.

The following described cars of hay are involved in the instant case:

Date of Shipment	Car Designation		Weight Pounds	Price Per Ton	Total Paid
July 3, 1946	C.B. & Q. R.R.	21096	36,220	$24	$ 434.64
July 4, 1946	Penna. R. R.	564057	29,700	24	356.40
July 7, 1946	Penna. R. R.	62804	41,380	24	496.56
July 10, 1946	C.B. & Q. R.R.	25650	22,920	24	307.80
July 10, 1946	Milw. R. R.	718737	33,040	22	363.44
July 13, 1946	Ill. Cent. R.R.	40208	38,680	24	464.16
July 30, 1946	C. & O. R.R.	9991	29,580	24	354.96
Total					$2,777.96

Benson further testified that the partners received from Walker the sum of $479.49, which came from two cars of hay sent by Walker to apply on the balance of his account after he had received the audit of the amount that had been paid to him and the amount due the partnership, and he was credited with the amount of $479.49.

The deposition of J. Thomas Morgan discloses that he is a resident of Macon, Georgia; that he is acquainted with Joe E. Benson and William E. Hardesty; that he was engaged in the brokerage business dealing in hay, grain, and other feeds; and that he had purchased hay from the plaintiffs from June 1945 until July 1950. He

testified to the cars of hay shipped to Georgia which are the ones previously described, and that none of the cars so shipped contained No. 1 green leafy hay. The hay was in such condition that it was not salable, and was refused by the consignees.

William Hardesty testified that on July 21 or 22, 1946, he talked to Walker over the telephone from Chickasha in regard to the hay that was rejected, and asked him what he could do about it. Hardesty suggested they sell it at the best advantage, and he informed Walker of the condition of the hay, how it arrived, and said that all there was to do about it was to unload it and store it, and have Morgan dispose of it. Walker said he believed that was all that could be done. He could not go down and see about it, and told Hardesty to go ahead and dispose of it to the best advantage possible.

At the conclusion of the plaintiffs' evidence, the defendant moved the court to require the plaintiffs to elect upon which cause of action set forth in the petition they would stand, (1) whether they would stand upon a breach of contract of sale; (2) whether they would stand upon the guarantee of the quality of the goods and merchandise sold; or (3) whether they would stand upon the theory of tort and recover for the false representation of merchandise sold. This motion was overruled. The defendant then moved for directed verdict, for the reason (1) that the evidence adduced was insufficient to support any cause of action set forth in the amended petition; (2) that the evidence adduced did not show that the plaintiffs suffered any damage except nominal damages; and (3) that the evidence adduced by the plaintiffs was insufficient to show the fair and reasonable market value of the hay in question at the time of its arrival in Georgia, nor was there any evidence in the record to show what the hay would have been worth if as represented; and further, defendant moved, in the alternative, that the court direct the jury to return a verdict in favor of plaintiffs and against the

defendant in the sum of $1. for nominal damages in this matter. This motion was overruled.

The defendant Arch Walker testified that he resides in York, Nebraska, and engages in farming; that he had transactions with the plaintiffs during the years of 1946 and 1947; that he met Joe E. Benson in York in the winter of 1945, around Christmas time; and that he talked about purchasing hay, gave his name and address to this witness, and told him if he had any hay to sell in the following spring or summer, to call him. Later on Walker called Benson and told him that he had some hay to sell. Benson said they could use lots of it, and told Walker where to send it. Walker billed out a load and shipped it. He believed Benson told him that he would pay $22 a ton for it, but did not remember. He was to get the weights and send them to Benson. Later he went to see Benson in Oklahoma, and took a sample of hay. He did not know whether it was good enough to ship or not, that was what he desired to find out. Benson examined the hay and said that he could use lots of it, as there was a big demand for it. He did not know that Benson was to charge a commission of $2 a ton for handling the hay. There was nothing said about the kind or quality of the hay, that it was to be No. 1 green leafy hay, or that if it was damaged in transit he, Walker, would have to stand the loss. He continued to ship hay during the months of June, July, August, September, and October of 1946. The practice with reference to shipping this hay was that there was usually some hay on the road, and he would get a check when he sent Benson the weights. Lots of times in the letter there would be a check and a notice of the place to send the hay if he had it. He heard the testimony of Benson and Hardesty that they called him on July 22, 1946, about the seven loads of hay that were shipped to Georgia. He remembered Benson calling him in August 1946. Benson never made any demand for repayment of this money for the hay in Georgia, and

he never did say that the hay in Georgia was rotten or bad, or ask for a refund of the money. Walker continued to ship hay, and he was paid when they got the weights. He received a letter in which the partnership claimed that it had lost $571.75 on some hay that went out of Grand Island. This is evidenced by exhibit No. 4, a check on the First National Bank of York on which is marked "Loss on hay shipped in 1946." In a couple of weeks the defendant was billed for a further loss. He sent a check, exhibit No. 5, upon which was written "Loss on wet hay." This check was to Joe Benson in the amount of $407.27, dated February 12, 1947. No claim or demand was made by the partnership for any money until the 4th of December, 1947, at which time correspondence sent by J. Thomas Morgan to Benson was forwarded to this defendant. This correspondence had to do with the transaction involving the hay shipped to Georgia and handled by Morgan. This witness did not return this letter.

The defendant further testified that when he sent the check for $571.75, that was in full and complete settlement of all claims and demands against him on the part of the partnership. On cross-examination he admitted that he received from the plaintiffs the sum of $2,700, as claimed by them.

The defendant assigns as error that: (1) The trial court erred in overruling the demurrer of the defendant to the amended petition as amended. (2) The trial court erred in overruling the defendant's motion to require the plaintiffs to elect upon which cause of action they would stand. This motion is previously set out, and was made at the close of plaintiffs' evidence in chief. (3) The trial court erred in failing to direct a verdict for defendant made at the close of plaintiffs' evidence or to direct in the alternative a verdict in favor of the plaintiffs in the sum of $1. (4) The trial court erred in giving instructions Nos. 1, 4, 5, 6, and 7 on its own motion. (5) The trial court erred in overruling the

defendant's motion for judgment notwithstanding the verdict.

The defendant argues that the amended petition in no way indicates that the plaintiffs were commission men and that the hay in question was to be shipped on a commission; that there is no language in instruction No. 1 containing the statements of the issues as tendered by the petition which would indicate that the plaintiffs were commission men and selling defendant's hay on a commission; that there is no evidence of what No. 1 green leafy hay would have been worth in Nebraska or in Georgia, where it was shipped, or in Oklahoma where Benson lived, or any other place; and that there is no record of what would be the value of this hay any place if it had been as represented by Walker. The defendant further argues that this being true, the rule applicable is as follows: In an action for damages for breach of warranty in sale of personal property the measure of damages is the difference between the value of the property as it actually was and what would have been its value if it had been as represented. See, Sherrill v. Coad, 92 Neb. 406, 138 N. W. 567; Young v. Filley, 19 Neb. 543, 26 N. W. 256; McClatchey v. Anderson, 84 Neb. 783, 122 N. W. 67; Chicago, B. & Q. R. R. Co. v. Metcalf, 44 Neb. 848, 63 N. W. 51, 28 L. R. A. 824; Oxygenator Co. v. Johnson, 99 Neb. 641, 157 N. W. 339.

The defendant further calls attention to the instructions of the trial court which are as follows:

"No. 5. A.- There is evidence tending to support a finding that hay was sold by defendant to plaintiffs; that the hay was shipped by defendant pursuant to instructions of plaintiffs, was paid for it by plaintiffs and that it became plaintiffs' hay to sell to others as they desired.

"B.- There is also evidence tending to support a finding that plaintiffs were to sell hay belonging to defendant on commission, remitting the price of the hay to defendant periodically upon being advised that it had

been shipped and the weights thereof, but that the hay would belong to defendant until such time as it was sold to some third party to whom it was to be consigned.

"Under all of the evidence in this case it is important that you determine at this point which, if either, of these finding (findings) is proved by the greater weight of the evidence as will be pointed out in Instruction No. 6 and No. 7."

"No. 6. If you find the situation to be as set out in Paragraph A of Instruction No. 5 the result will be that there is a lack of competent evidence from which you can determine the amount of damages if any, and as you are not permitted under the law to speculate nor guess as to the amount of damages, you should in that event return a verdict from (for) the defendant, provided, however, if you find the situation to be as set out in Paragraph A of Instruction No. 5 and find for the plaintiffs on all matters under all of the instructions you should return a verdict for the plaintiffs and fix their damages at the sum of $1.00."

"No. 7 If you find the situation to be as set out in Paragraph B of Instruction No. 5 then the measure of damages, if any, if you find for the plaintiff, would be the amount that plaintiffs have advanced to defendant for hay which you may find to have been shipped and for freight charges, if any, which you find were advanced by plaintiffs at defendant's request less any credits which have been proved."

The defendant argues that in the foregoing instructions the trial court recognized the lack of evidence on the measure of damages as evidenced by instruction No. 6. In this connection, the defendant contends that under the rule as stated in Ayres v. Wolcott, 66 Neb. 712, 92 N. W. 1036, and Bauer v. Wood, 144 Neb. 14, 12 N. W. 2d 118, the rule of law is inflexible that the allegations and the proof, allegata et probata, must agree; and that such is not the situation in the instant

case for the reasons heretofore set out as contended for by the defendant.

To determine whether a cause of action is pleaded in the manner in which it is required to be pleaded, the following is applicable: Under the code system of pleading, it is not necessary to state a cause of action or defense in any particular form. The facts are to be stated. See section 25-804, R. R. S. 1943, which provides in part: "* * * (2) a statement of the facts constituting the cause of action, in ordinary and concise language, and without repetition; and (3) a demand of the relief to which the party supposes himself entitled. If the recovery of money be demanded, the amount thereof shall be stated; and if interest thereon be claimed, the time from which interest is to be computed shall also be stated." All that the law requires is that there shall be a cause of action or defense. It looks at the real rights of the parties and aims at the protection and enforcement of such rights. See, In re Estate of Wise, 144 Neb. 273, 13 N. W. 2d 146.

The character of a cause of action is determined by the allegations of fact contained in the petition, unaffected by the conclusions of the pleader. See, Johnson v. Radio Station W. O. W., on rehearing, 144 Neb. 432, 14 N. W. 2d 666; State ex rel. Johnson v. Wagner, 139 Neb. 471, 297 N. W. 906.

The oral agreement pleaded by plaintiffs is the understanding between the plaintiffs and the defendant that the defendant was to supply No. 1 green leafy hay; that the plaintiffs were to sell the hay belonging to the defendant, remitting the price of the hay to the defendant periodically upon being advised that it had been shipped and the weights thereon; and that the hay would belong to the defendant until such time as it was sold to some third party to whom it was to be consigned. The evidence disclosed that the plaintiffs were to receive a commission of $2 a ton for handling the hay.

The allegations of plaintiffs' amended petition and the facts pleaded therein do not constitute a suit based upon a breach of warranty or a breach of contract, or upon deceit or false representations. The suit is based upon the oral agreement as pleaded therein. The evidence sustains the allegations as pleaded in the amended petition and, if believed by the jury, the jury would be fully warranted in returning a verdict such as it did in the instant case.

The measure of damages in this case was the amount paid to or for the defendant on account of the defendant's hay which was not in accordance with the sample, was not No. 1 green leafy hay, and was in such a condition that it was unsalable so that the consignee could not accept it and refused to do so.

The court did instruct, as pointed out in A of instruction No. 5, and instruction No. 6 applicable thereto, a theory upon which the defendant would be entitled to the relief sought by him in accordance with his motion made, that in the event the plaintiffs were entitled to recover damages, the damages would be nominal only. We see no prejudicial error in submitting the two theories as submitted and explained in the instructions given by the trial court.

This brings us to the assignment of error that the trial court, in effect, took away from the jury the affirmative defense of payment as pleaded in the defendant's answer; and that by instruction No. 7, its effect was that the $571.75, which the defendant contends constituted a full and complete settlement of the claims or demands of the plaintiffs, was completely withdrawn from the jury.

In instruction No. 4, of which the defendant complains but does not argue, the trial court said in part: "* * * unless it is proved by the greater weight of the evidence, considering also any evidence introduced by plaintiffs, that such damages, if any, have been settled

and paid, in which event you would find for the defendant."

In instruction No. 2, the trial court set forth the substance of the affirmative defense of the payment as pleaded in the defendant's answer. We are not in accord that the effect of instruction No. 7 was to withdraw from the jury the affirmative defense of payment as alleged in the answer of the defendant. In the event that the defendant desired a more explicit instruction than that given, he should offer such an instruction. See Hannah v. American Live Stock Ins. Co., 111 Neb. 660, 197 N. W. 404.

Instructions must be considered and construed together. If they are not sufficiently specific in some respects, it is the duty of counsel to offer requests for instructions that will supply the omission. And, unless this is done, the judgment will not ordinarily be reversed for such defects. See, Christensen v. Tate, 87 Neb. 848, 128 N. W. 622; Plumb v. Burnham, 151 Neb. 129, 36 N. W. 2d 612.

Other assignments of error are without merit and need not be discussed.

For the reasons given herein, the verdict and the judgment entered thereon are affirmed.

AFFIRMED.

HUGH V. GRIFFITH, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.

59 N. W. 2d 701

Filed July 17, 1953. No. 33320.

1. **Criminal Law: Evidence.** The test of whether a fact inquired of in cross-examination is collateral is, would the cross-examining party be entitled to prove it as a part of his case tending to establish his plea.
2. ———: ———. If a witness is cross-examined on a matter collateral to the issue, he cannot as to his answer be subsequently contradicted by the party conducting the examination.

3. **Criminal Law: Appeal and Error.** The ruling of the trial court in regard to the scope of cross-examination will be sustained unless it is an abuse of the discretion accorded the court on this subject.

4. ———: ———. If a witness is permitted to be cross-examined as to matters not brought out on his direct examination, the judgment in the case will not be reversed if it appears that no prejudice could have resulted therefrom.

5. **Criminal Law: Indictments and Informations.** In a criminal prosecution rebuttal testimony on behalf of the State may be given by witnesses whose names are not endorsed on the information.

6. **Homicide: Trial.** The duty of the jury in a prosecution for murder in the first degree is to determine the guilt or innocence of the accused and if it finds a verdict of guilty to determine whether the penalty shall be death or imprisonment for life. The decision of the jury should not be influenced by or rest upon the fact of whether a pardon, parole, or other clemency is easy or difficult to secure.

7. ———: ———. An instruction by the court, in response to an inquiry by the jury during its deliberations whether or not a person sentenced to life imprisonment for first degree murder could be paroled and if so after what period of time, that the matter of eligibility for parole or other clemency is determined by the State Board of Pardons when it may see fit, and that the jury was not permitted to decide whether such power may or may not be exercised or to control the time or manner of such exercise was not improper.

8. ———: ———. The trial court may in the exercise of its discretion give or refuse to give such an instruction as the one above described.

9. **Criminal Law: Witnesses.** A defendant in a criminal case who becomes a witness subjects himself to the rules of law applicable to other witnesses.

10. ———: ———. The credibility of witnesses and the weight of the evidence are for the jury to determine in a criminal case and the verdict of the jury may not be disturbed by this court unless it is clearly wrong.

ERROR to the district court for Cheyenne County: JOHN H. KUNS, JUDGE. *Affirmed.*

Patrick J. Heaton and *Harold E. Connors,* for plaintiff in error.

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

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

BOSLAUGH, J.

Hugh V. Griffith, identified herein as defendant, was charged with and convicted of the crime of murder in the first degree. The sentence was death. He prosecutes error to review the record of his conviction.

The State offered evidence tending to prove the following matters: The defendant and Anna Frerichs were married March 3, 1941, at Sidney. Thereafter they were in Denver and other places in Colorado, Russell and other parts of Kansas, and in various places in Utah. They did not have a home of their own in Sidney. On numerous occasions during the years following their marriage when not employed they returned to Sidney and lived with the parents of Mrs. Griffith. During the time from May 1951 to January 1952, she was at the home of her parents continuously. Defendant was a laborer. He was not employed continuously. His engagements were irregular and many times of short duration. In more recent periods he worked in the oil fields. He was what is described in the record as a roughneck in the oil fields. When not employed and also while he was working at places near Sidney he lived at the Frerichs home. He would be there for a "week or two and then he would find some other work and then go out again and be gone for a week or two, maybe longer, and then come back."

Defendant and his wife had no children, permanent place of abode, or home of their own. They had many misunderstandings and much unpleasantness. In January 1952, they discussed moving from the Frerichs home. They had a disagreement in the presence of Mrs. Frerichs. She asked if they would be gone before evening and defendant said " 'Anna will be here, but I am going

to get a damn divorce.' " They left the following day. Anna returned on March 9, 1952. Later defendant came to the home of her parents and talked with her. During April he came again and stayed for about 2 weeks. They had a rather severe quarrel late in April. Mrs. Griffith told her husband to leave—" 'All you want is revenge.' " He induced her to go with him to Sedgwick, Colorado, on June 4, 1952. They got back to Sidney the afternoon of the next day. They came to the home of her mother, but defendant stopped only to let his wife out of the car. She had a bruised hip and injuries to her neck and chin. He drove near the Frerichs home on the evening of June 13, 1952, but did not get out of the car. His wife went to the car, did not get in, but had a conversation with him. He left and did not return there before the tragedy in which Mrs. Griffith was shot and killed.

The defendant told Mrs. Echo Pingel in Sedgwick, Colorado, on June 3, 1952, as related by her at the trial, that he and his wife could not get along and were separated. The next day he and his wife came to the Pingel home. Mrs. Pingel, her husband, and the defendant had some previous acquaintance. The defendant introduced Mrs. Griffith to Mrs. Pingel. The face of Mrs. Griffith was badly bruised and scratched and her clothing was torn. Mrs. Pingel asked defendant if he had done that to her. He denied it, but Mrs. Griffith said he did it. Later in the conversation defendant said "she got just what she asked for." Defendant stated to Mrs. Pingel on that occasion that his wife had written a letter containing statements sufficient to send her to the pen for 10 to 20 years; that she had been in a motel with a man in Kansas and had accompanied him back to Sidney; that defendant had the register showing she had registered at a motel but not by use of her correct name; that he wanted her to go where he was working but she would not because she had a good steady job in Sidney; and that she only wanted

to stay there because she used dope and she desired to stay and "use that stuff and run around with other men." Mrs. Griffith denied these charges. Defendant complained because his wife had not had children and she said she did not want to do anything about that until they got their troubles straightened out. The witness asked defendant why he did not leave his wife alone, settle down, and behave himself, and his answer was that he was " '* * * doing all right.' " She said she asked him if he would let his wife alone for a couple of weeks while she could settle down and if he would get a place for them to live, and he replied, " 'No; if I can't have her, nobody else will.' * * * 'I will kill her first.' "

The State produced evidence that Mrs. Weert Frerichs, Sarah Anne Frerichs, Johnny Frerichs, Mrs. Catherine Hatcher, and Mrs. Anna Griffith attended a carnival in Sidney from about 8 p. m. until about 10:20 p. m. on the evening of June 20, 1952. They went from the Frerichs home in a car operated by Mrs. Weert Frerichs. They returned to the Frerichs home in the car about 10:30 and stopped in the street, Tenth Avenue, on the east of the Frerichs home.

Mrs. Hatcher had been an intimate friend of Mrs. Griffith since 1928. She had known and been friendly with Hugh Griffith since immediately before his marriage to Mrs. Griffith. They frequently associated in social and family affairs. The Hatcher home was immediately across the street intersection to the southeast from the Frerichs home. Mrs. Hatcher had been and was thoroughly familiar with, knew, and was able to identify the voice of defendant when she heard him speak.

When Mrs. Hatcher and Mrs. Griffith left the automobile in the street to the east of the Frerichs home they went to the private walk north of the home, then west on the walk to near the northwest corner of the house, and south to the door on the west of an enclosed porch.

It was immediately west of and adjoining the kitchen. There was a light in the kitchen. There was no other light in the house or west of it. There were many large trees and shrubs around the house, especially to the north and west thereof. The defendant and his wife used the entrance from the west onto the porch and from the porch into the house at the times they lived there. It was a dark night but there was a little reflection of light through from the kitchen. There was no light shining on the person standing immediately south of the door into the porch when Mrs. Griffith and Mrs. Hatcher came there on the night of June 20, 1952.

Mrs. Griffith preceded Mrs. Hatcher when they walked to the door of the porch. When they came to the door they saw an outline of what appeared to be a man standing south of but near the door. He had a long narrow object in his hand. It looked like a gun. Someone said, " 'This is it.' " It was the voice of a man. Mrs. Hatcher immediately recognized the voice as that of the defendant. She heard Mrs. Griffith say, " 'Oh, no, Hugh' " and she reached for him. Mrs. Hatcher turned and ran down the walk to the north. She heard Mrs. Griffith call " 'Catherine, Catherine,' " the first name of Mrs. Hatcher. She stopped at the window near the northwest corner of the house that opened into the kitchen and called " 'Help, John and Hannah,' " the first names of the parents of the deceased. She then went east to the sidewalk west of Tenth Avenue, turned south, and proceeded towards her home. As she was going south she heard a "blast, and I heard someone scream." She recognized the man standing by the door of the porch by his voice. She was not able to make any other identification.

Mrs. Frerichs, the mother of Mrs. Griffith, had retired for the night in the room on the west of the house immediately south of the kitchen. Between 10 and 11 o'clock that night she heard from her bed her daughter call " 'Mamma, open the door.' " She heard footsteps

running toward the east on the walk north of the house. She went from the bedroom to the kitchen and there she heard a loud blast. She proceeded to the front door near the southeast corner of the house, went out on the lawn, and found her daughter prostrate on the ground. She could see plainly because of a street light across the street. She turned her daughter partly over and saw blood on her chest. She ran into the house and called the officers. The shot she heard was north of the house. The body of the deceased was on the lawn a short distance east and south of the northeast corner of the house.

A doctor was called. He promptly arrived and found that Mrs. Griffith was dead. She had several punctures and numerous lacerations of her right chest and neck. There was evidence of severe bleeding from what appeared to be a gunshot wound recently inflicted. It was the opinion of the doctor that she died as a result of hemorrhage and shock caused by gunshot wounds. The doctor who performed an autopsy on the body of the deceased described its condition in detail and expressed his opinion that the death of the deceased was the result of "hemorrhage and shock—circulatory collapse" caused by gunshot wounds.

A shell casing of a No. 12 Western Xpert shotgun shell was found early the next morning about 20 feet northwest of the northwest corner of the house on the walk from the house to the garage. Some wadding from a shotgun shell was found between the south side of the walk and the north side of the house about midway between the east and west sides of the house. Another piece of the same kind of wadding was found on the pathway between the house and the flower garden north of the house. The siding on the north side of the house near the northeast corner had two injured places in the wood. They appeared like some objects had struck the wood and glanced off breaking the paint and surface of the siding to a depth of about one-eighth inch. The

higher one was about a foot from the east end of the north side and up about 6 feet from the ground. The lower one was about a foot further towards the west and about 2 feet lower. The location where the shell casing was found, the place furthest north where wadding was located, and the places where the north wall were injured were substantially in a line from northwest to southeast but more easterly than southerly. There was evidence that defendant had purchased a 12-gauge shotgun in the fall of 1950 and that he had it as late as April of 1952. There was no direct proof that he had a 12-gauge shotgun the night of June 20, 1952.

The defendant was at the Union Pacific depot in Hardin, Colorado, a village about 16 miles east of Greeley, Colorado, about 6:30 a. m. on June 23, 1952. He inquired of the custodian of the depot for information of trains going to Kansas City. He said his wife had been in an automobile accident in that city and he wanted to go and get her. The custodian could not sell tickets but he made a call to another station with the request that the train stop at Hardin. Defendant was arrested on the afternoon of that day by the sheriff of Weld County, Colorado, and two members of the Colorado Courtesy Patrol. When they located him they "covered" him. He said to them " 'You don't need to cover me,' * * * 'I haven't got any gun, and I know what you want me for.' " The sheriff asked him " 'What do you know that we want you for,' " and he replied " 'You want me for murder.' " The officers searched the automobile of defendant but did not find a gun of any kind. The license plates of the car had been removed from it. Defendant told the sheriff he had a part of a cabin camp register in his grip and it would explain everything. The sheriff inquired if the defendant would sign a waiver of extradition and he answered " 'I will be very glad to, because I want to get back and get this over with.' " The sheriff asked him " 'What did you do with the gun,' "

and he said " 'That's for you to find out.' "

The evidence on behalf of defendant was as follows: He drove his automobile through Sidney on the afternoon of June 20, 1952, on a trip from Ogallala to Brownson. He ate at the Brownson steak house and tavern. He was seen by an acquaintance there at about 4:30 p. m. This acquaintance corroborated the statement of defendant. The defendant then went to Potter. Brownson is about 6 miles west of Sidney and Potter is about 10 miles west of Brownson. Defendant had been doing steel work and roughnecking in the oil fields for several months. He was looking for work of this kind. He met and talked at Potter with an employee of Lohman and Johnson, oil drillers, about jobs where the longest locations were and about how long it takes to drill a well. About dark that evening he left Potter to go back to Brownson. He was driving a 1939 Ford sedan, and he had a 16-gauge Davenport single shot shotgun and a .22 single shot Winchester rifle in the back of his car. He went to Brownson, stopped a few minutes, made a purchase, and then drove south and west about 18 miles across the hills to the Lohman and Johnson well. He talked with the driller and other men there for about an hour. He was trying to get a job there because they were paying more money than anyone else. He then drove a short distance to the northeast to Cy Herndon's. He stayed there 2 or 3 hours. When he left he drove out north to the road and remained in his car there that night. He was not in Sidney on the night of June 20, 1952, or at any time that day after he drove through the city on the afternoon on his way to Brownson. He did not shoot his wife. He did not own or have in his possession a 12-gauge shotgun. The 12-gauge shotgun he owned in the fall of 1950 he sold in the early part of January 1952, at Lyons, Kansas, to an oil field worker. He had not owned and had not had in his possession a 12-gauge shotgun at any time since January 1952. The next morning he

started for Kimball, ran out of gas about 4 miles west and 8 miles south of Potter, walked to a farm house, succeeded in buying gasoline, and then drove west. He turned on the car radio and heard a broadcast to the effect that he was wanted by the Sidney police for murder. The radio broadcast gave a description of him, his car, and his dog. A short time later he took his dog to a washout, shot him, wrapped him in a blanket, and left him there. This was Saturday forenoon June 21, 1952. He drove around in the hills until the morning of June 23, when he went into Hardin, Colorado. He stopped that morning, and cleaned up by a creek under a bridge. He changed clothes and left some of his clothes and other belongings, including insurance papers, in a suitcase and an air force duffle bag under the bridge. He had stayed in his car out in the hills at night, slept in his car, and did not eat any place. He stopped at the depot at Hardin, Colorado, about 8 a. m., June 23, 1952, and asked about a ticket to Kansas City. He wanted to go there so that he could get to Marion, Kansas, and see a lawyer he knew. He later talked with him from the office of the sheriff in Sidney. While in Hardin he was arrested and returned to Sidney.

The dog and guns of defendant were found at the location where he said he left them after he heard he was wanted for murder. A No. 12 shell casing would not fit and could not be inserted in the 16-gauge shotgun of the defendant, the only one he owned or had possession or use of at the time the deceased was shot.

The defendant denied that there had been any serious disagreement between him and his wife; that he had been unkind to her; or that he had ever threatened to do her physical harm. He denied the statement in the testimony of Dallas Stephenson of Gering that he had said that he was discouraged and was going to sell everything he had and that he indicated to Stephenson that there had been some kind of trouble concerning his wife. He denied that he had injured his wife on either June 4 or

5 when they were on the trip to or from Sedgwick, Colorado. He denied each of the statements testified to by Mrs. Pingel as having been made by defendant when he and his wife were at her home on June 4, 1952, and defendant denied the statements attributed to him by the sheriff of Weld County, Colorado, at and about the time he was arrested.

The defendant claims error of the trial court prejudicial to him in the ruling made during the cross-examination of a witness produced by the State prohibiting inquiry by defendant in reference to a collateral matter for the declared purpose of attempting to establish a foundation for impeachment of the witness. The subject of the cross-examination attempted by counsel for the defendant, as indicated by the inquiry made, was whether or not the witness and her husband had at any time previous had marital difficulties or unpleasantness. The subject was not introduced by anything asked or by any answer or statement during the direct testimony of the witness. It is abundantly clear that if the defendant in presenting evidence of his defense during the trial had called this witness he could not properly have examined her as to any marital difficulties between her and her husband in support of his plea of not guilty. This is the basis for determining that a fact is or is not collateral. The test of whether a fact inquired of in cross-examination is collateral is, would the cross-examining party be entitled to prove it as a part of his case tending to establish his plea. Ferguson v. State, 72 Neb. 350, 100 N. W. 800; Owens v. Omaha & C. B. St. Ry. Co., 99 Neb. 364, 156 N. W. 661; Vanderpool v. State, 115 Neb. 94, 211 N. W. 605. The declared purpose of this examination could not have been served by the proposed inquiry because the subject being collateral the defendant would have been conclusively bound by the answer of the witness to his inquiry. He could not have been permitted to attempt to prove the untruth of her answer. If a witness is cross-

examined on a matter collateral to the issue he cannot as to his answer be subsequently contradicted by the party putting the question. Latham v. State, 152 Neb. 113, 40 N. W. 2d 522. The trial court in this instance strictly observed and properly applied the rule of practice that a party should not be permitted to cross-examine a witness as to a matter foreign to the scope of his direct examination. If he desires to inquire of him as to other matters he must make the witness his own, calling him in the subsequent progress of the case. The rule of strict cross-examination has been adopted and is in force in this state. The ruling of the trial court in regard to the scope of cross-examination will be sustained unless it is an abuse of discretion. Brooks v. Thayer County, 126 Neb. 610, 254 N. W. 413; Owens v. Omaha & C. B. St. Ry. Co., *supra;* Goemann v. State, 100 Neb. 772, 161 N. W. 421; Manley State Bank v. Spangler, 130 Neb. 196, 264 N. W. 459. The challenge of the judgment in this regard is without merit.

The defendant in his direct testimony mentioned no fact or matter in which he was in any way concerned, except his name, age, the name of his wife, and the period of their marriage, that happened or existed before June 20, 1952. That was the day of the tragedy responsible for this case. The State on cross-examination of defendant was permitted to examine him as to his whereabouts, activities, and conversations during a period of time prior to anything mentioned in his direct testimony. The length of the period is not definitely fixed by the record but it was at least 2 weeks and probably longer. The cross-examination involved his presence and conduct in Sedgwick, Colorado, and a business transaction there, the place where he stayed in Scottsbluff while he was employed there, how long he was there, and other business transactions in that locality. It was developed in the cross-examination that he had sold 3 items of personal property to a man in Gering. Defendant was then asked if it was not a fact that he told the purchaser

that he and his wife were splitting up and he wanted to sell everything he had. He denied this. Defendant also at this time sold some small rocks, a rock-polishing gadget, and a book of instruction on polishing rocks to another person. He was asked in this cross-examination if he had not told the purchaser that he and his wife had worked on the rocks and when he looked at them it made him think of her and because of this he wanted to get them out of sight. He denied it.

The purchaser who lived in Gering was produced as a witness in rebuttal and was permitted to testify that the defendant told him at the time of the transaction that "he had some stuff he wanted to sell, he was kind of discouraged and going to sell everything he had," and that "He indicated there had been some kind of trouble in the family concerning his wife." The whole of the cross-examination referred to and described above should have been excluded. However it may not be considered prejudicial to the defendant because of absence of timely and sufficient objections and also because at the time of the examination complained of there had been reviewed in the record without objection much evidence of the unpleasantness and the failure of the marriage of defendant and his wife and of their separation and strained relations. The well-established rule is that although a witness is permitted to be cross-examined as to matters not brought out on direct examination, the judgment will not be reversed when it appears that no prejudice could have resulted. Brooks v. Thayer County, *supra;* Manley State Bank v. Spangler, *supra.*

The defendant bases a contention of prejudicial error at the trial on the fact that two witnesses were called by the State and gave rebuttal testimony without their names being endorsed on the information. It has long been the rule in this state that the requirement that the names of the witnesses for the state must be endorsed upon the information has no application to rebut-

tal witnesses. In Ossenkop v. State, 86 Neb. 539, 126 N. W. 72, the rule is stated: "In a criminal prosecution, rebuttal testimony on behalf of the state may be given by witnesses whose names were not endorsed on the information." See, also, Clements v. State, 80 Neb. 313, 114 N. W. 271; Kelly v. State, 51 Neb. 572, 71 N. W. 299.

The jury after it had deliberated in this case for about 5 hours sent to the court a question concerning the eligibility for parole of a person condemned to life imprisonment. The jury was returned to the courtroom and the court gave it in writing an instruction. The jury again retired and less than an hour thereafter returned the verdict in this case. Defendant asserts that the giving of the instruction was prejudicial error. The inquiry made by the jury to the court was whether a person sentenced to life imprisonment for first degree murder was eligible for parole and if so after what length of time. The instruction given by the court in response thereto was that if the jury found the defendant guilty of murder in the first degree it was required under the evidence and the instructions to fix the penalty; that the eligibility for parole or other clemency is determined by the State Board of Pardons when it sees fit to act in reference thereto; and that the jury was not permitted to decide whether such power may or may not be exercised or to control the time or manner of such exercise.

The substance of this was that the court answered the inquiries of the jury by informing it that a convicted criminal sentenced to life imprisonment might be eligible for parole or other clemency if and when determined by the State Board of Pardons, and that the jury had nothing to do in that regard. There was no legal inaccuracy in what the court advised the jury. § 29-2604, R. R. S. 1943. The jury had to make a choice, when it found the defendant had committed first degree murder, between a recommendation of sentence of life imprisonment and punishment by death. § 28-401, R. R. S. 1943. It sought the aid of the court by proper means

for information on a subject concerning which it was not advised. The court could, in the exercise of judicial discretion, have refused to reply to the appeal of the jury for information on the subject of its inquiries. The court elected in the exercise of that discretion to advise the jury the applicable law. It cannot under the circumstances of this case be said the court abused its discretion. In Dinsmore v. State, 61 Neb. 418, 85 N. W. 445, this court said: "Questions of mercy are not for the jury, but for the executive, in the exercise of the pardoning power, and it is not erroneous to so instruct the jury in a prosecution for murder."

Recently in Sundahl v. State, 154 Neb. 550, 48 N. W. 2d 689, that case was considered and the court said: "We are mindful that in Dinsmore v. State, 61 Neb. 418, 85 N. W. 445, the court gave an instruction in which several matters were discussed and, among others, stated that they had nothing to do with questions of mercy, and that that was a power vested in the executive department in the exercise of its authority to pardon. Objection was there made that the instruction invaded the province of the jury. We there held that it did not and that it was a cautionary instruction which the trial court may, in its discretion, give or not." It is also said in that case: "Pardon or parole relates to something that may happen after conviction and to action by the executive department. * * * The jury's duty in a case involving murder in the first degree is to determine the question of guilt or innocence and, if it finds a verdict of guilty, then to fix the penalty at either death or imprisonment for life. That decision should not rest upon whether parole is easy or difficult to secure."

In Liska v. State, 115 Ohio St. 283, 152 N. E. 667, among the forms of verdict given to the jury was one for a verdict of guilty of murder in the first degree with recommendation of mercy. The jury had considered the case for a very long time and then inquired of the court making reference to the form of verdict of guilty with

recommendation of mercy as follows: " 'We would like to have you inform us if there is any hope of pardon if that verdict is brought in.' " In approving the action of the trial court in giving the information requested the court said: "The trial judge told the jury the pardon board could not recommend a pardon for one convicted of murder in the first degree, except on evidence showing innocence beyond a reasonable doubt, and then also said to the jury that the Governor could pardon, if so disposed, at any time. Council for Liska insists that 'this was prejudicial error of the most glaring kind.' We cannot agree with counsel on this. The recommendation of mercy rests wholly in the sound discretion of the jury. They may extend or withhold as they see fit. The trial court might have declined to answer the question asked by the jury, but he did answer, and then told the jury it was not an issue in the case, and that it was not a thing for the jury to speculate upon."

In State v. Carroll, 52 Wyo. 29, 69 P. 2d 542, the jury during its deliberations inquired of the court whether or not where a penalty of life imprisonment was imposed it could be reduced by parole, commutation of sentence, or pardon. The court informed the jury that it could be by the Board of Pardons and Paroles and that that was a matter in the discretion of the board as to the time and the manner of the action which the board might take. The court in deciding a claim of error because of this said: "A statement of trial court in response to inquiry by jury whether pardons or commutations of sentences or paroles could reduce penalty of life imprisonment, that Board of Pardons and Paroles could exercise its discretion at any time after conviction, was not prejudicial to accused who was convicted of murder in first degree with death penalty, statement being fair, extremely limited in scope, and not suggesting in the least what jury should or should not do * * *."

In State v. Buttry, 199 Wash. 228, 90 P. 2d 1026, the court commented that it was recognized in some jurisdic-

tions that whether the defendant can be pardoned if given a life sentence is an element to be considered by the jury in determining whether sentence of death or life imprisonment be imposed and the court also said: "In jurisdictions where a verdict of guilty in the first degree results automatically in sentence of death, unless the jury specifically recommends imprisonment for life, it is quite common for juries to come back into court and ask for an instruction as to whether, if the life sentence be recommended, the defendant can afterwards be pardoned or paroled. An instruction that he can be pardoned and paroled, given under such circumstances, is held not to be prejudicial."

The defendant complains that "the cloak of immunity" was placed around the State but the defendant "was afforded no protection" at the trial; that "forcing him to testify against himself as he was forced to do on cross-examination" is "a shock to the conscience of our courts"; and that the verdict was the result of passion and prejudice and was arrived at in disregard of the evidence and the law. The record has been carefully and completely examined. This investigation has failed to disclose any support of these assertions. The defendant has made no specific reference to any question, answer, objection and ruling of the court, or other matter in the record that in the slightest affords any basis for the contention that he was forced to testify to anything against himself or otherwise or that the trial was improperly conducted. The record shows that the trial was well directed in a dignified ethical manner with due regard for the best traditions of judicial investigations for the truth. There was no authority that could have forced defendant to have testified to anything at the trial. The Constitution was his guarantee and protection against that until he renounced it by voluntarily constituting himself a witness in support of his plea in the case. When he did that it was irrevocable. He could not alternatively disregard and restore immunity as he

decided his self-interest demanded or would best be benefited. A defendant in a criminal case who becomes a witness, subjects himself to the rules applicable to other witnesses. Latham v. State, *supra*. The objection that the verdict was produced by passion and prejudice in disregard of the evidence and the law is not evidenced by anything in the record and rests wholly on unsupported assertions.

The direct evidence of identification of defendant as the person armed with the shotgun waiting in the darkness of the night near the entrance of the home of the deceased when she returned shortly before she was shot was in the testimony of Catherine Hatcher. It is said that what she testified to was inconsistent with and was denied by the physical facts, and that if the events took place as she told them the deceased would of necessity have been shot in the back. The conclusion is deduced from this that the jury disregarded the evidence and that the court should have sustained the motion for a verdict for defendant or should have granted a motion for new trial. This witness was not present when the shot was fired. Neither did she attempt to describe the location of the principals at that time. She was fleeing from the scene, and when she heard a shot she was running south on the walk east of the premises on the way to her home across the intersection southeast of the Frerichs home. There is no direct evidence of the location, position, or conduct of the defendant or the deceased when the fatal shot was fired or what either of them did immediately thereafter until the deceased fell in death prostrate on the lawn. There is an absence in the record of direct proof that the deceased was killed by a shot from a 12-gauge shotgun or that she was not injured by a shot from a 16-gauge shotgun. There was no available, direct proof of any of these things. Neither was it indispensable that there should be. The testimony of Mrs. Hatcher was not inconsistent with or denied by any known physical fact. There is ample evidence from

which the jury could find that defendant feloniously, purposely, and of his deliberate and premeditated malice shot and killed the deceased as charged by the State. It is true that the evidence is conflicting but the duty and responsibility of resolving conflicts in the evidence in this case is not committed to this court. The credibility of witnesses and the weight of the evidence are for the jury to determine in a criminal case and the conclusion of the jury may not be disturbed by this court unless it is clearly wrong. Franz v. State, 156 Neb. 587, 57 N. W. 2d 139; Danielson v. State, 155 Neb. 890, 54 N. W. 2d 56; Fisher v. State, 154 Neb. 166, 47 N. W. 2d 349; Haffke v. State, 149 Neb. 83, 30 N. W. 2d 462. The evidence in this case does not permit a conclusion that a verdict of the jury is without proof to sustain it.

The record of this case has been, as the gravity of the charge and the seriousness of the result of the trial justifies and requires, carefully and meticulously searched to ascertain and make certain that defendant has not been deprived of or prejudiced in any right or protection that the law guaranteed to him. The result of this is an unqualified conviction that no injustice has been done to defendant. The sentence and judgment of the district court should be and each is affirmed. It should be and is adjudged that the sentence and judgment of the district court for Cheyenne County rendered and entered in this case be executed on Friday, October 16, 1953.

AFFIRMED.

IN RE ESTATE OF ALVIN A. BINGAMAN, DECEASED. ERIC H. REHN, APPELLEE, V. ARTHUR BINGAMAN, ADMINISTRATOR OF THE ESTATE OF ALVIN A. BINGAMAN, DECEASED, APPELLANT, IMPLEADED WITH JOHN P. MAINELLI, DOING BUSINESS AS MAINELLI CONSTRUCTION COMPANY, APPELLEE.

59 N. W. 2d 614

Filed July 24, 1953. No. 33238.

1. **Trial: Judgments.** An order denying a motion for summary judgment determines only that the court making it was not then convinced by the record in the case that there was no genuine issue as to any material fact and that the party interposing the motion was entitled to a judgment as a matter of law.
2. **Appeal and Error.** The fact alone that a litigant is subjected to inconvenience, annoyance, or expense by an order of the court does not give him a right to appeal from it if he is not thereby barred from asserting or defending his claim of personal or property rights in court.
3. **Trial: Judgments.** An order overruling a motion for a summary judgment is not a final order within the meaning of section 25-1902, R. R. S. 1943.

APPEAL from the district court for Douglas County: CARROLL O. STAUFFER, JUDGE. *Appeal dismissed.*

Cranny & Moore, for appellant.

Emmet L. Murphy and *E. Melvin Kennedy,* for appellee Rehn.

G. H. Seig, for appellee Mainelli.

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

MESSMORE, J.

Eric H. Rehn filed a claim for unliquidated damages in the proceedings for the administration of the estate of Alvin A. Bingaman, deceased, in the county court of Douglas County. The damages claimed were alleged to have resulted from negligence of Alvin A. Bingaman

in his lifetime and by virtue of which the claimant received personal injuries. The county court, upon hearing the claim, the answer and objections made thereto by the estate, disallowed the claim. The claimant appealed to the district court. His petition on appeal alleged the death of Alvin A. Bingaman on November 7, 1946; the appointment of Arthur Bingaman as administrator of the estate of Alvin A. Bingaman, deceased, and his qualifying as such; that Alvin A. Bingaman, for convenience hereafter referred to as Bingaman, owned a truck upon which was mounted a boom equipped with cables and appropriate fittings for its use and which was operated by power-driven machinery; that on November 7, 1946, pursuant to an oral agreement with John P. Mainelli to unload various items of material, particularly a large iron vat lid at the premises of the Falstaff Brewery, Bingaman came to the premises involved and proceeded with the performance of the services contemplated by the oral agreement; that the lid to the mash tub was hoisted by cables attached to the boom from the railroad car and the truck with Bingaman controlling and operating it moved to a point in front of the brewery; that after reaching this point Bingaman manipulated the controls in such manner as to cause the boom to come in contact with over-head high voltage electric transmission wires which were suspended and carried on poles in front of the brewery; that as a result thereof, electric energy passed through the boom, the cables, and the lid; that Eric H. Rehn, who was assisting in the operation and was then in contact with the lid, was severely and permanently injured; that he was an employee of Mainelli and at the time of the accident was working in the due course of his employment aiding and assisting in the transfer of the lid from the railroad car to the brewery; and that Bingaman operated the boom and cables negligently and his negligence was the cause of the injuries and damage to the appellee Rehn.

The negligence charged against Bingaman was that he improperly and negligently parked the truck with the boom extending along the power line and nearer thereto than was reasonably safe for the movement of the boom by the mechanism provided for that purpose or to accomplish the work intended and that at that time Bingaman had exclusive control and operation of the mechanism and the boom; that he did negligently cause the boom to come in contact with the power line; and that he negligently failed to warn the appellee before he, Bingaman, moved or caused to be moved the boom, instead of limiting the operation to the movement of the cables only, as careful and proper operation required.

The estate's answer denied generally the charges of negligence as alleged in the petition, and denied that Bingaman had or was delegated the duty of warning the appellee of anything at the place of the accident involved in this case. Many other defenses are pleaded by the appellant such as the lack of due care and assumption of risk which are not necessary to detail at this time.

John P. Mainelli was named a defendant in the district court solely for the purpose of protecting any right he had, as the employer of Rehn, of subrogation by the terms of the Workmen's Compensation Act.

Counsel for the administrator of the estate filed a motion for a summary judgment in the district court on the grounds that the pleadings and affidavit thereto, the opinion by the Supreme Court of Nebraska in the case of Peterson v. Estate of Bingaman, 155 Neb. 24, 50 N. W. 2d 523, the bill of exceptions in such cited case, it being a companion case to the instant case, and the deposition of Walter Hodder show that the administrator of the estate is entitled to a judgment as a matter of law. The motion for summary judgment was overruled. There was also filed by the estate a motion for a new trial which was denied. The administrator of the estate

appealed from the order overruling the motion for a summary judgment.

In considering a motion for a summary judgment by the trial court, it is guided by the following pertinent authorities:

The summary judgment law is contained in sections 25-1330 through 25-1336, R. S. Supp., 1951.

The object of a motion for summary judgment is to separate the formal from the substantial issues raised by the pleadings. See, Rule 56 (c), Federal Rules of Civil Procedure, 28 U. S. C. A., p. 153; Sprague v. Vogt, 150 F. 2d 795.

In considering a motion for a summary judgment the court should view the evidence in the light most favorable to the party against whom it is directed, giving to that party the benefit of all favorable inferences that may be reasonably drawn therefrom. See, Illian v. McManaman, 156 Neb. 12, 54 N. W. 2d 244; Dennis v. Berens, 156 Neb. 41, 54 N. W. 2d 259; Ramsouer v. Midland Valley R. R. Co., 135 F. 2d 101; Dulansky v. Iowa-Illinois Gas & Electric Co., 191 F. 2d 881; Mecham v. Colby, 156 Neb. 386, 56 N. W. 2d 299.

The court examines the evidence on motion for summary judgment, not to decide any issue of fact presented in the case, but to discover if any real issue of fact exists. See, Dennis v. Berens, *supra;* Sprague v. Vogt, *supra.* In other words, the court can merely determine that an issue of fact does or does not exist. If such an issue does exist, the summary judgment act has no application; if such issue does not exist, a motion for a summary judgment affords a proper remedy. The evidence offered in support of the motion is for the purpose of showing that no issue of fact exists, not to try issues on pleadings, depositions, admissions, and affidavits which constitute only a part of the evidence available on a trial on the merits. The burden is upon the moving party to show that no issue of fact exists, and unless he can conclusively do so the motion for

summary judgment must be overruled. See, Illian v. McManaman, *supra;* Dennis v. Berens, *supra;* Mecham v. Colby, *supra,* and cases cited therein.

The action of the trial court in overruling the motion for summary judgment indicates it was not convinced by the record of the case as it existed at the time the court passed on the motion that there was no genuine issue as to any material fact and that the moving party was entitled to a judgment as a matter of law. § 25-1332, R. S. Supp., 1951; Dennis v. Berens, *supra;* Illian v. McManaman, *supra;* Mecham v. Colby, *supra.*

The overruling of the motion did not decide any issue of fact or proposition of law affecting the subject matter of the litigation. All or any defenses of the estate remained just as before the denial of the motion for summary judgment, the case being retained for trial in the district court as any other civil action on appeal from the county court. See, § 30-1606, R. S. Supp., 1951; § 25-1104, R. R. S. 1943.

An application for a summary judgment is a step in the proceedings of the case, that is, it is procedural in fact. It may be said that the effect of the order overruling the motion for summary judgment, as in the instant case, is no different than one denying judgment on the pleadings.

The appellant sets forth several assignments of error, the principal one being that the trial court erred in overruling the appellant's motion for a summary judgment and in refusing to enter a summary judgment in favor of the estate of Alvin A. Bingaman, deceased.

The appellee contends that the court is not vested with and lacks jurisdiction of the appeal for the reason that the order overruling the motion of appellant for summary judgment is not a final order and is not a proper subject of appeal in this court.

The answer to this assignment of error depends upon whether or not the order overruling the motion for a summary judgment is a final and appealable order with-

in the meaning of section 25-1902, R. R. S. 1943, which provides: "An order affecting a substantial right in an action, when such order in effect determines the action and prevents a judgment, and an order affecting a substantial right made in a special proceeding, or upon a summary application in an action after judgment, is a 'final order' which may be vacated, modified or reversed, as provided in this chapter."

It is obvious that the overruling of the motion in question did not determine the action, nor did such ruling prevent a judgment. Did it affect a substantial right?

This court has defined a substantial right as follows: A substantial right is an essential legal right, not a mere technical one. See, Egan v. Bunner, 155 Neb. 611, 52 N. W. 2d 820; Western Smelting & Refining Co. v. First Nat. Bank, 150 Neb. 477, 35 N. W. 2d 116.

The substantial right contended for by the appellant that is affected by the trial court's ruling is that it subjected the estate to a long and expensive trial.

The mere fact that a person is subjected to inconvenience, annoyance, discomfort, or even expense, by a decree does not entitle him to appeal from it, as long as he is not thereby concluded from asserting or defending his claims of personal or property rights in any proper court. See, Sherer v. Sherer, 93 Me. 210, 44 A. 899, 74 Am. S. R. 339; Fisher v. Sun Underwriters Ins. Co., 55 R. I. 175, 179 A. 702, 103 A. L. R. 1097; 2 Am. Jur., Appeal and Error, § 152, p. 943.

Certainly the appellant is not deprived of any essential legal right he may have.

The law, as we understand it, is that an order is final for the purposes of an appeal when it determines the rights of the parties; and no further questions can arise before the court rendering it except such as are necessary to be determined in carrying it into effect. See, Clarke v. Nebraska Nat. Bank, 49 Neb. 800, 69 N. W. 104; Anson v. Kruse, 147 Neb. 989, 25 N. W. 2d 896.

From an analysis of section 25-1902, R. R. S. 1943, the

overruling of the motion for a summary judgment as applied in this case is not a final, appealable order within the meaning of such section of the statutes. Having so concluded, the other assignments of error set forth by the appellant are without merit and need not be determined.

For the reasons given in this opinion, the appeal should be, and is hereby, dismissed.

APPEAL DISMISSED.

BOSLAUGH, J., concurring.

I agree that the order overruling the motion of appellant for summary judgment was not an appealable order and that this appeal was properly dismissed. I protest the reasons given for the decision.

The basis of the decision I respectfully suggest should have been that the order sought to be reviewed by this appeal was one made in a special proceeding but it was not "an order affecting a substantial right." The majority opinion states that the denial of a motion for a summary judgment did not determine the *action,* did not prevent a judgment, or affect a substantial right. This is followed by the assertion that an order is final for purposes of appeal when it determines the rights of the parties and no further questions can arise before the court rendering it except those incident to the enforcement of the adjudication. This is all immaterial and foreign to this proceeding except the conclusion that the denial of the motion did not affect a substantial right.

The statute directly applicable and controlling is: "* * * an order affecting a substantial right made in a special proceeding * * * is a 'final order' which may be vacated, modified or reversed, as provided in this chapter." § 25-1902, R. R. S. 1943. The majority have elected to disregard it. There is no discussion of or application made of it. There is no reason that condemns its applicability.

The order involved here was entered in and was a part

of proceedings for the administration of the estate of a deceased person in reference to a claim presented originally in the county court and brought to the district court by an appeal from an order of the court of original jurisdiction denying the claim. The jurisdiction of the district court was derivative.

Any claim for a liability of a deceased existing at the time of his death is a part of the administration proceedings of his estate. It can only be pursued originally in a judicial manner in the county court having jurisdiction of it. § 30-601, et seq., R. R. S. 1943; Rehn v. Bingaman, 151 Neb. 196, 36 N. W. 2d 856. That case concerned the identical liability alleged and sought to be recovered by the proceeding exhibited by the record on this appeal, and it was said in the opinion in that case that clearly the action of plaintiff (appellee here) was within the prohibition of the statute (§ 30-801, R. R. S. 1943) prohibiting the commencement of an "action" against an executor or administrator for the recovery of money only. That was an attempted civil action brought in the district court on the very claim that appellee is now presenting. It was true then that there could be no civil action on the claimed liability of the estate and it is equally plain and conclusive now that this proceeding is not and cannot be a civil action within the meaning of the code. Notwithstanding this clear announcement that a proceeding on a claim against the estate of a deceased person is not and cannot be an action, the opinion asserts that the order here in question did not determine the "action." It is obvious that it did not because there was no action to be determined. The litigation presented by the record was not and could not be, on the authority of the statute and the prior decision of this court, an action.

The procedure for adjustment of a claim against the estate of a deceased has none of the characteristics of a civil action. There is no provision for the filing in the probate court of pleadings or the formation of issues

in case the claim is disputed and resisted. There is no authority for a petition and the issuance and service of summons, the only method for the commencement of a civil action defined and prescribed by the code. A claimant is only required to "present" his claim. § 30-603, R. R. S. 1943. In Fitch v. Martin, 83 Neb. 124, 119 N. W. 25, this court said: "Claims against the estates of decedents in Nebraska are to be examined and adjusted either by the county judge or a commission of two or more persons appointed by the court for that purpose. The statute relative to the settlement of estates is silent concerning the filing of pleadings or the formation of issues in case a claim is resisted. * * * The legislature did not contemplate that pleadings should be filed in the county court, nor that on appeal the representative of the estate should be held strictly to the theory upon which he made his defense in the county court." See, also, In re Estate of Nilson, 126 Neb. 541, 253 N. W. 675. The proceeding does not terminate, if the claim is allowed, in a judgment for money. The allowance of a claim presented in the probate court against the estate is in the nature of an audited and adjudged demand which is a lien on the assets of the estate in the hands of the administrator. An execution for its collection may not be permitted. Sharp v. Citizens Bank of Stanton, 70 Neb. 758, 98 N. W. 50.

In Estate of Beyer, 185 Wis. 23, 200 N. W. 772, it is stated: "The county court is a court of record, but the filing of a claim is not the commencement of a civil action, and therefore the provisions of ch. 121, Stats. 1921, relating to pleadings in courts of record, are not applicable to the filing and presentation of claims against the estates of deceased persons. * * * As has been said by the supreme court of the state of Illinois, the proceedings in the county court for the trial and determination of disputed claims are usually summary and they are neither actions at law nor suits in equity but distinctively statutory and sui generis." It is in that case as-

serted that this is the rule in all jurisdictions where the question has arisen with two exceptions, where a different rule has been established by statute. See, also, Estate of Smith, 218 Wis. 640, 261 N. W. 730, 100 A. L. R. 238; Grier v. Cable, 159 Ill. 29, 42 N. E. 395; In re Estate of Stahl, 305 Ill. App. 517, 27 N. E. 2d 662; 34 C. J. S., Executors and Administrators, § 447, p. 272.

If it is thought that this places the claimant in a different position in the prosecution of his claim than he would occupy if the tortfeasor were alive, it may appropriately be suggested that this is not an unusual experience in the law and that it is true in reference to all claimants of a liability of the deceased existing at the time of his death. If Bingaman had not died appellee could have filed a petition in the district court, had a summons served, and proceeded in the civil action to judgment. He would not have been compelled to have presented a claim in the estate of Bingaman in the county court, to have had a contest there, and to have appealed from an unfavorable result to the district court. If this is illogical, it is nevertheless the requirement of the law. The law provides the difference in these respects because Bingaman died. There is a difference in these respects to the claimant because of the death of the deceased not only as to the procedure in presenting his claim but also in the matter of an appealable order in this proceeding. This is recognized in Nebraska Wesleyan University v. Craig's Estate, 54 Neb. 173, 74 N. W. 605, by this language: "The claim originated, as we have before indicated, in a promise; it was purely contractual, and its non-performance would ordinarily but have given rise to an action at law for its enforcement. The death of the promisor cast upon the promise its nature of a claim against his estate or afforded a new or different channel through which a compliance with its terms and conditions might be sought."

The statute does provide that on appeal from a final order of the probate court the district court shall "hear,

try, and determine" it in the same manner as upon an appeal brought upon a judgment of the county court in a civil action. § 30-1606, R. S. Supp., 1951. This applies and extends only by its clear and precise terms to the manner or procedure of the trial in the district court. It obviously has no relation to or effect upon what is or is not an appealable order within the statutory provisions on that subject. It is equally clear that it was not intended to and does not have the effect of changing a purely statutory proceeding into a civil action as defined and prescribed by the code. In a similar instance, concerning a claim against an estate, the court of Illinois in the case of Grier v. Cable, *supra,* said: "In all of its essential features this proceeding is distinctively statutory. The mere fact that when a claim is contested, so as to necessitate a trial, the trial is to be conducted in the same way in which suits at law are tried, can not, of itself, have the effect of converting a purely statutory proceeding into a suit or proceeding at law." See, also, Whalen v. Kitchen, 61 Neb. 329, 85 N. W. 278.

Obviously the conclusion is correct that the procedure for handling, and if necessary litigating a claim against an estate, is distinctively statutory and sui generis. It is wholly foreign to the action provided by the code and it not being an action it is a special proceeding within the doctrine of this and other courts. A proceeding for the probate of a will or for the administration of the estate of a deceased person is distinctively and precisely a special proceeding. It never is anything but that. Egan v. Bunner, 155 Neb. 611, 52 N. W. 2d 820; Missionary Society v. Ely, 56 Ohio St. 405, 47 N. E. 537; In re Estate of Joseph, 118 Cal. 660, 50 P. 768; In re Estate of Raymond, 38 Cal. App. 2d 305, 100 P. 2d 1085; Caesar v. Burgess, 103 F. 2d 503.

A distinction is made by the statute between an order "in an action" and an order "in a special proceeding." In the former an order is a final one only

when it determines the action and prevents a judgment, while in the latter the only essential to constitute an order a final one is that it is one affecting a substantial right.

The Code of Civil Procedure adopted in 1867 substituted one form of action for all the forms employed in numerous kinds of actions at law and suits in equity by the provisions that: "The distinctions between actions at law and suits in equity, and the forms of all such actions and suits heretofore existing, are abolished; and in their place there shall be hereafter but one form of action, which shall be called a 'civil action.'" Constitution of 1866, Schedule, § 1, p. 73; Vol. 2, R. R. S. 1943, pp. 10-14; § 25-101, R. R. S. 1943. It further required that: "A civil action must be commenced by filing in the office of the clerk of the proper court a petition, and causing a summons to be issued thereon." § 25-501, R. R. S. 1943. The code does not define an action or a special proceeding nor does it specify that a remedy or proceeding which is not an action is a special proceeding. The legislation of many states contain such a definition. 2 Thompson's Laws of New York, Civil Practice Act, §§ 4, 5, p. 1620; State ex rel. Silverman v. Kirkwood, 361 Mo. 1194, 239 S. W. 2d 332; Waring v. South Sioux Falls, 72 S. D. 215, 31 N. W. 2d 766; Dow v. Lillie, 26 N. D. 512, 144 N. W. 1082, L. R. A. 1915D 754; Deuster v. Zillmer, 119 Wis. 402, 97 N. W. 31; In re Estate of Joseph, *supra;* Nelson v. Steele, 12 Idaho 762, 88 P. 95.

The code does not contain a definition of an action or a special proceeding but it does declare that there is but one form of action to be called a civil action, and the procedure for commencing and pursuing it to a final conclusion is prescribed. The civil action of the code includes all such proceedings as prior to its enactment were regarded as actions at law and suits in equity, and any such action since recognized and authorized by statute. Rhoads v. Columbia Fire Underwriters Agency, 128 Neb. 710, 260 N. W. 174.

Any proceeding in a court by which a party prosecutes another for enforcement, protection, or determination of a right or the redress or prevention of a wrong involving and requiring the pleadings, process, and procedure provided by the code and ending in a final judgment is an action. Every other legal proceeding by which a remedy is sought by original application to a court is a special proceeding. A special proceeding within the meaning of the statute defining a final order must be one that is not an action and is not and cannot be legally a step in an action as a part of it. None of the many steps or proceedings necessary or permitted to be taken in an action to commence it, to join issues in it, and conduct it to a final hearing and judgment can be a special proceeding within the terms of the statute. A special proceeding may be connected with an action in the sense that the application for the benefit of it and the other papers and orders concerning it may be filed in the case where the record of the filings in the action are made —as for instance garnishment or attachment—but it is not an integral part of or a step in the action or as it is sometimes referred to in such a situation a part of the "main case." The distinction between an action and a special proceeding has been clearly recognized by this court. In Turpin v. Coates, 12 Neb. 321, 11 N. W. 300, it is said: "A special proceeding may be said to include every special statutory remedy which is not in itself an action." See, also, Western Smelting & Refining Co. v. First Nat. Bank, 150 Neb. 477, 35 N. W. 2d 116; O'Brien v. O'Brien, 19 Neb. 584, 27 N. W. 640; In re Estate of Broehl, 93 Neb. 166, 139 N. W. 1020; Levin v. Muser, 107 Neb. 230, 185 N. W. 431; Egan v. Bunner, *supra.*

Likewise the courts of other jurisdictions have discussed and noted the distinction between an action and a special proceeding. The language of the code that "an order affecting a substantial right made in a special proceeding * * * is a 'final order' " is a copy of an identical provision of the code of Ohio which was discussed in

Missionary Society v. Ely, *supra,* in this manner: "As to the first inquiry (was it a special proceeding), it seems to us that there can be but little difficulty. Our code does not, as does the code of New York, specify that every remedy which is not an action is a special proceeding, nor does our statutes give any definition of an action or a special proceeding. But we suppose that any ordinary proceedings in a court of justice, by which a party prosecutes another for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense, involving the process and pleadings, and ending in a judgment, is an action, while every proceeding other than an action, where a remedy is sought by an original application to a court for a judgment or an order, is a special proceeding. * * * The law having conferred the right (to propound a will for probate), and authorized an application to a court of justice to enforce it, the proceeding upon such application is of a judicial nature, and, not being an action within the sense of the code, it follows that it belongs to that class known as special proceedings." See, also, Webb v. Stasel, 80 Ohio St. 122, 88 N. E. 143; Harryman v. Bowlin, 153 Okl. 202, 4 P. 2d 1011; In re Central Irrigation Dist., 117 Cal. 382, 49 P. 354; Anderson v. Englehart, 18 Wyo. 196, 105 P. 571, Ann. Cas. 1912C 894; Deppe v. Ford, 89 Minn. 253, 94 N. W. 679.

That an order is made in a special proceeding is not enough to make it a final order. It, to be final, must affect a substantial right of the appellant. It has been determined that a substantial right is an essential one as distinguished from a technical one. Egan v. Bunner, *supra.*

The disposition of the motion in this case did not decide any issue of fact or any matter of law affecting the subject matter of the litigation. It only signifies that the court was not convinced by the record of the case that there was "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., 1951. Any defense to the claim available to appellant before the denial of the motion for judgment remains undiminished. There are many adequate and unimpaired opportunities for appellant to test the validity and sufficiency of the claim of appellee as the litigation proceeds. The order of the trial court here involved required no payment or contribution, appropriated no property, prejudiced no interest, destroyed no defense, and imposed no burden or obligation. An order in a special proceeding which does not affect the subject matter thereof or which will not deprive the complaining party of any legal right if an appeal is delayed until after final judgment in the litigation does not affect a substantial right within the meaning of the statute defining a final order. 4 C. J. S., Appeal and Error, § 100, p. 195; Grinwald v. Mayer, 207 Wis. 416, 241 N. W. 375; Sherer v. Sherer, 93 Me. 210, 44 A. 899, 74 Am. S. R. 339; Cole v. Trust Co., 221 N. C. 249, 20 S. E. 2d 54; Dorman v. Credit Reference & Reporting Co., 213 Iowa 1016, 241 N. W. 436; State ex rel. Reirdon v. County Court of Marshall County, 183 Okl. 274, 81 P. 2d 488; Missionary Society v. Ely, *supra*.

This appeal should have been dismissed on the basis that the order involved was made by the district court in a special proceeding and it did not affect a substantial right of the appellant within the meaning of the statutory provision quoted herein.

FRANK D. KEIM ET AL., APPELLANTS, V. WILLIAM F. DOWNING ET AL., APPELLEES.
59 N. W. 2d 602

Filed July 24, 1953. No. 33313.

1. **Appeal and Error.** It is the duty of this court in an equity case to try the issues de novo and to reach an independent decision without being influenced by the findings of the trial court except if the evidence is in irreconcilable conflict this

court may consider that the trial court saw the witnesses, observed their manner of testifying, and accepted one version of the facts rather than the opposite.

2. ———. This court may in an equity case give proper consideration to the fact that the trial court inspected the premises and the physical matters involved and that its examination thereof constituted evidence because the relevant facts observed necessarily affected the mind of the court and tended to influence belief or unbelief on the matters at issue in the case.
3. **Waters: Drains.** Surface water is a common enemy and an owner of real estate may fight it as his judgment dictates, but he may not accumulate it in a drain, increase the flow, and discharge it on a servient estate or divert it in a different direction to the damage of a lower estate.
4. ———: ———. An oral arrangement for the construction and maintenance of a ditch and a graded road, serving as an embankment, in connection with drainage of land is valid and irrevocable if it has been accepted, executed, and used to advantage by the parties.
5. **Easements.** A parol grant of an easement or license like any other contract may rest in implication.

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

Max Kier, for appellants.

C. J. Campbell and *Fraizer & Fraizer,* for appellees.

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

BOSLAUGH, J.

Appellants brought this action against appellees to restrain them from having and maintaining a private road and ditch which appellants alleged obstructed and diverted the natural flow of surface waters from their land in such a manner as to throw the water back onto it to their damage; and that the surface waters, except for the obstruction and diversion would in the natural course of drainage have gone from the land of appellants onto and across the land of appellees. Appellants also sought to recover damages for injuries to their land because of the obstruction and diversion of the sur-

face waters by appellees. Appellees denied the claims of appellants, and alleged that the road and ditch complained of by appellants were constructed and maintained by virtue of an agreement between the parties; that for many years appellants had used the drainage provided by the ditch; that they had accepted the benefits of the better drainage of their land afforded by the road and the ditch; that by word and conduct they granted an easement or irrevocable license for the maintenance of the ditch and road; and that they were estopped to have them removed or to recover damages.

The district court found against appellants on their causes of action, in their favor on the cause of action alleged by appellees in their counterclaim for damages, dismissed the case, and denied the motion of appellants for a new trial.

The decision of this case is controlled by the determination of questions of fact. This is an equity case. The evidence is conflicting and in many important respects irreconcilable. The trial court made an inspection of the premises and physical matters involved. The manner of conducting a trial in this court in this situation has been firmly established. It is the duty of the court to try the issues de novo and to reach an independent conclusion without being influenced by the findings of the district court except to the extent the evidence is in irreconcilable conflict, and as to that the court may consider the fact that the trial court saw the witnesses, observed their manner of testifying, and accepted one version of the facts rather than the opposite. Likewise this court may and should give proper consideration to the fact that the trial court inspected the premises and the physical matters involved, and that its examination constituted evidence because the relevant facts observed necessarily affected the mind of the trial court and tended to influence belief or unbelief on the matters at issue in the case. Probert v. Grint, 148 Neb. 666, 28 N. W. 2d 548; Birdwood Irr. Dist. v.

Brodbeck, 148 Neb. 824, 29 N. W. 2d 621; Jack v. Teegarden, 151 Neb. 309, 37 N. W. 2d 387; Schomberg v. Kuther, 153 Neb. 413, 45 N. W. 2d 129.

Appellants were the owners of the northeast quarter and appellees were the owners of the southeast quarter and the east half of the southwest quarter of Section 23, Township 11 North, Range 7 East of the 6th P. M. in Lancaster County. Appellants asserted that the southeast quarter of the section was first bottom land near Salt Creek and was servient to drainage from their land; that the natural drainage of surface and flood waters from the west and northwest of their land flowed through natural drainage courses onto and across it; and that from time immemorial have so flowed from the north and west in a southeasterly direction to, on, and across the land of appellees and into Salt Creek. Appellees denied the assertions of appellants and alleged that the drainage of surface waters upon the land of appellants from the northwest and from higher land to the west entered near the northwest corner of their land; that the waters were diffused and followed a natural grade in a southeasterly direction over and across the land of appellants to the southeast portion thereof and from there onto the public highway to the east, except a part of the waters remained in a swampy depression in the southeast corner of the land of appellants; and that in the natural course of drainage none of the said surface waters came to or entered upon the land of appellees.

In the primitive state of the area important to this litigation there was a drain from the northwest that entered the land of appellants near its northwest corner and extended into the land towards the south and slightly towards the east for about 600 feet. There was another drain that crossed the section line about 30 rods west of the one above mentioned. It came from the northwest, but more from the west than the north, and entered the land of appellants about 30 rods south

of the northwest corner thereof and continued in a southeasterly direction until it joined the first draw about 600 feet from the north line of the land. The drain formed by the confluence of the two draws extended in an irregular course slightly towards the southeast until it was about midway of the land of appellants from north to south; and it then flattened out and substantially disappeared.

The draws, after a road was opened on the section line, had bridges over them. The east one was 12 feet long and the waterway below the stringers of the bridge was about 5 feet in depth. The bridge over the west draw was 8 feet long and the depth of the waterway was about 4 feet. The area drained by them was not less than a section of land. The combined area of the waterway under the bridges was between 80 and 90 square feet. It was many times insufficient to contain all the water flowing through the draws and overflow of the bridges and road was not unusual.

At the place where the drain lost its identity as above indicated the surface water passing through it spread out over the land. It became and was diffused surface water. When it was sufficient in volume to flow across and off of the land of appellants it crossed the east line near to and north of the southeast corner into, across the highway, and thereafter followed a northerly and northeasterly course about parallel with Salt Creek for a mile or more and finally entered Salt Creek.

The allegations of appellants that the land of appellees was servient to drainage from land of appellants and that the natural drainage of surface and flood waters from the north and west of and from their land was in a southeasterly direction across the land of appellees and thence into Salt Creek are contrary to the evidence. The finding is that in the natural course of drainage the waters referred to above did not come to, enter upon, or burden the land of appellees.

It was stated in the petition that appellees went upon

the land of appellants and excavated a ditch about 3 feet deep from the southeast corner thereof for a distance of about 1,000 feet to the west; that the earth taken from the ditch was used in the construction of a road about 1,300 feet in length from the public highway on the east of the land of appellants westerly to the residence and farm buildings on the land of appellees; that the road was immediately south of and adjacent to the ditch; that the road constituted a dike which obstructed and diverted surface waters from flowing across the land of appellees as it would have done in the natural course of drainage; that it resulted in them being held back and retained on the land of appellants; that it caused them to flow in a course and different direction than they would have done naturally; and that the waters eroded a deep ditch along the south side of the land of appellants.

The defense of appellees in this regard was that appellants acquired their land in 1942; that there was no watercourse thereon; that the surface waters moved in a diffused condition from the northwest to the southeast and from the land over the highway to the east and northerly and northeasterly until it flowed into Salt Creek; that appellants by the use of machinery excavated an artificial channel and made an embankment to the east thereof across their land from the northwest part in a southerly direction to a point about 400 feet east of the residence and farm buildings on the land of appellees; that the channel and embankment traversed the eastward flow of surface waters on the land of appellants from the north and northwest and it accumulated and conducted the waters away from the swampy depression in the southeast part of their land onto and over the private road and the land of appellees to the east of their residence and improvements; that the channel and embankment greatly improved the drainage of the land of appellants by accumulating, confining, and accelerating the flow of surface waters therefrom; that

in 1944 the surface waters came down the course of the constructed channel in great volume upon and from the land of appellees, washed out and destroyed their private road, flooded, eroded, covered with debris, and greatly damaged the northeast portion of their land; that the drainage facilities constructed by appellants were the sole cause thereof; that appellees advised appellants that they intended to bring suit against them for an injunction and damages because of their wrongful acts as stated above; that appellants sought a compromise and settlement with appellees and suggested the construction of a drainage ditch on the boundary line between the lands of the parties from a point east of the farm buildings of appellees to the public highway east of their land and the use of the excavated dirt to rebuild the private road immediately south of the ditch and extending west to the buildings; that appellees accepted the plan, waived the action for injunction and damages, and the ditch and road were constructed and have since been used by all of the parties; that appellants have since accepted without complaint or objection the existence of the road and ditch and the use of the ditch to carry away the waters diverted, accumulated, and accelerated by the artificial drainage constructed on their land; that the swampy portion of the land of appellants has been drained and benefited thereby; and that they are estopped because of said facts to seek to restrain the maintenance of the ditch and road or to claim damages.

There was no ditch or conservation work done on the land of appellants before they became the owners of it in 1942. There was then no watercourse, ditch, or drain on the south half of the land. The United States Soil Conservation Service made a soil conservation plan for the farm of appellants in the early part of 1943. The sole purpose of the plan was to benefit this farm. The drainage of the surface water from it was one of the principal features of the plan. A ditch was made that

year across the land from the northwest to the south line at a point a short distance east of the buildings of appellees. The area to the east of the ditch was planted to corn. It was put in with a lister. The rows paralleled the ditch and they were made deep. The year before the corn rows were east and west.

The soil conservation service in the spring of 1944 graded out a channel from the northwest corner on the farm of appellants for at least three-fourths of the distance to the south boundary of the land. Large and powerful machinery was used in the operation, including a 40-horsepower Caterpillar tractor and a grading machine called a "blade." The ditch as it then existed was made wider, deeper, and straighter, and the excavated dirt was put to the east thereof. The southern quarter of the ditch across the farm was not increased because "the capacity seemed to be adequate." The purpose and result of the work done were to make the water flow where it would not do so naturally, to confine it to a smaller area, to collect it in a channel or ditch, to accelerate its flow from the farm, and to deposit it at the border of the land of appellees at a location it never would have reached in natural flow as surface water. The work done on the land by the soil conservation service had to do solely with the drainage and it was specifically done to improve the drainage of surface water from it. The area over which the surface water spread at the time the work was done was at least 200 feet in width. The ditch constructed thereon was 6 to 8 feet wide. The construction and maintenance of the artificial ditch for drainage of surface waters from the land of appellants to and over the land of appellees was a legal wrong. Surface water is a common enemy and an owner of real estate may fight it as his judgment dictates, but an upper proprietor may not collect it in a drain, accelerate its flow, and discharge it on a servient estate or divert it in a different direction to the damage of the lower estate. If surface water flows in

a certain course in its primitive condition it cannot be arrested or diverted in a different direction or otherwise interfered with to the injury of another land owner. Bussell v. McClellan, 155 Neb. 875, 54 N. W. 2d 81, on rehearing, 156 Neb. 189, 55 N. W. 2d 606; Schomberg v. Kuther, *supra;* Hengelfelt v. Ehrmann, 141 Neb. 322, 3 N. W. 2d 576; Todd v. York County, 72 Neb. 207, 100 N. W. 299, 66 L. R. A. 561.

In the summer of 1944 after the ditch had been enlarged on the land of appellants by the soil conservation service water passing through it ran onto and destroyed the private road of appellees from a point opposite the south end of the ditch to the public highway on the east. The water cut a channel where the road had been. Water from the ditch went over, carried debris upon, eroded, and damaged the northeast portion of the land of appellees.

Thereafter Mr. Downing declared his determination to bring suit against appellants because of their ditch and the damage done appellees by the water accumulated and diverted by it. The situation was discussed and it was arranged, after consultation with and in the presence of the county engineer, that a ditch should be made on the quarter section division line between the lands of the parties from the south end of the ditch constructed on the land of appellants to the public highway to the east; and that the dirt excavated from the ditch should be used to rebuild the private road of appellees and, because they were to have the benefit of the road, they agreed to pay and did pay the cost of the work which was done with county equipment. The county engineer was consulted and concerned because of the effect of the drainage on the public highway. The tenant of appellants assisted Mr. Downing in the removal of the fence on the quarter section line where the new ditch north of the private road was to be made and shortly thereafter the work was done and the ditch and road have since 1944 existed at that location. This

was all done with the knowledge of appellants without objection or protest until this suit was commenced. Appellants have maintained and have improved at various times since, the drainage ditch across their land and the water therefrom has gone into the ditch north of the private road, across the highway, and thence into Salt Creek. Their land has been greatly benefited thereby. The only protest or objection made by them during the many years until the bringing of this suit was in reference to work done in 1948 or 1949 for the improvement of the public highway east of the land of the parties to this case. The only injury appellants complained of was caused by the improvement of the public highway in which appellees had no part and for which they had no responsibility.

The plan of these parties for drainage improvement at their common boundary, based on a consideration, fully executed, accepted, and utilized by each for many years was reasonable, legal, and not capable of revocation by either, and it will be respected in equity. An oral arrangement for an easement or license such as the maintenance of a ditch and graded road, serving as an embankment, in connection with drainage of land is valid and enforceable if it has been fully executed and used to advantage by the parties to the arrangement. A parol grant of an easement or license like any other contract may rest in implication. Gilmore v. Armstrong, 48 Neb. 92, 66 N. W. 998; Znamanacek v. Jelinek, 69 Neb. 110, 95 N. W. 28, 111 Am. S. R. 533; Arterburn v. Beard, 86 Neb. 733, 126 N. W. 379; Wachter v. Lange, 94 Neb. 290, 143 N. W. 207; Brown v. Story, 133 Neb. 535, 276 N. W. 155; Fitzsimmons v. Gilmore, 134 Neb. 200, 278 N. W. 262; Magnuson v. Coburn, 154 Neb. 24, 46 N. W. 2d 775; Annotation, 101 A. L. R. 983.

The relief asked by appellants or the claim for damages made in the counterclaim of appellees is not sustained by the record and each should be denied.

The judgment of the district court should be and it is affirmed.

AFFIRMED.

TOM G. DORN, APPELLEE, V. WILLIAM STURGES, APPELLANT.
59 N. W. 2d 751

Filed July 24, 1953. No. 33351.

1. **Trial: Appeal and Error.** If a motion for a directed verdict is made at the close of the plaintiff's evidence and again at the close of all the evidence, or in the alternative to dismiss plaintiff's case, to test the sufficiency of the evidence to support a verdict, it must be considered in the light most favorable to the successful party, that is, every controverted fact must be resolved in his favor and he should have the benefit of every inference that can reasonably be deduced therefrom.
2. **Automobiles: Highways.** A driver of a motor vehicle about to enter a highway protected by stop signs must stop as directed, look in both directions, and permit all vehicles to pass which are at such a distance and traveling at such a speed that it would be imprudent to proceed into the intersection.
3. **Evidence.** Extrajudicial statements of fact made by a party relating to matters material to the issues in a controversy are available to the adverse party in a trial thereof as admissions against interest or for impeachment. Such statements are, however, not conclusive but may be explained, rebutted, or contradicted, and thereafter are to be given such weight as the trier of facts deems them entitled.
4. **Automobiles.** In an action for damages to an automobile, where the automobile cannot be placed in substantially as good condition as it was before the injury, the measure of damages is the difference between its reasonable market value immediately before and immediately after the accident.
5. ———. The duty to sound a signal warning of the approach of a motor vehicle depends largely on the circumstances of the particular case.
6. **Trial: Appeal and Error.** Instructions must be considered and construed together. If they are not sufficiently specific in some respects, it is the duty of counsel to offer requests for instructions that will supply the omission, and, unless this is done, the judgment will not ordinarily be reversed for such defects.

APPEAL from the district court for Douglas County: HENRY J. BEAL, JUDGE. *Affirmed on condition.*

Gross, Welch, Vinardi & Kauffman and *Gray & Brumbaugh,* for appellant.

Hubka & Hubka and *Fraser, Connolly, Crofoot & Wenstrand,* for appellee.

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

MESSMORE, J.

This is an action at law brought in the district court for Douglas County by Tom G. Dorn against William Sturges to recover damages to the plaintiff's 1941 Ford V-8 2-ton truck, hereinafter referred to as the truck, driven by his son Arthur Dorn, as the result of a collision between plaintiff's truck and the defendant's 1947 Plymouth coach driven by the defendant. The accident occurred at Sixtieth and L Streets in Omaha, Nebraska.

The case was tried to a jury resulting in a verdict in favor of the plaintiff and against the defendant in the amount of $1,045, and a dismissal of the defendant's cross-petition. The defendant filed a motion for new trial which was overruled. From the order overruling the motion for new trial, the defendant perfected appeal to this court. For convenience we will refer to the parties as they are designated in the district court.

Insofar as necessary to a determination of this appeal, we set forth the substance of the pleadings.

Plaintiff's petition charged the defendant with negligence in the following respects: That defendant failed to keep his car under proper control, and he failed to keep a proper lookout for other automobiles at the same time and place; that he failed to stop his car at the stop sign located north of the intersection of Sixtieth and L Streets, or at any time prior to entering the intersection; that the defendant failed to stop his car for sufficient length of time before entering the intersec-

tion to ascertain if the intersection was clear of approaching vehicles constituting a menace; that the defendant failed to concede the right-of-way to the truck; that the defendant failed to give warning of his intention to turn to the east when entering the intersection; that the defendant cut inside the center point of the intersection toward the east, and in turning into the intersection failed to make a square turn as provided by law; and that the defendant failed to stop or divert the course of his automobile and thereby avoid a collision upon discovering the truck.

In addition thereto, the plaintiff alleged that the truck, as heretofore described, was demolished to the extent that it could not be repaired and placed in as good condition as it was prior to the accident; that the reasonable market value of the truck immediately before the accident was $1,400; that the reasonable market value of the same after the accident was $425; that the plaintiff's truck was damaged in the amount of $975; that after the accident the truck had to be immediately removed from the highway at a cost to the plaintiff of $5, and thereafter towed to Beatrice, Nebraska, at an expense of $65; and that these amounts were fair and reasonable and constituted a part of plaintiff's damages.

There was an item in the amount of $100 for the loss of the use of the truck as a result of the collision at $10 a day for 10 days which the trial court did not submit to the jury.

The plaintiff prayed for damages in the amount of $1,145, interest and costs, which was restricted to $1,045, interest and costs.

The defendant's answer denied generally the allegations of the plaintiff's petition not admitted; specifically denied the necessity of towing the truck, or that the amount charged therefor was reasonable; and admitted the ownership of the truck in the plaintiff and the operation thereof by his son at the time of the accident.

The defendant, by cross-petition, alleged injury and

disability to himself and damage to his automobile resulting from the negligence of the plaintiff and the plaintiff's son in the following respects: Failure of the plaintiff's son to observe south-bound traffic on Sixtieth Street; failure to surrender right-of-way to the defendant; excessive speed under the conditions prevailing; that the plaintiff's son made an abrupt turn of the truck to the left and into defendant's car instead of proceeding straight ahead or to the right to avoid the collision; and failure of the plaintiff's son to sound his horn or give other warning or to apply his brakes. The cross-petition alleged damages in the amount of $4,647.95. There was no proof offered as to $450 salary alleged as damages by the defendant. The employer continued to pay defendant during his absence from work.

The intersection of the streets and location of the scene of the accident may be described as follows: Sixtieth Street runs in a north-south direction, L Street runs in an east-west direction, and both are paved with concrete. L Street is a 4-lane highway with the paving 42 feet wide as it approaches the intersection of Sixtieth and L Streets from the east. West of the intersection L Street is a 2-lane highway with the paving 20 feet wide. The paving on Sixtieth Street is 18 feet wide, and it is a 2-lane street. On the northwest corner of the intersection is the Tex Filling Station. There is a stop sign on the west side of Sixtieth Street to the north of L Street, located in a concrete well the center of which is 44 feet north of the edge of the paving of L Street west of the intersection. This stop sign is for traffic going south on Sixtieth Street. There is another stop sign, which is a straight sign, 58.8 feet south of the south edge of L Street east of Sixtieth Street, that is for north-bound traffic on Sixtieth Street. The percentage of grade east on L Street is 6.6 percent, and on the west 5.6 percent, 5.2 percent, and 4.76 percent. The grade east of the intersection continues up the hill and is practically a straight grade for at least 1,000

feet. It is 1,000 or 1,200 feet to the summit of the hill. The distance from the southeast corner of the filling station to the north edge of L Street is 31 feet. The distance from the west edge of Sixtieth Street to the same corner of the filling station is 32 feet. Sixtieth Street and L Street are not in the city limits. Where Sixtieth Street enters the intersection, the pavement curves to the east and west on L Street, and it is 61 feet from the north line of L Street west to where the pavement starts to curve.

The plaintiff's son testified that at the time of trial he was 19 years of age; that he resided with his parents on a farm 2 miles north of Filley and 15 miles east of Beatrice; that stock is raised on this farm; that he began driving a truck with an assistant when he was 16 years of age, and subsequently by himself in making trips to Omaha; that such trips were made on numerous occasions to deliver stock; and that the truck involved in the accident carried stock which he was to deliver at the stock yards in Omaha on the day in question. He left the farm home between 12 midnight and 1 a. m. The stock was unloaded and he rested, then proceeded back toward home which is a distance of 92 miles from the stockyards. He further testified that he was driving the truck west on L Street in the farthest lane to the north until he came to a point where the lines converge into the 2-lane highway on L Street. He was driving in low range, the truck having eight gears, at a speed not to exceed 30 or 35 miles an hour as he proceeded down the hill. The morning was clear, the sun had just begun to rise. It was daylight, and the pavement was clear with no snow or ice. He was familiar with the intersection and knew where the stop sign was located on Sixtieth Street. As he came down the hill he could see the defendant's car approaching approximately 10 or 15 feet north of the stop sign. At that time his truck was 175 feet east of the intersection. He watched the defendant's car, and knew that the defendant would

encounter the stop sign before he entered the intersection into L Street. The defendant did not stop at this stop sign. When he first saw the defendant's car it was going approximately 25 to 30 miles an hour. Defendant was then 10 or 15 feet north of the stop sign. He slowed up a little as he approached the stop sign. This witness placed his foot on the brake. At that time the defendant was coming into the first lane past the stop sign, and the witness observed he was not going to stop. The truck was then 75 feet east of the intersection. The truck was equipped with hydraulic brakes which were in good condition. The brakes held, and the truck slowed up and was sliding a little. The defendant kept on coming, and the witness believed he was going to stop for the second lane where the truck was traveling. The defendant made a left turn into and toward the truck, cutting the corner. There was no time to slow down to any extent before the crash, nor to sound the horn or give any warning, and there was no space to pass the defendant either to the front or rear of his car. The collision occurred about 9 feet east of the east line of the intersection in the second lane of traffic from the north, in which the truck was traveling. The left front wheel of the truck and the rear part of the defendant's left front fender made the impact. The defendant's car spun around, and that was all that this truck driver could see because steam came from his radiator and covered the windshield. The truck proceeded a few feet and stopped at the east edge of the intersection. The whole truck did not get into the intersection, just the east edge of it. That was about 8 or 9 feet west of where the crash occurred. The defendant's car rolled off toward the filling station, struck it, and rolled back toward the road. He did not see what became of the defendant. After the crash he saw the defendant lying on the pavement. The defendant's car was at the north edge of the pavement rolling toward him. Two men from the filling station came out to help, as did this

witness. The truck remained in the position in which it was stopped for about an hour after the wreck. There were some skid marks left by the truck. All six of the wheels had slid for a distance of from 7 to 9 feet, and the skid marks ended 9 or 10 feet from where the crash occurred. The witness helped the men from the filling station stop defendant's car. The truck proceeded a distance of 30 to 50 feet before the brakes actually took ahold. The damage to the truck was as follows: The radiator was pushed back; the grille and fender were knocked almost off; the motor was jarred loose; the frame was bent; the front tire, wheel, and front axle were ruined; the endgate was broken; and the left front door post of the door was bent. Subsequently the truck was removed to vacant ground near the filling station at a cost of $5, and afterwards hauled to his home near Filley by a Ford dealer of Beatrice, at a charge of $65. This witness further testified that five of the tires of the truck were subsequently sold for $40. The body was junked, and the stock rack was sold for $200. He went to the defendant's home about a month later, and the defendant told him that he did not see the truck coming.

The accident happened about 7:45 a. m., December 14, 1949.

On cross-examination an exhibit was produced consisting of a statement of a page and a half, signed by this witness, in which he stated: "I have read the preceding page and a half and it's true." There was objection to the introduction of this statement, and the questioning with reference to it was for the purpose of impeachment. The plaintiff's son insisted that he did not know the claim adjuster who took the statement. Some of the statements made therein were in accord with his testimony; others were inconsistent with it, such as the statements "As I entered 60th a car came from nowhere, at least I didn't see him until he was directly in front of me" and, "I don't know how fast he was going."

Other statements appearing in the exhibit the witness did not remember making.

The defendant's version of the accident is in substance as follows: He is a bacteriologist employed by a packing company and has been for 30 years. At the time of the accident he was going to his work, to arrive at 8 a. m. From his home he drove west to Sixtieth Street and south on Sixtieth Street to L Street, the route he ordinarily took and with which he was familiar. He was likewise familiar with the intersection and the stop sign. As he came to the stop sign at the north side of L Street, he brought his car to a stop. The rear wheels were about on a line with the stop sign. The stop sign is located so that it is necessary to proceed that far to get a clear view of L Street east and west. He could see quite a distance east and west on L Street. He looked east when he stopped, and saw the truck coming west on the north side of L Street in its proper lane, a distance of about 900 feet east of Sixtieth Street. At that time there were no other cars in sight between Sixtieth Street and the top of the hill to the east on L Street. After seeing this truck, he looked to the west on L Street. As he did so he saw two trucks proceeding east, the first of which was about 100 feet west of Sixtieth Street and the other following it 25 or 30 feet. As he proceeded into the intersection of Sixtieth and L Streets at a low speed, he observed the speed of the trucks proceeding east to ascertain whether he should pass ahead or whether he should follow them in crossing. They were coming at such a speed that he believed it would not be safe to try to proceed ahead of them. At that time his car was on the north side of L Street. He decided to give the east-bound trucks right-of-way, and they passed through the intersection before he crossed or made a turn to the left or east, in the intersection. The front wheels of his car travelled from the north edge of L Street pretty well to the center thereof. There was no warning from the west-bound truck as

it was approaching the intersection. The second time he saw the plaintiff's truck it was 25 feet in front of his car. He had not started a turn to the left. When he saw the truck he endeavored to accelerate his speed and turn to the left. He could not say what happened. He merely recalled the truck coming at him from the side. He could not give an exact idea as to how his car was facing at the time of the impact. It had been facing south and in the last split second he tried to accelerate his speed and turn left. The east-bound trucks were at such a point that he could not quite follow inside of them. They were passing at the time, as he was making the swing to the east. With reference to the center line of L Street, the right wheels of his car were south thereof. At the time of the crash he blacked out. He remembered hearing voices, and that he was lying on the pavement. The value of his automobile at the time of the accident was $1,150. He sold it for $250. He denied making a statement to the driver of the plaintiff's truck that he did not see the truck before the accident. The plaintiff's son did come to defendant's home and there was some conversation about $200. He presumed it had to do with the truck the plaintiff's son was driving.

On cross-examination this witness testified that he saw the plaintiff's truck to his left and the two trucks to his right; and that he started forward from a dead standstill and travelled a distance of 10 to 18 feet before he arrived at the north edge of L Street. He continued into L Street until he got practically to the center, and he was traveling, he believed, 10 to 15 miles an hour. He did not recall which gear he was in when he got into the intersection, but believed it to be low gear. His purpose in making the turn to the east was to avoid running into the second east-bound truck.

The operator of the filling station testified that he did not see either the truck or the defendant's car before the collision. He heard a loud crash and ran out of the

filling station. He saw the defendant's car swerve and hit a pillar on the filling station and start to coast off toward a man lying on the pavement. The car was out of gear. He reached into it and turned the key off to hold it back. It stopped some 2 feet from where the man was lying. It was moving a little southeast when he saw it. The defendant was lying just at the right edge of the north curb, a little to the southwest of the filling station, on the north edge of L Street, in other words, directly south of the southeast corner of the filling station, and about 30 feet west of the west line of Sixtieth Street, about the same distance south of the filling station, face down on the pavement with his feet over the curb. The witness obtained blankets and covered the man, called for an ambulance, and called for the Nebraska Safety Patrol. The truck was located about the middle of the 4-lane highway, straight east of Sixtieth Street, with its front wheels just about in the east lane, about the center of the street. He did not recall that any part of the truck was over the east lane of Sixtieth Street. It faced west, turned a little to the left.

One of the filling station employees testified to substantially the same facts, and that he helped get the car stopped. It was out of gear and the brakes were locked. The floor boards had been pushed over against the pedal so that it could not be pumped, and the front of the car was headed southwest. The right side door was wide open. The left side was pushed in. There was glass broken near the station. He got into the car to help stop it. As to whether the plaintiff's son helped stop it or not, this witness was unable to tell. This witness towed the truck to the outside of the filling station. It was east of Sixtieth Street on L Street, toward the center of the street facing west, maybe a little over the center.

A trooper of the Nebraska Safety Patrol testified that he arrived at the scene of the accident about 8:35 a. m.

He noticed the truck and the Plymouth coach. The truck was out on the roadway at that time a little east of the center of the intersection, and the car was at the northwest corner of the intersection off of the roadway. Both the truck and the car were on their wheels. The driver of the truck was there. There was dirt and glass shaken off of the truck and the car where they collided in the driving lane as you proceed west, east of the intersection. He did not notice any tire or skid marks on the pavement. He filed a report which he made immediately after the accident. This report was rejected when offered in evidence.

The plaintiff testified that he went to the scene of the accident the next day with his son; that he purchased the truck secondhand; and that after finishing equipping it and on the day of the accident it was worth $1,500. He further testified that it was necessary to move the truck, and he figured it cost around $65 to $70. While his testimony is confusing to some extent, the $65 or $70 expense he concluded was on a new truck deal with the Ford dealer at Beatrice. He also said that he had given the truck in its damaged condition to one of his sons.

This son testified that he received the truck from the plaintiff and he gave $225 for the tires and the truck, and traded the tires off for certain equipment so that he could rebuild another truck and use it. He testified to the damage to the truck by virtue of the accident, and that he did not use this truck, but used another truck and some of the equipment from the damaged truck. In the accident the truck was damaged to such an extent that it could not be used. He further testified that he paid for the damaged truck by working for his father as occasion required. There is some testimony that he was obligated in the amount of $425 for the purchase of the damaged truck, which he would work out on his father's farm.

A claim adjuster investigated the accident and testi-

fied that he met the plaintiff's son the day after the accident at the filling station and talked to him, and that his father and a brother were also there. The adjuster wrote down the information obtained from the plaintiff's son, handed it to him to read, he then read it, and the adjuster asked him to write at the bottom: "I have read the preceding page and a half and it's true." The adjuster saw him read the statement and sign it, and it was read to the jury at the trial.

A witness employed by H. P. Smith Motors in Omaha examined the truck at Sixtieth and L Streets, described it, and estimated that it would cost more than it was worth to repair the truck. He did not, or could not, find the estimate he had made as to the needed repairs, however it was subsequently produced by the plaintiff's son Arthur. This estimate amounted to $570.70, and the parts were itemized in the estimate.

The defendant sets forth several assignments of error which may be briefly summarized as follows: (1) The trial court erred in failing to sustain the defendant's motion for a directed verdict, or in the alternative to dismiss the plaintiff's cause, made at the close of the plaintiff's evidence and at the conclusion of all the evidence; (2) the trial court erred in admitting certain testimony into evidence over the objections of the defendant; (3) the trial court erred in submitting instruction No. 1 on its own motion; (4) the trial court erred in withdrawing from the jury the allegations of negligence pleaded in defendant's cross-petition alleging failure on the part of the plaintiff's son to sound his horn or warn the defendant of his approach; and (5) the trial court erred in not submitting to the jury the speed the plaintiff's truck was traveling before and at the time of the accident.

If a motion for a directed verdict is made at the close of the plaintiff's evidence and again at the close of all the evidence, or in the alternative to dismiss plaintiff's case, to test the sufficiency of the evidence to support

a verdict, it must be considered in the light most favorable to the successful party, that is, every controverted fact must be resolved in his favor and he should have the benefit of every inference that can reasonably be deduced therefrom. See Borcherding v. Eklund, 156 Neb. 196, 55 N. W. 2d 643.

With this rule in mind, we proceed to a determination of this appeal to ascertain whether or not sufficient evidence has been adduced by the plaintiff to warrant submission of his case to the jury.

The defendant argues that the evidence of the plaintiff's son given at the trial and the statement made by him to a claim adjuster and reduced to writing before the trial are inconsistent and contradictory, and amount to self impeachment. Defendant further argues that such evidence cannot sustain liability on the part of the defendant nor show contributory negligence on his part, and therefore the plaintiff is not entitled to recover damages. The defendant further argues that the evidence adduced on behalf of the plaintiff was insufficient to prove the proper measure of damages for the damage done to plaintiff's truck.

In this connection, we believe the duties of the driver of a motor vehicle in approaching and entering an intersection are of importance.

A driver of a motor vehicle about to enter a highway protected by stop signs must stop as directed, look in both directions, and permit all vehicles to pass which are at such a distance and traveling at such a speed that it would be imprudent to proceed into the intersection. See Simcho v. Omaha & C. B. St. Ry. Co., 150 Neb. 634, 35 N. W. 2d 501.

As stated in 5 Am. Jur., Automobiles, § 303, p. 668: "* * * it is his duty to look both to right and left; and if a vehicle is approaching on the main or arterial highway, it is his duty to wait until such vehicle has passed, unless a prudent person would have reasonable ground to believe that such other vehicle proceeding at a law-

ful speed is so far distant from the intersection that he could safely cross in advance thereof." See, also, Schrage v. Miller, 123 Neb. 266, 242 N. W. 649; Borcherding v. Eklund, *supra;* Meyer v. Hartford Bros. Gravel Co., 144 Neb. 808, 14 N. W. 2d 660.

We believe the evidence is sufficient to warrant the jury to pass upon the question of negligence of the driver of the plaintiff's truck and of the defendant.

As to the statement made by the plaintiff's son to the claim adjuster, which was not sworn to, the defendant cites and relies on cases to the effect that where a verdict is against the clear weight of the evidence so that it cannot be sustained on any principle of right or justice, it is the duty of the court to set it aside. See, Ellis v. Omaha Cold Storage Co., 122 Neb. 567, 240 N. W. 760; Clark v. Gell, 17 Neb. 284, 22 N. W. 562; Cuva v. Glens Falls Ins. Co., 136 Neb. 359, 285 N. W. 917.

The defendant also relies on the case of Gohlinghorst v. Ruess, 146 Neb. 470, 20 N. W. 2d 381, wherein the court announced the rule pertaining to a motion for directed verdict and then stated: "But when other evidence of the plaintiff demonstrates to the extent that reasonable men cannot differ thereon, that such evidence is incapable of belief, the rule does not apply and a directed verdict may properly be granted."

We are not in accord with defendant's contention as to the applicability of such cases to the instant case. The applicable rule is that extrajudicial statements of fact made by a party relating to matters material to the issues in a controversy are available to the adverse party in a trial thereof as admissions against interest or for impeachment. Such statements are, however, not conclusive but may be explained, rebutted, or contradicted, and thereafter are to be given such weight as the trier of the facts deems them entitled. See, Meyer v. Platte Valley Construction Co., 147 Neb. 860, 25 N. W. 2d 412; 31 C. J. S., Evidence, § 272, p. 1023, § 273, p. 1027, § 276, p. 1028, § 380, p. 1164. See, also, Hin-

nenkamp v. Metropolitan Life Ins. Co., 134 Neb. 846, 279 N. W. 784; Havlik v. Anderson, 130 Neb. 94, 264 N. W. 146; Miller v. Nicodemus, 58 Neb. 352, 78 N. W. 618.

In the recent case of Kipf v. Bitner, 150 Neb. 155, 33 N. W. 2d 518, a distinction between Gohlinghorst v. Ruess, *supra,* and other cases announcing the same rule, was made, which would be applicable here. We deem it unnecessary to set forth the distinction made, except to say that in such actions the plaintiffs pleaded and testified to one story in one or more actions or trials, and after obtaining a benefit therefrom, or imposing a detriment thereby, it was found that they could not substantiate their claim, in which event they materially and substantially changed their testimony or pleadings and testimony in another trial, manifestly with a fraudulent motive for the purpose of obviating objections pointed out by the court in a former trial, or to meet the exigencies of their case, and, by thus experimenting and toying with litigants in courts, they vainly sought to obtain a recovery. See, also, Angstadt v. Coleman, 156 Neb. 850, 58 N. W. 2d 507.

The weight and credibility of the testimony given by the plaintiff's son were for the triers of the facts to determine.

We have set forth the allegations in the plaintiff's petition on the measure of damages. No error is predicated on the court's instruction as it applies to this subject.

The rule is announced in Helin v. Egger, 121 Neb. 727, 238 N. W. 364: "In an action for damages to an automobile, where the automobile cannot be placed in substantially as good condition as it was before the injury, the measure of damages is the difference between its reasonable market value immediately before and immediately after the accident." This rule is followed in Lund v. Holbrook, 153 Neb. 706, 46 N. W. 2d 130.

The evidence adduced on behalf of the plaintiff was

that the truck was so damaged it could not be repaired and put in as good condition as it was before the accident, and that immediately after the accident its reasonable market value was as testified to by plaintiff's witnesses. The evidence does not show any relationship between the towing charge or the charge to remove the truck from the highway and the value of the truck after the accident, and these items should be deducted from the judgment.

With reference to the assignments of error having to do with the admissibility of evidence claimed to have been admitted and thereby prejudiced the defendant's rights, we find no prejudicial error therein affecting the substantial rights of the defendant. See § 25-853, R. R. S. 1943.

With reference to whether or not the driver of the plaintiff's truck was guilty of negligence in failing to sound his horn or warn the defendant of his presence in approaching the intersection, the following is applicable: The duty to sound a signal warning of the approach of a motor vehicle depends largely upon the circumstances of the particular case. See, Tews v. Bamrick, 148 Neb. 59, 26 N. W. 2d 499; Adams v. Welliver, 155 Neb. 331, 51 N. W. 2d 739.

We believe that under the evidence the driver of the plaintiff's truck could not be found guilty of negligence in failing to sound his horn. Failure to do so had no relation to the cause of the accident, and therefore was no part of the proximate cause thereof.

While there is some contention that the trial court erred in not instructing the jury with reference to the speed of the plaintiff's truck, there is no denial of the speed as testified to by the driver of plaintiff's truck. The defendant did not give any testimony as to the speed of the truck, either when he claims he saw it approaching 900 feet away or next when he saw it 25 feet away a split second before the crash. He was asked no questions about the speed of the plaintiff's truck, and

volunteered none. There is no merit to the above assignment of error.

The defendant contends that the trial court omitted from its instructions certain items of damages which the jury would be entitled to consider in the event the defendant should recover on his cross-petition.

The trial court's instruction No. 6 informed the jury it could consider the pain and suffering, if any, caused by the negligence of plaintiff's son, and the extent of the same, the reasonable value of medical care reasonably necessary, the reasonable value of the defendant's hospital expenses, and loss which the evidence shows with reasonable certainty defendant may have sustained. The specific items not set forth in the instruction were the cost to replace eye glasses belonging to the defendant which were destroyed by virtue of the accident, the doctor bill, and the car damage. The items of the doctor bill and the cost of the eye glasses are covered by the term "medical care." Such items as car damage are included in the word "loss."

The defendant did not object to this instruction nor submit a more detailed instruction on this subject. The following is applicable: Where an instruction is given to a jury, which it is claimed did not fully state the rule of law upon the subject involved therein, but did not misstate any rule to be applied, the attention of the court should be called to the omission, as claimed by an instruction containing the alleged omission. If not, there can be no ground for reversal therefor. See, Edwards & Bradford Lbr. Co. v. Lamb, 95 Neb. 263, 145 N. W. 703; Plumb v. Burnham, 151 Neb. 129, 36 N. W. 2d 612. See, also, Snyder v. Lincoln, 153 Neb. 611, 45 N. W. 2d 749; In re Estate of Hunter, 151 Neb. 704, 39 N. W. 2d 418; McClatchey v. Anderson, 84 Neb. 783, 122 N. W. 67.

Instructions must be considered and construed together. If they are not sufficiently specific in some respects, it is the duty of counsel to offer requests for instructions that will supply the omission. And, unless

this is done, the judgment will not ordinarily be reversed for such defects. See, Christensen v. Tate, 87 Neb. 848, 128 N. W. 622; Plumb v. Burnham, *supra.*

A party desiring a more explicit instruction than that given should offer such an instruction. See, Hannah v. American Live Stock Ins. Co., 111 Neb. 660, 197 N. W. 404; Plumb v. Burnham, *supra;* Larsen v. Savidge, 103 Neb. 79, 170 N. W. 353.

If, therefore, the plaintiff shall, within 30 days from this date, file in this court a remittitur for $70 from the judgment recovered, then said judgment shall be, and, in that event, is affirmed. If said remittitur be not so filed, then said judgment shall be reversed and the cause remanded for a new trial. See Oliverius v. Wicks, 107 Neb. 821, 187 N. W. 73. All the costs of this appeal are taxed to the defendant.

Other assignments of error are without merit and need not be discussed.

AFFIRMED ON CONDITION.

WENKE, J., participating on briefs.