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REPORTS OF CASES

DECIDED BETWEEN
JULY 16, 1955 AND FEBRUARY 16, 1956

IN THE

Supreme Court of Nebraska

JANUARY TERM 1955, SEPTEMBER TERM 1955,
AND
JANUARY TERM 1956

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By WALTER D. JAMES, REPORTER OF THE SUPREME COURT

For the benefit of the State of Nebraska

SUPREME COURT

DURING THE PERIOD OF THESE REPORTS

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EDWARD F. CARTER, Associate Justice
FREDERICK W. MESSMORE, Associate Justice
JOHN W. YEAGER, Associate Justice
ELLWOOD B. CHAPPELL, Associate Justice
ADOLPH E. WENKE, Associate Justice
PAUL E. BOSLAUGH, Associate Justice

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Number of District	Counties in District	Judges in District	Residence of Judge
First	Johnson, Nemaha, Pawnee, and Richardson.	Virgil Falloon	Falls City
Second	Cass, Otoe, and Sarpy.	John M. Dierks	Neb. City
Third	Lancaster.	John L. Polk Harry Ankeny Harry A. Spencer Paul White	Lincoln Lincoln Lincoln Lincoln
Fourth	Burt, Douglas, and Washington.	James M. Fitzgerald Herbert Rhoades Arthur C. Thomsen William A. Day James T. English James M. Patton Carroll O. Stauffer L. Ross Newkirk Patrick W. Lynch	Omaha Omaha Omaha Omaha Omaha Omaha Omaha Omaha Omaha
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Sixth	Boone, Colfax, Dodge, Merrick, Nance, and Platte.	Russell A. Robinson Robert D. Flory	Fremont Columbus
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Eighth	Cedar, Dakota, Dixon, and Thurston.	Alfred D. Raun	Walthill
Ninth	Antelope, Cuming, Knox, Madison, Pierce, Stanton, and Wayne.	Lyle E. Jackson Fay H. Pollock	Neligh Stanton
Tenth	Adams, Clay, Franklin, Harlan, Kearney, Phelps, and Webster	Frank J. Munday Edmund P. Nuss	Red Cloud Hastings
Eleventh	Blaine, Garfield, Grant, Greeley, Hall, Hooker, Howard, Loup, Thomas, Valley, and Wheeler.	Ernest G. Kroger William F. Spikes	Grand Island St. Paul
Twelfth	Buffalo, Custer, Logan, and Sherman.	Eldridge G. Reed	Kearney
Thirteenth	Arthur, Banner, Cheyenne, Dawson, Deuel, Keith, Kimball, Lincoln, and McPherson.	Isaac J. Nisley John H. Kuns	North Platte Kimball
Fourteenth	Chase, Dundy, Frontier, Furnas, Gosper, Hayes, Hitchcock, Perkins, and Red Willow.	Victor Westermark	McCook
Fifteenth	Boyd, Brown, Holt, Keya Paha, and Rock.	Dayton R. Mounts	Atkinson
Sixteenth	Box Butte, Cherry, Dawes, Sheridan, and Sioux.	Earl L. Meyer	Alliance
Seventeenth	Garden, Morrill, and Scotts Bluff.	Claibourne G. Perry	Gering
Eighteenth	Gage and Jefferson.	Cloyde B. Ellis	Beatrice

PRACTICING ATTORNEYS

Admitted since the publication of Volume 160

R. JAMES BRENNAN
MICHAEL J. JONES
CURTIS W. SMITH

IN MEMORIAM

BAYARD H. PAINE

And now at the hour of nine o'clock A. M., on this twenty-sixth day of September, A. D. 1955, the same being the date fixed by the Court for hearing the report of the Committee appointed to draft resolutions in memory of Honorable Bayard H. Paine, the Court being in session and members of the bar in attendance, the Committee makes the following report, submitted by Harvey M. Johnsen:

HONORABLE HARVEY M. JOHNSEN.

May It Please the Court:

The Committee appointed by the Court for this occasion submits this brief statement as a memorial and tribute to Bayard H. Paine, who was for 18 years a member of this high tribunal. The reading of the statement will be followed by personal expressions on the part of various members of the Committee.

Bayard H. Paine was born at Painesville, Ohio, on April 27, 1872. He died at Grand Island, Nebraska, on April 19, 1955—just a week before he would have attained his 83rd birthday.

He was the only child of Ira T. and Ella M. Paine, who moved from Ohio to Nebraska when he was one year old. From that time on, until his death, the city of Grand Island always constituted his legal home or residence.

He graduated from the high school of that city in 1889. He attended Northwestern University, from which he received a Bachelor of Science degree in 1894. Before entering upon his career in the law, he served as principal of the high schools at North Loup, Nebraska,

and at Grand Island, Nebraska, and later, for a number of years, as court reporter for the District Court of the Eleventh Judicial District.

He was admitted to the bar of this state in 1904 and within a short time thereafter began the practice of law in Grand Island. His legal education had consisted of study in the office of John R. Thompson of Grand Island and of a year's attendance at the University of Michigan Law School. It was not, however, in the gladiator's, but in the arbiter's, field that his interest in the law really lay.

He soon was appointed a referee in bankruptcy by the United States District Court for the District of Nebraska—a position which he held for a period of approximately 11 years. In 1916, he ran for and was elected judge of the District Court for the Eleventh Judicial District, being thereafter continuously reelected to and holding that office, until he became a successful candidate for and took his seat as a judge of the Supreme Court, in January, 1931. He served three six-year terms upon this Court—a total of 18 years—until he chose not to be a candidate further and retired, in January, 1949.

His long judicial service, both on the trial and appellate bench, necessarily encompassed many cases of professional and public interest. Thus, soon after he went on the District Court, he tried the then highly famous Cole and Grammer murder cases. And in his appellate work, the opinions which he was called upon to write ranged over an extensive and diverse field, with a substantial number of them having been chosen by the editors of the American Law Reports, through the years, as a subject for an A. L. R. annotation.

In Judge Paine's long service upon the bench, however, he never allowed the numerous other fields of life to become secondary or subservient to the field of the law, as so many of us judges and lawyers are guilty of doing. For him, there were things that stood above his interest in and preoccupation with the law, principally his family and his church. These were institu-

tions ordained by God; the courts were institutions made necessary by the imperfections and artificialities of man.

The nature of his family and their close relationship to each other bear solid witness to the results of this concept. He married Grace Bentley, a school teacher at Grand Island, in 1902, and their marriage was one which endured happily throughout his life. They had three children, all of whom settled down in close proximity to the family abode and to continued parental contact. The oldest child, Alice E. Paine, is librarian at the Kearney State Teachers College. The two sons, Charles B. and Bayard H. Paine, Jr., are partners in the practice of law at Grand Island.

In his church affiliation and relations, Judge Paine was a lifelong Methodist, and he continued throughout the years to teach adult or young people's classes in the Sunday School of his church. He was for many years a trustee of Nebraska Wesleyan University at Lincoln, and also trustee of Southern Methodist University at Dallas, Texas. Nebraska Wesleyan University honored him with an LL.D. degree in 1934.

Beyond his devotion to his home and church, Judge Paine also had a keen civic and professional interest. He readily responded to church, school, and community invitations, to make inspirational or civic talks, particularly to an audience of young people, such as a graduating class. He equally delighted in attending meetings of the American Bar Association and the American Law Institute, where he could listen to, have contact with, and have his horizon broadened from those who he felt were greater than he. He also was a constant attendant at the annual meetings of our own Nebraska State Bar Association. In the fraternal field, he was a 32nd degree Mason, a Knight Templar, an Eastern Star, and an Elk. He further was an active Rotarian and had been the president of his local club.

In immediate hobbies and pursuits, he was always fond of traveling and especially of the camp life in which this afforded him the opportunity to engage. During

the younger days of the children, the whole family spent many summer vacations touring the United States, with a trailer loaded with tents and other camping equipment. In 1927, they all went on a trip to Europe, covering ten countries of that continent in their own car. They similarly made trips to Alaska and Mexico, and, even after he had retired from the bench, when it was no longer possible for the members of his family to make the trips with him, he could not resist the impulse to journey to South America, in order to see and learn things about another part of the world, where he had never previously been.

One other trait of his character is deserving of mention. He had perhaps the largest home library in the city of Grand Island. He was constantly purchasing books, which were for him a source of factual information, just as his many trips and jaunts had been. Many of the books which he was thus continuously acquiring, he would take occasion to send to schools in the outlying parts of the state. And many boxes of books also were packed from his library and shipped to ministers who were financially unable to purchase the library which they needed or desired.

This lifelong quest of Judge Paine for factual information about the geographical areas, people, and accomplishments of the various parts of his own country and of the world made it only natural that he should feel the urge to crystalize some of the material which he had thus acquired, into permanent written form. He did author a history of the pioneer days in southwest Nebraska, entitled "Pioneers, Indians and Buffaloes", which was published in 1935. But the never-ending task of an appellate judge in writing straight-jacketed legal opinions ordinarily causes the water table of literary creative expression to sink fairly low within him, or at least makes it necessary that he do some tiring pumping if he desires to bring that fresh fluid to the surface. And so, for this or other reason, Judge Paine did not see fit to engage in further authorship, as it seems prob-

able that he might have done, had he not found it necessary to cramp his style and written expression by the constant authoring of court opinions.

What has been said points out the predominant facts and facets of Judge Paine's life and character. To add conclusionarily that such a man has led a full, interesting, characterful, useful and contributive life, in the circles of family, community, state, profession, bench, and fellow-men generally, and that he will be missed, is hardly necessary. To Judge Paine, facts always spoke for themselves, and it is fitting, and appropriate to his character, that they should be allowed to do so here.

As a permanent memorial and tribute to Judge Paine, the Committee asks that this statement be spread upon the records of the Court.

Respectfully submitted,
Harvey M. Johnsen
George A. Eberly
Ernest G. Kroger
William F. Spikes
Louis Lightner
Don W. Stewart
Delpha M. Taylor
B. J. Cunningham, Sr.
Thomas W. Lanigan

JUDGE JOHNSEN continued.

May It Please the Court:

I should like to add to the statement of the Committee a word of personal expression.

For any portrait of a man to constitute a work of art, the artist must find in his subject, and accentuate in his painting, some outstanding feature or trait of character, which will dominate the viewer's gaze.

If I were an artist capable of painting a literary portrait, I should cause the canvas of my written expression to make stand out and dominate the viewer's gaze the intense interest which Judge Paine had in every

fact of nature, life, man and the universe, with which he came in contact. No fact was too trivial, nor was any too broad-horizoned, that he did not gain a keen and equal pleasure from having become acquainted with it.

The last verse of the first chapter of the Book of Genesis records—after God had created the world—"And God saw everything that he had made, and, behold, it was very good."

It always seemed to me, as I observed Judge Paine's desire to learn every fact possible about places, things and people, that he wanted to know as much about all of God's handiwork in the world as it was possible for him to see, hear, or read, and that he felt toward all of it—in the language of the verse of Genesis—"behold, it was very good."

I never ceased to marvel at this enviable trait, during the two-years' contact that I had with Judge Paine, while I was a member of this Court. It is a fact of his many-sided character, to which I pay tribute, and which I would record.

HONORABLE GEORGE A. EBERLY.

May It Please the Court:

Today we commemorate the life and labors of a friend, a colleague and a christian gentleman, Honorable Bayard Henry Paine, whose personality won our deep respect for him as a man and whose honesty of purpose in the discharge of his judicial duties was unquestioned.

Judge Paine was born at Painesville, Ohio, on April 27, 1872. This town was founded at the turn of the century by settlers coming from New York and from Connecticut. History advises us that the members of the Paine families in their early homes in New England belonged to the Revolutionary stock of that day. Indeed one of the Paines served with General Nathanael Greene in the southern campaigns that preceded the capture of Lord Cornwallis in October 1781.

Though Ohio born, Judge Paine came to Hall County,

Nebraska, at an early age and was graduated from the Grand Island High School in 1889. He then attended the Northwestern University and was graduated therefrom in 1894 with the degree of Bachelor of Science. He was admitted to the practice of law by the Supreme Court of Nebraska in 1904 and entered into the practice of his profession at Grand Island in the same year. Thereafter in 1907 he spent a year in the study of Law at the University of Michigan.

He was elected Judge of the District Court of the 11th district for the term commencing in 1917 and served as such continuously until 1930. In that year he was elected Judge of the Supreme Court and served continuously until January 1949.

Judge Paine's life was lived among pioneers and in many respects was the life of a pioneer. It is to be remembered that Grand Island is in the midst of what was the great buffalo range in Nebraska. As a matter of fact buffalo were still numerous in this region as late as 1866. Indeed its very name is derived from "La Granda Ile", a term applied to its situation by the early French Canadian trappers. Thus from old neighbors and old settler friends, Judge Paine was enabled to derive personal information of the stirring events that preceded his coming. This he incorporated in an interesting volume published by him in 1935 entitled "Pioneers, Indians and Buffaloes, by Bayard H. Paine." Thus, in addition to his judicial duties and labors of which daily use is made in the proceedings of our courts we are indebted to Judge Paine for the preservation of the historical knowledge of how Nebraska grew and developed into a great state.

HONORABLE ERNEST G. KROGER.

May It Please the Court:

For more than 80 years, Judge Paine was a resident of Grand Island. Of him it could be said, as was once so eloquently said of another, "To know him was to love

him, to name him was to praise." At the time of his death he was Grand Island's best known and most respected citizen. It was my good fortune to have known Judge Paine for more than 45 years. During all of that time he was a professed and devout Christian, an example to all of what a Christian life should be. He was a moralist and abhorred wrongdoing, yet his feeling towards the transgressor was not one of hate, but of compassion. He was kind and considerate. He took an active part in all activities looking towards the betterment of the community and state. He was active in his church, and a generous supporter of all charitable activities. Though possessed of considerable wealth, as wealth is measured in Nebraska, he never lost the human touch and his friends could be found in all walks of life. It was unthinkable for him to try to add to his prestige by belittling the efforts or judgment of others or to gloat over the opportunity, when his conscience and judgment required him to point out the mistakes of others. I never heard him speak an unkind word about anyone. He was generous of his time and talents. Widely traveled and an excellent speaker, he gladly appeared at innumerable gatherings, thrilling his listeners with word pictures of far away places and interesting experiences, or on other occasions discussing current issues, usually presenting both sides of the question, and all without a thought of compensation. He did unto others as he would have others do unto him. He lived a full life. He was faithful unto death.

HONORABLE WILLIAM F. SPIKES.

May It Please the Court:

In addition to my sincere appreciation of Judge Paine's career as a jurist and his prominence as a citizen, I want briefly to touch upon my association with him in private life. He was my close personal friend. Through correspondence which we had before he became a district judge, it was tentatively arranged that

I would come to Grand Island and enter into the practice of law with him. This plan never materialized because he was elevated to the bench, but he helped me to find a position as a partner in the practice of law with the late Frank J. Taylor, a position which proved fortunate for me. Later many, many times I came to Judge Paine for counsel and advice about personal matters and I came to look upon him as one of my best friends.

He seemed to have a way of bringing out the best in those with whom he was associated.

So I wish to pay tribute to his memory and say that I will always appreciate and treasure my association and friendship with Judge Paine.

HONORABLE DON W. STEWART.

May It Please the Court:

Although much of Judge Paine's life was devoted to the administration of justice, he had other important interests. One of these, which was very near to his heart, was the institutions connected with his Church. He realized the importance and value of providing a Christian education for our youth. During the many years that I knew him, he gave much of his time to such institutions. He served long and faithfully as a member of the Governing Boards of Southern Methodist University at Dallas, Texas, and our own Nebraska Wesleyan University in Lincoln. He had a keen interest in the welfare of these Universities and I know, from my association with him, of the valuable help that he gave to Wesleyan University for more than thirty years and especially during the depression days of the thirties. His long service with both Universities shows how highly they regarded his wise counsel and judgment.

The memory of Judge Paine's high ideals, as exemplified in his unselfish service to others, should be an inspiration to all of us as well as a fitting memorial to him.

MISS DELPHA M. TAYLOR.

May It Please the Court:

On Saturday, September 9, 1922, I went from Lincoln to Grand Island to become District Court Reporter for Judge Bayard H. Paine, at that time one of the two judges for the Eleventh Judicial District. About ten days later the first jury session of the fall term of court was held at the inland county seat of Bartlett in Wheeler County,—and thus began a period of over twenty-six years' service with Judge Paine, over eight years being spent as court reporter and the remainder as legal secretary during his incumbency as Associate Justice of the Supreme Court.

On this occasion I want to pay tribute to the humanness of Judge Paine as an employer, to his kindness, his patience, his optimism, and his universal habit of making the best of every situation.

During the several years when I was studying for admission to the bar, he was ever willing to grant all the time possible for such study, and when the examinations were finally over and my admission to the bar became a reality, his interest in the result was really genuine and sincere.

Judge Paine liked people—all people—and was especially interested in those of the younger generation. When we held court in the outlying counties of the district, he would invariably make it a point, if at all possible, to go to the public school and speak to the pupils, and always welcomed visits of the pupils to the courtroom. In the office he was never too busy to listen to the recital of the problems of any visitor, and many a young person starting out in life received invaluable assistance from a visit to the office of Judge Paine.

It is with a feeling of humility, of a desire to attempt to repay a debt of gratitude for the years I spent in the service of Judge Paine, and a real sadness of heart at the loss of a fine friend, that I add this tribute to the memory of Judge Paine.

HONORABLE B. J. CUNNINGHAM, SR.

May It Please the Court:

It was forty-five years ago next month that I made the acquaintance of Judge Paine. We had negotiated a settlement of the first case I had after leaving law school. In conferring about the settlement I was impressed by the kindly attitude of Judge Paine. Realizing my limited experience, he was extremely courteous and considerate of me so that he made an impression on me which I have never forgotten. As I observed him in later years I learned that he exercised the same kindly attitute toward all attorneys and especially the younger members of the bar. This same kindness and consideration was shown not only toward his fellow members of the bar but toward everyone with whom he came in contact. It was always a pleasure to Judge Paine to assist anyone in trouble.

I recall an incident that occurred in St. Paul, Nebraska, in the bleak thirties. He was presiding at the trial of an equity case and a night session of court was agreed upon; it continued until after eleven o'clock. As Judge Paine was driving away from the courthouse he noticed the lights of a litigant's car had gone out. It was too late to get service at a garage and the litigant told Judge Paine that it would be necessary for him to have his car early the next morning. Judge Paine solved the problem by driving ahead of him at five to ten miles per hour until they reached the man's home west of Grand Island.

He manifested the same thoughtfulness while he was teaching school, while serving as a court reporter, and later as a practicing attorney. I need not mention to this group that he followed the same practice as a Judge of the District Court and the Supreme Court. I doubt if any one over heard Judge Paine utter an unkind word. He was a man of deep religious conviction. He conscientiously practiced his religious beliefs in his every

act. He more truly lived the precept, "Do unto others as you would have them do unto you" than any person I have ever known. He was broad-minded; he was tolerant; he had a great respect for each individual, regardless of race, creed or color. His friends included everyone who knew him.

If every person to whom Judge Paine rendered assistance, either through charitable, legal or personal means, would write one sentence of appreciation, the record would constitute volumes. It would record a life of which his fine family might well be proud, a record which his fellow lawyers could strive to imitate, and a record which, I feel sure, would find no equal within the State of Nebraska.

HONORABLE LOUIS LIGHTNER.

May It Please the Court:

I first got acquainted with Judge Paine when I was appointed District Judge in 1923. He was District Judge of the 11th District just west of mine. We exchanged work quite often, aften talked about our problems and I became very fond of Judge Paine. Later after he became a Supreme Judge I also saw him quite often, both on the occasions when I had the honor of sitting with the Supreme Court and at bar meetings, and several occasions when he was our commencement orator at Columbus. He was a very fine Christian gentleman, had a good knowledge of the law and a keen sense of justice and the wish to enforce the law if possible in a humane way and so as to bring about a fair and equitable result. He had a fine sense of humor, was always interested in the young, and at least up to the last time I saw him a few months before his death, at all times was young in spirit.

Speaking of his sense of humor, he tried a case for me in Columbus where an injunction suit had been brought to enjoin the establishment of a funeral home

in a residential district. Witness after witness had testified that a funeral home had a depressing effect on them, but one witness, and Judge Paine told me about him with great gusto, said that funerals were always very cheerful to him because when he looked out and saw the funeral assembling or going by, he realized that he was not in the casket but was still living and that made him very happy.

Judge Paine made a great many commencement addresses and was a most delightful person to make them. Among one of several that he made in Columbus, he inquired of me about how long it should be and I said: "Judge, how long is your speech?" He said: "My speech is like an accordion, which I can close up or pull out to a great length. All I have in mind when I begin is an outline and I can fill it in to any extent with illustrations, quotations, anecdotes, etc." I had talked with the Superintendent of Schools before and he told me he thought Judge Paine's speech should be about 45 minutes long. I told the Judge that and apparently without even watching the clock, he quit almost exactly on time.

The last time I saw Judge Paine in life was at a legal seminar in Grand Island. He told me about a drive he had had shortly before he returned from Florida with his wife and what an excellent time they had had. He then took me over to visit his sons' office and was very proud of their office and the progress they were making.

I attended his funeral in Grand Island at the large Methodist Church, which was filled to overflowing with the townspeople, attorneys and judges from all over the state, and I believe the entire Supreme Court with the clerk and other officers. It was a wonderful showing of the respect and love people generally had for Judge Paine. He lived a life that is inspiring to remember because of its constant forward look. I know that his family are proud of him and justly so.

As Emerson once said with respect to another great American: "His soul was made for the noblest society;

he had in his long life exhausted the capabilities of the world; wherever there is knowledge, wherever there is virtue, wherever there is beauty, he will find a home."

HONORABLE THOMAS W. LANIGAN.

May It Please the Court:

I appreciate the privilege of adding a few remarks to what has already been said with relation to the life and accomplishments of Judge Bayard H. Paine. I knew Judge Paine for fifty years. When he was the court reporter for Judge Hanna, he spent a good deal of time in my home town—Greeley, where Judge Hanna resided and had his office.

I was attending college and studying some Greek—Ovid, Horace and other classics required—and he was especially interested in those studies. I recall he was keenly interested in a treatise we read together concerning friendship entitled De Amicicia, and another on old age.

I tried many cases before Judge Paine while he was District Judge of the Eleventh Judicial District. I recall a humorous incident that happened in Wheeler County. The attorney for the opposition and my client engaged in physical combat in the court room—a real good old-fashioned fight. Judge Paine arose from the bench on a table and walked between them, but they fought around him. When things quieted down, I resumed the examination of my witness where I left off and when the fight began. Judge Paine said, "Mr. Lanigan, we cannot go on with this case. We have two criminal cases to try. The State of Nebraska vs. the attorney involved and the State of Nebraska vs. ———— (my client)." The judge asked them to show cause why they should not be fined for contempt of court.

The attorney asked me to represent him. I explained that they were both hot headed Irishmen and pleaded for leniency for him and my client. When I finished, the court said, "I fine the attorney $10.00, and his services

in this case are terminated." The attorney dictated in the record a statement to the effect that his client had been deprived of his constitutional rights in the progress of the trial, and besides, the attorney said he did not have $10.00 to pay the fine. Judge Paine told him to borrow it from a friend. The attorney said, "Judge, you are my best friend. Would you loan me the money?" The judge said, "The fine is remitted, but your services are terminated."

The inquisitive mind of Judge Paine always fascinated me. He seemed to be interested in every phase and activity of human, plant and animal life. When he campaigned, he talked with the baker and learned how to make bread and the cost and the profit. When he talked to the blacksmith, he learned how to weld metals and materials, and the cost. The people liked him. They had confidence in him.

Judge Paine had a clean tongue and a clean mind. He was in every respect a Christian, American gentleman. Shakespeare wrote, "Let all the ends thou aimest at, be thy country's, thy God's and truth."

This personified the life and philosophy of Judge Paine.

HONORABLE FRED W. MESSMORE.

Justice Bayard H. Paine served on this tribunal as an associate justice for a period of 18 years, from January 1931 to January 1949, at which time he chose not to be a candidate for reelection and retired to private life.

To the members of the legal profession and others who had the privilege of his friendship, he was a gentleman. The first characteristic of a gentleman is that of fineness of structure in the body which renders it capable of the most delicate sensations and, secondly, the structure of the mind which renders it capable of the most delicate sympathies—one may say simply fineness of nature. Applied to Judge Paine, he was a man who radiated happiness, and was noted for clean living, kindness of

heart, and pleasant relationships. His was a well-balanced life of broad vision and wide sympathies which found expression in helpful service in civic, philanthropic, social, and religious organizations.

To those of us who served with him on this court he demonstrated a passion for whatever appeared to him to be right and lawful in the administration of justice. Epecially is this true in equity law as shown by many of his opinions appearing in the Nebraska reports.

We knew him as a just judge, an upright citizen, a genial friend, a devoted husband and father, and a kindly, modest, Christian gentleman.

We who survive will cherish his memory and endeavor to emulate his virtues.

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CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

JANUARY TERM, 1955

JOHANNA GRIESS, APPELLANT, V. GIDEON J. GRIESS, APPELLEE.

71 N. W. 2d 513

Filed July 15, 1955. No. 33710.

1. Divorce. In a divorce action the decree for child support is at all times subject to review in the light of changing conditions, regardless of the particular language of the award. Either party may, upon sufficient showing of changed conditions, apply to the district court for modification of the order made with respect to allowance for child support.
2. ———. An application for a change with respect to an allowance for support and maintenance of minors, as provided in a decree of divorce, made at any time after the decree has been entered must be founded upon new facts or circumstances which have arisen subsequent to the entry of the decree. In the absence of such facts and circumstances the matter will be deemed res judicata.
3. ———. Preliminary to making the order for the appointment of a receiver of the husband's property, provided for in section 42-323, R. R. S. 1943, there must be an order, also provided for in said section, requiring the husband to give security for payments of alimony or child support, according to the terms of the decree, and a failure or refusal upon his part to give such security.

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

Massie & Bottorf and *Perry, Perry & Nuernberger*, for appellant.

No appearance for appellee.

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

CHAPPELL, J.

Plaintiff, Johanna Griess, and defendant, Gideon J. Griess, who were married February 2, 1923, are the mother and father of 11 children. On September 21, 1953, plaintiff was granted a decree of absolute divorce from defendant because of extreme cruelty. At that time, the two oldest sons lived and worked away from home and were emancipated. The decree found and adjudged that plaintiff was a suitable person to have the custody, and she was awarded the custody of all other nine children. Three of them were sons, respectively 17, 13, and 5 years old. The other six were daughters, respectively 15, 12, 10, 9, 8, and 3 years old.

The parties, as joint tenants, owned 160 acres of described farm land in Clay County. Title to described 80 acres thereof, upon which was the residence and other farm buildings, was quieted in plaintiff. The crops then thereon were assigned to plaintiff. Title to the other described 80 acres, upon which were less valuable improvements, was quieted in defendant. The crops then thereon were assigned to defendant. The parties had also accumulated valuable personal property during the marriage. Except for particular items thereof, which were specifically assigned to each party, the decree gave plaintiff one-third and defendant two-thirds of the estate. In order to adjust the difference in values of the property awarded, plaintiff was allowed $1,521.06 as cash alimony. Defendant was also ordered to pay $60 per week as child support, payable to the clerk of the district court, beginning August 26, 1953, and thereafter on each Wednesday until further order of the court. Plaintiff was also awarded costs and $750 as attorney's fees, taxable as a part thereof.

Neither party ever appealed from such decree, thus it has become final and subject to modification only in the manner provided by sections 42-312 and 42-324, R. R. S. 1943.

On February 4, 1954, defendant was in default of child support payments, and plaintiff filed an application, in affidavit form, alleging that she was without funds with which to support the children; that although defendant was able to make the child support payments he had attempted to mortgage his property and avoid a lien thereon for such support; and that his failure to make the payments was willful, contumacious, and contemptuous. Plaintiff prayed that defendant should be cited to appear and show cause why he should not be held in contempt and why a receiver should not be appointed to take over and retain possession of all his property for the use and benefit of the children.

Thereafter, on March 5, 1954, defendant filed what he designated as a "Petition to Modify Decree," sworn to upon information and belief, alleging that plaintiff had refused to cooperate with him as required by the decree; and that he was in debt, without money, and unable to pay $60 per week child support. He prayed that the weekly allowance should be substantially reduced and for equitable relief.

On March 18, 1954, plaintiff filed an answer and cross-petition denying generally the allegations of defendant's petition and alleging that in December 1953 defendant had purchased a new Mercury automobile and had generally squandered his money and deliberately placed his property beyond the reach of plaintiff and the court; that he refused and neglected to pay child support without just cause; and that on February 6, 1954, after plaintiff's citation for contempt was filed, defendant paid $420 as child support, but was still in default for payments of March 4 and March 11, 1954. Plaintiff prayed that the allowance for child support

should be increased to $100 a week; that defendant should be required to furnish adequate security to insure future payments; and upon failure to do so, that a receiver should be appointed to take charge of all defendant's property and hold the same, together with the rents, issues, profits, and interest thereof for such security. Plaintiff also prayed for an accounting of delinquent payments, costs, an allowance of attorney's fee, and for equitable relief.

After hearings on March 31, July 20, and August 23, 1954, the trial court rendered a judgment, finding and adjudging that because of adverse economic conditions and change of circumstances, payments of child support required of defendant should be reduced to $50 per week until further order of court. A matter with relation to payment of personal taxes for 1953 was also disposed of, but it is not involved here. Plaintiff's motion for new trial was overruled, and she appealed, assigning that the trial court: (1) Erred in failing to allow plaintiff any attorney's fee; (2) erred in finding and adjudging that there had been any material change in defendant's financial situation and in reducing the allowance; (3) erred in denying plaintiff's request for appointment of a receiver; and (4) erred in failing to increase allowances for child support. Defendant filed no brief and made no appearance in this court. We sustain the first, second, and third assignments.

With regard to the first assignment, it appears that the trial court, in rendering the judgment, overlooked the taxation of any costs and the allowance of a fee for plaintiff's attorney as a part thereof. The costs in the district court should have been taxed to defendant, including therein a reasonable attorney's fee for services rendered by plaintiff's attorney in that court.

We turn to the primary question of whether or not the evidence justified a reduction in allowances for child support. Upon trial de novo, under elementary rules with relation thereto, we conclude that it did not.

In Schrader v. Schrader, 148 Neb. 162, 26 N. W. 2d 617, this court said: "In a divorce action the decree for child support is at all times subject to review in the light of changing conditions, regardless of the particular language of the award. Either party may, upon sufficient showing of changed conditions, apply to the district court for modification of the order made with respect to allowance for child support.

"An application for a change with respect to an allowance for support and maintenance of minors, as provided in a decree of divorce, made at any time after the decree has been entered must be founded upon new facts or circumstances which have arisen subsequent to the entry of the decree. In the absence of such facts and circumstances the matter will be deemed res adjudicata." See, also, Morris v. Morris, 137 Neb. 660, 290 N. W. 720.

The record discloses that at time of divorce defendant was farming 400 acres of land. Subsequently he rented 80 more acres, so that at the time of this hearing he was living 2½ miles north of Sutton and farming 480 acres. He then owned 80 acres of land, 16 cows and a calf, a pick-up truck, and valuable farm machinery, including tractors and a combine with which he did his own and outside work for hire. He also owned a new Mercury car which cost $2,900. On December 3, 1953, he had exchanged his 1951 Mercury car for it and paid $1,075 cash difference. His income tax return for 1953 disclosed that for such year his gross income was $14,528.59, with total expenses of $4,078.99. He reported a net farm income of $9,013.26, from which he deducted $1,521.06 alimony paid plaintiff, plus $750 attorney's fees paid by him. Among other things, he claimed 10 exemptions, one for himself and one for each of the nine children, upon the ground that he was responsible for more than one-half of their support. Thus, he eventually paid an income tax of only $15.10.

In 1954 he planted 140 acres of corn, 85 or 90 acres

of wheat, and some milo and popcorn. How much of the latter is not shown. Between January 1, 1954, and August 23, 1954, he sold 1,000 bushels of wheat stored on plaintiff's farm, receiving $2,100 therefor. He sold seed oats for $40, some corn for $337.50, and received $200 or more for combine work. He sold or obtained a loan on wheat for $2,328.90. He received a total of $1,201.75 for unexplained items, part of which was probably a loan. He also received $10 a month from a tenant, but the total so received is not clear. The total amount actually received by him during the first 8 months of 1954, accruing at a time when his corn crop, which was not as good as usual and had not yet been harvested, was $6,208.15 or more. During that period, child support payments accruing totaled $2,040, which left at least $4,168.15 for his own use.

As a matter of course, defendant had some legitimate debts and necessary expenses, but his explanation about what became of his money was vague and not convincing. For example, among other things, he testified that he spent $600 to repair his old Mercury car and the windmill. In that connection, it will be noted that his old car was traded off December 3, 1953. He claimed to have but little money in cash or in the bank, but he took a vacation trip to California, and has a lockbox with contents unexplained.

He complained that his two oldest sons, who were emancipated, did not live at home, and were employed in Hastings, did not help him. Of course, they were not required to do so. He complained also that the younger children refused to help him with the farm work, and that plaintiff urged them not to do so. Plaintiff denied that contention, which is supported by the fact that some of the children did assist him at times in spite of the fact that defendant called them abusive names, such as "damn dog," was unkind to them, and refused to compensate them for their work. The fact is that the oldest son at home was unable to work. He

was injured in an automobile accident on April 10, 1954, and as a result was confined in a hospital at Lincoln from that time until July 3, 1954, at great expense assumed by plaintiff. Since that time he has remained at home, paralyzed from his waist down, an invalid, cared for by plaintiff at great personal sacrifice, while defendant has not even attempted to see or visit with him.

This record clearly indicates that defendant's financial situation has not materially changed. His attitude, however, has changed. He is only 43 years old, and physically and financially able to pay $60 a week, but is unwilling to support his children. His position was " 'I don't have to kill myself.' She has help. When I was on the place we milked 12 to 14 cows and the children helped. She has got the farm. She has got the children. I got no help. She will have to take care of the children. I am done. I can't go any farther." Defendant evidently meant just that, because at the time this hearing was completed, he was delinquent 6 weekly payments for child support, amounting to $360.

In the meantime, plaintiff worked hard for long hours, living on 80 acres of land, with only 25 or 30 acres of corn, a garden, some cows and chickens, but little machinery, and no money. She had supplied herself and the children with vegetables, meat, chickens, milk, cottage cheese, and butter. Seven of the children were in school. Three attended high school and four attended grade school. They were driven back and forth in an old 1949 Ford car, owned, repaired, and supplied by plaintiff. She has sewed, fitted, and refitted the children with clothing. There is ample evidence that $50 a week, if paid, may furnish necessary food, but leave little if any money for clothing, medicine, and other expenses necessary for plaintiff and nine young children. Thus, $50 a week is patently insufficient, and plaintiff is in debt for necessaries required.

Plaintiff took the position that defendant could sup-

port the children if he would raise some hogs, milk some cows, and do more work, instead of staying in Sutton and hanging around the pool hall as he had been doing. In that regard, however, she said: "If he can't support the children, give me the machinery and the land and I will support them myself."

We conclude that defendant failed to establish any changed conditions which would justify any reduction in the allowance of $60 a week for child support, but under the circumstances, we also believe that it would be unwise at this time to require him to pay more than that amount each week.

The trial court evidently erred in refusing to require defendant to give sufficient security for payment of child support awarded by the decree, or, if such security was not furnished, to appoint a receiver as prayed by plaintiff, in conformity with section 42-323, R. R. S. 1943. In Ford v. Ford, 101 Neb. 648, 164 N. W. 577, we held: "Preliminary to making the order for the appointment of a receiver of the husband's property, provided for in section 1589, Rev. St. 1913, there must be an order, also provided for in said section, requiring the husband to give security for payments of alimony, according to the terms of the decree, and a failure or refusal upon his part to give such security." Section 1589, Rev. St. 1913, is now section 42-323, R. R. S. 1943.

We are convinced that defendant will not pay child support unless and until such orders are made, and that the children will thus continue to want the necessaries of life.

We conclude that the judgment of the trial court, reducing the child support to $50 per week, should be and hereby is reversed and the cause is remanded with directions to restore plaintiff's child support to $60 per week, as provided in the original decree; tax costs in the district court to defendant, including a reasonable attorney's fee for services rendered by plain-

tiff's attorney in that court; and require defendant to give sufficient security for payment of such child support, and upon neglect or refusal to furnish same, appoint a receiver to take charge of all defendant's real and personal property, as provided by section 42-323, R. R. S. 1943. All costs in this court are taxed to defendant, including $250 allowed as fees for services rendered by plaintiff's attorney in this court.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. EDWARD F. FEEHAN, RESPONDENT.

71 N. W. 2d 518

Filed July 15, 1955. No. 33747.

1. **Attorney and Client.** In admitting a lawyer to the bar and granting him a license to practice law, it is with the understanding that he will faithfully discharge his duties, uphold and obey the Constitution and laws of the state, observe established standards and codes of professional ethics, maintain the respect due to courts of justice, and abstain from all offensive practices which cast reproach on courts and the profession of law.
2. ———. A restitution of funds wrongfully converted by a lawyer, after he is faced with legal accountability, is not an exoneration of his professional misconduct.
3. ———. A duty rests on the courts to maintain the integrity of the legal profession by disbarring attorneys who indulge in practices designed to bring the courts or the profession into disrepute, or to perpetrate a fraud on the courts, or to corrupt and defeat the administration of justice.

Original Action. *Judgment of Disbarment.*

Clarence S. Beck, Attorney General, and *Robert A. Nelson,* for relator.

Louis Lightner and *George B. Boland,* for respondent.

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

WENKE, J.

This is an original disciplinary action initiated in this court against respondent, Edward F. Feehan, by the relator, Nebraska State Bar Association, through its Committee on Inquiry for the Sixth Judicial District. The charges in the complaint arise out of the respondent's conduct in handling the affairs of the estate of Edward J. Patterson, deceased. Respondent filed an answer to this complaint. Thereupon the relator asked that a referee be appointed to take the evidence and make a report and recommendation to the court. This request was granted and Daniel Stubbs of Alliance, Nebraska, was appointed. A hearing was had and, based on the evidence introduced thereat, the referee recommended that disciplinary action be taken against respondent. Respondent took no exceptions to this report. The cause is now here on relator's motion for judgment on the referee's report and for judgment of disbarment.

Respondent was admitted to the practice of law in this state on August 20, 1945. Immediately following his admission he associated himself in the active practice with Edward J. Patterson of Central City, Nebraska. Patterson had been actively practicing law in that city since about 1911. This association continued until Patterson died intestate on November 17, 1951. The heirs of the deceased employed respondent to handle all legal matters connected with administering the estate. John E. Patterson, a son of the deceased, was, on December 3, 1951, appointed special administrator of the estate by the county court of Merrick County. Thereafter, on December 17, 1951, John E. Patterson and a daughter of the deceased, Lillian Jean Saylor, were appointed administrators. Lillian Jean Saylor died on December 27, 1952. However, John E. Patterson continued to act as administrator of the estate until removed by the county court of Merrick County on July 13, 1953. Thereafter, on August 3, 1953, the county court of Merrick

County appointed Donald F. Sampson and Leo J. Armatys as administrators de bonis non of the Edward J. Patterson estate. The conduct complained of, and specifically set out in the complaint, relates to respondent's conduct in connection with this estate from the time of the appointment of John E. Patterson as special administrator on December 3, 1951, up to the time of his removal as administrator on July 13, 1953.

"In admitting a lawyer to the bar and granting him a license to practice law, it is with the understanding that he will faithfully discharge his duties, uphold and obey the Constitution and laws of the state, observe established standards and codes of professional ethics, maintain the respect due to courts of justice, and abstain from all offensive practices which cast reproach on courts and the profession of law." State ex rel. Nebraska State Bar Assn. v. Hungerford, 159 Neb. 468, 67 N. W. 2d 759.

Article X, part IV, Rules of the Supreme Court, provides:

"Rules of Professional Conduct.

"The ethical standards relating to the practice of law in this state shall be the canons of Professional Ethics of the American Bar Association, including the additions and amendments as of January 1, 1945, thereto, and those which may from time to time be approved by the Supreme Court."

In this respect canon No. 11, Canons of Professional Ethics, American Bar Association, provides: "Money of the client or collected for the client or other trust property coming into the possession of the lawyer should be reported and accounted for promptly, and should not under any circumstances be commingled with his own or be used by him."

The complaint of the Committee on Inquiry for the Sixth Judicial District sets forth numerous specific violations of the foregoing canon. The evidence adduced at the hearing before the referee fully substantiates each

of the charges made. It would serve no useful purpose to enumerate the specific charges and the evidence offered in support thereof. A complete and accurate statement of the facts adduced and the conclusions to be drawn therefrom will be found in the referee's report. It will suffice here to state the record discloses a flagrant abuse of this canon by the respondent. The evidence adduced establishes that respondent completely lacks professional honesty and integrity.

After they were appointed the administrators de bonis non of the estate of Edward J. Patterson, deceased, Donald F. Sampson and Leo J. Armatys proceeded to straighten out the affairs of the estate to the best of their ability and, after much effort on their part, were, as of January 21, 1954, successful in obtaining from respondent an admission that he owed the estate $9,400.44 and were able to secure payment thereof.

However, as stated in State ex rel. Nebraska State Bar Assn. v. Hungerford, *supra*: "A restitution of funds wrongfully converted by a lawyer, after he is faced with legal accountability, is not an exoneration of his professional misconduct."

We think the recommendation of the referee that disciplinary action should be taken against respondent is, in view of the record before us, well taken. Considering respondent's conduct in connection with his handling of the affairs of this estate, which were entrusted to him, we think he is no longer a fit person to be further entrusted with such responsibility.

"A duty rests on the courts to maintain the integrity of the legal profession by disbarring attorneys who indulge in practices designed to bring the courts or the profession into disrepute, or to perpetrate a fraud on the courts, or to corrupt and defeat the administration of justice." State ex rel. Nebraska State Bar Assn. v. Niklaus, 149 Neb. 859, 3 N. W. 2d 145.

It is therefore ordered that the license of the respondent to practice the profession of law be and is revoked

and he is disbarred from the further practice of the profession of law in the State of Nebraska. Costs of this proceeding are taxed to respondent.

JUDGMENT OF DISBARMENT.

ROY D. ARMSTEAD, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.
71 N. W. 2d 317

Filed July 15, 1955. No. 33751.

1. **Adultery.** Mere disposition and opportunity to commit adultery are not alone sufficient to justify a conviction therefor.
2. ———. Adultery may be established by circumstantial evidence, provided the circumstances adduced exclude every other reasonable hypothesis save the guilt of accused. Mere suspicion and conjecture are insufficient to sustain a conviction.

ERROR to the district court for Hall County: WILLIAM F. SPIKES, JUDGE. *Reversed and remanded with directions to dismiss.*

Kelly & Kelly, for plaintiff in error.

Clarence S. Beck, Attorney General, and *Robert V. Hoagland,* for defendant in error.

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

CHAPPELL, J.

An information, filed June 23, 1954, by the county attorney of Hall County, charged that on or about June 19, 1954, defendant, Roy Armstead, a married man, unlawfully and wrongfully lived and cohabited with a named unmarried woman in a state of adultery. Defendant, when tried to a jury, pleaded not guilty. At conclusion of the State's evidence-in-chief, defendant, reserving his right to introduce evidence in his behalf, moved to dismiss for failure of sufficient proof to estab-

lish a cause of action. The motion was overruled. Again, at conclusion of all the evidence, defendant renewed the motion and it was again overruled. The cause was then submitted to the jury, and it found defendant guilty. Thereafter, his motion for new trial or to dismiss for failure of proof was overruled, and he was sentenced to serve 5 months in the Hall County jail and pay costs. Therefrom he prosecuted error to this court, assigning, insofar as important here, that the verdict was not sustained by sufficient evidence. We sustain the assignment.

Section 28-902, R. R. S. 1943, provides in part: "If * * * any married man shall hereafter commit adultery, or desert his wife and live and cohabit with another woman * * * every person so offending shall upon conviction thereof be imprisoned in the county jail not exceeding one year."

At the outset of the trial, it was stipulated that defendant was a married man having a living wife from whom he was not divorced on June 19, 1954, or prior thereto. Here it will be noted also that at conclusion of the State's evidence, and after it had rested, it was stipulated that defendant's 13-year-old brother, if present and sworn, would testify that prior to the time school was dismissed in May, he stayed weekends in defendant's trailer, and that after school was dismissed, he lived in the trailer with defendant until June 19, 1954, during which time he and defendant occupied the same bed.

The State called four witnesses. All of them were women who lived in the neighborhood of defendant's trailer house, located at 411 North Carey Street in Grand Island, since the spring of 1954. In reciting the incidents hereinafter set forth, such witnesses, with an exception related hereafter, pointed out no specific dates upon which they allegedly occurred.

One such witness, who lived two doors south of defendant's trailer, testified that she never saw defendant's wife there, but she did see defendant and the named

woman around the premises. She saw the woman around there morning and evening. She saw her dressed in jeans, blouse, shirt, or housedress, like any woman does while working in the yard or feeding chickens.

Another witness, who lived across the alley from defendant's trailer, testified that she had seen the woman outside the trailer in the evening feeding some chickens and ducks. One time she had on a housecoat, but at all other times she was dressed like any woman should be when outside. She never saw the woman do any washing, and the only time she saw defendant was at noon when the woman would take him to work. It was not very often that she saw the woman there at night.

Another witness lived in a house rented from defendant's parents until she moved out on June 27, 1954. It was located on a lot next to defendant's trailer. She testified that defendant's parents and the woman were there quite often. At intervals the woman would be gone during the day. Otherwise, she seemed to be there most of the time. She saw her feeding the chickens and ducks, or working in the garden evenings. Much of the time she was dressed in a housedress, skirt and blouse, or jeans and blouse. She saw defendant, the woman, and a truck driver have supper together out in the yard. Once she saw the woman go from the trailer to the basement located right under the witness' kitchen, to answer the telephone, while she was dressed in a house coat. Once she saw her do so while dressed in a slip. She saw defendant and the woman together in defendant's trailer. The back end or bedroom part of defendant's trailer was right opposite the bathroom window of the witness' house. She could look out of her bathroom window and see into the bedroom part of the trailer when the trailer door thereto was open. She could also look out of her kitchen window into defendant's kitchen when the trailer door thereto was open, if she was possessed to do so.

She testified that "On the week end of Memorial week end" about midnight or after, she was awakened by a lot of argument, so she went into her bathroom and looking out the window saw the woman in her underwear in the bedrom part of the trailer. She heard defendant, who was also there, tell the woman that "if she wanted to leave she would have to walk * * *." She said that she did not see any other people around at that time, and that later, when the light went out she still heard them talking. In that regard, we must remember that the bedroom door into the trailer must have then been open, as the witness admitted it was, or she could not have seen them. It seems strange if something were wrong that they would leave the outside bedroom door open. Further, there is no evidence that defendant was not fully dressed at all times, or that the woman did not leave the trailer as she had threatened to do. It is not disputed that the woman actually lived at 405 East Eighth Street in Grand Island. Also, the witness admitted that she had seen defendant's truck driver around the premises at times, and that she had seen defendant's 13-year-old brother there during the daytime after school was out.

The other witness for the State lived one lot distant north from defendant's trailer. She testified that she had seen defendant and the woman around the premises. She had seen them come out of defendant's trailer as early as 6 or 7 a. m. Defendant would leave with a truck and the woman would feed the chickens and ducks, of which they had a large flock. They also had a large garden. The woman was fully dressed at all times except once, when she saw her dressed in a slip. She would drive to and from the premises in her own car, and the witness had seen her with defendant in the car or in a truck, although for some time there was a driver who drove defendant's truck.

On the "day after Memorial, the 31st day of May" the witness and her husband were awakened by screaming

about 12:30 at night, so her husband thought there was somebody coming to the door and he jumped out of bed and ran to the door, but it was the woman and a number of other people, probably having a party. She said the woman was seen "running down the road bawling," and that there were cars running up and down the alley and they did not quiet down until about 4 a. m. It is not clear, except by inference, that such incident was the same one heretofore described by the preceding witness as occurring "on the week end of Memorial week end." If it were the same incident, which seems entirely reasonable, then a number of other people were there at the time, and the woman, it may be inferred, ran down the road and left the premises as she wanted to do, before the lights went out in the trailer. The witness also admitted that she had once seen defendant's 13-year-old brother there after school was out.

Defendant testified in his own behalf, and it was not denied, that he had a 50-50 partnership with the woman in the trucking business. He owned one truck and she owned one. One was registered in his name and one in the name of both of them. The trailer was used as an office. Defendant supervised the trucking operations while the woman answered the telephone, kept all books and records, kept and figured up their account at the end of the day, collected all income, and after paying the bills, gave defendant his percentage of the income. He denied that she ever worked in a slip. The telephone was for a time located in the basement next door, with an outside signal bell, but his near neighbor complained of its ringing, and it was moved into the trailer. The woman was required to be in the trailer from early morning until sometimes late in the evening. She fed the chickens because she owned half of them, to be used by her as food during the winter months when the trucking business was slack. While working on a particularly-described job moving dirt for an engineering company, they worked 24 hours a day until someone complained

about the operation and they were required to shut down. Defendant did no driving while living in the trailer, because his license, for some unexplained reason, was suspended for several months. During that period defendant employed a truck driver who lived with him 4 or 5 months and slept in the trailer for some time prior to June 19, 1954. On that date, defendant sent the trucks out to haul dirt and he spent the evening digging a sewer line from his trailer to his parents' house, but found that it was illegal and did not complete the job. Defendant's 13-year-old brother stayed with him some of the time. Defendant testified that he never had intercourse with the woman or at any time ever lived with her or lived in a state of adultery with her. At time of trial he lived in Lexington where he had been working for some time on a gravel job.

The named woman testified as a witness called by defendant. She said she lived at 405 East Eighth Street, Grand Island, and was in the trucking business with defendant. She denied that she had ever lived in a state of adultery with defendant. She denied that she had changed her address to Lexington, but said that she had been down there to see how things were going on.

A mechanic was called as a witness by defendant. He worked on defendant's trucks two or three times a week during May and June, when they came in at night, in order to prepare them for morning work the next day. Sometimes he worked late into the night. He sometimes saw the woman there early in the evening, but never saw her there late at night. A truck driver lived in the trailer with defendant and he would often be seen there. Sometimes he would be in bed in the trailer. The witness sometimes awakened defendant after he was in bed. He also saw defendant's 13-year-old brother there part of the time.

Another witness for defendant was a boyhood friend. He visited with defendant evenings sometimes three or four times a week while defendant lived in the trailer.

He sometimes saw the woman there. She was always fully dressed. Her conduct and that of defendant was only like any other two people would act who were friends.

In Preston v. State, 107 Neb. 307, 185 N. W. 1004, this court said: "We are aware of the rule of this court that it is not necessary, to establish adultery, to have the testimony of a disinterested eye witness. 'Adultery, like any other fact, may be established by circumstantial evidence.' Reinhardt v. State, 101 Neb. 667. In Blue v. State, 86 Neb. 189, this court held: 'Without determining whether in all cases in a prosecution for adultery the unsupported evidence of one of the parties will justify the conviction of the other party when fully and circumstantially contradicted by the defendant and another apparently credible witness, under the circumstances shown in the record in this case, it is held that the wholly unsupported evidence of the complaining witness will not justify the conviction of the defendant.' * * * In connection with the rule quoted from Blue v. State, *supra,* we would go further and hold that mere disposition and opportunity to commit adultery are not alone sufficient to justify a conviction, but there must be circumstances inconsistent with any other reasonable hypothesis. State v. Trachsel, 150 Ia. 135. See, also, State v. Taylor, 160 Ia. 328; State v. Wiltsey, 103 Ia. 54. 'The circumstances must be such as will lead the guarded discretion of a reasonable man to the conclusion that the offense has been committed (here State v. Way, 5 Neb. 283, is cited in the note), and should be so cogent as to exclude every reasonable hypothesis (except that) of guilt. If the facts shown can be reconciled with innocence, they are insufficient to sustain a conviction.' 2 C. J. 22, sec. 44."

In the case at bar, it will be noted that both defendant and the named woman unequivocally denied any adulterous relations, and no fact or circumstance was shown which could not be reconciled with innocence.

In State v. Chaney, 110 Iowa 199, 81 N. W. 454, which presented a comparable situation, the court said: "He flatly denies the charge. There is no fact shown that cannot be reconciled with his innocence. While direct proof of the act of intercourse is not required in cases of this nature, it is necessary that the circumstances shown be inconsistent with innocent conduct. Even in civil cases we have held facts stronger than those here shown to be insufficient to sustain a charge of adultery. Aitchison v. Aitchison, 99 Iowa, 93; Carlisle v. Carlisle, 99 Iowa, 247. We are not inclined to say that defendant may be convicted of a felony upon a showing of facts which would not be enough to establish the charge of adultery in an action for a divorce."

Likewise, in State v. Thompson, 133 Iowa 741, 111 N. W. 319, it is said: "However wicked the heart, the law will not punish save for the overt act, and every citizen, whatever may be his propensities, is presumed to be allegiant to the law until the contrary is made to appear from tangible evidence. We do not say that this offense may not be established by circumstantial evidence, nor that the disposition of the parties accused toward each other and opportunity are not important circumstances to be considered by the jury. Quite the contrary rule has been repeatedly anounced by this court. * * * But the circumstances must be such as will lead the guarded discretion of a reasonable man to the conclusion that the offense has been committed. Whatever the disposition, the mere fact that the parties may have been in each other's company, under such circumstances that the act might have occurred, will not alone justify the conclusion that it actually did. There must be some circumstances, in addition to the disposition and opportunity, tending to rebut the presumption of innocence which continues until overcome by proof."

Also, as said in State v. Trachsel, 150 Iowa 135, 129 N. W. 736: "Conceding that the evidence tended to show an adulterous disposition as between the parties, and a

possibility that they might have had criminal relations on the occasion in question, it did not, we think, show even circumstantially that any criminal act had taken place. Mere disposition and opportunity are not alone sufficient. There must be circumstances inconsistent with any other reasonable hypothesis showing the fact of criminal connection."

In the case at bar there is no evidence whatever of any improper familiarities or that defendant ever in the slightest even caressed the woman involved or demonstrated any affection or desire to have sexual relations with her. There is no such evidence of disposition, and only opportunity appears. Further, there is no evidence that defendant had deserted his wife. Every fact and circumstance adduced by the State and presented by defendant can be reconciled with innocence, and cannot be said to be inconsistent with any other reasonable hypothesis except guilt.

In State v. Gardner, 198 Iowa 1308, 201 N. W. 2, the court said: "While it is true that this court is not the trier of facts, still we have authority to set aside a conviction which is not justified. We recognize the fact, as we have often said, that cases of this kind are difficult to prove, and even more difficult to disprove; that the charge is one easy to make, either by a designing woman or her husband, if he has some purpose of his own to accomplish. Sometimes circumstances may appear to be suspicious, on the face of it, and yet be entirely innocent. Often trifling circumstances may be magnified and become strong in the estimation of a jealous husband, or one who has some other motive. Some of the circumstances in this case relied upon by the State are natural and harmless, unless a strained or unnatural construction is placed upon them. * * * It would not do to say that a man and woman may not be together alone as neighbors, without having the name of the woman blackened and the man sent to the penitentiary on mere suspicion. The evidence must be clear, and the crime established

beyond a reasonable doubt. The fact of sexual intercourse must be shown circumstantially or otherwise."

Finally, in 2 C. J. S., Adultery, § 24, p. 489, it is said: "Adultery may be established by circumstantial evidence, provided the circumstances adduced exclude every other reasonable hypothesis save the guilt of accused, mere suspicion and conjecture being insufficient to sustain a conviction for adultery."

The rules heretofore set forth are controlling here, and for reasons heretofore stated, we conclude that the evidence was insufficient to sustain conviction and sentence of defendant. Therefore, the judgment of the trial court should be and hereby is reversed and the cause is remanded with directions to dismiss the same. All costs are taxed to the State.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

WALTER R. MULLIKIN, AS TRUSTEE IN BANKRUPTCY OF PEDERSEN-AYARS FURNITURE COMPANY, A CO-PARTNERSHIP, APPELLANT, V. MAYSEL I. PEDERSEN ET AL., APPELLEES.
71 N. W. 2d 485

Filed July 15, 1955. No. 33758.

1. **Insurance.** The provisions of section 44-371, R. R. S. 1943, are not applicable to the proceeds of an insurance policy on the life of an insured, the cost of which was paid in whole or in part by funds of another wrongfully, illegally, or fraudulently procured by the insured.
2. **Trusts.** The burden of establishing a constructive trust is upon the person who bases his right thereon and he must do so by evidence that is clear, satisfactory, and convincing.
3. **Evidence.** Circumstantial evidence is insufficient to warrant a recovery in a civil case unless the circumstances proved are of such a nature and so related to each other that only one conclusion can be reasonably drawn therefrom.

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

Donald V. Lowe, for appellant.

Maupin & Dent, Richard W. Satterfield, and *James N. Ackerman,* for appellees.

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

BOSLAUGH, J.

This is an action in equity to have a trust declared and impressed upon the proceeds of a life insurance policy on the life of Hilbert F. Pedersen, payable to his wife, because as it is claimed the funds used by the insured to satisfy the cost of the insurance were wrongfully obtained by him from the partnership of which he was a member.

Pedersen-Ayars Furniture was organized March 5, 1947, by Hilbert F. Pedersen and Homer R. Ayars of North Platte as a partnership in accordance with the Uniform Partnership Act of Nebraska to engage in and conduct a retail furniture, floor coverings, and appliance business in that city. Its capital structure was $34,000 apportioned to the organizers as the only members thereof on the basis of $20,000 to Hilbert F. Pedersen and $14,000 to Homer R. Ayars. It was agreed that the partners should own the business and assets of the partnership 20/34ths by the former and 14/34ths by the latter; that the partners should each devote his entire time and efforts to the business and affairs of the firm; that each should until it was otherwise agreed receive monthly $250 as compensation; and that the compensation of each should always be an equal amount. Hilbert F. Pedersen was constituted general manager and was empowered to determine the policies of the organization.

Hilbert F. Pedersen, spoken of hereafter as deceased, died June 1, 1954. The partnership June 23, 1954, was on the petition of Homer R. Ayars, the surviving partner, adjudged a bankrupt by the United States District

Court for the District of Nebraska, and July 9, 1954, appellant was appointed and qualified as trustee of the estate of the bankrupt.

Deceased made application to Bankers Life Insurance Company of Nebraska July 24, 1952, for a policy of insurance on his life and it issued to him the next day a policy of insurance in the maximum amount of $10,000 in which Maysel I. Pedersen, his wife, was designated beneficiary. She survived him. The premiums on the policy were payable monthly. They were paid except the last which was due but not delinquent at the time of the death of the deceased and it was deducted from the proceeds of the policy as authorized by its terms.

The claim of appellant in this litigation is that all the premiums except the final one were paid by the deceased with funds of the partnership misappropriated to that use by him secretly without notice to, knowledge, or consent of his partner Homer R. Ayars and contrary to the terms of the articles of partnership; that during the time of the illegal abstraction and wrongful appropriation of the funds of the firm to the payment of the insurance premiums the deceased was acting in a fiduciary capacity for the firm and by virtue thereof he became and was a trustee of the policy for the partnership; that he held only the legal title thereof for the exclusive benefit of the partnership as the cestui que trust; that Maysel I. Pedersen claimed to be the only beneficiary of the policy of insurance, was attempting to appropriate to her use the proceeds thereof, and would do so unless prevented by the judgment of the court; and that the insurer unless prevented by the court would pay to the named beneficiary the proceeds of the policy. The relief asked was that the insurer be restrained from paying and the beneficiary be enjoined from receiving the proceeds of the insurance; that a trust be imposed upon the proceeds of the policy in favor of appellant; and that he have and receive the proceeds of the policy of insurance.

The Bankers Life Insurance Company of Nebraska

conceded the existence and validity of the policy of insurance on the life of deceased; the receipt of all premiums on its account except the last one due at the time of the death of the deceased; the deduction of it from the amount of the policy; the fact that Maysel I. Pedersen was the named beneficiary therein; and that the net amount of the insurance was held by the insurer subject to the rights of the beneficiary. The insurer offered to pay the amount due on the policy with interest as the court adjudged.

The substance of the answer of Maysel I. Pedersen was a denial of the allegations of appellant except she admitted the existence of the partnership and the adjudication of bankruptcy against it; that appellant was the trustee in bankruptcy; and that the policy of insurance on the life of the deceased duly issued by the insurer was in force at the time of the death of the deceased and Maysel I. Pedersen was beneficiary of the insurance. She asserted that the premiums on the policy were required to be paid monthly; that it granted a grace period of 31 days for the payment of any premium from the due date thereof; that the policy had no provisions for paid-up or extended insurance and it wholly terminated on the 31st day after any monthly premium thereon became due; and that the beneficiary to keep the policy in force for her benefit paid with her individual funds to the insurer premiums on the policy including those for the months of March and April 1954. If she had not done so the policy would have terminated before the death of the deceased and that no amount would have been realized from it.

The district court found that the motion of appellees for a dismissal of the petition of appellant made at the close of his evidence should be sustained; that the Bankers Life Insurance Company of Nebraska should pay the proceeds of the policy of insurance issued by it on the life of the deceased including any accruals thereon to the clerk of the district court; that when payment had

been made by the insurer it should be discharged from liability upon the contract of insurance and the temporary injunction issued herein should be dissolved; that the proceeds of the insurance policy were the property of appellee Maysel I. Pedersen; that the clerk of the court upon receipt of the amount thereof from the insurer should pay to appellee $9,158.20 and any accruals on the policy, and the clerk should retain $785.50, the amount of the funds of the partnership devoted to payment of premiums on the insurance contract, until the further order of the court; and that it was not possible for the court to determine from the proof produced whether the partnership funds used by deceased to pay insurance premiums on the policy were the distribution of firm assets to him or whether they were wrongfully received and appropriated by him and are recoverable as partnership property. A judgment was rendered in harmony with the findings made. A determination of the correctness thereof is the purpose of this appeal.

The ground of the claim of appellant that he is entitled to the insurance fund, the subject of this controversy, is that the premiums upon the policy were paid by money wrongfully taken by the insured from the partnership and that this affords a basis for equity to impress a trust upon the fund in favor of appellant to remedy a wrong done by the insured and to prevent the beneficiary profiting from the misappropriation and wrongful acts of the deceased. The claim of appellant that he should recover the entire fund realized from the insurance contract cannot prevail in any event because of a failure of proof that all of the cost of the insurance was satisfied with partnership funds. There is no authority which supports this claim. There are decisions that if a person wrongfully obtains money of another and uses it in the payment of premiums for insurance on his life a trust is created in favor of the person from whom the money was wrongfully, illegally, or fraudulently appropriated, and that the latter is entitled to such

portion of the total insurance as the amount of the premiums which have been paid from the money bears to the total premiums paid. Truelsch v. Miller, 186 Wis. 239, 202 N. W. 352, 38 A. L. R. 914; Vorlander v. Keyes, 1 F. 2d 67; Massachusetts Bonding & Ins. Co. v. Josselyn, 224 Mich. 159, 194 N. W. 548; Shaler v. Trowbridge, 28 N. J. Eq. 595; Brodie v. Barnes, 56 Cal. App. 2d 315, 132 P. 2d 595; Jansen v. Tyler, 151 Or. 268, 47 P. 2d 969, on rehearing, 151 Or. 288, 49 P. 2d 372; Proctor v. MacClaskey, 278 Mass. 238, 179 N. E. 600; Annotation, 38 A. L. R. 930; 29 Am. Jur., Insurance, § 1299, p. 969. In other jurisdictions the doctrine is that recovery in such a situation is limited to the amount of the premiums paid by the insured with wrongfully acquired money of another. Board of Public Instruction v. Mathis, 132 Fla. 289, 181 So. 147; Thum v. Wolstenholme, 21 Utah 446, 61 P. 537; Succession of Onorato, 219 La. 1, 51 So. 2d 804, 24 A. L. R. 2d 656; American Nat. Bank v. King, 158 Okl. 278, 13 P. 2d 164; Hubbard v. Stapp, 32 Ill. App. 541. This court has not considered or determined the rule which should govern in such a situation and it is not necessary to decide it in this case.

Maysel I. Pedersen, identified herein as appellee, argues that provisions of the insurance law of the state bar recovery by appellant. These are contained in section 44-371, R. R. S. 1943: "All money * * * and every benefit accruing under * * * any policy or certificate of life insurance payable to a beneficiary other than the estate of the insured * * * heretofore or hereafter issued, shall be exempt from * * * all claims of creditors of the insured, and of the beneficiary if related to the insured by blood or marriage, in the absence of a written agreement or assignment to the contrary." The right to the relief demanded by the appellant does not depend upon a written agreement concerning or an assignment of the insurance involved in this case. It is not controverted that the appellee was the named beneficiary and the wife of the insured. The inappli-

cability of the statute is asserted by the appellant because of his claim that the cost of the insurance was paid with funds of the partnership wrongfully misappropriated and used by the deceased.

The statute does not operate to protect from the claim of a creditor the proceeds of an insurance policy on the life of the insured purchased with funds wrongfully, illegally, or fraudulently obtained by him from the creditor. Succession of Onorato, *supra*, considered a statutory provision that the proceeds of life insurance should be exempt from all liability from any debt not secured by a pledge or assignment of the policy or incurred by advance payments made on or against the policy. The insurance fund involved therein was the proceeds of insurance policies on the life of the insured, cost of which had been wrongfully paid with money in his hands as agent of named persons. It was argued that the statute protected the fund from the claim of the principals of the insured whose money without their knowledge was appropriated to the payment of the cost of the insurance. The court said: "The first question, then, is whether the exemption provided in the statute can be successfully used as a shield to protect the fruits of a fraudulent act. In other words, can such statute operate to validate a fraudulent act, and offer to one who practices such reprobated fraud a refuge or sanctuary for the property so taken, so that it can be placed beyond the reach of those defrauded? The answer must be in the negative, for it was never the intention of the Legislature by this exemption to encourage fraud and to provide a safe depository for stolen funds." In Truelsch v. Miller, *supra*, the court remarked: "The statutes guarding the rights of married women in insurance policies and homesteads are beneficent statutes, which are liberally construed in their behalf. But they are not designed to encourage fraud or to make such property a safe depository for stolen funds." It is said in Massachusetts Bonding &

Ins. Co. v. Josselyn, *supra:* "The fact that the wife of Reeber, instead of his estate, was named as beneficiary cannot affect plaintiff's rights. * * * While the statute (2 Comp. Laws 1915, § 9345) provides that moneys payable under policies in which the wife is named as beneficiary are not subject to the claims of creditors, the question here presented is not one of preference. Her right under the statute must yield to the paramount right of the estates, the moneys of which furnished the consideration for the investment." See, also, McConnell v. Henochsberg, 11 Tenn. App. 176; Jansen v. Tyler, *supra;* Shaler v. Trowbridge, *supra;* Exchange State Bank v. Poindexter, 137 Kans. 101, 19 P. 2d 705; 22 Appleman, Insurance Law and Practice, § 14585, p. 622. A much discussed and severely criticised decision to the contrary is Bennett v. Rosborough, 155 Ga. 265, 116 S. E. 788, 26 A. L. R. 1397, in which it is said: "Where the husband takes out a policy payable to his wife and does not change the beneficiary, creditors of the husband can not in this State, in a contest with the wife, take the money, even though premiums might have been paid at a time when the husband was insolvent or with money which had been stolen from the creditors." That case is definitely in the minority and is thought to be unsound. If it is proven that an insured used money wrongfully received by him to defray the cost of the insurance a denial of the exemption of the statute does not involve the taking away of the insurance money, as such, from the wife contrary to her designation as beneficiary by the insured, but merely the restoration to the creditor of the money to which he was equitably entitled which had been diverted to the payment of premiums which produced the insurance. The defrauded creditor in such a situation claims no positive benefit from the insurance but denies the power of the insured to put the money to which the former was equitably entitled beyond his reach by investing it in insurance for the benefit of the wife of the insured.

It is difficult to deny the justice of this. The statute of this state above quoted is not applicable and does not constitute a defense to the claim of appellant.

It is insisted by appellee that the proof is inadequate to justify any recovery by appellant. The deceased and Homer R. Ayars, hereafter spoken of as Ayars, the members of Pedersen & Ayars Furniture, operated it in a retail business for the sale of furniture, floor coverings, and household appliances from the time the firm was organized in March 1947, until the death of the deceased June 1, 1954. There is no showing of what was done with the partnership, its business, and assets from then until the adjudication of bankruptcy against the partnership.

The partners were each active in the conduct of the business and affairs of the firm. The deceased was designated manager thereof and dictated its policies. He had charge of the office and the routine matters in the conduct of the business. Ayars conducted sales, did part of the buying, looked after the inventory, and on occasions attended to payments of items of indebtedness of the firm. He would direct the bookkeeper to write any check necessary to be used in paying such items and he and the bookkeeper would sign it. The articles of partnership required all its funds to be deposited in a store account and to be withdrawn only by checks on the account signed by both partners but the practice was for both partners or one of them and the bookkeeper to sign its checks. The bookkeeper was employed in May 1951 and she continued until the business closed. Her hours were from 1 to 5:30 p. m. on each business day. It was probably because of this that she signed few checks with one of the partners as compared with the total number of checks made. The partners each signed incompleted blank checks and left them at the store where they could be used. Ayars did this oftener than the deceased. They also each signed checks after they had been completed except as

to signatures. Ayars testified that he could not identify any particular check as to whether it had been signed before or after it was completed by having the blank spaces on it properly filled. It is a fair inference that Ayars had access to the papers, books, and records of the firm. In any event he did not say when he was a witness that he did not have. It was a practice of each partner to pay individual items of indebtedness with partnership checks drawn on the partnership account. The books and records of the firm were submitted each month to Hansen & Fuenning, auditors and accountants of North Platte, and they made a report to it of their examination and the result thereof each year, and there is some indication a report was made by the accountants each month. None of these were produced or accounted for and no member of the firm of the accountants was called as a witness. An embezzler does not generally submit the records of his defalcation to auditors and accountants for an examination and report.

There is no direct evidence that deceased paid any cost of the insurance with funds wrongfully secured by him. No witness testified that deceased improperly appropriated any money or thing of value from the partnership or that premiums upon the policy on his life were satisfied with any funds or property of the partnership. The proof of appellant in this regard is entirely circumstantial. The proof in this respect is that deceased used checks drawn on the partnership account to the order of his landlord in payment of rental of the residence property where deceased lived; that there were checks drawn on the firm account payable to the order of the insurance company used by deceased to pay premiums on the policy on his life; and that there were checks payable to deceased drawn on the firm account but the purpose for which they were drawn or used is not indicated by any evidence. All of these checks except three were signed by both partners.

It is not asserted or attempted to be established that

the deceased was insolvent, what his assets or income other than from the firm were, or how his salary was disposed of. There is an entire absence of proof when, before the partnership was adjudged bankrupt, it became insolvent and the value of its assets or the amount of its obligations. The unsupported statement of Ayars that he and the deceased each drew a regular salary of $250 a month, $125 every 2 weeks "most of the time" is contrary to the record evidence and cannot be accepted as the fact. There were eight checks of the firm payable to the deceased and endorsed by him that were identified by Ayars as salary checks given to deceased. The date and the amount of these follow: 7-22-1952, $125; 11-7-1952, $54.38; 11-25-1952, $55.16; 11-26-1952, $25.60; 12-6-1952, $74.95; 2-6-1953, $100; 7-21-1953, $75; 7-22-1953, $125. This is convincing proof that deceased did not draw a regular salary or a definite amount, one-half thereof every 2 weeks.

The records of the partnership introduced show that at irregular times in varying amounts between October 3, 1952, and June 12, 1954, Ayars received from the partnership about $1,200 in excess of the amount paid by it to deceased. The refutation of the claim of Ayars concerning regularity of the monthly amount of salary to each partner and the payment thereof in equal amounts each 2 weeks is complete by such items as $418.90 received by Ayars in January 1953, consisting of $300 January 20 and $118.90 January 22, and $325 in February 1954.

The partner of the deceased testified for appellant but he did not say that the deceased wrongfully took or that he improperly used any of the property or assets of the partnership. The burden was on appellant to establish that deceased improperly appropriated assets of the partnership to the payment of the cost of the insurance or of a part of it. The nature of the trust appellant seeks to have impressed on the insurance policy is characterized by his allegation that the deceased was

a trustee ex maleficio of the insurance contract for the partnership. In Peterson v. Massey, 155 Neb. 829, 53 N. W. 2d 912, it is said: "The burden of establishing a constructive trust is always upon the person who bases his rights thereon and he must do so by evidence that is clear, satisfactory, and convincing." The circumstantial evidence relied upon by appellant is not sufficient to establish the indispensable elements of his case. In re Estate of Bingaman, 155 Neb. 24, 50 N. W. 2d 523, states the manner of considering this class of evidence: "Circumstantial evidence is insufficient to sustain a verdict or to require submission of a case to a jury unless the circumstances proved by the evidence are of such a nature and so related to each other that only one conclusion can be reasonably drawn therefrom." Appellant has not met the requirements of the law in these respects.

The proof in the case is limited to evidence offered by appellant. There is no irreconcilable conflict to resolve. This is an equity case and the court is obligated to consider and determine it de novo without regard to what was done in the trial court. Appellee is entitled to recover all of the proceeds of the insurance policy including interest thereon and any accruals to the policy, and to have the temporary injunction granted therein vacated and dissolved.

The cross-appeal of appellee cannot be sustained. The rule relied upon therein is to the effect that one partner may not maintain an action against his copartner for an amount alleged to be due him on account of partnership transactions where no settlement of the partnership accounts and business has been had. Lord v. Peaks, 41 Neb. 891, 60 N. W. 353; Sanley v. Davies, 113 Neb. 614, 204 N. W. 385. The present case is not a suit by one partner against his copartner. It is an action by the trustee in bankruptcy of the estate of the bankrupt. The bankrupt is the partnership, a legal entity. The trustee represents the bankrupt. He ap-

pears as a party to this litigation in that capacity. 6 Am. Jur. (Rev. Ed.), Bankruptcy, § 637, p. 915. The cross-appeal should be and it is dismissed.

The judgment should be and it is reversed and the cause is remanded to the district court for Lincoln County with directions to render and enter a judgment in the cause in favor of Maysel I. Pedersen, and against the Bankers Life Insurance Company of Nebraska, for the full amount of the proceeds of the policy No. 330765 issued on the life of Hilbert F. Pedersen July 25, 1952, in the sum of $9,943.70, plus any interest thereon or other accruals to the policy and with interest on the total amount of the judgment as provided by law, and vacating and dissolving the temporary injunction granted and allowed in this case August 5, 1954. The costs of the action should be and they are taxed to appellant.

REVERSED AND REMANDED WITH DIRECTIONS.

THOMAS SHIELDS, ADMINISTRATOR OF THE ESTATE OF ROBERT SHIELDS, DECEASED, APPELLEE, V. COUNTY OF BUFFALO ET AL., APPELLANTS.
71 N. W. 2d 701

Filed August 19, 1955. No. 33704.

1. **Trial.** It is the duty of the trial court to present to the jury those issues which are raised by the pleadings and which find support in the evidence.
2. **Trial: Appeal and Error.** However, it is error, which may be prejudicial, to include issues which find no support in the evidence.
3. **Counties: Highways.** 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 would require it to do so at a particular location.
4. ———: ———. At common law there was no right of action against a county for the recovery of damages resulting from a defective highway or bridge. In this state the source and ex-

tent of liability of a county for damages of this character are statutory.

5. ———: ———. 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.

6. **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.

7. **Automobiles: Negligence.** 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.

8. **Negligence.** Negligence is a question of fact and may be proved by circumstantial evidence and physical facts. All that the law requires is that the facts and circumstances proved, together with the inferences that may be properly drawn therefrom, shall indicate with reasonable certainty the negligent act charged.

9. **Automobiles: Evidence.** The question of the admissibility of evidence as to the speed of a vehicle shortly prior to the time of an accident rests largely in the discretion of the court.

10. ———: ———. Various factors, such as skid marks, distance traveled after impact, and force of impact, constitute pertinent evidence in arriving at an estimate of the rate of speed of an automobile, either by those involved in an accident or those in authority investigating the accident immediately thereafter.

11. **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.

12. ———: ———. However, if proof is offered of what was paid for materials furnished and services rendered in conducting a funeral, and no objection is made thereto on the ground that the amount so paid is not the proper basis for recovery, it will be

presumed the objection thereto on that basis is waived and that the amount so paid is the fair and reasonable value thereof.

13. **Damages: Death.** The measure of damage in an action by the personal representative of a child, for the benefit of its parents, to recover for wrongfully causing the death of such child, is the present worth in money of the contributions having a general monetary value of which the parents are shown by the evidence with reasonable certainty to have been deprived by the act causing the death, and those contributions that are only probable, or conjectural, may not be included in the amount of such damage.
14. **Damages.** Economic conditions, including the low purchasing power of money for the necessities of life, is a factor in determining the amount of a verdict.
15. **Damages: Appeal and Error.** The fixing of the damages is the function of the jury and unless it can be shown to be so exorbitant as to indicate passion, prejudice, mistake, or a complete disregard of the law and the evidence, its judgment will be sustained.

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

Robert L. Haines, Hamer, Tye & Worlock, and *Blackledge & Sidner,* for appellants.

Munro & Parker, for appellee.

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

WENKE, J.

Thomas Shields, as administrator of the estate of Robert Shields, deceased, brought this action in the district court for Buffalo County against the County of Buffalo, Douglas Anstine, and George Sobotka. The action is brought under and pursuant to the authority of sections 30-809 and 30-810, R. R. S. 1943, often referred to as Lord Campbell's Act, is for the exclusive benefit of the next of kin of the deceased, and is based on alleged acts of negligence claimed to have been the proximate cause of the death of Robert Shields and for which it is contended defendants are liable.

Issues were joined and trial had. Plaintiff recovered a verdict against all of the defendants in the sum of $10,931.65. Each of the defendants separately filed a motion for judgment notwithstanding the verdict or, in the alternative, for a new trial. These motions also included a request that in case both the foregoing were denied that the court reduce the amount of the verdict by requiring a remittitur because the verdict is excessive. The court overruled all of these motions and the defendants have appealed therefrom.

We will separately discuss the issues raised by the county but discuss those raised by Anstine and Sobotka together for Anstine was an employee of Sobotka and admittedly engaged within the scope of this employment at the time of the accident.

A person is liable for the negligent operation of an automobile by his servant where such servant, at the time of the accident, was engaged in his employer's business with the latter's knowledge and consent. Shaffer v. Thull, 147 Neb. 947, 25 N. W. 2d 755.

The accident in which Robert Shields was killed happened shortly before 11 p. m. on Friday, July 3, 1953, on a county road some 6½ miles south of Ravenna, Nebraska, and just south of what is referred to in the record as the Zeller bridge. Robert Shields was, just before the accident, driving his father's 1950 Oldsmobile sedan north on this county road, which road was built and is maintained by Buffalo County and referred to in the record as the Ravenna road, it running straight south from that city. At the same time Anstine was driving his 1949 Lincoln sedan on this road. At a point about 70 feet south of the Zeller bridge, which bridge is on the Ravenna road and was built and is maintained by Buffalo County, the Lincoln sedan hit the Oldsmobile sedan and killed four of the five teenagers riding therein, the fifth miraculously and fortunately survived. Robert Shields was 16 years of age at the time. We will

discuss the facts in more detail in connection with our discussion of the questions raised.

In considering several of the questions hereinafter discussed the following principles are applicable:

"A motion for directed verdict or for judgment notwithstanding the verdict must, for the purpose of decision thereon, be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed. Such party is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference that can reasonably be deduced from the evidence." Stark v. Turner, 154 Neb. 268, 47 N. W. 2d 569.

"In an action where there is any evidence which will support a finding for a party having the burden of proof, the trial court cannot disregard it and direct a verdict against him." Stark v. Turner, *supra*.

"In a law action, where the case is presented to the jury under proper instructions, a verdict based upon conflicting evidence will not be set aside on appeal unless clearly wrong." Remmenga v. Selk, 150 Neb. 401, 34 N. W. 2d 757.

"In testing the sufficiency of evidence to support a verdict it must be considered in the light most favorable to the successful party, that is, every controverted fact must be resolved in his favor and he should have the benefit of every inference that can reasonably be deduced therefrom." Remmenga v. Selk, *supra*.

"It is not the province of this court in reviewing the record in an action at law to resolve conflicts in or weigh the evidence." Snyder v. Farmers Irr. Dist., 157 Neb. 771, 61 N. W. 2d 557.

"It is presumed in such an action that controverted facts were decided by the jury in favor of the successful party, and its finding based on conflicting evidence will not be disturbed unless clearly wrong." Snyder v. Farmers Irr. Dist., *supra*.

Insofar as Buffalo County is concerned, the court submitted the following specifications of negligence:

"8. That the defendant County of Buffalo carelessly and negligently failed to maintain a sufficient bridge at said place on said county road in the following particulars:

"(a) In failing to maintain said bridge so that it was fit for public traffic to cross the same.

"(b) In failing to maintain a guide rail to prevent vehicles from running into the batter chord of said bridge.

"(c) In permitting said bridge to become out of repair.

"(d) In failing to replace said bridge when the defendant County of Buffalo knew or should have known that said truss type bridge was out of plumb.

"(e) In failing to warn the public that said bridge was narrower than the roadway approaching the bridge.

"(f) In failing to warn the public and particularly the defendant Douglas Anstine that the northwest batter chord was bent to the east.

"(g) In maintaining said bridge when it was old, rusty and obsolete and not fit for modern traffic and heavy loads that used said county road and bridge.

"(h) In failing to warn the public and particularly the defendant Douglas Anstine that the upper truss or banister was bent over the bridge floor."

The county contends it was prejudicial error for the trial court to include specifications of negligence in the foregoing instruction which find no support in the evidence.

"It is the duty of the trial court to present to the jury those issues which are raised by the pleadings and which find support in the evidence." Oliver v. Oliver, 159 Neb. 218, 66 N. W. 2d 420. See, also, Franks v. Jirdon, 146 Neb. 585, 20 N. W. 2d 597.

"In stating the issues to the jury it is error, which may be prejudicial, for the trial court to include allegations

of which there is no proof." Oliver v. Oliver, *supra.*

In this respect it is likewise error to submit an issue of negligence in regard to a matter where no duty is owing. This latter has application to specifications (b) and (e). We held in Olson v. County of Wayne, 157 Neb. 213, 59 N. W. 2d 400: "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." We went on in the opinion to say: "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."

Appellee contends the trial court, by instructions Nos. 21 and 22, submitted the foregoing proposition to the jury as a question of fact and that no error occurred by its doing so, stating: "It cannot be said, in view of this evidence, that as a matter of law, there was no duty to maintain signs or guide rails."

The evidence adduced as to the bridge, and the situation existing there, discloses the following: It was a compression type of bridge with steel frame and wooden bed or floor that was covered with gravel; the bridge was about 40 feet long and 16 feet wide, the metal part of which was rusty in appearance; the graveled and maintained portion of the road immediately to the north was 24 feet wide; there were no guide rails at the approach where the road narrows from 24 feet to the width of the bridge; there were no signs to warn a traveler of the fact that the bridge was narrower than the road itself; and there were some weeds and grasses growing in the ditch to the west and some, including sumac, growing in the creek or ravine over which the bridge extended

but there was nothing in the road that would have prevented any oncoming traveler from the north from seeing the bridge, as the road to the north is straight and slopes up only slightly from the bridge to a small knoll some 350 to 450 feet away.

Under this factual situation there was no duty on the part of the county to maintain guide rails at the approaches to the bridge nor to put up signs to warn the public that the bridge was narrower than the road approaching it. We find the submission of these two specifications was, under the circumstances shown, error, as it permitted the jury to speculate in regard thereto.

Appellee alleged the county was obligated to maintain and keep this bridge in repair. Specifications (a), (c), (d), (f), (g), and (h) relate to this duty, the county's failure to perform it, and its failure to warn the public in regard thereto.

"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." Olson v. County of Wayne, *supra.*

Section 39-834, R. R. S. 1943, insofar as here material, provides: "If special damage happens to any person, his team, carriage or other property 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, * * *."

"The word insufficiency in the statute referred to in the opinion means inadequate to the need, use, or purpose of the highway." Olson v. County of Wayne, *supra.*

"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." Olson v. County of Wayne, *supra.*

As stated in Olson v. County of Wayne, *supra:* "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." See, also, Wittwer v. County of Richardson, 153 Neb. 200, 43 N. W. 2d 505.

"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." Olson v. County of Wayne, *supra*. See, also, Bowerman v. Greenberg, 142 Neb. 721, 7 N. W. 2d 711.

" 'Negligence is not presumed; the mere happening of an accident does not prove negligence.' Bowers v. Kugler, 140 Neb. 684, 1 N. W. (2d) 299." Bowerman v. Greenberg, *supra*.

" 'The burden of proving a cause of action is not sustained by evidence from which negligence can only be surmised or conjectured.' Bowers v. Kugler, 140 Neb. 684, 1 N. W. (2d) 299." Bowerman v. Greenberg, *supra*.

The bridge involved had been used for many years. The trusses on each side of the floor of the bridge, and which were the supports thereof, consisted of three panels or parts. One was the horizontal panel on top, the other two were the sloping panels at each end, referred to as batter chords. The latter were anchored at the corners of the bridge by shoes. These shoes were riveted to caps or crossbeams attached to steel piling located at each end of the bridge. The bridge had a carrying capacity of 17 to 25 tons.

William G. Spahr, who was bridge superintendent for

the county in 1952, testified that his duties as such consisted of supervising and constructing bridges for the county; that when he examined this bridge he found the trusses were beginning to lean; that because of various factors the beams or trusses would not stay straight or plumb; that he thought the bridge ought to be replaced and ordered steel for that purpose; and that the last time he inspected it the lean was about 15°. However he also testified that the last time he inspected this bridge, which was shortly before January 1, 1953, that the needle beams had dropped a little but had not gone down far enough to affect the floor of the bridge; that the floor of the bridge was then level; and that the lean had not gone far enough to hurt anything. The only evidence as to the effect of a 15° lean of the trusses is that it would decrease the carrying capacity of the bridge somewhere between 5 to 10 percent and that it would not otherwise affect the stability thereof.

The evidence shows the road on which the accident happened is a well-traveled graded and graveled county road; that trucks and semitrailers carrying loads up to 700 or 800 bushels of grain and up to 11 tons of gravel used this road frequently. In fact, the evidence shows it was so used very shortly before the accident occurred and that no one using it for such purposes became aware of the fact that the bridge was in any way defective, if in fact it was. We find no evidence which would support a finding that the county did not use reasonable and ordinary care in the maintenance and repair of this bridge so that it would be, and was, reasonably safe for the traveling public.

But let us assume, for the sake of discussion, that the county was negligent in this regard. That fact alone would not make it liable for, as stated in the authorities quoted, such negligence would have to be established as the proximate cause of the accident or that it was a cause that proximately contributed thereto. As stated in Kennedy v. Chicago, R. I. & P. R. R. Co., 156 Neb.

345, 56 N. W. 2d 446: "Negligence which is the moving and effective cause of a happening is the proximate cause thereof."

The evidence shows that when the north end of the bridge collapsed the northwest batter chord of the bridge, which had been torn loose from its footing, was found under the wooden timbers of the floor or bed of the bridge; that this batter chord was bent downward into a "V" shape from a severe blow on the upperside or top thereof whereas it would have been bent upward had the bridge collapsed from an overload or overweight; and that the tearing loose of the footing of any batter chord would cause the bridge to collapse. The evidence shows that is what happened. Under this situation we can see no possible connection between the leaning of the trusses and the collapsing of the bridge. Such leaning was at most, under the circumstances here shown, a condition.

In this respect we have not overlooked the fact that Anstine testified he saw either the batter chord or handrail leaning in when he was about 25 feet from the bridge. At that time he admits he was traveling not less than 40 miles an hour and did not have time to apply his brakes in the fraction of a second after he saw it and before he hit the bridge. He said he was driving with his courtesy lights on, being blinded by the lights of an oncoming car, and that he did not see the handrail until it showed up white in his lights, which lights extended out about 25 to 30 feet.

"'* * * 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 * * *.' (Tomjack v. Chicago & N. W. Ry. Co., 116 Neb. 413, 217 N. W. 944.)" Olson v. County of Wayne, *supra*.

Of course the bright lights of any oncoming car would not excuse Anstine for we have often said a driver of a car must drive it so he can stop within the radius of his lights and that: "The existence or presence of smoke,

snow, fog, mist, blinding headlights, or other similar elements which materially impair or wholly destroy visibility are not to be deemed intervening causes but rather as conditions which impose upon the drivers of automobiles the duty to assure the safety of the public by the exercise of a degree of care commensurate with such surrounding circumstances." Haight v. Nelson, 157 Neb. 341, 59 N. W. 2d 576.

What is said in Olson v. County of Wayne, *supra,* has application here. Therein we said: "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."

We have come to the conclusion that the evidence adduced fails to show the county was guilty of any act which would constitute negligence. But assuming that permitting the trusses of the bridge to lean, which the evidence shows they did, was negligence, we find no evidence to show that it in any way contributed to the accident by being a proximate cause therefor or a cause that proximately contributed thereto. It was merely a condition that in no way related to the accident which caused the death of Robert Shields. We find the trial court was in error in submitting the issue of the county's liability to the jury and should have sustained its motion for a judgment notwithstanding the verdict.

As to Anstine the court submitted the following specifications of negligence:

"9. The careless and negligent acts of the defendant, Douglas Anstine, in which the defendant George Sobotka participated are as follows, to-wit:

"(a) The defendant failed to maintain proper control of his vehicle and failed to prevent the same from running into and against said bridge.

"(b) The defendant failed to maintain a proper lookout for other vehicles on said highway at said time and place and particularly for the vehicle which Robert Shields was driving.

"(c) The defendant failed to keep a proper lookout for narrow bridges on said highway, although he was familiar with said road and bridges.

"(d) The defendant was driving at said time and place at night on a graveled road approaching a bridge and approaching other vehicles and was operating his vehicle at a rate of speed greater than was reasonable and proper under such circumstances.

"(e) The defendant was operating said vehicle at a rate of speed greater than provided by law.

"(f) In failing to apply his brakes in time to avoid collision with said bridge and the vehicle driven by the decedent, Robert Shields.

"(g) In driving and operating his vehicle on the wrong side of said road and into and upon the vehicle driven by Robert Shields."

As already herein set forth, in stating the issues to the jury, it is error, which may be prejudicial, for the trial court to include allegations of negligence which find no support in the proof. Anstine, on the basis that appellee alleged specific acts of negligence and consequently the doctrine of res ipsa loquitur has no application (see Mischnick v. Iowa-Nebraska Light & Power Co., 125 Neb. 598, 251 N. W. 258; Security Ins. Co. v. Omaha Coca-Cola Bottling Co., 157 Neb. 923, 62 N. W. 2d 127), contends the circumstances shown are not sufficient to establish any of the acts of negligence alleged.

The principles applicable in civil cases are as follows:

"In testing the sufficiency of evidence to support a verdict it must be considered in the light most favorable to the successful party." Taylor v. J. M. McDonald Co., 156 Neb. 437, 56 N. W. 2d 610.

"It is often impossible to prove the existence of certain situations by positive and direct evidence. When one faces that situation, he may resort to the doctrine announced in Union P. R. Co. v. Erickson, 41 Neb. 1. It is there held in a situation similar to this: 'While the facts justifying an inference of negligence must be established by the evidence and their existence, must not be left to the conjecture of a jury, and while ordinarily negligence cannot be presumed merely from the happening of an accident, still facts may be established by circumstances, and the same facts which prove the accident may be circumstances from which the facts justifying an inference of negligence may be found to exist.' " Weber v. Thompson-Belden & Co., 105 Neb. 606, 181 N. W. 649.

"Negligence is a question of fact and may be proved by circumstantial evidence and physical facts. All that the law requires is that the facts and circumstances proved, together with the inferences that may be properly drawn therefrom, shall indicate with reasonable certainty the negligent act charged." Gilliland v. Wood, 158 Neb. 286, 63 N. W. 2d 147. See, also, Rocha v. Payne, 108 Neb. 246, 187 N. W. 804.

Anstine, a salesman for Sobotka, testified he completed his work in Ravenna shortly after 10 p. m. on the evening of July 3, 1953; that he then proceeded to drive south out of Ravenna on the Ravenna road, intending to return to his home in Kearney; that he was driving his 1949 Lincoln sedan; that he only passed one car before reaching the bridge, doing so about 2 miles north thereof; that he was then driving from 40 up to 45 miles an hour, driving about 50 as he approached the bridge; that as he approached the bridge a car with bright headlights was coming from the south, the road

south of the bridge is, for a considerable distance, straight and level; that he put on his courtesy lights and then flicked his lights from courtesy to bright three or four times trying to get the oncoming car to dim its lights but was not successful in doing so; that he left his lights on courtesy, which gave him a beam of light ahead of 25 to 30 feet; that as he approached the bridge from the knoll to the north he took his foot off of his accelerator but did not apply his brakes; that his car did not slow up; that he continued to drive on the right side of the road, not realizing there was a bridge immediately ahead; that suddenly, just an instant before the accident, he saw either the northwest batter chord or handrail of the bridge in the beam of his lights; that what he saw was white and appeared to be leaning to his left or east; that in the fractional part of a second, which he estimated at less than a half second, he was not able to put on his brakes or to avoid hitting whatever it was that was ahead of him; that after his car hit the handrail, or whatever it was, it went down with an awful bump; and that was the last he remembers until the accident was over and he was in his car which was lying on its left side.

John W. Schuller, who was the first person at the scene of the accident, testified he was driving his car south on the Ravenna road that evening very shortly before the accident; that Anstine's car passed him about 1½ miles north of the bridge; that he (Schuller) was at that time driving about 45 miles an hour; that outside of having to slow up momentarily when the Anstine car passed him, because of the dust and gravel which it kicked up, he continued at that speed; that the night was quiet and clear, the road dry, and visibility good; that when he got to the Wedemeyer mail box, a point about a half mile north of the bridge and from which point one can see cars approaching the bridge from the south, he did not then or thereafter see any car lights approaching from that direction; that he saw the An-

stine car in the road when he came over the first rise in the road north of the bridge, which rise is about 350 to 450 feet to the north thereof; that the Anstine car was then lying in the road south of the bridge, which was collapsed; that it was lying on its side facing east; and that Anstine was in it trying to get out.

Outside of what Anstine testified to there is no other testimony by anyone who was involved in the accident or saw it as Lee Etta Cash, the only survivor of the five passengers in the Shields car, had no recollection of anything that happened after she got into the Shields car in Kearney. However, there is evidence of the physical facts that were evident to those who came upon the scene shortly after it had happened.

The northwest batter chord of the bridge was introduced in evidence. This heavy steel beam was bent downward in a sharp "V", tearing the steel side walls thereof in doing so. The evidence shows that at the time of the accident 6 rivets on the face of this batter chord, 2 below and 4 above the bend of the "V", together with the inside edge thereof, were freshly scraped and battered. The right half of the front bumper of the Anstine car was also introduced in evidence. This bumper has a series of grooves, which the evidence shows were freshly made at the time of the accident, and is bent in a manner that it is clearly evident what hit the batter chord. As hereinbefore stated the batter chord was torn loose from its footing where it is fastened by a shoe, which had been riveted to the cap or steel cross beams which, in turn, were fastened to the steel piling at the north end of the bridge. There is evidence in the record to the effect that when that happens the bridge will collapse and the evidence shows that is exactly what happened to the north 10 feet thereof, the northwest batter chord being found under the wooden joists and planks of the bed or floor of the bridge.

The evidence also shows the south end of the floor

did not go down so the south 30 feet thereof sloped up from the bed of the creek or ravine, over which the bridge was constructed, to the level of the road at the south end thereof. On this floor or bed, which was covered with gravel, was a mark some 2½ to 3 feet wide extending some 25 feet on the floorbed and then 8 feet on the road beyond. At that point it stopped and there were no marks of any kind on the road from there to an indentation or scraped out place about 62 feet south thereof. The Anstine car, as it lay in the road on its side, was about 71 or 72 feet south of the south edge of the bridge and was badly damaged on both sides and on its top. It is significant that it had paint on its left side of the same color as the Shields car.

Immediately north of the Anstine car was an indentation or scraped out place in the road and scattered on the surface of the road around this indentation were pieces of glass and metal from both cars.

The Shields car was found east of the bridge in the bed of the creek or ravine with its top crushed down toward the rear. There was no sign of any damage to it below the horizontal line of the front bumper. Significant is the fact that the evidence shows this car had marks on the top and paint therein of the same color as the Anstine car. The tire tracks of the Shields car were traced back to where its front wheels had skidded or been shoved sidewise some 8 to 10 inches, which skid marks were on the east half of the road and to the north of where the Anstine car stopped on its side. The Shields car stopped about 126 feet northeast of the indentation mark on the road. It was on its wheels and facing east-southeast.

We come then to a discusison of whether or not the trial court was in error in submitting, as to Anstine, the several specifications of negligence which have hereinbefore been set forth.

As to specifications (a), (b), (c), (d), (f), and (g) little need be said because the evidence herebefore set

forth fully supports submitting these to the jury. These facts indicate, with reasonable certainty, that Anstine was, at the time, driving his car south on the Ravenna road at such a rate of speed that he did not observe the bridge until it was too late for him to either brake his car to avoid hitting the bridge or to turn it for that purpose; that his car, weighing over 2 tons, hit the northwest batter chord of the bridge with enough force to bend it into a "V" shape and tear it loose from its footing thus causing the bridge to collapse when his car, which went to the left, hit the floor thereof; that the Anstine car then traveled up the floor or bed of the bridge, and a short distance beyond, when it went into the air; that some 62 feet to the south it hit the Shields car on top with its left side, crushing the top thereof down and toward the back; and that the Shields car was on its right or east side of the road.

As to specification (e) we will assume, for the purpose of discussion, that this specification specifically relates to the 50 miles per hour maximum for driving at night, although the statute is much more restrictive as is evidenced by the following from section 39-723, R. R. S. 1943, of which it is a part: "* * * at a rate of speed greater than is reasonable and proper, having regard for the traffic and use of the road and the condition of the road, nor at a rate of speed such as to endanger the life or limb of any person, * * *." As to the quoted language the evidence would clearly justify submitting this specification to the jury.

Before proceeding to dispose of this issue we shall dispose of Anstine's contention that the court erred in overruling his objection to the testimony of John W. Schuller, which testimony has already been herein set forth. Anstine contends that the evidence of speed at the point where he passed Schuller, a mile and one-half north of the bridge, was manifestly too remote to have any competent evidentiary value as to Anstine's speed at or immediately prior to the time of the accident.

That is undoubtedly true but it will be observed that Schuller did not testify as to how fast Anstine was going but as to the fact that Anstine passed him and where, how fast he (Schuller) was going at the time, how fast he continued to go thereafter, and the fact that when he got to the Wedemeyer mail box, about a half mile from the bridge, there were no lights on the road and as he proceeded on he found the results of the accident.

"This question of the admissibility of the speed of a vehicle shortly prior to the time of the accident rests largely in the discretion of the court." Schwarting v. Ogram, 123 Neb. 76, 242 N. W. 273, 81 A. L. R. 769. We also said therein: "That when the machine was going at an excessive rate of speed a mile from the place where the collision occurred, and the speed did not slacken until after the collision, this evidence should be admitted."

"The rule of these cases is hereby approved but the discretion therein contemplated does not permit the admission of evidence of speed at other points unless the points are of such close proximity that a reasonable inference could be drawn that it was continued to the point of the accident, or unless, if more remote, there is evidence of fact or circumstance from which a reasonable inference could be drawn that speed was continued at approximately the same rate over the intervening distance." Prince v. Petersen, 144 Neb. 134, 12 N. W. 2d 704.

"Various factors, such as skid marks, distance traveled after impact, and force of impact, constitute pertinent evidence in arriving at an estimate of the rate of speed of an automobile, either by those involved in an accident or those in authority investigating the accident immediately thereafter. See 5 Am. Jur., Automobiles, § 630, p. 850." Koutsky v. Grabowski, 150 Neb. 508, 34 N. W. 2d 893.

It is true Anstine testified he did not exceed 50 miles

an hour but he testified he maintained the same speed from where he passed the Schuller car until he reached the bridge. The evidence shows Schuller reached the Wedemeyer mail box, about a half mile from the bridge, when it is apparent the accident had already taken place. The batter chord that the Anstine car hit is in evidence and it is self-apparent it was hit with terrific force. There is also the fact that the jury could reasonably find the Anstine car hurtled through the air some 60 feet before it landed on top of the Shields car. There is no question but what the jury could very properly find that Anstine was driving far in excess of 50 miles an hour when he hit the bridge.

In any event we think what was said in Advance-Rumely Thresher Co. v. Bartzat, 114 Neb. 35, 206 N. W. 7, is here applicable. Therein we said: "* * * we conclude that reversible error cannot be predicated upon this assignment, since the verdict of the jury is the only one which should have been returned under the testimony."

Anstine contends that funeral expenses cannot be recovered in the absence of proof that they represent the fair and reasonable value of the materials furnished and services rendered.

We said in Becker v. Hasebroock, 157 Neb. 353, 59 N. W. 2d 560: "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." See, also, Oliverius v. Wicks, 107 Neb. 821, 187 N. W. 73.

In discussing this issue in Becker v. Hasebroock, *supra,* we said: "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."

The evidence here adduced in this respect is that of Thomas Shields, the father. He testified as follows: "Q I have one further question that I should have asked on direct. Mr. Shields, I neglected to inquire about the funeral expenses. Have you paid the funeral expenses? A We have. Q And what did that amount to? A $931.65, if I'm not mistaken. (examining paper). $931.65."

It will be observed no objection was made to this testimony in the form in which it was offered. In the absence thereof, we think the following applies: If proof is offered of what was paid for materials furnished and service rendered in conducting a funeral, and no objection is made thereto on the ground that the amount so paid is not the proper basis for recovery, it will be presumed the objection thereto on that basis is waived and that the amount so paid is the fair and reasonable value thereof.

We come then to the question, was a verdict of $10,000 excessive? This court has laid down certain principles applicable here.

In Fisher v. Trester, 119 Neb. 529, 229 N. W. 901, we said: "The measure of damage in an action by the personal representative of a child, for the benefit of its parents, to recover for wrongfully causing the death of such child, is the present worth in money of the contributions having a general monetary value of which the parents are shown by the evidence with reasonable certainty to have been deprived by the act causing the death, and those contributions that are only probable, or conjectural, may not be included in the amount of such damage."

And, as stated in Dorsey v. Yost, 151 Neb. 66, 36 N. W. 2d 574, 14 A. L. R. 2d 544: "The measure of damages in an action such as we have before us is the pecuniary loss which the parent sustains by reason of being de-

prived of the child's services during his minority and the loss of contributions that might reasonably be expected to be made after reaching his majority. Contributions which are speculative or conjectural may not properly be included. It is for the jury to determine the pecuniary value of the child's services which would have accrued to the parent but for the accident. The amount to which a parent is entitled cannot be accurately determined because of the numerous contingencies involved. The amount being very problematical, it is peculiarly for the jury to determine, after hearing all the evidence bearing upon the situation, including the parent's position in life, the physical and mental condition of the child, his surroundings and prospects, and any other matter that sheds light upon the subject. Members of juries generally have children of their own and have information as to the pecuniary value of children's services and the expense involved in their care and education. A jury is peculiarly fitted to determine the loss sustained by a parent in such a case. At best, the verdict can only be an approximation as no yardstick exists by which the correct answer can be found with exactness."

The evidence shows that Robert Shields was 16 years of age on December 19, 1952; that he was a good student and had just completed his junior year in the high school of Kearney; that he intended to return the following year to complete his high school education; that he lived with his parents, Thomas and Wanda Shields; that he was an ambitious and capable young man, getting outside employment whenever he could do so; that in the summer of 1952 he worked for Willis Shields, no relation, at the Western Motel in Kearney; that he again had the same job in the summer of 1953 and was working there at the time of his death; that when working full time, which he did during his summer vacations, he was earning $35 a week; that he also worked at this place on Saturdays and occasionally on Sundays in the early spring

and late fall while attending school; that he was an able young man fully capable of handling the motel's business which consisted of running a filling station and the renting of cabins; that he was, on occasions, left in full charge thereof; that he used what he earned to buy himself clothes and other things he needed, including spending money and some of his incidental expenses in school; that while he was attending school he willingly helped his mother around the home doing anything she wanted him to do, including mowing the yard, scooping the snow etc., putting in about 1½ to 2 hours a day or from 10 to 12 hours a week at such services; that such services were reasonably worth $1 an hour; that he bought some things for the home, the exact items or the value of such purchases not being shown; and that he was a capable, ambitious, and industrious young man who seemed to be interested in his own and his family's welfare.

Thomas, the father, was 43 years of age and, under the Commissioner's Table, had a life expectancy of 27.62 years. At the time he was regularly employed, and had been for some time, by the Army Store as a clerk and drawing $60 a week. Wanda Shields, the mother, was 39 years of age and, under the Commissioner's Table, had a life expectancy of 30.08 years. She was at the time employed by Montgomery Ward in Kearney as a credit manager at the rate of $35 per week. The parents have no real estate or other property and seem to be entirely dependent upon their income.

In considering the amount of a verdict it is proper for this court to consider the fact that the jury, in arriving at its verdict, could properly have taken into consideration the low purchasing power of the dollar, for, as stated in Johnson v. Schrepf, 154 Neb. 317, 47 N. W. 2d 853: "The period of inflation now existing is a factor which the jury could consider in arriving at the amount of the verdict. We must assume that the jury gave consideration to this fact, as it had a right to do." See,

also, Segebart v. Gregory, 160 Neb. 64, 69 N. W. 2d 315. However, as stated in Segebart v. Gregory, *supra:* "It is not a proper subject for an instruction."

Also, as stated in Johnson v. Schrepf, *supra*: "The fixing of the damages is the function of the jury and unless it can be shown to be so exorbitant as to indicate passion, prejudice, mistake, or a complete disregard of the law and the evidence, its judgment will be sustained."

While we think the jury's verdict is very ample, considering all of the facts, we do not think it is so disproportionate as to say that it must have been the result of either prejudice or passion. In view thereof it is not within our right to disturb it.

In view of the foregoing we reverse the judgment of the trial court insofar as it overruled Buffalo County's motion for a judgment notwithstanding the verdict and remand the cause to the district court with directions to sustain such motion and to enter judgment accordingly. On the other hand we affirm its action in overruling the motions of Douglas Anstine and George Sobotka to the same effect and in entering judgment against each of these defendants for the full amount of the verdict. All costs are to be taxed against Anstine and Sobotka.

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

LAWRENCE LOWNES, APPELLANT, V. HOWARD G. FURMAN ET AL., APPELLEES.
71 N. W. 2d 661

Filed August 19, 1955. No. 33723.

1. **Negligence.** In order to constitute actionable negligence there must exist three essential elements, namely, a duty or obligation which the defendant is under to protect the plaintiff from injury, a failure to discharge that duty, and injury resulting from the failure.
2. **Master and Servant: Negligence.** It is the duty of a master to use ordinary and reasonable care to furnish appliances rea-

sonably safe for the use of his servants in carrying on his business, and a failure to exercise such reasonable and ordinary care upon his part renders him liable, if the servant suffers any injury by reason of his negligence in that behalf.

3. ———: ———. The master is not an insurer of the safety of the appliances which he furnishes. If he exercises the reasonable care which a prudent man would ordinarily take for his own safety, under like circumstances, in furnishing his servants with instruments reasonably safe for the particular purpose for which they are used, he has fulfilled his whole duty in that respect.
4. ———: ———. Ordinarily, in providing his employees with tools and appliances with which to work, an employer is bound to exercise reasonable care to insure the safety of such employees. The foregoing duty is a continuing one, and the employer is also bound to keep such tools and appliances in a reasonably safe condition, and to make seasonable inspection with that end in view.
5. ———: ———. The duty of the master as to working conditions includes a duty of care to supply competent supervisors of the operative details of the business where this is reasonably necessary to prevent undue risk of harm to his servants in the performance of such details.
6. ———: ———. Contributory negligence by an employee is the failure to use such precautions for his own safety as ordinary prudence requires under the circumstances presented. He is chargeable with contributory negligence where he fails to take due care to avoid defects and dangers which are so open and obvious that anyone in the exercise of ordinary care and prudence would discover them.

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

J. E. Porter and *Harris W. Snyder,* for appellant.

Stubbs & Metz, for appellees.

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

WENKE, J.

Lawrence Lownes brought this action in the district court for Dawes County seeking to recover damages because of personal injuries he sustained while employed

by defendants as a day laborer. The basis for the action is the claim that his employers required and permitted him to work with a power driven feed grinder and blower that was in a defective condition. Issues were joined and trial had. At the conclusion of plaintiff's evidence the defendants moved for a directed verdict, which was sustained. A verdict was rendered accordingly. Plaintiff filed a motion for new trial and this appeal is from the overruling thereof.

In considering the record to determine whether or not appellant made a prima facie case we apply thereto the following rule: "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." Ring v. Kruse, 158 Neb. 1, 62 N. W. 2d 279.

Appellee Furman Hereford Ranch is a partnership consisting of appellees John H. Furman and Howard G. Furman. The partnership was, at all times herein material, engaged in the business of ranching and farming in Dawes County. About May 1, 1952, one of the partners employed appellant as a laborer to assist generally in the ranching and farming activities.

What interest, if any, appellee Frances E. Furman had in either the partnership or appellant's employment is not disclosed by the record. We will not again refer to her because it is apparent she has no interest in this litigation.

Appellant was, at the time of his employment, 45 years of age. He had served in the armed forces of his country from December 10, 1929, to September 6, 1945. After his discharge, until sometime in 1950, appellant helped his father ranch. During this time he also did farm work for neighbors. After he quit helping his father appellant

worked at various jobs, generally on ranches. While doing so he had on occasions worked with heavy equipment such as corn shellers and threshing machines. Shortly before May 1, 1952, he worked for 7 months in a Chevrolet garage. While he was employed as a laborer it is apparent appellant had gained some experience with various kinds of power driven machinery.

At their ranch appellees had a combination hammer mill feed grinder and blower which was used for grinding feed for their cattle. It was operated by tractor power and appellant was instructed in how to line up and attach a tractor thereto for that purpose. Prior to July 1, 1952, appellant had, on three different occasions, helped grind feed, his job being to scoop the grain onto the feeder table. However, appellant had never been instructed in the operation of the machine itself, someone always being present to supervise.

About 1 p. m. on July 1, 1952, Kenneth Goodwin, who was in charge of the operations on that day, told appellant he was to help grind some grain. Appellant thereupon proceeded to fill the cart, which was used to haul grain, with barley and place it in position in the building where the grinder was located. He then lined up the tractor he was operating and attached it to the grinder by means of a 60-foot belt so it could be used for power. After starting the tractor he got up into the cart and started to feed the grain onto the feeder table of the grinder.

The grinder was so located in the building that the feeder table was to the north and the blower part to the south. On the blower casing was a small metal door located at the base thereof and directly in line with, but just below, the carrying-away tube. This door is about 6 by 6½ inches in dimension, hinged on one side, and could be fastened shut on the other side by means of a small metal button or bolt which we will hereinafter refer to as the catch. This door is located to permit the blower casing to be cleaned out if, for any reason, it

becomes clogged with ground grain. The blower, which elevates the ground grain, operates by means of a propeller with blades which forces the grain up through the casing or tube. These propeller blades are located just inside the blower casing. At the place where this door is located they are about ¼ to ½ inch inside the wall of the blower casing. When this cleanout door is open the propeller will not elevate the grain up the tube but will blow it out the opening covered by this door.

About the time appellant started to feed grain onto the feeder table Goodwin was cleaning up some dried grain which had accumulated around this blower door. After appellant had been scooping grain onto the feeder table for some 5 minutes he heard Goodwin holler and as he could not hear what Goodwin was saying he looked up. As he looked up he saw a cloud of dust. This dust was coming out of the blower door opening. Appellant then stepped off the cart and shut down the tractor, causing the grinder to come to a stop. At the same time he went back to where Goodwin was to see what the trouble might be. He found that when Goodwin had cleaned out from in front of the blower or cleanout door, which will hereinafter be referred to as the door, that the pressure from within had blown the door open because the catch, which was intended to keep it shut, was missing. The catch was necessary to keep the door closed during the operation of the machine because of air pressure from within caused by the operation of propeller blades. Appellant found a stick which he and Goodwin placed in front of this door, shoving both ends thereof some 2 inches into the dried and matted grain which still remained at each side of the door. This dried and matted grain was from 6 to 10 inches deep. Appellant and Goodwin both thought the matted grain would hold the stick in place and prevent the door from again opening.

Appellant then started up the power and commenced scooping. After he had scooped 10 or 12 scoops of grain

onto the feeder table one of the smaller belts started slipping, causing the machine to slow down. Appellant called this to Goodwin's attention and suggested to Goodwin they quit for the day and get a new belt. Goodwin did not agree with this suggestion, telling appellant they had to finish the grinding that day. Shortly thereafter the machine picked up speed and appellant again started feeding it grain. About a minute after he started doing so he noticed dust coming from the opposite side of the machine. He then stepped down from the cart and headed toward the blower. At the same time Goodwin started from the blower, where he was working, and walked toward the front of the grinder. When appellant got to the rear or blower part of the machine he noticed the door was open and that ground grain and dust were coming out of the door opening. He then, while the power was on and the machine running, attempted to close it, intending to put the same stick in front of the door. For this purpose he reached down and put his right hand on the door. Suddenly, when the door was about 3 inches from being closed, he felt his hand jerk and his glove flew off. Shortly thereafter he realized that parts of the fingers of his right hand were missing. They had been cut off.

We have held, in similar situations, that: "In order to constitute actionable negligence, there must exist three essential elements, namely, a duty or obligation which the defendant is under to protect the plaintiff from injury; a failure to discharge that duty; and injury resulting from the failure. The petition must allege these essential elements, and the proof must support them, or there can be no recovery." Ring v. Kruse, *supra.*

We think the following principles have application here:

"* * * it is the duty of a master to use ordinary and reasonable care to furnish appliances reasonably safe for the use of his servants in carrying on his business,

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

" 'Ordinarily, in providing his employees with a place to work, or tools and appliances with which to work, an employer is bound to exercise reasonable care to insure the safety of such employees. The foregoing duty is a continuing one, and the employer is also bound to keep such place, tools and appliances in a reasonably safe condition, and to make seasonable inspection with that end in view.' (Rombold v. New Omaha T.-H. E. L. Co., 68 Neb. 71, 97 N. W. 1030.)" Riley v. Cudahy Packing Co., 82 Neb. 319, 117 N. W. 765. As therein stated: " 'The duty of inspection is affirmative, and must be continuously fulfilled, and positively performed.' (Brann v. Chicago, R. I. & P. R. Co., 53 Iowa 595, 6 N. W. 5, 36 Am. R. 243.)"

" '* * * The rule is that as to his servants he is bound to use such care as the circumstances reasonably demand, to see that the appliances furnished are reasonably safe for use, and that they are afterwards maintained in such reasonably safe condition. He is not liable for defects of which he has no notice, unless the exercise of ordinary care would have resulted in notice. * * *.' (Lincoln Street Ry. Co. v. Cox, 48 Neb. 807, 67 N. W. 740.)" Ring v. Kruse, *supra.*

"The duty of the master as to working conditions includes a duty of care to supply competent supervisors of the operative details of the business where this is reasonably necessary to prevent undue risk of harm

to his servants in the performance of such details." Restatement, Agency, § 507, p. 1193.

Here the catch, necessary to keep this door shut when the propeller was operating because of the air pressure it created, was missing. Any seasonable or reasonable inspection would have discovered that fact. When it was discovered appellees' supervisor took no proper action to correct it but permitted what was a makeshift condition to exist. Under the foregoing principles there is no question but what the appellant made a prima facie case.

But even so appellees contend the negligence created only a condition which could not be and was not a proximate cause of the accident and resulting injury.

"Proximate cause, as used in the law of negligence, is that cause which in a natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury, and without which the accident could not have happened." Anderson v. Byrd, 133 Neb. 483, 275 N. W. 825.

"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." Shupe v. County of Antelope, 157 Neb. 374, 59 N. W. 2d 710.

But here the missing catch permitted the door to open. It was one of the activating factors without which the accident would not have happened.

While appellant says he does not know how his fingers were cut off there is only one reasonably certain hypothesis to be drawn from the evidence as to how it could have happened, that is, he must have inadvertently put his fingers over the edge of the door, when he attempted to close it, and extended them into the blower casing where the blades of the circulating propeller cut them off. To permit a jury to conclude, on the basis of the evidence adduced, that it happened in some other

manner would be to let them conjecture or speculate in regard thereto. We have often said that a verdict based on conjecture or speculation cannot be sustained. Cronin v. Swett, 157 Neb. 662, 61 N. W. 2d 219.

Appellees pleaded contributory negligence and assumption of risk. Appellant contends, since appellees offered no proof in support thereof, these issues are not here for the purpose of this decision. Appellant apparently overlooks part of the rule applicable, which is as follows: "If contributory negligence is relied upon by defendant as an affirmative defense, the burden is upon him to prove it by a preponderance of the evidence pertinent to that issue contained in the whole record, *except insofar as the same may appear in evidence adduced for plaintiff.*" (Emphasis ours.) Meyer v. Platte Valley Construction Co., 147 Neb. 860, 25 N. W. 2d 412.

"Contributory negligence by an employee is the failure to use such precautions for his own safety as ordinary prudence requires under the circumstances presented. He is chargeable with contributory negligence where he fails to take due care to avoid defects and dangers which are so open and obvious that anyone in the exercise of ordinary care and prudence would discover them." Ring v. Kruse, *supra.*

"In the absence of any statutory regulation of the subject, where a servant continues work with knowledge, actual or constructive, of dangers which an ordinarily prudent man would refuse to subject himself to, he is guilty of contributory negligence, particularly where he has created the danger." Ring v. Kruse, *supra.*

"As a general rule, where the servant has actual knowledge of the dangers to which the service exposes him or where the defects or dangers are so patent and obvious that in the exercise of ordinary care, in the performance of the services for which he was employed, he should have known of their existence, he assumes

the risk of injury incident thereto." Ring v. Kruse, *supra.*

If the negligence of appellant, in comparison with the negligence of the appellees, was, as a matter of law, more than slight and was a proximate cause of the accident of which appellant complains, he may not succeed in the cause. Dickenson v. County of Cheyenne, 146 Neb. 36, 18 N. W. 2d 559; Miller v. Aitken, 160 Neb. 97, 69 N. W. 2d 290.

The evidence shows the first time the door blew open the appellant shut off the power and caused the grinder and blower to come to a stop before attempting to close the door. He then became aware of the fact that the catch, which it was intended should hold this door shut, was missing. He then helped Goodwin construct the makeshift arrangement, hereinbefore described, to hold it shut. When the door again blew open he alone attempted to restore the same makeshift arrangement but did so without shutting off the power, thus permitting the propellor blades inside the blower casing to continue circulating in full force. While he testified he did not know what was inside of the blower casing, and did not look to see, he admits, however, he knew there was something in there that was moving and there must be blades somewhere. The factual situation must have been apparent to him as dust and particles of grain were blowing out of the opening. While the machine was thus operating appellant attempted to close the door with his right hand, on which he had a glove. Suddenly his hand jerked and his glove flew off. Parts of the fingers on his right hand were gone. The only way that could have happened was by permitting his fingers to extend beyond the door and into the blower casing where the propeller blades were circulating. We think appellant, being fully aware the machine was operating while he attempted the makeshift plan for keeping the door closed, assumed all risk resulting therefrom and, in addition thereto, was contributorily negligent

as a matter of law, in a degree sufficient to defeat any right to recover that he might otherwise have had, by permitting his fingers to extend into the blower casing while the machine was operating. It is difficult to understand why a person who had some knowledge of power driven machinery and who admits he knew there was something in there moving would proceed to do what appellant did while the grinder and blower were in full operation. Surely his employer should not be held responsible for what he did under these circumstances.

We find the action of the trial court was correct. We therefore affirm its judgment.

AFFIRMED.

ARNOLD L. LINGO, APPELLEE, V. HERBERT H. HANN, WARDEN OF THE NEBRASKA STATE PENITENTIARY (JOSEPH B. BOVEY, WARDEN, SUBSTITUTED), APPELLANT.
71 N. W. 2d 716

Filed August 19, 1955. No. 33741.

1. **Habeas Corpus.** Habeas corpus is a collateral and not a direct proceeding when regarded as a means of attack upon a judgment sentencing a defendant.
2. **Judgments: Habeas Corpus.** If a court or a judge thereof which renders a judgment, or who enters an order, does not have jurisdiction to perform the act done, either because the proceeding or the law under which it is taken is unconstitutional, or for any other reason the judgment is void, it may be questioned collaterally, and a defendant who is imprisoned under and by virtue of it may be discharged.
3. **Habeas Corpus.** To release a person from a sentence of imprisonment by habeas corpus, it must appear that the sentence was absolutely void.
4. **Infants.** Juvenile courts do not have the sole or exclusive jurisdiction of children under 18 years of age who have violated our laws.
5. **Infants: Criminal Law.** The county attorney is not limited by the Juvenile Court Act in any way in his duty to file proper

complaints against wrongdoers and prosecute the same.

6. Constitutional Law. The rights guaranteed to an accused in a criminal prosecution by Article I, section 11, of the Constitution of Nebraska are all personal privileges and not having been conferred from any consideration of public policy are not inalienable but may be insisted upon or abandoned at pleasure.
7. ———. Due process of law requires only that the accused be given sufficient notice of the nature of the charge against him in order that he may prepare a defense and plead the judgment as a bar to any subsequent prosecution for the same offense.
8. Criminal Law. A preliminary hearing before a magistrate is not a criminal prosecution or trial within the meaning of Article I, section 11, of the Constitution of Nebraska.
9. Infants. There apparently are no accommodations at the State Penitentiary to care for and handle children under 16 years of age in the manner contemplated by section 43-212, R. R. S. 1943. It is the duty of the state to provide such accommodations but the fact that none are available does not take from a trial court its authority, in a proper case, to sentence a child under 16 years of age thereto.

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

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

Norma VerMaas, for appellee.

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

WENKE, J.

This is a habeas corpus action instituted in the district court for Lancaster County by Arnold L. Lingo who was, at the time he filed his application for a writ on March 19, 1954, an inmate of the State Penitentiary. The district court allowed the writ. A hearing was thereafter had on the writ and the warden's return thereto. The court, based on the evidence adduced at the hearing, ordered the petitioner discharged. The warden filed a

motion for new trial, subsequently amended, and has appealed from the overruling thereof.

We will herein refer to Arnold L. Lingo as the petitioner and to the warden of the State Penitentiary as respondent.

The statute relating to habeas corpus provides: "When the judge shall have examined into the cause of the caption and detention of the person so brought before him, and shall be satisfied that the person is unlawfully imprisoned or detained, he shall forthwith discharge such prisoner from confinement." § 29-2806, R. R. S. 1943.

"Habeas corpus is a collateral and not a direct proceeding when regarded as a means of attack upon a judgment sentencing a defendant." Jackson v. Olson, 146 Neb. 885, 22 N. W. 2d 124, 165 A. L. R. 932. See, also, Swanson v. Jones, 151 Neb. 767, 39 N. W. 2d 557.

"Habeas corpus is a writ of right but not a writ of course, and probable cause must first be shown for its allowance, * * *." In re Application of Dunn, 150 Neb. 669, 35 N. W. 2d 673.

"In a petition for a writ of habeas corpus, if relator sets forth facts which, if true, would entitle him to discharge, then the writ is a matter of right and relator should be produced and a hearing held thereon to determine questions of fact presented, but if relator shows by the facts alleged in his petition for the writ that he is not entitled to relief, then the writ should be denied." In re Application of Dunn, *supra*. See, also, Swanson v. Jones, *supra*.

"* * * if a court or a judge thereof which renders a judgment, or who enters an order, has not jurisdiction to perform the act done, either because the proceeding or the law under which it is taken is unconstitutional, or for any other reason the judgment is void, it may be questioned collaterally, and a defendant who is imprisoned under and by virtue of it may be discharged." In re Resler, 115 Neb. 335, 212 N. W. 765.

"Habeas corpus will not lie to discharge a person from a sentence of penal servitude where the court imposing the sentence had jurisdiction of the offense, had jurisdiction of the person of the defendant, and the sentence was within the power of the court to impose." Jackson v. Olson, *supra*. See, also, Swanson v. Jones, *supra*.

"To release a person from a sentence of imprisonment by habeas corpus, it must appear that the sentence was absolutely void." Jackson v. Olson, *supra*. See, also, Swanson v. Jones, *supra*.

Petitioner did, on October 12, 1951, in the district court for Buffalo County, plead guilty to the crimes of robbery from the person by putting in fear and of stealing an automobile. See sections 28-414 and 28-522, R. R. S. 1943, for the definitions of what constitute these crimes and the punishment that may be imposed upon anyone found guilty thereof. The court thereupon, within the limits of these statutes, sentenced petitioner to the State Penitentiary for terms of 12 and 5 years respectively on these two counts, ordering the sentences to run concurrently. Petitioner was then taken to the State Penitentiary to serve these sentences and was there confined for that purpose when he instituted this action to be released therefrom.

Petitioner was born on March 31, 1936, and on September 28, 1951, when the crimes to which he pleaded guilty were committed, and on October 12, 1951, when he was sentenced, he was 15 years of age. The principal question raised by this appeal is, did the district court have authority to commit petitioner to the penitentiary? It is petitioner's thought that the district court was without authority to do so because of the Juvenile Court Act. See Ch. 43, art. 2, R. R. S. 1943.

District courts have general and original jurisdiction in criminal cases except when otherwise provided. § 24-302, R. R. S. 1943. The judges thereof may admit persons charged with a felony to plead guilty and then pass

such sentence as may be prescribed by law. Art. V, § 9, Constitution of Nebraska.

Section 28-414, R. R. S. 1943, provides that whoever is found guilty of robbing another by putting in fear shall be imprisoned in the penitentiary for a term of not less than 3 nor more than 50 years. Section 28-522, R. R. S. 1943, provides that whoever is found guilty of stealing an automobile shall be imprisoned in the penitentiary for not less than 1 year nor more than 10 years. These statutes provide that this punishment may be imposed upon all persons found guilty of the crimes covered thereby and the district court may do so unless forbidden by some other legislative act which supersedes these statutes or restricts their operation.

In regard to children under 18 years of age Nebraska's Constitution provides: "The Legislature may provide by law for the establishment of a school or schools for the safekeeping, education, employment and reformation of all children under the age of eighteen years, who, for want of proper parental care, or other cause, are growing up in mendicancy or crime." Art. VII, § 12, Constitution of Nebraska.

The first act of the Legislature in reference thereto was enacted in 1879. See Laws 1879, p. 413. At present section 83-463, R. R. S. 1943, provides: "The state industrial school for juvenile offenders shall be a school for the retention, education, discipline, industrial training and reformation of male juvenile offenders." See §§ 83-463 to 83-474, R. R. S. 1943, for present legislation relating to the state industrial school. This school is now referred to as Boys' Training School. See § 83-107.02, R. S. Supp., 1953. These statutes relating to the state industrial school, insofar as here material, provide: "When a boy of sane mind, under the age of eighteen years, has been found guilty of any crime, except murder or manslaughter, *in any court of record in this state,* the court *may order* that the boy be committed to the state

industrial school." § 83-465, R. R. S. 1943. (Emphasis ours.)

At the time petitioner was sentenced the Legislature had also provided that: "Any person, not less than sixteen nor more than thirty years of age at the time of conviction of a felony for the first time, *may be sentenced* to confinement in the state reformatory instead of to the state penitentiary, when in the judgment of the trial court the person is capable of reformation and the sentence is compatible with the general welfare." § 83-455, R. R. S. 1943. (Emphasis ours.)

The 1953 Legislature amended this act to read as follows: "Any person, not less than sixteen years of age at the time of conviction of a felony for the first time, may be sentenced to confinement in the state reformatory instead of to the state penitentiary, when in the judgment of the trial court the person is capable of reformation and the sentence is compatible with the general welfare." § 83-455, R. S. Supp., 1953.

Thus it will be observed that upon a defendant being convicted of a felony one or more of these statutes may apply, depending upon the facts of the case, and the district court can sentence accordingly or, if the circumstances justify, may, under the provisions of section 29-2218, R. R. S. 1943, without pronouncing sentence, suspend further proceedings and place the defendant on probation. Here the district court, because of petitioner's age, could sentence him to confinement in either the Boys' Training School or the State Penitentiary.

In 1905 the Legislature created the juvenile court. Legislation relating thereto will presently be found as Chapter 43, article 2, R. R. S. 1943. A careful study of the act clearly indicates it is not intended the juvenile court shall have exclusive jurisdiction and control of all juveniles. As stated in State v. McCoy, 145 Neb. 750, 18 N. W. 2d 101: "Juvenile courts do not have the sole or exclusive jurisdiction of children under eighteen years of age who have violated our laws."

And, "The county attorney is not limited by the Juvenile Court Act in any way in his duty to file proper complaints against wrongdoers and prosecute the same." State v. McCoy, *supra*. See, also, §§ 43-205 and 23-1201, R. R. S. 1943.

However, if election is made to proceed in the juvenile court by filing a complaint therein then that court acquires exclusive jurisdiction and the action must proceed therein in accordance with the procedures provided relating thereto. A juvenile court cannot sentence anyone coming before it to the penitentiary.

In this respect we note section 43-211, R. R. S. 1943, has no application to Buffalo County as it has a population of less than 50,000 and Kearney, located therein, has less than 40,000.

While we think the intent of the Juvenile Court Act is that offenders under 16 years of age, except when convicted of murder or manslaughter, should, if a sentence of confinement is imposed, be committed to the Boys' Training School rather than to the penitentiary, however, we find nothing in the law to prevent the district court from sentencing such juvenile to the penitentiary when convicted of a felony in that court.

Petitioner contends that he was not accorded "due process of law," as provided for by Article I, section 3, of the Constitution of Nebraska, nor a fair and impartial trial within the intent and meaning of Article I, section 11 thereof. We will discuss these questions in the various phases of the procedure leading up to petitioner's being sentenced and committed.

"The rights guaranteed to an accused in a criminal prosecution by Article I, section 11, of the Constitution of Nebraska are all personal privileges and not having been conferred from any consideration of public policy are not inalienable but may be insisted upon or abandoned at pleasure." Hawk v. State, 151 Neb. 717, 39 N. W. 2d 561.

"Due process of law requires only that the accused

be given sufficient notice of the nature of the charge against him in order that he may prepare a defense and plead the judgment as a bar to any subsequent prosecution for the same offense." Hawk v. State, *supra.*

On September 28, 1951, a complaint containing two counts was filed against petitioner in the county court of Buffalo County. At the preliminary hearing held thereon he pleaded guilty thereto and was bound over to the district court for trial. See § 29-1607, R. R. S. 1943, as to a preliminary hearing and the right thereto.

"A preliminary hearing before a magistrate is not a criminal prosecution or trial within the meaning of section 11, art. I of our Constitution." Roberts v. State, 145 Neb. 658, 17 N. W. 2d 666.

The functional purpose of the preliminary hearing is stated in section 29-506, R. R. S. 1943, as follows: "If upon the whole examination * * * it shall appear that an offense has been committed and there is probable cause to believe that the person charged has committed the offense, the accused shall be committed to the jail of the county in which the same is to be tried, there to remain until he is discharged by due course of law; * * *."

"It is in no sense a trial of the person accused. Its purpose is to ascertain whether or not a crime has been committed, and whether or not there is probable cause to believe the accused committed it." Roberts v. State, *supra.*

The effect of the foregoing, if found to exist, is to hold the accused for trial in the district court, which has jurisdiction to try him. See Dobrusky v. State, 140 Neb. 360, 299 N. W. 539. That is what the county court of Buffalo County did.

"The rule is that in the absence of a statute a person accused of an offense is not entitled as of right to representation by counsel upon his preliminary examination." Roberts v. State, *supra.*

Section 29-1803, R. R. S. 1943, provides that counsel

shall be furnished for an accused, in certain cases, if he does not have the financial ability to do so for himself.

But, as stated in Roberts v. State, *supra*: "Section 29-1803, R. S. 1943, requiring the court to assign counsel to an accused person in certain cases, who has not the ability to procure counsel, by its terms does not extend to the preliminary hearing."

The record discloses that none of petitioner's rights were violated in connection with the preliminary hearing in the county court of Buffalo County.

An information was thereafter filed in the district court and that court, on October 6, 1951, appointed two members of the Buffalo County bar to assist petitioner in that court, which they did. On October 12, 1951, he was arraigned in district court in accordance with section 29-1816, R. R. S. 1943. Petitioner, his mother, and his counsel were present thereat. At this arraignment, but immediately prior thereto, two things happened of which petitioner here complains: First, count one of the information was changed from a charge of kidnapping under section 28-417, R. R. S. 1943, to a charge of robbery from the person by putting in fear. Preliminary hearing thereon was waived. Second, after count one had been changed, the service of the information, as required by section 29-1802, R. R. S. 1943, was waived.

Section 29-1607, R. R. S. 1943, which provides for a preliminary hearing, provides it may be waived, as was here done.

"The failure to give a preliminary examination to a person charged with a crime is not a jurisdictional defect and is waived if not complained of before a plea of not guilty to the charge is made in the district court." Drewes v. State, 156 Neb. 319, 56 N. W. 2d 113. See, also, Swanson v. Jones, *supra*; Roberts v. State, *supra*.

Section 29-1802, R. R. S. 1943, provides for service of the information on defendant within 24 hours after

the filing thereof and that no one shall, without his assent, be arraigned until 1 day shall have elapsed after he has been so served with or has received a copy thereof.

"The right of a defendant under section 29-1802, R. S. 1943, not to be required, without his assent, to answer an information until one day shall have elapsed, after receiving a copy thereof, may be waived, * * *." Duggan v. Olson, 146 Neb. 248, 19 N. W. 2d 353.

"A defendant, by pleading guilty, waives all defenses other than that the information charges no offense." Duggan v. Olson, *supra.*

These rights were fully explained to the petitioner by the trial court and there is no question in our mind but what he fully understood them as they had also been explained to him by his counsel. We think these preliminary rights were knowingly waived and for petitioner's counsel to have insisted on their being carried out would have served no useful purpose.

Petitioner complains that at the trial he was without the assistance of effective counsel because he was permitted to waive the foregoing procedural step and, upon arraignment, allowed to plead guilty, which is the equivalent to a finding of guilty by a jury. In view of what petitioner had admitted doing on September 26, 27, and 28, 1951, as disclosed by his written admissions to the police officers of Kearney, no part of which he denied at the trial, it would seem there was little else for his counsel to do. He admitted to the police officers of Kearney a series of acts on those days, starting in Colorado Springs, Colorado, on the afternoon of Wednesday, September 26, 1951, and extending through Colorado, Kansas, and Nebraska, that included not less than 16 felonies involving such crimes as automobile theft, armed robbery of the person, kidnapping, armed robbery of a cafe, malicious destruction of property, and rape.

We think the record shows a fine example of a dis-

trict judge fully protecting the petitioner's rights by informing him in regard thereto, which rights we think he understood. These related to his constitutional rights hereinbefore discussed, the nature of the charges against him, the effect of a plea of guilty or not guilty, the penalties he would be subject to if he pleaded guilty, and his right to a jury trial. At the same time the trial court acted to protect the public, which, under the circumstances here, it was its duty to do. We find these contentions of petitioner to be without merit.

Section 43-212, R. R. S. 1943, contains the following provision: "When any child under the age of sixteen years shall be arrested or sentenced to confinement in any institution to which adult convicts are sentenced, it shall be unlawful to confine such child in the same building with such adult convicts or to confine such child in the yard or enclosure with such adult convicts, or to bring such child into any yard or building in which adult convicts may be present."

Petitioner contends any sentence committing a 15-year-old boy to an institution, where there is admittedly no provision for segregation from adult convicts, is, because of the foregoing statute, void.

The evidence shows petitioner was confined in the same building, yards, and enclosure as the adult convicts and lodged in a cell with two other convicts of the ages of 45 and 50 years. Apparently the penitentiary has no facilities for segregation such as the statute contemplates. The sentence and order of commitment to the penitentiary contained no direction as to such statutory provision. While it would have been proper, and probably desirable, to have had such directive in the sentence and order of commitment it is, however, not a jurisdictional matter.

As stated in State ex rel. Sowders v. Superior Court, 105 Wash. 684, 179 P. 79: "Counsel for relator also contend that there is no provision for caring for delinquent children at the state penitentiary. That fact may not be

considered by the trial court or by this court. It is the duty of the state to make provision, and if provision has not been made, that fact does not prevent the trial court from pronouncing judgment."

We said in Swanson v. Jones, *supra:* "The remedy of habeas corpus is not available in the absence of a statute authorizing it for the purpose of inquiring into the legality of a particular form, manner, or place of confinement executively or administratively imposed upon a prisoner lawfully in custody in an authorized place under a valid sentence and commitment."

We think the trial court erred in ordering the petitioner released. We reverse its action doing so. It is not clear, from the record before us, as to whether or not the petitioner actually has been released. If he has been then he should be ordered returned to the penitentiary to serve out the balance of his terms. If he has not been released he should remain confined in the penitentiary for the same purpose.

REVERSED AND REMANDED WITH DIRECTIONS.

CHAPPELL, J., dissents.

IN RE ESTATE OF MICHAEL CURRAN, DECEASED. GERTRUDE MINAHAN, ADMINISTRATRIX OF THE ESTATE OF MICHAEL CURRAN, DECEASED, APPELLEE, V. BYRL WALDO ET AL., APPELLANTS.

71 N. W. 2d 723

Filed August 19, 1955. No. 33765.

1. **Executors and Administrators.** A person who has no beneficial interest in or claim against the estate of a decedent may not appear and object to the final account of the representative of the estate.
2. ———. The representative of an estate is authorized to and should prosecute an action if he in good faith believes it is necessary for the recovery of a debt owing the estate.
3. **Executors and Administrators: Costs.** If the representative of an estate makes reasonable expenditures for costs or the services

of counsel in the prosecution of a claim of the estate he is entitled to be reimbursed therefor, even though his efforts are partly or wholly unsuccessful.

4. **Banks and Banking: Joint Tenancy.** A deposit in a bank of this state made in the name of two or more persons and deliverable or payable to either or the survivor is a joint account of the payees with right of survivorship and the funds represented thereby may be withdrawn in whole or in part by either of the payees or the survivor of them.
5. ———: ———. The property right of the payees named in such a deposit is fixed by section 8-167, R. R. S. 1943, unless a contrary intention affirmatively appears from the terms of the deposit.
6. ———: ———. If a payee of such a deposit is given and has a present interest in it his status in reference to it is not changed by the fact that he does not use any part of the deposit during the life of the other payee.
7. **Executors and Administrators: Judgments.** Proceedings to administer and settle the estate of a decedent are in rem and every person interested therein is a party thereto whether he is named or not and he is bound by the action of the court having jurisdiction thereof whether he actually appears in the proceeding or is absent therefrom.
8. **Judgments.** All matters in issue in a judicial proceeding and which are judicially determined therein are conclusively put at rest by a judgment rendered in it and may not again be litigated.
9. ———. The doctrine of res judicata applies, except in special cases, not only to points upon which the court was required by the parties to form an opinion and pronounce a judgment, but to every matter which properly belonged to the subject of litigation and which the parties might have brought forward therein.
10. **Courts: Judgments.** All presumptions are in favor of the regularity of proceedings had in a court of general jurisdiction and if a judgment rendered by such a court recites findings of fact material to the issue heard and determined it will be presumed that they were justified by evidence submitted to the court.

APPEAL from the district court for Holt County: LYLE E. JACKSON, JUDGE. *Affirmed.*

Elven A. Butterfield and *Louis Lightner,* for appellants.

Harold E. Connors, for appellee.

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

BOSLAUGH, J.

This appeal contests the correctness of the judgment of the district court approving the final report and account of appellee Gertrude Minahan as administratrix of the estate of Michael Curran, deceased.

Byrl Waldo, who described himself as a debtor of the estate of the deceased, filed a pleading containing his objection to the report of the administratrix of the estate. He did not assert therein and he did not attempt to prove that he was related to, or that he was an heir of the deceased or that he was a creditor of the estate. The only relationship to the estate of the deceased he alleged was that he was a debtor of it. He had no legal interest in the estate or the disposition of the money he paid to the representative of it in satisfaction of his debt to it. He was not a party in interest and he had no capacity to enter or participate in the pending contest. He was only a meddlesome volunteer in an area he had no legal sanction to invade and in which he had no right to enforce or protest. A person who may rightfully appear and participate in litigation as a party to it is generally one whose pecuniary or property interest may be affected by the litigation. A person who has no legal right or interest to enforce or defend may not generally invoke the jurisdiction of the court as a party to litigation. Byrl Waldo did not have any personal interest in the estate or in the final account of the representative thereof, and he had no legal authority to appear and participate in the contest concerning it. Lund v. Rubeck, 159 Neb. 335, 66 N. W. 2d 809. The order of the trial court denying Byrl Waldo permission to appear as a party to the proceeding and striking his pleading from the record of the cause was correct.

Delia Ernst, a sister and heir of the deceased and a

creditor of his estate, and Arthur Waldeman, a brother-in-law of the deceased and a creditor of his estate, herein referred to as appellants except when necessary to speak of them separately, by pleadings objected to the report of the administratrix in the respects hereafter mentioned and discussed. Delia Ernst alleged that Byrl Waldo "paid to the administratrix $700.00 in payment of a note and that no where in the report is it shown that the $700.00 was collected from the said Byrl Waldo." Arthur Waldeman pleaded that "she (the administratrix) should be required to repay to the estate * * * the other sums that she expended for court costs in bringing an unwarrantable suit against Byrl Waldo when she had knowledge that the said Byrl Waldo has paid to the probate court the amount of his indebtedness * * *." Byrl Waldo, hereafter spoken of as Waldo, borrowed $700 and gave his note therefor to the deceased. The note was not dated and it recited "Six Mo. ———— after date, for value received, we or either of us promise to pay to the order of MIKE CURRAN AT THE FIRST NATIONAL BANK OF ATKINSON, NEBRASKA Seven Hundred . . . . . Dollars with interest at 10% per annum after date. * * *" The note came to the knowledge and possession of Gertrude Minahan, a sister of the deceased. Waldo, the day of the funeral of the deceased in April 1951, told Gertrude Minahan that he owed the note and would pay it. Later after she had been appointed the representative of the estate she talked with Waldo about it and he said he would pay it when he sold his blue grass seed. He did not pay the indebtedness and she gave the note to John R. Gallagher, the attorney who represented her as administratrix. He wrote Waldo demanding that he pay the note and the attorney attempted otherwise to collect it. In the fall of 1951 Waldo came to the store where the administratrix was employed and said he would not pay the note to her. She, Waldo, and a brother of the deceased went to the office of her attorney where the matter of payment of the note was dis-

cussed but Waldo refused to pay it to her. The attorney advised suit on the note. The result of an action on it was uncertain. It was defective because of the absence of a date on it and it probably bore a usurious rate of interest. The administratrix made an arrangement with her attorney that he bring and prosecute suit on the note on a contingent basis, and that he should receive one-third of any amount collected thereby as his compensation and reimbursement for expenses. If nothing was realized he would receive no amount.

Appellee brought suit on the note in the county court the day of the conference in the office of her attorney September 29, 1951. Waldo consulted with the judge of the county court about the matter. The attorney for the administratrix dismissed the case without prejudice and filed an action on the note in the district court. Waldo did not appear in that court and a judgment was rendered against him. The administratrix was willing to accept $700 and the court costs but Waldo refused to pay the costs. He gave his check dated November 27, 1951, payable to the order of Holt County Court for $700 to the county judge with an endorsement thereon "Full tender on indebtedness to Michael Curran estate." This was without the knowledge of the administratrix but she and her attorney later learned of it. She did not receive the information from the county judge. The attorney for the administratrix was moving to execute the judgment against Waldo. He later received the check that was left with the county judge and deposited it for clearance. It was returned unpaid for insufficient funds of the drawer. He later, probably on February 28, 1952, collected from Waldo $700 in settlement of the note and the judgment entered thereon. The attorney retained $222.08 as compensation for his efforts and remitted to the administratrix $477.92 and this is accounted for in the final report of the administratrix.

The representative of an estate is required to inventory the personal property rights and credits owned by

the deceased at the time of his death, is chargeable in his account with them, and is obligated to make complete and just accounting of the property of the estate. In re Estate of Statz, 144 Neb. 154, 12 N. W. 2d 829. The representative of an estate may and should prosecute an action if he in good faith believes it is necessary for the recovery of any debt of the estate. § 30-803, R. R. S. 1943; Uptegrove v. Metropolitan Life Ins. Co., 145 Neb. 51, 15 N. W. 2d 220. If the representative of an estate expends money in the prosecution of a claim of the estate for costs or the services of counsel in a reasonable amount he is entitled to be reimbursed therefor even though his efforts are unsuccessful. McDowell v. First Nat. Bank of Sutton, 73 Neb. 307, 102 N. W. 615; In re Estate of Bush, 89 Neb. 334, 131 N. W. 602.

The standard by which the action of a representative of an estate is judged in this regard is the same as applies to all his transactions on behalf of the estate he represents. If in the exercise of sound reason under the circumstances it should be concluded by an ordinary, prudent, and cautious man necessary for the best interest of the trust to act as the representative did then his action should be approved by allowing the expenditures caused thereby in his final account even though subsequent developments indicate the action was unnecessary or ill-advised. In re Estate of Bush, *supra;* In re Estate of Hunter, 129 Neb. 529, 262 N. W. 41. Waldo was obligated to pay his debt owing the estate to the administratrix. She was duty-bound to make reasonable effort to collect it from him and she was the only person who had authority to receive payment thereof. She was justified in resorting to the courts for aid in compelling the debtor to satisfy his obligation to the estate. These considerations induce the conclusion that the action of the administratrix in reference to the indebtedness of Waldo should be approved.

The deceased and Clare Connors were on or after May 31, 1949, until the date of the death of the deceased,

the owners as joint tenants of a deposit account in the Chambers State Bank payable to Mike Curran or Clare Connors. The substance of a claim of appellants is that at the time Clare Connors became a joint tenant of the deposit account with the deceased it was upon the condition, limitation, and understanding that all debts of the deceased at his death, including the expenses of his last illness, the costs of his funeral and burial, and the costs and expenses of administering his estate should and would be paid from the joint account; that contrary to this Clare Connors paid the amount owing by the deceased at the time of his death for medical and nursing services he received in his last illness, and the funeral expenses of the deceased and she filed and had approved a claim against the estate of the deceased therefor in her favor in the sum of $1,140.09; and that the administratrix paid a part of the claim and took credit therefor in her final account with the estate. Appellants say the items specified above should have been paid from the joint deposit account and only the balance remaining thereafter should have been paid to Clare Connors, and that she could not have had a legal claim against the estate of the deceased on account of the items she paid from the joint account for medical, nursing, and undertaking services rendered the deceased.

There is an absence of any proof of the condition, limitation, and understanding concerning the joint deposit account as asserted by appellants. An officer of the bank in which the joint account was created testified that the deceased asked the officer about hospital bills and funeral expenses that would accumulate incident to the last illness and death of the deceased, and the banker replied that the deceased should make some provision for them. The deceased then said Clare, meaning Clare Connors, will pay the funeral expenses and doctor bills. The banker did not and would not testify that the statements made in that conversation were in the presence or hearing of Clare Connors. When

he was asked if the conversation was at the time the joint account was made the banker answered that he was not sure when it took place, whether it was that day or whether it was another day that the deceased talked to the banker. The writing made and signed by the deceased and Clare Connors at the time the joint account was made contains no such condition or limitation and does not evidence any such understanding as that claimed and alleged by appellants. Clare Connors was with the deceased in the bank all the time he was there the day the joint account was opened. She denied the claims of appellants in this regard. She testified that her brother never mentioned to her or in her presence the subject of expenses incident to his last illness and death or the payment thereof. This contention of appellants has no evidentiary support.

The instrument signed by the deceased and Clare Connors to evidence the status of each in reference to the deposit account recites that the funds then or thereafter placed in it were and should be their joint property and owned by them as joint tenants with right of survivorship; that upon the death of either of them the balance in the account should become and be the property of the survivor; that withdrawal of the funds by the survivor should be binding upon them, their successors, and assigns; and that the entire account or any part of it might be withdrawn by or upon the order of either of them or the survivor. There is no exception, limitation of, or condition imposed upon this language. This was a deposit in a bank of this state, in the name of two persons, and presently deliverable or payable to either or to the survivor of either. It abundantly complied with the relevant statute. § 8-167, R. R. S. 1943; Parkening v. Haffke, 153 Neb. 678, 46 N. W. 2d 117. The statute contemplates the conveyance of a present interest in the deposit, as there was by express words in this instance, even though the actual enjoyment thereof by one of the joint tenants may be postponed until some

future time. The fact that Clare Connors did not exercise her right to withdraw any part of the deposit before the death of the other joint tenant is not under the circumstances of this case significant. Young v. McCoy, 152 Neb. 138, 40 N. W. 2d 540. It has often been said and has been recently repeated by this court that the statute was intended for the protection of banks and that it also fixes the property right of the payees named in the deposit unless a contrary intent affirmatively appears from the terms of the deposit. Rose v. Kahler, 151 Neb. 532, 38 N. W. 2d 391; In re Estate of Johnson, 116 Neb. 686, 218 N. W. 739. It is too certain for argument that no such contrary intention is exhibited by the terms of the deposit concerned in this case.

Appellants argue in their brief that the statute does not foreclose proof by parol evidence of a trust of the deposit in favor of the creditors of the deceased. In brief they say in substance that the bank deposit that came to Clare Connors by survivorship should be determined to be held by her in trust for the creditors of the deceased. The deficiencies in this postulate are, as above pointed out, that there is no factual foundation for it; that there is no pleading of such an issue or theory; and that the belated mention of it first appeared in the brief of appellants in this court. The comment in Scriven v. Scriven, 153 Neb. 655, 45 N. W. 2d 760, is pertinent: "It is pointed out in In re Estate of Johnson, *supra* (116 Neb. 686, 218 N. W. 739), that in a proper action a bank deposit coming to a party through right of survivorship may be determined to be held in trust for another. This appears to be a sound principle but it has no application here. The action here is in equity to determine the true status of the account. There is no contention that it is a trust fund."

The claim was timely filed by Clare Connors against the estate of the deceased in the proceedings for the administration thereof in the county court for the amount of the expenses incident to the last illness and

death of the deceased which she paid. It was disallowed by that court and the claimant prosecuted an appeal from the order in that regard to the district court. A trial of the claim was had in that court. The record of that court recites that the matters presented by the appeal were by order made at a previous time set for hearing on August 18, 1952, and that on that date the cause was heard upon the transcript from the county court, the pleadings, and the evidence. That court found generally in favor of the claimant and against the estate; that the order of the county court disallowing the claim of Clare Connors was wrong and should be overruled and reversed; that the claim was a just and lawful one against the estate of the deceased in favor of the claimant in the sum of $1,140.09, the full amount asked; and that it should be allowed against the estate of the deceased. A judgment was rendered on the day designated for trial of the cause in harmony with the findings. There was no appeal from that adjudication and it became final.

Appellants think they are not bound by the judgment of the district court because they say they were not parties to the appeal of the claimant from the order of the county court disallowing her claim. Arthur Waldeman, one of the appellants, relies upon the fact that he was not personally present in the district court when the claim was heard and adjudicated. The record of that court recites that Delia Ernst was present and represented in court by her attorney, Francis D. Lee, and that Arthur Waldeman was represented in court by his attorney, Francis D. Lee. The record in the county court states that Francis D. Lee represented Arthur Waldeman at the hearing on claims in that court. Arthur Waldeman in this case attempts to deny that Francis D. Lee was authorized to represent him. However that may be if Waldeman stayed away and disregarded the proceedings in reference to the claim in the district court that fact does not interfere with the binding and con-

clusive effect of the judgment of that court. There is no issue of any jurisdictional defect. The proceedings to administer the estate of the deceased were in rem and everyone interested in them was bound by what was legally done whether named in the proceedings and in attendance at the time or not named and absent. In Lund v. Rubeck, *supra,* the court commented: "Administration proceedings to settle the estate of a decedent are proceedings in rem, and every person interested in such settlement is a party thereto whether he is named or not. Any person, whether he be a devisee, legatee, creditor, or the owner of a contingent interest, may appear for the purpose of protecting his rights." See, also, In re Estate of Statz, *supra;* In re Estate of Nilson, 126 Neb. 541, 253 N. W. 675. The administratrix was bound by a final judgment to apply any funds of the estate available for that purpose to the payment of the claim of Clare Connors. The administratrix breached no duty in making the payment that she did make on the claim.

Appellants were precluded from presenting any matter prejudicial to the legality of the claim of Clare Connors in the proceedings now under review that could have been legally asserted by either of them to defeat its allowance in the district court. The doctrine of res judicata is that it concludes the matters that were determined in the former proceeding and any other thing involved which might have been decided. If a litigant has a defense which he fails to present at the time and in the manner provided by law he does so at his peril. Anderson v. Anderson, 155 Neb. 1, 50 N. W. 2d 224.

The judgment allowing the claim is attempted to be assailed by appellants on the grounds that the district court wrongfully restricted and in some respects excluded the evidence desired to be presented in opposition to the validity of the claim and that in fact there was no evidence received except a stipulation. This is disputed

by the unimpeached record of that court but if what they assert were true it would be foreign and immaterial to this inquiry. Their attempt is a collateral assault upon a judgment containing no jurisdictional infirmities. The judgment of the district court in the absence of jurisdictional defect may not be impeached by any proceeding required as was the pending one to be originated in the county court. All presumptions are in favor of regularity of proceedings had in a court of general jursdiction and if the judgment recites findings of fact material to the issue before the court it will be presumed that they were justified by evidence submitted to the court. The fact that the court having jurisdiction to decide a cause may have exercised its power and dealt with the subject matter erroneously and irregularly is unimportant. Chicago, B. & Q. R. R. Co. v. Hitchcock County, 60 Neb. 722, 84 N. W. 97; Hassett v. Durbin, 132 Neb. 315, 271 N. W. 867.

An appeal from the order in reference to the account of the representative of an estate is tried in the district court as a suit in equity. § 30-1606, R. S. Supp., 1953; Egan v. Bunner, 155 Neb. 611, 52 N. W. 2d 820. An appeal to this court from the judgment of the district court in such a proceeding is heard de novo. The evidence in the present case is conflicting and incapable of being reconciled. It is the duty of this court in this situation to arrive at an independent conclusion uninfluenced by what was done in the cause before this appeal was taken except due consideration may be given to the fact that the trial court saw and heard the witnesses, considered the conflicting testimony, and accepted one version of it rather than the one in opposition thereto. An examination made and the consideration given the record in this cause has convinced this court and it finds that the final report of Gertrude Minahan as administratrix of the estate of the deceased is legal, true, and complete and that it should be approved.

The judgment of the district court should be and it is affirmed.

AFFIRMED.

FLORY, District Judge, dissenting.

There are two items allowed in the final report of the administratrix which I cannot agree should be allowed as credits. These are the items of $40, listed as costs in the district court in Minahan v. Waldo, and $218.52 shown as paid to Arthur Waldeman on his claim but which was, in fact, paid to an attorney and has never been received by Arthur Waldeman. In addition to the above items, it seems to me that the attorney's fee of $222.08, deducted by the attorney for the estate for the collection of the Waldo note, is entirely unreasonable and was an unnecessary dissipation of the funds of an insolvent estate.

The Waldo note was in the amount of $700 and drew a usurious rate of interest on its face. Waldo had admitted owing the principal of the note before any suit was commenced and had left a check for $700 with the county judge before suit was commenced in the district court. The attorney for the estate knew, or should have known, that only the face amount could be collected. He admitted on cross-examination that the check for $700 was in the hands of the county judge to be turned over to him, yet he refused to accept it because he had incurred $11.25 costs in the county court. Instead of paying these costs and collecting the note he dismissed the case, paid the costs, and filed a case in the district court thus incurring additional costs, and later took the $700 in full settlement of the judgment obtained in the district court.

The attorney for the estate, on cross-examination, stated that he knew the $700 check was in the hands of the county judge for him, and then this question was asked: "Then the only reason you dismissed the case in the county court, and filed it over in the district court, was because of the $11.00 court costs?" (Answer) "Yes,

I didn't think the estate should be taxed for those $11.25."

I cannot agree that this expenditure in attorney fees and court costs of $262.08 is reasonable when the $700 note could have been collected by the payment of $11.25. Neither can I agree that it complies with the standard set forth in the majority opinion that: "If in the exercise of sound reason under the circumstances, it should be concluded by an ordinary, prudent, and cautious man, necessary for the best interest of the trust to act as the representative did, then his action should be approved by allowing the expenditures caused thereby in his final account even though subsequent developments indicate the action was unnecessary or ill-advised."

In regard to the allowance of the payment of $218.52 to an attorney on the Arthur Waldeman claim, the attorney to whom the money was paid testified that he had never seen Mr. Waldeman and would not know him if he saw him; that he had not talked to Waldeman; and that Waldeman had not employed him. Apparently, from the record, Waldeman had never been in court with this attorney and had never signed any pleadings, and there was nothing except the attorney's statement that he represented Waldeman up to the time this check was delivered to the attorney. It is quite significant in this connection that on the hearing on the claims in the county court, the attorney now claiming to represent Waldeman dictated the stipulation allowing the Connors, Ernst, and Waldeman claims. That stipulation, Exhibit No. 4, states only that he is appearing for Delia Ernst. Also, in the "Appearances" at the beginning of the hearing (Exhibit No. 4) this attorney is listed only as attorney for Delia Ernst, and no appearance is shown for Arthur Waldeman.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

SEPTEMBER TERM, 1955

PETER KIEWIT SONS' CO., A CORPORATION, APPELLEE, V. COUNTY OF DOUGLAS, APPELLANT.
72 N. W. 2d 415

Filed October 7, 1955. No. 33697.

1. **Corporations: Taxation.** Under the provisions of section 77-706, R. R. S. 1943, domestic corporations are the agents of their stockholders for the purpose of assessing their stock in such corporation for taxation and paying the tax assessed thereon.
2. **Taxation.** By section 77-1502, R. S. Supp., 1953, a county board of equalization is authorized to meet in special session at any time after the close of the annual meeting for the purpose of equalizing assessments of omitted and undervalued property.
3. **Corporations: Taxation.** Shares of stock and capital stock represent different property rights and may be separately assessed.
4. ———: ———. A tax on the shares is not a tax on the capital of the corporation.
5. ———: ———. A state may impose a tax upon the stockholders' interests in a corporation, measured by corporate asset values, without making any deduction on account of United States securities held by the corporation.
6. ———: ———. It is the policy of the state to avoid, as far as possible, double taxation. The Legislature, in recognition of this principle, provided by the terms of section 77-706, R. R. S. 1943, that the value of the shares of stock in a domestic corporation for taxation purposes shall be determined by deducting from the value of the capital stock, surplus and undivided profits, the value of property owned by the corporation, both tangible and intangible, which is "listed and taxed"

in this state against the corporation, as well as the actual value of the property of the corporation outside of the state.

7. ———: ———. The method authorized for valuing the shares of stock of domestic corporations under section 77-706, R. R. S. 1943, results in discrimination against United States obligations.

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

Eugene F. Fitzgerald and *August Ross,* for appellant.

Fraser, Connolly, Crofoot & Wenstrand, for appellee.

Kennedy, Holland, DeLacy & Svoboda, Robert K. Adams, Edward A. Mullery, and *Robert L. Berry,* Amici Curiae.

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

WENKE, J.

The County of Douglas has appealed to this court from an order of the district court for Douglas County authorizing Peter Kiewit Sons' Company, a Nebraska corporation, to deduct from the value of its intangible class "B" personal property for the year 1953 $5,000,000 of United States government obligations, which it owned on March 10, 1953, in order to determine the value of its shares of stock for taxation purposes.

Appellee is a corporation organized under the laws of this state. In April 1953 it filed a tax return for the year 1953 with the county assessor of that county, Douglas County being the county wherein its principal office and place of business was then located. § 77-705, R. R. S. 1943. In computing the value of its shares of stock for assessment and taxation purposes the appellee deducted from its intangible class "B" personal property obligations of the United States which it owned on March 10, 1953, in the amount of $5,000,000. On July 1, 1953, the board of equalization of Douglas County notified the appellee its intangible class "B" personal

property, which it had returned at $149,515, should be $5,235,585 and that the board intended to raise the assessment accordingly. This notice advised appellee it could appear before the board on July 8, 1953, at 10 a. m. and show cause, if any there be, why said assessment should not be so raised. On July 8, 1953, appellee filed a complaint with the board protesting its action and set forth therein its reasons why the United States government obligations should not be included. The board, on the same day, dismissed appellee's complaint and fixed the valuation of the intangible class "B" personal property of the appellee to include the United States government obligations. From the board's ruling the company appealed to the district court for Douglas County. The district court's ruling has been hereinbefore set forth.

The principal question presented by this appeal is, whether or not, in determining the value of the shares of stock of a domestic corporation for taxation purposes pursuant to the provisions of section 77-706, R. R. S. 1943, the value of United States government obligations owned and held by such corporation can be deducted?

Preliminary to a discussion of the foregoing there are two questions raised by appellee in regard to the jurisdiction of the county board of equalization that should be answered. First, appellee contends no notice of any kind was ever given the owners (the stockholders) of the corporation of any proposed increase on their tax returns as required by section 77-1506, R. R. S. 1943. This statute provides as follows: "The county board of equalization shall adjust assessments for the county by raising and lowering the assessment of any person as to any or all items of his assessment in such manner as to secure the listing and the assessment of property at its actual value. In no case shall the assessment of any person be raised by the board until such person *or his agent* shall be previously notified, if such person *or his*

agent be found in the county." (Emphasis ours.)

In regard to banks this court, in First Nat. Bank of Blue Hill v. Webster County, on rehearing, 77 Neb. 815, 113 N. W. 190, held: "National banks are the agents of their stockholders for the purpose of listing their stock in such banks for taxation and paying the tax thereon." In the opinion the court went on to say: "The appellee insists that the entire proceeding is void, because the tax, in case of national banks, is a liability of the shareholder, and not of the banking corporation itself, and because the shareholders were not personally notified of the proceedings before the board; but that is an erroneous interpretation of the federal statute. Shares of stock in a national bank are assessed to the individual stockholder at the place where the bank is located, but the bank is liable in the first instance for the payment of the tax, and is given a lien on the stock to secure repayment from the shareholder. The bank is made the agent of the shareholder, not only for the payment of the tax, but for the purpose of listing the stock for taxation. No other course would be practical, because in many cases, as in this, stockholders in national banks reside in different states and all are not accessible to local assessors. Our statute was enacted with reference to these conditions and is in entire harmony with the federal law." See sections 77-708, 77-709, and 77-710, R. R. S. 1943, as they relate to banks. The same would be true of domestic corporations making returns pursuant to section 77-706, R. R. S. 1943. Notice to the corporation, as was given here, was compliance with the requirements of section 77-1506, R. R. S. 1943.

Appellee's second contention is that the board of equalization of Douglas County had no jurisdiction to act on July 8, 1953, because more than 40 days had elapsed since it first met on May 18, 1953. See § 77-1502, R. S. Supp., 1953. In Fromkin v. State, 158 Neb. 377, 63 N. W. 2d 332, we said of this section: "The provisions of section 77-1502, R. S. Supp., 1953, provide for 'a ses-

sion' of the county board of equalization of not less than 3 nor more than 40 days. The period of days defines the minimum and maximum term in days of a session. The statute contemplates one session to begin and end as provided in the act. Once started the time continues to run. The time limited in the act constitutes the term during which the county board can act for the purposes stated."

However, as to equalizing assessments of undervalued property, which is the situation here, we held in Ewert Implement Co. v. Board of Equalization, 160 Neb. 445, 70 N. W. 2d 397, that: "By section 77-1502, R. S. Supp., 1953, a county board of equalization is authorized to meet in special session at any time after the close of the annual meeting for the purpose of equalizing assessments of omitted and undervalued property."

In view of the foregoing we find the board of equalization of Douglas County had jurisdiction of the parties and authority to act in regard to the subject matter when it did so on July 8, 1953.

Section 77-706, R. R. S. 1943, to which the principal question is directed, at all times here material, provided as follows: "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."

After our opinion in Omaha Nat. Bank v. Jensen, 157 Neb. 22, 58 N. W. 2d 582, this statute was amended

by the 1953 Legislature to include: "The value of the shares of stock of corporations * * * domesticated under the laws of this state * * *." See Laws 1953, c. 267, § 1, p. 880. However, it was not changed insofar as the subject matter here involved is concerned and such change is not here material because appellee is a domestic corporation.

The immunity of obligations of the United States from taxation by or under state, municipal, or local authority is established by federal statute as follows: "Except as otherwise provided by law, all stocks, bonds, Treasury notes, and other obligations of the United States, shall be exempt from taxation by or under State or municipal or local authority." 31 U. S. C. A., § 742, p. 584. The United States Supreme Court has held obligations of the federal government cannot be taxed either directly or indirectly. New Jersey Realty Title Ins. Co. v. Division of Tax Appeals, 338 U. S. 665, 70 S. Ct. 413, 94 L. Ed. 439; Miller v. Milwaukee, 272 U. S. 713, 47 S. Ct. 280, 71 L. Ed. 487; Smith v. Davis, 323 U. S. 111, 65 S. Ct. 157, 89 L. Ed. 107. See, also, State v. First Nat. Bank, 103 Neb. 280, 171 N. W. 912.

However, shares of stock of a corporation in the hands of an individual are a distinct entity from the property of the corporation. See, Allied Contractors, Inc. v. Board of Equalization, 113 Neb. 627, 204 N. W. 374; Nemaha County Bank v. County Board, 103 Neb. 53, 170 N. W. 500; Peters Trust Co. v. Douglas County, 106 Neb. 877, 184 N. W. 812; National Bank v. Commonwealth, 9 Wall. 353, 19 L. Ed. 701; Home Savings Bank v. Des Moines, 205 U. S. 503, 27 S. Ct. 571, 51 L. Ed. 901; Society for Savings v. Bowers, 349 U. S. 143, 75 S. Ct. 607, 99 L. Ed. 557. As stated in Nemaha County Bank v. County Board, *supra:* "Shares of stock and capital stock represent different property rights and may be separately assessed." Also, in Allied Contractors, Inc. v. Board of Equalization, *supra,* we said: "In this connection it is well to bear in mind that shares of stock

in the hands of an individual are a distinct entity from the property of the corporation."

In 1866 the United States Supreme Court in Van Allen v. The Assessors, 3 Wall. 573, 18 L. Ed. 229, said: "* * * the tax on the shares is not a tax on the capital of the bank." This holding the same court has sustained, as recently as May 16, 1955, in Society for Savings v. Bowers, *supra*, when it said: "It has been held that a state may impose a tax upon the stockholders' interests in a corporation, measured by corporate asset values, without making any deduction on account of United States securities held by the corporation." The court then went on to explain the reason for its so holding, stating: "This doctrine had its origin in cases involving national bank stock. There, congressional consent to state taxation of the stock of national banks, upon certain conditions, was held, over strong dissent, to permit such taxes to be assessed without the exclusion of federal obligations owned by the banks. Van Allen v. Assessors, 3 Wall. 573 (1865); National Bank v. Commonwealth, 9 Wall. 353 (1869); Des Moines National Bank v. Fairweather, 263 U. S. 103 (1923). This result was reached in part on the theory that the stockholders' interests in a corporation represent a separate property interest from the corporation's ownership of its assets, so that a tax on the stockholders' interests is not a tax on the federal obligations which are included in the corporate property. This rationale has been carried over to cases involving stock of state-created banks, and thus a tax on their shareholders, though measured by corporate assets which include federal obligations, is held not to offend the rule immunizing such obligations from state taxation. Cleveland Trust Co. v. Lander, 184 U. S. 111 (1902). Further, in levying a tax on shareholders a state may require its payment by the corporation, as a collecting agent. Corry v. Mayor and Council, 196 U. S. 466 (1905). The result is that when, as is usually the case, the shareholder tax is measured solely

by corporate asset values, such a tax is difficult to distinguish from a tax imposed upon the corporation itself, so far as the practical impact of the two types of taxes upon corporate-owned federal obligations is concerned. Nevertheless, this exception to the general rule of immunity is firmly embedded in the law." See, also, National Bank v. Commonwealth, *supra;* Home Savings Bank v. Des Moines, *supra;* Des Moines Nat. Bank v. Fairweather, 263 U. S. 103, 44 S. Ct. 23, 68 L. Ed. 191; Educational Films Corp. v. Ward, 282 U. S. 379, 51 S. Ct. 170, 75 L. Ed. 400, 71 A. L. R. 1226.

As stated in Home Savings Bank v. Des Moines, *supra:* "Although the States may not in any form levy a tax upon United States securities, they may tax, as the property of their owners, the shares of banks and other corporations whose assets consist in whole or in part of such securities, and in valuing the shares for the purposes of taxation it is not necessary to deduct the value of the national securities held by the corporation whose shares are taxed. * * * The right of such taxation rests upon the theory that shares in corporations are property entirely distinct and independent from the property of the corporation. The tax on an individual in respect to his shares in a corporation is not regarded as a tax upon the corporation itself. * * * Accordingly, such taxes have been sustained by this court, whether levied upon the shares of national banks by virtue of the Congressional permission or upon shares of state corporations by virtue of the power inherent in the State to tax the shares of such corporation."

In 1903 the Nebraska Legislature enacted a law in regard to the shares of stock of financial institutions. Laws 1903, c. 73, § 56, p. 403. This law, which is now sections 77-708, 77-709, and 77-710, R. R. S. 1943, contains the following provision in section 77-709: "Such bank, industrial loan and investment company or trust company shall pay the taxes assessed upon its capital stock and have a lien thereon for the same."

On three occasions this court has had to construe this language and in each instance has held it to create an assessment, not upon the capital stock of the institution but upon the value of the shares of stock held by the stockholders thereof. See, State v. Fleming, on rehearing, 70 Neb. 529, 97 N. W. 1063; State v. First Nat. Bank, *supra;* Peters Trust Co. v. Douglas County, *supra.* The latter was affirmed by the United States Supreme Court. See Peters Trust Co. v. Douglas County, 260 U. S. 709, 43 S. Ct. 250, 67 L. Ed. 475. As stated in State v. First Nat. Bank, *supra:* "* * * we are of the opinion that the tax is laid upon the shares of stock, the property of the stockholders, which are a distinct entity from the property of the bank, and that, under the rulings of the supreme court of the United States, the taxing authorities were not required to deduct the value of United States securities belonging to the bank from the statement required to be made to the assessor when ascertaining the value of the shares of stock for the purpose of taxing the owners of such shares."

The basis for this holding is well stated in Citizens State Bank v. Board of Equalization, 110 Neb. 704, 194 N. W. 796:

"Under our law the shares of the bank are the unit of taxation, and each of the individual shares is taxed to the respective shareholders as personal property, and the bank as an entirety, as a corporation, is not taxed at all. By the statute provision is made to obtain a basis for taxing the shareholders and the assessor is required to determine and settle the true value of each share of stock, and such share then forms the unit or basis of taxation. It is taxed as personal property upon its true value, as determined by the assessor, and it matters not the kind of property, taxable or nontaxable, which goes to make up its value.

"It is worthy of note that the shares of stock are taxable to the stockholders even though all or any part of such bank stock may be invested in nontaxable gov-

ernment bonds. It is not a question of double taxation or single taxation or the nontaxation of certain property, a part of which goes to make up the value of the shares of stock."

In 1921 the Nebraska Legislature adopted a comparable statute in regard to fixing the value of the shares of stock of corporations organized under the laws of this state or domestic corporations. Laws 1921, c. 133, art. VIII, § 1, p. 582. At all times herein material it was section 77-706, R. R. S. 1943. It has been hereinbefore set forth. In 1925 this court, in Allied Contractors, Inc. v. Board of Equalization, *supra,* construed this statute in the same manner as it had the statute relating to banking organizations, holding: "In fixing the value of the shares of stock in a domestic corporation under the provisions of section 5884, Comp. St. 1922 (section 77-706, R. R. S. 1943, at all times herein material), no deduction is permitted on account of bonds, warrants or other evidences of indebtedness issued by the state or governmental subdivisions thereof, owned by the corporation."

We think the holdings of these opinions to be correct and have application here.

Appellee raises two further questions with reference to section 77-706, R. R. S. 1943: First, that it does not provide a procedure to foreclose the lien therein given the corporation for any taxes it pays pursuant to the provisions thereof, and second, that the provision creating the lien has been, in effect, repealed by section 21-215, R. R. S. 1943, of the Uniform Stock Transfer Act enacted by the 1941 Legislature. See Laws 1941, c. 42, § 15, p. 220.

As to the first of these appellee asks how a corporation would undertake to enforce its lien since there is no specific provision of any kind in the statute for the enforcement thereof?

As stated in Home Savings Bank v. Des Moines, *supra:* "The tax assessed to shareholders may be re-

quired by law to be paid in the first instance by the corporations themselves as the debt and in behalf of the shareholder, leaving to the corporation the right to reimbursement for the tax paid from their shareholders, either under some express statutory authority for their recovery or under the general principle of law that one who pays the debt of another at his request can recover the amount from him. National Bank of Commonwealth, 9 Wall. 353; Lionberger v. Rouse, 9 Wall. 468; Aberdeen Bank v. Chehalis County, 166 U. S. 440; Merchants Bank v. Pennsylvania, 167 U. S. 461; Cleveland Trust Company v. Lander, 184 U. S. 111." See, also, State v. Fleming, *supra.*

Courts of equity of this state are open to any corporation paying such tax to enforce its statutory lien against the stockholder and we think this provides the corporation ample means for the recovery thereof.

In 1941 the Legislature enacted into law what is now section 21-215, R. R. S. 1943. This statute provides: "There shall be no lien in favor of a corporation upon the shares represented by a certificate issued by such corporation and there shall be no restriction upon the transfer of shares so represented by virtue of any by-law of such corporation, or otherwise, unless the right of the corporation to such lien or the restriction is stated upon the certificate."

Since this statute relates to the subject of liens on stock the following principle is applicable: "All statutes relating to the same subject are considered parts of an homogeneous system; so, too, all statutes in pari materia must be taken together and construed as if they were one law and effect be given to every provision." In re Application of Hergott, 145 Neb. 100, 15 N. W. 2d 418.

Section 21-215, R. R. S. 1943, does not, either directly or by inference, strike down the specific lien given a domestic corporation that pays the taxes of a shareholder assessed and levied on his or her shares of stock

under and pursuant to the provisions of section 77-706, R. R. S. 1943. At most the only question that could arise is, does a corporation waive the right thereto if no provision to preserve it is contained in any certificate of stock which it has issued on and after the effective date of the act? But that question is not here. It could only arise in case the corporation paid the tax and then sought to enforce it.

The appellee offered evidence to the effect that investment bankers, trust companies, and others dealing in stock of Nebraska corporations have construed section 77-706, R. R. S. 1943, as not creating a liability on the part of the individual stockholder to pay the tax levied thereon when paid by the corporation and have so represented it to investors when selling stock of such corporations. The rule is: "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 a statute, is inapplicable." Omaha Nat. Bank v. Jensen, *supra*. Such would also be true of the custom and practice here sought to be established.

A further question is raised as to whether or not section 77-706, R. R. S. 1943, in view of taxing practices authorized thereunder, could result in discrimination against the tax-exempt character of securities held by domestic Nebraska corporations in the form of government obligations.

In considering this question the following principle has application: "It may be said that this is not the situation presented by the facts in this case, but it must be remembered that the validity of the act does not depend upon what has been done, but upon what the act authorizes and by what may be accomplished under it." Rowe v. Ray, 120 Neb. 118, 231 N. W. 689, 70 A. L. R. 1056.

In Commonwealth v. Curtis Pub. Co., 363 Pa. 299, 69

A. 2d 410, it was held: "If this tax so determined results in discrimination against the securities of the United States it is invalid because discrimination by any state against the United States securities has uniformly been interdicted by the decisions of the United States Supreme Court. * * * As the Supreme Court of the United States has repeatedly pointed out, while a taxing act's character in respect to its being discriminatory against federal securities may be determined by its expressed or implied intention, it may also be determined by its operation and effect. * * * When Pennsylvania exempts from taxation its own securities but taxes, directly or indirectly, the securities of the United States the latter securities are handicapped in their competition with the securities of Pennsylvania, among buyers in the market place. This handicapping is by implication proscribed by the Constitution of the United States."

Although we have already set forth in full section 77-706, R. R. S. 1943, we shall again set out that part of the statute which is pertinent to the question here raised. In this respect it provides: "The value of the shares of stock * * * 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 * * *."

The reason why the Legislature so provided becomes evident when we consider the policy of the state in regard to taxation. In Peters Trust Co. v. Douglas County, 113 Neb. 596, 203 N. W. 1001, we said: "It is the settled policy of our law to guard against double taxation, even though such taxation be not unconstitutional." See, also, Nye-Schneider-Fowler Co. v. Boone County, 102 Neb. 742, 169 N. W. 436; Citizens State Bank v. Board of Equalization, *supra*.

Based on this principle we have construed the fore-

going statute as follows: "It is the policy of the state to avoid, as far as possible, double taxation. The legislature, in recognition of this principle, has provided that the value of the shares of stock in a domestic corporation for taxation purposes shall be determined by deducting from the value of the capital stock, surplus and undivided profits, the value of property owned by the corporation, both tangible and intangible, which is 'listed and taxed' in this state against the corporation, as well as the actual value of the property of the corporation outside of the state." Allied Contractors, Inc. v. Board of Equalization, *supra*.

"What is meant by the words 'the assessed value of the property of the corporation, both intangible and tangible, listed and taxed in this state?' * * * It seems to us, however, that this construction leaves out of view the purpose of the legislature, apparent upon the face of the act and deducible from its language, viz., to protect the corporation and shareholders, in the assessment of the capital stock, from being taxed twice upon its property; and where it appears that such double taxation will result unless deduction is made, it will be allowed." Kelkenny Realty Co. v. Douglas County, 116 Neb. 796, 219 N. W. 140.

It was held in Schuylkill Trust Co. v. Pennsylvania, 296 U. S. 113, 56 S. Ct. 31, 80 L. Ed. 91, that permitting a deduction in the determination of the value of shares of stock of a corporation so much thereof as represented shares of corporations which had already paid a tax thereon or, under the policy of the Commonwealth of Pennsylvania, had been exempted therefrom, resulted in discrimination. The court therein, in discussing the question, stated: "The point is that the State has chosen a portion only of the net assets of the corporation as a measure of the tax, whether the exaction be from the company or its shareholders. The State has exempted certain assets on the theory that to measure the tax in part by their value would in effect be to tax them twice.

If to measure the shareholder's tax by inclusion of these taxed or exempted securities found amongst the company's assets would be to tax the shareholder in virtue of the company's ownership of those securities, it seems clear that to refuse to exempt United States securities from the measure of the tax is to lay a tax reckoned upon their value. To put it otherwise, if to exclude securities already taxed or exempted from tax pursuant to the policy of the Commonwealth avoids double taxation, to include United States securities in the measure of the tax seems inevitably to increase the burden of the tax by reason of their ownership. If the burden of the tax be lifted in respect to some securities (as it is by confession from those issued by certain Pennsylvania corporations) it must necessarily fall on the remaining securities owned by the company."

Then in Schuylkill Trust Co. v. Pennsylvania, 302 U. S. 506, 58 S. Ct. 295, 82 L. Ed. 392, involving the same situation, the court said: "We held further that the exclusion from the base of a proportion of the value of tax exempt shares of Pennsylvania corporations, and the refusal of like treatment of federal securities, operated as an unconstitutional discrimination against the latter."

While in Schuylkill Trust Co. v. Pennsylvania, 296 U. S. 113, 56 S. Ct. 31, 80 L. Ed. 91, only stock of domestic corporations was involved, here, by the language of our statute, the deductions include all intangible property owned by the corporation and taxed to it, which would include stock owned by it in other domestic corporations. As stated in Commonwealth v. Schuylkill, 327 Pa. 127, 193 A. 638: "But because of the statutory deductions of the value of stocks already taxed or relieved from taxation by the state, no similar deduction being provided for in the case of United States securities, it 'is impossible to avoid the conclusion' that the law works a discrimination against such securities."

And, as stated in Fidelity & Guaranty Fire Corp. v.

Tax Comm., 172 Md. 652, 193 A. 164: "The quoted portion of the Schuylkill opinion seems to declare that a state, in valuing the stock of a corporation for purposes of taxation, cannot exempt any of its securities, whether tax exempt or not, when amongst its assets are national bank stocks or federal securities, unless they also are exempted, in which event the local tax exempt property or securities would also be exempted. In other words, the federal policy seems to be with respect to the taxing of shares in domestic corporations owning national bank shares, federal securities, tax exempt or already taxed shares, to tax all or omit the national bank stocks and federal securities."

Under these holdings we can come to no other conclusion than that the method authorized for valuing the shares of stock of domestic corporations under section 77-706, R. R. S. 1943, results in discrimination against United States obligations and that the trial court was correct in so holding. However we call attention to the fact that the 1955 Legislature has authorized such deduction. See Laws 1955, c. 292, § 1, p. 924. Therein it is provided that: "The value of the shares of stock of corporations, organized or domesticated 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 actual value of bonds or other obligations issued by the United States of America or any of its agencies or instrumentalities, * * *."

AFFIRMED.

MISSOURI VALLEY CONSTRUCTION CO., A CORPORATION, APPELLEE, V. COUNTY OF DOUGLAS, APPELLANT.
72 N. W. 2d 425

Filed October 7, 1955. No. 33696.

Corporations: Taxation. All questions herein raised are fully discussed and disposed of in Peter Kiewit Sons' Co. v. County of Douglas, *ante* p. 93, 72 N. W. 2d 415, and the principles therein announced are controlling of the issues herein.

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

Eugene F. Fitzgerald and *August Ross,* for appellant.

Fraser, Connolly, Crofoot & Wenstrand, for appellee.

Kennedy, Holland, DeLacy & Svoboda, Robert K. Adams, Edward A. Mullery, and *Robert L. Berry,* Amici Curiae.

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

WENKE, J.

The County of Douglas has appealed to this court from an order of the district court for Douglas County authorizing the Missouri Valley Construction Company, a Nebraska corporation, to deduct from the value of its intangible class "B" personal property for the year 1953 $435,149 of United States government obligations, which it owned on March 10, 1953, in order to determine the value of its shares of stock for taxation purposes.

Appellee is a corporation organized under the laws of this state. In April 1953 it filed a tax return for the year 1953 with the county assessor of that county, Douglas County being the county where its principal office and place of business was then located. See § 77-705, R. R. S. 1943. In computing the value of its shares of stock for assessment and taxation purposes the appellees deducted from its intangible class "B" personal property obligations of the United States which it owned on March

10, 1953, in the amount of $435,149. On May 16, 1953, the county assessor of Douglas County notified appellee that he had raised its class "B" personal property, which had been returned at $4,950 to $436,480. The raise was brought about by including the $435,149 of government obligations which the company had deducted. In the same notice the assessor advised the company that his action was subject to review by the board of equalization at its meetings in the courthouse beginning on May 18, 1953. Appellee, upon receiving the notice, filed a complaint with the board of equalization protesting the county assessor's action of including these government obligations, together with its reasons for doing so, and asking that the assessor's action be corrected. This complaint, which was filed June 8, 1953, the board of equalization dismissed on June 12, 1953, thus affirming the action of the county assessor. Appellee took an appeal from the board of equalization's action to the district court for Douglas County with the result hereinbefore set forth.

All issues herein raised, and necessary for a determination of this appeal, have been fully discussed and determined in Peter Kiewit Sons' Co. v. County of Douglas, *ante* p. 93, 72 N. W. 2d 415. In view of our holding therein the action of the district court is affirmed.

AFFIRMED.

BETTY J. FICK, ADMINISTRATRIX OF THE ESTATE OF THOMAS FICK, DECEASED, APPELLEE, V. MABEL C. HERMAN, DOING BUSINESS AS HERMAN OIL TRANSPORT COMPANY, ET AL., APPELLANTS, IMPLEADED WITH EDGAR CLIFTON, APPELLEE.

72 N. W. 2d 598

Filed October 21, 1955. No. 33591.

1. **Torts: Damages.** A joint tortfeasor is liable for all damages to which his conduct has contributed, and it is no defense that

such damages would not have occurred without the concurring conduct of another person.

2. **Torts: Trial.** The jury in an action against several tortfeasors may ordinarily return a verdict in favor of one and against the others.
3. **Judgments.** That a judgment against two or more defendants is vacated as to one does not require its vacation as to the others, unless it appears that because of an interdependence of the rights of the defendants, or because of other special factors, it would be prejudicial and inequitable to leave the judgment standing against them.
4. **Courts.** The Supreme Court, in a proper case, is empowered to make any order that the district court is authorized to make, by virtue of section 25-1926, R. R. S. 1943.
5. **Automobiles: Appeal and Error.** In an action by a guest against the owner-operator of a motor vehicle in which he was riding and the driver and the owner of a truck with which it collided, a reversal of a judgment against the owner and the driver of the truck does not require a reversal of the judgment in favor of the owner-operator of the motor vehicle, there being no interdependence of the rights of the defendants or other special factors shown which would be prejudicial or inequitable to the defendants as to whom a retrial was ordered.
6. **Appeal and Error.** The filing of a notice of appeal and the depositing of the docket fee in the office of the clerk of the district court, as required by section 25-1912, R. R. S. 1943, gives the Supreme Court jurisdiction of the cause and all persons made parties thereto in the district court.
7. ———. Although the Supreme Court may have jurisdiction of a cause and all the parties thereto in the district court, it will consider such alleged errors only as have been properly preserved and presented.

APPEAL from the district court for Dodge County: FAY H. POLLOCK, *Judge. Motion to recall mandate denied.*

Wear & Boland, M. D. Cook, and *John E. North,* for appellants.

Sidner, Lee, Gunderson & Svoboda, for appellee Fick.

Spear, Lamme & Simmons, for appellee Clifton.

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

CARTER, J.

The appellee, Betty J. Fick, administratrix of the estate of Thomas Fick, deceased, moves this court to recall its mandate to allow consideration of a further motion praying for a specific order that the nonappealing defendant, Edgar Clifton, shall be a party to the retrial.

The record presented discloses that the mandate of this court was received by the clerk of the district court for Dodge County on February 19, 1955, and since that date no action has been taken thereon by the district court of that county. The showing for a recall of the mandate is sufficient under the holdings of this court if reason exists for our so doing. Merriam v. Gordon, 20 Neb. 405, 30 N. W. 410; Horton v. State, 63 Neb. 34, 88 N. W. 146; State Bank of Beaver Crossing v. Mackley, 118 Neb. 734, 226 N. W. 318; Rehn v. Bingaman, 152 Neb. 171, 40 N. W. 2d 673. We think that a consideration of the question whether or not this court's order of reversal and remand requires a new trial as to the nonappealing defendant, Edgar Clifton, should be made more specific and eliminate the possibility of error on this point on a retrial of the case.

The factual situation is: Betty J. Fick, administratrix of the estate of Thomas Fick, deceased, brought an action to recover damages for the wrongful death of Thomas Fick caused by a collision between an automobile driven by the defendant Edgar Clifton, in which Thomas Fick was a passenger, and a stalled truck owned by the defendant Mabel C. Herman, doing business as the Herman Oil Transport Company, and Marvin G. Melia, its driver. The case was submitted to a jury, which returned a verdict for the plaintiff and against the defendants Mabel C. Herman and Marvin G. Melia. The jury found specifically that plaintiff was not entitled to recover against the defendant Clifton. An appeal was taken by the defendants Herman and Melia. Plaintiff did not appeal or cross-appeal from the jury's

finding in favor of Clifton. The judgment was reversed and the cause remanded for a new trial by this court because of error in the instructions. Fick v. Herman, 159 Neb. 758, 68 N. W. 2d 622. It is the contention of the plaintiff below that the entire judgment as rendered on the verdict, including the claim of liability on the part of Clifton, is reversed and the cause remanded for a new trial. It is the contention of Clifton that the jury verdict exonerating him, in the absence of his being made a party to the appeal, has become final and is res judicata as to him.

Defendant Clifton relies on the case of Lewis v. Beckard, 118 Neb. 533, 225 N. W. 462. In that case plaintiff was approaching an intersection from the east. The defendant Haggerty approached it from the west. The defendant Beckard approached the same intersection from the south. Beckard's car struck the Haggerty car and shoved it against the plaintiff's car. Plaintiff brought suit against Beckard and Haggerty. The jury found against Haggerty and for Beckard. Haggerty's motion for a new trial was overruled, and he appealed. Plaintiff did not appeal from the verdict and judgment against her in favor of Beckard. The judgment against Haggerty was reversed and remanded because of misconduct of counsel. This court in its opinion stated: "And in our opinion the finding of the jury in defendant Beckard's favor is not presented by this appeal. It is a matter which does not affect the defendant Haggerty adversely and about which he therefore has no right to complain. * * * The plaintiff might have appealed from the verdict and judgment in Beckard's favor, but she did not do so." The judgment was thereupon reversed and a new trial ordered as to the issues between the plaintiff and the defendant Haggerty. The question of the power of the court to remand the cause for a new trial as to Haggerty only was not briefed nor in any manner questioned on the appeal. The case is similar in principle to the one before us. It is a con-

trolling precedent unless a consideration of the issue reveals a fallacy in the reasoning which supports it.

The common-law rule on this subject is that a judgment against joint defendants is an entirety which must stand or fall as a unit, whether the liability which gave rise to the judgment was joint, or joint and several. In accordance with that view, a judgment against two or more defendants, whether in contract or tort, was indivisible, and could neither be vacated by a trial court nor reversed by a reviewing court as to one defendant alone, even though it was not erroneous as to the others. The inflexible character of the common-law rule has been abandoned in most jurisdictions, but the extent of the departure from the common-law rule varies. See Chmielewski v. Marich, 2 Ill. 2d 568, 119 N. E. 2d 247, 42 A. L. R. 2d 1023.

Every joint tortfeasor is liable for all damages to which his conduct has contributed, and it is no defense that these damages would not have occurred without the concurring misconduct of another person. The plaintiff need not join all tortfeasors as defendants in an action for damages. A jury may properly return a verdict in favor of one tortfeasor and against another, or the court may direct a verdict in favor of one codefendant and permit the case against another to go to the jury. If a verdict is returned against two defendants, the court may grant a new trial as to one of them only. This appears to be the general rule in this state. There is, however, one exception to that rule which is made clear by the opinion in Sturgis, Cornish & Burn Co. v. Miller, 79 Neb. 404, 112 N. W. 595. In that case we said: "There are jurisdictions holding that a judgment obtained against two or more parties is an entirety, and therefore if void as to one is also void as to all. * * * Relief may be obtained against one or more of several parties sued jointly and the action dismissed as to the others. A judgment may be sustained as to one party and reversed as to another. One judgment debtor may appeal,

and, unless his interests are inseparably connected with another judgment debtor, the relief granted on his suit to reverse will not affect the original judgment as against his codebtors. Section 429 of the code (now section 25-1302, R. R. S. 1943) provides: 'Judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants; it may determine the ultimate rights of the parties on either side, as between themselves, and it may grant to the defendant any affirmative relief to which he may be entitled. In an action against several defendants, the court may in its discretion render judgment against one or more of them, leaving the action to proceed against the others, whenever a several judgment may be proper. The court may also dismiss the petition with costs, in favor of one or more defendants, in case of unreasonable neglect on the part of the plaintiff to serve the summons on other defendants, or to proceed in the cause against the defendant or defendants served.' Section 594 of the code (now section 25-1926, R. R. S. 1943) provides in part: 'When a judgment or final order shall be reversed either in whole or in part in the supreme court, the court reversing the same shall proceed to render such judgment as the court below should have rendered, or remand the cause to the court below for such judgment.' In Polk v. Covell, 43 Neb. 884, it was held that 'one of several defendants having separate and distinct defenses may prosecute an appeal from the county court to the district court, without joining his codefendants.' In the case cited two defendants were sued, one as principal and the other as surety. Separate answers were filed, and upon trial judgment was rendered against both. The alleged surety alone appealed, and his right to thus prosecute an appeal was challenged. In the opinion this court quotes from McHugh v. Smiley, 17 Neb. 626, as follows: 'The rule as to appeals appears to be this, that when the action is against several defendants who have distinct and separate defenses the judgment as

to one defendant in a proper case may be appealed; in which case it will only be necessary to take up so much of the record as pertains to his case. Where, however, the interests of the parties are inseparably connected, an appeal will take up the case as to all.' "

The general rule is: The principle that a trial or appellate court has power to vacate a judgment as to less than all of the parties against whom it runs is to some extent qualified. The controlling rule involving the question whether or not a judgment against multiple defendants may be vacated as to some only, is that when a judgment against two or more defendants is vacated as to one of them, it need not for that reason alone be vacated as to any of the others and should not be vacated as to them, unless it appears that because of an interdependence of the defendants or because of other special factors it would be prejudicial and inequitable to leave the judgment standing against them. Sturgis, Cornish & Burn Co. v. Miller, *supra;* Chmielewski v. Marich, *supra.* See Annotation, 42 A. L. R. 2d 1030.

It seems clear to us that under the foregoing holdings the interests of Clifton are not interdependent and inseparably connected with those of Herman and Melia. The liability of Clifton, if any, is based on different issues and different facts. Consequently, a reversal and remand for new trial as to Clifton would be improper and erroneous.

The Supreme Court, in a proper case, is empowered to make any order that the district court is authorized to make by virtue of section 25-1926, R. R. S. 1943.

It might be contended that rule 1b of Part 1, Rules of the Supreme Court, may play some part in matters of this kind. That rule provides that the clerk of the district court, in forwarding the notice of appeal and docket fee to the Clerk of the Supreme Court as required by section 25-1912, R. R. S. 1943, shall accompany the same with a certificate setting forth the names of all the parties to the cause in the district court and their re-

lation to the case as they appeared in that court. The Clerk of the Supreme Court is then required to docket the case, designating the party or parties filing the notice of appeal in the court below as appellant or appellants and all other parties as appellees. We have held: "The filing of a notice of appeal and the depositing of the docket fee in the office of the clerk of the district court, as required by Section 20-1912, Comp. St. Supp. 1941 (now section 25-1912, R. R. S. 1943), gives the supreme court jurisdiction of the cause and all persons made parties thereto in the district court." Madison County v. Crippen, 143 Neb. 474, 10 N. W. 2d 260. See, also, Ash v. City of Omaha, 152 Neb. 699, 42 N. W. 2d 648. It appears, therefore, that this court has jurisdiction of the cause and all the parties, including Clifton, by virtue of the appeal. But this does not mean that this court will consider any and all claims of error. Error must be properly preserved and presented. In the instant case the verdict and judgment for Clifton was not appealed from by the plaintiff. No motion for a new trial was filed as to the judgment entered in favor of Clifton. No cross-appeal was taken. It is therefore conclusively presumed that plaintiff was satisfied with that portion of the jury's verdict. The judgment in favor of Clifton is therefore final unless it is interdependent and inseparably connected with that of the appellants, which we have heretofore held that it is not.

We find that the mandate and order for a new trial as to the appellants Herman and Melia only are correct. The motion of the plaintiff-appellee for a specific order that the nonappealing defendant Clifton shall be a party to the retrial is without merit, and the motion is denied. The order for a retrial as to the defendants Herman and Melia only being entirely correct, no reason exists for recalling the mandate, and the motion for this court to do so is also overruled.

MOTION DENIED.

SIMMONS, C. J.

In the decision of this case appearing in 159 Neb. 758, 68 N. W. 2d 622, I am shown as participating in this case. The record is correct. The firm of Spear, Lamme and Simmons is shown as representing the appellee Clifton. However, at that time they did not participate by briefs or argument in the submission of the case. They appeared by filing made herein on September 16, 1955, and are concerned in the matter now decided. I have not participated in the instant decision.

JOHN M. MCDONALD, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.
72 N. W. 2d 521

Filed October 21, 1955. No. 33786.

1. **Appeal and Error.** It is a fundamental rule applicable to appellate proceedings that the record of a court in which a cause originated or was tried, when properly authenticated, imports verity and cannot be impeached, varied, or changed by oral testimony or extrinsic evidence.
2. ———. The law does not authorize an appellate court to amend or disregard the record as made by an inferior court in a case presented to the appellate court for review and decision.

ERROR to the district court for Keith County: ISAAC J. NISLEY, JUDGE. *Reversed and remanded with directions.*

McGinley, Lane, Powers & McGinley, 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.

BOSLAUGH, J.

Plaintiff in error, who is hereafter referred to as defendant, was accused in the county court of Keith County

with willfully and unlawfully operating or being in the physical control of a motor vehicle on the 21st day of October 1954, upon the public highways of the state in said county while under the influence of intoxicating liquor or drugs. He was convicted of the charge and was adjudged by that court to pay a fine, his license to operate a motor vehicle was suspended for 6 months, and he was committed to the county jail until the fine and costs were paid.

The amount of an undertaking as a part of the proceedings for a review of the cause in the district court was fixed by the county court at $400. An undertaking, in the form and containing the conditions required by the appropriate statute, in which defendant was named as principal and two other persons were designated as sureties, signed by the principal and each of the sureties with qualification of the sureties in proper form endorsed thereon, was tendered the county court on the day that the case was tried and decided by that court. The judge of the county court that date accepted the bond and certified thereon in writing over his signature that it was "Taken, acknowledged and subscribed to before me and sureties approved by me this 8th day of November, A. D. 1954" and on that date he filed the bond in the case.

The statute concerning such an appeal, section 29-611, R. R. S. 1943, contains the following: "No appeal shall be granted or proceedings stayed unless the appellant, together with his surety or sureties, shall, within ten days after the rendition of such judgment, appear before such magistrate, and then and there enter into a written recognizance to the people of the State of Nebraska in a sum not less than one hundred dollars, with surety or sureties to be fixed and approved by the magistrate before whom such proceedings were had, conditioned for his appearance forthwith and without further notice, at the district court of such county, and from day to day thereafter until the final disposition of

such appeal, to answer the complaint against him, and to abide the judgment of the district court and not depart therefrom without leave; * * *."

A transcript of the filings made and the proceedings had in the case was prepared and certified by the judge of the county court as correct and complete. The certificate thereto contained a statement that: "All original instruments included in this Transcript." The transcript was filed in the district court the day after the case was decided in the county court. The county attorney on behalf of the State filed a motion on January 3, 1955, in the district court to dismiss the appeal because as claimed therein defendant had not given an appeal bond as required by law; that the county court required two sureties as a condition of the appeal; that the signature of one of the named sureties was not subscribed on the bond and it was not given by her in the presence of the county judge as required by the law of Nebraska; that more than 10 days had elapsed since the conviction of the defendant; and that the district court had no jurisdiction of the appeal. The motion was sustained and the appeal was dismissed. Defendant has prosecuted this error proceeding to challenge the legality of the action of the district court.

The acts of the judge of the county court with reference to the appeal bond were judicial and required the exercise of discretion as to the amount thereof in excess of the statutory minimum, as to whether more than one surety should and would be required, and as to the qualifications and sufficiency of the sureties. The appeal bond tendered by appellant complied with the requirements of the statute as to form and conditions. It was signed by the defendant as principal and two other persons as sureties. Their qualifications as sureties made by them under oath were endorsed on the bond. It was tendered for acceptance and approval the day of the conviction of the defendant and that date the judge of the county court certified in writing thereon over his signa-

ture, attested by the seal of the county court, that the bond was taken, acknowledged, and subscribed before him and that he approved the sureties. He filed the bond in the cause that date. The truth of all this was transmitted to the district court by the transcript over the signature of the judge of the county court, attested by the seal of that court, and, of course, it is contained in the transcript lodged in this court as the basis of the consideration and decision of this cause. There is no issue that the transcript made by the county court is not a true and complete copy of the record of the proceedings had in the case in that court. The transcript filed herein is, for the purposes of review and decision of this cause, the sole, conclusive, and unimpeachable record of the proceedings had therein in the court of original jurisdiction.

In the case of In re Estate of Bednar, 151 Neb. 242, 37 N. W. 2d 195, this court said: "Appellee introduced evidence in the district court to the effect that the date of April 20, 1948, as shown by the transcript, was not the correct date the order was made by the county court, but that it was made at a later date. Any evidence of this character was improper. It is a fundamental rule applicable to all appellate proceedings that the record of a court where a matter originated or was tried when properly authenticated imports absolute verity and cannot be contradicted, varied, or changed by oral testimony or any extrinsic evidence. An issue of fact cannot be made in this court as to any matter properly shown by the records of the court where the case originated or was tried from whence the case comes to this court for review. Drier v. Knowles Vans, Inc., *supra* (144 Neb. 619, 14 N. W. 2d 222); Morgan v. State, 51 Neb. 672, 71 N. W. 788; Merchants Savings Bank v. Noll, 50 Neb. 615, 70 N. W. 247; Ford v. State, 46 Neb. 390, 64 N. W. 1082. * * * The law neither commands nor authorizes this court to amend the record of an inferior court in a case presented for review. Thomp-

son & Sons Mfg. Co. v. Nicholls, 52 Neb. 312, 72 N. W. 217." See, also, Kennedy & Parsons Co. v. Schmidt, 152 Neb. 637, 42 N. W. 2d 191; Krska v. County of Sarpy, 144 Neb. 613, 14 N. W. 2d 194; Lippincott v. Lippincott, 144 Neb. 486, 13 N. W. 2d 721; In re Estate of Piel, 141 Neb. 783, 4 N. W. 2d 875; Drainage Dist. No. 1 v. Kirkpatrick-Pettis Co., 140 Neb. 530, 300 N. W. 582.

In Dale v. Doddridge, 9 Neb. 138, 1 N. W. 999, an issue was attempted to be made in the district court on appeal of the cause from a justice of the peace court as to when a bill of exceptions was allowed and certified by the justice of the peace. His certificate recited September 14, 1878. Afterwards an unsigned statement was made in writing apparently by the justice of the peace to the effect that the bill was signed 4 days after the date shown by the certificate of allowance of the bill. This court disposed of the contention by this statement: "The court must presume the docket entry and the certificate to have been made at the time they purport to be, and even if the supplemental statement had been signed it would be void, as a justice could not thus stultify himself."

The doctrine of the cases above referred to is that the facts recited in or exhibited by a transcript lodged in an appellate court as the basis of the review of a cause cannot be impeached by extrinsic evidence. It is obvious therefore that neither the judge of the court of original jurisdiction of the cause or any other person was qualified to contradict the transcript by testifying that one of the sureties on the bond did not sign or give the bond in the presence of the judge of the county court. The objections of the defendant that the judge of the county court was disqualified and incompetent to give evidence to contradict the assertions made in the transcript and in the certificate on the appeal bond should have been sustained.

The judgment dismissing the appeal of defendant should be and it is reversed and this cause is remanded

to the district court for Keith County with directions to reinstate the appeal of defendant in that court and for further proceedings in the cause as required by law.

REVERSED AND REMANDED WITH DIRECTIONS.

OTTO L. PRICE, ADMINISTRATOR OF THE ESTATE OF NELLIE V. PRICE, DECEASED, APPELLEE, V. HARRY KING ET AL., APPELLANTS.

72 N. W. 2d 603

Filed October 21, 1955. No. 33787.

1. **Negligence: Trial.** Where different minds may reasonably draw different conclusions from the evidence, or there is a conflict in the evidence as to whether or not negligence or contributory negligence has been established, the question is for the jury.
2. ———: ———. It is only where the evidence shows beyond reasonable dispute that plaintiff's negligence is more than slight as compared with the negligence of the defendant that it is proper for the trial court to instruct the jury to return a verdict for the defendant or to enter a judgment notwithstanding the verdict in his behalf.
3. **Trial.** 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 witnesses and the weight to be given their testimony are solely for the consideration of the jury.
4. **Negligence: Trial.** Negligence must be proved by direct evidence or by facts from which negligence can reasonably be inferred. In the absence of such proof negligence will not be presumed.
5. **Trial.** Instructions given to a jury must be construed together, and if when considered as a whole they properly state the law they are sufficient.
6. **Negligence: Trial.** The burden of proof is on the plaintiff to prove negligence on the part of the defendant by a preponderance of the evidence. The burden of proof is on the defendant to prove contributory negligence on the part of the plaintiff by a preponderance of the evidence. An instruction to this effect cannot afford any basis for error.

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

Clark J. Mingus and *Suhr & Cronin,* for appellants.

Cunningham & Cunningham, for appellee.

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

CARTER, J.

This is an action brought by Otto L. Price, administrator of the estate of Nellie V. Price, deceased, for the benefit of the next of kin of Nellie V. Price, to recover damages for her wrongful death. The jury returned a verdict for the plaintiff against the defendants in the sum of $20,000, and judgment was entered thereon. The defendants appeal.

The death of Nellie V. Price was the result of a collision between an automobile being driven by the deceased, Nellie V. Price, and a truck being driven by the defendant Harry King, and owned by the defendant Orville Conn. It occurred at the intersection of two graveled county roads about 4 miles west of Alda, Hall County, Nebraska, referred to in the record as the Bonsak corner, on October 13, 1953, at about 7:30 a. m. The weather was clear, visibility was good, and the roads were dry. There were no warning or stop signs on either road at the intersection. No question is raised by the appeal in regard to the amount of the damages as found by the jury. The assignments of error relate to the liability of the parties for negligence and to the correctness of the instructions of the court in submitting the case to the jury, if a jury question is found to exist.

The record shows that Mrs. Price was an employee of an ordnance plant near Grand Island, Nebraska. It was her custom to leave home about 7 a. m. and drive to work in her car. Immediately prior to the collision she was driving north as was her usual custom towards

the intersection where the accident occurred. After the collision the automobile of the deceased was in the ditch, headed west, at the northeast corner of the intersection.

The truck being operated by the defendant King approached the intersection from the west. It was hauling a load of shelled corn and according to King was traveling at a speed of approximately 35 miles an hour. After the collision the truck was also in the ditch, headed west, at the northeast corner of the intersection. There is evidence that the truck was on top of the front end of the Price car.

Mrs. Price died approximately 3 hours after the accident without making any statement as to how it happened. A witness, John McDermott, testified that he talked with the defendant King shortly after the accident and that King said "he did not see her until he hit her."

The defendant King testified that he approached the intersection from the west at approximately 35 miles an hour. There was a cornfield to the south which had been picked out and he said that he could see the Price car approaching when he was west of the Bonsak barn, which was about 280 feet west of the north and south highway. He said Mrs. Price was twice as far away from the intersection at that time. He fixed the distance as three light poles south of the intersection. He said he looked again when he was "pretty close to the intersection." At this time, he said, the Price car was a "considerable distance south" and that it "was about twice as far from the front of her car to the intersection as from the front of my truck to the intersection." He said he was from 7 to 11 steps from the west line of the intersection the last time he looked. He continued to drive at the same speed and at no time slowed down as he approached the intersection. His evidence is that he saw he had time to clear the intersection so he kept on going, but that the Price car hit the right front fender

and wheel of his truck in the intersection. He states he was driving on his right-hand side of the road and that his truck was hit on the east side of the center of the intersection. He did not know where on the north and south road the Price car was being driven. He states that when the front of the truck was struck it went up in the air and that is the last he remembers as to what happened. He admits that he did not again look to the south after he came by the last row of corn in the field south of him because "I felt I had plenty of time to get across the intersection." He said he had on a heavy load and had to watch the road ahead of him, and for that reason he did not again look to the south. He said he knew that Mrs. Price had the right-of-way over him because she was approaching from his right.

There is evidence by the witness Bonsak that he saw the truck pass his place going east and that the Price car was about twice as far away from the intersection as the truck at that time. The witness Dobesh was standing in a cornfield southeast of the intersection while engaged in picking corn and watched the approach of both vehicles immediately prior to the collision. He said he saw the truck at the Bonsak trees and the car approaching near the point where he had a truck parked in his field. He stated that both the truck and car were traveling too fast when he saw them and that if their speeds were maintained there would be an accident. He testified that the truck was farther from the intersection when he saw it at the Bonsak trees than was the Price automobile.

There is evidence of some tire marks in the intersection. One was described as a brush mark indicating that a wheel had been pushed to the north. The condition of the car and truck is described after the accident. It is asserted by defendants that the damage to the truck shows that it was struck on the right front fender and wheel. This evidence is disputed. The pictures in evidence show that the truck and car were totally wrecked.

The evidence is clear that the truck turned over and landed partly on the Price car. The physical facts are disputed and any conclusion reached from them is not at all conclusive.

The evidence may be summarized as follows: Defendant King was the employee of the defendant Conn. He was driving a truck which was in good condition. As he approached the intersection he was driving at 35 miles an hour and at no time did he apply his brakes or attempt to slow down. He saw the Price car coming some distance away. He looked a second time and assumed he had time to go on through. After passing the last row of corn on his right he did not look again, and the collision occurred. The plaintiff was traveling north. Because of her death, shortly after the accident, her version of the accident is not available. She evidently was traveling on her right-hand side of the highway as King stated the collision occurred east of the center of the intersection. The physical facts are inconclusive and any inferences to be drawn from them are clearly for the jury. The condition of the truck and automobile after the collision was such that it points to no conclusive theory as to who was responsible for the accident. Whether the damage relied upon was caused by the original impact in the intersection, or by the subsequent overturning of the loaded truck, is not certain. The evidence in this respect was clearly a question for the jury to consider. The evidence of some of the witnesses relied upon was impeached to some extent by previous statements alleged to have been contrary to their evidence at the trial. This goes to the credibility of such witnesses and the weight to be given their testimony. Such matters are solely for the jury. We conclude from an examination of the whole record that the evidence was sufficient to submit the case to the jury. The conflicts in the evidence were peculiarly for the jury to resolve. Consequently the trial court did not err in overruling the motions of the defendants for a directed

verdict and their motion for judgment notwithstanding the verdict. This conclusion is supported by our holdings to the following effect: Where different minds may draw different conclusions from the evidence in regard to negligence, the question should be submitted to the jury. It is only where the evidence shows beyond reasonable dispute that plaintiff's negligence is more than slight as compared with the negligence of the defendant that it is proper for the trial court to instruct the jury to return a verdict for defendant or enter a judgment notwithstanding the verdict. Becks v. Schuster, 154 Neb. 360, 48 N. W. 2d 67; Young v. Stoetzel, 159 Neb. 624, 68 N. W. 2d 186; Granger v. Byrne, 160 Neb. 10, 69 N. W. 2d 293.

The defendants contend primarily that the evidence shows Nellie Price was guilty of negligence more than slight as a matter of law when compared with the negligence of the defendants. The only negligence shown on the part of Nellie Price was that she was driving fast. There is no evidence that she was violating any speed limit fixed by statute. Whether she was negligent in failing to keep a proper lookout, or in failing to yield the right-of-way, is dependent upon the facts proved, and consequently is a matter for the jury. The presumption is that she used due care. There is a natural presumption that everyone will act with due care. The mere fact that an accident happens does not prove contributory negligence. Negligence must be proved by direct evidence or by facts from which such negligence can be reasonably inferred. In the absence of such proof, negligence cannot be presumed. The evidence of the plaintiff, and the defendants as well, is sufficient from which the jury might find that King was grossly negligent. The jury could find that he failed to keep a proper lookout and failed to slow down or stop his truck where reasonable care under the circumstances required him to do so. The fact that he had a heavy load on the truck, requiring, as he said, that he

had to watch the road immediately ahead of him, would not excuse his duty to keep a proper lookout for approaching traffic. It cannot be said that Nellie Price was guilty of negligence which would as a matter of law preclude a recovery. From the record before us, she could well have assumed that her right-of-way was going to be respected by the driver of the truck. The degree of negligence on her part, if any, is for the jury to determine under proper instructions by the court.

The defendants contend that instruction No. 4 given by the trial court was prejudicially erroneous. The complaint is directed at that part of the instruction providing: "You are instructed that the defendants in their answer deny the material allegations of the plaintiff's petition and also in said answer allege negligence on the part of said Nellie V. Price.

"The latter provisions of said answer are affirmative in their nature and before defendants can avail themselves thereof they must have proved the same by a preponderance of the evidence." The defendants assert that this portion of the instruction places too great a burden upon them. In support of their contention they cite Murray v. Pearson Appliance Store, 155 Neb. 860, 54 N. W. 2d 250. It was therein said: "The rule in this regard is as follows: 'If the defendant pleads that the plaintiff was guilty of contributory negligence the burden is upon him to prove that defense and this burden does not shift during the trial of the case. However, if the evidence adduced by the plaintiff tends to prove that issue the defendant is entitled to receive the benefit thereof and the court must instruct the jury to that effect.' Munday v. Davis, *supra*. See, also, Krepcik v. Interstate Transit Lines, 154 Neb. 671, 48 N. W. 2d 839."

While instruction No. 4 is not in compliance with the foregoing rule, we have repeatedly held that the instructions given to a jury must be construed together, and if when construed as a whole they properly state the

law it is sufficient. Shiers v. Cowgill, 157 Neb. 265, 59 N. W. 2d 407. By instruction No. 5 in the present case the court told the jury: "In determining whether a party has sustained the burden of proof placed upon him by the preceding instructions you are not limited to the evidence introduced by such party. Either party is entitled to the benefit of any evidence tending to establish his contentions, even though such evidence comes from witnesses presented by the opposite party." Instruction No. 4, when properly construed with instruction No. 5, correctly states the law, and is in accord with the rule quoted in the Murray case.

The defendants' assignments of error are without merit. The judgment of the district court is affirmed.

AFFIRMED.

DEAN LIAKAS, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.
72 N. W. 2d 677

Filed October 28, 1955. No. 33733.

1. **Indictments and Informations.** Where a statute states the elements of a crime, it is generally sufficient, in an information or indictment, to describe such crime in the language of the statute.
2. ———. If the information or indictment apprises the defendant with reasonable certainty of the accusation against him so that he may prepare his defense and plead the judgment as a bar to a subsequent prosecution for the same offense, it meets the fundamental purposes of an information or indictment, as well as constitutional requirements.
3. **Burglary.** Under section 28-532, R. R. S. 1943, if the information for burglary sufficiently identifies the building allegedly entered, an allegation of ownership is not necessary in order that an offense under the statute be stated.
4. **Criminal Law: Witnesses.** The statute providing that "A witness may be interrogated as to his previous conviction for a felony" does not limit the inquiry to a single conviction or prevent a proper inquiry as to the number of his convictions.
5. ———: ———. If a person accused of crime testifies in his own behalf he is to be treated as any other witness.

6. **Appeal and Error.** Error cannot be predicated on the refusal of the court to give a tendered instruction, where the court on its own motion properly instructed the jury on the points covered by the instruction offered and refused.
7. **Trial: Appeal and Error.** Instructions are to be considered together to the end that they may be properly understood, and, when so construed, if as a whole they fairly state the law applicable to the evidence, error cannot be predicated on the giving of the same.
8. **Criminal Law: Appeal and Error.** The credibility of witnesses and the weight of their testimony are for the jury to determine in a criminal case, and the conclusion of the jury will not be disturbed unless it is clearly wrong.
9. **Criminal Law: Evidence.** Where the accused is identified as having been at or near the scene of a crime about the time of its commission, evidence showing that he owned, possessed, or had access to any tools with which the crime was or might have been committed is admissible to show that the accused had the means to commit the offense in the manner that it was committed. It is a circumstance which the jury may consider.

ERROR to the district court for Douglas County: L. ROSS NEWKIRK, JUDGE. *Affirmed.*

Eugene D. O'Sullivan and *Eugene D. O'Sullivan, Jr.*, 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.

MESSMORE, J.

In a prosecution by the State in the district court for Douglas County Dean Liakas was convicted of burglary, and for that felony was sentenced to serve a term of 8 years in the State Penitentiary. As plaintiff in error, defendant presents for review the record of his conviction. We hereafter refer to the plaintiff in error as defendant.

The first three assignments of error made by the defendant relate to the giving of instruction No. 9 by the trial court on its own motion, the contention being

that by the giving of this instruction the defendant was denied due process of law under Article 1, section 3, of the Constitution of the State of Nebraska and section 1 of the Fourteenth Amendment to the Constitution of the United States.

The defendant also assigns as error that the possession and occupancy of a burglarized building must be proved as charged by evidence beyond a reasonable doubt, and failure to do so amounts to a denial of due process of law to the defendant as guaranteed to him under the Constitution of the State of Nebraska and the Constitution of the United States. The latter assignment of error will be discussed first, the first three assignments of error second, and other assignments of error as appear in the opinion.

The information, insofar as necessary to be considered here, charged: "* * * that on or about the 30th day of May * * * (1953) Dean Liakas * * * did willfully, maliciously, and forcibly, and with the intent to steal property of value, break and enter into a certain building located at 3552 Leavenworth Street, in the City of Omaha, in said county and state, which building is leased and occupied by Ben Perelman, Robert Perelman, and Harold Perelman, doing business as Ben Perelman Grocery, * * *."

To charge a statutory offense, the information or complaint must contain a distinct allegation of each essential element of the crime as defined by the law creating it, either in the language of the statute or its equivalent. Dickens v. State, 139 Neb. 163, 296 N. W. 869; Sedlacek v. State, 147 Neb. 834, 25 N. W. 2d 533, 169 A. L. R. 868.

Where a statute states the elements of a crime, it is generally sufficient, in an information or indictment, to describe such crime in the language of the statute. Pandolfo v. State, 120 Neb. 616, 234 N. W. 483; Sedlacek v. State, *supra*.

If the information or indictment apprises the defend-

ant with reasonable certainty of the accusation against him so that he may prepare his defense and plead the judgment as a bar to a subsequent prosecution for the same offense, it meets the fundamental purposes of an information or indictment, as well as constitutional requirements. Cowan v. State, 140 Neb. 837, 2 N. W. 2d 111; Sedlacek v. State, *supra.*

Under section 28-532, R. R. S. 1943, if the information for burglary sufficiently identifies the building allegedly entered, an allegation of ownership is not necessary in order that an offense under the statute be stated. Sedlacek v. State, *supra.*

The specific ownership of a building involved in a crime of burglary is not an essential element of the offense. An allegation of the ownership as such is immaterial save for the purpose of identifying the property, where the crime allegedly was committed, as not the property of the accused, and to show that the defendant had no right to enter the premises. See Sedlacek v. State, *supra,* and cases cited therein.

With reference to the evidence on this subject, the witness Ben Perelman testified that he and his son Robert run the business; that the business was located at 3552 Leavenworth Street, on the northwest corner of Thirty-fifth Avenue and Leavenworth Streets; that he occupied the whole building; and that there were things of value inside the store. In addition, this witness described the store as being 60 feet by 100 feet, with the east side facing Thirty-fifth Avenue and the west side facing a parking lot, and at the back there is an alley. He described the front or south part of the store, the nature of the construction, the glass and the entrance and other details relating to the premises. From a review of the evidence, the property is clearly identified, its occupancy and possession shown, and the disassociation of the right of the defendant to occupy the premises or to enter the premises at the time the alleged burg-

lary was committed. This assignment of error cannot be sustained.

We next consider the first three assignments of error summarized above.

Section 25-1214, R. R. S. 1943, provides: "A witness may be interrogated as to his previous conviction for a felony, but no other proof of such conviction is competent except the record thereof."

The defendant asserts that there is a difference between the defendant as a witness and an ordinary witness for the reason that he is more than a witness and is possessed of certain constitutional and statutory rights which the ordinary witness does not have. On cross-examination the defendant was asked if he had been previously convicted of a felony. He answered "Yes, sir." And to the question "How many times?" he answered "Three." It is contended that the defendant was required to give evidence against himself which could be used in the proof of an habitual criminal charge.

In Brown v. State, 111 Neb. 486, 196 N. W. 926, it is said that by statute, a person charged with crime shall, at his own request, but not otherwise, be deemed a competent witness. "If he becomes a witness * * * he should be treated as any other witness. Heldt v. State, 20 Neb. 492; Comstock v. State, 14 Neb. 205 * * *."

In Sulley v. State, 119 Neb. 783, 230 N. W. 846, the court held: "The statute providing that 'a witness may be interrogated as to his previous conviction for a felony' does not limit the inquiry to a single conviction or prevent a proper inquiry as to the number of his convictions."

This brings us to instruction No. 9 given by the trial court on its own motion as follows: "You are instructed that it is the law of the State of Nebraska that any witness in any case may be asked on cross examination as to his previous conviction of a felony, as was done in this case when the defendant, Dean Liakas, was being cross examined. In this connection you are instructed

that under the law of Nebraska any previous conviction of a felony may be considered by the jury for the sole and only purpose of affecting the credibility of Dean Liakas, the defendant in this case. Credibility is defined to mean the weight and credit the jury should give the testimony of such a witness—the worthiness of belief of such testimony, and in no way may be considered by the jury as proof of the crime charged in the Information."

The defendant requested the following instruction No. 6 which was refused: "You are instructed that it is the law of the State of Nebraska that any witness in any case may be asked on cross-examination as to his previous conviction for a felony, as was done in this case, when Dean Liakas was being cross-examined, and in this connection you are instructed that under the law of Nebraska any previous conviction of a felony may be considered by the jury for the sole and only purpose of affecting the credibility of Dean Liakas, the defendant in this case, and you are further instructed that credibility is defined to mean, which means the weight and credit the jury should give the testimony of such a witness—the worthiness of belief of such testimony, and in no way may be used by the jury as proof of the substantive act charged in the Information."

Reviewing instruction No. 9 given by the trial court on its own motion and instruction No. 6 requested by the defendant, it is apparent that the instruction given by the trial court is substantially identical with the one requested by the defendant.

It is elementary that error cannot be predicated on the refusal of the court to give a tendered instruction, where the court on its own motion properly instructed the jury on the points covered by the instruction offered and refused. Jorgensen v. Robinson Seed Co., 112 Neb. 573, 199 N. W. 855. See, also, Peacock v. J. L. Brandeis & Sons, 157 Neb. 514, 60 N. W. 2d 643; Perrine v. Hokser, 158 Neb. 190, 62 N. W. 2d 677.

Instructions are to be considered together to the end that they may be properly understood, and, when so construed, if as a whole they fairly state the law applicable to the evidence, error cannot be predicated on the giving of the same. Lovings v. State, 158 Neb. 134, 62 N. W. 2d 672, certiorari denied 348 U. S. 850, 75 S. Ct. 77, 99 L. Ed. 41.

The court did not err in giving instruction No. 9, as contended for by the defendant.

At the conclusion of all the evidence the defendant moved for a dismissal of the case, one of the reasons being the insufficiency of the evidence to prove the offense as charged.

In addition to the evidence heretofore set out, the record discloses that on the front of the building, facing south, there is about 30 feet of glass in three partitions, each being 11 feet high and 9 feet wide. The corner of the building is cut off, and a door which faces the southeast is the main entrance to the store. At the rear of the building there is a door that leads into the store where most of the deliveries are made. Across this door on the inside there is an iron grille. Next to this door is a window about 2½ feet by 5 feet, and there are iron bars across this window on the outside of the building. On the inside is a window screen which opens up and down. The screen was locked and all entrances to the building were securely locked at the time in question. The front of the store is lighted with neon advertising and other lights; there is a light inside the store; and Leavenworth Street is well lighted, making it easy to see inside of the store and to check the same.

At about 1:40 a. m., May 30, 1953, officer Reese and his partner, officer Gentleman, were checking store buildings in the vicinity of Thirty-fifth Avenue and Leavenworth Street. Officer Gentleman was driving the car. They proceeded up Leavenworth Street and were using the spotlight on the car. In checking Perelman's store, officer Reese saw a break in the window

on the east side adjacent to the door of the store. The bars had been moved or pulled apart. He stepped out of the car, went toward the front of the building, leaned against the wall, and looked in through the door. At a distance of 20 feet he saw a man in the store look around the corner. He shouted to his partner that there was a man inside. The man darted back, and this officer headed toward the front of the store. He was running south along the east side of the building, approximately 10 feet from the corner, when he heard a crash and glass breaking. When he arrived at the corner, the glass was still scattering in the street. He rounded the corner on the south side of the store and saw a man running west on Leavenworth Street about 35 to 40 feet away. The officer yelled for the man to stop, then he ran after him. When the man reached the southwest corner of the Perelman store he angled off northwest across a parking lot beside the store, and when he reached the rear of the buildings on the east side of Thirty-sixth Street, the officer lost sight of him momentarily. He heard a horn honk on Thirty-sixth Street and the screeching of brakes, and saw a man spread in front of the lights of a car. The man was not struck by the automobile. He gave further pursuit of the man and could see that he had gone north and was angling toward Thirty-seventh Street. There was a group of boys who were also running north on Thirty-seventh Street. When the officer came around the corner of the first house north of Leavenworth Street on Thirty-seventh Street, the man was lying on his face in a yard. The man had on one glove and was holding a glove and a steel punch in his hand. The gloves and steel punch, also referred to in the testimony as a pinch bar, were the property of the defendant. The officer handed his gun and the glove to one of the lads standing there, and pulled the man up. After the man was up he was evidently sick from running, and was taken back to the

Perelman store. The officer identified the man as the defendant in this case.

Officer Gentleman corroborated the testimony of officer Reese with reference to what Reese did in the immediate vicinity of the Perelman store. Officer Gentleman looked around the neighborhood for cars that might have been parked and which could have been used by the intruder. Across the street on the east side of Thirty-fifth Avenue, about 10 feet north of the Perelman store, he found a 1942 Ford sedan parked with the keys in the ignition. No one attempted to start this car, but it was towed to the police station. He found a kit of tools and a sack of money under the front seat of the car. He testified that there was a large break in the first window west of the main entrance to the store with an opening large enough to get through without difficulty.

A police sergeant arrived at the Perelman store and went through a hole in the plate glass window of the store. His examination disclosed that there were horizontal bars across the window on the east side, one of which had been pried and pulled downward leaving a method of entrance for a man to get through. The trunk in the back of the car was not locked, but difficult to open. There was a box of carpenter tools in the trunk and some tools lying outside of the box which were selected, taken, and introduced in this case as exhibits and which will be discussed later in the opinion.

After the defendant was taken to police headquarters, at about 8 o'clock the next morning he was questioned by Captain Clinchard who testified that he questioned the defendant with reference to the circumstances surrounding a burglary of the Perelman store; that the defendant "indicated" to him that he had entered the store through the back part of it; that he had seen the officers when they arrived; that he grabbed a jug of wine and threw it through the front window; that he had the pinch bar when he was apprehended; and that it belonged to him, as well as the other tools. This officer

took no statement, but made a memorandum as to what the defendant told him, and refreshed his memory from that. There was no objection to this testimony.

Officer Gallagher testified that the window adjacent to the door on the east side of Perelman's store, the small window with bars across the bottom half, had the middle bar pried clear down and the window had been forced up on the inside; and that on the window frame or below the glass there were regular bar marks, wide marks made by a pinch bar of some kind.

Ben Perelman testified that he received a call from the police that his store had been broken into. When he arrived at the store the front window was knocked out and glass was lying all over the sidewalk. The window on the east side of the building disclosed that the bars were pulled open, one practically pulled out, and it looked like a bar of some kind had been stuck under it and pried up. The screen was pushed in, the glass was broken, and the lock on the window forced. He further testified that nothing was taken from the store, but a half gallon jug of wine was broken.

Three high school boys and their dates were in the vicinity of Thirty-fifth Avenue and Leavenworth Street at the time in question. The boy driving the car stopped at the traffic signal at Thirty-sixth Street. He heard a crash, and when the signal changed he pulled across the street, stopped, and parked the car which was headed west on Leavenworth Street. They saw a man cross Thirty-sixth Street in front of a car going north which had stopped and its brakes screeched. This man was coming from between two houses, and was running south. The boys yelled at him, and he turned around and ran west. The boys gave chase, ran across a vacant lot at the corner of Thirty-seventh and Leavenworth Streets, and caught him in the front yard of a house. The boy in the lead pushed him and he went down on his face and stayed there. As this boy testified: "Well, I grabbed ahold of him and just gave him a push for-

ward * * * and he was so tired that he went forward and layed down. He just stayed there." Officer Reese came up and took the man into custody.

The defendant's testimony was to the effect that he borrowed a 1942 Ford car from his friend Bud Tyrell who was a bartender at the Seven Seas cocktail lounge located at 1510 Harney Street. His reason for borrowing the car was to haul materials to a house he was building at Seventy-sixth and Cass Streets in Omaha upon which he was doing most of the work. He had no car of his own at the time. The car was in poor mechanical condition. At about 9:30 p. m., on May 29th, the defendant drove this car and parked it in the vicinity of the Seven Seas cocktail lounge. He went into the cocktail lounge and talked to people therein who appeared as witnesses in his behalf and testified to seeing him there. The defendant stayed in the cocktail lounge until about 1:10 or 1:15 a. m., May 30th, when he started home. He had difficulty in getting the car started. He lived at 827 South Twenty-ninth Street, half a block south of Twenty-ninth and Leavenworth Streets. He was proceeding on Leavenworth Street to the Motor Inn garage located on Turner Park Boulevard, to get his car fixed. This garage was closed. He then thought of the Blackstone garage, as he worked at the Blackstone Hotel as an upholsterer. From the evidence it appears the Blackstone garage is used for storage for General Motors products, and apparently is not the type of garage where the defendant could have had his car fixed. He turned right after he got to the top of the hill, and the motor of the car sputtered and died. He was required to stop the car at Thirty-fifth Avenue and Jones Street. He was unable to get the car started, so he parked it along the east curb of Thirty-fifth Avenue, the same street on which the Perelman store is located. He tried to pry the gears so they would mesh. He used a small bar, the one he had when he was apprehended. He then went on foot south on the east side of Thirty-

fifth Avenue to Leavenworth Street. He thought the Cherry Garden garage might be open as it had been an all-night garage. He crossed Leavenworth Street on Thirty-fifth Avenue and went west on Leavenworth Street for two blocks. The garage was not open. He then cut across Thirty-seventh Street from the south to the north side of Leavenworth Street intending to go back to the car. He had on his person $400 and the pinch bar with which he tried to start the car. He walked from Thirty-seventh and Leavenworth Streets eastward on the north side of Leavenworth Street. When he was in front of the first house west of Thirty-sixth Street, about a block from Perelman's store, he heard brakes screeching and saw a man run across a lot and another man stop practically in front of a car, but kept going. There was another car parked approximately in front of a vacant lot about 20 feet ahead of him, headed west. Three men got out of this car, and the defendant ran. He denied that he ran between two houses or across the street in front of any car. He testified that he thought these men were after him and he started to go into a house but was unable to do this as the house was dark. He ran in front of other houses. At the end of the block he ran northwest across a lot up to a house that had a light burning and went into the front yard. This was described as the first house north of Leavenworth Street, facing west on Thirty-seventh Street. He was overtaken, grabbed, turned around, struck in the stomach, and pushed, falling face downward. He could not get up. These men were standing around him. In a couple of minutes officer Reese came up, put his foot on the defendant's back, kicked him hard on the left side, used language which the defendant said he could not repeat, and told him to stand up. The officer grabbed him by the shoulders and under the arms and pulled him up. He was not able to stand up. He was taken into custody, put in a police car, taken to the police station, and booked for the Perelman burglary. He

denied that he committed the burglary, was in the grocery store, fled from the store, or had anything to do with the crime charged. He admitted the ownership of the tools found in his car and introduced into evidence as exhibits.

The applicable rule is: "The credibility of witnesses and the weight of their testimony are for the jury to determine in a criminal case, and the conclusion of the jury cannot be disturbed unless it is clearly wrong." Fisher v. State, 154 Neb. 166, 47 N. W. 2d 349. See, also, Hoffman v. State, 160 Neb. 375, 70 N. W. 2d 314.

The trial court properly denied the motion of defendant to dismiss the case on the ground of the insufficiency of evidence.

The defendant contends the trial court erred in admitting in evidence, over the defendant's objections, exhibits Nos. 7 through 12, and each of such exhibits. The exhibits admitted in evidence consisted of a small hammer, a sledge hammer, a large crowbar, two chisels, and a small crowbar. These tools were found loose in the trunk of the car, together with a box of other tools which were not offered in evidence. However, all the tools were admitted to be the property of the defendant which he was using in the building of a house. The car, which the defendant had borrowed and of which he had possession on May 30, 1953, at the time of the commission of the burglary, had the ignition keys in it and was parked across the street a short distance from the Perelman store and north of the window that had been entered on the east side of the building. The State's evidence places the defendant inside of the Perelman grocery store. The evidence shows that the east window through which entrance had been gained showed indentations that could have been made by a pinch bar, and that the defendant at the time he was apprehended had a pinch bar in his possession. Two police officers testified that tools such as these exhibits are commonly used in burglaries.

In Phillips v. State, 157 Neb. 419, 59 N. W. 2d 598, the court said: "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."

There are cases too numerous to mention holding that where an accused is identified as having been at or near the scene of a crime about the time of its commission evidence showing that he owned, possessed, or had access to any articles with which the crime was or might have been committed is competent. See, State v. Montgomery, 175 Kan. 176, 261 P. 2d 1009; State v. Wayne, 62 Kan. 636, 64 P. 69; Commonwealth v. Williams, 56 Mass. 582; People v. Clinton, 78 Cal. App. 451, 248 P. 929; State v. Campbell, 7 N. D. 58, 72 N. W. 935; 22 C. J. S., Criminal Law, § 611, p. 931, § 712, p. 1207; 20 Am. Jur., Evidence, § 246, p. 239, § 273, p. 260, § 401, p. 361; Annotation, 143 A. L. R. 1199.

We find no error prejudicial to the defendant under the circumstances here existing.

For the reasons given in this opinion, the judgment of the district court should be and is affirmed.

AFFIRMED.

EARL HOUK, DOING BUSINESS AS WESTERN NEBRASKA TRANSPORT SERVICE, ET AL., APPELLEES, V. W. W. BECKLEY ET AL., APPELLANTS.
72 N. W. 2d 664

Filed October 28, 1955. No. 33757.

1. **Public Service Commissions: Appeal and Error.** An order of the Nebraska State Railway Commission is not reviewable by proceedings in the Supreme Court under the provisions of section 75-405, R. R. S. 1943, unless and until it imposes an obligation, denies a right, or fixes some legal relationship as a consummation of an administrative process.

2. ———: ———. The ultimate test of reviewability of an administrative ruling is not to be found in an overrefined technique, but in the need of the review to protect from the irreparable injury threatened in the exceptional case by rulings which attach legal consequences to action taken in advance of other hearings and adjudications that may follow.

APPEAL from the Nebraska State Railway Commission. *Appeal dismissed.*

J. Max Harding and *Bannister & Deines,* for appellants.

Robert S. Stauffer and *James E. Ryan,* for appellees.

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

SIMMONS, C. J.

This is an appeal from the Nebraska State Railway Commission, hereinafter called the commission. The basic question presented is whether or not the commission has jurisdiction of the parties and subject matter of the complaint. Preliminary to that issue there is presented the question as to whether or not the order entered by the commission is an appealable order. We hold that it is not, and dismiss the appeal.

This proceeding was initiated by formal complaint filed with the commission on June 16, 1954.

The complainants alleged that they were common carriers of property under authority issued by the Interstate Commerce Commission. They further alleged that "each conduct operations in the transportation of crude oil from various oil well batteries or storage tanks, located within the State of Nebraska, to one or more pipe line receiving stations, also located within the State of Nebraska, and that such operations are movements in interstate commerce."

The complaint alleged that the defendant Beckley holds common carrier authority issued by the commission, and also holds authority issued by the Interstate Commerce Commission under authority of the second

proviso of section 206(a) of the Interstate Commerce Act.

It is further alleged that the defendant Kinney holds neither interstate nor intrastate authority for the transportation of the commodities here involved.

It is further alleged that the certificate issued by the commission to defendant Beckley, and registered with the Interstate Commerce Commission, "is indefinite, ambiguous and uncertain in its terms and provisions; that said certificate does not authorize the transportation of crude oil in bulk, in tank vehicles from oil well batteries or storage tanks in Nebraska to pipe line receiving stations also located in the State of Nebraska"; and that he has permitted his authority issued by the commission to lapse and become dormant and "now holds no operating authority thereunder and specifically holds no operating authority for the transportation of petroleum and petroleum products, in bulk, in tank vehicles to from or between points in the State of Nebraska."

It is further alleged that defendants Beckley and Kinney have entered into a contractual arrangement under which they hold themselves out as and are soliciting and "performing service in the transportation of crude oil, in bulk, in tank vehicles, and from oil well batteries or storage tanks in Nebraska, to pipe line receiving stations also located in Nebraska; that such operations are being conducted by the said Defendants on a for-hire basis and without proper authority therefore (sic)"; that such is without authority of either the commission or the Interstate Commerce Commission; and that the services conducted by the defendants are competitive with those of the complainants and are not required by public convenience and necessity.

The complainants prayed that the certificate issued to defendant Beckley be interpreted and clarified; that the contract arrangements between the defendants be declared to be illegal; and that they be ordered to

"cease and desist all operations by motor vehicle as common carriers of petroleum or petroleum products, in bulk, in tank vehicles, between points in the State of Nebraska."

Defendant Kinney filed a motion to dismiss the complaint as to himself on the ground that, so far as the operations involved in the complaint are concerned, he is an employee of defendant Beckley.

Defendant Beckley filed a motion to dismiss, relying on the allegations above quoted, and contending that the "Commission has no jurisdiction over the parties, as interstate carriers, nor of the traffic allegedly being handled by defendant Beckley for the reason that both complainants are motor carries (sic) operating in interstate commerce and the operations of defendant, complained of herein are clearly and admittedly operations performed in interstate commerce." He contended that the allegations of the complaint above quoted constitute admissions that the traffic being handled is interstate commerce and that jurisdiction of the subject matter of the complaint lies with the Interstate Commerce Commission.

Oral argument was had on the motions. On October 20, 1954, the commission overruled the motions and ordered the defendants to answer or satisfy the complaint.

Defendant Kinney filed a motion to hold the complaint in abeyance as to himself until the issues presented by defendant Beckley were finally determined.

A motion for rehearing and reconsideration was filed by defendant Beckley.

On November 19, 1954, the motion for rehearing and reconsideration was overruled, and hearing on the complaint was ordered.

It is from that order that this appeal is taken.

Section 75-405, R. R. S. 1943, provides: "If any * * * common carrier * * * shall be dissatisfied * * * with the decision of the commission with reference to any * * * order * * * upon which there has been a hearing

before the commission, * * * such dissatisfied * * * common carrier * * * may institute proceedings in the Supreme Court of Nebraska to reverse, vacate, or modify the order complained of * * *."

Both complainants and defendants rely on this statute and our decisions construing and applying it.

The Supreme Court of the United States in Chicago & Southern Air Lines v. Waterman S. S. Corp., 333 U. S. 103, 68 S. Ct. 431, 92 L. Ed. 568, stated: "This Court long has held that statutes which employ broad terms to confer power of judicial review are not always to be read literally. Where Congress has authorized review of 'any order' or used other equally inclusive terms, courts have declined the opportunity to magnify their jurisdiction, by self-denying constructions which do not subject to judicial control orders which, from their nature, from the context of the Act, or from the relation of judicial power to the subject-matter, are inappropriate for review."

As stated in 42 Am. Jur., Public Administrative Law, § 196, p. 577, "Courts are averse to review interim steps in an administrative proceeding. Whether review is sought in nonstatutory or statutory proceedings, review of preliminary or procedural orders is generally not available, primarily on the ground that such a review would afford opportunity for constant delays in the course of administrative proceedings for the purpose of reviewing mere procedural requirements or interlocutory directions. Broad language of statutes providing for judicial review of orders of regulatory commissions has been construed as not extending to every order which the commission may make, and mere preliminary or procedural, as distinguished from final, orders have been held not to be within such statutes, especially where the context of the provision indicates that the orders for which review is provided are such as are of a definitive character dealing with the merits

of a proceeding and resulting from a hearing upon evidence and supported by findings."

We do not find where we have so stated the rule. Nevertheless in our decisions we have followed it generally. In In re Application of Neylon, 151 Neb. 587, 38 N. W. 2d 552, the commission entered an order without hearing or notice to interested parties. Later that order was held for naught and the matter set for hearing. The appeal was taken from this latter order. We held it was interlocutory and not appealable, stating: "As stated in Barry v. Wolf, 148 Neb. 27, 26 N. W. 2d 303: 'An order is not final when the substantial rights of the parties involved in the action remain undetermined and when the cause is retained for further action. In such a case, the order is interlocutory.'

"In view of our holdings herein we find the appeal to be premature and therefore is dismissed."

Complainants, as appellees, rely upon that decision.

The same question of whether or not an order of the commission was appealable was before us in In re Application of Airline Ground Service, Inc., 151 Neb. 837, 39 N. W. 2d 809. In the course of that opinion we said: "Surely no one could logically contend that the ruling of the commission to the effect that it had jurisdiction of the subject matter of the proceeding, standing alone, would not be a final as well as an appealable order."

The defendants, as appellants, rely on the language above quoted. However, it cannot be lifted and considered separate and apart from the facts and holding of that decision. In that case, a complaint had been filed and issues had been made. As stated in the opinion: "The railway commission referred the case to an examiner, who heard all the evidence and examined all the exhibits introduced into the record. The examiner reported his conclusions of law and fact to the commission. The commission on July 16, 1949, entered its interim order in which it is stated that a transcript of

the evidence cannot be obtained before August 15, 1949, and, asserting the existence of an emergency, upon due consideration of the portion of the transcript of the evidence which was available, along with the examiner's report and recommendation, the exceptions thereto, and the oral arguments and briefs filed, directed the respondents to forthwith cease and desist the use of starters, recruiters, or agents at the Omaha Municipal Airport, either directly or indirectly."

In the course of the opinion we said: "It is fundamental of course that the form of an order or the label placed upon it does not determine its character. It is the substance of the order which is controlling in determining its nature. In Columbia Broadcasting System v. United States of America, 316 U. S. 407, 62 S. Ct. 1194, 86 L. Ed. 1563, the court held: 'The ultimate test of reviewability is not to be found in an over-refined technique, but in the need of the review to protect from the irreparable injury threatened in the exceptional case by administrative rulings which attach legal consequences to action taken in advance of other hearings and adjudications that may follow * * *.'"

We held that the order was an appealable one, stating in the opinion: "This does not mean that a procedural or interlocutory order is reviewable. It simply means that any order meeting the conditions set forth in section 75-405 is reviewable, which involves a justiciable issue that is decisive of some subject matter of which the commission has jurisdiction and the power to enforce against any party to the proceeding. Under the provisions of section 75-416 the order takes effect from the time prescribed and continues in force for the time specified unless the order is annulled, revised, or modified by the commission, or set aside by a court of competent jurisdiction. This affords convincing proof that an interlocutory or procedural order incident merely to the natural course of the proceedings does not con-

stitute the subject matter of the proceeding and is not therefore reviewable."

In Doher v. Herman, 159 Neb. 438, 67 N. W. 2d 421, we considered whether or not a "minute entry" of the commission was a reviewable order. We quoted with approval our language in the Airline Ground Service case, *supra,* and also relied on the Neylon case, *supra.*

In the course of that opinion we also stated: "In Rochester Telephone Corp. v. United States, 307 U. S. 125, 59 S. Ct. 754, 83 L. Ed. 1147, involving statutes comparable in principle, the court listed several types of interstate commerce actions in which judicial review should be denied. The type primarily in point here is stated as: 'Where the action sought to be reviewed may have the effect of forbidding or compelling conduct on the part of the person seeking to review it, *but only if some further action is taken by the Commission.*' (Italics supplied.) Likewise, as stated in United States v. Los Angeles & Salt Lake R. R. Co., 273 U. S. 299, 47 S. Ct. 413, 71 L. Ed. 651, denying a right of review: 'The so-called order here complained of is one which does not command the carrier to do, or to refrain from doing, any thing; which does not grant or withhold any authority, privilege or license; which does not extend or abridge any power or facility; which does not subject the carrier to any liability, civil or criminal; which does not change the carrier's existing or future status or condition, which does not determine any right or obligation.'"

It thus appears that our decisions have been in accord with the rule stated in 73 C. J. S., Public Administrative Bodies and Procedure, § 186, p. 534: "Whether or not a decision is denominated an 'order,' it is not reviewable unless and until it imposes an obligation, denies a right, or fixes some legal relationship as a consummation of an administrative process * * *."

The Supreme Court of the United States in Chicago & Southern Air Lines v. Waterman S. S. Corp., *supra,*

held: "But administrative orders are not reviewable unless and until they impose an obligation, deny a right or fix some legal relationship as a consummation of the administrative process."

In United States v. Illinois Central R. R. Co., 244 U. S. 82, 37 S. Ct. 584, 61 L. Ed. 1007, petitions were filed before the Interstate Commerce Commission asking for damages against a common carrier for failure to furnish cars to meet a shipper's needs. The carrier by answer challenged the jurisdiction of the Interstate Commerce Commission to award damages. It was held that it had jurisdiction, and the cause was assigned for hearing upon the issue of reparation. When the matter reached the Supreme Court of the United States (by a procedure unlike ours), it was contended that the order of the commission was merely a notice of hearing and not a reviewable order. The court held: "The notice, therefore, had no characteristic of an order, affirmative or negative. It was a mere incident in the proceeding, the accident of the occasion—in effect, and, it may be contended, in form, but a continuance of the hearing. The fact that the continuance was to another day and place did not change its substance or give it the character described in Procter & Gamble Co. v. United States, one which constrained the railroad company to obedience unless it was annulled or suspended by judicial decree."

In Federal Power Commission v. Metropolitan Edison Co., 304 U. S. 375, 58 S. Ct. 963, 82 L. Ed. 1408, the Supreme Court of the United States in reviewing the above case said: "In United States v. Illinois Central R. Co., 244 U. S. 82, the Interstate Commerce Commission had made an order for a hearing upon an issue of reparation. The Railroad Company contended that the Commission had no jurisdiction to award damages in the case presented. A decree of the District Court, enjoining the Commission from proceeding with the hearing was reversed by this Court with directions to dis-

miss the petition. The 'order' was not of the sort which brought it within the purview of the statute. It was a mere step in procedure."

In accord with these decisions, including our own, we hold that the order entered here was procedural and interlocutory in character, and hence was not an appealable order.

The appeal is accordingly dismissed.

APPEAL DISMISSED.

THE GREYHOUND CORPORATION, A CORPORATION, APPELLANT, V. LYMAN-RICHEY SAND & GRAVEL CORPORATION, A CORPORATION, APPELLEE.

72 N. W. 2d 669

Filed October 28, 1955. No. 33779.

1. **Trial.** The trial court should eliminate all matters not in dispute and submit to the jury only the controverted questions of fact upon which the verdict must depend.
2. ———. Where two conflicting instructions are given on a question, one containing an incorrect, and the other a correct, statement of the law, the latter will not cure the former.
3. **Automobiles.** One is required only to have his car under such reasonable control as to be able to avoid a collision with other vehicles whose drivers exercise due care. Complete control which is such as will prevent collision by the anticipation of negligence on the part of another in the absence of warning or knowledge is not required.
4. ———. "Reasonable control" by drivers of motor vehicles is such as will enable them to avoid collision with other vehicles operated without negligence in streets or intersections, and with pedestrians in the exercise of due care.
5. **Trial: Appeal and Error.** The verdict of a jury on conflicting evidence will not be disturbed on appeal unless it is clearly wrong.
6. **Automobiles: Negligence.** As a general rule it is negligence as a matter of law for a motorist to drive an automobile on a highway in such a manner that he cannot stop in time to avoid a collision with an object within the range of his vision.

APPEAL from the district court for Douglas County:

CARROLL O. STAUFFER, JUDGE. *Reversed and remanded.*

Fitzgerald, Hamer, Brown & Leahy, for appellant.

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

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

WENKE, J.

The Greyhound Corporation brought this action in the district court for Douglas County against the Lyman-Richey Sand and Gravel Corporation. The purpose of the action is to recover damages caused to a bus owned and operated by the Interstate Transit Lines when one of the defendant's trucks ran into it. Plaintiff alleged the proximate cause of the accident, which caused the damages, was certain acts of negligence on the part of the driver of the truck. Defendant filed a counterclaim based on the same accident. It recovered a verdict thereon in the sum of $1,312.58. Plaintiff thereupon filed a motion for new trial and has perfected this appeal from the overruling thereof.

At the time of the accident the bus that was damaged was owned and being operated by the Interstate Transit Lines, doing business as Overland Greyhound Lines. Whatever rights the Interstate Transit Lines had against appellee by reason of the accident were acquired by appellant, as of January 1, 1952, when appellant's purchase of the Interstate Transit Lines became effective. Admittedly its rights thereunder were subject to any and all defenses and claims, if any, which appellee might have thereto.

The accident happened about 10:45 a. m. on June 1, 1950, on U. S. Highway No. 275, also known as the West Dodge road. It happened about one-half mile east of the Ten Mile corner located west of Omaha which is the intersection of the Ten Mile road and U. S. Highway No. 275. At the time of the accident L. M. Woods, then

assistant superintendent of the Interstate Transit Lines, was giving the bus a trial run to see if it had any water or oil leaks. This was necessary because a factory rebuilt motor, transmission, and radiator had just been installed therein. It was not the intention of the driver of the bus to pick up any passengers during this trial run nor did he do so. In making the test run the bus was driven north on the Ten Mile road and then onto the West Dodge road at the point where the Ten Mile road and West Dodge road intersect. It proceeded to travel east toward Omaha in the south eastbound lane. This highway has a 42-foot paved surface with four lanes, two for eastbound and two for westbound traffic. As the bus entered onto the highway the driver of appellee's truck saw it do so. At that moment the truck, which was traveling east on the Dodge Street road, was just east of the main entrance to Boys Town. This point is about one-fourth mile west of the intersection. The truck, a K-8 International, was a "semi" with a dump type body constructed on the trailer for the purpose of hauling sand and gravel. At the time the truck was hauling about 11 tons of gravel. Both bus and truck proceeded east in the south lane until the accident occurred at a point just west of the crest of a long gradual uphill grade which starts at a point about 500 feet east of the intersection. The accident occurred when the right front of the truck ran into and against the left rear of the bus, damaging both vehicles. The point of the impact was just south of the north line of the south lane for eastbound traffic. The foregoing is a general summary of when, where, and how the accident happened. Later in this opinion we shall set forth the evidence more in detail as it relates to the several errors assigned and herein discussed.

Appellant's counsel complains of several instructions given by the trial court and contends the giving thereof was error and prejudicial to his client's rights. The first of these is instruction No. 6 which, among other

things, placed upon appellant the burden of establishing by a preponderance of the evidence the nature and extent of the damage to the bus when, as a matter of fact, the parties had stipulated thereto.

We said in Zancanella v. Omaha & C. B. St. Ry. Co., 93 Neb. 774, 142 N. W. 190: "The trial court should, as far as possible, eliminate all superfluous matters, and submit to the jury only the controverted questions of fact upon which their verdict must depend. To submit to the jury matters not in issue, or to submit issues that are so wholly unsupported upon the one side or so conclusively established upon the other that reasonable minds could not differ with regard to them, is erroneous."

And in Myers v. Willmeroth, 151 Neb. 712, 39 N. W. 2d 423, we said: "The trial court should eliminate all matters not in dispute and submit to the jury only the controverted questions of fact upon which the verdict must depend." See, also, Bee Building Co. v. Weber Gas & Gasoline Engine Co., 86 Neb. 326, 125 N. W. 518.

In view of the parties' stipulation the issue of damages should not have been submitted to the jury. The trial court should have instructed the jury that the amount of the damages had been admitted. But every error does not necessarily result in prejudice so as to require a reversal. Instruction No. 7 given by the court submitted the same issue with reference to the appellee's right to recover on its counterclaim, although a similar stipulation had been entered into by the parties fixing the amount thereof. It is apparent the jury was not confused by these instructions for when it found for the appellee on the counterclaim it fixed the amount of the verdict in the exact amount that the damages to the truck had been stipulated to be. In view thereof we find the giving of these instructions to have been error without prejudice.

Appellant complains that the court was in error in giving instructions Nos. 12 and 12½. These instructions are as follows:

No. 12. "You are instructed that under the laws of the State of Nebraska, it is required that no person shall stop or suddenly decrease the speed of a vehicle without first giving an appropriate signal, as hereinafter stated."

No. 12½. "You are instructed that under the laws of the State of Nebraska a person is bound to give a warning of his intention to stop a motor vehicle upon the highway by giving a hand signal and if a hand signal cannot be seen, then by an appropriate signaling device which would warn vehicles traveling of the intention of the driver of said vehicle to stop said vehicle."

With reference to the duties of a driver in this regard the statutes then in force, so far as here material, provided as follows:

"No person shall stop or suddenly decrease the speed of a vehicle without first giving an appropriate signal * * * to the driver of any vehicle immediately to the rear, when there is opportunity to give such signal, * * *." § 39-7,111, R. R. S. 1943.

"The signals required by sections 39-7,111 * * * shall be given either by means of the hand and arm or by a signal lamp or signal device of a type approved by the Department of Roads and Irrigation, but when a vehicle is so constructed or loaded that a hand and arm signal would not be visible both to the front and the rear of such vehicle the signals must be given by such a lamp or device." § 39-7,116, R. R. S. 1943.

"All signals required by sections 39-7,111, * * * to be given by hand and arm shall be given from the left side of the vehicle in the following manner and such signal indicated as follows: (1) Left turn, arm and hand extended horizontally; (2) right turn, hand and arm extended upward; (3) stop or decreased speed, hand and arm extended downward." § 39-7,117, R. R. S. 1943.

It will be observed that the statute does not provide that one is bound to give a hand signal but, on the contrary, provides that such signal may be given either by

means of the hand and arm, or by a signal lamp or signal device of a type approved by the Department of Roads and Irrigation. This has particular application here for the driver of the bus admitted he gave no hand signal when he slowed down to stop but depended entirely on the signal lamps on the rear of the bus, which lamps were automatically activated by the application of the foot brake. These lamps were located on each side of the rear about 4 feet from the level of the road. We find instruction No. 12½ placed a positive duty on the appellant which the law does not require and that, under the circumstances here shown, was prejudicial.

The court also gave instructions Nos. 15, 16, and 17 dealing with the same subject. These instructions, particularly No. 17, properly discuss the duties of appellant and appellee in this regard. It is true that we should consider the instructions given by the court as a whole to see if it can be said they properly submitted the issues to the jury. If they do then prejudice does not result merely because there may be error in one or more of the instructions given. But here, under the circumstances shown, we think the following principle controls: "Where two conflicting instructions are given on a question, one containing an incorrect, and the other a correct, statement of the law, the latter will not cure the former." Krepcik v. Interstate Transit Lines, 153 Neb. 98, 43 N. W. 2d 609.

And, as stated in Harsche v. Czyz, 157 Neb. 699, 61 N. W. 2d 265: "An instruction which conflicts with the propositions of law properly and correctly stated in another instruction in the same charge on a vital issue of fact and tends to mislead or confuse the jury in deliberating on conflicting evidence is erroneous and prejudicial."

Appellant also complains of instruction No. 18 given by the court as placing a positive duty on the driver of the bus to avoid the accident.

By this instruction the court advised the jury that:

"You are further instructed that if you find from the evidence in this case that the plaintiff was able to avoid the accident, yet failed to do so, then your verdict should be for the defendant."

We think this instruction came very close to directing a verdict for the appellee and was clearly prejudicial. The rule in this regard has often been announced by this court.

In Patterson v. Kerr, 127 Neb. 73, 254 N. W. 704, we said: "One is required only to have his car under such reasonable control as to be able to avoid a collision with other vehicles whose drivers exercise due care. Complete control which is such as will prevent collision by the anticipation of negligence on the part of another in the absence of warning or knowledge is not required."

We think what was said in Spomer v. Allied Electric & Fixture Co., 120 Neb. 399, 232 N. W. 767, has application here. Therein we said: " 'Reasonable control' by drivers of motor vehicles is such as will enable them to avoid collision with other vehicles operated without negligence in streets or intersections, and with pedestrians in the exercise of due care; but 'complete control' such as will only prevent a collision by anticipation of negligence or illegal disregard of traffic regulations, in absence of notice, warning or knowledge, is not required by the laws of Nebraska. The instruction given by the trial court in the present case imposed upon defendant too high a degree of control under the circumstances." See, also, Ficke v. Gibson, 153 Neb. 478, 45 N. W. 2d 436.

In view of what we have already said the appellant is entitled to a new trial but before reversing the judgment for that purpose we shall briefly discuss the question raised as to the sufficiency of the evidence to sustain the verdict as a matter of law. The rule controlling is that: "The verdict of a jury on conflicting evidence will not be disturbed on appeal unless it is clearly wrong." Kohrt v. Hammond, 160 Neb. 347, 70 N. W. 2d 102.

Before entering into a discussion of the evidence we shall review two statutes cited by appellee. These statutes are apparently cited for the purpose of showing that, under the circumstances here shown, they created some duty on the part of the driver of the bus with which he failed to comply. Section 39-724, R. R. S. 1943, relates, among other things, to the duty of the driver of any motor vehicle carrying passengers for hire to stop the vehicle before crossing at grade any track or tracks of a railroad, a situation not here involved. This statute does require vehicles used for carrying passengers for hire, a service in which the bus was ordinarily used, be equipped with electric signal stop lamps, red in color, located on the rear of the vehicle at a height of not less than 42 inches nor more than 60 inches above the surface of the highway and that the device shall be operated independently by a control in the driver's compartment of the vehicle. The evidence shows the bus was so equipped and that the type of signal stop lamps used on the bus for this purpose had been approved by and complied with the specifications adopted by the Department of Roads and Irrigation of the State of Nebraska. We do not think, because the statute provides, "all such vehicles shall be equipped with an electric signal stop lamp, red in color, located on the rear of the vehicle," that such lamps are required to have the word "stop" thereon unless the specifications adopted by the Department of Roads and Irrigation so provide. The evidence shows no such requirement.

Appellee also cites section 39-757, R. R. S. 1943, which 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, in no event shall any person park or leave standing any vehicle, whether attended or un-

attended, upon any highway unless a clear and unobstructed width of not less than fifteen feet upon the main traveled portion of said highway opposite such standing vehicle shall be left for free passage of other vehicles thereon, nor unless a clear view of such vehicle may be obtained from a distance of two hundred feet in each direction upon such highway."

We think this statute was not intended to prohibit a momentary stoppage on the paved portion of the highway under proper circumstances for a normal and reasonable purpose. A like statute was fully, and we think correctly, analyzed in Peoples v. Fulk, 220 N. C. 635, 18 S. E. 2d 147. Therein the court said: "The temporary stop of the bus on the hard surface portion of the highway to take on a passenger did not constitute a violation of sec. 123(a), ch. 407, Public Laws 1937, which provides that '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 of the paved or improved or main traveled portion of such highway.'

"The clause 'whether attended or unattended' limits the meaning of the word 'park' as well as of 'leave standing.' The two terms, as thus limited, are synonymous. A vehicle which is left standing is parked and a vehicle which is parked is left standing. Neither term includes a mere temporary stop for a necessary purpose when there is no intent to break the continuity of the 'travel.'

" 'Park' or 'leave standing' means something more than a mere temporary or momentary stop on the road for a necessary purpose. S. v. Carter, 205 N. C., 761, 172 S. E., 415; Stallings v. Transport Co., 210 N. C., 201, 185 S. E., 643, 42 C. J., 614, 2 Blashfield Cyc. Auto L. & P., 332, and cases cited; Billingsley v. McCormich Transfer Co., 228 N. W., 424 (N. D.); Axelson v. Jar-

dine, 223 N. W., 32 (N. D.); Dare v. Bass, 224 Pac., 646; Kastler v. Tures, 210 N. W., 415 (Wis.); Henry v. S. Liebovitz & Sons, 167 Atl., 304 (Pa.); American Co. of Ark. v. Baker, 60 S. W. (2d), 572 (Ark.); Dolfosse v. Oil Co., 230 N. W., 31 (Wis.). Starting and stopping are as much an essential part of travel on a motor vehicle as is 'motion.' Stopping for different causes, and according to the exigencies of the occasion, is a natural part of the 'travel.' The right to stop when the occasion demands is incident to the right to travel. Fulton v. Chouteau County Farmers Co., 32 Pac. (2d), 1025; Morton v. Mooney, 33 Pac. (2d), 262." See, also, Leary v. Norfolk Southern Bus Corp., 220 N. C. 745, 18 S. E. 2d 426; Fritz v. York Motor Express Co., 358 Pa. 398, 58 A. 2d 12; Naylor v. Dragoon, 116 Vt. 552, 80 A. 2d 600; American Co. of Arkansas v. Baker, 187 Ark. 492, 60 S. W. 2d 572.

James Million, driver of the truck, testified to the following: That he saw the bus enter the highway at the intersection of it with the Ten Mile road; that he was then on the highway traveling east at a point just east of the main entrance to Boys Town; that the main entrance to Boys Town is about one-fourth mile west of the intersection; that he caught up with the bus some 800 feet east of the intersection and then continued to travel about 100 feet behind it; that he was then traveling from 35 to 40 miles an hour; that both bus and truck continued to travel in the south lane of travel for eastbound traffic; that the bus just stopped; that he saw no signals indicating such intent on the part of the driver of the bus nor was he aware the bus was slowing down for that purpose although he was looking ahead and watching the bus; that when he noticed the bus had stopped it was about 50 feet ahead of him; that he estimated it would take a distance of about 100 feet to stop the truck at the speed he was traveling upgrade; that he applied the brakes and turned to the left but was unable to avoid hitting

the bus; and that he was not able to turn left into the passing lane for eastbound traffic because he observed, in his rear view mirror, that a semitrailer truck, loaded with hay, was about to pass him.

There were skid marks made by the tires of the truck from the point of impact for a distance of about 24 feet 5 inches to where the truck stopped on the highway. There were no skid marks of the bus tires, it being driven ahead some 50 or 60 feet from the point of impact.

We have often said: "As a general rule it is negligence as a matter of law for a motorist to drive an automobile on a highway in such a manner that he cannot stop in time to avoid a collision with an object within the range of his vision. See, Buresh v. George, supra; Huston v. Robinson, 144 Neb. 553, 13 N. W. 2d 885.

"The basis for this rule is stated in Buresh v. George, supra, as follows: '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.'" Murray v. Pearson Appliance Store, 155 Neb. 860, 54 N. W. 2d 250.

In regard to this duty we have held: "There is nothing that will excuse his failure to see what was plainly in sight if he had maintained a proper lookout." Buresh v. George, 149 Neb. 340, 31 N. W. 2d 106.

Accepting the truck driver's testimony, as we must for testing the sufficiency of the evidence to sustain the verdict, we think he was guilty of negligence as a matter of law. Admittedly he saw the bus at a considerable distance. The day was bright, the sun was shining overhead, and the pavement was dry. He was at all times able to view the movements of the bus and he was duty bound to look and observe its movements. That the bus must have been slowing down to stop, as the

bus driver said it was, seems self evident from all the circumstances shown and there is no evidence from which it could be said that the slowing down was sudden or abrupt. In fact the evidence, without dispute, shows it was gradual. It seems to us that the truck driver was negligent in not observing this fact and acting accordingly and that his negligence was a proximate cause of the accident. It may be that when he finally became aware of the bus having stopped he was in a position from which he could not extricate himself, but it was a situation of his own making. In this regard we have not overlooked our holding in O'Brien v. J. I. Case Co., 140 Neb. 847, 2 N. W. 2d 107, but that was a situation in which the jury could find there was a sudden and abrupt stop which is not the situation here.

The driver of the truck, who stated he was looking straight ahead and watching the bus, testified he never saw any signal that indicated it was going to stop. On the other hand the driver of the bus said such a signal was given. The occasion for the bus stopping was to advise a lady who was signaling to get on it that the bus was not carrying passengers. This lady was standing some 8 or 9 feet south of the paved portion of the highway and signaling with her hand indicating she wanted to get on the bus. The driver of the bus and his assistant, the latter being a mechanic who was riding with him, testified they saw this lady at some distance and then started to slow down in order to stop to so advise her. The driver testified he applied the brakes. The driver and his assistant both testified the accident occurred before the bus had come to a stop. The bus driver admitted he gave no hand signal of his intention to stop nor did he look in the rear view mirror to see if any vehicles were behind him but depended entirely on the rear stop lamps being activated by his use of the brakes. He admitted he never saw the truck until after the accident. This presented an issue of

fact. The duty of a driver to give a signal under these circumstances is created by statute. See § 39-7,111, R. R. S. 1943. See, also, O'Brien v. J. I. Case, *supra*.

There is evidence from which a jury could find this duty was not complied with on the part of the bus driver and that he was negligent in that respect. We think the evidence is sufficient, under the circumstances disclosed by the record, to take the question of contributory negligence of the bus driver to the jury on the issue of appellant's right to recover.

We therefore reverse the judgment and remand the cause for a new trial in accordance herewith.

REVERSED AND REMANDED.

WILLARD C. YOST, APPELLEE, V. MAUDIE M. YOST, ALSO KNOWN AS MAUDIE M. FANNING, APPELLANT.
72 N. W. 2d 689

Filed October 28, 1955. No. 33794.

1. **Divorce: Domicile.** A divorce obtained in another jurisdiction is of no force and effect in this state if both parties to the marriage were domiciled in this state at the time the proceeding for the divorce was commenced.
2. **Divorce: Constitutional Law.** A judgment, refusing to accord full faith and credit to the divorce decree of a sister state on the ground that no bona fide domicile was acquired there, does not offend the full faith and credit clause of the federal Constitution where it appears that proper weight was given to the claims of power by the court of the sister state; that the burden of disproving a bona fide domicile in the sister state was properly placed upon the party challenging the validity of the divorce decree; that such issue of fact was determined by appropriate legal procedure; and that the finding as to the absence of a bona fide domicile in the sister state is amply supported by the evidence. This is so even if in the record of the court rendering the divorce decree in the sister state there is warrant for its finding that it had jurisdiction.
3. **Divorce: Judgments.** A judgment in one state is conclusive upon the merits in every other state, but only if the court of the first state had power to pass on the merits, had jurisdiction,

that is, to render the judgment. A divorce decree of a foreign state is subject to collateral attack where constructive process only has been had in the state granting the divorce.

4. **Constitutional Law: Judgments.** The full faith and credit clause of the federal Constitution does not operate to make a judgment of a sister state a judgment in this state except where it can be shown that the court purporting to render the original judgment had the necessary jurisdiction to decide it on the merits. The presumption is that the foreign decree is valid.
5. **Divorce: Judgments.** The burden of undermining the verity which the divorce decree of a sister state imports rests upon the party attacking its validity.
6. **Domicile: Divorce.** A bona fide domicile in the state in which a decree of divorce is obtained is necessary for such court to attain jurisdiction and consequently a holding that such a domicile was established is subject to collateral attack by the spouse domiciled in another state.
7. **Divorce: Marriage.** Where a divorce decree is held to be void for want of jurisdiction by the court granting it, a purported subsequent marriage by the party obtaining it is also void.
8. **Marriage: Adultery.** A person who remarries after obtaining a decree of divorce in another state which is void and cohabits thereafter with the purported spouse as man and wife, even though a ceremonial marriage was had, is, in the eyes of the law, an occupant of an adulterous relationship with such purported spouse.
9. **Divorce: Parent and Child.** Where a wife is conclusively found to be occupying an adulterous relationship with a man not her husband, she is an unfit person as a matter of law to have the care and custody of her minor children as against the husband she has wronged.
10. **Divorce: Adultery.** Where in a suit for divorce adultery on the part of the defendant is conclusively proved, the trial court is required to grant a divorce to the plaintiff on that ground.
11. **Divorce: Attorney and Client.** Where adultery of a wife is established, she is not entitled to an award of alimony or attorneys' fees. The costs of the action in such a case are taxable to the wife.

APPEAL from the district court for Chase County: VICTOR WESTERMARK, JUDGE. *Affirmed as modified.*

Albert S. Johnston and *Henry W. Curtis*, for appellant.

Beatty, Clarke, Murphy & Morgan and *John P. O'Brien*, for appellee.

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

CARTER, J.

The plaintiff, Willard C. Yost, brought this suit in the district court for Chase County to obtain a divorce from the defendant, Maudie M. Yost, on the grounds of adultery and cruelty. Plaintiff also prayed for the custody of the two minor children of the parties. The defendant, Maudie M. Yost, denied the allegations of the petition and alleged that she had been lawfully divorced from the plaintiff in the State of Florida on the grounds of cruelty, and prayed for the custody of the minor children. By his reply the plaintiff alleged that the purported Florida divorce was void in that the defendant, Maudie M. Yost, never became a bona fide resident of that state, that personal service of summons was never had upon the plaintiff, that the only process obtained was by publication, and that said purported divorce was obtained by fraud perpetrated upon the Florida court by the defendant, Maudie M. Yost, and Cleo Fanning, with whom she subsequently entered into a purported marriage. The trial court held the Florida marriage to be void, granted a divorce on the ground of cruelty to the plaintiff, granted the prayer of the plaintiff for the custody of the minor children, denied alimony to the defendant, Maudie M. Yost, and denied an allowance of attorneys' fees to the defendant. The costs of the action, other than the costs of defendant's depositions, were taxed to the plaintiff. The defendant, Maudie M. Yost, appeals. The plaintiff, Willard C. Yost, cross-appeals.

Willard C. Yost will hereinafter be referred to as the plaintiff and Maudie M. Yost as the defendant.

Plaintiff and defendant were married on August 2, 1940. From February 1, 1943, to October 2, 1953, they lived together in a modern home on the ranch of Glen Maddux, about 10 miles from Imperial, Nebraska. They

have two small children. Plaintiff was employed by the month by Maddux and in addition had a share in some of the crops and produce, and the privilege of running some of his own cattle on the ranch. Cleo Fanning lived on a farm about 5 miles from the Maddux ranch. Fanning was married but has no children. On October 2, 1953, defendant was 31 years of age and Fanning was 51.

The record shows that defendant met Fanning at a dance approximately 2 years prior to October 2, 1953. Sometime thereafter they commenced meeting clandestinely in various isolated places. Their amorous conduct continued until a few months before October 2, 1953, when they began to plan and conspire to rid themselves of their spouses in order that they might marry. Their clandestine conduct became generally known to certain relatives of both, including defendant's mother and brother, who made attempts to break up the relationship without success. On October 1, 1953, defendant packed suitcases for herself and her 7-year-old daughter and hid them in the trunk of Fanning's automobile. The next day defendant drove the family car into Imperial, parked the car on the street, and departed with Fanning, taking the child Sylvia with her. The evidence sustains a finding that plaintiff had no inkling of the transaction until he found the car and a note left in the glove compartment by the defendant, advising him of her intentions.

It appears that Fanning, before leaving, had consulted a lawyer regarding the divorce laws of various states and obtained a directory of lawyers in the states through which they expected to pass. They made inquiries in at least one state other than Florida concerning the residence requirements for the obtaining of a divorce. On October 12, 1953, they arrived in Panama City, Florida, where Fanning consulted a lawyer and subsequently rented an apartment for defendant and Sylvia, and a room for himself. Sylvia was placed in school and attended until the end of the school year

on June 4, 1954. All living expenses were paid by Fanning.

Shortly after the expiration of 90 days, the residence requirement in divorce proceedings in Florida, suits for divorce were commenced in Leon County circuit court by defendant and Fanning to procure divorces from their respective spouses in Nebraska. Service of process was had on plaintiff by publication. The evidence in each case was taken by a special master, each of the parties providing corroborative evidence for the other. On April 20, 1954, defendant obtained a final decree of divorce. On April 23, 1954, they made application for a marriage license and on May 1, 1954, they went through a ceremonial marriage ceremony. On June 7, 1954, 3 days after the close of the school term, they returned to Lincoln, Nebraska, where they purchased a home and have lived purportedly as husband and wife. Plaintiff commenced the present suit for a divorce on July 22, 1954, in the district court for Chase County.

When defendant left with Fanning she had one suitcase of clothes for herself and one for Sylvia. She had $15 in money. Fanning took his car, some clothes, a radio, and a checkbook. Fanning is shown to have been a wealthy rancher and farmer. He has several thousand acres of land and considerable money and personal property. His bank accounts were left in Nebraska banks and his bonds and securities were left in a safety deposit box in a Nebraska bank. They acquired no property in Florida. Fanning made his income tax return to the Director of Internal Revenue at Omaha. He took a letter of credit with him. He had planted fall wheat on his farm which was turned over to his renter on some subsequent date. There are letters in the record written by defendant and Fanning indicating a clear intention that they intended to return to Nebraska after obtaining a divorce. They had no destination in mind when they left Nebraska and located in Panama City, Florida, after consulting a

lawyer concerning the divorce laws of that state. Their divorce cases were filed in Tallahassee, Leon County, instead of Panama City, Bay County, because their lawyer stated that the local circuit judge was too strict in divorce matters.

The record is replete with admissions by the defendant and Fanning which show the whole plan. Each admitted being married at the time they carried on their clandestine relations. They deny any sexual relations until after their purported marriage on May 1, 1954, but the acceptance of such evidence at its face value would tax the credulity of a self-respecting court. The record recites the story in detail and contains letters and notes in the handwriting of the defendant which show that her conduct was based on an illicit infatuation for Fanning and not on any cruelty towards her by the plaintiff. The record is clear, also, that Fanning alienated the affection of the defendant for her husband and brought about the dissolution of the family ties of the plaintiff and defendant. The evidence is clear that defendant and Fanning went to Florida for the sole purpose of securing a quick divorce. There was never any intent to establish a bona fide residence or domicile in that state. The evidence amply sustains the findings of the trial court to that effect.

It is the contention of the defendant that her Florida divorce was valid and that the courts of Nebraska are required to give full faith and credit to the divorce decree obtained in that state under the full faith and credit clause of the federal Constitution.

The Nebraska Uniform Divorce Recognition Act provides in part:

"A divorce from the bonds of matrimony obtained in another jurisdiction shall be of no force or effect in this state, if both parties to the marriage were domiciled in this state at the time the proceeding for the divorce was commenced." § 42-341, R. R. S. 1943.

"Proof that a person obtaining a divorce from the

bonds of matrimony in another jurisdiction was (1) domiciled in this state within twelve months prior to the commencement of the proceeding therefor, and resumed residence in this state within eighteen months after the date of his departure therefrom, or (2) at all times after his departure from this state, and until his return maintained a place of residence within this state, shall be prima facie evidence that the person was domiciled in this state when the divorce proceeding was commenced." § 42-342, R. R. S. 1943.

The Florida divorce was clearly void under the provisions of these sections of our statutes. Defendant did not obtain a bona fide residence in Florida as we have heretofore found from the evidence. Consequently her domicile remained in this state. The record shows also that the rule as to prima facie evidence contained in section 42-342, R. R. S. 1943, applies to her and that the evidence contained in the record is not sufficient to overcome it. The public policy of this state with reference to the obtaining of quick foreign divorces by residents of this state was clearly violated.

The correct rule is set forth in the case of Williams v. North Carolina, 325 U. S. 226, 65 S. Ct. 1092, 89 L. Ed. 1577, 157 A. L. R. 1366, as follows: "What is immediately before us is the judgment of the Supreme Court of North Carolina. We have authority to upset it only if there is want of foundation for the conclusion that that Court reached. The conclusion it reached turns on its finding that the spouses who obtained the Nevada decrees were not domiciled there. The fact that the Nevada court found that they were domiciled there is entitled to respect, and more. The burden of undermining the verity which the Nevada decrees import rests heavily upon the assailant. But simply because the Nevada court found that it had power to award a divorce decree cannot, we have seen, foreclose reexamination by another State. Otherwise, as was pointed out long ago, a court's record would establish its power and the power

would be proved by the record. Such circular reasoning would give one State a control over all the other States which the Full Faith and Credit Clause certainly did not confer. * * * If this Court finds that proper weight was accorded to the claims of power by the court of one State in rendering a judgment the validity of which is pleaded in defense in another State, that the burden of overcoming such respect by disproof of the substratum of fact—here domicil—on which such power alone can rest was properly charged against the party challenging the legitimacy of the judgment, that such issue of fact was left for fair determination by appropriate procedure, and that a finding adverse to the necessary foundation for any valid sister-State judgment was amply supported in evidence, we cannot upset the judgment before us. And we cannot do so even if we also found in the record of the court of original judgment warrant for its finding that it had jurisdiction. If it is a matter turning on local law, great deference is owed by the courts of one State to what a court of another State has done. * * * But when we are dealing as here with an historic notion common to all English-speaking courts, that of domicil, we should not find a want of deference to a sister State on the part of a court of another State which finds an absence of domicil where such a conclusion is warranted by the record."

This court has adhered to the foregoing rule. In Lippincott v. Lippincott, 141 Neb. 186, 3 N. W. 2d 207, 140 A. L. R. 901, we held that a decree of divorce rendered in another state may be collaterally attacked by showing that the court was without jurisdiction, either of the subject matter of the suit or of the person of defendant, without violating the full faith and credit clause of the federal Constitution. See, also, Anglim v. Anglim, 140 Neb. 133, 299 N. W. 346; Repp v. Repp, 156 Neb. 45, 54 N. W. 2d 238. This rule has been consistently adhered to by the Supreme Court of the United States where constructive service of process only has been had in

the state granting the divorce. Rice v. Rice, 336 U. S. 674, 69 S. Ct. 751, 93 L. Ed. 957; Sutton v. Leib, 342 U. S. 402, 72 S. Ct. 398, 96 L. Ed. 448.

A bona fide domicile in the state in which a decree of divorce is obtained is a jurisdictional matter. A bona fide domicile is necessary for the court to attain jurisdiction, and consequently a holding that it existed by the court granting a divorce is subject to attack by the spouse domiciled in another state. In Phillips v. Phillips, 146 Fla. 311, 1 So. 2d 186, the court said: "We may say here that the taking up of abode in Florida for the sole purpose of prosecuting a divorce suit is not the establishment of a bona fide residence in Florida. There must be coupled with the sojourn in the State the intent to make this State the legal residence of the plaintiff. The State is a party at interest in every divorce suit and, therefore, the courts should not allow the process of the State to be used by those who are not entitled to have its beneficent aid and protection. No hardship can be worked by requiring corroboration of the plaintiff's testimony both as to cause or ground for divorce and as to bona fide residence for the statutory period.

"Our conclusion is that the plaintiff in the court below failed to meet the burden of establishing the jurisdictional fact of residence in this State and that, therefore, the decree of divorce should not have been entered."

In Fairlamb v. Fairlamb, 156 Fla. 104, 22 So. 2d 580, the Florida court said: "Regardless of what he has stated his intention to be, our opinion is that the whole record shows that his pretended establishment of residence in Florida was for the purpose of procuring a divorce under the laws of the State of Florida and that his residence in the State of Florida, if any, was not sufficient to give the Circuit Court of Pinellas County jurisdiction of the subject matter and was not sufficient to comply with requirements of Sec. 65.02, supra. See Taylor v. Taylor, 132 Fla. 690, 182 So. 240; Mills v. Mills, 153 Fla. 727, 15 So. (2nd) 763; Phillips v. Phillips, 146 Fla. 394, 1 So.

(2nd) 186; and Minick v. Minick, 111 Fla. 620, 149 So. 483."

Under the holdings of the foregoing cases and the evidence adduced in the present record, it is clear that the defendant did not have a bona fide domicile in Florida sufficient for her to obtain a valid divorce. A bona fide domicile being a jurisdictional requirement, it is subject to collateral attack without violating the full faith and credit clause of the federal Constitution. The divorce decree being void, the purported subsequent marriage of the defendant is also void. Lippincott v. Lippincott, *supra;* Williams v. North Carolina, *supra;* Rice v. Rice, *supra;* Sutton v. Leib, *supra.*

The record shows conclusively that the defendant and Fanning have been cohabiting together as man and wife since May 1, 1954. This is nothing more than an adulterous cohabitation and amply supports the granting of a divorce to the plaintiff and a denial of alimony to the defendant.

The defendant contends that the trial court erred in granting the custody of the two minor children to the plaintiff. We are of the opinion that the evidence herein recited shows the unfitness of the defendant to have the custody of either or both of the minor children. With reference to the custody of the minor children, the evidence shows that on October 2, 1953, she abandoned her husband and her son, Stanley, then 12 years of age. She took Sylvia, aged 7 years, with her without the knowledge or consent of the plaintiff and thereby caused the child to become an innocent participant in the sordid mission in which she and Fanning were engaged. She has brought disgrace and humiliation upon her husband and her children. She now asks that she be given the custody of the children; and that they be required to live with her and Fanning while they continue to cohabit in an adulterous relationship. This court will not, under the circumstances here shown, grant any relief to her. She has forfeited any right she

may have had to the custody of her children because of her disgraceful conduct. One may not willfully destroy the family relationship as she has done and expect a court to give consideration to her to the detriment of the husband she has so grievously wronged. She argues that she has done nothing morally wrong; and that she has at all times kept within the letter of the law. This, of course, is not true. One who goes into another state to secure a divorce to meet the exigencies of the occasion does so at his peril. She may not be heard to say, after participating in a fraudulent plan to secure a quick divorce in another state, that her intentions were good and that she acted with the best of motives. The public policy involved, particularly one so important as that bearing upon the integrity of the marriage relation, and the duties and responsibilities arising therefrom, will not permit misconceptions of legal rights to be urged as a defense in such cases. One who toys with the laws of the states and their judicial processes must accept the consequences when his plans fall short of the anticipated result. The prayer of the defendant for the custody of the minor children was properly denied by the trial court.

The record discloses that plaintiff is a proper person to have the custody of the children. He has a well-furnished modern home with suitable assistance for caring for the children's well-being. Adequate school facilities are shown to be available. He has the financial means to care for them in a suitable manner. The trial court properly granted the custody of the children to the plaintiff.

The plaintiff has filed a cross-appeal. He complains therein that the trial court should have found the defendant guilty of adultery and taxed the costs to her. Defendant admitted living with Fanning as his wife after May 1, 1954. This undisputed evidence requires a finding that the charge of adultery was established. The decree is hereby amended to so find. It necessarily

follows that the costs of the action should be taxed against the defendant. The decree is modified to so order. The costs in this court are likewise taxed to the defendant.

The decree in all other respects is correct. The decree as modified by this court is therefore affirmed.

AFFIRMED AS MODIFIED.

JEAN W. HARDY, APPELLEE, V. PHILIP S. HARDY, APPELLEE AND CROSS-APPELLANT, BERNARD S. GRADWOHL ET AL., APPELLANTS AND CROSS-APPELLEES.
72 N. W. 2d 902

Filed November 4, 1955. No. 33746.

1. **Appeal and Error.** The Supreme Court cannot consider any defense not submitted to the trial court nor disclosed by the record, except the defense that the court is without jurisdiction over the subject matter.
2. **Divorce: Attorney and Client.** A reasonable attorney's fee in an action for divorce is to be determined by the nature of the case, the amount involved in the controversy, the results obtained, and the services actually performed therein, including the length of time necessarily spent in the case, the care and diligence exhibited, and the character and standing of the attorneys.

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

Ginsburg & Ginsburg, for appellants and cross-appellees.

Woods, Aitken & Aitken, for appellee and cross-appellant.

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

YEAGER, J.

The issues presented by this appeal flow as incidents

from an action for divorce instituted by Jean W. Hardy, plaintiff and designated as an appellee in this court, against Philip S. Hardy, defendant and also designated as an appellee, which action was dismissed at the instance of plaintiff without a trial.

Bernard S. Gradwohl was retained by plaintiff as her attorney and on her behalf he filed the petition in the action for divorce on October 14, 1953. Apparently at the time the action was instituted there was no agreement between plaintiff and her attorney as to fees or compensation for the attorney. Thereafter on October 28, 1953, a written agreement was entered into covering the question of compensation. It was in form a letter from and signed by plaintiff to her attorney setting forth the terms of the employment which was accepted in writing over the signature of the attorney by endorsement on the letter. The letter is in five paragraphs of which four are numbered. The portions of the letter of pertinence on this appeal are the first and fourth numbered paragraphs as follows:

"1. You are to receive a reasonable fee from me for all services to be rendered, regardless of whether there is a contested trial. This includes a property settlement before or after the trial; and also any reconciliation to which I may agree."

"4. I agree to pay costs and expenses which you may incur, but any amounts paid to you by Philip for such costs and expenses shall be credited."

After the action was instituted the plaintiff and her attorney negotiated with the defendant and his attorney with the view to the arrival at an agreement on the subject of alimony for plaintiff, division of property, custody of minor children, there being two, and support and maintenance of the children. Negotiations ended on December 4, 1953. On this date the defendant in the presence of plaintiff made an effort to get the attorney to fix a charge for his services but this was refused. And incidentally the record does not disclose that the

attorney ever placed a value on his services until the issue presented here was presented to the district court.

Within a couple of days after December 4, 1953, the plaintiff left for Florida but before departure she wrote her attorney a letter requesting a dismissal of the action for divorce.

On December 10, 1953, the attorney on his own behalf and on behalf of Edward F. Carter, Jr., and John M. Gradwohl, as attorneys for plaintiff, filed an application to have fixed and charged against the defendant an attorneys' fee for the services performed on behalf of plaintiff.

As a part of this same pleading the attention of the court was called to the communication from plaintiff to the attorney requesting dismissal of the divorce action. No responsive pleading was filed by either plaintiff or defendant.

A trial was had on the application for attorneys' fees at the conclusion of which it was adjudged that the defendant should pay as an attorneys' fee to plaintiff's attorneys the sum of $3,250. As a part of that adjudication the divorce petition of plaintiff was dismissed.

Following the adjudication as to attorneys' fees the attorneys filed a motion for new trial, which motion was overruled. From the adjudication and the order overruling the motion for new trial they have appealed.

The brief of the attorneys for plaintiff, who will be referred to hereinafter as appellants, contains seven separate assignments of error as grounds for reversal but by the argument one question is presented. The question presented is that of whether the fee allowed was adequate. The appellants insist that it was grossly inadequate.

The defendant cross-appealed. In his brief he presented together his position with reference to the appellants' appeal and his cross-appeal. In this connection he presented three assignments of error.

The first is that the court erred in finding that the

appellants, as attorneys for plaintiff, were entitled to an allowance for attorneys' fees to be taxed against him. This assignment has apparently been abandoned since it has not been argued in the brief or supported by legal proposition.

The third is that the court erred in overruling the motion for new trial made by the defendant and cross-appellant. This motion does not appear in the transcript although general reference is made to it without any mention of its content, hence in this connection there is nothing which this court may consider.

The second is that the fee of $3,250 which was allowed was grossly excessive.

In further defense in the brief but not in any assignment of error the defendant urges that the appellants should be denied any fee as a disciplinary measure on the ground that the contract between plaintiff and Bernard S. Gradwohl, hereinbefore referred to, was a contingent fee contract in a divorce case and as such was against public policy.

The conclusion reached as to this is that it may not be considered herein. The appellants by their reply brief assert that no such issue is before this court. This assertion is sustained by the record. The record fails to disclose that any such question was ever presnted to the district court.

It is a long-established rule that the Supreme Court cannot consider a defense not submitted to the trial court nor disclosed by the record. Chamberlain v. Grimes, 42 Neb. 701, 60 N. W. 948; Bell v. Rice, 50 Neb. 547, 70 N. W. 25; Goodwin v. Rosebud Cattle Co., 112 Neb. 90, 198 N. W. 568; McDonald v. Lincoln County, 141 Neb. 741, 4 N. W. 2d 903.

The only exception to this rule is that jurisdiction over the subject matter may be asserted as a defense on appeal. Houser v. McCrystal, 5 Neb. (Unoff.) 217, 97 N. W. 828. The question presented in this instance is of course not one of jurisdiction.

This then leaves remaining only the question of whether or not the district court erred in fixing the amount of a fee for the appellants.

It should be observed here that this is not an action to enforce the contract above referred to between the plaintiff and Bernard S. Gradwohl, but is one to fix fees and expenses in favor of appellants on account of services performed on behalf of plaintiff in her divorce action against her husband, the defendant. Bernard S. Gradwohl, however, has by his testimony on the trial of the issues involved here committed himself to the proposition that an unqualified allowance of fees against the defendant would relieve fully against the obligation of his contract with the plaintiff.

As a general guide to the fixing of attorney's fees in cases including actions for divorce this court has said: "A reasonable attorney fee in any proceding is to be determined by the nature of the case, the amount involved in the controversy, the results obtained, and the services actually performed therein, including the length of time necessarily spent in the case, the care and diligence exhibited and the character and standing of the attorneys concerned.". Hemmer v. Metropolitan Life Ins. Co., 133 Neb. 470, 276 N. W. 153. See, also, Darnell v. City of Broken Bow, 139 Neb. 844, 299 N. W. 274, 136 A. L. R. 101; Strasser v. Strasser, 153 Neb. 288, 44 N. W. 2d 508.

Proceeding with this guiding statement in mind it is repeated that this was an action for divorce. Also involved were custody and support for children, alimony for the wife, and division of property. The questions of alimony, child support, and division of property in case of divorce are dependent upon the social position and the living standard of the parties, and the amount of defendant's property and income.

The property of the plaintiff was, comparatively speaking, inconsequential. The appellants' estimate of the value of defendant's property was around $700,000. The

defendant's estimate of the net value of his estate was slightly over $100,000. From the conflicting evidence no satisfactory conclusion can be reached as to the value of this estate, but reasonably it may be said that the true value was much below the estimate of the appellants, but considerably above the estimate of the defendant. The defendant's salaried income at the time of the trial was $24,000 a year. Previously it had been higher. He had a small amount of additional income.

The social standing and the standard of living of the parties before their separation appears to have been rather high.

The character and standing of the appellants as attorneys, according to attorneys called by both the appellants and the defendant, was high. The same may be said as to their reputation for diligence.

The record fails to disclose that any results of a substantial character were obtained. During the period that the appellants represented the plaintiff there were repeated conferences and proposals dealing with property and allowances but nothing was ever agreed upon or settled. Negotiations ended on December 4, 1953, and on that day plaintiff and defendant left a conference of the parties and their attorneys together. Before their departure an effort was made to get Bernard S. Gradwohl to fix the fee for his services. This he refused to do. Whether or not his refusal had anything to do with the breaking off of negotiations is not certain. It is not of great importance.

After this the plaintiff went to Florida and was gone for a considerable period of time. Thereafter she returned to Lincoln, Nebraska, and at the time of the hearing which is being reviewed here, she was living at the family residence. Whether or not there was an actual reconciliation, temporary or permanent, is not disclosed by the record. It is not of importance here. This recital discloses, as was stated, that no substantial results were obtained for plaintiff by the appellants.

As to the services actually performed, including the time devoted to the case, we have only the testimony of Bernard S. Gradwohl. He testified in very considerable detail as to the character and extent of the service performed by himself and the other appellants. Those details will not be repeated here. As to time, he kept no records but he estimated that he devoted 25 days and the other appellants 25 days.

He fixed the value of his time at $300 to $350 a day and that of the other appellants at $200 to $250 a day or a total value for time from $12,500 to $15,000. In his testimony he valued the total service at $35,000.

He called a witness who, on the basis of a hypothesis, testified that the time of appellants was worth a maximum of $7,500 and that the value of the total service was from $25,000 to $35,000. Another witness gave testimony of similar import.

The defendant called two witnesses who gave testimony as to the value of appellants' services. Effectually, under the circumstances as disclosed, one witness testified that the maximum value of the time devoted to the case by appellants was $3,250 and that no further allowance was justified. The testimony of the other witness in general conformed to that of this witness.

Having taken into consideration all of the facts as disclosed by the record and applied to them the rule set forth for the determination of the value of attorneys' services, the conclusion is reached that the amount fixed by the decree and judgment of the district court represents adequately the value of appellants' service to the plaintiff.

AFFIRMED.

MILDRED B. KROEGER, ADMINISTRATRIX OF THE ESTATE OF RUSSELL K. KROEGER, DECEASED, APPELLEE, V. KARL SAFRANEK, APPELLANT, IMPLEADED WITH PRUCKA TRANSPORTATION, INC., A CORPORATION, APPELLEE.
72 N. W. 2d 831

Filed November 4, 1955. No. 33766.

1. **Negligence.** Proximate cause, as used in the law of negligence, is that cause which in a natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury, and without which the accident could not have happened.
2. ———. A party is only answerable for the natural, probable, reasonable, and proximate consequences of his acts; and where some new efficient cause intervenes, not set in motion by him, and not connected with but independent of his acts and not flowing therefrom, and not reasonable in the nature of things to be contemplated or foreseen by him, and produced the injury, it is the dominant cause.
3. ———. If the original negligence is of a character which, according to the usual experience of mankind, is liable to invite or induce the intervention of some subsequent cause, the intervening cause will not excuse it, and the subsequent mischief will be held to be the result of the original negligence.
4. ———. A cause of an injury may be the proximate cause notwithstanding it acted through successive instruments or a series of events, if the instruments or events were combined in one continuous chain or train through which the force of the cause operated to produce the disaster.
5. **Trial.** The proper method of presenting a case to the jury is a clear and concise statement by the court of those issues which find support in the evidence and not by substantially copying the pleadings of the parties and if, by doing the latter, it results in prejudice to the complaining party it is a sufficient ground for reversal.
6. **Pleading.** The office of the ad damnum in a pleading is to fix the amount beyond which a party may not recover on the trial of his action.
7. **Trial.** It is the duty of the trial court to present to the jury those issues which are raised by the pleadings and which find support in the evidence.
8. **Death: Damages.** In an action brought by a personal representative in behalf of statutory beneficiaries to recover damages for the death caused by the wrongful act of the defendant, recovery must be measured by the pecuniary loss suffered by the beneficiaries by being deprived of what they would have

received from the earnings of the injured party from the date of his death, had he lived out his full expectancy.

9. ———: ———. We are required by our law to restrict the recovery to the pecuniary value lost to the family. This, however, is not necessarily limited to the dollars and cents which the deceased would probably have expended upon his family if he had lived. Care and maintenance of children mean more than this. The jury may properly consider his services in the superintendence and attention to, and care of, his family and the education of his children.
10. **Trial.** The charge of the trial court to the jury should be confined to the issues presented by the pleadings and supported by the evidence.
11. **Trial: Damages.** It is always the duty of the court to instruct the jury as to the proper basis upon which damages are to be estimated. The jury should be fully and fairly informed as to the various items or elements of damage which they should take into consideration in arriving at their verdict, otherwise the jury may be confused and misled.
12. **Death: Damages.** Medical or funeral expenses resulting from a wrongful death are recoverable as damages in an action under sections 30-809 and 30-810, R. R. S. 1943, when the beneficiaries for whom the action is being brought have paid or have legally obligated themselves to pay such expenses and may be recovered in a separate cause of action.
13. **Evidence.** Maps, drawings, and diagrams illustrating the scenes of a transaction and the relative location of objects, if shown to be reasonably accurate and correct, are admissible in evidence.

APPEAL from the district court for Saunders County: HARRY D. LANDIS, JUDGE. *Reversed and remanded with directions for a new trial.*

Howard V. Kanouff and *Schaper & Schaper,* for appellant.

Pilcher, Haney & Howard, for appellee.

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

WENKE, J.

This appeal from the district court for Saunders County involves an action based on the alleged wrongful death of Russell K. Kroeger. It was brought by

Mildred B. Kroeger, administratrix of decedent's estate, for the benefit of his widow and 5-year-old daughter as next of kin. Plaintiff recovered a verdict of $37,725 against defendant Karl Safranek and judgment was entered thereon. Defendant Safranek thereupon filed a motion for new trial and perfected this appeal from the overruling thereof.

Decedent was an employee of Prucka Transportation, Inc., a corporation, and, at the time of his death, was acting within the scope of that employment. In view thereof the employer has paid the widow workmen's compensation benefits and is entitled to be subrogated to any recovery by appellee to the extent of such payments. It was for that reason made a party defendant in this action.

The accident, which resulted in the death of Russell K. Kroeger, happened about 11 p. m. on Thursday, July 23, 1953, on U. S. Highway No. 30-A, also identified as State Highway No. 92, at a point in Saunders County that is about 7½ miles west of Wahoo, Nebraska. It occurred when the trailer of a tractor-trailer unit owned and being driven east on U. S. Highway No. 30-A by appellant collided with the tractor of a tractor-trailer unit being driven west on this same highway by decedent for Prucka Transportation, Inc. We shall hereinafter refer to these trucking units as either the appellant's truck or the Prucka truck. From the evidence adduced the jury could properly find that the impact occurred north of the marked center line of the paved highway; that it was occasioned by the weaving of the front end of the trailer of appellant's truck north across the center line and into the left side or front fender and wheel of the tractor of the Prucka truck; that the Prucka truck was, at that time, being driven by decedent west in the north lane for westbound traffic; that the initial blow caused the back end of appellant's trailer to whip to the north; and that as a result the back end thereof also hit the tractor of the Prucka truck and resulted in the driver

thereof losing control. The Prucka truck, subsequent to the collision, ended up in a cornfield to the south of the highway. When stopped it was facing southwest.

The foregoing is a general picture of when, where, and how the accident happened. We shall discuss some of the evidence in more detail in connection with the errors assigned. It is true appellant testified the collision occurred south of the center line of the highway but, since appellee obtained a verdict, we must accept, as established, the facts most favorable to her.

Appellant contends decedent's walking into the wires of a power line and being electrocuted was such an efficient intervening cause that it can be said, as a matter of law, that any negligence of the appellant, even though established, could not be and was not the proximate cause of decedent's death. He also contends that, in any event, decedent's death by electrocution was not a natural, probable, reasonable, and proximate consequence of any act on his part nor reasonably, in the nature of things, to be contemplated or foreseen by him.

There was an electric power line located just south of the highway at the point where the accident happened. It ran parallel with the highway and was located some four or five rows out in the cornfield. This cornfield was located just south of the highway and adjacent thereto. The Prucka truck, in leaving the highway and entering this cornfield, broke off a pole supporting this power line. The breaking of the pole left some 5 or 6 feet of the upper end thereof attached to the power line wires by insulators, neither of the wires having been broken by the impact. The weight of this piece of pole, together with the wires, caused the power line to sag. It sagged into the tops of the corn. After the truck he was driving had stopped the decedent got out on the left side of the cab and, with the aid of a flashlight, started for the highway. He first walked around the front of the truck and then headed straight north, the highway at this point running east and west.

As he came to where the wires were hanging in the corn he went down. Whether he fell or came directly in contact with a wire and was knocked down is not shown. However, he ended up lying on the ground with his body across one wire, the other suspended some 4 feet above him. He was in this position a considerable length of time before he could be moved. His death was caused by electrocution.

"Proximate cause, as used in the law of negligence, is that cause which is a natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury, and without which the accident could not have happened." Anderson v. Byrd, 133 Neb. 483, 275 N. W. 825. See, also, Danielsen v. Eickhoff, 159 Neb. 374, 66 N. W. 2d 913.

"A party is only answerable for the natural, probable, reasonable, and proximate consequences of his acts; and where some new efficient cause intervenes, not set in motion by him, and not connected with but independent of his acts and not flowing therefrom, and not reasonably in the nature of things to be contemplated or foreseen by him, and produced the injury, it is the dominant cause." Driekosen v. Black, Sivalls & Bryson, 158 Neb. 531, 64 N. W. 2d 88. See, also, Johnson v. City of Omaha, 108 Neb. 481, 188 N. W. 122.

" 'An injury that could not have been foreseen or reasonably anticipated as the probable result of the negligence is not actionable, nor is an injury that is not the natural consequence of the negligence complained of, and would not have resulted from it, but for the interposition of some new, independent cause that could not have been anticipated.' Chicago, St. P., M. & O. R. Co. v. Elliott, 5 C. C. A. 347." Johnson v. City of Omaha, *supra*.

"If the original negligence is of a character which, according to the usual experience of mankind, is liable to invite or induce the interventon of some subsequent cause, the intervening cause will not excuse it, and the

subsequent mischief will be held to be the result of the original negligence." Driekosen v. Black, Sivalls & Bryson, *supra.*

"A cause of an injury may be the proximate cause notwithstanding it acted through successive instruments or a series of events, if the instruments or events were combined in one continuous chain or train through which the force of the cause operated to produce the disaster." 38 Am. Jur., Negligence, § 56, p. 705.

We think the collision of the two trucks on the highway set in motion a series of events, which included the breaking of the pole and the sagging of the power line wires, which combined in one continuous chain or train through which that force operated to produce the disaster. We do not think decedent's getting out of the cab and starting for the highway was such an efficient intervening cause as to absolutely defeat any right to recover. We do think it presented a question of fact as to whether or not, by his action, decedent was guilty of contributory negligence, and if so, the extent thereof. That issue was presented to the jury.

A comparable situation is found in the case of Arnold v. Northern States Power Co., 209 Minn. 551, 297 N. W. 182, wherein the court held the continuous sequence of events so put in motion was in no way interrupted. We think that is true here. Under the circumstances here disclosed we think a jury could properly find the accident was caused by appellant's negligence and that the ensuing death of the driver of the Prucka truck was a natural, probable, and reasonable consequence thereof.

Complaint is made of the court's instruction No. 1. In this regard we have said:

"This court has frequently criticized the practice of copying the pleadings as a method of stating the issues to a jury and where they contain allegations not supported by evidence it may be reversible error to include such allegations in defining the issues if the reviewing court is satisfied that the jury may have been misled

thereby. See Hutchinson v. Western Bridge & Construction Co., 97 Neb. 439, 150 N. W. 193; McClelland v. Interstate Transit Lines, 139 Neb. 146, 296 N. W. 757. However, the fact that the court copied the pleadings in presenting the case to the jury is not alone sufficient to cause a reversal unless it can be said that the complaining party was prejudiced thereby. See Scott v. New England Mutual Life Insurance Co., 128 Neb. 867, 260 N. W. 377; Merritt v. Ash Grove Lime & Portland Cement Co., 136 Neb. 52, 285 N. W. 97." Franks v. Jirdon, 146 Neb. 585, 20 N. W. 2d 597.

"The proper method of presenting a case to the jury is a clear and concise statement by the court of those issues which find support in the evidence and not by substantially copying the pleadings of the parties and if, by doing the latter, it results in prejudice to the complaining party it is a sufficient ground for reversal." Snyder v. Farmers Irr. Dist., 157 Neb. 771, 61 N. W. 2d 557.

Appellant complains of the fact that the trial court, without any request therefor on the part of appellee, increased the amount appellee sought to recover on her first cause of action from $119,748.34 to $144,643 and changed the facts alleged as the basis therefor. In her petition appellee alleged: "That prior to the accident, plaintiff's decedent was an able bodied and gainfully employed truck driver earning an average weekly wage of $119.00. That decedent was twenty-nine years of age at the time of said accident and had a normal life expectancy of thirty-eight years; that decedent's widow is thirty-one years of age and his minor child, Diane Susan, is five years of age. That at the time of his death, decedent was living at home with his wife and child and was the sole and only support of his family; and that due to the negligence of the defendant Safranek, plaintiff has been deprived of decedent's support of the value of $6,188.00 per year for thirty-eight years, or $235,144.00; that the present value of said sum is $119,-

748.34. That by reason of the foregoing, plaintiff has suffered damages on her First Cause of Action in the amount of $119,748.34. * * * WHEREFORE, plaintiff prays for judgment against the defendant Karl Safranek in the sum of $119,748.34 on her First Cause of Action, * * *."

In its instruction No. 1 the court informed the jury: "That prior to the accident plaintiff's decedent was an able bodied and gainfully employed truck driver earning an average weekly wage of $122.00. That decedent was twenty-nine years of age at the time of said accident and had a normal life expectancy of thirty-eight years; that decedent's widow is thirty-one years of age and his minor child, Diane Susan, is five years of age. That at the time of his death, decedent was living at home with his wife and child and was the sole and only support of his family; and that due to the negligence of the defendant Safranek, plaintiff has been deprived of decedent's support of the value of $6,344.00 per year for thirty-eight years, or $241,072.00; that the present value of said sum is $144,643.00. That by reason of the foregoing, plaintiff has suffered damages on her first cause of action in the amount of $144,643.00. * * * WHEREFORE, plaintiff prays for judgment against the defendant Karl Safranek in the sum of $144,643.00 on her First Cause of Action, * * *."

The appellee and decedent were married on March 31, 1947. After decedent got out of the service he attended college in California for about 2 years. During this time he worked as registrar for the school he was attending. He worked as registrar during the day and attended classes at night. As registrar he received $320 a month. His father, a farmer who lived near Bennington, Nebraska, became ill, suffering from cancer. The family thereupon requested decedent to come home. In response to this request decedent, together with his family consisting of his wife and daughter, Diane Susan, born February 10, 1948, returned to the parental home.

He returned in the early part of 1949 and remained there until after his father died in January 1951. During this time decedent and his family received their board and room together with some money. Neither the value of the board and room nor the amount of the money received is shown. After his father's death decedent worked for the Kirby Company in Omaha as a bookkeeper. He worked at this line for about 2 years earning a net of $75 a week. In May 1953 he obtained the employment he was engaged in when he was killed. He was an over-the-road truck driver. During the period of this employment he averaged $122 a week during the 7 weeks he worked full time.

"The office of the ad damnum in a pleading is to fix the amount beyond which a party may not recover on the trial of his action. Cole v. Hayes, 78 Me. 539, 7A. 391; Karnuff v. Kelch, 69 N. J. Law 499, 55 A. 163; Vincent v. Mutual Reserve Fund Life Assn., 75 Conn. 650, 55 A. 177.

"The general rule is that an amendment may be made to a pleading which does not change the issues nor affect the quantum of proof as to a material fact at any stage of the proceedings. Miller Rubber Products Co. v. Anderson, 123 Neb. 247, 242 N. W. 449; Robinson Outdoor Advertising Co. v. Wendelin Baking Co., 145 Neb. 112, 15 N. W. 2d 388.

"No good reason is apparent why this rule should not apply to the ad damnum as well as any other part of a petition." Gable v. Pathfinder Irr. Dist., 159 Neb. 778, 68 N. W. 2d 500.

In the instant case no request for such amendment appears to have been made. In the absence thereof we do not think the court should have made such a material change in the amount sought to be recovered. This is particularly true in this case because the change made is based on the highest earnings shown, which had continued over only a very short period of time considering his probable lifetime expectancy.

Appellant complains because the court submitted speed as a basis for negligence. In this respect instruction No. 1 submitted this issue as follows: "(e) In driving his vehicle at an excessive rate of speed. (f) In driving his vehicle at a rate of speed greater than was reasonable and prudent having regard for the tendency of his tractor and empty trailer to swerve from side to side at such speed and thereby create a hazard on said highway."

There is evidence that appellant was driving his truck between 48 and 50 miles an hour at the time of the accident. This was not in violation of the statutory maximum. See § 39-7,108, R. R. S. 1943. There is evidence that appellant's trailer was swaying or weaving from side to side, that is, it would from time to time sway or weave to the edge of the pavement and onto the curb and then sway or weave back across the center line of the highway.

"It is the duty of the trial court to present to the jury those issues which are raised by the pleadings and which find support in the evidence." Oliver v. Oliver, 159 Neb. 218, 66 N. W. 2d 420.

"In stating the issues to the jury it is error, which may be prejudicial, for the trial court to include allegations of which there is no proof." Oliver v. Oliver, *supra*. See, also, Weisenmiller v. Nestor, 154 Neb. 839, 49 N. W. 2d 679; Simcho v. Omaha & C. B. St. Ry. Co., 150 Neb. 634, 35 N. W. 2d 501; Styskal v. Brickey, 158 Neb. 208, 62 N. W. 2d 854.

It seems to us the allegations of (e) of instruction No. 1 could, when considered in connection with instruction No. 8, have been interpreted as relating to the maximum lawful speed of 50 miles per hour. There is no proof that appellant was driving his truck in excess of that limit. The allegations of (f), considering our statement of what the evidence shows as to the trailer of appellant's truck, was properly submitted in view of the following provision of the statute relating thereto.

The statute, in this respect, provides: "No person shall drive a vehicle on a highway at a speed greater than is reasonable and prudent under the conditions then existing." § 39-7,108, R. R. S. 1943.

Appellant further complains of instruction No. 1 containing the allegation, also found in appellee's petition, that decedent was caused "to suffer an excruciating death by electrocution." The ground for this complaint is that the nature of decedent's death could, in no manner, be a basis for any rights appellee might have and that its only effect could be to inflame the minds of the jury and thus gain their sympathy.

We held in Hindmarsh v. Sulpho Saline Bath Co., 108 Neb. 168, 187 N. W. 806, that: "* * * in the action brought by the personal representative, in behalf of the statutory beneficiaries, to recover damages for the death caused by the wrongful act of the defendant, the recovery must be measured by the pecuniary loss suffered by those beneficiaries by being deprived of what they would have received from the earnings of the injured party from the date of his death, had he lived out his full expectancy."

And, in O'Grady v. Union Stock Yards Co., 90 Neb. 138, 132 N. W. 938, we held: "We are required by our law to restrict the recovery to the pecuniary value lost to the family."

Thus any pain or suffering endured by the decedent is not an element upon which appellee can herein base any recovery and it was error for the court to include the allegations in its instructions. In this regard we have not overlookd that the court advised the jury that recovery "is limited to the monetary loss suffered by the widow and the child and that alone." Such admonition does not necessarily cure any and all ill effects that might result from the language used.

Further is the fact that no evidence was introduced to support this allegation. We have often said: " 'The instructions of the court should direct the attention of

the jury only to the facts in support of which evidence has been introduced upon the trial. * * *.' Mannion v. Talboy, 76 Neb. 570." Trute v. Holden, 118 Neb. 449, 225 N. W. 238. See, also, Fick v. Herman, 159 Neb. 758, 68 N. W. 2d 622; Allen v. Clark, 148 Neb. 627, 28 N. W. 2d 439.

Appellant also complains of the fact that the court in its instruction No. 14, which relates to informing the jury about assessing the amount appellee could recover, if they found she was entitled to do so, and what it could consider in arriving thereat, included the following: "* * * value of services according to their worth in money, during the period that probably would have been the lifetime of Russell K. Kroeger." The basis for the complaint is that no claim was made therefor in appellee's petition nor proof offered in regard thereto.

That the value of services to one's family may be recovered in this type of action has long been recognized by the holdings of this court. As stated in O'Grady v. Union Stock Yards Co., *supra*: "We are required by our law to restrict the recovery to the pecuniary value lost to the family. This, however, is not necessarily limited to the dollars and cents which the deceased would probably have expended upon his family if he had lived. Care and maintenance of children mean more than this. The jury may properly consider 'his services * * * in the superintendence and attention to, and care of, his family and the education of his children.' Chicago, R. I. & P. R. Co. v. Zernecke, 59 Neb. 689." See, also, Pricer v. Lincoln Gas & Electric Light Co., 111 Neb. 209, 196 N. W. 150.

In this regard we have said:

"The law does not provide any positive, definite mathematical formula or legal rule by which a jury shall fix the pecuniary loss suffered in the death of the head of a family." Tate v. Barry, 144 Neb. 517, 13 N. W. 2d 879.

" 'A presumption of pecuniary loss exists in favor of one legally entitled to service or support from one killed by the wrongful or negligent act of another.' Killion v. Dinklage, 121 Neb. 322, 236 N. W. 757." Tate v. Barry, *supra.*

And in Moses v. Mathews, 95 Neb. 672, 146 N. W. 920, Ann. Cas. 1915A 698, we said: "In an action to recover for the loss to a husband of the services of a wife, it is not essential that the exact money value per day, week or month, of her services be proved with mathematical certainty. If the wife is able to perform ordinary household duties, the lack of such services constitutes an element of damages. Ordinarily, the matter must be left to the good judgment and ordinary common sense of the jurors, considering the circumstances of each case, and, unless the verdict is manifestly unjust and excessive, it will not be disturbed on appeal." See, also, Chicago, R. I. & P. Ry. Co. v. Zernecke, 59 Neb. 689, 82 N. W. 26, 55 L. R. A. 610.

Appellee did not make any claim in her pleadings for such services nor was any evidence introduced at the trial in regard thereto. The only claim made was that his death deprived them of decedent's support. In this respect the evidence shows the decedent always lived with his family from the time of the marriage and used whatever he earned in support thereof.

As we have already stated herein, it is the duty of the trial court to present to the jury only those issues which are raised by the pleadings and which find support in the evidence adduced. "The charge of the trial court to the jury should be confined to the issues presented by the pleadings and supported by evidence." Perrine v. Hokser, 158 Neb. 190, 62 N. W. 2d 677. Consequently it would be error, which might be prejudicial, for the trial court to include an element of damage which is neither claimed nor proved. In Borcherding v. Eklund, 156 Neb. 196, 55 N. W. 2d 643, we quoted, with approval, the following from 25 C. J. S., Damages, § 185, p. 890:

"Where the pleadings and evidence sufficiently raise such issue, the court in a personal injury case should properly instruct the jury concerning damages for loss of time or earnings."

And in Shiverick & Co. v. Gunning Co., 59 Neb. 73, 80 N. W. 264, we held: "Instructions should not submit to the jury elements of damage not embraced within the evidence adduced on the trial." See, also, Borcherding v. Eklund, *supra.*

In the absence of claim therefor and proof of the extent thereof we think it would be purely speculation and conjecture on the part of a jury to formulate any idea of the value of such services even though a presumption of pecuniary loss exists in favor of those legally entitled to such service and although the exact money value per day, week, or month for such services need not be proved with mathematical certainty.

Appellant contends the court, in its instruction No. 16, which is an instruction on how to compute damages, completely ignored advising the jury that in computing the present worth of the financial benefits that would, with reasonable certainty, have resulted to appellee and her child, of the fact that the amount upon which such determination must be made to depend is the amount of decedent's earnings it found he would, had he lived, have, with reasonable certainty, contributed to their support and not, as the court therein stated, to "the probable income that the deceased would have earned."

In this regard we have said: "The personal representative is entitled to recover for the widow and next of kin, in the statutory action for wrongfully causing death, the pecuniary loss suffered by them by reason of their being deprived of what they would have received from the earnings of the injured party, from the time of his death, during the period that he would have lived, had he lived out his entire expectancy." Hindmarsh v. Sulpho Saline Bath Co., *supra.*

It is true that instruction No. 14 given by the court

includes this limitation. However, we very much doubt if the two instructions can be read together and be said to properly inform the jury of this limitation. Since the case must be sent back for a new trial because of other errors which occurred we do not think a further discussion thereof is necessary as instruction No. 16 can then be corrected by the trial court. It is sufficient to say: "It is always the duty of the court to instruct the jury as to the proper basis upon which damages are to be estimated. The jury should be fully and fairly informed as to the various items or elements of damage which they should take into consideration in arriving at their verdict, otherwise the jury may be confused and misled." Linch v. Hartford Fire Ins. Co., 138 Neb. 110, 292 N. W. 27, 129 A. L. R. 1063.

We have not overlooked the fact that appellee testified that decedent brought home all the money he earned and that it was all used for the support of the family. Regardless of this testimony it was still the duty of the court, in telling the jury how to compute the present worth of the financial benefits that would, with reasonable certainty, have resulted to the appellee and her daughter from the continued life of decedent, to state it correctly and to include therein a limitation of his earnings to what it found he would, with reasonable certainty, have contributed to their support.

Appellant further complains of instruction No. 16 because it does not require the jury to consider the age, appearance, and health of the child in determining the present worth of any financial benefits which would accrue to her. In this respect it does limit the amount of any benefits accruing to her by advising the jury they would not be available to her after she had reached the age of 21. We think, under the circumstances here shown as to her life expectancy, that this was a sufficient limitation and properly presented and limited the issue as to appellee's right to recover for her daughter.

Appellant complains the court erred in submitting

funeral and burial expenses as an element of recovery and, if recoverable, by permitting their recovery in a separate action. He urges that our wrongful death statutes, sections 30-809 and 30-810, R. R. S. 1943, provide for but one action for the pecuniary loss for the widow or widower and next of kin. Section 30-810, R. R. S. 1943, provides, insofar as here material, that: "The verdict or judgment should be for the amount of damages which the persons in whose behalf the action is brought have sustained."

Under this language we think that recovery may be had in such a case for medical and funeral expenses which have been paid by the beneficiaries for whom the action is brought, or for which they are legally liable. See Killion v. Dinklage, 121 Neb. 322, 236 N. W. 757, for a discussion of this question and a review of the holdings of other courts of this country in regard thereto.

As stated in Annotation, 94 A. L. R. 441: "But in a large majority of the states in which the question has arisen it is held that funeral expenses are recoverable as damages in an action for death by wrongful act, when the plaintiff has paid or has rendered himself legally liable to pay the funeral expenses of the deceased. The ground for this holding is that the funeral expenses are a direct result of the wrongful death, and, as a matter of justice should be considered as an item of damages suffered by the person liable to pay them."

In allowing their recovery we think it proper and best to do so in a separate cause of action. The reason for our so holding is that if recovery therefor is allowed by the jury the amount of such recovery will be known and it can then be distributed to the beneficiaries who have paid them or are legally liable for their payment.

Appellant complains of the court's refusing to admit in evidence exhibits Nos. 25, 26, and 27. The foregoing exhibits were offered in evidence as schematic drawings of two semitrailers and tractors of the dimension of the ones decedent and appellant were driving, as shown by

the evidence. It shows them colliding on the highway in the positions as testified to by witnesses for both sides. They are drawn to scale.

As stated in 20 Am. Jur., Evidence, § 739, p. 616: "It is a well-established rule, applied in everyday practice in courts, that maps, drawings, and diagrams illustrating the scenes of a transaction and the relative location of objects, if shown to be reasonably accurate and correct, are admissible in evidence, in order to enable the court or jury to understand and apply the established facts to the particular case. The use of such things as testimony of the objects represented rests fundamentally upon the theory that they represent a method of pictorial communication of a qualified witness which he may use instead of, or in addition to, some other method. Evidence of this character is helpful in aiding the jury to visualize the objects and scenes in the action."

We think these exhibits should have been admitted.

Appellant also complains of the court's instruction No. 5. We think this instruction was in error insofar as it referred to "the defendant having alleged in his answer that the proximate cause of the accident was negligence on the part of the plaintiff, * * *." It should have been plaintiff's decedent.

Appellant also complains of instruction No. 5 because it does not specifically inform the jury that appellant's burden of proving negligence on the part of decedent arises only in connection with appellant's defense of contributory negligence.

"Instructions given to a jury must be construed together and if, when considered as a whole, they properly state the law it is sufficient." Shiers v. Cowgill, 157 Neb. 265, 59 N. W. 2d 407. See, also, Bolio v. Scholting, 152 Neb. 588, 41 N. W. 2d 913.

While instruction No. 5 should have more definitely related appellant's burden in this regard to his defense of contributory negligence, we think, when the instructions relating to contributory negligence as a defense

are considered as a whole, that the jury could not possibly have been misled as to what instruction No. 5 related.

Appellant complains of the trial court's denial of his request: "* * * to state to the jury that Prucka Transportation Company, although named as a defendant, would pay no part—that is, would be liable for no part of any judgment rendered in this case; * * *."

As a basis for this request is the claim that the local newspapers published the fact that Prucka Transportation, Inc., was made a party defendant in this action and because thereof the jury might have thought it would be liable for part of the judgment.

There is no proof of any kind to support this contention. It is true that the company was made a party defendant for the reasons hereinbefore set forth. During the trial the evidence adduced established the relationship between it and decedent as that of employer and employee and that decedent was killed while so engaged. However, the court's instructions did not, in any manner, refer to the company as a defendant or that it could in any way be held liable. Consequently we do not find error occurred in the overruling of appellant's request. In order to sustain it we would have to assume the jury did not follow the court's instructions but went outside of the scope thereof in returning its verdict. That we cannot do.

While some of the errors herein found to have occurred might not, in and of themselves, be of such character as to require a reversal, we find, however, that because thereof appellant did not have a fair trial. We therefore reverse the judgment of the district court and remand the cause with directions that appellant be granted a new trial.

REVERSED AND REMANDED WITH DIRECTIONS FOR A NEW TRIAL.

MARY ZENKER, APPELLANT, V. WILLIAM M. ZENKER, APPELLEE.

72 N. W. 2d 809

Filed November 4, 1955. No. 33769.

1. **Appeal and Error.** This court will take judicial notice of the fact that the bill of exceptions was not settled within the time provided by statute, and therefore cannot be considered on appeal.
2. ———. In the absence of a bill of exceptions it will be presumed that issues of fact presented by the pleadings were established by the evidence, that they were correctly decided, and that the only issue remaining for this court is the sufficiency of the pleadings to support the judgment.
3. **Divorce.** Jurisdiction to grant a divorce depends upon the domicile of at least one of the parties being in the state of the forum and a procedural due process over the person of the defendant. If either is lacking, the court has no power to act.
4. ———. An appearance in a divorce suit cannot give validity to a divorce decree where the court does not have jurisdiction of the subject matter, to-wit, an actual domicile of one of the parties within the jurisdiction of the court.
5. ———. In a suit for a divorce, jurisdiction of the subject matter and of the person of the defendant must both exist. Proof of one does not supply a defect in the other.
6. **Divorce: Constitutional Law.** A judgment refusing to accord full faith and credit to the divorce decree of a sister state, on the ground that no bona fide domicile was acquired there, does not offend the full faith and credit clause of the federal Constitution where it appears that proper weight was given to the claims of power by the court of the sister state; that the burden of disproving a bona fide domicile in the sister state was properly placed upon the party challenging the validity of the divorce decree; that such issue of fact was determined by appropriate legal procedure; and that the finding as to the absence of a bona fide domicile in the sister state is amply supported by the evidence. This is so even if in the record of the court rendering the divorce decree in the sister state there is warrant for its finding that it had jurisdiction.
7. **Constitutional Law: Judgments.** The full faith and credit clause of the federal Constitution does not operate to make a judgment of a sister state a judgment in this state except where it can be shown that the court purporting to render the original judgment had the necessary jurisdiction to decide it on the merits. The presumption is that the foreign decree, when

rendered by a court of general jurisdiction, is valid.

8. **Divorce: Domicile.** Where the record establishes that a bona fide domicile in the state in which a decree of divorce is obtained did not exist, and the service of summons personally on the defendant was obtained by fraud, the court did not obtain jurisdiction of the subject matter or of the person, and the court is without authority to enter a decree which is entitled to full faith and credit in this state.
9. **Judgments: Estoppel.** In a proper case, a party may be estopped from collaterally attacking a void judgment induced by his own fraudulent conduct. Such an estoppel may be asserted only by the party injured and those in privity with him.
10. **Judgments.** A judgment rendered by a court that did not have jurisdiction of the subject matter, or of the person, is not res judicata of any issue purported to have been raised therein, and it is subject to collateral attack.
11. **Process.** Personal service of summons, if procured by fraud, trickery, or artifice is not sufficient to give a court jurisdiction over the person thus served. A service of summons upon him through such improper means is invalid.
12. **Divorce: Domicile.** The right of the state of the actual domicile of the parties to control the marital status and domestic relations of its own inhabitants has precedence over the attempt of any other state to interfere therewith, except where jurisdictional requirements have actually been met and the court has thereby acquired power to act.
13. **Courts.** Consent of the parties does not confer jurisdiction of the subject matter upon a court which it otherwise does not have.
14. **Constitutional Law: Judgments.** The final determination of the question as to whether or not a foreign judgment must be given full faith and credit under Article IV, section 1, Constitution of the United States, rests with the Supreme Court of the United States.

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

Halligan & Mullikin, for appellant.

E. H. Evans and *Richard W. Satterfield,* for appellee.

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

CARTER, J.

The plaintiff brings this action to secure the regis-

tration of a judgment obtained against the defendant in the district court for Denver County, Colorado, in the judgment record of the district court for Lincoln County, Nebraska, and for an order declaring it to be a valid and proper judgment against the defendant and a lien upon property owned by him in Lincoln County. The trial court found that the Colorado court did not have jurisdiction to render a decree of divorce and the money judgment rendered in connection therewith, and dismissed the action. The plaintiff appeals.

We are required to take notice of the fact that there is no proper bill of exceptions filed in this case. In this respect the record shows that plaintiff filed her notice of appeal on December 29, 1954. The initial period for reducing her exceptions to writing was 40 days from the date notice of appeal was filed. § 25-1140, R. R. S. 1943. The trial court extended the time an additional 40 days pursuant to section 25-1140.07, R. R. S. 1943. No further extension of time was applied for or granted by the Supreme Court as authorized by section 25-1140.07, R. R. S. 1943. The time for reducing the exceptions to writing therefore expired on March 19, 1955. Appellant had 10 days to serve the draft of the bill on the adverse party, as provided by section 25-1140.03, R. R. S. 1943. This period ended on March 29, 1955. The appellee then had 10 days to prepare proposed amendments and return the bill to the appellant, as authorized by section 25-1140.04, R. R. S. 1943. This period ended on April 8, 1955. The bill must be presented for settlement to the court, or the clerk of the district court in a proper case, within 10 days thereafter. § 25-1140.05, R. R. S. 1943. This period ended on Monday, April 18, 1955. The bill was not settled until April 21, 1955. There is no authority for settling a bill of exceptions more than 110 days after the filing of notice of appeal when an extension of 40 days only has been obtained for the purpose of reducing the exceptions to writing.

In Gernandt v. Beckwith, 160 Neb. 719, 71 N. W. 2d 303, this court stated: "This court will take judicial notice of the fact that the bill of exceptions was not settled within the time provided by statute, and therefore cannot be considered on this appeal." See, also, Bednar v. Bednar, 146 Neb. 726, 21 N. W. 2d 438. We are compelled to hold that there is no bill of exceptions before us which can be considered on this appeal.

In the absence of a bill of exceptions it will be presumed that issues of fact presented by the pleadings were established by the evidence and that they were correctly decided. In such a situation the only issue that will be considered on appeal to this court is the sufficiency of the pleadings to support the judgment. Goger v. Voecks, 156 Neb. 696, 57 N. W. 2d 621; Gernandt v. Beckwith, *supra.*

The petition alleges that in January 1952, the plaintiff instituted an action in the district court for Denver County, Colorado, against the defendant, the object and prayer of which was to obtain a divorce and a proper division of the property owned by the parties. The petition further alleges that personal service of summons was had on the defendant in Denver County, Colorado, but that defendant failed to appear, and on March 7, 1952, an interlocutory decree was entered allowing plaintiff $145 per month as temporary alimony and $250 as attorney's fees. It is further alleged that, after proper notice to the defendant, a final hearing was held on November 19, 1952, at which a judgment was rendered against the defendant in the sum of $15,669.20, the amount the court found to be plaintiff's share of the jointly accumulated property. The judgment, a copy of which is attached to the petition, shows that defendant was served with summons but had not appeared or answered, that evidence was taken, and the judgment rendered. The prayer of the petition is that the court order the registration of this judgment in Lincoln County and that it be declared to be valid and

a lien on defendant's property in that county.

The answer alleges that plaintiff and defendant are husband and wife, that the decree of divorce and judgment procured in Colorado are null and void for the reason that plaintiff never acquired a bona fide domicile in Colorado, that plaintiff at the time of the commencement of the divorce proceeding in Colorado was domiciled in Lincoln County, Nebraska, and that the Colorado court therefore never obtained jurisdiction to grant a valid divorce in that state. The answer alleges further that the statutes of Colorado require a bona fide residence for at least one year in that state prior to the commencement of a divorce proceeding, that plaintiff never had such a domicile in Colorado, and that the court in Colorado therefore never attained jurisdiction to hear and adjudicate plaintiff's petition for a divorce. The defendant admits that he was personally served with summons in Denver County, Colorado, but alleges that such purported service was void for the reason that his temporary presence in Denver County was by reason of enticement thereto by the fraudulent representations of plaintiff that his presence there was required to join in selling and conveying certain real estate in Denver when plaintiff had no intention of so doing, and that such representations were falsely made to procure the presence of the defendant in Denver County for the sole purpose of serving a summons upon him in an action already commenced and of which defendant had no previous knowledge. The answer alleges that the Colorado court entered the decree and judgment on plaintiff's evidence that she was domiciled in Colorado, which was false and fraudulent, and that, in fact, the Colorado court did not have jurisdiction of the subject matter nor of the person of the defendant. The prayer of the answer is that plaintiff's action be dismissed, that the court deny registration of such purported judgment, and that any registration theretofore made be held for naught.

In her reply the plaintiff alleges that defendant was personally served with summons in Denver County, Colorado, made no objection to the jurisdiction of that court, and is now estopped from challenging collaterally the jurisdiction of the district court for Denver County, Colorado, to adjudicate the cause.

The question of the right of a spouse to attack collaterally a decree of divorce in a sister state was recently before this court in the case of Yost v. Yost, *ante* p. 164, 72 N. W. 2d 689. In that case we said: A judgment refusing to accord full faith and credit to the divorce decree of a sister state on the ground that no bona fide domicile was acquired there does not offend the full faith and credit clause of the federal Constitution where it appears that proper weight was given to the claims of power by the court of the sister state; that the burden of disproving a bona fide domicile in the sister state was properly placed upon the party challenging the validity of the divorce decree; that such issue of fact was determined by appropriate legal procedure; and that the finding as to the absence of a bona fide domicile in the sister state is amply supported by the evidence. This is so even if in the record of the court rendering the divorce decree in the sister state there is warrant for its finding that it had jurisdiction. See, also, Williams v. North Carolina, 325 U. S. 226, 65 S. Ct. 1092, 89 L. Ed. 1577, 157 A. L. R. 1366. In other words, a decree of divorce rendered in another state may be collaterally attacked by showing that the court was without jurisdiction, either of the subject matter of the suit or of the person of the defendant, without violating the full faith and credit clause of the federal Constitution. Lippincott v. Lippincott, 141 Neb. 186, 3 N. W. 2d 207, 140 A. L. R. 901.

There being no bill of exceptions which we can consider, it will be presumed that the issues of fact presented by the defendant's answer were established by the evidence. This being true, we are required to hold

that the evidence shows that plaintiff did not have a bona fide domicile in Colorado at the time she commenced her suit for a divorce.

The defendant admits by his answer and plaintiff alleges in her reply that personal service of summons was had on the defendant in Denver County, Colorado, and plaintiff alleges further that the defendant is now estopped from challenging collaterally the jurisdiction of the Colorado court to adjudicate the cause. It is not alleged in the pleadings that defendant made an appearance or in any manner contested the divorce proceeding in Colorado. In fact, it is not alleged in the pleadings that defendant ever appeared or contested any proceeding in the Colorado court which brought about the judgment directly involved in this litigation. It is necessary, therefore, to determine the effect, if any, that the personal service of summons had on the defendant in Denver County, Colorado, had on the validity of the divorce decree, and the necessity for giving it full faith and credit in this state.

We point out that the Nebraska Uniform Divorce Recognition Act provides in part: "A divorce from the bonds of matrimony obtained in another jurisdiction shall be of no force or effect in this state, if both parties to the marriage were domiciled in this state at the time the proceeding for the divorce was commenced." § 42-341, R. R. S. 1943. For the purposes of the present case we are required to hold that the allegation in the answer that the parties to the marriage were both domiciled in Nebraska when plaintiff commenced her suit in Colorado is sustained by the evidence. The public policy of this state is, as declared by the foregoing legislative enactment, that a foreign divorce will not be recognized if both parties to the marriage, as here found, are domiciled in this state at the time the proceeding for the foreign divorce was commenced. The question therefore is: Does the statute, section 42-341, R. R. S. 1943, contravene the full faith and credit

clause of the federal Constitution in such a case as we have before us?

In Williams v. North Carolina, *supra,* it was clearly recognized that jurisdiction over the marriage status depends upon the domicile of one of the parties being in the state where the divorce is granted, and that the full faith and credit clause does not require the state of original domicile to accept as conclusive the determination of the court of the state granting the divorce that a change of domicile has been effected. This rule appears to have been modified to some extent by later cases. We shall briefly consider some of these subsequent holdings.

In Sherrer v. Sherrer, 334 U. S. 343, 68 S. Ct. 1087, 92 L. Ed. 1429, 1 A. L. R. 2d 1355, it was held that full faith and credit must be given to a decree of divorce in a sister state where the defendant, on receiving notice by mail of the pendency of the suit, retained counsel, entered a general appearance, and filed an answer denying the allegations of the complaint, including those as to complainant's domicile. The defendant appeared personally at the trial to testify with reference to the custody of the children. The divorce decree was held to be res judicata and that the full faith and credit clause outweighed the interest of the domiciliary state in the regulation of the marital relation of its citizens.

In Coe v. Coe, 334 U. S. 378, 68 S. Ct. 1094, 92 L. Ed. 1451, 1 A. L. R. 2d 1376, it was held that full faith and credit must be given to a decree of divorce in a sister state where the defendant wife filed an answer admitting as true the allegations of the husband's complaint as to his Nevada residence and filed a cross-complaint for a divorce. At the trial both parties appeared personally and were represented by counsel. The wife raised no question as to the husband's domicile in Nevada. The decree of divorce was held to be res judicata and entitled to full faith and credit in the state in which the wife was domiciled.

In Johnson v. Muelberger, 340 U. S. 581, 71 S. Ct. 474, 95 L. Ed. 552, the court held in a case where a defendant in a foreign divorce proceeding appeared and answered on the merits, and had full opportunity to contest the jurisdictional issues, that full faith and credit should be given to the foreign decree by the state of original domicile. In the opinion, however, the court said: "It is clear from the foregoing that, under our decisions, a state by virtue of the clause must give full faith and credit to an out-of-state divorce by barring either party to that divorce who has been personally served or who has entered a personal appearance from collaterally attacking the decree. Such an attack is barred where the party attacking would not be permitted to make a collateral attack in the courts of the granting state." It will be noted that the holding that one personally served, but who did not otherwise appear, may not collaterally attack the decree in the state of the original domicile, goes beyond the facts in the case before the court. Whether or not personal service, without any appearance of any kind being made, is sufficient of itself to require full faith and credit by the state of original domicile was not the issue before the court.

In Cook v. Cook, 342 U. S. 126, 72 S. Ct. 157, 96 L. Ed. 146, the court said: "If the defendant spouse appeared in the Florida proceedings and contested the issue of the wife's domicile (Sherrer v. Sherrer, 334 U. S. 343) or appeared and admitted her Florida domicile (Coe v. Coe, 334 U. S. 378) or was personally served in the divorce state (Johnson v. Muelberger, 340 U. S. 581, 587), he would be barred from attacking the decree collaterally; and so would a stranger to the Florida proceedings, such as respondent, unless Florida applies a less strict rule of res judicata to the second husband than it does to the first."

While it appears that the Supreme Court of the United States has not determined, since the second Williams

case at least, that personal service on a defendant within the jurisdiction of the court granting the foreign divorce is sufficient, of itself, to require full faith and credit, that result is plainly indicated by the foregoing cases. Consequently the rule as announced by the United States Supreme Court is: Even though the nonresident defendant in a divorce proceeding has not made a personal appearance, the divorce decree is entitled to full faith and credit where the defendant was personally served in the jurisdiction where the divorce was granted. See, also, Sutton v. Leib, 342 U. S. 402, 72 S. Ct. 398, 96 L. Ed. 448; Rice v. Rice, 336 U. S. 674, 69 S. Ct. 751, 93 L. Ed. 957.

We think it is clear therefore that the decree of divorce and the judgment growing out of it determining the property rights of the parties in their joint property, rendered in Colorado, is entitled to full faith and credit, under the present holding of the United States Supreme Court, unless the issue of fraud in procuring personal service of summons in Colorado is available to the defendant.

The defendant alleges that the service of a summons on him personally in Denver County, Colorado, was void for the reason that his temporary presence there was due to his being enticed there by the fraudulent representations of the plaintiff that his presence was required to complete a sale and transfer of certain real property. He alleges that after being enticed within the jurisdiction of the court he was served with a summons in a divorce suit already commenced and about which he had no knowledge. Under the state of the present record we are required to presume that evidence of these facts had support in the record and that they were properly decided by the trial court. The question presented is whether or not a finding that such allegations are true has the effect of invalidating the personal service and, if so, may it be used to collaterally attack the judgment in this state.

The general rule is: "Personal service of process, if procured by fraud, trickery, or artifice is not sufficient to give a court jurisdiction over the person thus served, and service will be set aside upon proper application. Relief is accorded in such cases not because, by reason of the fraud, the court did not get jurisdiction of the person of the defendant by the service, but on the ground that the court will not exercise its jurisdiction in favor of one who has obtained service of his summons by unlawful means. Thus, if a person resident outside the jurisdiction of the court and the reach of its process is inveigled, enticed, or induced, by any false representation, deceitful contrivance, or wrongful device for which the plaintiff is responsible, to come within the jurisdiction of the court for the purpose of obtaining service of process on him in an action brought against him in such court, process served upon him through such improper means is invalid, and upon proof of such fact the court will, on motion, set it aside." 42 Am. Jur., Process, § 35, p. 32. We are required to assume that the evidence sustains the finding of the trial court that service of personal summons in the Colorado court was fraudulently obtained. The issue is whether or not it is available to the defendant in this action.

For many years it was generally held with the approval of the Supreme Court of the United States that Article IV, section 1, Constitution of the United States, commonly called the full faith and credit clause, did not prevent the courts of the state of the marital domicile from determining whether or not a bona fide domicile had been established in the state granting a divorce and, if not, that such state could properly refuse full faith and credit. The right of the state of the actual domicile of the parties to control the domestic relations of its own inhabitants was given precedence over the attempt of any other state to interfere therewith. The right of the state to regulate divorce, the care and custody of children of the marriage, the prop-

erty interests of the parties in their joint property, and its own interest in maintaining the dignity of the marriage relation and the resulting family ties, was held to be such that one or both of them could not go into another state and, by false evidence of domicile, procure a decree which their own state was compelled to accept as valid. It stands to reason that if both parties were domiciled in Nebraska, neither could be domiciled in Colorado, and jurisdiction of the divorce suit could not exist in the latter state. Commencing with Davis v. Davis, 305 U. S. 32, 59 S. Ct. 3, 83 L. Ed. 26, 118 A. L. R. 1518, and subsequently in the Sherrer, Coe, Johnson, and Cook cases herein cited, the long-established principle affirmed in the second Williams case was seriously undermined. This becomes a serious departure in view of the fact that the Supreme Court of the United States is the final arbiter to determine when full faith and credit must be accorded a judgment rendered by a sister state.

The nature of a divorce proceeding becomes of great importance in determining the questions here presented. It is not a transitory action in which a defendant may be sued in any jurisdiction in which personal service of process may be had upon him. It is in some respects sui generis. The jurisdiction of a court to decree a divorce is based on two fundamental considerations which must exist before it can lawfully act: (1) It must have before it a party who is actually domiciled within its jurisdiction; and (2) it must have jurisdiction of the defendant by procedural due process. If either of these primary elements of jurisdiction are absent it has no power to act and any order or decree entered is a nullity. It is fundamental, as we see it, that a void decree is void for all purposes and may be collaterally attacked. A void decree is not res judicata of anything. See State ex rel. Kennedy v. Broatch, 68 Neb. 687, 94 N. W. 1016, 110 Am. S. R. 477, wherein we said: "A 'right, question or fact' distinctly put in issue and directly deter-

mined by a court of competent jurisdiction as a ground of recovery, can not be disputed in a subsequent suit between the same parties or their privies, * * *." See, also, Russell v. Place, 94 U. S. 606, 24 L. Ed. 214. It is possible, of course, in a proper case, that one may estop himself and those in privity with him, from attacking a void decree resulting from his own fraud. 19 Am. Jur., Estoppel, § 77, p. 716; Simmons v. Simmons, 57 App. D. C. 216, 19 F. 2d 690, 54 A. L. R. 75. But an estoppel of a party will not estop the state of the actual domicile of the parties from asserting the want of jurisdiction of the sister state in entering the decree, when it undertakes to maintain the dignity of the marriage relation by prosecutions for bigamous or adulterous cohabitation. While service of summons personally on a defendant, or an appearance, or a contest of the issues, may constitute full compliance with procedural due process and give jurisdiction over the person, it cannot give jurisdiction of the subject matter to a court where domicile within the state is absolutely essential to its existence. The two jurisdictional elements are of equal rank and a compliance with one does not supply a defect in the other. We share the views of the court in Staedler v. Staedler, 6 N. J. 380, 78 A. 2d 896, 28 A. L. R. 2d 1291, wherein it is said: "Jurisdiction depends upon the existence of basic facts and a bona fide finding that the necessary facts actually exist, and where they do not exist it cannot be conferred upon any court anywhere by consent of the parties or by fraud. It presupposes a bona fide examination by a court of competent jurisdiction of such facts before any judgment can be entered by such court."

In Shepherd v. Ward, 5 N. J. 92, 74 A. 2d 279, the court used the following language in dealing with a similar situation: "Matrimonial suits are in some respects sui generis. Their reflex consequences are rooted deeply in the home, in society and in human relations generally. They ought not be permitted to take on the aspects of

a game wherein wits, speed, daring and finesse prevail over elemental right and justice. Divorces and their incidents have become little less than a national scandal. The efforts of most of the states to maintain equilibrium in the marital status and responsibilities of their domiciliaries are shockingly thwarted by the liberal provisions of a few jurisdictions, known as 'easy divorce' states, and by the facility with which, under prevailing conditions, the laws of more conservative jurisdictions, such as our own state, are mocked. Let us consider the philosophy of the instant case:—The wife, without justification, departs to another jurisdiction long enough to get a decree which by no skill or deception could be got here and forthwith returns with impudent effrontery to bring suit, relying upon the argument that the due faith and credit which are owing to the decree of another state should be linked with our own laws enacted to protect a deserving wife against an erring husband. Upon that reasoning she demands that the husband, having been wrongfully subjected to a broken home, shall further respond in considerable and continued maintenance payments. Thus, in absentia, one of our citizens, blameless by our standards, is gripped by the legal machinery of a state where he never has been and never expects to be, against which and against the citizens of which he had never sinned, where he is not known, and therefore where the asset of a life well lived and of a merited place in the community loses its value. The suit is instituted in a far state, going to which on an errand of this sort would of itself be an unreasonable burden; but in addition the husband does not dare to appear there either in person or by attorney because in so doing he yields to the jurisdiction. The inequity and the iniquity of such a situation should, if possible, be relieved."

In the case before us, both of the primary elements of jurisdiction are, under the state of the record, conclusively established to have been fraudulent. Domicile

in the state granting the divorce was established by false evidence on the part of the plaintiff. The service of summons personally on the defendant was accomplished by trickery and deceit by inveigling the defendant into the jurisdiction of the court by false representations for the purpose of serving a summons on him. Fraud pervades the whole decree from the inception of the litigation. To give full faith and credit to such a decree is equivalent to permitting one to plead his own fraud as a defense to the attack on the foreign judgment.

A foreign state which undertakes to enter a decree of divorce involving parties who are citizens of another state must have something upon which to act. In a divorce suit that "something" is domicile. If a party has established a bona fide domicile in the state where the divorce is sought, the power to act is established and the resulting decree is entitled to full faith and credit. If the domicile remains in the state of original domicile, no power to act exists. Jurisdiction in such a case cannot be obtained by consent. 14 Am. Jur., Courts, § 184, p. 380. In Andrews v. Andrews, 188 U. S. 14, 23 S. Ct. 237, 47 L. Ed. 366, the court disposed of that question in the following language: "The principle dominating the subject is that the marriage relation is so interwoven with public policy that the consent of the parties is impotent to dissolve it contrary to the law of the domicil. The proposition relied upon, if maintained, would involve this contradiction in terms: that marriage may not be dissolved by the consent of the parties, but that they can, by their consent, accomplish the dissolution of the marriage tie by appearing in a court foreign to their domicil and wholly wanting in jurisidiction, and may subsequently compel the courts of the domicil to give effect to such judgment despite the prohibitions of the law of the domicil and the rule of public policy by which it is enforced." For the same reasons, jurisdiction of the subject matter cannot be obtained by service of summons personally, by appearance, by contest, or by fraud going

to the matter of jurisdiction. Irrespective of the fact that the Supreme Court of the United States has not specifically overruled this principle, it appears to have departed from it in some of the cases herein cited. The reasoning behind the principle, however, seems compelling to us. While it is true that jurisdiction may be obtained over the person of a defendant by a lawful service of process, his appearance, or by consent, jurisdiction of the subject matter may not be so obtained. And, ordinarily, an attack upon a summons fraudulently served must be made in the court from which the process was issued, or be treated as a waiver. That rule applies only in a case where the court has jurisdiction of the subject matter. Where the latter does not exist, the court has no power to make any order at all and consequently the attack upon the validity of the process may be collaterally made. The confusion in the cases decided by the Supreme Court of the United States appears to have resulted from applying the same rules to jurisdiction of the subject matter as are ordinarily applied in determining questions of jurisdiction over the person, when they are in fact wholly different. Jurisdiction in the one case cannot be obtained by personal service of summons, appearance, or contest, while in the case of obtaining jurisdiction over the person, they may confer such jurisdiction. In the case before us, a bona fide domicile was not established in Colorado and the service of summons personally was obtained by fraud. To hold that full faith and credit must be accorded to a decree based on such a record is to say that the full faith and credit clause of the federal Constitution may be used to protect fraud, trickery, and deceit and to punish the innocent, the wronged, and the law-abiding. No such result was ever intended by that clause. It was never contemplated that a collusive appearance or a token defense should raise the resulting decree to the dignity required to compel its acceptance in the state of actual domicile and thereby destroy the public policy

of that state by the fraud and deceit practiced in another.

What reason can possibly exist for such an interpretation of the full faith and credit clause in this type of case? Can it be for the purpose of protecting the fundamental rights of the person seeking the foreign divorce or those of a conniving spouse? We submit that it is not. One who becomes disgruntled by the restraints imposed by the public policy of the state of his domicile and seeks the benefit of the less rigorous divorce laws of a foreign state, should be required to assume the risks of such a venture and, if he fails when such decree is attacked, upon a return to the state of his original domicile, to successfully withstand the collateral assault made upon it, we can see no reason, equitable or otherwise, why he should be protected from the results of his own fraudulent conduct.

We concede the right of the Supreme Court of the United States to determine when full faith and credit shall be given to the decrees of a sister state. We concede the power of that court to interpret the full faith and credit clause as it did in the Davis, Sherrer, Coe, Johnson, and Cook cases, even though we question its assumed right to do so. We conclude that the latter cases each cover a very narrow situation, and, because of their radical departure from the prior decisions of the court which they do not purport to overrule, they will not be applied to situations other than those which they specifically decide. We follow the precedent set by the Wisconsin court when it said in a similar case: "Under these circumstances we do not consider that the federal constitution nor the decisions interpreting it have called upon Wisconsin to surrender to the courts of another state this remnant of its historic right to determine for itself the marital status of its own residents, and we shall not surrender it until higher authority, speaking on the instant facts or on others which are indistinguishable, requires us to do so." Davis v. Davis, 259 Wis. 1, 47 N. W. 2d 338.

The Supreme Court of the United States has never held, so far as we have been able to determine, that full faith and credit must be given to a divorce decree of a sister state where jurisdiction of the subject matter (domicile) and procedural due process (personal service of summons) have each been obtained by fraud. Consequently we hold that the Colorado decree is subject to collateral attack and, under the state of the record, it is not entitled to full faith and credit in this state. The trial court having in effect so found, the judgment is affirmed.

AFFIRMED.

ROBERT GRIESS, BY MOTHER AND NEXT FRIEND, JOHANNA GRIESS, APPELLEE, V. DEAN BORCHERS, APPELLANT.
72 N. W. 2d 820

Filed November 4, 1955. No. 33774.

1. **Trial.** A motion for directed verdict 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. 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: Trial.** In negligence cases the trial court should sustain a motion for directed verdict or for judgment notwithstanding the verdict, only when the evidence, viewed in the light most favorable to the party against whom the motion is directed, fails to establish actionable negligence.
3. ———: ———. Where different minds may draw different conclusions from the evidence in regard to negligence, the question should be submitted to the jury. It is only where the evidence shows beyond dispute that plaintiff's negligence is more than slight as compared with defendant's negligence that it is proper for the trial court to instruct the jury to return a verdict for defendant or render a judgment notwithstanding the verdict.
4. **Negligence: Evidence.** Negligence is a question of fact and may be proved by circumstantial evidence. All the law re-

quires is that the facts and circumstances proved, together with the inferences that may be legitimately drawn from them, shall indicate, with reasonable certainty, the negligent act complained of.

5. **Automobiles: Negligence.** When a person enters an intersection of two streets or highways he is obligated to look for approaching cars and to see those within that radius which denotes the limit of danger. If he fails to see a car which is favored over him under the rules of the road, he is guilty of contributory negligence sufficient to bar a recovery as a matter of law. If he fails to see an automobile not shown to be in a favored position, the presumption is that its driver will respect his right-of-way and the question of his contributory negligence in proceeding to cross the intersection is a jury question.
6. ———: ———. Where two motorists approach an intersection at or about the same time, the driver approaching from the right at a lawful speed has the right-of-way, and he may ordinarily proceed to cross, having a legal right to assume that his right-of-way will be respected by the other party, but if the situation is such as to indicate to the mind of an ordinarily careful and prudent person in his position that to proceed would probably result in a collision, then he should exercise ordinary care to prevent an accident, even to the extent of waiving his right-of-way.
7. ———: ———. On the other hand, a vehicle which has entered an intersection and is passing through it at a lawful speed has the right-of-way over a vehicle approaching the intersection from a different direction into its path.
8. ———: ———. One having the right-of-way may not on that account proceed with disregard of the surrounding circumstances, nor is he thereby relieved from the duty of exercising ordinary care to avoid accidents.
9. ———: ———. The lawfulness of the speed of a motor vehicle within the prima facie limits fixed is determined by the further test of whether the speed is greater than was reasonable and prudent under the conditions then existing.
10. **Trial: Appeal and Error.** The verdict of a jury, based on conflicting evidence, will not be disturbed unless clearly wrong.
11. **Trial: Damages.** While in a personal injury action the better practice is to state to the jury in suitable words that plaintiff sues for an amount sufficient to compensate him for the loss sustained, it is not ordinarily prejudicial error to state the amount for which the action is brought.
12. **Damages: Appeal and Error.** When a certain theory as to the

measure of damages is relied upon by the parties in the trial court as the proper one, it will be adhered to on appeal whether it is correct or not.

13. **Negligence: Trial.** If defendant pleads that the plaintiff was guilty of contributory negligence, the burden is upon him to prove that defense and this burden does not shift during the trial. However, if the evidence adduced by the plaintiff tends to prove that issue, the defendant is entitled to receive the benefit thereof and the court must instruct the jury to that effect. In that respect, if other instructions can reasonably be construed to properly advise the jury in that regard, it will be sufficient.
14. **Trial.** 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 for harmless error in one of them.
15. **Appeal and Error.** Errors in instructions not prejudicial to the complaining party do not require reversal of a judgment otherwise correct.

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

John E. Dougherty, for appellant.

Massie, Bottorf & Massie and *Perry, Perry & Nuernberger*, for appellee.

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

CHAPPELL, J.

Plaintiff Robert Griess, a minor 17 years old at time of the accident, brought this action by his mother and next friend against defendant Dean Borchers, seeking to recover damages for personal injuries alleged to have been proximately caused by negligence of defendant when, about 11:50 p. m. April 10, 1954, a car owned and driven by defendant and one driven by plaintiff collided at an open intersection of graveled county highways about 6 miles southeast of Clay Center. By answer and cross-petition defendant admitted that an accident occurred at such time and place, but denied that he was negligent, and alleged that the sole and proximate cause

of plaintiff's injuries and damages was plaintiff's own negligence. Defendant prayed for dismissal of plaintiff's petition and to recover for personal injuries and damages to his car. Plaintiff's reply to defendant's answer and answer to defendant's cross-petition denied generally and alleged that the negligence of defendant was gross in character. Motions for directed verdict made by defendant at close of plaintiff's evidence and renewed at close of all the evidence, were overruled, and the issues were submitted to a jury which returned a verdict filed and entered of record by the court finding for plaintiff and awarding him $15,000. Defendant's motion for judgment notwithstanding the verdict or in the alternative for new trial, was overruled. Therefrom he appealed to this court, assigning substantially: (1) That the trial court erred in failing to sustain his motions for directed verdict; (2) that the judgment against defendant was not sustained by sufficient evidence but was contrary thereto and contrary to law; (3) that the trial court erred in giving certain instructions; and (4) that the trial court erred in receiving, excluding, and striking certain evidence. We conclude that the assignments should not be sustained.

Turning to assignments of error Nos. 1 and 2, we have examined the evidence in the light of well-established rules. In Pahl v. Sprague, 152 Neb. 681, 42 N. W. 2d 367, it is held: "A motion for directed verdict or for judgment notwithstanding the verdict must, for the purpose of decision thereon, be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed. Such party is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference that can reasonably be deduced from the evidence.

"In negligence cases the trial court should sustain a a motion for directed verdict or for judgment notwithstanding the verdict, only when the evidence, viewed

in the light most favorable to the party against whom the motion is directed, fails to establish actionable negligence.

"In a law action, it is error for the trial court to direct a verdict for either of the parties on an issue of fact on which the evidence is conflicting. Such issue should be submitted to the jury for its determination.

"Negligence is a question of fact and may be proved by circumstantial evidence. All that the law requires is that the facts and circumstances proved, together with the inferences that may be legitimately drawn from them, shall indicate, with reasonable certainty, the negligent act complained of.

"When a person enters an intersection of two streets or highways he is obligated to look for approaching cars and to see those within that radius which denotes the limit of danger. If he fails to see a car which is favored over him under the rules of the road, he is guilty of contributory negligence sufficient to bar a recovery as a matter of law. If he fails to see an automobile not shown to be in a favored position, the presumption is that its driver will respect his right-of-way and the question of his contributory negligence in proceeding to cross the intersection is a jury question.

"Where different minds may draw different conclusions from the evidence in regard to negligence, the question should be submitted to the jury. It is only where the evidence shows beyond dispute that plaintiff's negligence is more than slight as compared with defendant's negligence, that it is proper for the trial court to instruct the jury to return a verdict for defendant or enter a judgment notwithstanding the verdict."

As held in Becks v. Schuster, 154 Neb. 360, 48 N. W. 2d 67: "Where two motorists approach an intersection at or about the same time, the driver approaching from the right has the right-of-way, and he may ordinarily proceed to cross, having a legal right to assume that his

right-of-way will be respected by the other driver, but if the situation is such as to indicate to the mind of an ordinarily careful and prudent person in his position that to proceed would probably result in a collision, then he should exercise ordinary care to prevent an accident, even to the extent of waiving his right-of-way."

On the other hand, as held in Long v. Whalen, 160 Neb. 813, 71 N. W. 2d 496: "A vehicle which has entered an intersection and is passing through it at a lawful speed has the right-of-way over a vehicle approaching the intersection from a different direction into its path." Such case also reaffirmed that one having the right-of-way may not on that account proceed with disregard of the surrounding circumstances, nor is he thereby relieved from the duty of exercising ordinary care to avoid accidents.

In Stark v. Turner, 154 Neb. 268, 47 N. W. 2d 569, we held: "The lawfulness of the speed of a motor vehicle within the prima facie limits fixed is determined by the further test of whether the speed was greater than was reasonable and prudent under the conditions then existing."

In Granger v. Byrne, 160 Neb. 10, 69 N. W. 2d 293, we reaffirmed that: "The verdict of a jury, based on conflicting evidence, will not be disturbed unless clearly wrong."

The record discloses competent evidence, part of which is without dispute, the rest of which is conflicting, from which the jury could reasonably have concluded, as it evidently did, as follows: Plaintiff, 18 years old at the time of trial, who had been graduated from high school, was employed doing construction work and earning $58 a week. Prior to the accident he was driving his brother's 1949 Ford car from the south toward the north on his right side of a 27-foot double-track gravel highway with his left wheels near the center line. The car was in good condition and the lights had been turned on bright at all times since he left

Edgar, some 10 or 12 miles from the point of accident. Plaintiff was traveling at about 50 miles an hour and continued at that speed up to the point of accident. It was a clear night and the highway was dry with the view unobstructed for one-half mile each way from the intersection where the collision occurred. A young man, 18 years old at time of trial, was riding with plaintiff. He had been drowsy, but upon being aroused he turned his head and saw defendant's lights coming from the west a couple of feet from the back of plaintiff's car.

Defendant, a senior in high school at time of the accident, who had been graduated at time of trial, was driving his 1950 Studebaker car from the west toward the east over a double-track gravel highway, the travel portion of which was 26 feet wide. His girl friend, a junior in high school at that time, was riding with him.

When plaintiff was about one-fourth mile from the intersection he looked to the left and saw defendant's car headed east about one-half mile away from the intersection. Plaintiff could not tell then whether or not defendant's car was moving. When plaintiff was about one-eighth of a mile from the intersection he looked again and saw defendant's car coming from the west about one-fourth mile from the intersection. Plaintiff did not actually turn his head to look again, but he could and did see the beam of light from defendant's approaching car at all times before entering the intersection. Believing that he had plenty of time, since defendant was then at least three car lengths west of the intersection, plaintiff went into the intersection, and, thinking that he was through the interesection, the front of his car having passed beyond the intersection to the north, he turned and saw defendant's car right behind his own and they collided. There in the northeast quarter of the intersection the left front end of defendant's car hit the left rear of plaintiff's car which was hurled into the air off the highway toward the northeast a distance of 15 or 25 feet, where, sliding sideways, it

turned over on its side or top, slid about the length of the car, then struck the bank to the northeast, and went north, stopping upright, headed north in the east ditch about 156 feet from where the impact occurred north of the middle of the intersection. Plaintiff was thrown from his car out upon the highway and was found unconscious about 35 feet north of his car. As a result of the accident his spinal cord was severed at about the fifth or sixth cervical vertebrae, causing permanent and total disability by almost completely paralyzing his body from that point to his waist, and completely and permanently paralyzing his body from his waist down. He was hospitalized from April 11, 1954, until July 3, 1954, during which period surgery, medical care, and hospital attention were required at great expense. He did and will in the future suffer great pain and anguish and require future medical and nursing care. His life expectancy was shortened and his future earning capacity was destroyed. No contention is made here that plaintiff was not so permanently and totally disabled.

Before the impact, defendant's car skidded and swerved sideways from a point close to the south or right side of the east and west highway toward the left and northeast for about 35 feet to the point of impact north and east of the center of the intersection. From that point defendant's car went end over end, then slid and swirled around into the east bank and stopped, headed west, in the north ditch and on the east bank in the north and east portion of the intersection about 35 feet from the point of impact.

Within a short time after the accident, defendant told one witness: "* * * there was nothing he could do; he slammed the brakes and that is all he could do. * * * from the time he seen what was going to happen, it was beyond help."

To another witness defendant said: "* * * that he seen the car coming and he stepped on his brakes to

stop and he slid a ways and then he decided maybe he could make it so he stepped on it."

To another witness both defendant and his girl companion said: "They saw the lights and * * * thought they could beat it across the intersection. * * * if they would have stepped on the gas they know they could have gotten across the intersection. * * * 'I am sure we could have made it if we would have stepped on the gas.' "

To another witness they said: "* * * that they hit Bob. They had seen his lights, but they thought that they could get over the intersection before he come. * * * they saw the lights and thought they could get across there first * * *."

To plaintiff's brother they said: "* * * they hit my brother's car, and they were coming from the west and my brother from the south" and they "saw him, but figured they would beat him across the intersection before he got there. * * * they had seen him coming, but they thought they would get across before he got there."

On the other hand, defendant and his companion both denied that the foregoing statements were true or that they were ever made by them. Their testimony was substantially that during the last one-half mile, before reaching the intersection, they drove about 40 or 45 miles an hour; that as they approached the intersection, they slowed down to about 35 or 40 miles an hour and looked right and left several times but saw no lights approaching; that when they were about 40 feet from the intersection and driving on the right side of the highway, they saw the lights on plaintiff's car turn on when he was about 65 feet from the intersection; that plaintiff's car was then coming from the south at a speed of 65 or 70 miles an hour; whereupon defendant slammed on his brakes hard but slid and swerved slightly to the left for about 35 feet, and the impact occurred just

north and east of the center of the intersection when defendant was traveling about 15 miles an hour.

In the light of the foregoing evidence and rules of law we conclude that the issues of negligence were for determination by the jury. There was ample competent evidence to sustain the verdict and a judgment rendered thereon. Therefore, assignments of error Nos. 1 and 2 have no merit.

Instruction No. 1, Part I, summarized the allegations of plaintiff's petition. Subparagraph 3 thereof contained the allegation that defendant was negligent because he "drove said vehicle at an excessive and unlawful rate of speed under the circumstances, to-wit, approximately sixty-five miles per hour." Defendant argued that the record contained no specific evidence that defendant was driving 65 miles per hour, and it was prejudicially erroneous to submit such allegation. In that connection, instruction No. 1 also told the jury that the statements contained therein were simply an outline of the claims and contentions of the parties and were not to be considered as proof or evidence unless admitted to be true by either or both of the parties. Further, there was ample competent evidence from which the jury could have concluded that defendant was driving at an excessive and unlawful rate of speed under the circumstances.

In Becker v. Hasebroock, 157 Neb. 353, 59 N. W. 2d 560, which presented a comparable situation, this court said: "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 applicable rule reaffirmed therein is that: "Errors in instructions not prejudicial to the complaining party do not require a reversal of a judgment otherwise correct." Defendant's contention should not be sustained.

Subparagraph 4 of instruction No. 1, Part I, also submitted plaintiff's allegation that defendant "failed to make proper and adequate use of the braking facilities

on his car." Contrary to defendant's contention, as heretofore set forth, there was competent evidence to support such allegation.

Instruction No. 1, Part I, also submitted plaintiff's allegations that as a direct and proximate result of defendant's alleged negligence, plaintiff proximately received described severe permanent and complete personal injuries and damages. It then said: "Plaintiff further claims that at the time of said accident, he was earning $58.00 per week and that by reason of such injuries plaintiff has been totally and permanently injured to his damaged (damage); that plaintiff will incur hospital, doctor and medical bills in a substantial amount and that plaintiff will be required to obtain and receive special hospital care and attention the rest of his life; that plaintiff has suffered and will be forced to continue to suffer extreme severe and continuous pain to his damage.

"For all of which plaintiff prays damage in the sum of $60,000.00."

Defendant argued that the last sentence aforesaid was prejudicial to defendant's rights because it set forth the amount which plaintiff sought to recover. In Tate v. Barry, 144 Neb. 517, 13 N. W. 2d 879, this court held: "In summarizing the allegations of the petition, it is not prejudicial error to set out in an instruction the amount for which the plaintiff prays damages." Such case was cited with approval in Remmenga v. Selk, 152 Neb. 625, 42 N. W. 2d 186, wherein we held: "While in a personal injury action the better practice is to state to the jury in suitable words that plaintiff sues for an amount sufficient to compensate him for the loss sustained, it is not ordinarily prejudicial error to state the amount for which the action is brought." Such cases are applicable and controlling here. Defendant's contention has no merit.

Defendant also argued that such part of instruction No. 1, Part I, as referred to hospital, doctor, and medi-

cal bills and further medical attention and hospitalization, was erroneously submitted as a part of plaintiff's cause of action, because the obligation to keep, maintain, and support plaintiff, a minor, was the obligation of his parents who were entitled to his wages during minority. The contention should not be sustained.

In that connection, the record discloses that by pleadings, evidence, stipulation, and waiver, without any objection, the case was tried and submitted as if and upon the theory that plaintiff had been emancipated and was entitled to his wages and was personally liable for such obligations, therefore, if the jury found for plaintiff, he would be entitled to recover the same. Further, the question was raised for the first time in this court. In Welch v. Reeves, 142 Neb. 171, 5 N. W. 2d 275, this court held: "When a certain theory as to the measure of damages is relied upon by the parties in the trial court as the proper one, it will be adhered to on appeal whether it is correct or not." Also, it is the rule that: "A party cannot predicate error upon a ruling which he procured to be made." Pahl v. Sprague, *supra.*

In a similar manner, and for like reasons, defendant argued that instruction No. 8 relating to the measure of damages recoverable if the jury found for plaintiff, was erroneous because it also submitted the elements among others of "the reasonable value of hospitalization, nursing services and medical care" and "the reasonable value of the time lost from work to date and loss of earning capacity that plaintiff will suffer * * *." For reasons just heretofore stated, that contention should not be sustained.

In that connection, defendant also argued that instruction No. 8 was erroneous because it submitted the question of plaintiff's "pain and suffering * * * and the extent" thereof and the reasonable value of plaintiff's "time lost from work to date and the loss of earning capacity that plaintiff will suffer" without confining it to such loss as is shown by the evidence with reason-

able certainty. In that respect, instruction No. 8, conjunctive in character, specifically told the jury: "If you find for the plainiff (plaintiff) you will then proceed to assess the amount of the plaintiff's damages at such sum as will fairly and reasonably compensate him for any and all injuries, pain, suffering, reduction of his life expectancy, reduction of his earning capacity, and any other loss which the evidence shows *with reasonable certainty* proximately to have been caused by the defendants (defendant's) negligence, and you should consider all of the evidence shown to be the pain and suffering, if any, so caused and the extent of the same, * * * and the reasonable value of the time lost from work to date and the loss of earning capacity that plaintiff will suffer by reason of his injuries arising out of such acts of the defendant driver." (Italics supplied.) It will be noted that the words "with reasonable certainty" are all-inclusive and qualify the elements of damage about which defendant complains. The instruction was not prejudicially erroneous.

Instructions No. 2 and No. 3 with relation thereto submitted in proper form the burden of proof imposed upon plaintiff and the question of plaintiff's alleged contributory negligence which was an issue pleaded in defendant's answer and cross-petition. Contrary to defendant's contention, instruction No. 3 was correct in every respect. It appears also that plaintiff's reply to defendant's answer and his answer to defendant's cross-petition denied each and every allegation contained therein and alleged that the negligence of defendant was gross in character. In that respect, instructions No. 4 and No. 5 with relation thereto, submitted the burden of proof imposed upon defendant and the question of defendant's contributory negligence involved in his alleged right to recover upon his answer and cross-petition controverted by plaintiff's reply and answer thereto. Contrary to defendant's contention, plaintiff did put in issue the question of defendant's contributory negligence

when in his petition plaintiff pleaded that defendant was negligent and pleaded in his reply and answer that defendant was guilty of gross negligence. Defendant's contention requires no further discussion except to cite Tempero v. Adams, 153 Neb. 331, 44 N. W. 2d 604, and Hamilton v. Omaha & C. B. St. Ry. Co., 152 Neb. 328, 41 N. W. 2d 139, which are controlling.

Defendant also argued that instruction No. 4, relating to the burden of proof imposed upon defendant with regard to plaintiff's alleged contributory negligence, was prejudicially erroneous because it failed to inform the jury that in such respect defendant was entitled to receive the benefit of any evidence adduced by plaintiff tending to prove that he was negligent. Defendant relied upon Mundy v. Davis, 154 Neb. 423, 48 N. W. 2d 394, which held: "If the defendant pleads that the plaintiff was guilty of contributory negligence the burden is upon him to prove that defense and this burden does not shift during the trial of the case. However, if the evidence adduced by the plaintiff tends to prove that issue the defendant is entitled to receive the benefit thereof and the court must instruct the jury to that effect." We decide that although it could be reasonably concluded that the evidence adduced by plaintiff did in some respects tend to prove that he was negligent, the omission to specifically include such direction aforesaid in instruction No. 4 was not prejudicially erroneous when all of the instructions are considered together.

An applicable rule is found in Blanchard v. Lawson, 148 Neb. 299, 27 N. W. 2d 217, wherein we held: "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 for harmless error in one of them.

"If an examination of all the instructions given by the trial court discloses that they fairly and correctly state the law applicable under the evidence, error can-

not be predicated thereon." See, also, Granger v. Byrne, *supra.*

In that connection, instruction No. 6, after setting forth every and all involved issuable rules of the road alleged to have been respectively violated by the parties, said: "You are instructed that failure on the part of either the Plaintiff Robert Griess or the defendant Dean Borchers to follow any of the above rules of the road and duties above set out would not of itself be negligence on his part, but you may take into consideration *any evidence* tending to show such a violation in connection *with all the other evidence* in the *case* in determining whether either the plaintiff or the defendant or both of them was negligent." (Italics supplied.) Instruction No. 13, relating to credibility of the witnesses and the weight to be given their testimony, told the jury among other things that it should take into consideration *"all other evidence, facts and circumstances* proved tending to corroborate or contradict such witnesses * * * and give such wieght (weight) to the testimony *of any witness* as in your judgment it should have fnder (under) *all the circumstances of the case."* (Italics supplied.)

All of such statements in the instructions aforesaid relate to a determination of the issues which distinguish the case at bar from Krepcik v. Interstate Transit Lines, 154 Neb. 671, 48 N. W. 2d 839. In such case, referring to the rule in Mundy v. Davis, *supra*, we said: "The better practice, of course, is that the instruction to that effect be included in the instruction on contributory negligence. That it was not so included here is patent. We recognized, however, in the above decision that if other instructions could reasonably be construed to properly advise the jury in that regard, it would be sufficient." The last sentence thereof is controlling here. See, also, City of Beatrice v. Forbes, 74 Neb. 125, 103 N. W. 1069, cited in both Mundy v. Davis, *supra,* and Krepcik v. Interstate Transit Lines, *supra.* We con-

clude that under the circumstances, the omission of the direction from instruction No. 4 was not prejudicial error. The jury could not have been misled.

Instruction No. 5½ about which defendant complains simply told the jury that both parties could not recover and that "as already stated" the case was grounded upon negligence, each party claiming himself free from negligence and charging that the injuries sustained by them respectively or the property of either was caused by negligence of the other. Contrary to defendant's contention, the primary issue was the respective alleged negligence of the parties as already theretofore stated by the court in other instructions and the fact that the instruction itself did not mention contributory negligence was not prejudicial error.

The first paragraph of instruction No. 9 defined "intersection" by use of the identical material language contained in subdivision (7) of section 39-741, R. R. S. 1943. The instruction read: "An intersection is defined as the area embraced within the prolongation of *the lateral curblines or, if none, then* the lateral boundary lines of two or more highways which join one another at an angle, whether or not one such highway crosses the other." (Italics supplied.) Defendant argued that inclusion of the words "the lateral curblines" was erroneous since there were none involved, the accident having occurred at an intersection of open country highways which crossed each other at right angles, and should have been defined only as the area embraced within "the prolongation of the lateral boundary lines of two or more highways which join one another at an angle, whether or not such highway crosses the other." It will be noted that the latter language was included in the instruction as an alternative if there were no lateral curb lines. True, the court could as well have omitted any reference to "the lateral curblines" but under the clear language of the instruction and the specifically undisputed evidence in this case with regard to the

boundary lines and measurements of the highways and intersection thereof, the jury could not have been misled by the instruction. It was not prejudicially erroneous.

Upon direct examination, after the plaintiff had testified that he was able to and did observe the beam of defendant's lights, he was asked without objection: "Q. Were you able from that to tell about how far he was away? A. Oh, pretty close. Q. And from that were you able to tell whether or not you thought you had time enough to go through the intersection? Answer that yes or no. A. Yes." Plaintiff was then asked: "And di (did) you have time to go through the intersection ahead of this car?" Over objection by defendant that such question was incompetent, irrelevant, and immaterial, no proper and sufficient foundation laid, and called for a conclusion of the witness and not a statement of fact, the witness was permitted to answer "Yes." Defendant argued that the court erred prejudicially in overruling the objection and permitting the answer to be given. In that regard, the objection might be said to be well taken, but it was not prejudicial error to overrule the objection because prior thereto plaintiff was permitted without objection to testify that: "Before entering the intersection I seen it. I had plenty of time so I went on through." Further, no motion was made by defendant to strike such answer.

During the trial defendant was asked by his counsel: "Now, after you saw those lights coming on and after applying the brakes, was there anything else you could do to avoid that accident?" Objection thereto as asking for a conclusion of the witness and invading the province of the jury was sustained. The same objection to an offer of proof that defendant would say there was nothing more he could do was also sustained. Contrary to defendant's contention, the objections were properly sustained.

Defendant had testified that he was driving 35 or 40 miles an hour when he applied his brakes, and about

15 miles an hour when the impact occurred. Upon cross-examination, defendant's girl companion was asked: "And you are not saying he is incorrect about the speed at the point of impact itself, and that you are not certain that is right, is that right?" Defendant's objection that the question was argumentative, asking her to interpret somebody else's testimony, incompetent, hearsay, and calling for a conclusion of the witness, was overruled, whereupon she answered: "As to what speed he was traveling at the point of impact, I couldn't say one way or the other. I imagein (imagine) he is pretty well right." The objection might be said to be well taken, but since the answer was favorable to defendant, the overruling of the objection could not have been prejudicial error.

Upon cross-examination, defendant testified: "Q. And when you looked the last time you saw the lights? A. The lights snapped on just like that." Plaintiff's motion to strike the answer as not responsive was sustained, whereupon defendant answered "Yes." He was then asked: "And that is the first time you had seen the lights? A. Yes, that is when the lights came on." Plaintiff's motion to strike the last part of such answer as not responsive and a voluntary statement was sustained, leaving the answer "Yes." Contrary to defendant's contention, such rulings of the court were not erroneous and could not have been prejudicial in any event because upon direct examination, as heretofore observed, defendant had already been permitted affirmatively to testify fully with relation to the matter thus stricken.

We find that the verdict and judgment were sustained by competent evidence and that there was no error in the record prejudicial to the rights of defendant. Therefore, the judgment of the trial court should be and hereby is affirmed.

AFFIRMED.

IN RE APPLICATION OF MAX L. CAUDILL,
IN RE APPLICATION OF DONALD L. PEDERSEN.
IRENE CAUDILL, AS ADMINISTRATRIX OF THE ESTATE OF MAX L. CAUDILL, DECEASED, ET AL., APPELLANTS, V. RICHARD R. LYSINGER ET AL., APPELLEES.

72 N. W. 2d 684

Filed November 4, 1955. No. 33777.

1. **Public Service Commissions: Appeal and Error.** A case coming to the Supreme Court from the Nebraska State Railway Commission for review of action taken by the commission comes upon the evidence presented before the commission, as reported by its official stenographer, and reduced to writing and certified by the stenographer and the chairman of the commission, together with the pleadings and filings duly certified in the case under the seal of the commission.
2. **Public Service Commissions: Motor Carriers.** The Nebraska State Railway Commission is without power to revoke a certificate of convenience and necessity in the absence of evidence of a willful failure of the holder thereof to observe and comply with the Motor Carrier Act or any lawful order or regulation of the commission or any term, condition, or limitation of the certificate.
3. ———: ———. Where a certificate of convenience and necessity is not dormant it may be transferred on approval of the Nebraska State Railway Commission under reasonable rules and regulations to be prescribed by it, if the transfer will be consistent with public interest, if it will not unduly restrict competition, and if the transferee is fit, willing, and able to perform the service proposed.
4. ———: ———. The statute governing the transfer of certificates of convenience and necessity is permissible in terms and not mandatory, and action of the Nebraska State Railway Commission in refusing a transfer will be sustained unless it appears that the refusal was unreasonable and arbitrary.

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

Cyril P. Shaughnessy and *J. Max Harding*, for appellants.

Manasil & Erickson, for appellees.

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

YEAGER, J.

On August 3, 1946, Max L. Caudill, under No. M-8014, was issued a certificate of convenience and necessity by the Nebraska State Railway Commission, authorizing him to engage in trucking operations as a common carrier. The Nebraska State Railway Commission will be hereinafter referred to as the commission. Under the certificate he was permitted to transport commodities generally including road construction materials and livestock over irregular routes with operations to originate or terminate within a radius of 35 miles from Grand Island, Nebraska, with the over-all operation to be within 286 miles from Grand Island, Nebraska. Max L. Caudill died on June 23, 1950, and thereafter Irene Caudill, the widow of Max L. Caudill, became the administratrix of his estate and succeeded to his rights under the certificate.

On May 27, 1953, Donald L. Pedersen, under application No. M-10282, applied to the commission for permission to operate as a common carrier as successor in interest to the certificate which had been issued to Max L. Caudill pursuant to an agreement for transfer entered into between Pedersen and Irene Caudill.

On August 4, 1953, the commission entered an order requiring Irene Caudill to show cause before an examiner of the commission why the certificate should not be suspended, changed, or revoked for a number of reasons generally mentioned but specifically because of "Cessation of operations and discontinuance of service contrary to General Order 81, section (9) (a)."

Notice was given of hearing on the application of Pedersen for transfer of the certificate and also on the order to show cause. Hearing was had before an examiner on the application and the order to show cause at St. Paul, Nebraska, on October 1, 1953. Following the

hearing the examiner appears to have made a report to the commission.

After the hearing and the report, on March 5, 1954, the commission rendered an opinion, findings, and order disposing of both matters presented to the examiner. By it the certificate of Irene Caudill was canceled and revoked. The application of Pedersen for a transfer of the certificate was denied. The letter giving notice was not mailed to the parties until November 6, 1954.

On November 12, 1954, Irene Caudill and Donald L. Pedersen filed a motion for rehearing and reconsideration. On December 21, 1954, this motion was overruled. Notice of appeal was given on January 13, 1955.

From the two orders and the ruling on the motion for rehearing Irene Caudill and Donald L. Pedersen have appealed. These two parties are designated as appellants. In the briefs the designated appellees are "Richard R. Lysinger et al." Richard R. Lysinger and certain others are engaged in the trucking business in the vicinity of St. Paul, Nebraska. With their attorneys they appeared as witnesses at the hearing before the examiner and without any formal act making them intervening or objecting parties they purportedly became interveners and from that point on have been allowed to be the adversaries of the appellants. This was all over objection of appellants. Irregularity in this connection is readily apparent, but for the purposes of determination of the issues it does not become important.

The brief of appellants contains five assignments of error which they contend are grounds for reversal. However only one, which substantially appears, requires direct consideration. That one is that the orders of the commission are without sufficient support in the evidence and that therefore they are arbitrary, unreasonable, and contrary to law.

Appropriately that portion of the order canceling and revoking the certificate of Irene Caudill requires first consideration. As pointed out the certificate was can-

celed and revoked because it was found to be dormant.

The evidence in the record presented to this court does not sustain or even tend to sustain this finding. All of the evidence presented here is directly contrary to the finding. It is true that in the findings herein it is stated substantially that on February 1, 1952, the commission found that the certificate was dormant and that no appeal was taken from that finding. It is apparent from the further findings herein that this purported finding of February 1, 1952, was largely if not entirely the basis for the revocation and cancellation involved here. But that finding according to the record before this court never became a part of the bill of exceptions and neither did it become a part of the files in this case before the commission. This being true it may not be considered by this court. The statutes make this point clear. Section 75-407, R. R. S. 1943, provides: "The evidence presented before the State Railway Commission, as reported by its official stenographer and reduced to writing, shall be duly certified to by the stenographer and the chairman of the commission as the true bill of exceptions, which, together with the pleadings and filings duly certified in the case under the seal of the commission, shall constitute the complete record and the evidence upon which the case shall be presented to the appellate court."

It is conceded that there was no cancellation and revocation of the certificate in February 1952. Even if there had been evidence of an order finding dormancy on February 1, 1952, it would still be necessary to say that dormancy did not exist at the time the order to show cause was issued and at the time of the hearing. The record affirmatively and positively discloses that there was activity under the certificate at all times after February 1, 1952, up to and including the date of hearing and presumably up to the time the notice of cancellation and revocation was mailed. All of the incidental requisites under law and the rules of the com-

mission to keep it alive and active were complied with. Thus there were 33 months of activity under the certificate between February 1, 1952, and the date when the adjudication of cancellation and revocation became legally effective.

As pointed out the order to show cause was predicated on the specific proposition that the certificate was dormant because of inactivity under it. The appellants do not contend that dormancy on account of inactivity would not be a legal basis for cancellation and revocation of the certificate.

As to the right of the commission to revoke and cancel certificates this court has held that it is without power to revoke a certificate in the absence of evidence that there has been a willful failure of the holder thereof to observe and comply with the Motor Carrier Act or any lawful order or regulation of the commission or any term, condition, or limitation of the certificate. See, In re Application of Hergott, 145 Neb. 100, 15 N. W. 2d 418; Safeway Cabs, Inc. v. Honer, 155 Neb. 418, 52 N. W. 2d 266; Nebraska State Railway Commission v. Service Oil Co., 157 Neb. 712, 61 N. W. 2d 381; Schmunk v. West Nebraska Express, 159 Neb. 134, 65 N. W. 2d 386.

There was definitely no evidence of a willful failure to observe and comply with the Motor Carrier Act or any term, condition, or limitation of the certificate or regulation of the commission. It must, therefore, on that ground be said that the action of the commission was contrary to law.

The next question to be considered is that of whether the action of the commission in refusing to allow a transfer of the certificate from Irene Caudill to Donald L. Pedersen was valid and proper.

In the record the reason for refusal to permit the transfer has not been declared. Under circumstances such as here where a certificate is not dormant it may be transferred on approval of the commission under

reasonable rules and regulations to be prescribed by it, (1) if the transfer will be consistent with public interest, (2) if it will not unduly restrict competition, and (3) if the transferee is fit, willing, and able to perform the service proposed. § 75-240.02, R. S. Supp., 1953. There are other provisions of the section but they have no application. Particularly the provisions relating to present and future convenience and necessity have no application. They relate only to dormant certificates and those situations which will result in a new or different service or operation as to territorial scope. No material change was proposed as an accompaniment of this requested transfer.

This section of the statute is new. Its effective date was August 27, 1951. It has not been previously construed by this court. It is observable that the language granting the power to transfer certificates is permissive and not mandatory. We think however that the proper attitude to be taken toward incidents of exercise of the power under the provision by the commission should be the same as has been manifested by the decisions of this court with regard to the exercise of other functions of the commission, that is, that the action of the commission is to be sustained unless it is made to appear that it was unreasonable or arbitrary. Nebraska State Railway Commission v. Service Oil Co., *supra;* Schmunk v. West Nebraska Express, *supra.*

The question of whether or not action is unreasonable and arbitrary is of course one of fact. Factually without contradiction there had been continuous operation under this certificate since 1946. At no time had any service been declined or denied. During a part of the time the service was performed by a lessee and during another part by Irene Caudill by the use of leased equipment. During this latter period the leased equipment was the property of Donald L. Pedersen and Pedersen was in charge for Irene Caudill of the operations. Users of the service desired that it be continued.

Pedersen, the prospective transferee, was capable and efficient, had satisfactory equipment, and was financially able to meet the working and legal obligations imposed by law and the rules and regulations of the commission.

When Max L. Caudill died it is apparent that he left but a small estate. The equipment was sold and thereafter, as has been pointed out, operations were carried on under the certificate under lease or by the use of leased equipment. A transfer of the certificate would enable the widow to obtain a small amount of money. A transfer would not change the transportation status in the area or the competitive status from what it has been since at least as far back as 1946. The only substantial effect of a refusal would be to remove from the field a competitor.

The conclusion therefore is that the record does not contain any facts to sustain the finding that the certificate of Irene Caudill was dormant, and therefore its cancellation on the ground of dormancy was arbitrary, unreasonable, and contrary to law. The further conclusion is that on the facts of record it must be said that the action of the commission in refusing to transfer the certificate in question from Irene Caudill to Donald L. Pedersen was arbitrary and unreasonable.

Accordingly the order of the commission canceling and revoking the certificate in question and the further order denying its transfer are reversed.

REVERSED.

IN RE ESTATE OF EMMA BAKER, DECEASED.
FONNIEL WEHRER ET AL., APPELLEES, V. CARL A. BAKER ET AL., APPELLANTS.
72 N. W. 2d 844

Filed November 4, 1955. No. 33795.

1. **Wills.** There is a presumption that a person who makes a

testamentary disposition of his property does not intend it to be divided as though he died intestate.

2. ———. In the construction of a will the court is required to give effect to the true intent of the testator so far as it can be collected from the whole instrument.
3. ———. Parol evidence is inadmissible to determine the intent of a testator as expressed in his will, unless there is a latent ambiguity therein which makes his intent obscure or uncertain.
4. ———. Where in a will there is a patent ambiguity resulting from the use of words, and nothing appears within its four corners to resolve or clarify the ambiguity, the words must be given their generally accepted literal and grammatical meaning.
5. ———. In construing a will the term "children" does not include grandchildren unless an intention to that effect can clearly be gathered from the language of the will.
6. ———. The general rule is that the time for ascertaining the members of a class depends upon the intention of the testator. Ordinarily the members of the class are to be determined as of the time the gift is to take effect.
7. ———. Since a will speaks as of the date of a testator's death, the members of the class will be determined as of the date of the death of the testator, unless a contrary intent is shown by the will.
8. ———. A gift "to my children to be theirs absolutely, share and share alike" is a gift to the children of the testator living at the time fixed by the will, when the word "children" is not qualified or given a different meaning by the will.
9. ———. The provision in a will, "should any of my said children die before my death," the issue of such deceased children shall share by representation, shows the intent of testatrix that the class shall be ascertained as of the date of the will and not as of her death. Otherwise the provision would have no meaning.

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

Kenneth M. Olds and *Thomas L. Grady*, for appellants.

H. D. Addison and *Greydon L. Nichols*, for appellees.

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

CARTER, J.

This is a suit involving the construction of the residuary clause of the will of Emma Baker, deceased, who died on March 12, 1954. The trial court found that the appellees were entitled to share in the estate by representation, they being children of deceased children of the testatrix who had died prior to the execution of the will. The appellants, the children of Emma Baker living at the time the will was made, have appealed.

The residuary clause of the will provides: "All the rest, residue and remainder of my estate which I now have or may hereafter become possessed of I give, devise and bequeath to my children to be theirs absolutely, share and share alike. Should any of my said children die before my death leaving issue the interest of such child shall go to his issue by right of representation."

The controlling facts are not in dispute. The testatrix was the mother of nine children, five of whom were living on the date the will was executed on June 29, 1951, and who were also living on the date of her death. These five children are the appellants in the present appeal. On the date the will was executed, four children of the testatrix were dead, to-wit: Marguriete B. Mulvey, a daughter who left surviving a daughter, Gwendolyn Bentzien, and a son, Tracy Mulvey. Wendell A. Baker, a son who left no issue. William S. Baker, a son who left surviving a daughter, Fonniel Wehrer. Minnie Carson, a daughter who left a son, Harvey Carson; a son, Quentin Carson; a son, Earl Carson; a daughter, Louella Houdesheldt; and a daughter, Louise DeWitt. The sole question presented by the appeal is whether or not the issue of the children of testatrix who were deceased when the will was executed are entitled to share in the residuary estate under the quoted residuary clause of her will.

The trial court permitted the introduction of extrinsic evidence in this case. Such evidence is admissible only in case there is a latent ambiguity in the will.

If the ambiguity is patent, extrinsic evidence is inadmissible. Any ambiguity existing in the present case is patent and becomes a question of law as to the meaning to be given to the language of the will itself. Where in a will there is a patent ambiguity resulting from the use of words, and nothing appears within its four corners to resolve or clarify the ambiguity, the words must be given their generally accepted literal and grammatical meaning. Brandeis v. Brandeis, 150 Neb. 222, 34 N. W. 2d 159; In re Estate of Pfost, 139 Neb. 784, 298 N. W. 739.

The question has been determined by the decisions of this court, and we shall not undertake to discuss cases from other jurisdictions. There is a presumption that a person who makes a testamentary disposition of his property does not intend it to be divided as though he died intestate. Kramer v. Larson, 158 Neb. 404, 63 N. W. 2d 349. But where there is nothing in the will to the contrary, the presumption is that the testator intended that his property should go where the statute of descent would take it in the absence of a will. Roberts v. Roberts, 147 Neb. 494, 23 N. W. 2d 774. In the construction of a will the court is required to give effect to the true intent of the testator so far as it can be collected from the whole instrument. In its construction the generally accepted literal, natural, and grammatical meaning must be given to the words used. Brandeis v. Brandeis, *supra*. In construing a will the term "children" does not include grandchildren unless an intention to that effect can clearly be gathered from the language of the will. Brown v. Brown, 71 Neb. 200, 98 N. W. 718, 115 Am. S. R. 568; Lacy v. Murdock, 147 Neb. 242, 22 N. W. 2d 713; Tiehen v. Hebenstreit, 152 Neb. 753, 42 N. W. 2d 802. The general rule is that the time for ascertaining the members of a class depends upon the intention of the testator. Ordinarily the members of the class are to be determined as of the time the gift is to take effect. Since a will speaks as of the

date of a testator's death, the members of the class will be determined as of the date of the death of the testator, unless a contrary intent is shown by the will. Lacy v. Murdock, *supra*; Tiehen v. Hebenstreit, *supra*. We find nothing in the will which qualifies the word "children." Unexplained and unqualified, it refers to the children of the testator living at the date of the death of the testator. Tiehen v. Hebenstreit, *supra*.

The second sentence in the residuary clause which provides in part "should any of my said children die before my death" indicates that the testatrix intended that the members of the class should be ascertained as of the date of the execution of the will, rather than at the time of the death of the testatrix. The distinction is not a material one in the present case as the five children living at the time of the execution of the will were all living at the time of the death of the testatrix. It is clear also that the use of the words "said children" in the sentence relates the provision of that sentence to the children ascertained to be the members of the class designated in the first sentence of the residuary clause, and no others.

Since the word "children" is not qualified in any way by the will, it means the living children of the testatrix at the time indicated by the will. No reference is made in the will to the heirs or descendants of any child who was deceased at the time the will was made, and consequently they are not designated beneficiaries. The provision in the residuary clause that if "any of my said children die before my death" intends to provide that if any one of the children of the testatrix ascertained to be included within this clause of the will shall die in her lifetime, his issue shall take the share of the deceased child. Obviously a child already dead was not included in this provision, and as no provision was made for her deceased children, or their issue, they can have no interest in the estate. The second sentence of the residuary clause shows the in-

tent of the testatrix that the class shall be ascertained as of the date of the will and not as of her death. The children of testatrix who were deceased at the time she executed her will had no interest in the residuary estate because the entire residuary estate was given to her living children. There was no share, therefore, that appellees could take by representation. And since "children" does not include grandchildren, in the absence of qualifying language indicating that they should be so considered, appellees can take nothing because of their relationship as grandchildren of the testatrix.

It is clear therefore that the sole beneficiaries of the residuary clause of the will are the five children of the testatrix, living at the time the will was drawn. Since they were all living at the time of the death of the testatrix they alone are the beneficiaries of the residuary estate. Any claim on the part of the appellees is necessarily based on the interest of their deceased parents by representation. Their parents having no interest under the terms of the will, they can have none.

It is contended that testatrix intended something different than the result we have reached because of Item 4 of the will wherein she gave her personal effects and household goods to her children living at the time of her death. The fact that she created a class whose members are to be determined at a different time for this purpose has no bearing upon the class she created as beneficiaries of her residuary estate. This is a perogative that any testator has in executing a will. We fail to find where this item in any manner relates to the intent of the testatrix in fixing the class which was to receive her residuary estate.

The trial court erred in finding that the appellees were entitled to share in the residuary estate of Emma Baker. The decree of the district court is reversed and the cause remanded with directions to the trial court to enter a decree in accordance with this opinion.

REVERSED AND REMANDED.

STATE OF NEBRASKA EX REL. ELEANOR KLOSTERMEIER, APPELLEE, V. EMIL KLOSTERMEIER, APPELLANT.
72 N. W. 2d 848

Filed November 11, 1955. No. 33781.

1. **Children Born Out of Wedlock.** The uncorroborated testimony of the mother of a child born out of wedlock is not sufficient to support a verdict or finding that the alleged father is the actual father.
2. ———. In an action to establish the paternity of a child born out of wedlock it is not essential to a verdict or finding of guilty that the testimony of the mother shall be corroborated by the testimony of other witnesses as to the act producing conception, but only that she be corroborated as to material facts and circumstances which tend to support her testimony and from which, together with her testimony as to the principal fact, the inference of guilt may be drawn.
3. ———. In an action to establish the paternity of a child born out of wedlock, the defense of sterility is one of fact for a jury.
4. ———. In an action to establish the paternity of a child born out of wedlock, only a preponderance of the evidence is necessary to sustain a conviction.
5. ———. In an action to establish the paternity of a child born out of wedlock, a verdict rendered on conflicting evidence will be sustained unless it is clearly wrong.

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

J. A. Hayward and *Herbert W. Baird,* for appellant.

Joseph Ach, Alan L. Steinacher, and *Joe T. Vosoba,* for appellee.

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

YEAGER, J.

This is an action by the State of Nebraska on relation of Eleanor Klostermeier, plaintiff and appellee, against Emil Klostermeier, defendant and appellant. The action was originally instituted by the filing of a complaint in the county court of Saline County, Nebraska, charg-

ing that the defendant was the father of an unborn child of Eleanor Klostermeier which child, if born alive, would be born out of wedlock. Eleanor Klostermeier was the complainant and she will be hereinafter so referred to. The child was born alive and through appropriate proceedings the case became an action in the district court.

In the district court the issue as to whether or not the defendant was the father of the child was tried to a jury. The verdict of the jury was that the defendant was guilty, the effect of which was to say that he was the father. Later a hearing was had to the court the purpose of which was to have fixed and determined the amount which the defendant should be required to pay for the support of the child. At that hearing it was adjudicated that the defendant should pay to Saline County for doctor and hospital bills $141.25 and $5,040 for child support as follows: For doctor and hospital bills $35.30 on January 17, 1955, $35.30 on the 15th of the two succeeding months, and $35.35 on the 15th of the next month; and that starting on the 18th day of April and on the 18th of each month thereafter he should pay $20 until the total sum of $5,040 awarded for child support was paid.

Motion for new trial, termed motion to set aside verdict and for judgment non obstante veredicto, was duly filed. This was in due course overruled. From the judgment on the verdict, the judgment fixing the amount of payments to be made, and the order overruling the motion the defendant has appealed.

The assignments of error in the brief are numerous but in the light of the manner in which the case has been presented the only question before this court is that of whether or not the verdict finding that the defendant is the father of this child born out of wedlock is sustained by the evidence. The propriety of the award is not discussed.

The testimony of the complainant as to the act of her-

self and of the defendant which was productive of this child is clear, specific, and unequivocal. Nothing has been found in it from which it may be said that it was incapable of belief.

This evidence of complainant in and of itself was not sufficient to sustain the verdict. Section 13-112, R. R. S. 1943, provides in part as follows: "The uncorroborated testimony of the mother shall not alone be sufficient to support a verdict or finding that the alleged father is actually the father."

One of the contentions made by the defendant as ground for reversal herein is that the testimony of the complainant stood without corroboration.

Attention has not been called to any case wherein this court has spoken upon the character, quality, or extent of corroboration required in cases of this kind. However it has spoken on a number of occasions with reference to it in another class of cases wherein the testimony of the prosecutrix must be corroborated, and no reason appears as to why the rule and observations applicable to the other class of cases should not be made applicable in cases such as this one.

In criminal prosecutions wherein the charge is rape a conviction may be sustained only if the testimony of the prosecutrix is corroborated. As to the character and quality of corroboration required this court said in an early case: "In a prosecution for rape, it is not essential to a conviction that the prosecutrix should be corroborated by the testimony of other witnesses as to the particular act constituting the offense. It is sufficient if she be corroborated as to material facts and circumstances which tend to support her testimony, and from which, together with her testimony as to the principal fact, the inference of guilt may be drawn." Fager v. State, 22 Neb. 332, 35 N. W. 195. The pronouncement has been consistently adhered to in the later decisions. See, Aller v. State, 114 Neb. 59, 205 N. W. 939; Beer v. State, 129 Neb. 366, 261 N. W. 824; Haynes v.

State, 137 Neb. 69, 288 N. W. 382; Frank v. State, 150 Neb. 745, 35 N. W. 2d 816; Hughes v. State, 154 Neb. 86, 46 N. W. 2d 904.

In the case of Beer v. State, *supra,* while there were other circumstances, being together in a room was evidently regarded as a corroborating circumstance. In Aller v. State, *supra,* it was pointed out that opportunity and inclination could be regarded as corroborating circumstances.

In this case the testimony as to the act and the time of its commission was positive and clear. The circumstances relied upon as corroboration were that the defendant was in the home of complainant at about the time that conception took place. Opportunity existed. A physician testified that conception took place at about the time the complainant said the act took place.

We think that, within the meaning of the rule, the circumstances related in the evidence satisfy the statutory requirement as to corroboration.

The defendant of course denied the acts charged against him. In addition he adduced evidence of sterility on his part. His own testimony in this regard was supported by that of a specalist in the genito-urinary field of medicine and surgery. The evidence of this witness supported the claim of sterility produced by surgery at the time of trial. However, he was not able to testify that the surgery was performed before the conception of this child born out of wedlock. The question of sterility was one of fact and for the jury.

In Beer v. State, *supra,* one of the questions for determination was that of impotency. As to it this court said: "Whether the defendant was impotent was, under the evidence, a question of fact for the jury."

It is true that sterility rather than impotency is involved here but reason does not suggest that a different rule should apply.

As to the weight of evidence in this kind of case this court has said: "In a bastardy proceeding, only a pre-

ponderance of the evidence is necessary to a conviction, and a verdict rendered on conflicting evidence will be sustained unless it is clearly wrong." Parrish v. Hodges, 98 Neb. 403, 153 N. W. 493. See, also, Torske v. Johansen, 104 Neb. 378, 177 N. W. 169; Madsen v. Poore, 131 Neb. 195, 267 N. W. 418.

The present action is not nominally a bastardy action but it is the same as the old action known by that name. By a statutory change a child born out of wedlock is simply so denominated instead of, as formerly, a bastard.

There is nothing in the record which would justify this court in saying that the verdict of the jury in this case was clearly wrong. In this light and in the light of the other observations contained herein it is found necessary to say that the question of whether or not the defendant was the father of complainant's child born out of wedlock was one to be determined by a jury. The applicable rule, as stated by this court, is the following: "Where the evidence of complainant in a bastardy proceeding, if undisputed, would be sufficient to make a prima facie case, and a direct conflict in the evidence appears, the issue of fact as to the paternity of the child must be submitted to a jury to determine." Martin v. Leininger, 103 Neb. 448, 172 N. W. 353. See, also, State ex rel. Bishop v. Liston, 110 Neb. 487, 194 N. W. 477.

The conclusion reached is that the issues presented by the complaint were properly submitted to a jury and that the record contains no error which would justify vacating or setting aside the verdict or the judgment rendered thereon. The judgment of the district court is therefore affirmed.

AFFIRMED.

HELEN M. SCHROEDER, APPELLEE, V. HAROLD ELY ET AL., APPELLANTS.
73 N. W. 2d 165

Filed November 18, 1955. No. 33716.

1. **Compromise and Settlement.** Where parties capable of entering into a contract enter into an agreement whereby the one agrees to pay, and the other to accept, a certain sum in full satisfaction and discharge of a disputed claim urged by the latter against the former, such agreement constitutes a valid contract between the parties.
2. ———. Where a compromise is pleaded and proved, in the absence of fraud, mistake, or duress, it is binding on the parties. In order to avoid the effect of such a compromise settlement it is necessary to plead and prove fraud, mistake, or duress which resulted in an unconscionable settlement.
3. **Contracts: Equity.** It is the duty of persons holding confidential relations, of whatever nature, with others, to put themselves on terms of perfect equality, by furnishing full, exact, and truthful information of all matters which enter into a negotiation between them.
4. ———: ———. When the contract is of such a nature as to justify the conclusion that a party has been imposed upon by cunning, artifice, or undue influence, a court of equity will not hesitate to set the contract aside.
5. **Estoppel.** The doctrine of equitable estoppel is frequently applied to transactions in which it is found that it would be unconscionable to permit a person to maintain a position inconsistent with one in which he has acquiesced or of which he has accepted any benefit. The acceptance of any benefit from a transaction or contract, with knowledge or notice of the facts and rights, may also create an estoppel.
6. **Liens: Equity.** An equitable lien is a right, not recognized at law, to have a fund or specific property, or its proceeds, applied in whole or in part to the payment of a particular debt or class of debts. It is not an estate or property in the thing itself, nor is it a right to recover the thing, that is, it is not a right which may be the basis of a possessory action, but it is merely a charge upon it.
7. ———: ———. In the absence of an express contract, a lien based upon the fundamental maxims of equity may be implied and declared by a court of equity out of general considerations of right and justice as applied to the relationship of the parties and the circumstances of their dealing.

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

E. Merle McDermott and *Cunningham & Cunningham,* for appellants.

A. G. Abbott, for appellee.

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

WENKE, J.

This is an appeal from the district court for Hall County by Harold and Faye Ely, defendants below, from a judgment against them and in favor of Helen M. Schroeder, plaintiff below, for the sum of $56,055 with interest at 6 percent from June 25, 1954, and costs.

Appellee sued appellants for an accounting of all money she had advanced to them under and in pursuance of an alleged oral agreement she claims was entered into by the parties hereto in July 1947. Under the terms of the agreement she alleged she agreed to loan appellants the necessary money to construct and equip a motel on condition that appellee would have a home with appellants as one of the family for the balance of her life. The basis for the action is the claim that appellee was forced to leave the home of appellants on July 30, 1953. In addition to granting appellee a judgment for the amount hereinbefore set forth the court, pursuant to appellee's prayer therefor, granted her an equitable lien on the motel property, both real and personal, for the full amount it found she was entitled to. This appeal was taken by the appellants after their motion for a new trial had been overruled.

For convenience we shall herein refer to the appellants as the Elys or by their individual names of Harold Ely and Faye Ely.

The action, being equitable in character, is considered here de novo. In view of the evidence adduced by the parties on some material questions of fact, the following

principle has application: "Actions in equity, on appeal to this court, are triable de novo * * * subject, however, to the rule that when the evidence on material questions of fact is in irreconcilable conflict this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying and must have accepted one version of the facts rather than the opposite." Sopcich v. Tangeman, 153 Neb. 506, 45 N. W. 2d 478. See, also, Smith v. Black, 143 Neb. 244, 9 N. W. 2d 193.

The principal question raised by this appeal is whether or not the evidence sustains the judgment. Involved in that issue is whether or not the written compromise settlement executed by the parties on September 17, 1953, after this litigation was begun on September 10, 1953, should be upheld. Involved in the latter issue is the question of whether or not appellee, by her conduct, is now estopped to deny the compromise settlement.

Appellee, at the time of trial in June 1954, was 63 years of age. She was born in Dennison, Iowa, and came to Hall County, Nebraska, in 1895 with her parents. She was educated in the rural schools of Hall County, attending school to the eighth grade. Appellee never married and has spent most of her life doing housework for others. On Christmas day of 1942 she became acquainted with the Elys at the home of mutual friends.

The Elys, who are husband and wife, were, insofar as the record shows, respectively 50 and 66 years of age at the time of trial. They were married in 1940 and came to Nebraska and Hall County sometime in 1942. Their coming resulted from his employment with a contractor who was engaged in helping to construct the Cornhusker Ordnance Plant.

In December 1944 the Elys bought an improved 18-acre tract of land south of Grand Island located on South Locust Street at the intersection of U. S. Highways Nos. 34 and 281. They immediately moved onto the premises and thereafter engaged in the business of buy-

ing or raising chickens, ducks, and rabbits, dressing them, and then selling the dressed product. They also raised and sold dogs. The property was equipped for this business. In June 1947 appellee came to their place and started working on a part-time basis, working about 2 days a week. At that time she lived in her own home located at 1420 West Louise Street in Grand Island.

Appellee had always worked for a very modest wage. She was one of two children, having a brother by the name of Peter. She had inherited a great deal of property from her relatives, particularly her parents and grandparents. Her inheritance included interests in farms in Story, Madison, and Crawford Counties, Iowa, as well as substantial amounts of other personal property, including cash. While the evidence shows she had had very little business experience it appears she was extremely frugal and had saved the money she earned and the property she inherited.

Sometime during July 1947, while she was at the Elys' home, the Elys mentioned that they planned to start building a motel by constructing two cabins out of some used lumber they had on hand. Appellee at that time suggested to the Elys that she had plenty of money and they could use it to build a good motel. Out of this discussion an agreement was entered into whereby appellee was to advance the money necessary to build a motel and in return she was to have a home with the Elys for the rest of her life, the Elys to repay the money so advanced but not to pay interest for its use.

Under this arrangement appellee advanced substantial amounts of money, disposing of considerable of her real and personal property to do so. She advanced sufficient money to build a 13-unit modern motel. The building of this motel was started about August 26, 1947, and, for all practical purposes, was completed in July 1949. After this arrangement had been agreed upon appellee sold her home in Grand Island, the contract being dated July 29, 1947, and moved out to stay with the Elys.

For over 4 years everything worked out well although the parties had some differences. The first serious difficulty occurred when, on January 28, 1952, appellee was forced to leave the Ely home because of the conduct of Faye Ely. However, within about a month, a reconciliation was had and she moved back. Everything again seemed to run smoothly until July 30, 1953, when appellee was again forced to leave the Ely home because of the conduct of Faye Ely. We find the Elys failed to carry out their obligation to provide a home for appellee for the balance of her lifetime and that she left their home for good cause because the conduct of Faye Ely made it impossible for appellee to live with them and, because thereof, appellee was entitled to bring this action and to have an accounting of the money she had advanced and judgment therefor. See McCoy v. Cunningham, 141 Neb. 708, 4 N. W. 2d 835.

The evidence shows she advanced in excess of the amount for which judgment was rendered. Appellee testified that in July 1953 Harold Ely admitted he owed her about $84,000. We think that amount is about correct if the $7,000 appellee advanced for the purchase of 14 acres is included. However, that loan will be more fully discussed hereinafter and should not be included in the accounting herein sought. Suffice to say the evidence would entitle the appellee to a much larger judgment than she has obtained, but since she took no cross-appeal that question is not here.

This action was started on September 10, 1953, and the Elys were served on the same day. In her original petition appellee asked to recover the sum of $35,000. When she started this suit she did not know how much money she had advanced to the Elys as she had kept no account thereof, depending on Mr. Ely to do so. Her attorney had not then had time to check her accounts to ascertain the amount advanced. It appears from an ad in a Grand Island paper dated September 1, 1953, that the Elys were endeavoring to sell the motel prop-

erty. Appellee's counsel advised immediate suit in order to prevent the Elys from consummating a sale and leaving the community with the proceeds. Consequently the action was immediately started and the figure of $35,000 used although later, after a check of appellee's accounts had been made, an amended petition was filed on January 16, 1954, asking for the sum of $86,403.88.

Very shortly after the action was started Harold Ely and appellee entered into a settlement agreement dated September 17, 1953. Under the terms of the agreement appellee was to be paid in full the $7,000 mortgage which she held on the 14-acre tract of land purchased by the Elys in 1950, to be paid $32,000 which was to be secured by a mortgage on the motel property, and to be paid the amount she had paid in the spring of 1953 for furniture used in the motel. In addition the agreement provided the Elys were to continuously list the motel for sale. The evidence establishes that Harold Ely induced appellee to sign the settlement on the basis that it would put her back in the financial condition she was in when she came out to their place in 1947 before she had advanced any money to build the motel.

"Where parties capable of entering into a contract enter into an agreement whereby the one agrees to pay, and the other to accept, a certain sum in full satisfaction and discharge of a disputed claim urged by the latter against the former, such agreement constitutes a valid contract between the parties." Massillon Engine & Thresher Co. v. Prouty, 65 Neb. 496, 91 N. W. 384.

Where a compromise is pleaded and proved, in the absence of fraud, mistake, or duress, it is binding on the parties. In order to avoid the effect of such a compromise settlement it is necessary to plead and prove fraud, mistake, or duress which resulted in an unconscionable settlement. See Springfield Fire & Marine Ins. Co. v. Peterson, 93 Neb. 446, 140 N. W. 760. Appellee so pleaded in her reply.

While appellee contends otherwise we think the par-

ties, at the time they entered into the original agreement, dealt at arms length and fully understood the terms thereof. However, after appellee became a member of the Ely family in September 1947 a confidential relationship developed, especially between appellee and Harold Ely. She developed such complete confidence in Harold Ely that she consulted no one else about her business affairs and let him take care of them. In fact, at the Elys' suggestion, she told no one what she was doing. When he advised her in regard to any business matter the evidence shows she trusted him, relied on his advice, and always followed it to the extent that she kept no account of the money advanced, depending on him to do so as he had told her he would. This he failed to do. This confidence in him she never lost even though it was no longer possible for her to stay in the Ely home because of the conduct of Faye Ely. Incidentally Faye Ely was visiting in Texas at the time the settlement was entered into. With this background it is understandable how appellee accepted Harold Ely's figures to show the agreement would restore her to her 1947 financial condition when, in fact, it would not return even half the money she had advanced.

As early as Columbus Co. v. Hurford, 1 Neb. 146, we said: "It is the duty of persons holding confidential relations, of whatever nature, with others, to put themselves on terms of perfect equality, by furnishing full, exact and truthful information of all matters which enter into a negotiation between them."

"The rule as to confidential or fiduciary relations applies to any transaction or situation of advantage, in which confidence is rightfully reposed on one side and a resulting superiority and opportunity for influence is thereby created on the other. In any such case where confidence is known, or may reasonably be expected, to exist as a fact, whether it is of a legal, moral, social, domestic or personal character, equity will scrutinize the transaction critically—and especially so where

age, infirmity and instability are involved—to see that no inequitable action has been taken and no injustice has occurred. Its purpose is not merely to satisfy itself of absence of pressure or influence, but to be certain that the fullest and fairest explanation possible has been made, and that complete knowledge, understanding, intention, consent and freedom of action duly existed." Stieber v. Vanderlip, 136 Neb. 862, 287 N. W. 773.

A reasonable summary of the value of the property she owned at the time she went to live with the Elys, under the arrangements made as hereinbefore set forth, indicates a total of approximately $124,000 whereas when she left there in July 1953 it would total about $57,700 or a difference of $66,300. Deducting from this the $7,000 used to buy the 14-acre tract leaves a total of $59,300 as compared with the $32,000 the settlement agreement would give her. This does not include any income she received as rents, interest, or dividends during the years from 1947 to 1953, which was substantial. Considering the confidential relationship of the parties at the time this settlement agreement was entered into we thing Harold Ely overreached the appellee when he induced her to sign it on September 17, 1953, and it would be unconscionable to enforce it. As stated in Wilson v. Bergmann, 112 Neb. 145, 198 N. W. 671, and cited with approval in Cunningham v. Brewer, 144 Neb. 211, 13 N. W. 2d 113: "* * * when the contract is of such a nature as to justify the conclusion that a party has been imposed upon by cunning, artifice, or undue influence, a court of equity will not hestitate to set the contract aside." Appellee is entitled to have the compromise agreement set aside as the trial court decreed.

Did an estoppel arise by reason of what transpired subsequent to the settlement agreement of September 17, 1953, which would prevent appellee from repudiating that agreement? The Elys contend they partially performed it and that appellee accepted the benefits of their partial performance and is now estopped to deny the

effect of the compromise agreement and is bound thereby.

The rule here applicable is stated in Brisbin v. E. L. Oliver Lodge No. 335, 134 Neb. 517, 279 N. W. 277: "In 10 R. C. L. 694, sec. 22, it is stated: 'The doctrine of equitable estoppel is frequently applied to transactions in which it is found that it would be unconscionable to permit a person to maintain a position inconsistent with one in which he has acquiesced or of which he has accepted any benefit. * * * And so also the acceptance of any benefit from a transaction or contract, with knowledge or notice of the facts and rights, will create an estoppel.' "

The Elys testified that after September 17, 1953, they continuously listed the motel property for sale as the settlement provided. This was not done with appellee's approval because, on September 18, 1953, Harold Ely was informed that appellee did not intend to carry out the agreement and was given the reasons for her not being willing to do so. Consequently he could not create an estoppel, as far as appellee is concerned, by endeavoring to carry out the contract unless she knowingly received and accepted some material benefit by reason thereof. Such is not the fact.

As to the $32,000 note and mortgage it was tendered to appellee at the trial but not accepted.

Finally we come to a consideration of the mortgage referred to in the agreement which is on a 14-acre piece of bare land. The Elys bought this land in 1950 to prevent the possibility of a motel being built thereon as it is situated in the immediate neighborhood. The purchase price was $7,000 which appellee advanced and for which it was then understood she was to have and was given a mortgage. The original description in the mortgage was for 11.9 acres. That is the reason, when appellee sought the foreclosure thereof, she also sought a reformation of the description to cover the 14 acres that were purchased. It appears the correction was made by giving a new mortgage and the foreclosure dismissed.

In regard to the settlement agreement, as it relates to this obligation, Harold Ely agreed to do and did nothing he was not already legally obligated to do.

A careful consideration of all the facts convinces us that appellee did nothing nor did she receive any benefit therefrom that would now estop her from having the settlement agreement vacated and set aside.

There is one further factual matter which we will consider. However, considering the amount of the judgment, it is not too material. On January 1, 1951, appellee turned over to Harold Ely an envelope containing nine cancelled checks evidencing $15,250 of the amount she had advanced to the Elys under and in pursuance of the contract originally entered into. On this envelope she had written "Paid in Full Happy New Year from Helen 1951." It is clear from the evidence that appellee did not thereby intend to cancel that amount of the loan which the Elys then owed her but rather for the purpose of having him keep the checks for her and to show the Elys she would not press them for payment. It is evident that Harold Ely so understood it and always intended to pay appellee the amount thereof. At most it was a gift on condition that she have a home with them for life. That, as we have already said, became impossible because of the conduct of Faye Ely.

As said in Williamson v. Johnson, 62 Vt. 378, 20 A. 279, 9 L. R. A. 277, 22 Am. S. R. 117: "* * * the gifts were not absolute, but conditional, and * * * when the condition failed a right of action accrued to the plaintiff to recover the money."

Although the evidence adduced does not disclose the parties expressly agreed the appellee should have a lien on the motel property, both real and personal, for all money advanced the trial court's decree so provided. It provides: "* * * plaintiff be and she is awarded an equitable lien on the premises hereinbefore described owned by defendants in joint tenancy with the fixtures thereon and the equipment, utensils, appliances, utensils

and paraphernalia pertaining to the motel, restaurant, filling station and gift shop and the chattels hereinbefore referred to: * * *."

"An equitable lien is a right, not recognized at law, to have a fund or specific property, or its proceeds, applied in whole or in part to the payment of a particular debt or class of debts. It is not an estate or property in the thing itself, nor is it a right to recover the thing, that is, it is not a right which may be the basis of a possessory action, but it is merely a charge upon it. Such a lien may be created by an express contract which shows an intention to charge some particular property with a debt or obligation, or it may arise by implication from the relations and dealings of the parties whose interests are involved." 33 Am. Jur., Liens, § 18, p. 427.

As stated in 33 Am. Jur., Liens, § 21, p. 430: "In the absence of an express contract, a lien based upon the fundamental maxims of equity may be implied and declared by a court of equity out of general considerations of right and justice as applied to the relationship of the parties and the circumstances of their dealing." See, also, Hilton v. Clements, 137 Neb. 791, 291 N. W. 483; 53 C. J. S., Liens, § 4, p. 844.

Having come to the conclusions hereinbefore set forth, we affirm the decree of the trial court.

AFFIRMED.

HELEN M. SCHROEDER, APPELLEE, V. HAROLD ELY ET AL., APPELLANTS.
73 N. W. 2d 172

Filed November 18, 1955. No. 33754.

1. **Homesteads.** All that the law requires to establish a homestead is that the homestead claimant and his family reside in the habitation or dwelling house, whatever be its character, on the premises claimed as a homestead.
2. ———. Under the homestead law in force in this state a judgment is a lien only on the debtor's interest in lands, im-

pressed with the character of a homestead, in excess of $2,000.

3. ———. If the property is not capable of division, it may, in its entirety, then be sold; but from the proceeds of the sale an amount, in lieu of the homestead interest, must be preserved to the debtor. In such a case, however, the court must first determine whether the homestead property is of more value than $2,000, and whether or not the homestead selected can be segregated from the remainder of the property without material injury thereto.

4. **Courts: Equity.** The district courts of this state, being courts of general equity jurisdiction, are not limited in the exercise of such jurisdiction by statute.

APPEAL from the district court for Hall County: ERNEST G. KROGER, JUDGE. *Reversed and remanded with directions.*

E. Merle McDermott and *Cunningham & Cunningham,* for appellants.

A. G. Abbott, for appellee.

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

WENKE, J.

This appeal involves the question of homestead and arises in the same cause of action as was involved in Schroeder v. Ely, *ante* p. 252, 73 N. W. 2d 165. In the decree therein entered it was provided: "* * * that in default of the payment of the same ($56,055) with interest and costs herein taxed to defendants within ninety days from June 25, 1954, that the premises, equipment and chattels hereinbefore referred to be sold by the sheriff as upon execution * * *."

Pursuant thereto and in accordance therewith, no supersedeas bond having been given in the appeal taken from the rendition of that decree and the amount therein found due the plaintiff remaining unsatisfied, the clerk of the district court for Hall County, on September 30, 1954, issued an order of sale to satisfy the amount found due the plaintiff. Thereupon the sheriff for Hall County,

under authority of the decree of the court and pursuant to the directions contained in the order of sale, advertised the property described therein for sale at public auction at 2 p. m. on November 12, 1954, at the north front door of the courthouse in Grand Island, Nebraska.

On October 25, 1954, Harold Ely, one of the defendants, pursuant to and by authority of section 40-105, R. R. S. 1943, filed his application in the office of the clerk of the district court making a selection and asking for a determination of his homestead exemption in the real property being advertised for sale. He asked the court to set aside the following part of the real estate being offered for sale, on which the house in which the Elys dwell is located, and his homestead, to wit: "Part of the Northeast Quarter of the Northeast quarter of Section 33 in Township 11, North, Range 9, West of the 6th P. M. more particularly described as follows: Commencing at a point on the East line of said Section 460.1 feet South from the North East corner of said section, thence in a Westerly direction and parallel with the North line of said Section 222 feet, thence at right angles in a southerly direction 197 feet, thence at right angles in an easterly direction 222 feet to the east line of said North East Quarter and thence in a northerly direction 197 feet to the point of beginning, all in Hall County, Nebraska."

Helen M. Schroeder, the plaintiff, joined issue on this claim and the matter proceeded to hearing and determination pursuant to and in accordance with section 40-108, R. R. S. 1943. The trial court, on November 26, 1954, found the defendants had a homestead in the premises but that it was subject to the lien of the plaintiff and therefore decreed the defendants were not entitled to have a homestead set off to them as exempt. The defendants thereupon filed a motion for new trial and, from the overruling thereof, have perfected this appeal.

We shall herein refer to the appellants as the Elys or as Harold Ely and Faye Ely.

The sheriff proceeded with the sale and on November 15, 1954, made his return showing he had sold the property to appellee for the sum of $40,000. This sale the court confirmed on December 6, 1954, but directed that $2,000 of the amount be reserved and not ordered distributed until after this appeal had been completed.

In their answer in the original action the Elys pleaded: "Defendants further allege that they reside on the said 18 acres whereon the said motel is located and the same is their homestead under the laws of the State of Nebraska." In her reply appellee stated she "Admits that defendants have a homestead right in said motel premises."

We said in Wright v. Lincoln City Lines, Inc., 160 Neb. 714, 71 N. W. 2d 182:

"A party may at any time invoke the language of the pleading of his adversary on which the case is tried on a particular issue as rendering certain facts indisputable; and in so doing he is neither required nor permitted to offer the pleading in evidence.

"An admission made in a pleading on which the trial is had is more than an ordinary admission. It is a judicial admission and constitutes a waiver of all controversy so far as the adverse party desires to take advantage of it, and is therefore a limitation of the issues."

But the issue of homestead was not tried on these pleadings and consequently the foregoing rule has no application.

The Elys bought the 18-acre tract, on part of which the motel was subsequently built, in December 1944 and moved into the house located on the northeast corner thereof and have lived there ever since. It is their homestead within the meaning of section 40-101, R. R. S. 1943. As stated in Hawley v. Arnold, 137 Neb. 238, 288 N. W. 823: "'* * * All that the law requires on the

subject is that the homestead claimant and his family should reside in this habitation or dwellinghouse, whatever be its character, on the premises claimed as a homestead.' (Corey v. Schuster, 44 Neb. 269, 62 N. W. 470.)"

May the Elys select as their homestead a 1-acre tract together with the residence thereon and segregate it from the balance of the 18 acres and hold it exempt against subsequent judgment obtained against them? Generally the answer is yes unless the judgment is obtained for a debt included under the provisions of section 40-103, R. R. S. 1943, provided the tract selected does not exceed $2,000 in value or its segregation does not materially damage the balance of the tract. See §§ 40-101, 40-108, 40-110, R. R. S. 1943. However, there are situations in which a court of equity has and will deny the claim when to do so would be unconscionable. See the cases hereinafter referred to.

"Under the homestead law in force in this state a judgment is a lien alone on the debtor's interest in lands, impressed with the character of a homestead, in excess of $2,000." Farmers Loan & Trust Co. v. Schwenk, 54 Neb. 657, 74 N. W. 1063.

"If the property is not capable of division, it may, in its entirety, then be sold; but from the proceeds of the sale an amount, in lieu of the homestead interest, must be preserved to the debtor. * * * In such a case, the questions to be determined by the court are whether the homestead property is more value than $2,000, and whether it may be segregated from the remainder of the property without material injury." Pohlenz v. Panko, 106 Neb. 156, 182 N. W. 972.

From the evidence adduced we find the tract selected by the Elys to be set aside for a homestead has a value substantially in excess of $2,000 and that its segregation from the balance of the 18-acre tract would materially injure the property as a whole. Consequently Harold

Ely's request to have it set aside as their homestead should be denied.

The trial court found that, under the equitable situation here existing, the Elys should be denied their homestead rights. That equity may do so, in proper cases, has long been held by this court. As stated in Cochran v. Cochran, 42 Neb. 612, 60 N. W. 942: "The district courts of this state, being courts of general equity jurisdiction, are not limited in the exercise of such jurisdiction by statute." See, also, Rhoades v. Rhoades, 78 Neb. 495, 111 N. W. 122, 126 Am. S. R. 611; Lacey v. Zeigler, 98 Neb. 380, 152 N. W. 792; Jones v. Carpenter, 90 Fla. 407, 106 So. 127, 43 A. L. R. 1409.

We have denied such homestead rights in the following situations: Where deeds have been set aside which were given in consideration of an agreement to support for life, McCoy v. Cunningham, 141 Neb. 708, 4 N. W. 2d 835; enforcement of decrees providing for the payment of alimony, Best v. Zutavern, 53 Neb. 604, 74 N. W. 64; where money has been unlawfully taken from another and placed in property that became the homestead, Nebraska Nat. Bank v. Johnson, 51 Neb. 546, 71 N. W. 294; specific enforcement of agreements to convey property for support where property is the homestead, Denesia v. Denesia, 116 Neb. 789, 219 N. W. 142; enforcement of purchase money obligations, either mortgage or contract, Jackson v. Phillips, 57 Neb. 189, 77 N. W. 683; and enforcement of a right by adverse possession, Jensen v. Showalter, 79 Neb. 544, 113 N. W. 202.

Under the circumstances disclosed in this record we do not think appellee is entitled to have the homestead right of the Elys destroyed.

From a consideration of the record as a whole we have come to the conclusion that the Elys are entitled to a homestead interest in the 18-acre tract on which the motel was built. However, because the tract which they selected is in excess of the value of $2,000 and would, if segregated therefrom materially injure the

value of the whole tract, we direct that they be paid $2,000 out of the proceeds of the sale in lieu thereof.

In view of the foregoing we reverse the judgment of the trial court denying the Elys the benefit of their homestead right and direct it to enter a judgment in accordance herewith.

REVERSED AND REMANDED WITH DIRECTIONS.

HARRY C. HOGUE ET AL., APPELLANTS AND CROSS-APPELLEES, V. VIRGIL F. DREESZEN ET AL., APPELLEES AND CROSS-APPELLANTS.
73 N. W. 2d 159

Filed November 18, 1955. No. 33788.

1. **Covenants.** Property owners in a restricted subdivision are not estopped from preventing a flagrant violation of restrictive covenants on account of their theretofore failure to stop a slight deviation from the strict letter of such restrictions.
2. ———. The change in the character of certain sections of property bordering on a street does not affect a large neighborhood bordering on that street, where the lot owners in such neighborhood have strictly adhered to the restrictive covenants in their deeds.
3. **Covenants: Equity.** Where the owners of a tract of land have platted the same into many lots and formed and carried out a plan to sell the lots subject to covenants restricting them to the construction of homes of a certain character, equity will protect the rights of other grantees who accepted deeds in the same locality with similar restrictions.
4. **Covenants.** A covenant of the character involved here is to be construed in connection with the surrounding circumstances, which the parties are supposed to have had in mind at the time they made it, the location and character of the entire tract of land, the purpose of the restriction, whether it was for the sole benefit of the grantor or for the benefit of the grantee and subsequent purchasers, and whether it was in pursuance of a general building plan for the development and improvement of the property. If there was a general building scheme the purpose of which was to restrict a district to single residences, it matters not how it is expressed in the covenant, or what the covenant may be called. However, so far as the purpose is definitely stated in the covenant, that purpose should control.

5. ———. Restrictions as to the erection or use of buildings or other structures and improvements will be so construed as, if possible, to effectuate the intention of the parties.
6. ———. A covenant restricting the erection of any building, except for dwelling house purposes, applies to the use as well as to the character of the building.
7. **Injunctions: Covenants.** A mandatory injunction may be issued directing the removal or alteration of a building or structure erected in violation of a restrictive covenant.

APPEAL from the district court for Lancaster County: JOHN L. POLK, JUDGE. *Affirmed in part, and in part reversed and remanded with directions.*

Frederick J. Patz and *Sterling F. Mutz,* for appellants.

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

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

SIMMONS, C. J.

This action was brought to enjoin the construction of a building which the plaintiffs contend was being carried out in violation of restrictive covenants. Issues were made and trial was had. The trial court held that the building being constructed was not in violation of the restriction and that the restriction was valid and binding.

Plaintiffs are owners of property adjoining that of defendants. They appeal from a denial of relief. Defendants appeal from the decree insofar as it holds the restriction to be valid and binding. We affirm the judgment of the court holding the restriction to be valid and binding. We reverse that part of the decree which held that the building was not in violation of the restriction, and remand the cause with directions to issue a mandatory injunction.

In October 1917, the National Security Investment Company and other owners filed a plat to East Lawn Terrace. This subdivision consisted of 14 blocks lying south of A Street and west of Fortieth Street in the city

of Lincoln. The western border of the subdivision was halfway between Thirty-third and Thirty-fifth Streets. West of that to Thirty-third Street was the Marydell Subdivision. West of Thirty-third Street was an addition known as Perkins Addition. The National Security Investment Company acquired a part of that addition in December 1917 and in June 1919 replatted that land as Block 15, East Lawn Terrace. It was physically separated from the 1917 dedicated East Lawn Terrace Subdivision by the 300-foot Marydell Addition and Thirty-third Street.

Defendants own Lot 1, Block 1, of East Lawn Terrace, holding by mesne conveyances from the National Security Investment Company. This lot is on the corner of Fortieth and A Streets.

The deed to the first grantee was for Lots 1, 2, and 3. It contained the following provision: "This conveyance is made with the express understanding that no store, public stable, wood yard, manufacturing establishment, laundry, factory, warehouse or shop shall be erected upon said lots; that no more than one dwelling shall be erected upon any one lot, and no dwelling house erected upon the within described property shall cost less than Twenty-five Hundred Dollars; that no building shall be moved on to said lots * * *."

Plaintiffs are the owners by mesne conveyances of Lot 24, Block 1, which adjoins the defendants' lot on the south. The deed to the first grantee of this property contained the following provision: "This conveyance is made with the express understanding that no store, public stable, wood yard, manufacturing establishment, laundry, factory, warehouse or shop shall be erected upon any one lot, and no dwelling house erected upon the within described property shall cost less than Twenty-five Hundred Dollars: and no building shall be moved on to said lots * * *."

It appears that provisions of similar import were placed in all of the deeds conveying the lots in Blocks

1 to 14 of East Lawn Terrace, except as to six lots in Block 3, which were not owned by the National Security Investment Company.

It further appears that in the intervening years substantially all of the lots in all of the 14 blocks of East Lawn Terrace have been improved with single unit dwellings. Several owners testified that they bought and improved their property with knowledge of the restrictions and in reliance thereon. The 14 blocks consist of a compact restricted residential area.

Defendant testified from hearsay that some occupant of a residence in this addition either sold or made radio parts, operating out of his basement. Defendant also testified about one owner who had closed the front of an attached garage, converted it into a room, and operated a beauty parlor there.

It also appears that across the street, north and east of Fortieth and A Streets, there are business buildings.

There is evidence that in several of the conveyances of lots in Block 15, East Lawn Terrace, there were inserted restrictions such as above set out. In the intervening years, Block 15 has been changed into largely a commercial area. In doing so, it does not appear whether the restrictions were removed, waived, or ignored.

The defendants purchased their property in February 1953. It was then unimproved. Thereafter they prepared the plans for a building on the lot. The outside dimensions were to be 26 feet 6 inches wide by 40 feet long, with flat roof, and about 9 feet high. It was to contain three rooms with toilet and heating facilities. One of the rooms was to open on Fortieth Street, with a door and wide window. Two other rooms had doors facing the corner of Fortieth and A Streets, with wide windows facing the streets. Thereafter they secured on March 1, 1954, a building permit from the city authorizing the construction of the building "to be used as Dental & Barber Shop." Either that day or the next

day the defendants set up the lines for foundation excavation. Plaintiffs and other property owners in the block immediately protested to defendants, and advised them of the restrictions. Defendants replied that they knew of the restrictions and would observe them, but that they had a building permit and authority to proceed with the building.

On March 3, 1954, defendants started to dig the footings. Plaintiffs and others again protested the construction. On March 6, 1954, defendants had five or six rows of concrete blocks laid on two sides of the building when this action was started.

Defendants continued the construction. On April 9, 1954, a restraining order was issued. Defendants testified that they stopped construction at that time. When construction was stopped the exterior portion of the building was completed, the roof was on, and the doors and windows were not in.

There is no evidence that the lot of defendants was not suitable for residence purposes. It appears that the remaining lots in the block were so improved and used. The evidence is that it was more valuable for business purposes and that defendants bought it and intended to so use it, subject to the restrictions and zoning ordinances of the city.

There is also evidence, undisputed, that the construction and use of the building proposed by defendants would materially depreciate the value of the property of plaintiffs and other residence owners in the block involved.

At the conclusion of the trial, plaintiffs secured leave and amended the prayer of their petition to ask for a mandatory injunction.

While the case was under submission, defendants secured leave to reopen the trial and offered the evidence about the platting and use of the land in Block 15, East Lawn Terrace, and about the beauty shop.

Defendants' cross-appeal is predicated on the proposi-

tion that the restrictions have become obsolete and invalid because of a change in character of the neighborhood and acquiescence in violation of the restrictions, and that the plaintiffs are barred by laches from maintaining the action.

There is no evidence that the restrictions have become obsolete. The evidence is to the contrary. The charge of a change in the character of the neighborhood rests upon the use of the property north and east of the property here involved for business purposes. The terms and conditions of the title to those properties is not shown. Obviously, there must be a dividing line somewhere between restricted and nonrestricted areas, or the restrictions would be of no force. The situation here is no exception to that situation.

The charge of an acquiescence in violation of the restrictions rests upon the beauty parlor and radio shop evidence and the use of the property in Block 15, East Lawn Terrace.

The use of the property in Block 15, East Lawn Terrace, a different subdivision some 7 blocks from this property, does not affect this situation. There is the circumstance that a corporation of the same name was an owner in part in both dedications and the circumstance that the subdivision consisting of Block 15, East Lawn Terrace, is of the same name as the earlier subdivision. Those circumstances do not affect the problem we have here. The hearsay statement of the radioman's operations is not of importance. The evidence as to the beauty parlor is little more than hearsay, save that there is in evidence a picture of the outside of the room with a picture in the window of a lady with her hair dressed in style. Knowledge of these activities, their duration, and their extent, is not shown. Whether or not they constitute violations of the restrictions is not for decision here. These matters do not furnish a foundation for an equity court to set aside the restrictions imposed in the deeds here involved. There is no

showing of failure to act on the part of the plaintiffs but in any event, "Plaintiffs are not estopped from preventing a most flagrant violation of the restrictions on account of their theretofore failure to stop a slight deviation from the strict letter of such restrictions." Boston-Edison Protective Assn. v. Goodlove, 248 Mich. 625, 227 N. W. 772.

In the above case, it was also held: "The change in the character of certain sections of property bordering on a street does not affect a large neighborhood bordering on that street, where the lot owners in such neighborhood have strictly adhered to the restrictive covenants in their deeds."

The cross-appeal is denied.

This brings us to the matter of plaintiffs' appeal as to whether or not the building being erected by defendants is in violation of the restriction.

In Wright v. Pfrimmer, 99 Neb. 447, 156 N. W. 1060, L. R. A. 1917A 323, we held: "When similar covenants are inserted in deeds from the common grantor pursuant to a general plan of improvement or development made public by the grantor, each grantee has such an interest in the restrictive covenants in the other deeds, in view of the general plan under which he purchased, that he may enforce such covenants against other grantees. When a general plan of improvement has not been published by the grantor, one grantee can enforce the covenants against another only when they were intended for the benefit of adjacent lots. The intention to give such right to enforce the covenants must be expressed in the deeds themselves, or must be evident from the covenants in the deeds when viewed in the light of the surrounding circumstances." See, also, Dundee Realty Co. v. Nichols, 113 Neb. 389, 203 N. W. 558.

The Supreme Court of Minnesota has stated the rule in this wise: "* * * where the owners of a tract of land have platted the same into many lots and formed

and carried out a plan to sell the lots subject to covenants restricting them to the construction of homes of a certain character, equity will protect the rights of other grantees who accepted deeds in the same locality with similar restrictions." Rose v. Kenneseth Israel Congregation, 228 Minn. 240, 36 N. W. 2d 791. See, also, 14 Am. Jur., Covenants, Conditions and Restrictions, § 319, p. 656.

Clearly the plaintiffs here are entitled to the relief sought if the building being constructed is in violation of the restrictive covenant.

The trial court held that a barber shop was not a shop within the meaning of the restriction. We find it a bit difficult to follow the reasoning and conclusion of the trial court.

We place the decision on a broader ground.

The Supreme Court of Michigan has held that a covenant of the character involved here is to be construed "in connection with the surrounding circumstances, which the parties are supposed to have had in mind at the time they made it, the location and character of the entire tract of land, the purpose of the restriction, whether it was for the sole benefit of the grantor or for the benefit of the grantee and subsequent purchasers, and whether it was in pursuance of a general building plan for the development and improvement of the property. If there was a general building scheme the purpose of which was to restrict this district to single residences, it matters not how it is expressed in the covenant or what the covenant may be called. However, so far as the purpose is definitely stated in the covenant that purpose should control." Library Neighborhood Assn. v. Goosen, 229 Mich. 89, 201 N. W. 219.

The rule is stated as follows: "Restrictions as to the erection or use of buildings or other structures and improvements will be so construed as, if possible, to effectuate the intention of the parties * * *." 26 C. J. S., Deeds, § 164, p. 520.

The restriction, of course, applies to a building which would normally be useable and used for a "store," "manufacturing establishment," "laundry," "factory," "warehouse," or "shop." That is a negative covenant. It is perfectly obvious that the building being built by defendants, subject only to the limitations of space, could be quite readily used for any of those purposes. More important is the fact that it is obviously not designed or being built for what would be normal residence purposes.

The restriction bars a "public stable." It is a matter of common knowledge that when this language was used, private stables in connection with residences were quite common, but public stables were not. The restriction permits a "dwelling house" provided it does not cost less than $2,500. Again it is a matter of common knowledge that at that time a substantial dwelling house could be constructed at a cost of $2,500.

The restriction in the initial deed to the lot which defendants now own provides "no more than one dwelling shall be erected upon any one lot." That deed conveyed Lots 1, 2, and 3 in Block 1. The above provision is not in the initial deed to the property which plaintiffs own, but that deed conveyed only one lot.

Considering the various provisions of the restrictions as a whole, we think that the restrictions were intended to and had the purpose and effect of limiting the use of the lots to dwelling houses, consisting of one dwelling house on each lot. The affirmative provisions as to what can be built are clear; the negative provisions simply reinforce the permissive use construction. Moreover, it is clear from this record that the owners of these lots during the last third of a century have so understood, construed, and followed the provisions.

Paraphrasing our language in Dundee Realty Co. v. Nichols, *supra,* the building being constructed by the defendants is a clear and direct violation of the letter as well as the spirit of the restrictive covenant. Irre-

parable injury is shown, "thus creating a condition which is appealing to a court of equity, in the exercise of its extraordinary power. The relief sought by plaintiffs is fair, equitable, and just."

In Boston-Edison Protective Assn. v. Goodlove, *supra,* the court held: "A covenant restricting the erection of any building, except for dwelling house purposes, applies to the use as well as to the character of the building."

The rule is stated in 43 C. J. S., Injunctions, § 87, p. 595: "A mandatory injunction may be issued directing the removal or alteration of a building or structure erected in violation of a restrictive covenant." See, also, 14 Am. Jur., Covenants, Conditions and Restrictions, § 352, p. 672.

Plaintiffs are entitled to a mandatory injunction requiring the defendants to raze and remove the structure as erected, or requiring alteration if the portion of the building constructed can be altered, so as to comply with the restrictions as here construed. See Boston-Edison Protective Assn. v. Goodlove, *supra.*

The judgment of the trial court is accordingly affirmed in part, and in part reversed and the cause remanded with directions to issue a mandatory injunction in accord with this opinion directing the defendants, within 60 days from the issuance of the writ to either raze and remove the structure as erected or to alter the building as constructed so as to comply with the restrictions as here construed.

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

MILTON R. HIGGINS, APPELLEE, V. POSTAL LIFE AND CASUALTY INSURANCE COMPANY, A CORPORATION, APPELLANT.
73 N. W. 2d 175

Filed November 18, 1955. No. 33819.

1. **Appeal and Error.** In the absence of a bill of exceptions it will be presumed that issues of fact presented by the pleadings were established by the evidence, that they were correctly decided, and that the only issue remaining for this court is the sufficiency of the pleadings to support the judgment.
2. ———. In order that a stipulation of facts may be considered on appeal, such stipulation must be identified and offered in evidence on the trial of the case and preserved in a bill of exceptions.

APPEAL from the district court for Dundy County: VICTOR WESTERMARK, JUDGE. *Affirmed.*

Harold D. Knight and *Hines & Hines,* for appellant.

Daniel E. Owens, for appellee.

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

CARTER, J.

This is an action under a limited accident insurance policy to recover damages resulting from an accident which occurred on or about October 3, 1952. The defendant insurance company denied by its answer that there was any liability under the limited terms of the policy. A jury was waived by the parties. The trial court found for the plaintiff in the amount of $339.50 with interest at six percent per annum from December 13, 1954. The defendant appeals.

There is no bill of exceptions in the present case. The court will take judicial notice of such fact. In the absence of a bill of exceptions it will be presumed that issues of fact presented by the pleadings were established by the evidence and that they were correctly decided. In such a situation the only issue that will be

considered on appeal to this court is the sufficiency of the pleadings to support the judgment. Goger v. Voecks, 156 Neb. 696, 57 N. W. 2d 621; Gernandt v. Beckwith, 160 Neb. 719, 71 N. W. 2d 303; Zenker v. Zenker, *ante* p. 200, 72 N. W. 2d 809.

There is attached to the transcript a purported stipulation of facts to which two exhibits are attached. The first is the original policy of insurance in the action, and the second is a true and correct description and illustration of the Farmhand tractor attachment to which reference is made in the stipulation. It has long been the rule in this state that a stipulation of facts appearing in the transcript is without authority of law and it may not be noticed on an appeal. The procedure for presenting such an instrument to this court for its consideration is by identification, introduction in evidence, and preservation thereof in a bill of exceptions. Prokop v. Mlady, 136 Neb. 644, 287 N. W. 55; Todd v. Board of Educational Lands & Funds, 154 Neb. 606, 48 N. W. 2d 706; Caldwell v. Savage, 157 Neb. 603, 60 N. W. 2d 657.

The only question for decision, therefore, is the sufficiency of the pleadings to support the judgment of the district court. In this respect the petition alleges: Plaintiff is a resident of Dundy County, Nebraska, and the defendant is a foreign insurance company; that on January 23, 1952, defendant issued a policy of insurance to the plaintiff providing benefits for injuries sustained by accidental means; that on October 3, 1952, plaintiff was injured in an accident to a tractor-drawn vehicle while he was riding therein; and that said policy of insurance provided benefits for bodily injury sustained "as a result of an accident to any tractor-drawn vehicle while the assured is actually therein in the amount of $1000.00." The petition further alleges that due notice of the accident and the injuries sustained by the plaintiff was given to the defendant in accordance with the terms of the policy, and that demand was made for the benefits due under the policy which was

refused. The answer admits the residence of the plaintiff, that defendant is a foreign corporation, and that the cause of action arose in Dundy County. All other allegations of the petition were denied.

The petition clearly alleges facts sufficient to state a cause of action against the defendant. The proof of such facts is presumed in the absence of a bill of exceptions. The judgment is within the scope of the pleadings. Since the only error assigned involves a consideration of the evidence, there is nothing before the court on which a claim of prejudicial error can be predicated. Under the record before us an affirmance of the judgment is required.

AFFIRMED.

GERALDINE M. BENEDICT, APPELLEE, V. EPPLEY HOTEL COMPANY, A CORPORATION, DOING BUSINESS UNDER THE NAME AND STYLE OF ROME HOTEL, APPELLANT.

73 N. W. 2d 228

Filed November 25, 1955. No. 33784.

1. **Negligence.** The doctrine of res ipsa loquitur means that the facts of the occurrence permit, but do not compel, an inference of negligence. It is a rule of evidence and not a rule of substantive law. It is a qualification of the general rule that negligence will not be presumed but must be proved. The doctrine takes the place of evidence as affecting the burden of proceeding with the case.
2. ———. If facts are shown to which the doctrine of res ipsa loquitur has application an inference of negligence arises, that is, the thing speaks for itself and a question is presented for the jury as to liability.
3. **Appeal and Error.** If on the retrial the facts relating to the issues upon which the findings were made are substantially the same as those adduced at the former trial of the cause, such findings are binding on the parties, the trial court, and this court as the law of the case. It is when 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. ———. If on appeal findings of fact are made which become the law of the case and there is a remand for a new trial, at the retrial, such findings are binding on the parties, the trial court, and this court unless at the retrial the facts relating to the issues upon which the findings were made are materially and substantially different from those adduced at the former trial, and the burden of showing a difference is upon the party making the claim.
5. **Trial: Appeal and Error.** The determination of the issue of whether or not the evidence at a retrial is different from that presented at an earlier trial of the cause is for the court and not the jury.
6. **Trial.** In deciding whether or not there is error in a sentence or phrase of an instruction it will be considered with the instruction of which it is a part and the remainder of the charge to the jury and the meaning thereof will be determined not from the sentence or phrase alone but by consideration of all that is said upon the subject.
7. ———. Instructions to a jury should be considered as a whole and if they fairly submit the case that is all the law requires.
8. **Damages: Trial.** 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.
9. ———: ———. A verdict may be set aside as excessive only when it is so clearly exorbitant as to indicate that it was the result of passion, prejudice, or mistake, or that it is clear that the jury disregarded the evidence or controlling rules of law.
10. **Case Overruled.** Tyler v. McDougal, 130 Neb. 633, 265 N. W. 887, is disapproved and overruled in the respect and to the extent stated in the opinion.

APPEAL from the district court for Douglas County: L. ROSS NEWKIRK, JUDGE. *Affirmed.*

Mecham, Stoehr, Moore, Mecham & Hills, for appellant.

Matthews, Kelley, Fitzgerald & Delehant, for appellee.

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

BOSLAUGH, J.

This action is for damages claimed to have been sus-

tained by appellee because of injuries inflicted upon her as a result of negligence of appellant. Appellee had a verdict and judgment. A motion of appellant for a directed verdict at the close of all the evidence was denied. Motions for judgment notwithstanding the verdict or, in the alternative, for a new trial were overruled.

The cause of action pleaded by appellee is as follows: Appellant, a corporation, maintains and operates hotels in Omaha. One of them is the Rome Hotel. Appellant on or about March 5, 1949, operated a bingo game as a part of its activities and as an attraction to induce persons of the city and surrounding territory to the Rome Hotel. The facilities for the game, including the place where it was conducted, the tables, and the chairs were provided by appellant. The appellee at the invitation of appellant attended the game, procured from an attendant in charge a chair, and occupied it at one of the bingo tables. She sat on the chair for a short time when it collapsed and hurled her to the floor with force and violence causing her numerous and severe permanent injuries. The chair was defective in a respect unknown to appellee. The defect therein caused it to collapse and injure her. It was a folding chair constructed so that when it was not in use the seat could be folded up against the front of the back of the chair. If it was not defective or out of repair it could not and would not collapse or cause injury to a person sitting on it. The appellee invoked the doctrine of res ipsa loquitur. The defenses interposed by appellant were a denial of the claims of appellee and a plea of her contributory negligence.

The jury decided the issues of fact for appellee. She is entitled to have the evidence viewed and considered in this court most favorably to her and she must be accorded the benefit of reasonable inferences therefrom. Bolio v. Scholting, 152 Neb. 588, 41 N. W. 2d 913; Stolting v. Everett, 155 Neb. 292, 51 N. W. 2d 603.

Appellee did not allege specific negligence. She re-

lied upon general negligence and the doctrine of res ipsa loquitur. The doctrine of res ipsa loquitur means that the facts of the occurrence permit, but do not compel, an inference of negligence. It is a rule of evidence and not of substantive law. It is a qualification of the general rule that negligence will not be presumed but must be proved. The doctrine takes the place of evidence as affecting the burden of proceeding with the case. If the facts are shown to which the doctrine of res ipsa loquitur has application an inference of negligence arises, that is, the thing speaks for itself and a question is presented for the jury as to liability. Benedict v. Eppley Hotel Co., 159 Neb. 23, 65 N. W. 2d 224.

The validity of the judgment is attacked on the hypothesis that the doctrine of res ipsa loquitur is not applicable to this cause because appellant says that the instrumentality, that is the chair which produced the injury complained of, was not at the time of the accident in the exclusive control and management of appellant; that the defect in the chair concerned in the accident was latent and could not have been discovered with reasonable care; and that the evidence at the second trial of the cause was materially and substantially different from what it was at the first trial of the case. These contentions make it appropriate to consider and determine if the findings and matters decided on the first appeal in the cause are the law of the case. It is said in Master Laboratories, Inc. v. Chestnut, 157 Neb. 317, 59 N. W. 2d 571: "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." This court also said in Noble v. City of Lincoln, 158 Neb. 457, 63 N. W. 2d 475, that: "The decision of questions presented to this court

in reviewing the proceedings of the district court becomes the law of the case, and for purposes of the litigation, settles conclusively the matters adjudicated expressly or by necessary implication."

Appellant did not at the second trial of this case, after it had been on the first appeal considered, determined, and remanded by this court to the district court, attempt by any method to satisfy the burden on it of showing that at the second trial the facts relating to the issues upon which the findings and decisions were made on the first appeal of the cause were materially and substantially different from those adduced at the first trial of the case in the district court. The result is that this omission prevents this court from considering or determining the contention of appellant that the evidence produced at the second trial was materially and substantially different from the evidence produced at the first trial of the cause. The law applicable is stated in Callahan v. Prewitt, on rehearing, 143 Neb. 793, 13 N. W. 2d 660, as follows: "It is therefore the holding of this court that where on appeal findings of fact are made which become the law of the case and there is a remand for a new trial, on such retrial, such findings are binding on the parties, the trial court and this court, unless on the retrial the facts relating to the issues upon which the findings were made are materially and substantially different from those adduced on the former trial, and that the burden of showing a difference shall rest upon the party making the claim.

"In order to avoid confusion in the future we deem it advisable to say here that the burden is evidentiary and is for determination by the court and not the jury. As to methods, of course, the introduction of the bill of exceptions of the first trial or pertinent parts thereof would be most satisfactory but there should be no such limit on method. The right to present this question should not be denied if for some reason the bill of exceptions is not available."

The findings and decision on the first appeal are the law of the case and are binding on the parties and this court. It was found and determined on the first appeal that appellant had the control and management of the chair occupied by appellee at the time it collapsed; that the defect in the chair which caused the accident was not latent; that appellee was an invitee of appellant at that time; and that she was in this cause entitled to the benefit of the doctrine of res ipsa loquitur. Benedict v. Eppley Hotel Co., *supra.*

Tyler v. McDougal, 130 Neb. 633, 265 N. W. 887, in the respect hereafter indicated, is not in harmony with the doctrine quoted above from Callahan v. Prewitt, *supra,* and the language therein: "While the record in the former trial is not before us for the purpose of comparison, a reference to the two former opinions in this case indicates that the evidence is not substantially the same * * *" is disapproved and to that extent that case is overruled.

The object of the Military Order of the Cooties, an auxiliary of the Veterans of Foreign Wars, was to provide charity for needy and unfortunate veterans, their families, and widows. One of its activities at the time important to this litigation was the conducting of bingo games to provide funds to realize the purpose to which it was devoted. There was conducted a bingo game on the premises of the Rome Hotel in Omaha, owned and operated by appellant at the time appellee was injured. When a bingo game was to be played there the hotel selected and furnished the place for it, erected the tables, placed the chairs, and furnished all other facilities but the supplies required in the conduct of the game consisting substantially of tickets, cards, and corn. The hotel set up the tables and arranged the chairs for the participants and all who came to attend the game, and at the conclusion the hotel dismantled the tables, removed the chairs, and placed them in storage.

The bingo game on the evening of March 5, 1949, was

scheduled to start at 8 p. m. The mother of appellee and a friend of hers were present when the game was commenced. Appellee knew that they were to be there and it was because of this that she attended. She arrived at about 9:30 p. m., paid the charge required to become a player, and went into the ballroom where her mother and her friend were seated at a table and were participating in the game. There was a very large attendance at the game that night and it was conducted in three adjoining and connected rooms. One was the ballroom and another was the room in which a bar was located and operated. Appellee found a vacant place at the table across from where her mother was seated. Appellee looked for an unoccupied chair but did not find one in that room. She looked for and found one in the connecting hallway between the rooms where the game was in progress. She asked one of the attendants, a Cootie who was assisting in the conduct of the game, if she could use the chair. He said he had been using it but she could have it. She also saw Mr. Pennington and inquired of him if she could have the use of the chair and he advised her to take it and use it. She took it to the table where her mother was, occupied it, and entered the game. She did not then know that it was a folding chair. She was seated on the chair for 20 or 30 minutes when it suddenly gave way backwards and somewhat to one side and caused appellee to nearly turn a backwards somersault. Her head was severely jerked, she was thrown to the floor, was knocked breathless, and was injured. The game was stopped. Mrs. Pennington, the wife of the man directing the game, came to her, helped her up, and she was given a different chair. She did not realize that she was injured much. She sat at the table and continued in the game for some time. She noticed the chair after it failed and saw it was a folding chair and that it was out of order. About a half hour later she began to suffer discomfort as a result of the fall, left the game, reported the accident

and her condition to Mr. Pennington, and he sent her to the manager of the hotel. She went to the office of the manager and reported what had happened and then went to her home. The chair involved in the accident was delivered to and was taken charge of by Mr. Pennington. He described it as a folding chair with braces on its sides fastened with bolts. The braces on one side had become loose at the back of the chair and it collapsed sideways. He took it that night in the condition it was after the accident to the office of the hotel manager and reported to him what had happened. He left the chair with the manager who accepted and retained it. Mr. Pennington testified that appellee was turned over to the hotel authorities for care.

It was the condition of the chair furnished by appellant and not the use made of it that was responsible for the fall and injury of appellee. She had done no more than sit upon it as was intended by appellant that someone should when it collapsed and there is no suggestion that her conduct or that of anyone except appellant in reference to the chair was in any manner improper.

Instruction No. 2 was a correct summary of the pleadings in the case and it properly advised the jury that it was merely a statement of the contentions made by the parties to the case and was not to be considered as evidence. Appellant complains of two statements therein. The first is that the general public, including the plaintiff (appellee), was invited to attend the bingo game and the other is that plaintiff procured a chair from an attendant. The petition contained these allegations. They were not only each supported by evidence but there is no dispute in the proof as to them. It was found on the first appeal of this cause that appellee was on the premises of appellant as its invitee. That finding is the law of the case and may not be disputed. Appellant made no effort at any time during the course of the litigation to have the person referred to in the petition and

in the instruction as "an attendant" identified or his status defined. It is too late for it to object after the case has been tried twice.

Appellant assails the language in instruction No. 3 to the effect "That at the time and under the circumstances set forth in plaintiff's petition the defendant (appellant) was negligent." This was part of the charge as to what appellee was required to prove to entitle her to a recovery in the case. The essence of the objection of appellant is that the jury had no way of knowing the contents of the petition. This has no validity. The court had told the jury what the petition contained by an instruction immediately preceding instruction No. 3. A second objection to instruction No. 3 is that the court did not include therein that appellee was required to establish by the weight of the evidence that the chair was at the time of the accident in the exclusive control and management of appellant. This was specifically and clearly stated in instruction No. 5 which charged the jury as to the doctrine of res ipsa locquitur and it was the subject of a finding favorable to appellee on the first appeal of this case. Neither of the objections to instruction No. 3 can be sustained.

Error is claimed because of the part of instruction No. 5 which advised the jury that if it found, from a preponderance of the evidence, that the chair was under the management and control of the defendant at the time of its collapse the jury was permitted to infer that the defendant was negligent without proof of specific acts of negligence. The alleged error is based upon the view of appellant that the proof established that the chair had been in the control and management of the Military Order of the Cooties for as much as 2 hours before the accident. What has been said herein disposes of this contention adverse to appellant. The trial court could, on the basis of the present record, have instructed the jury that the hotel had the control and management of the chair. In determining whether or not there is

error in a sentence or clause of an instruction it will be considered with the instruction of which it is a part and the other parts of the charge to the jury and the true meaning thereof will be deduced not from the sentence or phrase alone but by a consideration of all that it said on the subject. Instructions should be considered as a whole and if they fairly submit the case the instructions will be approved. Myers v. Willmeroth, 151 Neb. 712, 39 N. W. 2d 423; Bolio v. Scholting, *supra*.

Appellee prior to the accident enjoyed good health and was free from bodily defects or disability. She was a strong, active woman and performed the work required in the home maintained by her and her husband. She was 43 years of age and had an expectancy of about 26 years. The accident in which she was injured caused her to suddenly and violently fall to the floor. She soon thereafter had symptoms of injury. The accident occurred on a Saturday evening. Sunday she suffered from headache and back pains. She was confined to her bed substantially all that day. Monday she consulted her physician, a general practitioner. He examined her and taped her lower lumbar section. The tape was left on for about 10 days. The pain in her back increased and heat treatments were prescribed and applied. The doctor saw and treated her 8 or 10 times during a period of 2 or 3 weeks. The result was not satisfactory and he referred her to another doctor for a diagnosis. This doctor advised her to continue the services of her physician. She did but her condition was not improved and on March 30, 1949, she consulted Dr. Iwersen, an orthopedic specialist. Appellee gave him a history of a fall from a chair on March 5, 1949. He found she had a tenderness over the lumbosacral area and limitation of motion. His treatment of her did not produce any substantial improvement in her condition. He had prescribed therapy, rest, and support in bed consisting of placing boards under the mattress she used. This continued until January 27, 1950, when he had her taken to a hos-

pital. He did a spinogram or a myelogram and found that she had a herniated disc between the 4th and 5th lumbar vertebrae. His opinion was that her condition as he found it was the result of the trauma she sustained on March 5, 1949. He had her thereafter wear a specially constructed and reinforced corset which supported her body and limited the movements thereof. He continued as her medical adviser until he left Omaha in January of 1953.

Appellee afterwards, on the advice of another doctor who made arrangements for her, went to the Mayo Clinic at Rochester, Minnesota, and stayed there 3 weeks. She later consulted Dr. Gross, an orthopedic surgeon, on February 10, 1953. He found limitation of motion and tenderness of the back of appellee, some sensory change in the left leg, and some difference of knee jerk on the left side as compared to the right. The sensory change corresponded to the 5th lumbar nerve root or nerve between the 4th and 5th lumbar vertebrae on the left side. He diagnosed the condition of appellee as a herniated disc between the vertebrae above mentioned on the left side. Dr. Gross operated upon appellee at St. Joseph's Hospital in Omaha March 10, 1953. He explored the interspaces in her back on three different levels for discs that might be pathological. The bone was removed between the 3rd and 4th lumbar vertebrae, the 4th and 5th, and between the 5th and the sacrum. The nerve roots were pulled toward the middle. He found she had a degeneration of the disc between the 4th and 5th lumbar vertebrae and the one between the 5th lumbar vertebrae and the sacrum. He removed these. The duration of this operation was 2 hours and 15 minutes. The opinion of the doctor was that the condition of the appellee was caused by the accident she was the victim of on March 5, 1949. He estimated her permanent disability at 15 per cent of the body as a whole. He said her leg pain had much improved when he last saw her in July 1953, but she could

not do heavy work and her back would bother her if she overexerted herself. Appellee to the time of the trial had not been able to do any lifting or heavy work in her home.

The record contains no indication that the jury was actuated during its deliberations or in arriving at a verdict by passion, prejudice, bias, or any other improper matter or conduct. The fact that the second trial resulted in a larger verdict than the first trial is not indicative of passion, prejudice, mistake, or disregard by the jury of the evidence or the charge of the court. The determination of the amount that would compensate appellee was the duty of the jury and its action in this respect may not be disturbed. The verdict has a reasonable relationship to the injuries and damage proved. In Remmenga v. Selk, 152 Neb. 625, 42 N. W. 2d 186, this court said: "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. * * * A verdict may be set aside as excessive only when it is so clearly exorbitant as to indicate that it was the result of passion, prejudice, or mistake, or that it is clear that the jury disregarded the evidence or controlling rules of law." See, also, Dunn v. Safeway Cabs, Inc., 156 Neb. 554, 57 N. W. 2d 75; Peacock v. J. L. Brandeis & Sons, 157 Neb. 514, 60 N. W. 2d 643.

The judgment should be and it is affirmed.

AFFIRMED.

ROLAND W. PARSONS, APPELLANT, V. HAROLD COOPERMAN, FIRST REAL AND TRUE NAME UNKNOWN, APPELLEE.
73 N. W. 2d 235

Filed November 25, 1955. No. 33802.

1. 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.
2. Negligence. It is only where the evidence shows beyond dispute that plaintiff's negligence is more than slight as compared with defendant's negligence that it is proper for the trial court to instruct the jury to return a verdict or, as in the instant case, to dismiss the plaintiff's petition.
3. Automobiles: Negligence. In those cases where reasonable minds may differ on the question of whether or not the operator of an automobile exercised the ordinary care required of him under the circumstances of the particular situation, the issue of negligence on the part of the operator is one of fact to be determined by a jury.
4. ———: ———. The driver of an automobile, upon reaching an intersection, has the right-of-way over a vehicle approaching on his left, and may ordinarily proceed to cross; but if the situation is such as to indicate to the mind of an ordinarily prudent person in his position that to proceed would probably result in a collision, then he should exercise ordinary care to prevent an accident, even to the extent of waiving his right.
5. ———: ———. A motorist entering an intersection from the right is in a favored position and has the right-of-way, other things being equal, but such fact does not do away with the duty of the driver of the favored car to exercise ordinary care to avoid an accident.

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

Charles E. Kirchner and *Gilbert S. Brown*, for appellant.

Pilcher, Haney & Howard, for appellee.

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

WENKE, J.

This is an appeal from the district court for Douglas

County by Roland W. Parsons, plaintiff below. Parsons sued Harold Cooperman in the municipal court of the city of Omaha to recover damages caused to his 1947 Mercury sedan when it was struck by Cooperman's 1953 Pontiac station wagon. In the municipal court Parsons recovered a judgment for $371.71. However, on appeal to the district court, Parsons' action was, on motion of the defendant, dismissed at the conclusion of the plaintiff's evidence. Plaintiff thereupon filed a motion for new trial and this appeal was taken from the overruling thereof.

Two questions are necessarily involved in this appeal: First, is appellant's evidence sufficient to sustain a verdict in his favor? If the answer is yes then the second question arises, does appellant's evidence establish that he was guilty of negligence sufficient, as a matter of law, to defeat his right to recover? In considering the evidence adduced to determine these questions we apply thereto the following principle: "A motion for directed verdict or for judgment notwithstanding the verdict must, for the purpose of decision thereon, be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed. Such party is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference that can reasonably be deduced from the evidence." Stark v. Turner, 154 Neb. 268, 47 N. W. 2d 569.

And further: "In an action where there is any evidence which will support a finding for a party having the burden of proof, the trial court cannot disregard it and direct a verdict against him." Stark v. Turner, *supra.*

"It is only where the evidence shows beyond dispute that plaintiff's negligence is more than slight as compared with defendant's negligence that it is proper for the trial court to instruct the jury to return a verdict or, as in the instant case, to dismiss the plaintiff's peti-

tion. See, Pahl v. Sprague, supra (152 Neb. 681, 42 N. W. 2d 367); Gorman v. Dalgas, supra (151 Neb. 1, 36 N. W. 2d 561)." Evans v. Messick, 158 Neb. 485, 63 N. W. 2d 491.

"In those cases where reasonable minds may differ on the question of whether or not the operator of an automobile exercised the ordinary care required of him under the circumstances of the particular situation, the issue of negligence on the part of the operator is one of fact to be determined by a jury." Weisenmiller v. Nestor, 153 Neb. 153, 43 N. W. 2d 568. See, also, Plotkin v. Checker Cab Co., 133 Neb. 1, 274 N. W. 198; Costello v. Hild, 152 Neb. 1, 40 N. W. 2d 228; Parks v. Metz, 140 Neb. 235, 299 N. W. 643.

This action arises out of an automobile accident that happened in the city of Omaha about 10 a. m. on Monday, February 15, 1954, in the intersection of Fourteenth and Cass Streets. Both Fourteenth and Cass Streets are paved, Fourteenth Street to a width of 60 feet and Cass Street, west of the intersection, to a width of 60 feet but east thereof to a width of only 30 feet. The north curbline of Cass Street is in a straight line east and west of the intersection, the break occurring in the south curbline. Thus the south curbline of Cass Street east of the intersection would be the same as the center line of Cass Street west of the intersection if the curbline was extended west across the intersection. There were no stop or slow signs on either street to control traffic upon approaching and entering the intersection. Neither were there center lines marked on the streets.

On the day in question, which was partly cloudy, the appellant was driving his car south on Fourteenth Street. He was familiar with the street, having driven over it on previous occasions. He was driving on the inner lane for southbound traffic, Fourteenth Street having four lanes for travel, two for northbound and two for southbound traffic. The inner driving lane is adjacent to the center of the street. Fourteenth Street,

north of the intersection, also had parallel parking areas on both sides extending along the curbs to its intersection with Cass Street. At the time appellant was approaching the intersection from the north appellee was approaching it from the east on Cass Street, driving his station wagon on about the middle of the paved surface thereof. East of the intersection there are five railroad tracks running parallel with Fourteenth Street. The west rail of the track farthest to the west is about 20 feet east of the east curbline of Fourteenth Street.

As appellant approached the intersection he looked to his left, or east, when he got to a point where he could see past the cars which were then parked along the east side of Fourteenth Street and saw appellee approaching the intersection in his station wagon. When appellant first observed appellee's station wagon the front of appellant's car was about 15 feet north of the north curbline of Cass Street and traveling about 20 to 25 miles an hour. The speed limit in the area of Omaha where the intersection is located is 25 miles an hour. Appellant testified that when he saw the station wagon it was on the first set of railroad tracks east of the intersection; that it was about 20 to 25 feet east of the east curbline of Fourteenth Street; and that it was traveling about 25 to 30 miles an hour. Appellant, upon observing the station wagon, immediately applied his brakes but did not turn his car. He continued straight ahead into the intersection. The brakes started taking effect and when the rear wheels of his car were some 2 to 4 feet north of the north curbline of Cass Street they left marks from there to where it stopped. It stopped when the rear wheels were some 8 to 10 feet south of the north curbline of Cass Street, thus causing it to stop in the northwest quarter of the intersection as it relates to the width of Cass Street to the west. When appellant's car came to a stop its front end was some 5 to 7 feet north of the center of Cass Street to the west extended into the intersection, the car being about 15

feet long. Appellant, by applying his brakes, had slowed his car so that when it crossed the north curbline of Cass Street and entered the intersection, which he testified was prior to appellee's station wagon entering the intersection, it was going from 10 to 15 miles an hour. The station wagon, owned and being driven by appellee, proceeded in the center of Cass Street until it entered the intersection and thereafter continued, without changing its course or diminishing its speed, until the collision occurred. There were no tire marks of any kind on the pavement to the east of the point of the collision.

The collision did not materially move the rear of appellant's car, which had stopped before it occurred, but did shove the front end some 4 or 5 feet to the right. After the accident the car was standing in the northwest quarter of the intersection facing southwest. The appellee's station wagon stopped in the southwest quarter of the intersection facing northwest, its front end being some 8 to 10 feet south of the center line of Cass Street to the west extended into the intersection and some 5 to 8 feet east of the west curbline of Fourteenth Street if extended across Cass Street.

Both vehicles remained upright and neither driver was hurt although both vehicles were damaged. The damage to the car occurred at the left front corner, it being shoved to the right some 20 to 24 inches. The damage to the station wagon occurred to its right side from about the center back to the rear wheel, it being torn from the front toward the rear.

We realize appellant testified or made admissions contrary to some of the foregoing statements of fact, but in view of the principle here controlling he is entitled to have these controverted facts resolved in his favor. If it was undisputed or a jury found, as he stated in a written statement that he signed that "I first saw the Cooperman car about 1½ car lengths before my car struck the right side of his vehicle," he would be guilty of contributory negligence sufficient to defeat any right to recover

he might otherwise have. But that statement stands disputed by appellant's other testimony and, under the situation here, we are not privileged to pass on that disputed fact as a matter of law. It is a jury function.

The rules applicable to the situation here are either statutory or have often been announced by this court. Section 39-751, R. R. S. 1943, insofar as material here, provides: "When two vehicles approach or enter an intersection at approximately the same time, the driver of the vehicle on the left shall yield the right of way to the vehicle on the right except as otherwise provided in section 39-752." The exceptions therein referred to are not material here.

"The rule would seem to be that a vehicle reaching and entering an intersection first shall have the right of way." Parks v. Metz, *supra*. See, also, Plotkin v. Checker Cab Co., *supra*.

"When two automobiles approach an intersection from opposing directions at lawful rates of speed at approximately the same time, the right of way to which is not otherwise controlled by statute or ordinance, the one to the right has the right of way in the intersection." Crandall v. Ladd, 142 Neb. 736, 7 N. W. 2d 642.

"* * * when a person enters an intersection of two streets or highways he is obligated to look for approaching cars and to see those within that radius which denotes the limit of danger. If he fails to see a car which is favored over him under the rules of the road, he is guilty of contributory negligence sufficient to bar a recovery as a matter of law. If he fails to see an automobile not shown to be in a favorable position, the presumption is that its driver will respect his right of way and the question of his contributory negligence in proceeding to cross the intersection is a jury question." Whitaker v. Keogh, 144 Neb. 790, 14 N. W. 2d 596.

"A user of the highways may assume, unless and until he has warning, notice, or knowledge to the contrary, that other users of the highways will use them in

a lawful manner, and until he has such warning, notice, or knowledge, he is entitled to govern his actions in accordance with such assumption." Angstadt v. Coleman, 156 Neb. 850, 58 N. W. 2d 507.

"A motorist entering an intersection from the right is in a favored position and has the right-of-way, other things being equal, but such fact does not do away with the duty of the driver of the favored car to exercise ordinary care to avoid an accident." Evans v. Messick, *supra*.

"One having the right-of-way may not on that account proceed serenely unconscious of the surrounding circumstances. He has the right-of-way over traffic approaching on his left, but is not thereby relieved from the duty of exercising ordinary care to avoid accidents." Stark v. Turner, *supra*.

From the evidence adduced we think a jury could find that appellee approached and entered the intersection without stopping; that he was traveling between 25 and 30 miles an hour; that he never deviated from his course; and that he ran into appellant's car in the northwest corner of the intersection. Under this situation we think the following, taken from DeBus v. Amen, 142 Neb. 109, 5 N. W. 2d 92, has application: "A motorist is guilty of actionable negligence and liable for resulting damages, where he drives into the center of the intersection of city streets without slackening an excessive speed or changing his course and runs violently into the automobile of another motorist who has the right of way and who is free from negligence."

From the evidence adduced we think the jury could find appellant, as he was driving south on Fourteenth Street, observed appellee's station wagon at the first opportunity; that he continued to watch it as it approached and entered the intersection; and that he applied his brakes and stopped his car to avoid the accident. Under this situation it is a question for the jury to determine whether or not appellant's conduct, under

the circumstances, was negligent and, if so, the degree thereof.

We recognize that when a driver of an automobile is about to and does enter an intersection of two streets that he is obligated to look for approaching cars and to see those within that radius which denotes the limit of danger and that under this rule we have held the driver guilty of negligence more than slight, as a matter of law, where he drove into an intersection without looking for traffic in the direction from which he could have seen it coming, Miller v. Aitken, 160 Neb. 97, 69 N. W. 2d 290, or, after seeing a vehicle approaching at some distance enters the intersection without looking again, Evans v. Messick, *supra,* or failing to look after reaching a point where he could have seen it, Nelson v. Plautz, 130 Neb. 641, 265 N. W. 885.

As we said in Thrapp v. Meyers, 114 Neb. 689, 209 N. W. 238, 47 A. L. R. 585: "We have no doubt that cases may arise where it would be the duty of the court to rule, as a matter of law, that the failure of the driver of an automobile upon approaching an intersection to look in the direction from which other travelers upon the highway might be expected would amount to more than slight negligence and prevent a recovery, but we do not feel warranted in laying down a hard and fast rule governing all cases."

But such is not the situation here. Appellant looked at the first opportunity he had when looking would permit him to see and observed appellee's station wagon approaching the intersection from the east on Cass Street or to his left. When he saw the station wagon he applied his brakes and stopped his car in the northwest quarter of the intersection. He continued to observe the station wagon from where he first observed it up until it hit his car. We find the evidence adduced, viewed favorable to appellant, presents a question of fact for the jury both as to appellee's negligence and appellant's contributing negligence together with a comparison

thereof if both are found to exist. We do not think it can be said that appellant was, as a matter of law, guilty of contributory negligence sufficient to defeat his right to recover.

As stated in Thrapp v. Meyers, *supra:* "The driver of an automobile, upon reaching an intersection, has the right of way over a vehicle approaching on his left, and may ordinarily proceed to cross; but if the situation is such as to indicate to the mind of an ordinarily prudent person in his position that to proceed would probably result in a collision, then he should exercise ordinary care to prevent accident, even to the extent of waiving his right."

Having come to the conclusions herein set forth we find the action of the trial court was in error. We therefore reverse its judgment and remand the cause with directions that the appellant be given a new trial.

REVERSED AND REMANDED WITH DIRECTIONS.

VILLAGE OF MAXWELL, LINCOLN COUNTY, NEBRASKA, A MUNICIPAL CORPORATION, APPELLANT, V. FRED M. BOOTH ET AL., APPELLEES.

73 N. W. 2d 177

Filed November 25, 1955. No. 33811.

1. **Dedication.** The general rule is that a plat of dedication is taken as a mere offer to dedicate which must be accepted before the dedication is complete.
2. **Municipal Corporations.** It is not necessary that a municipality accept and open a street for public use until the public necessity requires it.
3. **Dedication.** Unless controlled by statute, acceptance of a dedication within a reasonable time is sufficient, such reasonable time depending on the circumstances of the case. In general, acceptance prior to revocation and prior to acquisition of adverse rights is sufficient.
4. ———. Ordinances and resolutions authorizing the construction of public works on the property constitute a sufficient acceptance of the dedication.

5. ———. In the absence of controlling statutes, construction and maintenance of public works constitute an acceptance by the municipality.
6. ———. Generally speaking official acceptance may consist in any positive conduct of the proper public officers evincing their consent on behalf of the public.
7. **Highways: Municipal Corporations.** No matter what the particular act of a municipality is, if it be an act which could only be rightfully done on a highway, it is regarded as an acceptance of that highway.
8. **Dedication.** Offers of dedication may be accepted by long continued use or by acts of governmental officials exercising control of the property, and formal action is not required.
9. **Municipal Corporations.** The use of streets for telephone or telegraph purposes is a use for a public purpose.
10. ———. Evidence of the acceptance of streets by a city is found in the affirmative act of taking possession thereof for the purpose of placing therein water mains, sewers, and surface drains.
11. ———. The authority granted the board of trustees of a village to locate and open streets is administrative in its character.
12. ———. It is entirely proper to act by resolution, if the action taken is merely declaratory of the will of the corporation in a given matter, and is in the nature of a ministerial act.
13. ———. The provision contained in section 17-508, R. R. S. 1943, that no street, avenue, or alley shall be graded unless the same shall be ordered to be done by the affirmative vote of two-thirds of the city council or board of trustees, is limited to orders for the grading of streets.
14. ———. The streets that proprietors may vacate are those only in which no adverse interest has been acquired. If accepted by the municipality, and improved so that the conveyance has been effective in passing the fee thereto, it is beyond the reach of the proprietors of a part of a plat.
15. **Dedication.** After dedication of property as a street and acceptance thereof by a municipality, private proprietors of adjoining land are powerless to vacate or change the dedication.

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

Baskins & Baskins, for appellant.

William S. Padley, for appellees.

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

SIMMONS, C. J.

This action involved primarily the question of whether or not a street extending for one block and an alley in the village of Maxwell have been "laid out according to law" so as to prevent a vacation of a part of a dedicated street in a platted subdivision.

The plaintiff sought a decree determining that it had a legal title to the street and alley, was entitled to the possession of the same, and determining that a vacation deed was void and of no effect.

We hold that the plaintiff had accepted the dedication and that the vacation deed is ineffective. We reverse the judgment and remand the cause with directions to render a decree for plaintiff.

The village of Maxwell will hereinafter be referred to as the plaintiff. In stating the evidence, reference will be made to Fred M. Booth as defendant, as Mildred Booth, his wife, did not testify in the case.

On July 10, 1909, the then owners of the land here involved filed a plat of Mackin's First Addition to the village of Maxwell. The addition consisted of 4 blocks in a rectangular plat. The plat shows streets (not named) around each block with alleys through each block. It is recited that the streets and alleys "are dedicated to the Public use."

Block 4 is in the southwest corner of this addition. It consists of 10 lots, 5 facing north and 5 facing south, with an alley in between 20 feet in width. To the south is a street which is now U. S. Highway No. 30. To the west is shown a street 80 feet in width running north 2 blocks. It connects with a street between Blocks 1 and 2, and 3 and 4, running east and west. Lots 5 and 6 of Block 4 are adjacent to this street. A like street is north of Blocks 2 and 3. There are no connecting streets shown to the north or west of this addition.

The alley in Block 4, running east and west, is used in part from the east.

The west line of this street is the west corporate limits of plaintiff village, and the boundary line to the north of the addition is the north corporate limit. The street is not open for travel west of Blocks 3 and 4 and north of Block 3 in the sense that it has not been graded or maintained. It is in its natural state, although there is no indication that it could not be traveled by the public if it is so desired. The street east of Blocks 3 and 4 is a used street, as is the street between Blocks 3 and 4. The platted land was within the corporate limits when platted and continuously thereafter.

In summary, the part of the street involved here is unused and unimproved so far as public travel is concerned.

In August 1932, the plaintiff by ordinance granted a telephone company the right to construct and maintain its lines over the streets and highways of the village. It is shown that a line was constructed running north and south along the east side of the street in question and that two or more poles are located in the 1-block area here involved. Just when this construction occurred is not shown. It is shown that it was before the defendants took title to their property. It is there now. Defendant testified that he had entered into an agreement, apparently after this controversy arose, to permit the maintenance of this line if the street was vacated. It is an interstate toll line and is not a part of the telephone system of the plaintiff.

In 1951, the plaintiff had the west corporate limit of the village surveyed. Thereafter in 1951, a drainage ditch was constructed along the west line of the street in question for 2 blocks north and south and 1 block east and west where it connected with a drainage ditch running to the east. It is a ditch 5 feet wide and from 2 to 3 feet deep. This was designed to drain an area at

the south end of the street and a low place in the borrow pit of U. S. Highway No. 30.

It was stipulated that this drainage ditch was constructed at the instance of the defendant with the permission and approval of the board of trustees of plaintiff. It was an informal proceeding. Defendant wanted the drainage ditch built. The board members gave him permission and showed him where to put it. Prior to that time there was a north-to-south fence in the middle of the street. Defendant had it removed to the west line of the street. Defendant had the ditch dug. The stipulation is that the cost was paid by the defendant. The evidence is that the contractor sold the dirt and got pay in that way.

In June of 1953, the defendant began the construction of a garage in the street. The members of the village board protested at that time. Defendant asked the members of the board to vacate the street, close it, or sell it to him. His request was denied. He went ahead and completed the construction of the garage.

In July of 1953, the plaintiff had the area involved surveyed. Defendant built his house on Lot 6 of Block 4 in 1948. The survey shows that the west wall of his house and the eaves are in the street and that he has built a north-and-south fence in the street, beyond the telephone line and across the alley.

On July 3, 1953, the plaintiff filed its petition in this action in which it asserted ownership and right of possession of the street involved.

On December 1, 1953, the board of trustees of plaintiff met in regular session and passed a resolution as follows: "There was a discussion of platted street west of Booth's. Moved by Eubank, seconded by Carrothers, to open street. Motion carried." The record does not show who were present and voting. The evidence is that at least a majority of three were present.

On December 11, 1953, the defendants executed, acknowledged, and filed a vacation deed "vacating a strip

of land 80 feet in width located to the west of Lots 5 & 6 in Block 4."

On December 18, 1953, defendants filed an amended answer in which they alleged the execution of the vacation deed and relied on it as a defense to the action and asserted a right to the use and occupancy "of an undivided one-half of said right-of-way." Plaintiff replied on January 9, 1954.

The dedication here was a statutory one under the provisions of what are now sections 17-415, 17-416, 17-417, and 17-418, R. R. S. 1943. Section 17-420, R. R. S. 1943, provides: "Any part of a plat may be vacated under the provisions and subject to the conditions of section 17-419; *Provided,* such vacating does not abridge or destroy any of the rights and privileges of other proprietors in said plat. *Nothing contained in this section shall authorize the closing or obstructing of any public highways laid out according to law.*" (Latter emphasis supplied.)

The precise question presented here is whether or not the vacation deed of the defendants of December 11, 1953, is unauthorized because of the language italicized above.

Was this street one laid out according to law?

Both parties here cite and rely on our decision in Village of Hay Springs v. Hay Springs Commercial Co., 131 Neb. 170, 267 N. W. 398, wherein we held: " 'The words "laid out according to law" have a well-known meaning, under our statutes, and they plainly *include* the doing of those things by the proper local officers which are essential in creating a public highway, to authorize it to be worked and traveled, and especially the surveying, marking the course and boundaries, and ordering it established as a highway. The affirmative action of the public authorities is indispensable in such case.' Chicago Anderson Pressed Brick Co. v. City of Chicago, 138 Ill. 628, 28 N. E. 756." (Emphasis supplied.)

The above, of course, is not an all-inclusive rule. It answered the problem there presented.

The general rule is that the plat is taken as a mere offer to dedicate which must be accepted before the dedication is complete. 16 Am. Jur., Dedication, § 31, p. 377. All the streets of a new plat are not ordinarily needed at once, and acceptance and use as soon as growth and improvements require is all that is expected.

The Supreme Court of Wisconsin in Galewski v. Noe, 266 Wis. 7, 62 N. W. 2d 703, held: "It is not necessary that a municipality accept and open a street for public use until the public necessity requires it."

The rule is also stated: "Unless controlled by statute, acceptance of a dedication within a reasonable time is sufficient, such reasonable time depending on the circumstances of the case. In general, acceptance prior to revocation and prior to acquisition of adverse rights is sufficient." 26 C. J. S., Dedication, § 35, p. 96. See, also, 16 Am. Jur., Dedication, § 41, p. 389.

A study of our decisions indicates that we have generally followed that rule, although we do not find that we have so stated it. See, Hart v. Village of Ainsworth, 89 Neb. 418, 131 N. W. 816; Johnson v. Buhman, 98 Neb. 236, 152 N. W. 403.

The rule is also stated: "Ordinances and resolutions authorizing the construction of public works on the property constitute a sufficient acceptance of the dedication, and this is also true of a petition by a municipality for such works. Likewise, in the absence of controlling statutes, construction and maintenance of public works constitute an acceptance by the municipality." 26 C. J. S., Dedication, § 40(2), p. 107. Also, in 16 Am. Jur., Dedication, § 33, p. 380, it is stated: "Generally speaking, however, official acceptance may consist in any positive conduct of the proper public officers evincing their consent on behalf of the public."

In Littler v. City of Lincoln, 106 Ill. 353, it was held: "It is not essential that there should be any prescribed

formal act of acceptance, but there must be user, or some other act indicating acceptance, by those authorized in such matters to represent the public, to complete the dedication."

This case is quoted with approval in Chicago Anderson Pressed Brick Co. v. City of Chicago, 138 Ill. 628, 28 N. E. 756. We cite it because the latter case is the one which we used as authority in Village of Hay Springs v. Hay Springs Commercial Co., *supra.*

In City of Knoxville v. Hunt, 156 Tenn. 7, 299 S. W. 789, it was held: "* * * no matter what the particular act of a municipality is, if it be an act which could only be rightfully done on a highway, it should be regarded as an acceptance of that highway." See, also, Mulligan v. McGregor, 165 Ky. 222, 176 S. W. 1129.

In Graves County ex rel. v. City of Mayfield, 305 Ky. 374, 204 S. W. 2d 369, the rule is stated: "Offers of dedication may be accepted by long continued use or by acts of governmental officials exercising control over the property, and formal action is not required." See, also, In re Hunter, 163 N. Y. 542, 57 N. E. 735, 79 Am. S. R. 616; Olsen v. Village of Grand Beach, 282 Mich. 364, 276 N. W. 481.

Did the plaintiff accept the dedication prior to the attempted vacation of the street by the defendants in December 1953?

There are at least four distinct and separate acts of acceptance by the plaintiff shown by this record.

In 1932, the plaintiff, by ordinance, granted the right to the telephone company to use its streets for a telephone line.

The use of streets for telephone or telegraph purposes is a use for a public purpose. See, City of Plattsmouth v. Nebraska Telephone Co., 80 Neb. 460, 114 N. W. 588, 127 Am. S. R. 779, 14 L. R. A. N. S. 654; Slabaugh v. Omaha Electric Light & Power Co., 87 Neb. 805, 128 N. W. 505, 30 L. R. A. N. S. 1084. This particular street was so used. Defendants recognized that

right of user by the separate agreement made with the telephone company. That agreement, obviously, cannot affect the action of the plaintiff or its rights in the street. The action of the plaintiff in this regard was a clear acceptance of the dedication of the street to a public use.

Again in 1951, possession of the street was asserted by the plaintiff when, with its permission, consent, and approval, a drainage ditch was built in the street. This again evidenced the acceptance of the dedication.

In Consumers' Co. v. City of Chicago, 268 Ill. 113, 108 N. E. 1017, it was held: "* * * evidence of the acceptance of streets by a city is found in the affirmative act of taking possession thereof for the purpose of placing therein water mains or sewers." We see no controlling distinction between water mains or sewers, and surface drains. See, also, 26 C. J. S., Dedication, § 40(2), p. 107.

Again in 1953, board members of the plaintiff protested the construction of the garage, had this particular part of the street surveyed, determined the encoachments thereon by the defendants, and brought this action in which it asserted it had acquired a legal estate in and the right of possession, and prayed for judgment accordingly.

Again in December 1953, the plaintiff by resolution determined to open the street.

We have held that: "The authority granted the trustees to locate and open streets is administrative in its character * * *." Chicago, R. I. & P. Ry. Co. v. Nebraska State Railway Commission, 88 Neb. 239, 129 N. W. 439.

In Weilage v. City of Crete, 110 Neb. 544, 194 N. W. 437, we held: "* * * it is entirely proper to act by resolution, if the action taken is merely declaratory of the will of the corporation in a given matter, and is in the nature of a ministerial act."

Section 17-508, R. R. S. 1943, provides: "Second-

class cities and villages shall have the power to provide for the grading and repair of any street, avenue or alley and the construction of bridges, culverts and sewers. No street, avenue or alley shall be graded unless the same shall be ordered to be done by the affirmative vote of two-thirds of the city council or board of trustees."

It is suggested here that this resolution is of no effect because the record does not show that it was passed by the affirmative vote of two-thirds of the board of trustees of plaintiff. We see no merit in this contention. Normally the grading of streets requires the expenditure of public funds. Obviously, the requirement of a two-thirds affirmative vote is limited to orders for the grading of streets. Such an order is not involved here.

The defendants contend that this street was not accepted nor laid out according to law because it was never graded or otherwise improved for pedestrian or vehicular travel. Implicit in the section is a legislative recognition that municipalities may have streets, avenues, and alleys that have not been "graded." It is a matter of general knowledge which the Legislature has recognized. In Hart v. Village of Ainsworth, *supra,* we pointed out: "It does appear that none of the streets designated upon the plat had ever been accepted by the village, *or* used as a street." (Emphasis supplied.)

It follows that there have been clear and unequivocal acts of acceptance of the dedication by the village over a period of years prior to the vacation deed of the defendants and that the street involved is one which has been laid out according to law within the meaning of section 17-420, R. R. S. 1943.

The vacation attempted by the defendants is one clearly not authorized by the statute upon which defendants rely.

In Chrisman v. Omaha & C. B. Ry. & Bridge Co., 125 Iowa 133, 100 N. W. 63, the court in considering a com-

parable statute said "that the streets that proprietors may vacate are those only in which no adverse interest has been acquired. If accepted by the municipality, and improved so that the conveyance has been effective in passing the fee thereto, it is beyond the reach of the proprietors of a part of the plat." We quote from this case because it is one relied on in Village of Hay Springs v. Hay Springs Commercial Co., *supra.* The building of the telephone line and the drain are improvements under this language.

In Kelroy v. City of Clear Lake, 232 Iowa 161, 5 N. W. 2d 12, the court said: "A dedication of streets has been likened to a tender, which may not be withdrawn after acceptance on behalf of the public or the accrual of private rights with respect thereto."

In Theisen v. City of Detroit, 254 Mich. 338, 237 N. W. 46, the court held: "Private individuals could not, as against the public, after the dedication of the property as a street and acceptance by the township, take back the land so dedicated or any rights in it. They were powerless to change the dedication." See 26 C. J. S., Dedication, § 58, p. 144. See, also, 16 Am. Jur., Dedication, § 64, p. 410.

We have followed this rule in cases of implied dedication. See, Burk v. Diers, 102 Neb. 721, 169 N. W. 263; City of McCook v. Red Willow County, 133 Neb. 380, 275 N. W. 396. We see no reason why it should not be applied to the dedication here.

The judgment of the trial court is reversed and the cause remanded with directions to render a decree for the plaintiff in accord with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

FRED L. HEESE, APPELLEE, V. STERLING WENKE ET AL., APPELLANTS, IMPLEADED WITH THE VILLAGE OF PENDER, THURSTON COUNTY, NEBRASKA, APPELLEE.
73 N. W. 2d 223

Filed November 25, 1955. No. 33827.

1. **Municipal Corporations.** An action to recover on a contract entered into with a village contrary to the prohibition of section 17-611, R. R. S. 1943, may not be maintained.
2. ———. Where a contract has been entered into with a village contrary to the prohibitions of section 17-611, R. R. S. 1943, and payments have been made for materials furnished or service performed thereunder, the amounts so paid may be recovered in an action by the village or by a taxpayer on behalf of the village.
3. ———. A contract entered into with a village contrary to the prohibitions of section 17-611, R. R. S. 1943, is void.
4. **Case Overruled.** The case of Grand Island Gas Co. v. West, 28 Neb. 852, 45 N. W. 242, to the extent that it is in conflict with the opinion herein is overruled.

APPEAL from the district court for Thurston County: LYLE E. JACKSON, JUDGE. *Affirmed.*

Mark J. Ryan, for appellants.

H. D. Addison, for appellee.

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

YEAGER, J.

This is an action by Fred L. Heese, a resident and taxpayer of the village of Pender, Thurston County, Nebraska, plaintiff and appellee, against Sterling Wenke, Wenke Farm Store, and the village of Pender, Thurston County, Nebraska, defendants, to recover judgment against the defendants Sterling Wenke and Wenke Farm Store in the amount of $8,638.39 with interest and costs, and for injunction against the defendant village of Pender enjoining it from paying any funds to Sterling Wenke or the Wenke Farm Store upon any contract or transaction with it in which Sterling Wenke or the Wenke

Farm Store was interested directly or indirectly.

The case was tried to the court on that portion of the pleaded cause of action wherein it was claimed that the defendants Sterling Wenke and Wenke Farm Store were obligated to pay the sum of $8,638.39 with interest, at the conclusion of which judgment was rendered against the defendants Sterling Wenke and Wenke Farm Store for $9,890.84. This judgment included accrued interest. That portion of the pleaded cause of action which presented the issue of injunction against the village of Pender was not submitted for determination on the trial.

The defendants Sterling Wenke and Wenke Farm Store filed motion for new trial which motion was in due course overruled. From the judgment and the order overruling the motion for new trial these defendants have appealed. They will be hereinafter referred to as the appellants.

The action was by plaintiff and against the defendants Sterling Wenke and Wenke Farm Store for the benefit of the defendant village of Pender. The basis of the action was that during the period involved Sterling Wenke was a member of the board of trustees of the village of Pender and was also the owner of the Wenke Farm Store, and that during this period he received from the village of Pender by warrants on account of and as pay for services, materials, and labor, $8,638.39 the payment of which was illegal and therefore recoverable back by the village of Pender. The defense was, to the extent necessary to state it here, that the payments were not illegal and there was no right of recovery by the village of Pender.

Prior to the commencement of the action the plaintiff in due form requested the village of Pender to institute action to recover the amount claimed but the request was refused. In the light of this refusal the action was instituted by plaintiff in behalf of the village. No question of the right of the plaintiff to maintain the action is presented on this appeal.

There is no material dispute as to facts. It appears clearly that during the period under inquiry Sterling Wenke was a member of the board of trustees of the village of Pender. It further appears that during this period there was paid to appellants out of the cash funds of the village of Pender $8,638.39 and that this amount was paid for material furnished and service performed for the village, except one warrant in the amount of $311.68 which was simply to correct an erroneous overcharge by the village to the appellants, the details of which are not made clear but concerning it there is no controversy. The trial court deducted this $311.68 from the total of the payments and rendered judgment accordingly. It appears that the proceedings whereby the payments by the village were allowed were with the knowledge of and participated in by the appellant Sterling Wenke.

The judgment in favor of the plaintiff for the benefit of the village and against the appellants was rendered on the theory that the payments made were violative of and void under section 17-611, R. R. S. 1943.

Numerous assignments of error are set out in the brief as grounds for reversal of the judgment but the only questions requiring consideration here are, first, the question of whether or not the transactions involved come within the prohibition of section 17-611, R. R. S. 1943; second, if it be found that they do come within the prohibition, then the question of whether or not appellants were and are entitled to receive for the material furnished and the service performed the reasonable value thereof; and third, the question of whether or not the action is barred by laches.

Section 17-611, R. R. S. 1943, is as follows: "No officer of any city or village shall be interested, directly or indirectly, in any contract to which the corporation, or any one for its benefit, is a party. Any such interest in any such contract shall avoid the obligation thereof on the part of such corporation. No officer shall receive

any pay or perquisites from the city other than his salary. Neither the city council nor board of trustees shall pay or appropriate any money or other valuable thing to any person not an officer for the performance of any act, service or duty, the doing or performance of which shall come within the proper scope of the duties of any officer of such corporation."

The first question must, in the light of a long line of authoritative decisions of this court, be decided adversely to the appellants. In Grand Island Gas Co. v West, 28 Neb. 852, 45 N. W. 242, a case wherein action was instituted to enjoin the enforcement of claims by the Grand Island Gas Company against the city of Grand Island under circumstances where an individual was an officer of the city and also an officer and stockholder of the Grand Island Gas Company, on the ground that the transactions which gave rise to the claims were prohibited by public policy and the statute involved here, this court said: "That an action cannot be maintained on such a contract is well sustained by the authorities." Further in the opinion it is said: "This section is broad and sweeping in its terms. It is obvious that a contract entered into with a city in which any of its officers have directly or *indirectly* a pecuniary interest, cannot be enforced against the corporation."

The opinion contains the citation of a number of decisions from other jurisdictions with quotations and a quotation from Dillon on Municipal Corporations supporting this conclusion. In it are found cogent and compelling reasons for the conclusion. The reasons set forth there will not be repeated here but they appear nonetheless cogent and compelling at this time.

In Village of Bellevue v. Sterba, 140 Neb. 744, 1 N. W. 2d 820, it was held that a contract falling within the category of the transactions involved here was void and unenforceable. The same was true in the following cases: Neisius v. Henry, 142 Neb. 29, 5 N. W. 2d 291; City of Lincoln v. First Nat. Bank, 146 Neb. 221, 19 N.

W. 2d 156; Warren v. County of Stanton, 147 Neb. 32, 22 N. W. 2d 287. See, also, Carlson v. City of Faith (S. D.), 67 N. W. 2d 149.

Having thus found that the transactions involved were void it becomes necessary to say whether or not the appellants were entitled to receive, or under the facts of this case, to retain the reasonable value of that which they had furnished to the village.

On the basis of the ultimate conclusion arrived at in Grand Island Gas Co. v. West, *supra,* if those conclusions are to be accepted as controlling, it appears that it would be necessary to say that they were so entitled to receive the reasonable value. However we think the effect of that ultimate conclusion is contrary in principle to the determination as to the validity of the contract. Certainly it is contrary to the later clear expressions of this court as to the rights or lack of rights under contracts or arrangements entered into and performed contrary to the prohibition of the statute. In the later cases the doctrine in this respect expressed in Grand Island Gas Co. v. West, *supra,* has been renounced although not directly overruled.

The case of Village of Bellevue v. Sterba, *supra,* was one wherein the village of Bellevue sought to recover back from Sterba money paid contrary to the prohibition of the statute. In that case it was urged that even if the contract was void still he was entitled to retain the reasonable value of his service. In response to the contention this court said: "This section has a salutary purpose—the insuring of honest and efficient village government. The prohibition against an officer of a village entering into contracts with the village is clear. It is urged, however, that Sterba was entitled under the law to recover for the reasonable value of the services he rendered the city. With this we cannot agree. Such a rule would defeat the very purpose of the statute."

The case of Neisius v. Henry, *supra,* was one which when it was tried was in most if not all legal aspects

like this one. It was one for the recovery of money and for an injunction against the payment of money other than salary. The question of quantum meruit was presented. This court denied the right of recovery on the basis of quantum meruit. In response to that question this court said: "There is much distinction between a contract with a city which is the result of an illegal exercise of an authorized power and one which is illegal because of a statutory disqualification to make a contract, or to create liability. The former may be ratified or a suit quantum meruit maintained. But where one is prohibited by statute from entering into a contract, and the obligation of the contract avoided for so doing, an action quantum meruit cannot be maintained."

The case of City of Lincoln v. First Nat. Bank, *supra,* was a declaratory judgment action wherein a charter provision of the city of Lincoln and a prohibitory statutory provision affecting the city of Lincoln similar to the statutory provision in question here was being considered. In that case the same conclusion was reached as in the case of Neisius v. Henry, *supra.*

In Warren v. County of Stanton, *supra,* although this statute was not involved the principles announced in Neisius v. Henry, *supra,* and Village of Bellevue v. Sterba, *supra,* with regard to prohibitory contracts with political subdivisions were reannounced.

There is a clear distinction which has been drawn between the attitude to be taken toward situations where there is a prohibition of power to contract coupled with a declaration of avoidance of obligation in the case of attempted exercise of power, as here, and situations where power exists to contract but the power has been irregularly exercised.

As pointed out, in the former there may be no recovery by the claimant and if payment has been made the village may recover all payments made. In the latter recovery may not be had by the claimant on the contract, but there may be recovery quantum meruit.

Cathers v. Moores, on rehearing, 78 Neb. 17, 113 N. W. 119, 14 L. R. A. N. S. 298; Omaha Road Equipment Co. v. Thurston County, 122 Neb. 35, 238 N. W. 919; Tidd v. Kirkham, 124 Neb. 605, 247 N. W. 594; Village of Bellevue of Sterba, *supra;* Neisius v. Henry, *supra;* Warren v. Stanton County, *supra.* To the extent that Grand Island Gas Co. v. West, *supra,* is in conflict herewith, it is overruled.

The remaining question to be considered is that of whether or not by reason of laches the plaintiff may be allowed to prevail in this case.

Factually the first incident of plaintiff's cause of action was a payment for supplies made by warrant dated June 14, 1950. The last was on April 28, 1953. There were numerous incidents between the two dates. The suit was commenced by filing a petition in the district court for Thurston County, Nebraska, on September 10, 1953. Summons was served on appellants likewise on September 10, 1953. It is clear therefore that no part of the amount, for recovery of which suit was instituted, was barred by any statute of limitations.

The appellants, however, contend that the plaintiff knew and was informed long before action was commenced, if not at all times during the period over which the transactions about which complaint is made, of the manner in which they were being carried out and that he should have acted earlier, and that because of his failure to act earlier he was guilty of laches in consequence of which he should not be allowed to maintain the action.

The defense of laches is an equitable defense and whether or not it may be regarded as available may depend upon a variety of considerations. These various considerations do not require enumeration and review herein. Only one of them need be noted. This one relates to change of conditions or relations of property or parties.

In Platte Valley Bank v. Lemke, 141 Neb. 218, 3 N.

W. 2d 396, it was said: "Laches does not grow out of the mere passage of time. It is founded upon the inequity of enforcing a claim where there has been a change in the condition or relations of the property or parties." See, also, Langdon v. Langdon, 104 Neb. 619, 178 N. W. 178; Geiss v. Trinity Lutheran Church Congregation, 119 Neb. 745, 230 N. W. 658; Schurman v. Pegau, 136 Neb. 628, 286 N. W. 921; Neisius v. Henry, *supra;* State v. Platte Valley Public Power & Irr. Dist., 143 Neb. 661, 10 N. W. 2d 631.

No fixed standard is available whereby in all cases it may be ascertained whether or not a party has been guilty of laches. However the case of Neisius v. Henry, *supra,* provides a precedent for a determination in this case that the plaintiff was not guilty of laches. In that case the void payments made by the city of Fremont started in 1927 and continued through the years until 1940. In the light of that situation this court held that the defense of laches was not available. With these facts before this court and in response to them, this court said: "Defendants have not been injured by the delay and the situation has not materially changed."

In the case here being considered the transactions involved covered a period of less than 3 years.

The conclusion reached therefore is that the judgment of the district court should be and it is affirmed.

AFFIRMED.

HARRY L. FRIDLEY, APPELLEE, V. E. L. BRUSH, FIRST AND REAL NAME UNKNOWN, APPELLANT.
73 N. W. 2d 376

Filed December 2, 1955. No. 33756.

1. Negligence: Trial. If the defendant pleads that the plaintiff was guilty of contributory negligence the burden is upon him to prove that defense and this burden does not shift during the trial of the case. However, if the evidence adduced by

the plaintiff tends to prove that issue the defendant is entitled to receive the benefit thereof and the court must instruct the jury to that effect.

2. ———: ———. Under general allegations of contributory negligence supported by evidence, the trial court, without request, should submit to and properly instruct the jury on such charges. However, where the trial court has instructed the jury on a specific charge of contributory negligence pleaded in the defendant's answer, such instruction is sufficient.
3. **Trial.** The true meaning of instructions is to be determined not from a separate phrase or paragraph, but by considering all that is said on each subject or branch of the case.
4. ———. The meaning of an instruction, not the phraseology, is the important consideration, and a claim of prejudice will not be sustained when the meaning of an instruction is reasonably clear.
5. **Trial: Appeal and Error.** An instruction will not be held to be prejudicially erroneous merely because of a harmless imperfection which cannot reasonably be said to have confused or misled the jury to the prejudice of the party complaining.
6. ———: ———. If an examination of all the instructions given by the trial court discloses that they fairly and correctly state the law applicable under the evidence, error cannot be predicated thereon.
7. **Automobiles: Negligence.** As a general rule it is negligence as a matter of law for a motorist to drive an automobile on a highway in such a manner that he cannot stop in time to avoid a collision with an object within the range of his vision.
8. ———: ———. 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.
9. ———: ———. The driver of an automobile 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.
10. **Trial: Damages.** A verdict may be set aside as excessive only when it is so clearly exorbitant as to indicate that it was the result of passion, prejudice, or mistake, or that it is clear

that the jury disregarded the evidence or controlling rules of law.

11. ———: ———. In an action for damages, where the law furnishes no legal rule for measuring them, the amount to be awarded rests largely in the sound discretion of the jury, and the courts are reluctant to interfere with a verdict so rendered.

APPEAL from the district court for Douglas County: ARTHUR C. THOMSEN, JUDGE. *Affirmed.*

Neely, Otis & Neely, for appellant.

George B. Boland and *Robert D. Mullin,* for appellee.

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

MESSMORE, J.

This is an action brought by Harry L. Fridley, plaintiff, in the district court for Douglas County against E. L. Brush, defendant, to recover damages resulting from injuries allegedly caused by the defendant. There was a trial to a jury resulting in a verdict and judgment in favor of the plaintiff for $16,500. From the order overruling a motion for new trial and order overruling a motion for judgment notwithstanding the verdict, the defendant has appealed.

For convenience the parties will be referred to as designated in the district court.

The plaintiff's petition alleged that the injuries and damages occasioned to the plaintiff were the direct and proximate result of the negligence of the defendant in the following particulars: (a) In operating his automobile at a high, dangerous, and excessive rate of speed, greater than was reasonable and proper taking in consideration the highway, the use of the highway, the condition of the highway, and the traffic thereon, and at a rate of speed in violation of the statutes of the State of Nebraska; (b) in failing to keep a proper lookout for traffic and especially the automobile and the person of the plaintiff; (c) in failing to change, alter, or divert

the course of his automobile and to avoid colliding with the plaintiff; (d) in failing to sound any signal or warning of his approach; (e) in failing to have his automobile under proper control; (f) in driving his automobile at such a rate of speed in the nighttime so that he could not bring it to a stop within the area lighted by his headlights; and (g) in failing to seasonably apply his brakes and to bring his automobile to a stop before colliding with the plaintiff.

The defendant's answer was a general denial of the allegations of negligence pleaded in the plaintiff's petition. In addition it alleged that the collision was the direct and proximate result of the negligence of the plaintiff in stopping his automobile on a heavily-traveled highway after sundown without exhibiting white and red lights visible from a distance of 500 feet to the rear as required by the statutes of Nebraska.

Defendant's counterclaim alleged that he was driving his automobile in an easterly direction on what is known as the Dodge Street highway on December 1, 1953, at 5:30 p. m.; that he had proceeded down a hill located about 3 miles west of the city limits of Omaha, traveling at approximately 30 miles an hour; that the night was dark and it had been misting, so that the highway was wet; that the plaintiff had stopped his automobile a short distance from the bottom of an incline directly in the path of the defendant's car; that the color of the plaintiff's automobile was similar to that of the road, and by reason of that fact, coupled with its position on the highway on an upgrade a short distance from the bottom of a hill, defendant was unable to see plaintiff's automobile until he was only a short distance away from it; that as soon as the plaintiff's automobile became visible, defendant turned his automobile sharply to the left and applied his brakes in an effort to avoid a collision; that the right front of the defendant's car struck the left rear corner of the plaintiff's automobile, damaging defendant's car without fault on defendant's

part; and that the damage occasioned to defendant's automobile was the direct and proximate result of the negligence of the plaintiff. Defendant prayed for damages sufficient to reimburse the defendant for the money expended in repairing his automobile.

Plaintiff's reply to defendant's answer was in effect a general denial of all the allegations contained therein which were not admissions of plaintiff's petition, and a specific denial of the affirmative defense pleaded in defendant's answer. Plaintiff's answer to defendant's counterclaim was in effect a general denial of the allegations contained therein.

The testimony discloses that a highway marker sign designating U. S. Highways Nos. 6 and 275 is in the vicinity where the accident occurred, and that the highway above mentioned is commonly referred to as the West Dodge Street highway. This highway consists of four vehicular lanes, with the paved portion 42 feet wide. Through the center of the paving there is a black line. There is a distance of 21 feet on the north and south sides of the black line indicating the traveled portions of the highway for vehicular travel east and west. The highway marker sign is approximately 485 feet up an incline which begins approximately one and one-half blocks west of the point of impact. The grade of the incline where the accident occurred is 2 percent for the first 100 feet, 4 percent for the next 100 feet, and then increases to 6 percent as the incline continues upward to the east.

On both sides of the highway in close proximity to the point of impact are several billboard signs with electric lights on them which light up the highway.

The plaintiff testified that he was 70 years of age and employed as a salesman to hustle freight for the McMaken Transportation Company; that he owned a 1948 Nash sedan, gray in color; and that in his business he used the company's 1946 Nash, the top part of which was gray and the lower part of the body red. We will

hereafter refer to these Nash cars as the family car and the company car. His daughter kept house for him, and was employed at Boys Town. About 5 p. m., the evening of December 1, 1953, his daughter telephoned to inform him that the family car which she was driving had stalled on the highway. The plaintiff took the company car to go to his daughter's assistance. He drove the company car up behind the family car and proceeded to push it about three-fourths of a mile east on the highway, bumper to bumper. As he pushed the family car up the incline, his tires commenced to slip because the pavement was "a little bit wet" as it had previously been misting. The company car was getting "a little hot" from the pushing, so he stopped, with one right wheel of the car on the right shoulder of the pavement, to let the motor cool. His intention was to push the family car east to the first crossroad where they could get it off the highway. He got out of the company car, and went up to talk to his daughter and question her about the first place where they could turn off the highway. He then went back to the company car and endeavored to get the left front door of the car open. During the time that he was stopped, which he estimated to be about 5 minutes, four or five cars and one truck passed, going east. His daughter testified, however, that he was stopped only from a minute to a minute and a half. As he was trying to open the door he saw a car approaching at a distance of about 75 feet to the west, or rear, of the company car. He was standing on the north side of the company car. The approaching car was in the south lane of travel, that is, the driving lane. He estimated the speed of the approaching car, which was coming straight at him, at 40 miles an hour. This car, driven by the defendant, continued east right into the rear of the company car, and swerved slightly to the left or north just prior to the impact. The right front of the defendant's Packard car struck the left rear part of the company car dam-

aging both cars and the family car. At the moment of impact the plaintiff had his hand on the door of the company car. The force of the impact threw him to the pavement.

The plaintiff's daughter testified that she started home from Boys Town about 4:30 p. m. in the family car. The car stalled on the Dodge Street highway. She telephoned her father who came out in the company car. He tried but could not get the family car started, and then proceeded to push it from behind with the company car. When it was pushed about a mile, the company car was in trouble, so her father stopped and inquired of her if a turn could be made to get the cars off the highway. When he got back to the company car, the accident occurred. She felt the force of the impact of the Packard car striking the company car. It knocked her against the steering wheel and moved the family car possibly a foot or so to the east. She got out of the family car and went to her father's assistance. The side of the Packard car was up against the left rear side of the company car. Her father was pinned underneath the Packard car, laying with his face down and his head to the east, with the fender and part of the bumper of the Packard car over his legs up above his hips. Plaintiff was extricated from this position and put into the company car. She further testified that she saw the defendant immediately after the accident. He got out of his car and said: "This is a terrible thing to happen. I will be late now for my dinner engagement in Omaha."

The record also shows that the family car and the company car were equipped with the customary headlights in front, and three red lights across the back of each car, that is, in the middle of the trunk there was a light and one on each rear fender. The plaintiff and his daughter testified that before, at the time of, and after the accident the front headlights on both Nash cars were on; that the red taillights were lighted on

both cars; and that it was dark. Plaintiff's daughter also testified that there were half a dozen or more billboard signs with lights on in the vicinity of the accident and "it seemed very light."

The defendant testified that he was 75 years of age and a physician at Norfolk; that on December 1, 1953, he left his home, accompanied by his wife, to visit their son in Omaha; that he was familiar with the Dodge Street highway and had driven over it both day and night on several occasions; that he came from Fremont on Highway No. 275; and that as he came to the Dodge Street highway he slowed his car down to 30 miles an hour. The first thing he noticed on the highway was when the lights of his car shone upon a man standing on the highway by a car approximately 20 feet ahead of him. His wife said: "There's a man!" and they both said: "There's a car." They had noticed him at the same time. The defendant then tried to slow his car to miss the Nash car directly ahead of him and also the man, and endeavored to turn left, or northeast, and made an effort to apply his brakes but was unable to stop the car in time to avoid colliding with the car ahead of him. As a result, his car pushed the Nash car which knocked the plaintiff down. Both Nash cars were in the driving lane of the highway right up against each other. After the impact the Nash car he struck was in the first lane of travel and the Packard car in the second lane of travel headed east, and very close to the second Nash car. The highway was very wet. It was misty, and visibility was low. After the defendant got out of his car, the plaintiff and his daughter were standing up beside the Nash car. The plaintiff said it felt like his leg was broken. The defendant then opened the car door and the plaintiff was put into the company car. The defendant examined the plaintiff's leg and informed him of the nature of the injury.

On cross-examination the defendant testified that his car was equipped with hydraulic brakes which were

functioning in perfect order. He was unable to tell how far the beam of his headlights would show ahead. He was familiar with the weather condition at the time, and the heavy volume of traffic on Dodge Street highway. He recalled the lighted Giovanni billboard on the south side of the highway in close proximity to the point of impact. He further testified that he was coming down a hill and the Nash cars of the plaintiff were up on the other side of another hill, and the lights of the defendant's car were in a position so that he did not see the cars until he started up the hill. He saw the plaintiff standing in the highway just as his car started up the hill. There were no other cars ahead of him to block his view of the plaintiff or the Nash cars. His windshield wipers were working at the time of the accident. However, in a statement given by the defendant in the presence of a court reporter 3 days after the accident, he could not recall whether the windshield wipers were working or not. He did not recall sounding his horn at the time of the accident. He did not see lights on the rear of the Nash car ahead of him, and did not see anything until his lights showed the man standing in the highway at the back end of the Nash car. Defendant's Packard car was equipped with regular two-beam lights, and he was driving with the high beam when he first saw the plaintiff.

The defendant's wife testified that all she recalled was seeing a man and a car at the time of the impact. She did not recall seeing any lights on the cars. She remained in the car after the accident. It did not seem to her that the car traveled any distance after the collision. The headlights on the Packard car were lighted, the night was dark, the sky was overcast, and it had been drizzling and raining. They were driving in the south lane on Dodge Street to enable them to turn off when they reached the street leading to their son's home, which was to the south. The man looked as though he was standing beside his car toward the rear of it, facing to-

ward the west. She testified that the defendant had slowed down to probably 30 to 35 miles an hour. She was unable to tell how far ahead the headlights on the defendant's car would reveal an object.

A deputy sheriff arrived at the scene of the accident about 10 p. m. and took several pictures which were received in evidence as exhibits. He testified that there was a slight drizzle, it was not foggy, nor was there enough moisture in the air to reduce visibility. The highway was slightly damp and would be somewhat slippery.

A state safety patrolman testified that he received a call on the date of the accident about 5:45 p. m.; that when he arrived, he noticed that the two Nash cars were jammed together in the southernmost lane of the highway; that the Packard car was out in the passing lane; and that these vehicles were in the vicinity of the U. S. Highway markers 6 and 275. He further testified that it was dark at the time of the accident; that the pavement was still wet; that prior to the time of the accident it had been misting; and that the red lights on the back end of the Nash car that was struck were on. He talked to the defendant who told him that he was going 40 miles an hour at the time of the accident, and said he tried to avoid it as soon as he realized he was in difficulty but was unable to do so. On cross-examination he testified that it was a "nasty" evening, cloudy, and visibility was "not too good."

The defendant predicates error on the part of the trial court in giving instructions Nos. 4, 5, 6, 7, 10½, and 11 to the jury.

In considering the above assignments of error, it must be borne in mind that instructions given by the trial court to a jury must be construed together and considered as a whole to ascertain whether or not they properly state the law applicable to the case.

Instruction No. 4 reads: "The Court finds as a matter of law that the proximate cause of the accident was

negligence on the part of the defendant, in whole or in part, in those respects charged against the defendant in the petition at Instruction No. 1, and to an extent to defeat the defendant's recovery on his counterclaim. You are, therefore, directed to return a verdict for the plaintiff on the defendant's counterclaim."

The defendant contends that the use of the article "the" before the words "proximate cause" would mean the negligence of the defendant was the sole and only cause of the accident, and that to properly instruct the jury, the article "a" should have been used before the words "proximate cause" which would mean one or more of the elements of negligence on the part of the defendant.

Instruction No. 4 relates only to the defendant's counterclaim. There is a qualifying phrase in the instruction as follows: "in whole or in part." The qualifying phrase conveys the meaning that the defendant was guilty of negligence sufficient to bar his recovery on his counterclaim, and that such negligence on the part of the defendant amounted to either a portion of the proximate cause of the accident or, in the alternative, constituted the sole proximate cause and, as stated above, this instruction should be considered and construed with all the other instructions in the case.

In connection with instruction No. 4, the defendant then makes reference to instruction No. 5, which reads as follows: "The burden is upon the plaintiff to establish by a preponderance of the evidence the nature and extent of his injuries and the amount of his loss all as proximately caused by negligence on the part of the defendant.

"If the plaintiff has so established such proposition by a preponderance of the evidence your verdict will be for the plaintiff, unless you find the plaintiff himself to have been negligent to an extent to defeat his recovery, as herein elsewhere stated. If the plaintiff has failed to establish such proposition by a preponderance of the

evidence your verdict will be for the defendant."

The defendant's contention is that the phrase "all as proximately caused by negligence on the part of the defendant," as used in instruction No. 5 given immediately after instruction No. 4, could only be construed to mean that the proximate cause of the accident was the negligence of the defendant; that after the plaintiff had satisfied the jury of the nature and extent of his injuries and the amount of his loss, a verdict for the plaintiff must follow; and other instructions given by the trial court thereafter would not restore the defendant's right to have the jury consider the contributory negligence of the plaintiff, if any.

The last paragraph of instruction No. 5 informed the jury that it could return a verdict for the defendant if the plaintiff failed to prove his case by a preponderance of the evidence, or if the plaintiff himself was guilty of more than slight negligence. It is a proper instruction.

Instruction No. 6 reads: "Negligence is not presumed but must be proved. The defendant having alleged that the accident was proximately caused by negligence on the part of the plaintiff or his contributory negligence, the burden is upon the defendant to establish any such negligence or contributory negligence and that the same was the proximate cause of or proximately a contributing cause to the accident."

The defendant contends that instruction No. 6 is incomplete. The effect of the instruction is to inform the jury that the question of the plaintiff's contributory negligence was in issue; and that the burden was on the defendant to establish any such negligence or contributory negligence and that the same was the proximate cause of or proximately a contributing cause to the accident. This instruction, under the circumstances, was proper.

Instruction No. 7 reads: "In determining any issue under the pleadings or evidence you should consider all the evidence submitted and not only that of the side

which happens to have the burden of proof. If any evidence of the other side tends to establish a fact required to be established by a preponderance of the evidence, the one who has the burden of proof shall have the advantage of it."

The defendant contends instruction No. 7, wherein appears the general statement "In determining any issue under the pleadings or evidence you should consider all the evidence submitted," is not in compliance with the rule announced in Mundy v. Davis, 154 Neb. 423, 48 N. W. 2d 394. In the cited case we said: "If the defendant pleads that the plaintiff was guilty of contributory negligence the burden is upon him to prove that defense and this burden does not shift during the trial of the case. However, if the evidence adduced by the plaintiff tends to prove that issue the defendant is entitled to receive the benefit thereof and the court must instruct the jury to that effect." See cases cited in Mundy v. Davis, *supra.*

As we view instruction No. 7, it conforms precisely to the type of instruction indicated in Mundy v. Davis, *supra,* on this subject and is a proper instruction.

Instruction No. 10½ reads: "In determining the degree of negligence of the defendant you should consider the visibility of plaintiff and his car and whether or not the lights on the rear of the car plaintiff had driven were lighted and all other facts and circumstances in evidence affecting the car's visibility, what the defendant could and should have been able to see and do in the exercise of ordinary care, the speed at which he was traveling, and all other facts and circumstances relating to these subjects."

The defendant contends the above instruction told the jury, by implication, that the defendant was guilty of negligence. This instruction refers to certain evidence adduced that the jury might consider in determining the degree of defendant's negligence with relation to the rule of comparative negligence, and must

be considered and construed with all the other instructions in the case. We find no prejudicial error in the giving of this instruction.

Instruction No. 11 given by the trial court was the standard instruction on comparative negligence. It conforms to the comparative negligence statute. The defendant argues the inapplicability of this instruction in the light of what the court informed the jury in instruction No. 4 which we have previously analyzed, and needs no further discussion. Instruction No. 11 was properly given.

Instruction No. 9 set forth the definitions of "negligence" and "contributory negligence" as well as the phrases "proximate cause," "preponderance of the evidence," and "ordinary care."

Instruction No. 10 related to the statutes of Nebraska which apply to the case under the pleadings and the evidence.

Instruction No. 13 related to the measure of damages in the event the plaintiff was entitled to recover. In this instruction the jury was also informed that if it should find the plaintiff to have been negligent proximately contributing to cause the accident but not to an extent to defeat his recovery, the jury would then reduce the amount of his recovery in the proportion which plaintiff's negligence bore to the total negligence in the case; that in the event the jury should find for the defendant it should simply say so by its verdict; and in any event, the jury was to find for the plaintiff and against the defendant on the defendant's counterclaim. The part of the instruction referred to above again made possible a finding by the jury that plaintiff's contributory negligence, if any, might bar plaintiff's right to recover, or might proportionately reduce the amount he was possibly entitled to recover.

The defendant contends it is the duty of the trial court, without request, to submit to and properly instruct the jury upon all the material issues presented

by the pleadings and the evidence. The defendant asserts that all the specific acts of negligence were not contained in the defendant's answer, for the reason that they were not known until they were adduced by the evidence of the plaintiff and other witnesses at the time of trial.

The defendant did not apprise the trial court nor make application to amend his answer or counterclaim to conform to what he claimed the evidence disclosed to be the specific acts of negligence on the part of the plaintiff that should be charged in such pleadings.

The defendant, in his answer, alleged that "the collision was the direct and proximate result of the negligence of the plaintiff in stopping his automobile on a heavily traveled highway after sundown without exhibiting white and red lights visible from a distance of 500 feet to the rear, as required by the statutes of Nebraska," and further alleged that "plaintiff's negligence was more than slight, and sufficient to bar recovery herein." This specific charge of contributory negligence was submitted to the jury for its consideration.

Krepcik v. Interstate Transit Lines, 153 Neb. 98, 43 N. W. 2d 609, is cited by the defendant. In this case the trial court instructed the jury on the basis of specifications of defendant's negligence claimed by plaintiff in the petition and supported by the evidence, but the trial court neglected to specify the charges of contributory negligence pleaded in the defendant's answer with particularity and supported by proof. We said: "It is the uniform and proper practice in this state that where specific acts of negligence are charged and supported by the evidence, the trial court instructs as to the specific acts so alleged and supported. It necessarily follows that where specific charges of contributory negligence are pleaded and supported by proof the instructions should submit those specific charges to the jury for its determination." It is apparent that the requirement

is that such specific charges must be both pleaded and supported by proof.

Mundy v. Davis, *supra,* is cited in support of the proposition that the trial court should have specifically submitted the several elements of contributory negligence. An examination of the above case shows that defendant Davis made general, rather than specific, allegations of contributory negligence by the plaintiff, and that the plaintiff, Mundy, took no action to require the defendant to specify with exactness the acts of alleged contributory negligence upon which he was relying.

It is true that under a general allegation of contributory negligence the trial court should instruct the jury as to any such negligence which might be supported by the evidence. That is not the situation here, as pointed out above, and the defendant cannot prevail in this contention.

There are certain well-established rules relating to instructions that are applicable to the instructions complained of in the instant case.

"The true meaning of instructions is to be determined not from a separate phrase or paragraph, but by considering all that is said on each subject or branch of the case." Roberts v. Carlson, 142 Neb. 851, 8 N. W. 2d 175.

"The meaning of an instruction, not the phraseology, is the important consideration, and a claim of prejudice will not be sustained when the meaning of an instruction is reasonably clear." Brown v. Hyslop, 153 Neb. 669, 45 N. W. 2d 743.

"An instruction will not be held to be prejudicially erroneous merely because of a harmless imperfection which cannot reasonably be said to have confused or misled the jury to the prejudice of the party complaining." In re Estate of Kinsey, 152 Neb. 95, 40 N. W. 2d 526.

If an examination of all the instructions given by the trial court discloses that they fairly and correctly state

the law applicable under the evidence, error cannot be predicated thereon. See Blanchard v. Lawson, 148 Neb. 299, 27 N. W. 2d 217.

Having examined the record and all of the instructions given by the trial court, we conclude that they fairly and correctly state the law applicable to the evidence, and that error cannot be predicated thereon. Gallagher v. Law, 135 Neb. 381, 281 N. W. 806.

The defendant asserts that when a person standing or walking on a public highway at night is struck by a motor vehicle, the question of the defendant's negligence, if any, and the contributory negligence of the plaintiff, if any, are questions to be determined by the rules of ordinary care. In support thereof the defendant cites Brenning v. Remington, 136 Neb. 883, 287 N. W. 776; Carlson v. Roberts, *supra;* Grantham v. Watson Bros. Transp. Co., 142 Neb. 362, 6 N. W. 2d 372; and White v. Edwards, 222 Mich. 321, 192 N. W. 560. Suffice it is to say that the factual situations in the cited cases are not analogous to those in the instant case and they are not in point here.

Due consideration of all the facts reflected by the evidence in the instant case leads to the inevitable conclusion that at the time of the accident the plaintiff was lawfully on the pavement where he was standing, and his position was open to view of the approaching cars. He had a right to rely on reasonable care on the part of automobile drivers thereof. Any person using the highway was bound to take notice of him and to use care not to injure him, and the plaintiff had a right to assume that this would be done. The issue of the plaintiff's contributory negligence was submitted to the jury for its consideration.

The defendant makes reference to the general rule and the exceptions thereto, and contends that the same apply to him under the facts and circumstances of the instant case. The general rule and the exceptions thereto are shown by the following authorities.

"As a general rule it is negligence as a matter of law for a motorist to drive an automobile on a highway in such a manner that he cannot stop in time to avoid a collision with an object within the range of his vision." Murray v. Pearson Appliance Store, 155 Neb. 860, 54 N. W. 2d 250. See, also, Buresh v. George, 149 Neb. 340, 31 N. W. 2d 106.

The basis of this rule is that a driver of an automobile is legally obligated to keep such a lookout that he can see what is plainly visible before him and that he cannot relieve himself of that duty. And, in conjunction therewith, he must so drive his automobile that when he sees the object he can stop his automobile in time to avoid it. Buresh v. George, *supra;* Mundy v. Davis, *supra.*

In Mundy v. Davis, *supra,* we said, quoting from Fairman v. Cook, 142 Neb. 893, 8 N. W. 2d 315: " '* * * the existence or presence of smoke, snow, fog, mist, blinding headlights or other similar elements which materially impair or wholly destroy visibility are not to be deemed intervening causes but rather as conditions which impose upon the drivers of automobiles the duty to assure the safety of the public by the exercise of a degree of care commensurate with such surrounding circumstances. Anderson v. Byrd, 133 Neb. 483, 275 N. W. 825; Fischer v. Megan, 138 Neb. 420, 293 N. W. 287.' "

In Haight v. Nelson, 157 Neb. 341, 59 N. W. 2d 576, referring to the general rule requiring a motorist to stop within the range of his lights, we said: "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.' "

It is the defendant's contention in the instant case that the evidence brings this case within the exceptions to the general rule.

In Murray v. Pearson Appliance Store, *supra*, this court said: "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."

In the instant case, the accident occurred at a point 485 feet up a long, gradual incline. There is no evidence that the Nash car which was struck by the defendant's car was dirty or begrimed with oil, or in any manner, by its color or otherwise, blended with the pavement. It was admitted that the Nash car which the plaintiff had been driving was stationary in the vicinity of numerous large billboards which were lighted, and these lights illuminated the highway. The defendant's testimony discloses that there was no object between his car and the two Nash cars standing stationary on the highway which prevented him from seeing them. In addition there were three lanes of traffic to the north of where the Nash cars were stationary and to the north of the defendant's car. There was sufficient space for the defendant to have used the passing lane to avoid striking the Nash cars. There is little dispute, if any, in the evidence that both headlights and taillights on the stationary Nash cars were showing. The defendant

said his visibility was diminished because of mist in the air. However, he was well aware of this condition long before the accident occurred. He had no idea whatsoever as to the distance which his headlights shown ahead of him under the circumstances existing at the time, nor the extent of his visibility, nor the distance in which he could stop his car at an admitted rate of speed of 30 miles an hour right up to the point of impact.

It must be concluded that under the evidence and the circumstances existing here, the facts do not bring this case within the exceptions of the general rule, and the trial court did not err in finding, as a matter of law, that the defendant was guilty of negligence.

The defendant complains that the verdict of the jury was excessive. In this respect, the evidence shows that plaintiff's right leg began to pain him immediately after the accident, and he was hospitalized. His kneecap was moved upward 4 or 5 inches above its regular position. An orthopedic surgeon, upon examination, found the knee to be greatly swollen, and there was considerable bleeding in the joint. There was an avulsion of the patellar tendon which goes from the kneecap down to the shin bone. The plaintiff was unable to straighten his right leg. The left leg was bruised and contused. An operation was performed which resulted in a shortening of the tendon. The plaintiff was placed in a plaster cast from ankle to hip, which he wore approximately 3 months. He used crutches with difficulty, and at the time of trial was suffering pain in his right knee and leg to the extent that injections of hydracortisone were given in an attempt to control the pain. The operation left a scar approximately 5 inches in length. The doctor testified that there was pain and limitation of motion in the plaintiff's right leg, and that plaintiff had suffered 15 percent permanent disability and would be disabled to that extent for the rest of his life. The plaintiff had reached the maximum recovery at the

time of trial and could hope for no further improvement. His doctor bills were in excess of $400 at the time of trial. He walked with a limp, and would continue to do so for the rest of his life. His earning power had been diminished.

The defendant offered no evidence to contradict the foregoing evidence as to the nature and extent of the plaintiff's injuries.

"The law gives to the jury the right to determine the amount of recovery in cases of personal injury. That is, of course, one of its functions, and, if the verdict is not so disproportionate to the injury as to disclose prejudice and passion, it will not be disturbed." Dailey v. Sovereign Camp, W. O. W., 106 Neb. 767, 184 N. W. 920.

"A verdict may be set aside as excessive only when it is so clearly exorbitant as to indicate that it was the result of passion, prejudice, or mistake, or that it is clear that the jury disregarded the evidence or controlling rules of law." Remmenga v. Selk, 152 Neb. 625, 42 N. W. 2d 186.

In Sutton v. Inland Const. Co., 144 Neb. 721, 14 N. W. 2d 387, we said: "No method of exact computation can be devised in determining compensatory damages in cases of this kind. We think the evidence was such that the jury could properly arrive at the amount determined upon by them. We can find no yardstick whereby we can say as a matter of law that the verdict was excessive. Under such circumstances this court may not substitute its judgment for that of the jury, even if it be assumed that this court would determine that a lesser amount would constitute adequate compensation for the injuries sustained." See, also, Horky v. Schroll, 148 Neb. 96, 26 N. W. 2d 396; Rueger v. Hawks, 150 Neb. 834, 36 N. W. 2d 236; Thoren v. Myers, 151 Neb. 453, 37 N. W. 2d 725; Peacock v. J. L. Brandeis & Sons, 157 Neb. 514, 60 N. W. 2d 643. This assignment of error cannot be sustained.

We find no error in the record prejudicial to the rights

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

AFFIRMED.

CHARLES R. LARSON, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.
73 N. W. 2d 388

Filed December 2, 1955. No. 33817.

1. **Burglary.** The gist of the crime of burglary is the breaking and entering into any building described in the statute defining the offense, with intent to steal property of any value. It is not necessary to allege in charging the commission of the crime that there was property in the building at the time of the breaking and entry which could have been stolen by the accused.
2. **Indictments and Informations.** If the statute contains the elements necessary to constitute the offense intended to be punished, it is sufficient for an information to allege the crime in the terms of the statute.
3. **Criminal Law.** In determining the sufficiency of circumstantial evidence to support a conviction, each case must be determined on its own peculiar circumstances.
4. ———. To justify a conviction on circumstantial evidence, it is necessary that the facts and circumstances essential to the conclusion sought must be proved by competent evidence beyond a reasonable doubt, and, when taken together, must be of such character as to be consistent with each other and with the hypothesis sought to be established thereby and inconsistent with any reasonable hypothesis of innocence.
5. **Indictments and Informations: Criminal Law.** The same rule as to the information, conduct of the case, and punishment applicable to a principal in fact governs his aider, abettor, or procurer and no additional facts are required to be set out in the information against the latter than are necessary against the principal.
6. **Criminal Law: Witnesses.** The credibility of witnesses and the weight of the evidence are for the jury to determine in a criminal case in which the evidence presents an issue of fact as to the guilt or innocence of the accused and the conclusion of the jury may not be disturbed by this court unless it is clearly wrong.

7. **Case Overruled.** The case of Winslow v. State, 26 Neb. 308, 41 N. W. 1116, is disapproved and overruled in the respect and to the extent stated in the opinion.

ERROR to the district court for Douglas County: L. ROSS NEWKIRK, JUDGE. *Affirmed.*

John C. Burke, for plaintiff in error.

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

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

BOSLAUGH, J.

Plaintiff in error, hereinafter called defendant, was accused of the offense of burglary. He denied the charge but was convicted. A motion for a new trial and a motion in arrest of judgment were each denied and he was adjudged to be confined in the Nebraska State Reformatory.

The information alleged that on or about the 3rd day of October 1954, the defendant in Douglas County did willfully, maliciously, and forcibly, with intent to steal property of value, break and enter into the building located at 3562 Farnam Street in Omaha, Nebraska, which building was occupied by Phillip Crandell, doing business as Crandell Furs. The defendant timely but unsuccessfully challenged the sufficiency of the information to state a crime by interposing a motion to quash it because it was not alleged therein that the breaking and entering into the building was with the intent to steal property within the building at the time it is claimed the crime was committed. The action of the court in denying the motion to quash the information is an assignment of error in this court.

The relevant statute contains the following: "Whoever willfully, maliciously and forcibly breaks and enters into any * * * shop, office, storehouse * * * or other private building * * * with intent to steal property of

any value, shall be punished * * *." § 28-532, R. R. S. 1943. The essence of the argument of defendant in support of his contention in this regard is that an information charging the crime of burglary must allege that the breaking into the building described was with intent to steal property of value then within the building. He says in effect that intent to steal property of value presently in the building is an essential element of the crime of burglary. The statute defining the crime of burglary quoted above does not so provide.

It was decided in Wheeler v. State, 79 Neb. 491, 113 N. W. 253, that one who willfully, maliciously, and forcibly breaks and enters any structure described in the statute defining the crime of burglary, with intent to steal any property of value which he assumes is within the building, is guilty of a violation of that statute and that the value of the property actually within the building is not a necessary ingredient of the crime. The exact language thereof in reference to this is: "By the provisions of section 48 of the criminal code (now § 28-532, R. R. S. 1943) it is made a felony for a person to break and enter a storeroom, with intent to steal property of any value. While the statute says 'property of any value,' we do not regard the words 'of value' as being necessary ingredients of the charge."

The above case was approved in Schultz v. State, 88 Neb. 613, 130 N. W. 105, 34 L. R. A. N. S. 243, in which it is stated: "One who unlawfully, wilfully, maliciously and forcibly breaks and enters a mill building with the intent to steal property of any value is guilty, although there is no personal property therein."

The contention of the defendant in Pointer v. State, 114 Neb. 13, 205 N. W. 574, was that an information charging burglary must allege that the property which the accused intended to steal possessed some value. The comment of the court in reference thereto is as follows: "An information which charges one with feloniously, wilfully, maliciously and forcibly entering a

building with intent to steal property is not defective in omitting to allege that such property was of some value." The effect of this is that the value of the property which the accused intended to steal is not an ingredient of the crime and that the words of the statute "of any value" are immaterial to the crime of burglary. This is a convincing indication that the substance of the crime is the breaking into and entering a building with the intent to steal and that intent may exist although unknown to the burglar the building contains nothing of value or is literally without anything in it.

The Criminal Code of Nebraska was adopted from Ohio and the decisions of the Supreme Court of that state construing its criminal code are persuasive whenever a like problem is considered by this court. Schultz v. State, *supra.*

In State v. Beal, 37 Ohio St. 108, 41 Am. R. 490, the court said: "The judge presiding at the trial seems to have been of the opinion, that the averment of an intent to steal the personal effects or property of the owner of the building broken into, is not sustained, unless property belonging to such owner and which the accused intended to steal, was found within the building. * * * In this we think the court erred. Burglary, under the statute, involves the ingredients of breaking and entering the building * * * forcibly and maliciously, with intent to commit a felony, or with intent to steal property of some value. It differs but slightly from burglary at common law. 2 East P. C. 484. The offense is complete when the facts entering into the above definition exist, whether the intent is executed or not." See, also, Spencer v. State, 13 Ohio 401.

The Minnesota court said in State v. Golden, 86 Minn. 206, 90 N. W. 398: "The gist of this offense is the breaking and entering any building with intent to commit a crime therein * * *. It was not necessary to allege in the indictment that there were any goods in the warehouse at the time of the breaking and entry thereof which

could be the subject of larceny. A breaking and entering the building with intent to steal chattels therein completes the offense, even if there be at the time in fact no goods in the building. If the defendant supposed that there were goods in the warehouse, and broke and entered it with the intent to steal them, the fact that he was mistaken in his belief does not lessen the criminal intent with which he did the act. 'The sting of the crime is, in short, the guilty purpose, without reference to the possibility of accomplishing it in any given instance.' "

In People v. Shaber, 32 Cal. 36, the defendant after his conviction of breaking and entering a house with intent to commit larceny moved in arrest of judgment on the ground that the indictment failed to state that he intended to feloniously steal, take, and carry away any property then being in the house entered. The court said: "The indictment charges the offense in the very terms used in defining it * * *. As a larceny actually committed is not made an element in the offense, it cannot be needful to allege one, either generally or by an averment of the facts entering into and constituting its definition. And as a forcible entry, etc., with a larcenous intent is all that is made essential to the crime, we consider that a conviction would be due even though it should appear that there were no goods in the building at the time the entry was made. The forcible entry and the intent being found or given, the crime would be complete even though it should turn out that, contrary to the calculations of the burglar, the building was empty." See, also, State v. Emmons, 72 Iowa 265, 33 N. W. 672; Charles v. State, 36 Fla. 691, 18 So. 369; Hale v. Commonwealth, 98 Ky. 353, 33 S. W. 91; Harvick v. State, 49 Ark. 514, 6 S. W. 19; Edwards v. State, 171 Ark. 778, 286 S. W. 935; Ford v. State, 80 Fla. 781, 86 So. 715; Annotation, 34 L. R. A. N. S. 243; 9 Am. Jur., Burglary, § 29, p. 255; 12 C. J. S., Burglary, § 39, p. 706.

In order to make out, within the meaning of the stat-

ute quoted, the crime of which defendant was convicted, it must be alleged in the information, and of course proved, that the accused did feloniously break and enter some structure as therein described with intent to steal property of value. It is not required that it be alleged or established, except as a fact bearing on the guilt of the accused, that the place broken into and entered contained at the time chattels or other property of value, for a person under mistaken belief that a place ordinarily used as a depository for such chattels or property of value contains property the subject of larceny may, feloniously and with intent to steal, break into it and be consequently as guilty of the offense in question as if the place had actually been filled with property.

The information alleged the offense against defendant in terms of the statute. This is conceded by defendant. The statute clearly contains the elements necessary to constitute the offense intended to be punished. This is all the law requires. Cowan v. State, 140 Neb. 837, 2 N. W. 2d 111; Puckett v. State, 144 Neb. 876, 15 N. W. 2d 63; Sedlacek v. State, 147 Neb. 834, 25 N. W. 2d 533, 169 A. L. R. 868; Vaca v. State, 150 Neb. 516, 34 N. W. 2d 873. The information was not defective for any reason urged by defendant and the motion to quash it was correctly denied.

The case of Winslow v. State, 26 Neb. 308, 41 N. W. 1116, is confidently relied upon by defendant to establish his contention that the information is fatally insufficient for the reason it does not aver that the property defendant intended to steal was in the building described at the time it is alleged it was broken into and entered. The Winslow case is discussed in State v. Schultz, *supra,* in this manner: "The writer of the opinion suggests that, if the accused knew that there was no property in the building, his entry would not have been with the intent to steal, and we do not hesitate to reaffirm the proposition. We did not say that the criminal intent might not exist if the building were vacant and the de-

fendant did not know that fact, nor did we say that in order to sustain a conviction there must have been proof of the value of whatever property was contained therein." The discussion in the Winslow case went far beyond any matter presented for decision. It is, to the extent that it maintains that an information charging the crime of burglary must allege that the breaking and entering into the building was with intent to steal property of value then in the building, unsound and it should be and is disapproved and overruled.

Defendant contests the sufficiency of the evidence to justify or sustain his conviction of burglary. He alleges error of the court in submitting this issue to the jury. The evidence is to this effect: The place of business of Crandell Furs, a merchandising concern dealing in fur garments and fur pieces, was at 3562 Farnam Street in Omaha at the time important to this case. The east side of the building occupied was 100 feet west of the west side of Thirty-fifth Avenue. It was on the north side of Farnam Street and the front and main entrance to the building was to the south. There was a doorway in the center of the front of the building and a large plate glass display window on each side of the door. There were facilities for displaying merchandise in spaces inside and adjacent to the windows. Harkerts restaurant was in the second building east of the Crandell place of business. The first street west of the Crandell store is Thirty-sixth Street. The Blackstone Hotel is at the southwest corner of the intersection of Thirty-sixth Street and Farnam Street.

The Crandell store discontinued business for the week and it was closed and locked between 5:30 and 6 p. m., on Saturday, October 2, 1954. It was protected by a central station burglar alarm system known as A. D. T. The system was constructed so that all openings in the store had to be closed and secured before the store could get a ring-out signal at closing time. The circuits were broken by entry into the building and thereby A. D. T.

was at its place of business notified of such entry by signal device. The assistant manager of the Crandell store closed and locked it and got the close-out signal on Saturday, October 2, 1954. At that time there were displayed in the window to the east of the front door, on a figure or manikin clothed with a skirt, a silver-blue mink paw coat of the value of about $800 and on a small stand near the window a silver-blue mink scarf of the value of $179, and a ranch mink scarf of the value of $149.

The night manager of the Blackstone Hotel on the early morning of Sunday, October 3, 1954, heard an unusual sound. It was a hissing sound sufficient to alarm her and she went from the lobby of the hotel out its front door to the east so that she was on the west side of Thirty-sixth Street and near the south side of Farnam Street. As she was doing this, in addition to the first noise that had attracted her attention, she heard the breaking or shattering of glass. She could clearly see the area to the northeast to the intersection of Thirty-fifth Avenue and Farnam Street. She saw that a window in the front of the Crandell store had been broken. She saw a man who was not heavy but sort of slender and young running to the east through a temporary walk in front of a building that was in process of construction immediately west of Thirty-fifth Avenue. She saw him go to and get into an automobile at the end of the temporary walk and the north part of the intersection of Thirty-fifth Avenue and Farnam Street. The body of the automobile was maroon with a tan top. It was facing north on Thirty-fifth Avenue and after the man entered it, it got away as fast as it could travel. There was no other vehicle in the view of the witness at that time and all the things related by her transpired very fast and in a very few seconds. She called the police and told them what she had heard and seen. The time of this was fixed by her at between 3:40 and 3:50 a. m.

There were two police officers of the cruiser division

of the police department that were driving east on Dodge Street approaching Thirty-fifth Avenue at 3:41 a. m. on October 3, 1954. The traffic signal was then green for east and west traffic on Dodge Street. They saw a 1949 Ford automobile with a maroon body and cream top operated from south to north run the red traffic light at a very high speed at the intersection of Thirty-fifth Avenue and Dodge Street. The police officers pursued the Ford north on Thirty-fifth Avenue. The lights on their car, including the headlights, a spot light, and a red light, were operating. The Ford and its occupants attempted to elude the police car. The Ford was in view of the police at all times from where it was first seen by them until it was stopped and the three men in it were placed under arrest. The chase proceeded from Thirty-fifth Avenue and Dodge Street by various routes, many turns, and much back tracking for a considerable time and to Fortieth and Seward Streets where the Ford was stopped and the arrests were made.

The driver of the Ford was Donald Hendrickson. The defendant, Charles R. Larson, was in the rear seat at the right and a Mr. Raven was in the rear seat at the left. About the time the Ford was stopped by the police they saw the men in the back seat stuffing something down behind it or the cushion of the seat. The police asked the men in the Ford what it was and they would not tell. One of the officers pulled the seat forward and found two fur stoles behind the rear seat. Later a skirt was found hidden in the back seat of the Ford. One of the officers asked the men where they got the furs and one of them said in the presence of the other two that he did not know. The three of them were arrested and taken to the headquarters of the police department.

The furs recovered by the police were identified as the silver-blue mink scarf and the ranch mink scarf that were in the display window to the east of the door in the Crandell store when it was closed the night before.

The tags containing the name, address, and stock number of the store, fastened to the furs with metal seals which locked the tags to the furs, were on them when they were recovered. There was on each seal "Crandell Furs, Omaha." The skirt found in the Ford was identified as the one that was on the manikin in the display window of the store under the silver-blue mink paw coat. The coat was missing from the store after the window was broken and it has not been found. The manikin on which the coat was displayed was found on the sidewalk in front of Harkerts restaurant.

The defendant offered no evidence at the trial. He relied upon his plea of not guilty. The conviction of defendant depends upon circumstantial evidence. In determining the sufficiency of circumstantial evidence to sustain a conviction, each case must be decided on its own peculiar circumstances. To justify a conviction on such evidence, it is necessary that the facts and circumstances essential to the conclusion sought must be proved by competent evidence beyond a reasonable doubt, and, when taken together, must be of such character as to be consistent with each other and with the hypothesis sought to be established thereby and inconsistent with any reasonable hypothesis of innocence. Reyes v. State, 151 Neb. 636, 38 N. W. 2d 539. The undisputed proof in this case justifies a finding of these requirements.

There is no direct proof that defendant broke into or entered the building described in the information for any purpose. Such proof is not necessary. There is evidence tending to establish he aided and abetted others to break into and enter the building in which the store was conducted with intent to steal property of value contained therein. This is sufficient. Burnell v. State, 159 Neb. 349, 66 N. W. 2d 838.

The guilt or innocence of the defendant of the charge made against him was under the circumstances of this case a matter for the jury to decide. The court was

correct in submitting this issue to the jury and instructions Nos. 4 and 5 to which the defendant objects are without fault. It was a question of fact. The credibility of the witnesses and the weight of the evidence were for the jury to consider and determine and its conclusion may not be disturbed by this court unless clearly wrong. Burnell v. State, *supra*. It cannot be said that the verdict in this case was clearly wrong.

The sentence and judgment of the district court should be and they are affirmed.

AFFIRMED.

J. WESLEY MONTGOMERY, APPELLANT, V. ROY W. BLAZEK ET AL., APPELLEES.
73 N. W. 2d 402

Filed December 2, 1955. No. 33825.

1. **Pleading.** A general demurrer admits all the allegations of fact in the pleading to which it is addressed, which are issuable, relevant, material, and well pleaded; but does not admit the pleader's conclusions of law or fact.
2. ———. A general demurrer tests the substantive legal rights of parties upon admitted facts, including proper and reasonable inferences of law and fact which may be drawn from facts which are well pleaded.
3. **Statutes.** Where the language of a statute is plain and unambiguous there is no occasion for construction, and the statute must be given effect according to its plain and obvious meaning.
4. ———. If the language of a statute is clear and unambiguous, courts will not by interpretation or construction usurp the function of the lawmaking body and give it a meaning not intended or expressed by the Legislature.
5. **Automobiles: Constitutional Law.** The purpose of the Motor Vehicle Safety Responsibility Act is to protect the public on the highways against the operation of motor vehicles by financially irresponsible persons and thus is referable to the police power of the state. This power is inherent in every sovereignty and permits the enactment of laws, within constitutional limits, to promote the general welfare of its citizens. Therefore, in the interests of the public the state may make

and enforce regulations reasonably calculated to promote care on the part of those who use its highways.

6. ———: ———. A license to operate an automobile upon the highways of the state is a privilege and not a property right, and the power given the Department of Roads and Irrigation to suspend such operating privileges is an administrative and not a judicial function.

7. **Automobiles: Appeal and Error.** Provision is made by section 60-503, R. R. S. 1943, that any person aggrieved by an order or act of the Department of Roads and Irrigation made under the Motor Vehicle Safety Responsibility Act, sections 60-501 to 60-569, R. R. S. 1943, may, within 10 days after notice thereof, file a petition in the district court of the county where the aggrieved party resides for review of the proceedings had before the department.

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

Matthews, Kelley, Fitzgerald & Delehant and *Martin A. Cannon, Jr.*, for appellant.

Clarence S. Beck, Attorney General, *Homer G. Hamilton*, and *Herbert T. White*, for appellees.

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

MESSMORE, J.

J. Wesley Montgomery filed his amended petition in the district court for Douglas County wherein he made Roy W. Blazek and the Department of Roads and Irrigation of the State of Nebraska defendants. For convenience we will at times hereafter refer to the Department of Roads and Irrigation as the department.

While the amended petition did not designate the position held by Roy W. Blazek with the department at the time of the filing of the amended petition, he was Chief Supervisor of Financial Responsibility of the Motor Vehicle Division of the department.

The purpose of the action was to permanently enjoin the enforcement of an order of the Motor Vehicle Division of the Department of Roads and Irrigation of the

State of Nebraska under the authority of the Nebraska Motor Vehicle Safety Responsibility Act. This order required the plaintiff to surrender his license plates and motor vehicle driver's license, and suspended the driver's license. The order was issued pursuant to the Motor Vehicle Safety Responsibility Act, Laws 1949, c. 178, p. 482, hereinafter called the Act.

The defendants filed a general demurrer to the plaintiff's amended petition on the grounds that such petition did not state a cause of action. The trial court sustained the demurrer and dismissed the case. The plaintiff filed a motion for new trial. The motion for new trial was overruled and the plaintiff perfected appeal to this court.

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

The amended petition set forth the following factual situation: The plaintiff is a resident of Omaha, Douglas County, Nebraska, and the holder of Nebraska license plates and Nebraska driver's license. On or about February 26, 1954, plaintiff was the driver of an automobile which was involved in a collision with one Robert Conn at Twenty-fourth and Cuming Streets in Omaha, Nebraska, resulting in property damage to the Conn automobile. The plaintiff, at the time of the accident, had no liability insurance. Thereafter the plaintiff paid in full the property damage in the amount of $108.72. Plaintiff further agreed to pay all the medical expenses of Conn resulting from the accident and claimed injury to Conn's wife, Louise, a passenger in Conn's car at the time. The petition further alleged that in consideration of payment of the property damage and in further consideration of plaintiff's promise to pay the medical expenses, the Conns, and each of them, did on February 26, 1954, orally agree to release and discharge the plaintiff from all liability arising out of the said accident and at the time Robert Conn executed and delivered to the plaintiff a property damage release. This release

bears the date of March 11, 1954. Following said agreement and release, the plaintiff at various times tendered payment of medical expenses to the Conns but his tender was refused by them. As a result the plaintiff alleged that he had been released of all liability to the Conns by an oral and written release which the Conns wrongfully refused to acknowledge, and as a result of said release plaintiff is entitled to retain his operating privileges and license plates. Plaintiff filed with the defendants the original of exhibit "A", the personal property release, and an affidavit, exhibit "B", setting out the facts appearing in the amended petition. A copy of exhibits "A" and "B" were attached to the petition.

Plaintiff further alleged that prior to the time of the filing of the affidavit the defendants, acting under the purported authority of the Nebraska Motor Vehicle Safety Responsibility Law, had demanded the surrender of plaintiff's license plates and operator's license and ordered said license to be revoked; that following the filing of the affidavit, plaintiff requested the order to be withdrawn; that notwithstanding said request and filing, defendants refused to withdraw said order although by filing the originals of exhibits "A" and "B" plaintiff had complied with the law and therefore had a right to possession and use of the driver's license and plates; that by reason of the filing of exhibits "A" and "B" he had provided evidence of release to the defendants which should be accepted as sufficient to entitle him to a revocation of the suspension; and that nevertheless the defendants wrongfully refused this revocation of the suspension order.

A general demurrer admits all allegations of fact in the pleading to which it is addressed, which are issuable, relevant, material, and well pleaded; but does not admit the pleader's conclusions of law or fact. A general demurrer tests the substantive legal rights of parties upon admitted facts, including proper and reason-

able inferences of law and fact which may be drawn from facts which are well pleaded. See In re Estate of Halstead, 154 Neb. 31, 46 N. W. 2d 779.

The sections of the Act involved in the instant case are as follows:

Section 60-507, R. S. Supp., 1953, provides: "Within sixty days after the receipt of a report of a motor vehicle accident within this state which has resulted in bodily injury or death, or damage to the property of any one person, including such operator, to an apparent extent in excess of one hundred dollars, the department shall suspend (1) the license of each operator and all registrations of each owner of a motor vehicle in any manner involved in such accident, (2) the privilege, if such operator is a nonresident, of operating a motor vehicle within this state, and (3) the privilege, if such owner is a nonresident, of the use within this state of any motor vehicle owned by him, unless such operator, owner, or operator and owner shall deposit security in a sum which shall be sufficient, in the judgment of the department, to satisfy any judgment or judgments for damages resulting from such accident which may be recovered against such operator, owner, or operator and owner; Provided, notice of such suspension shall be sent by the department to such operator and owner not less than ten days prior to the effective date of such suspension and shall state the amount required as security."

Section 60-508, R. R. S. 1943, provides: "Sections 60-507 to 60-509 shall not apply: (1) To such operator or owner if such owner had in effect at the time of such accident an automobile liability policy with respect to the motor vehicle involved in such accident; * * *."

Section 60-510, R. R. S. 1943, provides: "The requirements as to security and suspension in sections 60-507 to 60-509 shall not apply: * * * (4) If, prior to the date that the department would otherwise suspend license and registration or nonresident's operating

privilege under sections 60-507 to 60-509, there shall be filed with the department evidence satisfactory to it that the person, who would otherwise have to file security, has (a) been released from liability, (b) been finally adjudicated not to be liable, (c) executed a warrant for confession of judgment, payable when and in such installments as the parties have agreed to, or (d) executed a duly acknowledged written agreement providing for the payment of an agreed amount in installments, with respect to all claims for injuries or damages resulting from the accident."

Where the language of a statute is plain and unambiguous there is no occasion for construction, and the statute must be given effect according to its plain and obvious meaning. See 82 C. J. S., Statutes, § 322, p. 577.

If the language of a statute is clear and unambiguous, courts will not by interpretation or construction usurp the function of the lawmaking body and give it a meaning not intended or expressed by the Legislature. See, Armstrong v. Board of Supervisors, 153 Neb. 858, 46 N. W. 2d 602; State ex rel. Nebraska Beer Wholesalers Assn. v. Young, 153 Neb. 395, 44 N. W. 2d 806; In re Estate of Robinson, 138 Neb. 101, 292 N. W. 48; Shamp v. Landy Clark Co., 134 Neb. 73, 277 N. W. 802.

The purpose of the Motor Vehicle Safety Responsibility Act is to protect the public on the highways against the operation of motor vehicles by financially irresponsible persons and thus is referable to the police power of the state. This power is inherent in every sovereignty and permits the enactment of laws, within constitutional limits, to promote the general welfare of its citizens. Therefore, in the interests of the public the state may make and enforce regulations reasonably calculated to promote care on the part of all who use its highways. Hadden v. Aitken, 156 Neb. 215, 55 N. W. 2d 620, 35 A. L. R. 2d 1003.

A license to operate an automobile upon the highways of the state is a privilege and not a property right, and

the power given the Department of Roads and Irrigation to suspend such operating privileges is an administrative and not a judicial function. Hadden v. Aitken, *supra.*

It will be noted that section 60-507, R. S. Supp., 1953, uses the language "the department shall suspend" the license and registration certificate of owners of motor vehicles involved in an accident. Therefore, by the use of the word "shall" no discretion is given to the department to do otherwise than follow the statutory provision.

As to whether or not the department exercises judicial powers as distinguished from administrative acts, is answered by the following authorities.

"We do not think the Act confers any judicial powers upon the Department of Roads and Irrigation by directing it, except under certain situations set forth in the Act, to suspend within sixty days after the receipt of a report of an accident which has resulted in bodily injury or death or damage to the property of any person in excess of fifty dollars (under the present statute changed to one hundred dollars) the license of each operator and all registrations of each owner of a motor vehicle involved in any manner in the accident unless security is deposited in an amount which it shall deem sufficient to satisfy any judgment or judgments for damages which may result therefrom." Hadden v. Aitken, *supra.* See, also, Thompson v. Smith, 155 Va. 367, 154 S. E. 579, 71 A. L. R. 604; Larr v. Dignan, 317 Mich. 121, 26 N. W. 2d 872.

As evidenced by the above-cited statutes, exceptions are made to the suspension provisions if the operator or owner of an automobile can show proof of financial responsibility in the manner prescribed. The requirements as to such security and suspension shall not apply where the owner or operator of any motor vehicle so involved has filed with the department evidence satisfactory to it that the person, who would otherwise have

to file security, has been released from liability. § 60-510, R. R. S. 1943.

The plaintiff did not have liability insurance and did not deposit security as provided by section 60-507, R. S. Supp., 1953. Rather, he submitted to and invoked the provisions of section 60-510, R. R. S. 1943, by paying for and securing a release for damages to the personal property involved. He did not procure a valid release for personal injuries alleged to have been suffered by Louise Conn.

Referring to section 60-510, R. R. S. 1943, the exception applies if, before licenses are suspended, there shall be filed with the department evidence satisfactory to it that the person involved has "been released from the liability."

The plaintiff's amended petition shows that at the time the plaintiff paid for the property damage a release was executed and delivered by Robert Conn, which he acknowledged, for property damage, and related only to property damage. In paragraph 4 of the amended petition the plaintiff alleged that following said agreement and release, plaintiff at various times tendered payment of medical expenses to the Conns but his tender was refused by them for no sufficient reason but because they wished to dishonor their agreement.

We believe it should be apparent to the plaintiff the type of release that should be filed with the department in the event of a settlement had between the plaintiff and the Conns with reference to personal injuries alleged to have been received by Louise Conn.

We find nothing in the record to show that the parties at any time agreed as to any amount to be paid for personal injuries alleged to have been received by Louise Conn, or that the plaintiff was in any manner released from such liability. Certainly, the department is not required or permitted to inquire into outside, oral negotiations between parties, nor act in any judicial capacity to determine the legal effect of any such pro-

ceedings. The record fails to disclose any communication or statement of any kind from the Conns on the subject of personal injuries or damages to be paid therefor.

In paragraph 3 of the petition the plaintiff alleged that he agreed to pay the medical expenses resulting from injuries alleged to have occurred to Louise Conn and that the Conns agreed to release him from all liability in consideration of this promise. This was alleged to have occurred on February 26, 1954. The release from the property damages was dated March 11, 1954. The record is silent as to what, if anything, was done about the personal injuries on the latter date, but it is clear no settlement was arrived at after that date and no release for personal injuries was executed, delivered, and filed with the department.

The only provisions of the statutes pertaining to payments in the future are those found in parts (c) and (d), subdivision (4), of section 60-510, R. R. S. 1943. Plaintiff makes no contention that he falls within these categories. Parts (c) and (d), subdivision (4), of section 60-510, R. R. S. 1943, specifically require written instruments and agreements by the parties.

As there is no valid release on file with the department relating to personal injuries alleged to have been received by Louise Conn, then plaintiff has failed to qualify under any of the exceptions provided by statute. Therefore, it must be held that the department acted properly in suspending plaintiff's driving privileges.

The plaintiff, being dissatisfied with the order of the department, could have resorted to section 60-503, R. R. S. 1943, which in part provides as follows: "Any person aggrieved by an order or act of the department, under the provisions of sections 60-501 to 60-569, may, within ten days after notice thereof, file a petition in the district court of the county where the aggrieved person resides * * * for a review thereof; * * *." See Hadden v. Aitken, *supra*.

We conclude that the trial court did not err in sustaining the defendants' demurrer to the plaintiff's amended petition, and the judgment of the trial court should be and is hereby affirmed.

AFFIRMED.

LOUIS E. GRUNTORAD ET AL., APPELLANTS, V. HUGHES BROTHERS, INC., A CORPORATION, ET AL., APPELLEES.
73 N. W. 2d 700

Filed December 9, 1955. No. 33764.

1. **Eminent Domain.** The mere fact that the taking of property for a public use will result in greater benefit to some persons than others or that private persons contribute to the expense of such taking or to the cost of the public improvement for which the taking was had does not affect the character of the use or render it any less public.
2. ———. A person whose connection with a public improvement is that he assisted in securing it, made contributions to the construction, and as a member of the public enjoys its benefits is not liable for damages caused by its existence and operation.
3. **Constitutional Law: Eminent Domain.** A municipality which invades the right conferred upon a property owner by the Constitution which assures him that his property will not be taken for a public purpose without compensation is liable for any damages caused thereby.
4. ———: ———. Negligence or a wrongful act is immaterial to a cause of action based on the constitutional provision to the effect that the property of no person shall be taken or damaged for public use without just compensation therefor.
5. **Eminent Domain: Judgments.** A landowner who fails to appeal from the award of appraisers in a condemnation proceeding is conclusively bound by it.
6. ———: ———. A final award in a condemnation proceeding for the acquisition of a right-of-way is conclusive upon the parties thereto as to all matters necessarily within the issue or issues of the proceeding.
7. **Eminent Domain: Damages.** All damages, immediate and prospective, which result from the taking of property by the exercise of eminent domain or on account of proper construction and future operation of the improvement for which the taking is had must be compensated in the condemnation proceeding.

8. ———: ———. In a condemnation proceeding, the owner of property taken or damaged is entitled to have all proper elements of damage considered by the appraisers, and, if they fail to do so, he cannot afterwards maintain an action to recover damages omitted which were necessarily involved in the condemnation proceeding.
9. **Appeal and Error.** A litigant may not predicate error on any action of the court which he procured to be taken or to which he consented.

APPEAL from the district court for Seward County: HARRY D. LANDIS, JUDGE. *Affirmed.*

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

Flansburg & Flansburg, Harry L. Norval, Paul H. Bek, J. W. Weingarten, and *W. P. Loomis,* for appellees.

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

BOSLAUGH, J.

This is an action in equity brought by appellants to enjoin and to compel the removal and abatement of a nuisance created, as they allege, by appellees' erecting dams, dikes, and obstructions and excavating a diversion ditch in the flood plane of the Big Blue River and thereby diverting floodwaters from the river and Bayou Creek from their natural course of drainage upon and over the land of appellants and to recover the damages they claim they have sustained as a result thereof.

The land owned by appellants is in the Big Blue River valley upstream from the city of Seward. It is described in detail in the record and its quite lengthy and involved description will not be repeated. The allegations made concerning P. H. Wiegardt, named as one of the appellees, are that he is the judge of the county court of Seward County and that he has the custody of the amount of the award in a condemnation proceeding by which there was appropriated a part of the land of appellants. There will be no further mention of him.

There are several causes of action alleged in the

amended petition of appellants none of which are separately stated and numbered. The causes of action for claimed loss of crops by water flooding small areas of the land of appellants in each of the years 1948 to 1951 inclusive and for the loss of personal property and damage to improvements on the land by the flood of June 1 and 2, 1951, were expressly excluded by the court from the adjudication from which this appeal is prosecuted and they are each preserved to appellants for trial in the district court. There are, therefore, none of these causes of action involved in this appeal.

The cause of action concerned in this appeal is one for injunctive relief in which claim is made by appellants for permanent damages caused by the existence and future maintenance of the flood control project around the city of Seward to the construction of which appellees consented, gave approval, and made contribution. It is described by appellants as an action "* * * in equity for abatement and removal of a nuisance created by defendants in placing dams, dikes, structures and obstructions in the flood plane of the Big Blue River and diverting Bayou Creek into Big Blue River * * *" and causing permanent, irreparable damage and detriment to the farm of appellants amounting to $100,000.

There are two legal defenses interposed by appellees to the claim of appellants for permanent damages and injunctive relief as follows:

1. That the flood control project, described at considerable length in the amended petition of appellants, which was completed in 1953 and because of which permanent damages are claimed, is a public project built according to the surveys and plans of the Corps of Engineers of the United States Army as authorized by the Federal Flood Control Act; that it was sponsored by the city of Seward; that the city obligated itself to secure rights-of-way for it; that the city would maintain the works when constructed and would save the government

of the United States harmless from any liability that might result from the construction and operation of the project; and that the purpose of it was to relieve a large area of the city from floods caused by the Big Blue River.

2. That the city of Seward had exercised the right of eminent domain granted it by the State of Nebraska and had by condemnation proceeding taken a part of the land of appellants for the construction of a diversion canal required as a part of the project and as a borrow pit for dirt necessary to erect and complete the dams and dikes of the project; that an award for damages to appellants was made in and as a part of the proceeding as provided and required by law; that the award had become final and was conclusive as to all damages for the land taken and all incidental and consequential damages which had or could result from the construction, continuance, or operation of the project; and that the condemnation proceeding and the award therein to appellants was res judicata of their claim made in this cause for damages to their land and property.

Appellants denied the allegations of fact made by appellees in presenting their defenses.

Appellees advised the court at the commencement of the trial of the cause that they had pleaded and had two legal defenses to the claim of appellants for permanent damages as stated in their amended petition which prevented liability of any of the appellees notwithstanding they approved, consented to, and contributed to the construction of the project complained of by appellants and even though the works of the project should cause flooding of their land. It was suggested to the court that it would be advantageous to have a ruling on the sufficiency of the legal defenses pleaded by appellees before doing the work and consuming the time inherent in producing evidence by appellants in an attempt to sustain their claim of permanent damages and their right to injunctive relief. Counsel for appellants thereupon offered and there was received on behalf of appel-

lants evidence establishing the facts claimed by appellees to be a bar to the granting of an injunction or to the recovery of permanent damages by appellants. The evidence introduced included the surveys, the reports, the maps, the plans, and the operation and maintenance manual of the Corps of Engineers of the United States Army for the flood control project in and around the city of Seward; resolutions of the city consisting of one sponsoring the project and another accepting it and obligating the city to maintain and operate it at the expense of the city; and the record of the condemnation proceeding referred to above and evidence of the fact that the award made to appellants had become final and that the amount thereof had been paid by the city to the county court of Seward County. The parties to the litigation by their statements and conduct invited and urged the court in that condition of the record to then accept a submission of the case to the extent of the alleged cause of action for permanent damages and for the abatement and removal of the nuisance as described and alleged by appellants in their amended petition. The court acceded to the desire and request of the parties. It found that appellees except the city of Seward were not liable for the existence and maintenance of the flood control project because it was a public one erected by virtue of an act of Congress and statutes of the state and was required to be continued and maintained by the city by its agreement with the government of the United States and the mandate of the act of Congress and the statutes; that the project could not be abated or enjoined; and that the award made in the condemnation proceeding had the effect of a final judgment; that it was res judicata of any claim of appellants for permanent damages caused by the existence or operation of the flood control project; and that it was a bar to the recovery by appellants of any permanent damages in this cause from any of the appellees. The court dismissed the case

as to the matters comprehended within the findings. This is an appeal from that action of the court.

The record indicates that persons affected by flood conditions that had occurred at Seward had made efforts in 1949 to interest the government of the United States and the Army Engineers in some undertaking to protect the inhabitants of the city from the results of such floods. In 1950 the first project report on the flood control project at Seward was made by the engineers. The city became the sponsor of it in June 1951 by a resolution of the city council providing the required assurances of local cooperation. These were: That the city would provide without cost to the United States all land, easements, and rights-of-way necessary for construction of the project; that the city would hold and save the United States free from damages due to the construction works; and that the city would maintain and operate all of the works upon completion in accordance with regulations prescribed by the Secretary of the Army. The last revision of the project report of the engineers was in May 1952. The plan of improvement in general was drainage and protection works consisting of an earth levee and appurtenant structures along the south, west, and north portions of the city, straightening a section of the Big Blue River immediately above the mouth of Lincoln Creek, and a diversion channel for drainage from Bayou Creek to the channel of the Big Blue River west of the county fair grounds. These are the works that were constructed as the flood control project at Seward with which this cause is concerned.

The purpose of the works was to protect about 105 acres of land of which 104 acres were within the city. There were 37 city blocks, 16 business and 74 residence properties, the municipal water works and swimming pool, and the Hughes Manufacturing Company to which protection was provided. This area was inundated in March 1949 and June 1951 and on numerous occasions

prior thereto. The benefits intended to result from the project were a reduction of flood losses to business and residential property, to public utilities, to municipal improvements, and the elimination of indirect losses such as business suspension. The flood control works for the city of Seward were built as planned and designed by the Corps of Engineers of the United States Army. A contribution of the federal government of $147,200 was made to defray a part of the costs and the balance of the estimated cost of $200,500 was required from local interests. It is true as appellants claim that Hughes Brothers granted, without compensation, easements for use in the construction of the project and that they and others contributed in various ways to its cost. The legislation authorizing a project of this character contemplates that local interests should satisfy much of its cost. The federal government is restricted to an expenditure for this purpose of not more than $150,000 in any single locality unless specifically otherwise authorized by Congress. 33 U. S. C. A., § 701s, p. 229. These facts did not make the project a private one. The court said in Weaver v. Pennsylvania-Ohio Power & Light Co., 10 F. 2d 759: "The fact that the Railway & Light Company agreed to give the right of way across the Ball farm does not, of itself, affect the validity of the proceedings, nor does it show that plaintiff's land was taken for private interests only. The fact that private interests are also subserved, or even that such interests defray, in whole or in part, the expense of an improvement, does not take away the otherwise public nature of the improvement."

In re Condemnations for Improvement of Rouge River, 266 F. 105, uses this language: "The mere fact that the taking of property for a public use will result in greater benefit to some persons than to others, or that private individuals contribute to the expense of such taking, does not affect the character of such use, or render it any the less public, within the meaning and scope

of the law of eminent domain." See, also, 29 C. J. S., Eminent Domain, § 97, p. 898.

Congress placed flood control projects in which the federal government participates under the jurisdiction of the Department of the Army and the supervision of the Chief of Engineers. 33 U. S. C. A., § 701b, p. 216. It is provided that no money shall be appropriated for such a local control project unless the city or local agency involved shall give assurance to the Secretary of the Army that it will provide without cost to the United States all lands, easements, and rights-of-way necessary for the construction of the project, bind itself to hold and save the United States free from damages due to the construction works, and maintain and operate all the works after the completion as the Secretary of the Army shall prescribe. 33 U. S. C. A., § 701c, p. 219. The record disputes the contention of appellants that the flood control project for Seward was a private and not a public project. The foregoing definitely establishes the project as a public one.

The project was completed and it was accepted by the city on October 1, 1953, for operation and maintenance, a resolution of the city to that effect was adopted on December 1, 1953, and shortly thereafter the operation and maintenance manual prepared by the Army Engineers containing regulations to be followed in the maintenance and operation of the project was furnished the city.

The city of Seward, a city of the second class, was authorized by the state: To establish and alter the channel of watercourses and to erect and maintain a dike or dikes as protection against flood or surface waters. § 17-529, R. R. S. 1943. To acquire a right-of-way over real estate by exercise of the power of eminent domain for the purpose of constructing a ditch and dike to prevent flooding of the city subject to the condition that the city should be liable for land taken and consequential damages to other lands injured by the improvement

and to annually levy a tax on the taxable, tangible property in the city to assist in defraying the cost of construction or maintenance of the flood control ditch and dike. § 17-529.01, R. R. S. 1943. To acquire by purchase or by gift necessary lands, rights-of-way, and easements required for a flood control project. §§ 23-320.02, 23-320.07, R. R. S. 1943. To enter into agreements with the United States in order to secure federal aid, obligating the city to provide without cost to the United States all lands, easements, and rights-of-way necessary for the construction of the project, keeping the United States free from damages due to the project, and maintain and operate it as provided and required by federal regulations. § 17-529.02, R. R. S. 1943. The pertinent legislation also makes it the duty of the city to keep such flood control works in serviceable condition and to make necessary repairs thereof. § 23-320.07, R. R. S. 1943.

The improvement which appellants seek to have abated and because of which they claim permanent damages is a flood protection project constructed by authority of law, and accepted and maintained by the city of Seward. It is not claimed that any damages resulted to the property of appellants in the past from the existence of the improvement. The claim is permanent damages which they assert they will sustain by reason of the completed project which is a hazard to their property and the inevitable consequences of which will be to flood their land. Any such damages depend upon the existence and upon the effect of the project as it is maintained and operated by the city. Appellees may not be made liable for damages unless they have done or are doing a wrong to appellants causing them injury. It is not the acts which contributed to the construction of the project that have caused or will cause any injury but the completed works themselves can only cause appellants harm which might be the basis of a cause of action. The author says in 66 C. J. S., Nuisances, § 139,

p. 947: "In cases of damages by nuisance, the injurious consequences resulting from the nuisance, rather than acts which produce the nuisance, constitute the cause of action * * *. The hurt to plaintiff must come from the structure, qua nuisance, to give him a cause of action for maintaining it."

Appellants say the project was negligently constructed but they specify no acts of negligence. The term negligently constructed as used by them must be considered descriptive with the intention of saying that the building of the works in the manner described so as to impound and divert waters onto and flood their premises is negligence. The project was constructed as planned by the engineers of the United States Army and if it floods the lands of appellants it will not be because of negligence but because the project itself will inevitably cause such damages and that this result is inherent in the plan. Whether or not there was negligence in the building of the works is immaterial. It is the completed project which is in issue. If the property of appellants is damaged as claimed by them it results from a public use for which the city was liable by virtue of the constitutional provision that private property may not be taken or damaged for a public purpose without compensation. Art. 1, § 21, Constitution of Nebraska. Negligence or wrongful act is immaterial to such a liability.

In Wagner v. Loup River Public Power Dist., 150 Neb. 7, 33 N. W. 2d 300, an action to recover damages to riparian lands resulting from diversion of water by a public corporation, it is said: "Plaintiff's cause of action is based on article 1, section 21, of the Nebraska Constitution, which provides in substance that the property of no person shall be taken or damaged for public use without just compensation therefor. Proof of negligence or the commission of a wrongful act is not, therefore, necessary to a recovery." See, also, Quest v. East Omaha Drainage Dist., 155 Neb. 538, 52 N. W. 2d 417.

Carroll v. Davis, 128 S. C. 40, 121 S. E. 601, considered

this situation: Plaintiff sued Davis, the county, and others for damages, alleging that the individual defendants had entered into a combination and conspiracy to induce and had succeeded in getting the county to open a road through the property of plaintiff for the benefit of Davis which resulted in injury and damage to her property. The trial court on demurrer dismissed the case as to all defendants except Davis and the county and plaintiff had a judgment on a verdict against them. The Supreme Court decided that the county only was liable under the condemnation statute. It said: "The demurrer of Davis should have been sustained. He was a private citizen, in no wise connected with the county. No overt act is alleged in the complaint which resulted in the injury complained of, but the complaint alleges that he induced the highway commission to open the road through plaintiff's land. The alleged wrongs alleged in the complaint against Davis do not give a cause of action against him. He did nothing that gave the plaintiff a cause of action against him. The alleged opposing causes of action were not those of Davis, but the acts of those clothed with authority and law to build roads in the county."

In Austin v. Village of Tonka Bay, 130 Minn. 359, 153 N. W. 738, the court discussed and cited numerous cases and then said: "The above cases are all against cities; none of them is against a county. But the logic of all of them is to the effect that the municipality which invades the right conferred upon the property owner by the Constitution must respond in damages therefor." See, also, Tidewater Constr. Corp. v. Manly, 194 Va. 836, 75 S. E. 2d 500; Yearsley v. Ross Constr. Co., 309 U. S. 18, 60 S. Ct. 413, 84 L. Ed. 554; Benner v. Atlantic Dredging Co., 134 N. Y. 156, 31 N. E. 328, 17 L. R. A. 220, 30 Am. S. R. 649; Coy v. City of Tulsa, 2 F. Supp. 411; Weaver v. Pennsylvania-Ohio Power & Light Co., *supra;* 29 C. J. S., Eminent Domain, § 195, p. 1095; 66 C. J. S., Nuisances, § 11c, p. 756.

A flood protection project of a municipality authorized by law could obstruct and divert water and cause it to flow contrary to the natural course of drainage upon and over the property of another to his damage. The damage would be recoverable from the municipality if timely established in a legal manner. But the project being a public one which the municipality is bound to maintain and operate could not be enjoined or abated. The liability of the city would not extend to or be recoverable from persons who had consented to, encouraged its construction, or contributed to the cost thereof. Appellees, not including the city, are not liable for the existence, maintenance, or future operation of the public flood control project of the city of Seward, the maintenance and operation of which are the right, obligation, and responsibility of the city. This is true notwithstanding the appellees consented to, approved, and contributed to the construction of the project in accordance with the plans prepared, adopted, and executed by the public authorities.

The flood control project as planned by the Army Engineers was approved by the city of Seward by resolution of its council as early as June 19, 1951. A part of it had then been constructed. A report of the engineers detailed all work that was intended to be done to complete the project. The city passed an ordinance which was approved May 27, 1952, authorizing proceedings by condemnation to acquire a right-of-way over the real estate owned by appellants for the purpose of changing the channel of a watercourse and to erect and maintain dikes against flood and surface waters to protect the city and its property from inundation. The ordinance recited the necessity for the work proposed to be done and authorized the payment of all damages sustained, direct and consequential, by appellants on account thereof. The real estate to be taken was precisely described. Condemnation proceedings were instituted June 17, 1952, more than a year after the project was approved by the

city and after negotiations with appellants for the right-of-way, as the city alleged, were unsuccessful. The right-of-way was required by the city to satisfy its obligation to the federal government to provide any right-of-way the project required.

Appellants appeared in the condemnation proceedings, filed an answer therein, and had opportunity of a hearing as to all they claimed because of the project. The answer made in the county court by them described the identical land owned by them as is described in the amended petition in this case and therein they pleaded that the purported flood control project consisted of dikes, dams, structures, and obstructions north of the city limits of Seward about 15 feet high across the natural watercourse that flows through the city, and that they divert all water that naturally flows in said natural water and flood channel and plane by causing it to back upon, impound upon, and stand on the flat land north of the obstructions including the land of appellants and that the dikes along the north part of the city will block off, dam, and hold back the whole east half of the Blue River flood channel and plane. The answer filed by appellants in the district court made substantially the same allegations as are made in the amended petition of appellants in this case. They asked to recover in the condemnation case the value of their land taken and consequential damages for injury to all their other property. It is definitely shown by the record that all damages for the taking of a part of their land and consequential damages to the balance thereof by reason of the project were fully contemplated, pleaded, and asked to be recovered in the condemnation case by appellants for the reasons that are stated as a basis for the recovery of permanent damages in this case.

There was an award made by the appraisers to appellants in the condemnation proceeding. They attempted an appeal in the matter to the district court but

it failed, and the appeal was dismissed. City of Seward v. Gruntorad, 158 Neb. 143, 62 N. W. 2d 537. The award of the appraisers became final and the amount of it was deposited with and left in the custody of the judge of the county court of Seward County. In Ehlers v. Chicago, B. & Q. R. R. Co., 118 Neb 477, 225 N. W. 468, it is said: " 'A landowner who fails to appeal from the freeholders' award in a condemnation proceeding, is conclusively bound by it.' " The award in the condemnation case is a final and conclusive adjudication of the amount of permanent damages appellants were entitled to receive and they have no right of recovery therefor in this case. Damages occasioned by the proper construction and future prudent and careful operation of the improvement may only be assessed and awarded to an adjoining proprietor in the condemnation proceeding by which a part of his property was taken for the improvement.

In Snyder v. Platte Valley Public Power & Irr. Dist., 140 Neb. 897, 2 N. W. 2d 327, it is said: "The final award in condemnation proceedings for the acquisition of a right of way is conclusive upon the parties thereto as to all matters necessarily within the issues joined, although not formally litigated. * * * For all injuries which may arise on account of the proper construction or future operation of an improvement, an adjoining proprietor must be compensated in the original condemnation proceedings. * * * In condemnation proceedings, the owner of property taken or damaged is entitled to have all proper elements of damage considered by the commissioners, and, if they fail to do so, he cannot afterwards maintain an action to recover damages thus omitted, which were necessarily involved in the issues in the condemnation proceedings." See, also, Little v. Loup River Public Power Dist., 150 Neb. 864, 36 N. W. 2d 261, 7 A. L. R. 2d 355; State v. County of Cheyenne, 157 Neb. 533, 60 N. W. 2d 593.

Appellants assert that the court was not authorized

to consider and decide the effect of the legal defenses pleaded by appellees at the time and in the manner it was done in this case. Appellants may not urge error in this regard. They consented to it and urged the court to follow the procedure that was adopted. It was done with the concurrence of all who participated in the litigation. It has often been said by this court that a litigant may not predicate error on any action of the court to which he consented or procured to be taken. Pahl v. Sprague, 152 Neb. 681, 42 N. W. 2d 367; Pierce v. Fontenelle, 156 Neb. 235, 55 N. W. 2d 658.

The judgment of dismissal involved in this appeal should be and it is affirmed.

AFFIRMED.

VIRGINIA K. MORAN, APPELLEE, V. CLARENCE E. MORAN, APPELLANT.
73 N. W. 2d 709

Filed December 9, 1955. No. 33810.

1. **Appeal and Error.** In an equity case appealed to this court, if it is desired to review alleged erroneous rulings of the trial court as to the reception of evidence, a motion for a new trial must be filed and overruled in the district court.
2. **Husband and Wife.** A contract between husband and wife, made after and in consequence of severance of the marital relation and permanent separation, providing for a division of property, and containing mutual releases of rights and obligations relative thereto, will be respected by the courts as presumably fair and valid, and a just and equitable adjustment of the matters of which it treats. But the courts will scrutinize such transactions closely, without too much regard for formal rules of pleading and procedure, and see to it that no unconscionable advantage is taken through fraud or intimidation, or by reason of ignorance, passion, or improvidence.
3. **Divorce.** 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.
4. ———. 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.

APPEAL from the district court for Douglas County: HERBERT RHOADES, JUDGE. *Affirmed.*

Max Marshall, for appellant.

Marcell & Raneri, for appellee.

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

SIMMONS, C. J.

This appeal involves the question of whether or not the trial court erred in vacating a divorce decree.

We affirm the action of the trial court.

On April 2, 1954, plaintiff filed her petition for a divorce on the ground of extreme cruelty. She prayed for the custody of minor children, temporary and permanent alimony, attorney's fees, court costs, and an adjudication of property rights. Among other things plaintiff alleged that the parties were joint owners of two pieces of real estate in Omaha, together with furniture, furnishings, and restaurant equipment, subject to encumbrances.

On May 5, 1954, plaintiff, on information of defendant, was committed to the Douglas County Hospital as one "mentally ill."

On May 6, 1954, defendant answered. He denied generally the plaintiff's allegations. He admitted the marriage, the birth of two children to the parties, and the joint ownership of the property. He prayed that the plaintiff's petition be denied.

On May 20, 1954, plaintiff was released from the hospital.

On July 8, 1954, defendant received permission to file an amended answer and cross-petition. It was filed on July 12, 1954. In it he admitted and denied as in his original answer. For cross-petition defendant alleged misconduct of plaintiff. He sought an absolute divorce,

custody of the children, a denial of temporary or permanent alimony, and a vesting in him of title to the real estate.

On July 16, 1954, a property settlement was entered into between the parties.

On July 28, 1954, a decree was rendered. It recites that plaintiff appeared by her attorney and that defendant appeared in person and by his attorney. Trial was had. Defendant was awarded a decree of divorce based on a finding of extreme cruelty, and was given the custody of the children.

The decree recites that a property settlement was entered into on July 16, 1954, which the court approved. The decree recites that plaintiff for a consideration, partly performed and partly to be performed by defendant, had surrendered all claims and demands of every kind against the defendant. The decree awarded the defendant a divorce and the custody of the children, approved the property settlement, and incorporated it in the decree to the extent and purpose of quieting title to the real estate in the defendant. It awarded attorney's fees to the plaintiff.

On January 27, 1955, plaintiff filed an application to set aside the decree on three grounds: (1) That at the time of the signing of the property settlement and the entry of the decree she was mentally and physically incapable of realizing the import of the property settlement; (2) that the decree and property settlement was secured through fraud, deceit, and duress; and (3) that the defendant at no time intended to carry out the terms of the decree as to custody and support of the children.

A hearing was had. On March 3, 1955, the court rendered its decree setting aside the decree of July 28, 1954.

We find no sufficient evidence in the record that sustains the third ground above set out.

We determine one question presented preliminary to a

recital of the material evidence taken on the hearing to set aside the decree. Plaintiff testified as to what her lawyer advised her and did not advise her during the divorce proceedings. Defendant called the lawyer as a witness. He raised the question of privilege and plaintiff refused to waive it. The lawyer was not permitted to testify. Defendant claims the plaintiff had waived the privilege by her testimony, and assigns error here in that regard. There was no motion for a new trial.

The rule is: "In an equity case appealed to this court, if it is desired to review alleged erroneous rulings of the trial court as to the reception of evidence, a motion for a new trial must be filed and overruled in the district court." Nemetz v. Nemetz, 147 Neb. 187, 22 N. W. 2d 619. See, also, Molczyk v. Molczyk, 154 Neb. 163, 47 N. W. 2d 405; Rush v. Heinisch, 157 Neb. 545, 60 N. W. 2d 608. The rule is applicable to this proceeding and prevents consideration of the alleged error here.

Although there is no direct evidence to that effect, it is fairly inferable from the record that the property, admittedly held in joint ownership by the parties, was accumulated during the marriage relationship.

It appears that in April 1952 on information signed by the defendant, the plaintiff was confined to a hospital as one "mentally ill." The specific nature of the illness and the duration of the confinement is not shown.

As above recited, it also appears that during the pendency of this proceeding on information filed by defendant alleging that plaintiff was "mentally ill," she was, on May 5, 1954, again confined in the Douglas County Hospital. The specific nature of the illness is not shown. She was discharged on May 20, 1954.

Defendant was asked at the hearing if he had advised the court of the latter commitment at the trial of the divorce action and he stated he did not remember.

Shortly after plaintiff was released from the hospital, defendant had several visits with her about a

property settlement. The decree recites that it was entered into on July 16, 1954. The property settlement is not in evidence. The evidence of the parties is that plaintiff was to receive $500 and the "furniture." She was paid the $500 in two installments, the last being paid October 29, 1954. She sold the furniture to the defendant for $100. Plaintiff received from the settlement a total of $600.

One piece of real estate was sold for $2,800, and from that source plaintiff was paid $475 of the $500 she was to receive, defendant's evidence being that prior thereto he had paid plaintiff $25. The value of the other property is not shown, but it obviously had a substantial value. Plaintiff testified that defendant told her he would have her put back in the hospital if she did not sign. She testified that she signed because of fear that if she did not, she would be again committed to the hospital. Defendant denied making this statement.

We cannot determine from this record the fact of mental illness. The important consideration is the fact of commitment. Defendant had twice demonstrated an ability to secure that sort of an order.

Four days before this property settlement was entered into, defendant filed his answer and cross-petition. Twelve days later the cause went to trial on defendant's cross-petition without answer or other pleading of the plaintiff. Plaintiff was not informed that the trial was to be had, although it is obvious that shortly thereafter she knew about the trial and decree.

This court has followed a markedly liberal attitude toward applications for vacation or modification of divorce decrees which is peculiar to this class of judgments. See Shinn v. Shinn, 148 Neb. 832, 29 N. W. 2d 629, 174 A. L. R. 510.

It is patent that when defendant secured this property settlement he lost no time in securing a decree.

In Pittman v. Pittman, 148 Neb. 864, 29 N. W. 2d 790, we had a property settlement that we held was in-

equitable and unfair "By the standards established by the precedents of this court * * *." So this one appears to be on this record. We there held: "A contract between husband and wife, made after and in consequence of severance of the marital relation and permanent separation, and providing for a division of property, and containing mutual releases of rights and obligations relative thereto, will be respected by the courts as presumably fair and valid, and a just and equitable adjustment of the matters of which it treats. But the courts will scrutinize such transactions closely, without too much regard for formal rules of pleading and procedure, and see to it that no unconscionable advantage is taken through fraud or intimidation, or by reason of ignorance, passion, or improvidence."

Section 42-340, R. R. S. 1943, provides that where no appeal has been instituted the court may at any time within 6 months vacate or modify its decree.

We have held: "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. * * *

"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." Roberts v. Roberts, 157 Neb. 163, 59 N. W. 2d 175.

Defendant suggests here that relief should be denied the plaintiff because she did not offer to do equity by offering to return and tendering into court the $500 which she received. We see no merit in that contention. As this record stands, she received $475 out of the $2,800 sale price of jointly-owned property. She received only a part of that which, on this record, was admittedly hers were it not for the property settlement and the decree. See Leeker v. Leeker, 23 Ariz. 170, 202 P. 397.

On this record it cannot be said that the trial court did not exercise a sound judicial discretion when it entered the order vacating and setting aside the decree.

The order of the trial court is affirmed.

AFFIRMED.

IN RE APPLICATION OF ABLER TRANSFER, INC.
ABLER TRANSFER, INC., ET AL., APPELLANTS, V. ROYAL LYON, DOING BUSINESS AS LYON TRANSFER, ET AL., APPELLEES.
73 N. W. 2d 667

Filed December 9, 1955. No. 33812.

1. **Public Service Commissions: Appeal and Error.** On an appeal to the Supreme Court from an order of the Nebraska State Railway Commission, administrative and legislative in nature, the only questions to be determined are whether the Nebraska State Railway Commission acted within the scope of its authority and if the order complained of is reasonable and not arbitrarily made.
2. ———: ———. Unless an order of the Nebraska State Railway Commission is shown to be unreasonable or arbitrary, this court is not authorized to interfere with the power of the Nebraska State Railway Commission to regulate common carriers.
3. **Public Service Commissions: Motor Carriers.** Section 75-238, R. R. S. 1943, must be considered a special statutory provision with regard to a particular subject and, as such, controls the general provisions with regard to such subject. The Nebraska State Railway Commission, in order to revoke, change, or suspend a certificate of public convenience and necessity, must proceed in accordance with the provisions thereof.
4. ———: ———. The term "willful failure," as used in section 75-238, R. R. S. 1943, is such behavior through acts of commission or omission which justifies a belief that there was an intent entering into and characterizing the failure complained of.

APPEAL from the Nebraska State Railway Commission. *Affirmed in part and reversed in part.*

Bernard A. Ptak, for appellants.

J. Max Harding and *Raymond P. Medlin*, for appellees.

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

WENKE, J.

This is an appeal from the Nebraska State Railway Commission which will hereinafter be referred to as the commission. Abler Transfer, Inc., of Pierce, Nebraska, filed an application with the commission on September 21, 1953, No. M-10315, seeking approval by the commission of the acquisition by it of the operating rights and authority issued to and then held by Walter Abler, doing business as Abler Transfer, Pierce, Nebraska, in application No. M-1003 and supplement No. 1 thereto. We shall hereinafter refer to Walter Abler, doing business as Abler Transfer, as Abler.

On October 16, 1953, the commission entered an order in application No. M-1003 and supplement No. 1 against Abler, as respondent, to show cause, if any there be, why his certificate of public convenience and necessity should not be suspended, changed, or revoked, in whole or in part, for willful failure to comply with the provisions of the Nebraska Motor Carrier Act, sections 75-222 to 75-250, R. R. S. 1943, as amended; the orders, rules, and regulations of the commission promulgated thereunder; the terms, conditions, and limitations of said certificate; and specifically for cessation of operations and discontinuance of service contrary to General Order No. 81, § (9)(a).

In view of the foregoing the proceedings had related to and concerned itself with both the application filed by Abler Transfer, Inc., seeking approval of the acquisition of the operating rights and authority that had been previously issued to Abler and the order issued by the commission against Abler to show cause why his certificate should not be suspended, changed, or revoked, in whole or in part, for the reasons therein set forth.

The commission sustained in part its order to show cause for willful failure of the certificate holder Abler to

comply with the provisions of sections 75-222 to 75-250, R. R. S. 1943, and the orders, rules, and regulations of the commission promulgated thereunder. It thereupon revoked in part and changed in part the operating authority of Abler and, as changed, authorized the Abler Transfer, Inc., to acquire such rights. It thereupon consolidated the authority, as clarified, in one certificate and authorized its issuance to Abler Transfer, Inc., the certificates previously issued to Abler having been revoked and cancelled.

Abler and Abler Transfer, Inc., filed a joint motion for rehearing and have perfected this appeal from the overruling thereof.

This appeal concerns itself entirely with the change made by the commission in the "Irregular Route Operations" contained in No. M-1003 and the restrictions placed thereon.

Abler appears to have been a pioneer in the trucking business and was so engaged long prior to April 1, 1936. With the passage by the 1937 Legislature of the Motor Carrier Act, Laws 1937, c. 142, p. 526, Abler applied for and on December 30, 1937, was issued his so-called "grandfather" rights under the act. See Laws 1937, c. 142, § 7, p. 531. These rights included regular and irregular route operations. As evidenced by certificate No. 985, issued in application No. M-1003, the "Irregular Route Operations" were described as follows: "From towns in the vicinity of his regular routes to and from Omaha, Norfolk, Pierce, points on the regular routes and points within a 50-mile radius from Pierce, and occasionally to and from O'Neill, Creighton, Bloomfield, Wausa, Crofton, Neligh and other points within a 140-mile radius of Pierce, Nebraska. Also occasionally to and from all parts of the state."

These operations the commission changed to: "Between points and places within a 50-mile radius of Pierce, Nebraska, and between points and places within said radial area on the one hand, and, on the other hand,

points and places within the State of Nebraska, over irregular routes."

It then placed a further restriction thereon as follows: "Tacking or combining of the regular and irregular route portions of the instant certificate prohibited."

No question is raised on this appeal in regard to the commission's revoking part of the regular route authority held by Abler, nor the limitation placed on the type of services authorized by excluding therefrom authority to transport commodities requiring the use of special equipment other than refrigeration. The reason for not doing so is apparent as the record fully supports the commission's action in this respect.

Abler Transfer, Inc., is a corporation organized by Abler and three of his sons, Leonard, Mark, and Paul. It was organized for the purpose of taking over the trucking business of Abler, apparently due to Abler's failing health.

"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." Furstenberg v. Omaha & C. B. St. Ry. Co., 132 Neb. 562, 272 N. W. 756.

"On an appeal to the Supreme Court from an order of the Nebraska State Railway Commission administrative or legislative in nature, the only questions to be determined are whether the Nebraska State Railway Commission acted within the scope of its authority and if the order complained of is reasonable and not arbitrarily made." In re Application of Neylon, 151 Neb. 587, 38 N. W. 2d 552. See, also, Furstenberg v. Omaha & C. B. St. Ry. Co., *supra;* Moritz v. State Railway Commission, 147 Neb. 400, 23 N. W. 2d 545; Nebraska State Railway Commission v. Service Oil Co., 157 Neb. 712, 61 N. W. 2d 381; Effenberger v. Marconnit, 135 Neb. 558, 283 N. W. 223; In re Application of Petersen & Petersen, Inc., 153 Neb. 517, 45 N. W. 2d 465.

"Unless an order of the railway commission is shown to be unreasonable or arbitrary, this court is not authorised to interfere with the power of the commission to regulate common carriers." In re Application of Resler, 154 Neb. 624, 48 N. W. 2d 718.

In Kassebaum v. Nebraska State Railway Commission, 142 Neb. 645, 7 N. W. 2d 464, a similar or comparable irregular route operation was involved as the following in Abler's certificate: "From towns in the vicinity of his regular routes to and from Omaha, Norfolk, Pierce, points on the regular routes and points within a 50-mile radius from Pierce, * * *." Therein we said of such authority: "Kassebaum's certificate is broader in its authority than a certificate limited to named routes, fixed termini and intermediate and off route points." Then we went on to say: "The fact that his business has grown so as to require more frequent and somewhat regular trips cannot be the basis of construing his certificate so as to deny him the right to carry within that territory all of the authorized commodities tendered him. His certificate makes no limitation as to volume of business. He has been authorized to render the service within territorial limitations without regard to volume of or increase of business." Such, we think, was the nature of the authority granted Abler under the quoted part of his "Irregular Route Operation."

In Kassebaum v. Nebraska State Railway Commission, *supra,* the court held: "* * * the legislature has not granted to the Commission the power to classify common carriers as regular or irregular route carriers, nor to establish a formula of 'elements' that determine to which classification a common carrier belongs, nor to test the operations of a carrier according to such classification."

Subsequent to the release of this opinion the 1943 Legislature granted to the commission the following authority: "(c) The commission may, from time to time, establish such just and reasonable classifications of

groups of carriers, included in the term 'common carrier', or 'contract carrier', as the special nature of the services performed by such carrier shall require; and such just and reasonable rules, regulations and requirements, to be observed by the carriers so classified or grouped, as the commission deems necessary or desirable in the public interest and as are consistent with the provisions of this act. (d) All certificates and permits heretofore or hereafter issued by the commission, shall be construed and interpreted and the operations authorized thereunder shall be tested and determined in accordance with such classifications so established and any rule, regulation or requirement prescribed by the commission relating to such carriers so classified." Laws 1943, c. 169, § 1, p. 591, which is now part of section 75-225, R. R. S. 1943.

Pursuant thereto, on December 24, 1943, the commission promulgated its General Order No. 82 dealing with the classification of the services performed by common and contract carriers as to regular and irregular routes. Subsequently, as of March 5, 1948, supplement No. 2 thereto was adopted and is the one herein involved.

Although the amendments to what is now section 75-225, R. R. S. 1943, provided that "All certificates * * * heretofore * * * issued by the commission, shall be construed and interpreted, and the operations authorized thereunder shall be listed and determined, in accordance with such classifications so established and any rule, regulation or requirement prescribed by the commission relating to such carriers so classified," we do not think the act, or any action taken by the commission thereunder, was intended to nor could it, in and of itself, have the effect of suspending, changing, or revoking, in whole or in part, any authority authorized prior to the enactment thereof. That authority the commission has by proceeding under and in accordance with the provisions of section 75-238, R. R. S. 1943, and may only be done for the reasons therein set forth;

that is, "Any such permit or certificate may, upon application of the holder thereof, in the discretion of the State Railway Commission, be revoked or may, upon complaint or on the commission's own initiative, after notice and hearing, be suspended, changed or revoked in whole or in part, for willful failure to comply with any of the provisions of sections 75-222 to 75-250, or with any lawful order, rule or regulation of the commission promulgated thereunder, or with any term, condition or limitation of such permit or certificate." § 75-238, R. R. S. 1943.

As stated in In re Application of Hergott, 145 Neb. 100, 15 N. W. 2d 418: "* * * section 75-231 (now section 75-238, R. R. S. 1943) must be considered a special statutory provision with regard to a particular subject and, as such, controls the general provisions with regard to such subject. * * * the commission, in order to revoke, change or suspend a certificate of public convenience and necessity, must proceed in accordance with the provisions of section 75-231, Comp. St. Supp. 1941, * * *." See, also, In re Application of Neylon, *supra*.

"By statute, willfulness is one of the essential facts to be determined by the commission before it possesses the power to revoke, in whole or in part, a certificate of public convenience and necessity." In re Application of Hergott, *supra*.

"The term 'willful failure,' as used in section 75-238, R. S. 1943, is such behavior through acts of commission or omission which justifies a belief that there was an intent entering into and characterizing the failure complained of." Union Transfer Co. v. Bee Line Motor Freight, 150 Neb. 280, 34 N. W. 2d 363. See, also, Nebraska State Railway Commission v. Service Oil Co., *supra*.

The record establishes that Abler at all times fully responded to all demands by the public for services under and pursuant to his irregular route authority and had sufficient equipment to enable him to do so. We

think that under the factual situation established it was unreasonable for the commission to change his "Irregular Route Operation" authority and that it should be restored.

In considering certain language used in Nebraska State Railway Commission v. Service Oil Co., *supra,* it should be remembered that the question here involved was not therein ruled on nor was it necessary to do so in order to determine the issues therein presented.

Was the restriction placed on Abler's "Irregular Route Operations" arbitrary or unreasonable? The evidence shows that as his business in certain areas increased he established routes out of Norfolk and Neligh which included points on his authorized regular routes and points in his irregular route territory and peddled to these towns on a regular daily schedule and advertised to that effect. Section 75-231, R. R. S. 1943, provides in part: "There shall, at the time of issuance, and from time to time thereafter, be attached to the exercise of the privileges granted by the certificate such reasonable terms, conditions and limitations as the public convenience and necessity may from time to time require, including terms, conditions and limitations as to the extension of the route or routes of the carrier, and such terms and conditions as are necessary to carry out, with respect to the operations of the carrier, the requirements established by the commission." As stated in In re Application of Neylon, *supra*: "It is, of course, true that the commission shall exercise the powers and perform the duties imposed upon it and shall have power to make all needful rules and regulations for the administration thereof." See, also, Art. IV, § 20, Constitution of Nebraska; State ex rel. State Railway Commission v. Ramsey, 151 Neb. 333, 37 N. W. 2d 502. It was entirely within the commission's authority in regulating and administering the authority it had granted to keep these two services separate, although issued in one certificate. We find nothing arbitrary or unreason-

able in its doing so. Whenever, in the normal development and growth of its irregular route operations, the movement of traffic between particular points becomes so constant in point of time and of such volume as to suggest a public need for regular route service between such points the act provides a means by which appropriate authority for such operations may be obtained and the regular route authority extended.

It is suggested this restriction will place Abler Transfer, Inc., at an economic disadvantage because it will result in additional operating costs. In support of this contention are cited the provisions of section 75-222, R. R. S. 1943, and what we said in Kassebaum v. Nebraska State Railway Commission, *supra,* in regard thereto. Therein we said: "The act recites a policy 'to regulate transportation by motor carriers * * * 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; promote adequate, economical and efficient service * * * develop and preserve a highway transportation system properly adapted to the needs of the commerce of Nebraska.' Section 75-222, supra." But this refers to the policy of transportation by motor carriers generally and not necessarily to individuals. For the commission to permit Abler to continue to operate as he has been doing could seriously affect other carriers who are serving towns within a 50-mile radius of Pierce on a regular route basis.

In view of the foregoing we reverse that part of the commission's order which changed the irregular route operations originally granted Abler but otherwise approve the commission's order.

AFFIRMED IN PART AND REVERSED IN PART.

STATE OF NEBRASKA EX REL. JAMES L. WEASMER, COMMISSIONER OF LABOR, APPELLANT, V. MANPOWER OF OMAHA, INC., APPELLEE.

73 N. W. 2d 692

Filed December 9, 1955. No. 33814.

1. **Statutes.** The petition on which this case was tried describes an employment agency as such agency is defined by sections 48-501 and 48-502, R. R. S. 1943.
2. ———. Penal statutes are inelastic and must be strictly construed, and may not be extended by implication.
3. **Injunction.** Injunction may be properly used for the protection of public rights, property, or welfare.
4. **Statutes.** The maintenance of an employment agency as defined by sections 48-501 and 48-502, R. R. S. 1943, has a relation to the public welfare.
5. **Appeal and Error.** Where, on appeal in equity 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.
6. ———. Where a bill of exceptions has been quashed, no question will be considered the determination of which necessarily involves an examination of the evidence adduced in the trial court, and in such a situation, if the pleadings are sufficient to support the judgment, it will be affirmed.
7. ———. By the terms of section 25-1140.01, R. R. S. 1943, a party appealing from a judgment of the district court may elect to come to this court on a bill of exceptions containing less than all of the evidence adduced at the trial. If, however, he does so elect he must within 3 days after notice of appeal serve notice upon the adverse party or his attorney of record and file with the clerk of the district court (1) a designation of the witnesses whose testimony he deems essential, (2) a designation of the exhibits and such trial proceedings as he desires to have included, and (3) a statement of the errors he intends to rely upon for reversal or modification of the judgment or final order from which the appeal is taken.
8. ———. The same statute grants to the opposing party the right within 7 days thereafter to request additions and to have such requested additions made a part of the bill of exceptions.
9. ———. The statute provides for service of the notice within 3 days after notice of appeal upon the adverse party or his attorney of record but does not prescribe any method of service.
10. **Process: Evidence.** Where a statute requires service upon a designated person or persons and no method of service is pre-

scribed, and the question of whether or not service has been had comes into dispute, the burden devolves upon the party making the service to make due proof thereof.

11. ———: ———. As against clear and unequivocal evidence that notice was not received proof that notice was placed in the mail addressed to the party to be served may not be accepted as due proof of service.

12. **Appeal and Error.** The filing of a motion to quash a bill of exceptions in this court is proper procedure whereby to present the question of whether or not there has been compliance with the requirements necessary to obtain and settle a bill of exceptions.

13. ———. Where a party at the earliest opportunity objects to the propriety of a bill of exceptions as to a matter involving the deprivation of a substantial right and he continues at all times to urge his objection, he may not ordinarily be said to have waived it.

APPEAL from the district court for Douglas County: PATRICK W. LYNCH, JUDGE. *Motion to quash sustained. Affirmed.*

Clarence S. Beck, Attorney General, and *Richard H. Williams,* for appellant.

Edmund R. Sturek, for appellee.

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

YEAGER, J.

This is an action in equity instituted by the State of Nebraska on relation of James L. Weasmer, Commissioner of Labor, relator and appellant, against Manpower of Omaha, Inc., a corporation, respondent and appellee, the purpose of which was to enjoin the respondent from operating an employment agency without compliance with the statutes requiring employment agencies to obtain a license to operate such an agency.

The action was tried to the court at the conclusion of which a decree was rendered in favor of the respondent and against the relator in which decree it was found that the respondent was not an employment agency

within the purview of the Nebraska statutes. From this decree the relator has appealed. The only substantial question raised by the assignments of error is that of whether or not the respondent is an employment agency within the meaning of the statutes and the facts as they appeared on the trial.

Section 48-501, R. R. S. 1943, defines employment agency. The section in this respect, to the extent necessary to quote it here, is as follows: "The term 'employment agency,' means and includes the business of conducting, as owner, agent, manager, contractor, subcontractor or in any other capacity, an intelligence office, domestic and commercial employment agency, theatrical employment agency, bonding and reference bureau, shipping agency, teachers' employment agency, general employment bureau or any other agency or office for the purpose of procuring or attempting to procure help or employment or engagements, or for the registration of persons seeking such help, employment or engagement, or for giving information as to where and of whom such help, employment or engagement may be procured, where a fee or other valuable consideration is exacted, or attempted to be collected, directly or indirectly, for such services, whether such business is conducted in a building or on the street or elsewhere."

The section defines fee as follows: "The term 'fee' means and includes any money or other valuable consideration paid or promised to be paid for services rendered or to be rendered by any person conducting an employment agency of any kind under the provisions of said sections. Such term includes any excess of money received by any such person, over what has been paid out by him for the transportation, transfer of baggage or board and lodging for any applicant for employment. Such term also includes the difference between the amount of money received by any such person who furnishes employees and the amount paid by him to such employee."

Section 48-502, R. R. S. 1943, provides: "Any person, firm or corporation who for hire or with a view to profit shall undertake to secure employment or help or through the medium of cards, circulars, pamphlets of any nature whatsoever, or through the display of a sign or bulletin offer to secure employment or help or give information as to where employment or help shall be secured, shall be deemed a private employment agency and shall be subject to the provisions of sections 48-501 to 48-514."

It is obvious from a reading of these sections that section 48-502, R. R. S. 1943, is cumulative of section 48-501, R. R. S. 1943, in that it includes within the definition of employment agency the procurement of help for an employer as distinguished from procurement of employment for an employee. It also subjects employment agencies to all of the provisions of article 5, chapter 48, of the Nebraska statutes.

Section 48-503, R. R. S. 1943, provides: "No person, firm or corporation in this state shall open, operate or maintain a private employment agency for hire or for help without first obtaining a license for the same from the Commissioner of Labor, * * *."

Coupled with allegations of fact which are not in dispute the petition of the relator alleges the following facts upon which it relies to have the respondent declared an employment agency and to have it enjoined from operating as such without the procurement of a license required by section 48-503, R. R. S. 1943:

"3. That the respondent, Manpower of Omaha, Inc., is * * * engaged in the maintenance and operation of an employment agency * * * without * * * first procuring or taking out therefor * * * a license as required by said laws.

"4. That respondent's business office is open to the public and the public is invited to avail themselves of the services offered by the respondent; that respondent interviews and lists in its files, without charge for regis-

tration, persons who come to it seeking part-time or temporary work; that other business organizations or persons interested in procuring such help notify respondent of their needs and respondent selects from its files a person deemed qualified to fulfill the request and dispatches him or her to the requesting organization or other person; that the requesting organization reports the actual hours that the worker dispatched has labored and respondent then bills the requesting organization at an hourly rate which is determined in advance according to the type of work requested or performed; that the hourly amount billed the requesting organization is greater than the hourly amount which is then paid to the person dispatched; that respondent keeps all records on the persons it dispatches, withholds social security and withholding taxes, maintains workmen's compensation insurance, liability insurance and fidelity bonds."

To the extent necessary to set forth its contents here the answer denies that the respondent has ever engaged in the maintenance or operation of an employment agency or that it has violated any valid, constitutional, or enforceable statute of the State of Nebraska. And further the answer contains a general denial.

No theory of unconstitutionality of the statutory provisions in question is urged here hence that phase of the answer may be disregarded.

Also no theory of invalidity of statute on other grounds is presented. The respondent asserted in its brief that the provisions to which the petition relates are penal in character and must be strictly construed, and that being thus construed it must be said that the respondent was guilty of no violation of the statutes.

As contended by respondent penal statutes are inelastic and must be strictly construed, and may not be extended by implication. See, Macomber v. State, 137 Neb. 882, 291 N. W. 674; State v. Chicago & N. W. Ry. Co., 147 Neb. 970, 25 N. W. 2d 824.

It however can have no controlling significance in a situation such as is presented here where under the terms of the pleading the effort is to declare the statute invalid but in truth the effort is to seek to have an adjudication that the respondent is not amenable to a valid act.

The purpose in pointing this out here is not to say that this rule may not have application to appropriate issues in a case but to make clear upon what issue this case was actually submitted by the pleadings to the district court and on which it comes to this court.

In actuality the case was presented to the district court upon the issue tendered by the relator in its petition, the significant part of which is quoted herein, and the general denial of the respondent.

Evidence was adduced by the parties and thereafter on that evidence and the law the district court, as already indicated, adjudicated the issue in favor of the respondent. In particular the adjudication was a dismissal of the petition.

The case therefore comes here for review on the record made in the district court and authentically and authoritatively brought to this court.

Having examined the allegations of fact in the petition filed in the district court and the statutes in question it is our opinion that on strict construction of the statutes or otherwise, if the allegations of the petition were sustained by evidence sufficient in degree to support a decree, that the decree of the district court was erroneous.

It appears that the acts charged against the respondent were violative of the clear, specific, and unambiguous language of both sections 48-501 and 48-502, R. R. S. 1943. To demonstrate this it becomes necessary only to repeat by abstraction from section 48-501, R. R. S. 1943, language which accurately describes the charge against the respondent as follows: "The term 'employment agency,' means and includes the business of con-

ducting * * * any * * * agency * * * for the purpose of procuring * * * help or employment or engagements, or for the registration of persons seeking such help * * * where a fee or other valuable consideration is exacted, or attempted to be collected, directly or indirectly, for such services * * *. Such term (fee) also includes the difference between the amount of money received by any such person who furnishes employees and the amount paid by him to such employee."

Obviously this language covers the activities described in the petition. Even if there could be any doubt about this in the language preceding the last sentence, none could remain after reading this sentence. It points to the kind of acts described. If there could still be any doubt about this it is dispelled by section 48-502, R. R. S. 1943. This section aptly describes the functions the respondent was engaged in as declared by the petition. The petition declares that the respondent was a corporation which undertook for hire or with a view to profit to secure for others employment or help. This activity the section describes as a private employment agency.

It appears that injunction is a proper remedy for the correction of conditions such as were complained of by the relator in the petition. In State v. Chicago & N. W. Ry. Co., *supra,* it was said: "Injunction is properly used for the protection of public rights, property, or welfare, whether or not such acts violate a penalty statute and whether or not they constitute a nuisance." See, also, State v. Pacific Express Co., 80 Neb. 823, 115 N. W. 619, 18 L. R. A. N. S. 664; State ex rel. Sorensen v. Ak-Sar-Ben Exposition Co., 118 Neb. 851, 226 N. W. 705, 121 Neb. 248, 236 N. W. 736.

In determining whether or not the pleaded cause of action has been sustained reference of course must be had to the evidence adduced at the trial and coming to this court in an authentic bill of exceptions.

This court has said: "Where, on appeal in equity

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." Bednar v. Bednar, 146 Neb. 726, 21 N. W. 2d 438. See, also, Palmer v. Capitol Life Ins. Co., 157 Neb. 760, 61 N. W. 2d 396.

This court has also said: "Where the record contains no authentic bill of exceptions or the bill of exceptions has been quashed, no question will be considered, the determination of which necessarily involves an examination of the evidence adduced in the trial court, and in such a situation, if the pleadings are sufficient to support the judgment, it will be affirmed." Dryden & Jensen v. Mach, 150 Neb. 629, 35 N. W. 2d 497. See, also, Adkisson v. Gamble, 143 Neb. 417, 9 N. W. 2d 711; Ratay v. Wylie, 147 Neb. 201, 22 N. W. 2d 622; Benson v. General Implement Corp., 151 Neb. 234, 37 N. W. 2d 223; Horn v. Gooch Feed Mill Co., 157 Neb. 125, 58 N. W. 2d 626.

After this case was appealed and the purported bill of exceptions was settled by the trial judge the respondent filed a motion to quash it on the ground that it was not prepared and presented in such manner as to give it validity under statutory requirements. The motion is in terms to strike and expunge the bill from the files and records of the appeal.

This motion has been presented but not ruled upon. It therefore must be disposed of before the determination is made upon the issues tried in the district court.

By statute (section 25-1140.01, R. R. S. 1943) a party appealing may request that all of the evidence shall be contained in a bill of exceptions. The concern here however is not with this provision. In the alternative he may request that the bill of exceptions include less than all of the evidence. If he requests less than all he is required within 3 days after filing notice of appeal to serve notice upon the adverse party or his attorney of record and file with the clerk of the district court (1) a

designation of the witnesses whose testimony he deems essential, (2) a designation of the exhibits and such trial proceedings as he desires to have included, and (3) a statement of the errors he intends to rely upon for reversal or modification of the judgment or final order from which the appeal is taken.

The basis of the motion to quash is that the statutory notice was not served upon the respondent or its attorney of record.

The filing of a motion to quash a bill of exceptions in this court is proper procedure whereby to present the question of whether or not there has been compliance with the requirements necessary to obtain and settle a bill of exceptions. Greenwood v. Craig, 27 Neb. 669, 43 N. W. 427; Phoenix Ins. Co. v. Readinger, 28 Neb. 587, 44 N. W. 864; Scotts Bluff County v. McHenry, 128 Neb. 613, 259 N. W. 754. In Scotts Bluff County v. McHenry, *supra,* this question was not directly considered but the motion to quash was disposed of on its merits.

With regard to the question of whether or not the notice of request for partial bill of exceptions was served within 3 days the transcript contains the following: Notice of appeal was filed March 11, 1955. On March 18, 1955, the attorney representing the relator filed his affidavit in which he stated that he served his request for a partial bill of exceptions upon the attorney for respondent by placing a true copy of it in the United States mail in registered form on March 12, 1955. A partial bill of exceptions was prepared and submitted to the attorney for respondent on May 19, 1955. It was returned on May 26, 1955. The respondent substantially objected to it on the ground that it was a partial instead of a complete bill of exceptions. The bill was settled by the trial judge as a partial bill of exceptions on June 3, 1955. On October 27, 1955, the respondent filed its motion to quash.

The motion to quash was in substance and to the ex-

tent pertinent here based on the grounds that the bill of exceptions is not complete and thus could not afford respondent a fair and just opportunity to present its case to the Supreme Court, and that notice of the intention to procure a partial bill of exceptions was never served upon respondent or its attorney.

This motion is supported by the affidavit of the attorney for the respondent. In addition it is stated in the affidavit that the first notice the respondent or its attorney had of the request for a partial bill of exceptions was on or about May 18, 1955, the time when the bill was served.

It is observable that while the statute provides that notice shall be served it contains no provision as to manner or method of service beyond the requirement that it shall be served "upon the adverse party or his attorney of record." As is made apparent by the affidavit of the attorney for the relator the method employed in this instance was by registered mail.

No objection has been made that service was made by mail. The objection is that there was no service of the notice. Strictly speaking then we are called upon to determine whether or not there has been service. In turn this determination must depend upon the question of whether or not there is satisfactory and sufficient proof of service.

The decisions of some of the jurisdictions adhere to the rule that where service of notice is required and no method of service is prescribed the service must be made personally. Calkin v. Roberts Park Fire Protection Dist., 398 Ill. 374, 76 N. E. 2d 43; James v. Hutchinson (Mo. App.), 211 S. W. 2d 507; State v. Stokes, 55 Idaho 51, 37 P. 2d 404; Lock Joint Tube Co. v. Citizens Trust & Sav. Bank, 218 Ind. 162, 31 N. E. 2d 989.

In other jurisdictions it has been held that under such circumstances the only necessity is that the party to be served shall actually receive the notice and that the method is unimportant. Brost v. Whitall-Tatum Co.,

89 N. J. Law 531, 99 A. 315, L. R. A. 1917D 71; Smirl v. Globe Laboratories, Inc., 144 Tex. 41, 188 S. W. 2d 676; North v. Kinney, 231 Iowa 951, 2 N. W. 2d 407; Bailey Lumber Co. v. General Construction Co., 101 W. Va. 567, 133 S. E. 135.

A condition of both rules however is that the party making the service must be in a position to make due proof that service was actually had upon the party required to be served.

Assuming but not deciding that service of notice may be made under this statute by registered mail, in the absence of evidence to the contrary, it is to be presumed that the notice was received by the attorney for the respondent. See 31 C. J. S., Evidence, § 136a, p. 777. This is a rule which is generally accepted.

The presumption however is only prima facie and may be rebutted. And in case of denial of receipt of notice the question of delivery becomes one of fact with the burden upon the sender to prove receipt by the addressee. Bloch v. Eastern Machine Screw Corp., 281 F. 777; Huntley v. Whittier, 105 Mass. 391, 7 Am. R. 536; National Union Fire Ins. Co. v. Owens, 14 Tenn. App. 556; National Aid Life Assn. v. Driskill (Tex. Civ. App.), 138 S. W. 2d 238; 31 C. J. S., Evidence, § 136e, p. 785.

Since we are not called upon to do so we do not decide upon the method whereby service of notice is to be made in instances wherein a statute requires notice but fails to provide the method. What we do decide is that in the light of the record presented the relator has failed under the rules to sustain the burden of showing that the required statutory notice was served upon the respondent.

It has been suggested that the right to complain was waived by failure to raise the question earlier. This contention is untenable. The question was raised at the earliest opportunity and has been urged at all times since. This opportunity came after the respondent was

deprived of a substantial right granted by this same section of the statute. The respondent was entitled within 7 days to request additions beyond the request of the relator. Clearly by implication if no request for additions was made within 7 days such additions were barred.

There have been a number of decisions of this court wherein it has been held for different reasons that the right to have a bill of exceptions quashed has been waived but our attention has not come to any the effect of which is to say that where a substantial right would be abridged the doctrine of waiver may be applied. In a case, not in point in fact, we think the rule which should obtain in this case is found, as follows: "The appearance of defendant in error was solely to insist on the objection to the allowance, and one does not ordinarily waive a right by insisting on it." Supreme Tent of the Knights of the Maccabees v. Kreig, 54 Neb. 588, 74 N. W. 1104.

The conclusion therefore is that the motion to quash the bill of exceptions should be sustained.

In the light of the determination upon the motion to quash, it becomes necessary to say that the case comes to this court effectually without a bill of exceptions. In consequence of this in the light of what has already been said herein the only inquiry is that of whether or not the pleadings may be said to support the judgment of the district court. From what has been pointed out it is clear that the pleadings support the judgment. The judgment of the district court therefore must be affirmed.

MOTION TO QUASH SUSTAINED. AFFIRMED.

VICTOR JOHNSON, APPELLANT, V. EVELYN NATHAN, APPELLEE.
73 N. W. 2d 398

Filed December 9, 1955. No. 33828.

1. **Appeal and Error: Trial.** The verdict of a jury based upon conflicting testimony will not be disturbed unless clearly wrong.
2. **Appeal and Error.** On appeal, an assertion by appellant that the evidence sustains an assignment of error may be disregarded, where no reference is made in his brief to the pages or to the places in the record where such evidence may be found.
3. **Trial: Juries.** It will not be presumed that passion and prejudice influenced the action of jurors, but it must be affirmatively shown before a verdict will be disturbed.
4. **Trial.** The giving of a cautionary instruction generally rests within the judicial discretion of the trial court.
5. ———. 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.
6. **Trial: Appeal and Error.** 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.
7. **Trial.** A supplemental instruction is sufficient if it contains a correct statement when considered in connection with the main charge.
8. **Trial: Appeal and Error.** A party may not complain of misconduct of counsel if, with knowledge of such misconduct, he does not ask for a mistrial, but consents to take the chance of a favorable verdict.

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

Shrout & Brown and *Brower & Brower*, for appellant.

Paul I. Manhart, for appellee.

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

SIMMONS, C. J.

In this action plaintiff sought to recover judgment on three promissory notes totaling the principal sum of

$5,000. Defendant by answer admitted the execution and delivery of the notes, and pleaded payment by the conveyance of real estate and personal property to the plaintiff. Defendant further answered and alleged that plaintiff had agreed to return the notes and failed to do so.

Plaintiff for reply pleaded details and alleged that the conveyances to him by the defendant involved other transactions and had nothing whatever to do with the notes upon which he based his action.

The cause was tried to a jury resulting in a verdict for the defendant.

Plaintiff's motion for a new trial was overruled and judgment was rendered on the verdict. Plaintiff appealed.

We affirm the judgment of the trial court.

Plaintiff's first assignment of error is that the verdict should be set aside because to sustain it would result in a palpable injustice. Plaintiff relies on Stewart v. City of Lincoln, 114 Neb. 362, 207 N. W. 511, and Corr v. City of Omaha, 122 Neb. 323, 240 N. W. 312. Those cases dealt with either gross inadequacy of a verdict or a clearly excessive verdict. They do not apply here.

The case was tried largely on the testimony of the parties. Each testified in support of the allegations of his or her pleadings. The jury accepted the evidence of the defendant.

The rule is that the verdict of a jury based upon conflicting testimony will not be disturbed unless clearly wrong. Pruitt v. Lincoln City Lines, 147 Neb. 204, 22 N. W. 2d 651.

Plaintiff does not point out wherein the evidence fails to support the jury's verdict. The assignment is not sustained.

Plaintiff next contends that the verdict must be set aside because it is based on an inference of sympathy and prejudice. He bases this on the purported fact that the evidence showed the defendant was a widow, resi-

dent of the county where trial was had, whereas he was a resident of a foreign state. He contends also that defendant gave the impression in her evidence of financial difficulties, heavy burdens, etc. which "might have" been sufficient to produce "involuntary sympathy" for the defendant, and "involuntary prejudice" for the plaintiff. Plaintiff does not point out the evidence upon which he relies. See McCoy v. Cunningham, 141 Neb. 708, 4 N. W. 2d 835.

In Shaw v. Alexander, 94 Neb. 774, 144 N. W. 907, it was held: "On appeal, an assertion by appellant that the evidence sustains an assignment of error may be disregarded, where no reference is made in his brief to the pages or to the places in the record where such evidence may be found."

The rule is: "It will not be presumed that passion and prejudice influence the action of jurors, but it must be affirmatively shown before a verdict will be disturbed." Dyer v. Ilg, 156 Neb. 568, 57 N. W. 2d 84.

The assignment is not sustained.

Plaintiff next complains about the court's instructions in three particulars:

First. In stating the pleadings, the trial court "substantially" copied the pleadings. There is no contention that the court did not properly instruct on the issues as disclosed by the evidence. The contention has no merit.

Second. The trial court did not give a cautionary instruction that the pleadings and allegations were not to be regarded as evidence but were simply statements of what the parties claimed. No such instruction was requested.

The giving of a cautionary instruction generally rests within the judicial discretion of the trial court. 88 C. J. S., Trial, § 297(b), p. 809; 53 Am. Jur., Trial, § 610, p. 480.

The rule is: "It is the duty of the court to submit to the jury under appropriate instructions all issues pre-

sented by the pleadings and supported by evidence." Rice v. American Protective Health & Accident Co., 157 Neb. 256, 59 N. W. 2d 378.

The rule also is: "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.

The assignment is not sustained. We do not determine whether or not such an instruction should have been given had it been requested.

Third. The defendant pleaded that plaintiff had agreed orally to return the notes sued on to defendant and had failed to do so. The court so advised the jury in its instructions. Defendant's testimony supported her allegation.

There appears in the transcript a "question of jury" as follows: "Was it established that this Plaintiff did offer to return notes of $2000; $2000; & $1000 to defendant if deed were executed?" The court answered in a signed writing: "This question is for you to determine under the evidence adduced during the trial." The motion for new trial recites that this occurred "after the Jury had gone into chambers." No other showing appears in the record.

Plaintiff contends that this instruction could have misled the jury to believe that that was the only question to be decided. Plaintiff cites no authority for his position.

The rule is that a supplemental instruction is sufficient if it contains a correct statement when considered in connection with the main charge. 89 C. J. S., Trial, § 477, p. 121.

We find no merit in the plaintiff's contention.

During the direct examination, the defendant was asked and testified without objection that plaintiff had

offered to return the notes to her "after the deed was given," "Yesterday afternoon and this morning," and that he then requested defendant to go to the office of plaintiff's attorney. Defendant was then asked, "What did he say?" She answered that plaintiff said "I should offer him five or eight hundred dollars—." On motion of the plaintiff, this answer was stricken and the defendant was admonished by the court not to refer to anything that might be an offer of compromise or settlement. Defendant then testified that plaintiff said "he would return all the notes to me." The court sustained a motion of plaintiff to strike the answer.

Defendant was then asked if plaintiff had offered to return the notes "this morning," and she replied that he had. She was then asked what he had said, and answered, "He said the same thing — I should go with him * * *" to his attorney. The answer was stricken on the motion of plaintiff.

Upon that record plaintiff contends there was prejudicial misconduct of defendant's counsel which requires a reversal and a new trial. He relies on Ashland Land & Livestock Co. v. May, 59 Neb. 735, 82 N. W. 10. The facts and conclusion in that case do not sustain plaintiff's position.

It will be observed that plaintiff did not ask that the jury be admonished, he made no reference to misconduct of counsel, and he did not ask for a mistrial. He proceeded with the trial after the court had sustained his objections.

In Beads v. State, 160 Neb. 538, 71 N. W. 2d 86, we held: "A party may not complain of misconduct of counsel if, with knowledge of such misconduct, he does not ask for a mistrial, but consents to take the chance of a favorable verdict."

The assigned error is not sustained.

The judgment of the trial court is affirmed.

AFFIRMED.

WESLEY JONES, APPELLEE, V. YANKEE HILL BRICK MANUFACTURING COMPANY ET AL., APPELLANTS.
73 N. W. 2d 394

Filed December 9, 1955. No. 33861.

1. **Workmen's Compensation: Appeal and Error.** An appeal to this court in a workmen's compensation case is considered and determined de novo upon the record.
2. **Workmen's Compensation.** A compensable injury within the Workmen's Compensation Act is one caused by an accident arising out of and in the course of the employment.
3. ———. An accident within the Workmen's Compensation Act is an unexpected and unforeseen event happening suddenly and violently and producing at the time objective symptoms of injury.
4. ———. In order to recover, 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.
5. ———. Mere exertion, which is no greater than that ordinarily incident to the employment, cannot of itself constitute an accident, and if combined with preexisting disease such exertion produces disability, it does not constitute a compensable accidental injury.
6. ———. An award of compensation under the Workmen's Compensation Act may not be based on possibilities, probabilities, or speculative evidence.
7. ———. 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 shall prove his right to compensation within the rules above set forth nor does it permit a court to award compensation where the requisite proof is lacking.

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

Davis, Healey, Davies & Wilson and *Kenneth Cobb*, for appellants.

Richard O. Johnson, for appellee.

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

CHAPPELL, J.

Plaintiff, Wesley Jones, sought in this action to recover benefits under the provisions of the workmen's compensation law. Defendant Yankee Hill Brick Manufacturing Company was his employer and defendant Employers Mutual Liability Insurance Company of Wisconsin was his employer's compensation insurer. After a hearing by one of the judges of the workmen's compensation court, plaintiff's petition was dismissed upon the ground that plaintiff had failed to meet the burden of proof required by law to establish by a preponderance of the evidence that the condition of which he complained resulted from an accident as defined by section 48-151, R. R. S. 1943. Thereafter plaintiff filed a waiver of rehearing and notice of appeal to the district court for Lancaster County. Therein issues were joined by pleadings filed by the respective parties, and trial de novo was had whereat evidence was adduced. Thereafter the trial court rendered a judgment which vacated and set aside the order of the workmen's compensation court dismissing plaintiff's petition, and found and adjudged the issues generally in favor of plaintiff and against defendants. The amount and duration of payments of compensation required by the judgment we deem it unnecessary to set forth.

Subsequently, defendants' motion to vacate the judgment and for new trial was overruled and defendants appealed, assigning in substance that the judgment was not sustained by the evidence but was contrary thereto and contrary to law. We sustain the assignments. In that regard, defendants made and argued other assignments but they require no discussion in order to dispose of the case upon its merits.

Well-established rules of law have application and are controlling here. As recently as Murray v. National Gypsum Co., 160 Neb. 463, 70 N. W. 2d 394, a case comparable with that at bar, we reaffirmed that: "An appeal to this court in a workmen's compensation case is

considered and determined de novo." In such case we also held that: "A compensable injury within the Workmen's Compensation Act is one caused by an accident arising out of and in the course of the employment.

"An accident within the Workmen's Compensation Act is an unexpected and unforeseen event happening suddenly and violently and producing at the time objective symptoms of injury.

"An employee claiming the benefit of the Workmen's Compensation Act must, to succeed, show by the greater weight of the evidence all the essential elements of an accident as that word is defined in the act.

"An award of compensation under the Workmen's Compensation Act may not be based on possibilities, probabilities, or speculative evidence.

"A mere exertion, which is not greater than that ordinarily incident to the employment, cannot of itself constitute an accident within the meaning of the Workmen's Compensation Act."

Also, in Chiles v. Cudahy Packing Co., 158 Neb. 713, 64 N. W. 2d 459, we held that: "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.

"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."

In Cole v. Cushman Motor Works, 159 Neb. 97, 65 N. W. 2d 330, we reaffirmed the foregoing rules and said, quoting with approval from Anderson v. Cowger, 158 Neb. 772, 65 N. W. 2d 51: " 'Such facts must be proved by the claimant by sufficient evidence leading to the direct conclusion, or by a legitimate legal inference

therefrom, that such an accidental injury occurred and caused the disability. There must be shown a causal connection between the accident suffered by the claimant and the cause of his disability.' "

In Tucker v. Paxton & Gallagher Co., 153 Neb. 1, 43 N. W. 2d 522, we held that: "A plaintiff in a workmen's compensation action is entitled to recover an award if he has shown by a preponderance of the evidence that he has sustained injury resulting from an accident arising out of and in the course of his employment even if preexisting disability combined to produce his disability."

However, in Foster v. Atlas Lumber Co., 155 Neb. 129, 50 N. W. 2d 637, a case comparable with that at bar, this court specifically reaffirmed that: "Mere exertion, which is not greater than that ordinarily incident to the employment, which combined with pre-existing disease produces disability, does not constitute a compensable accidental injury."

Cases relied upon by plaintiff are generally distinguishable upon the facts and applicable law. To discuss them more fully here would serve no purpose.

In the light of such rules, we have examined the record which without dispute substantially discloses the following pertinent facts: Prior to June 29, 1954, plaintiff had been employed by defendant Yankee Hill Brick Manufacturing Company for about 7 years. He was classified as a shader of tile and brick manufactured by defendant in its plant southwest of Lincoln and adjacent to Pioneer Park. Plaintiff earned about $70 per week measured by piece work. When bricks and tile came out of the kiln they had to be shaded out in various colors dependent upon the type of clay used in manufacturing them. Accordingly, a shader assorted the brick and tile. On June 29, 1954, about 2:30 p. m. plaintiff was working in kiln No. 1 while engaged in picking up and putting 3 by 12 by 12 inch hollow tile, weighing 7 or 8 pounds each, on a conveyor. It was one of his usual duties. In doing so he customarily bent

or stooped over and picked up two tile in each hand, then straightened up, and turning or twisting his body around, carried the tile about 10 feet while walking on loose brick, covered with sand, and deposited the tile on a conveyor. While so working he went back to get some more tile. Bending over, he picked them up and started back to the conveyor when a sudden pain shot up his back into his head and right arm, and he dropped the tile solely because of the pain. He did not slip or fall in any manner on the loose brick upon which he was walking, or otherwise.

While so working as a shader and performing his usual duties, he had to be continuously in every position, bending and twisting all the time, and the twisting referred to by plaintiff was simply turning his body in bending over, picking up the tile, and setting them down again on the conveyor. Plaintiff did not know what brought on his trouble, but it was caused by his work that day which was an ordinary day except it was hotter than usual. The work that day was the same as it had always been and the twisting or bending of his body was not different than at any other time.

Previously, on August 7, 1953, plaintiff had a minor trouble and pain in his neck while shading common brick, but upon being treated by a chiropractor he felt pretty good up until June 29, 1954, when it recurred with more violence.

After experiencing the pain on June 29, 1954, plaintiff went outside to rest and get a drink of water, after which he resumed work but was bothered by pain for the rest of the day. The next morning, on June 30, 1954, he returned to work but was unable to perform it, so defendant's manager and superintendent, one and the same person, sent him to an orthopedic physician and surgeon who testified for plaintiff. There plaintiff gave a history and received a clinical and X-ray examination. The substance of the history was that while plaintiff was at work for defendant and engaged in his normal duties

lifting rather heavy loads, he noticed an acute pain in his neck area and right shoulder while lifting a brick load. Plaintiff gave no history of an accident of any kind either to the orthopedist or plaintiff's employer or defendant's insurer, although he gave statements to all of them. There was no competent evidence from which it could be concluded that an unexpected and unforeseen event happening suddenly and violently caused plaintiff's pain and claimed disability. Rather, plaintiff simply suffered a sudden pain and disability while performing his ordinary duties. It was the result of mere exertion no greater than that ordinarily incident to his employment. His trouble was diagnosed on June 30, 1954, as a lordosis or slight forward curvature of the spine and a degenerative sclerotic change in the area of the fifth and sixth cervical vertebrae, a condition which was not of recent origin, not something that had been caused a day or two or a week previous to June 29, 1954, but had been present for some months before plaintiff experienced the pain about which he complained on June 29, 1954. In that regard, the orthopedist testified that the bending, turning, and twisting of plaintiff's body and the lifting of such bricks in performing his ordinary duties could aggravate plaintiff's already existing condition. He testified with reference to the cervical spine that plaintiff had about a 25 or 30 percent disability and explained that he had recommended and prepared a collar-like brace for plaintiff to wear in order to prevent any extra burden on plaintiff's cervical spine.

Plaintiff did no work from June 29, 1954, to September 25, 1954, after which he returned to his employment with defendant, doing lighter work, and has since missed only a day or two a week. Defendants at all times denied any legal liability, and plaintiff brought this action.

In the light of the evidence and rules heretofore set forth, we conclude that plaintiff failed to meet the burden of proof as required by law to establish by a

preponderance of the evidence that the disability of which he complained resulted from an accident arising out of and in the course of his employment.

Therefore, the judgment of the trial court should be and hereby is reversed and the cause is dismissed at plaintiff's cost.

REVERSED AND DISMISSED.

STATE OF NEBRASKA EX REL. CLARENCE S. BECK, ATTORNEY GENERAL OF THE STATE OF NEBRASKA, AND THE DEPARTMENT OF BANKING OF THE STATE OF NEBRASKA, APPELLANT, V. ASSOCIATES DISCOUNT CORPORATION, A FOREIGN CORPORATION, ET AL., APPELLEES.

73 N. W. 2d 673

Filed December 10, 1955. No. 33943.

1. **Courts: Appeal and Error.** This court has the inherent power in the exercise of its appellate jurisdiction in a proper case to award a temporary restraining order, to impound the subject of the litigation, and to appoint an interim receiver, for the purpose of protecting the subject matter of an appeal and preserving the statu quo of the parties in their relations thereto, where it is made to appear that the judgment finally rendered would otherwise be ineffectual and moot.
2. ———: ———. Such inherent powers will not be exercised by the court unless it is indispensable to the protection of the rights of the party asking it and the means are at hand to fully protect the rights of adverse parties.
3. ———: ———. Where it appears necessary, in the interests of justice, the court may, upon a proper showing, exercise such inherent powers ex parte or upon its own motion, to prevent irreparable damage to the litigants or the public.
4. **Injunction.** Whether an order is a temporary restraining order or a temporary injunction is ordinarily determined by whether or not a further hearing was contemplated by the order. If a further hearing is contemplated it is a temporary restraining order. If further hearing is not contemplated it is a temporary injunction.
5. ———. An order restraining a litigant until the right to a temporary injunction can be determined on the merits of an

appeal is a temporary restraining order and not a temporary injunction.

6. ———. A temporary restraining order is in aid only, and not a part of the main action. Its office is only to hold matters in statu quo for the time being, and until parties can be heard as to the propriety of issuing a temporary injunction.

APPEAL from the district court for Douglas County: CARROLL O. STAUFFER, L. ROSS NEWKIRK, and PATRICK W. LYNCH, JUDGES. *Motions overruled.*

Clarence S. Beck, Attorney General, and *Robert A. Nelson,* for appellant.

Matthews, Kelley, Fitzgerald & Delehant and *Woods, Aitken & Aitken,* for appellees.

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

CARTER, J.

The issue before the court arises on a motion of appellees for an order directing the clerk of this court to withhold approval of the bond of the receiver appointed by this court and a motion for an order dissolving a temporary restraining order entered by this court, both for the reason that the court was without power or authority to enter such orders and that they are therefore void and of no force and effect.

This action was commenced in the district court for Douglas County on July 7, 1955. The petition alleged in substance that the defendant, Associates Discount Corporation, is organized and existing under the laws of the State of Indiana and qualified to do business in this state. The suit was instituted by the Attorney General of Nebraska by the filing of a petition in the district court in which it is alleged that the defendants and each of them have failed to procure a license to conduct an installment loan business in this state and, with the intent of evading the usury laws of the state, have engaged in a devise and subterfuge by means of which

they have and are exacting usurious charges for the making of installment loans to purchasers of automobiles as specifically set forth in the petition. The prayer of the petition is for a decree finding that Associates Discount Corporation is operating an installment loan business in this state in violation of law with the intent of violating its usury laws; that, pending a hearing on the application for a temporary injunction and the appointment of a receiver, a restraining order be issued restraining the removal of the assets, books, and papers of the corporation beyond the jurisdiction of the court and from collecting or attempting to collect any of their unlawful and void loans; and that upon final hearing, an injunction be entered enjoining the defendants from engaging in the installment loan business in this state in the manner set forth or in any other manner which is violative of the laws of this state.

The trial court issued a temporary restraining order on the date the petition was filed, restraining the defendants from removing any of their records, files, papers, documents, notes, mortgages, and other assets of every kind and description pertaining to the business of defendants and further restraining the defendants from the making of loans at unlawful and usurious rates and from collecting or attempting to collect any such loans theretofore made. On July 15, 1955, upon a showing and finding that defendants were violating the restraining order, the trial court granted an order impounding the records and assets of the corporation and directed the sheriff of Douglas County to take possession thereof. The sheriff executed the order and took possession of the property. On July 18, 1955, defendants made application for the return of the books, records, and documents impounded, and for a dissolution of the temporary restraining order restraining defendants from collecting or attempting to collect the unlawful and void loans described in plaintiff's petition. The trial court without a formal hearing entered an order on July 19, 1955, dis-

solving the temporary restraining order, except the part thereof restraining the defendants from removing their records, files, papers, documents, notes, mortgages, and other evidences of indebtedness. The dissolution of the latter was conditioned upon the defendant corporation filing a good and a sufficient corporate surety bond in the penal sum of $1,000,000, conditioned that such books, records, and documents would not be removed from the jurisdiction of the court. Such a surety bond was given. Before any hearing was held on plaintiff's application for a temporary injunction and the appointment of a receiver, the trial court sustained a demurrer to plaintiff's amended petition and, upon plaintiff's election not to plead further, dismissed the action. Plaintiff has appealed.

It is the contention of the defendants that the injunction order entered by the trial court was a temporary injunction which was kept in force by plaintiff's appeal. We point out that no hearing was ever held on the application for a temporary injunction. The defendants were successful in having such a hearing continued from time to time until the trial court entered its dismissal of the action on the ground that plaintiff's amended petition did not state a cause of action. The order finally entered had the effect of temporarily restraining the removal of the records, files, papers, documents, notes, mortgages, and other evidences of indebtedness from the jurisdiction of the court, and nothing more. The temporary restraining order was dissolved and was not superseded and kept in force by plaintiff's appeal. The dissolution of a temporary restraining order cannot be superseded. State ex rel. Plattsmouth Telephone Co. v. Baker, 62 Neb. 840, 88 N. W. 124; Harbin v. Love, 119 Neb. 76, 227 N. W. 145. There is no order of the district court in effect restraining the defendants from removing any of its property from the jurisdiction of the court, or from collecting or attempting to collect its loans, notes, and mortgages, or from receiving any of the proceeds of

the loans described in plaintiff's amended petition. The bond given, consequently, did not protect the state from any acts of the defendants after the dismissal of the action by the district court.

On December 3, 1955, the Attorney General made application to this court for a restraining order, temporarily restraining the defendants from collecting or attempting to collect the unlawful and void loans described in the amended petition, and for a further order impounding all the books, records, files, papers, notes, mortgages, and other documents pertaining to the loan business of the defendants pending the appeal. After an examination of the pleadings in the case and the orders theretofore made, and a consideration of the affidavits attached to the application, this court issued a temporary restraining order as prayed, and impounded the books, records, files, papers, notes, mortgages, and other documents pertaining to the business of the defendants, and appointed a receiver to take possession of the property impounded, with all authority generally imposed upon a receiver or as contained in the orders of this court, said appointment being conditioned upon the designated receiver posting a bond of $100,000 to be approved by the Clerk of the Supreme Court.

It is the contention of the defendants that the court acted beyond its power and authority in entering the orders without giving notice to the defendants. This contention is based largely upon the assertion that the order granted was a temporary injunction and not a temporary restraining order. The order contemplates, in the form in which it was drawn, that defendants be restrained and enjoined from performing the acts therein set out until the application for a temporary injunction can be heard when the appeal is heard on its merits. Whether or not a further hearing is contemplated on an application for a temporary injunction is generally considered to be the primary difference between a temporary restraining order and a temporary injunction. The

order granted shows on its face that it is to be in force pending a hearing of the appeal on the merits of plaintiff's prayer for a temporary injunction, or until the further order of the court. State ex rel. Minden-Edison Light & Power Co. v. Dungan, 89 Neb. 738, 132 N. W. 305. In State ex rel. Keefe v. Graves, 82 Neb. 282, 117 N. W. 717, the court stated in the syllabus: " 'A restraining order is in aid only, and not a part of the main action. Its office is only to hold matters in statu quo for the time being, and until parties can be heard as to the propriety of issuing a temporary injunction.' Trester v. Pike, 60 Neb. 510." In Harbin v. Love, *supra,* this court said: "The plaintiff contends that the temporary order granted in this case amounted to a temporary injunction. He contends that a temporary restraining order contemplates a hearing as to whether it will be supplanted by a temporary injunction. * * * Whether an order is a restraining order or a temporary injunction must be determined from its form and substance. 32 C. J. 28. Tested by this rule, the form and substance indicates that this was a temporary restraining order. If the order had restrained defendants absolutely without providing for a hearing upon the application, it would have been an injunction and not a temporary restraining order. State v. Dungan, 89 Neb. 738; State v. Graves, supra. The order in this case did provide for a hearing and did not operate as a temporary injunction * * *." Such is the situation in the present case. The order purports to hold the subject of the action in statu quo until the merits of plaintiff's claim to a temporary injunction can be heard de novo on the appeal. The order was a temporary restraining order as distinguished from a temporary injunction.

The power of this court to grant injunctive relief to protect the subject matter of an appeal and preserve the statu quo of the parties, where the judgment finally rendered would otherwise be ineffectual and moot, was recognized in State ex rel. Phoenix Loan Co. v. Marsh,

139 Neb. 290, 297 N. W. 551, 133 A. L. R. 1101. In the foregoing case the court said: "We think the case before us is one which warrants the protective action of this court. Unless a restraining order be issued, the property of relator will be irreparably damaged and imperiled, and any relief obtained by the appeal would be ineffectual and moot. The rights of the respondent can be protected by a bond, properly conditioned and ample in amount. While it is true that the issuance of a restraining order pending an appeal to protect or enforce the jurisdiction of the court, or to protect the status quo of the parties to prevent irreparable pecuniary damage, should be sparingly used, yet in a proper case if the purposes of justice require it and the means are at hand to fairly protect the appellee, such powers of the court should be exercised to make the appeal effectual."

In the present case, defendants filed a general demurrer to the amended petition in the district court and thereby admitted all well-pleaded and pertinent facts. For the purposes of this appeal the question is whether or not such facts constitute a violation of applicable statutes. There appears in the transcript an affidavit of George W. Omacht, a vice president of the defendant corporation, supporting the motion of defendants for a dissolution of the restraining order issued by the trial court, in which it is stated: "That the debts in the remainder of said accounts consisting of about 170 in number and totaling approximately $219,000.00 likewise arose from time sales of motor vehicles made by automobile dealers to retail buyers which obligations were purchased by this defendant from such automobile dealers. Such transactions when purchased by this defendant were likewise free from interest charge or usury under the case of Grand Island Finance v. Fowler. But after this defendant acquired said last mentioned receivables and prior hereto at the request of said debtors, the defendant agreed to forbear collection of said debts as

contracted and extended the time of payment thereof, and charged for such forbearances sums in excess of 9% per annum interest which total excesses are in the aggregate amount of approximately $20,000.00; that the total interest charge on all of said forbearances including the allowable and the excess charges, was approximately $48,000.00.

"That upon the filing of this suit this defendant began a review of its accounts and concluded that because of its said overcharges of interest in the approximate amount of $20,000.00 for the forbearances on the said 170 accounts, it was not entitled to collect under the law of Nebraska (Sec. 45-105) any interest whatever from the date of such forbearances; that thereupon it began making offers to said debtors to contract with each of them to credit each such debt with the amount of all interest contracted for from the date of such forbearance to the date of such credit and interest thereafter at the rate of 9% simple; that by so doing, defendant was attempting to show the Court that in good faith it was voluntarily purging such forbearance from any possible question of usury." We point out that the violations mentioned cannot be purged by a credit or waiver of interest. If such exactions of interest are usurious, the whole obligation is void and uncollectable under applicable statutes. §§ 45-128, 45-155, R. R. S. 1943.

From this evidence appearing in the record, together with the allegations of fact appearing in the amended petition admitted by the demurrer to be true, and the allegations of the Attorney General in his application for a restraining order and the appointment of a receiver pending the hearing of the appeal on its merits, and the affidavits filed in support of such application, this court concluded that the case was one warranting the issuance of a temporary restraining order and the appointment of a receiver to protect the subject matter of the litigation pending the outcome of the appeal. The showing was adequate to warrant the issuance of the tem-

porary restraining order, the order impounding the books, records, notes, and mortgages of the defendant corporation, and the appointment of a receiver to conserve such property for the protection of the state, the defendants, and the debtors of the defendant corporation.

The defendants further contend that the appointment of a receiver without notice was beyond the power and authority of the court. We do not concur in this view. This court clearly has the power, in a proper case, to appoint a receiver ex parte. 45 Am. Jur., Receivers, §§ 89, 90, p. 81; 75 C. J. S., Receivers, § 37, p. 698. The question before us is whether or not a proper case has been presented to warrant the appointment of a receiver ex parte. We point out that the records and assets of the defendant corporation have been impounded and are presently in the possession of the sheriff of Douglas County. Unless they are placed in the possession of one with authority to conduct the business of the corporation, irreparable loss would result to the successful party to the litigation. Ordinarily the right to a temporary restraining order ex parte would obviate the necessity for an interim receiver. But such is not the case here. The impounding of the records and assets of the corporation without an interim receiver would cause great loss in value to the type of assets constituting the subject matter of this action. The appointment of an interim receiver is an act of imperative necessity to prevent irreparable loss. The necessity was immediate. We point out that the defendants violated the restraining order issued by the district court of Douglas County. We have no assurance that the attitude of these defendants toward lawful court orders is any different now than it was at that time. In order to preserve the assets of the corporation pending the appeal, it appears necessary, as this court has found, to exercise its inherent powers in such a manner as to properly effectuate the orders of this court. The appointment of a receiver pending the appeal is ancillary to the re-

straining order and the impounding of the records and assets of the corporation. On December 6, 1955, a hearing was had at the instance of the defendants on the validity of the order appointing a receiver before that order became effective. We think, after hearing arguments thereon, that the order was a proper one under all the circumstances of this case. The clerk of this court should approve the bond of the receiver if it be a good and sufficient one, meeting the requirements of the order of this court appointing such receiver.

We recognize the fact that the issuance of temporary restraining orders, orders impounding property, and the appointment of an interim receiver, without notice and hearing, is summary in its nature, involving the extraordinary powers of the court, and should be exercised with the greatest of caution. Because of the serious impact of such orders the situation will be alleviated to the fullest extent possible by this court by affording prompt hearings on preliminary matters properly presented for the consideration of the court.

For the reasons stated, the motion to dissolve the temporary restraining order is overruled. The motion for an order directing the clerk to withhold approval of the receiver's bond is likewise overruled.

MOTIONS OVERRULED.

LOYD CARROLL GRANDSINGER, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.
73 N. W. 2d 632

Filed December 16, 1955. No. 33663.

1. **Criminal Law: Appeal and Error.** In criminal prosecutions it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence, all of which are matters for the jury.
2. ———: ———. In a criminal case this court will not interfere with a verdict of guilty based upon the evidence unless it

is so lacking in probative force that we can say, as a matter of law, that it is insufficient to support a finding of guilt beyond a reasonable doubt.

3. **Criminal Law: Evidence.** As a general rule, evidence of other crimes than that with which the accused is charged is not admissible in a criminal prosecution.
4. ———: ———. However, there are exceptions to such rule where a defendant is charged with a crime involving the essential elements of motive, intent, or guilty knowledge, and such evidence is admissible in such cases if it falls within one or more of such recognized exceptions.
5. **Trial.** A statute requiring that instructions be in writing is not to be so construed as to require the court to reduce to writing all the admonitions which it may be proper to give the jury while the trial is in progress.
6. ———. Subject to general rules, the trial court may orally give its opinion on a motion to exclude testimony; in ruling on the admissibility of evidence, may explain its rulings; and state for what purpose evidence is admitted, limit its application, or direct the jury to disregard it.
7. **Criminal Law: Evidence.** When a defendant in a criminal case testifies in his own behalf he is subject to the same rules of cross-examination as any other witness and may be required to testify on his cross-examination as to any matter brought out or suggested by him on his direct examination, and ordinarily he cannot avail himself of the objection that the evidence may incriminate him.
8. ———: ———. The cross-examination of a witness which relates to the issues and facts pertinent thereto may be pursued by counsel as a matter of right, but when the object of the cross-examination is to collaterally ascertain the accuracy or credibility of a witness, some latitude should be permitted. The scope of such latitude is ordinarily subject to the discretion of the trial judge and, unless abused, its exercise is not reversible error.
9. **Criminal Law: Trial.** A defendant in a criminal action may not predicate error on an instruction that is more favorable to him than is required by the law applicable to the charge made.
10. ———: ———. All instructions given should be considered in determining whether a particular instruction is prejudicial, and where instructions considered as a whole state the law fully and correctly, error may not be predicated thereon merely because a separate instruction, considered by itself, might be subject to criticism or is incomplete.
11. ———: ———. It is not error to refuse instructions requested by defendant where the court on its own motion has given the

substance of such requests. The trial court is not required to instruct in the exact language of a requested instruction. If the point is covered by an instruction couched in proper terms, it meets all the requirements of the law.

12. **Homicide.** Section 28-401, R. R. S. 1943, does not prescribe or authorize the court to prescribe any rule defining or circumscribing the exercise of the right of a jury in its discretion to determine in a homicide case whether upon finding an accused guilty of murder in the first degree the penalty shall be death or imprisonment for life. The statute commits the whole matter to the judgment or conscience of the jury and the doctrine of reasonable doubt has no application in the jury's determination of the penalty to be imposed.

13. **Criminal Law: Trial.** The mere fact that a witness in a criminal prosecution is a regular law enforcement officer does not entitle an accused to an instruction that the jury in weighing his testimony should exercise greater care than in weighing the testimony of other witnesses.

14. ———: ———. The rule that where informers, detectives, or other persons employed to produce evidence against the accused are called to testify against him, the defendant is entitled to an instruction to the jury that in weighing the testimony of such witnesses greater care and closer scrutiny should be exercised than in considering the testimony of witnesses who are disinterested, is generally not applicable to public law enforcement officers who are witnesses.

15. **Homicide: Trial.** In a homicide prosecution it is not proper to give an instruction as to assault in any of its grades unless such instruction is applicable and authorized by the evidence.

16. ———: ———. Pardon or parole relates to something that may happen after conviction by action of the executive department. The jury in a homicide case has nothing to do upon a finding of guilt of murder in the first degree except to determine whether the penalty should be death or imprisonment for life, and in event the decision is for life imprisonment, whether or not a defendant should be later pardoned or paroled is not a matter of concern for the jury. Its task is to choose between one or the other of the penalties and its decision should not rest upon whether pardon or parole is easy or difficult to secure.

17. ———: ———. In a homicide case, a prosecutor has a right to urge the jury to fix the penalty at death if the accused is found guilty of murder in the first degree, and the scope of his argument in that regard should be given a broad latitude provided it is predicated upon the evidence or reasonable inferences therefrom.

18. ———: ———. However, it is improper and error in such cases for the prosecutor to make any statements in his closing argument with regard to pardon or parole, although it is not prejudicial error to make remarks which are simply a statement of existing constitutional or statutory law, which all men, including the jurors, are presumed to know and doubtless do already know before the statement is made, if the statement is unaccompanied by other related objectionable or prejudicial remarks.

ERROR to the district court for Cherry County: EARL L. MEYER, JUDGE. *Affirmed.*

Charles A. Fisher, for plaintiff in error.

Clarence S. Beck, Attorney General, and *Robert A. Nelson,* for defendant in error.

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

CHAPPELL, J.

Plaintiff in error, Loyd Carroll Grandsinger, hereinafter called defendant, was charged with murder in the first degree by shooting and killing one Marvin Hansen, a Nebraska safety patrolman, on April 8, 1954, in Cherry County, Nebraska. Defendant pleaded not guilty, and after trial to a jury in the district court it returned a verdict which found defendant guilty of murder in the first degree and fixed the penalty at death. Defendant's motion for new trial was overruled, whereupon judgment and sentence in conformity with the verdict were rendered. Therefrom defendant prosecuted error to this court. Errors assigned and discussed are substantially as follows: (1) That the evidence was insufficient to support the verdict and judgment or justify the death penalty; (2) that the trial court erred in the admission of certain evidence; (3) that the prosecutor in argument was guilty of misconduct prejudicial to defendant's rights; (4) that the trial court erred in giving and refusing certain instructions; and (5) that in the event of affirmance, the verdict and judgment

should be modified to reduce the sentence under the provisions of section 29-2308, R. R. S. 1943. We conclude that the assignments should not be sustained.

There is competent evidence in the voluminous record from which the jury could have concluded beyond a reasonable doubt as follows: At the time of the alleged commission of the crime in Cherry County, Nebraska, about 11:30 p. m., April 8, 1954, defendant was 21 years of age, with the equivalent of a tenth-grade education. He was born at Valentine, Nebraska, but had been living at Bell Gardens, California, a suburb of Los Angeles, where he had been employed as a receiving clerk. He was married and had one child about 14 months old at time of trial. However, about a month previous to April 3, 1954, he had separated from his family because of marital difficulties. On April 3, 1954, out of employment and with little cash, defendant left California in his own 1941 Ford car and started east. Defendant's brother Leon, 32 years old, left with him. Prior to leaving, defendant took a gun, a .22 cylinder pistol, from a trailer house belonging to a friend. Defendant's car was not in good condition, and at various points along the route they worked upon it. Also along the route they prowled and pilfered several cars from which articles were stolen. Eventually defendant's car would barely run, so at some point in Wyoming they stole a 1952 or 1953 Ford car, behind which they towed defendant's car the rest of the way while one of them guided it, because to leave it would be a dead give-away. They started the stolen car by direct wire from battery to coil. In that regard, defendant said, "there wasn't a car he couldn't get into in two minutes." A second .22 cylinder gun, almost identical with that taken by defendant, was also stolen by them either from one of the prowled cars or from the stolen car, so that each one of them had a loaded gun, which carried nine .22 long rifle cartridges, in his possession, with extra such car-

tridges to use in them, and they engaged in target practice.

After stealing the car and numerous other items including the guns, they drove on to Valentine, Nebraska, thence to a point south and east of Springview where they stopped at a hay lot and worked on defendant's car. From there they drove to a point southeast of Wewela, South Dakota, and parked defendant's car about 100 yards off the highway along a creek. Thence they drove to a farm where defendant stole a tire and they stole 25 or 30 gallons of gasoline, some of which they took along with them in cans taken by defendant from a pick-up truck.

On Wednesday evening, April 7, 1954, about 8:30 p. m., they arrived at the home of an acquaintance, Bud Frederickson, located a few miles east of the Cherry County line. Both Bud Frederickson and his brother Fred were there at the time. Bud testified as a witness for the State. Defendant and Leon while there together both visited with the Fredericksons quite a while, as much as 2½ or 3 hours. Among other things, they bragged of their prowess, and Leon asked the Fredericksons if they wanted a pheasant which defendant had shot from the car window with one of the .22 pistols as they were driving along the highway in South Dakota. Leon told the Fredericksons, "Don't tell anyone that we are even in the country" because "I am wanted for parole violation that I jumped, and some bad checks that I gave." He then took one of the .22 cylinder pistols out of the stolen car, showed it to them, warned that it was loaded, refused to sell it, and put it back in the car. Also, defendant and Leon attempted to sell the Fredericksons some second-hand clothing, tires, and tools which they had in the stolen car. When asked where they got the tools, defendant answered, "That is a racket man, it is easy to get tools." When asked where they got all those clothes, Leon said, "it was a racket

it was easy to get clothes." As a matter of fact, they were admittedly stolen along the way.

Defendant and Leon then told of having another car. They wanted to change motors because the car they were then driving was stolen by them, as they then said, east of Las Vegas, Nevada, where defendant's car broke down. They stated that they intended to change motors, pour gasoline over the body of the stolen car, and burn it in order to destroy the evidence, then take defendant's car to Council Bluffs, Iowa, have the motor numbers ground off, and get a title thereto so they could sell it. They asked permission to use Fredericksons' barn or to go out in their canyons and so change motors and burn the evidence, but that was refused. They then talked about going up to Henry Johnson's place in Wewela, South Dakota, where they once lived, and use the barn and cellar there to change motors. When asked what if Johnson "walks up on you" they replied, "We will be able to talk him out of it and if he doesn't and can't talk he won't get away until we are done with him." However, the Fredericksons finally convinced defendant and Leon that they should take the cars out in the sand hills where they could more safely change the motors and burn the body of the stolen car. It then was arranged that defendant and Leon should come back the next night at 10 p. m., bring defendant's car along, and the Fredericksons would show them the way west as far as the game refuge, from which point they would be on their own. When Bud Frederickson asked what they would do if some one came riding up on horseback out there in the sand hills, defendant said, "we will watch that, we will be down there in the brush." When asked, "Well, what will you do, you got a gun" defendant said, "we will bluff them out and if we can't bluff them out we won't let them get away."

When defendant and Leon left the Fredericksons' place, they drove to Wewela, South Dakota, where defendant broke a window in the door, and opening it, they

burglarized a store and the United States post office, stealing therefrom food, clothing, tools, other merchandise, and cash. They then drove back to Bud Frederickson's place, arriving there about 5:30 a. m., Thursday, April 8, 1954. The back of the stolen car "was clear full of something" and Leon asked Bud if they could unload some groceries admittedly obtained by robbing the store at Wewela. Bud refused to let them unload the merchandise but told them there was a place down by the river where they could hide the stuff and they could pick it up that evening when they returned. They ate part of the food, then hid the stolen merchandise in a ravine some distance back of a schoolhouse located on the river road. However, two cigar boxes, containing the money admittedly taken from the store and post office at Wewela, were kept in their car. They then went to the home of a person for whom defendant had worked in 1951, where they had breakfast and dinner, visited, and slept before leaving in late afternoon. From there they drove by a roundabout way to the place where defendant's 1941 car had been left, and, hitching it behind the stolen Ford, drove back to Fredericksons, arriving at about 10:10 p. m., as previously arranged.

In the meantime, after defendant and Leon had left Fredericksons' place on the morning of April 8, 1954, the Fredericksons had gone to Valentine and reported to the Cherry County sheriff and state safety patrolman Marvin Hansen the information which they had obtained with regard to the unlawful conduct of defendant and Leon. Pursuant to prior arrangements, defendant and Leon, having arrived at Fredericksons' place that evening, the Fredericksons directed them along a road which took them to a place near Berry hill on highway No. 7, where the fatal shooting of the patrolman took place. As previously arranged, the Fredericksons were presumably showing defendant and Leon a way to the sand hills where they could remove the motor from the stolen car, burn the body, and place the motor therefrom in defend-

ant's car. The Fredericksons led the way in a car owned by Fred from which the bulb in the left taillight had been removed in conformity with instructions given by the sheriff and patrolman. Their car was followed by Leon driving the stolen car with lights on, and towing defendant's car which defendant was guiding without lights.

That evening about 9 p. m. the sheriff and patrolman, the mayor of Valentine, the chief of police, and a police officer from Valentine, all drove to the vicinity of Berry hill. The sheriff and patrolman went in the sheriff's car, driven by him. That car was equipped with two headlights, also two red lights on the front of the car which blinked on and off, a siren, a two-way radio, and a portable spotlight which was powered by plugging the end of its 7-foot cord into the lighter socket. A road block was set up at Berry bridge where the mayor and two police officers remained. The sheriff and patrolman then drove north on the highway in the sheriff's car for about one-eighth of a mile, where they turned around facing south, and waited for some period of time before they saw the headlights of two cars coming from the east. Such cars turned south on highway No. 7 and the officers noted that the left taillight of the first car was out and that two cars were following with headlights only on the first car. When such cars had passed, the sheriff communicated by two-way radio with the officers at Berry bridge, then started his car, and with lights off drove out on the highway. After driving out upon the highway, the sheriff turned on his lights, including the blinking red lights, and started the siren on his car. He so stayed behind the stolen car driven by Leon and defendant's towed car guided by defendant until they slowed down and stopped on the right or west side of the highway headed south. There the sheriff stopped his car on the left or east side of the highway after turning it a little toward the west so that his lights would shine on both the other two stopped cars. The Fredericksons

drove on down the highway and home. At the time such cars stopped, the patrolman had the portable spotlight on and was holding it in his hand as he sat on the right side of the sheriff's car. There are exhibits in the record showing the position of the three cars after they stopped. As a matter of fact, photographs received in evidence show the location of the cars and the position of the sheriff, patrolman, and defendant as they alighted therefrom. Such locations and positions were fixed by defendant himself on April 10, 1954, when he voluntarily made a statement to officers at the scene of the tragedy.

As the cars stopped, Leon was seen sitting in the driver's seat of the stolen car with his left hand on the steering wheel and one of the stolen .22 pistols in his right hand. Defendant was seen sitting in the driver's seat of his towed car. Thereupon, the sheriff jumped out on the left side of his car and the patrolman jumped out on the right side thereof. Each of them held a .38 revolver, identical except for serial numbers. The patrolman was dressed in a well-marked regulation uniform with cap, Sam Browne belt, and official badge. Both defendant and Leon well knew that the sheriff and patrolman were officers. Leon opened the left door and swung his feet out, gun in hand, but obeyed the sheriff's orders to drop the gun and come out with hands up, whereupon the sheriff handcuffed him and chained him to defendant's car. The .22 pistol, loaded with long rifle cartridges which had been in Leon's hand, was thrown back on the seat of the stolen car and taken care of by the sheriff or other officers. It was never fired that night, and the only other .22 pistol at the scene was the one in defendant's possession.

As the patrolman jumped out on the right side of the sheriff's car, defendant reached for and obtained the other .22 pistol hidden in his car, and instead of coming out the left door with his hands up as commanded, defendant opened and came out of the right door, thus

placing himself between his car and the patrolman. Defendant had his gun, loaded with .22 long rifle cartridges, in his right hand, concealed down by his side. As the patrolman walked out into the highway telling defendant to follow him on back, defendant came around the corner of his car where he could see the patrolman, then started running toward the west. Twice the patrolman told defendant to "stop" but he paid no heed, and running, fell into a west roadside ditch. The patrolman then twice told defendant to "get up" but there was a pause and defendant shot the patrolman and ran on west, followed by the patrolman for some 200 feet from the sheriff's car, where the patrolman was later found lying on the ground face down, unconscious, gravely and mortally wounded by a .22 bullet. The patrolman's gun was found lying just to the left of his body, with all cartridges therein discharged except one. Defendant escaped and contended in his testimony that as he came around his car, the patrolman fired into the ground and defendant ran away because he was frightened. He claimed that if he shot the patrolman, which he denied, that his .22 pistol was discharged accidentally when he fell; or, that things blacked out, and, because of his mentally insane condition and the strain, he didn't know what he was doing; or that in any event he didn't know the patrolman was an officer, and shot in self-defense. However, there was ample competent evidence that defendant knew the sheriff and patrolman were officers; that defendant's .22 pistol was fired first; and that after a pause there were .38 and other .22 shots fired which gradually got farther away from the cars toward the west after each shot. In any event, all of defendant's defenses aforesaid were submitted to the jury in a manner entirely proper and favorable to defendant.

As defendant and the patrolman ran west, the sheriff called over his two-way radio to the officers at Berry bridge, asking for immediate help. When they came

down to the cars, a police officer was left in charge of Leon while the sheriff and other officers went to look for defendant and found the patrolman. Even after finding the patrolman the officers heard two .22 shots fired from the west and north. It will be noted that at all times all persons at the scene were east thereof except defendant, and no other .22 except defendant's was fired that night.

The officers, upon locating the patrolman, examined his body and found a bullet hole in the area where it had passed through his pants belt and entered his body. He was thereupon placed on a stretcher and the sheriff took him to a hospital in Valentine, where a physician previously called examined the patrolman and found that he was dead. His examination disclosed a small penetrating wound in the area where a bullet had passed through the patrolman's Sam Browne belt, pants belt, and trousers, then entered his body to the left and above the left-hand side pocket, and then came out of his body, naturally forming a larger hole on the right side below the outer edge of his right hip pocket. A post-mortem examination disclosed that the bullet had passed into the patrolman's body at an upward angle, then perforated his aorta, a main artery which travels from the heart down through the chest and abdominal cavity. The bullet also pierced a kidney and upon being deflected downward by his ribs, came out of his body. After diligent search the bullet was never found. From such examination the physician concluded that the wound was caused by a bullet, and that death was caused by progressive loss of spurting blood from the aorta into the peritoneal cavity. The physician gave his opinion that it was a wound which could have been produced by a .22 bullet, certainly not by a .38 or larger bullet. He found that the perforation in the aorta was only pencil-tip size, and could not have been caused by a .38. He also testified that the impact of such a wound from a .22-caliber gun would not have caused

great pain, discomfort, or immediate collapse as a larger bullet would have done, and would not have prevented a man the size of the patrolman from running a distance of 200 to 250 feet immediately after receiving the wound before he would fall. Further, it was established by the undisputed testimony of gun experts that the holes in the patrolman's Sam Browne belt and pants belt were caused by a .22 bullet and could not have been caused by a larger one. Further, such belts were received in evidence and an examination thereof by the jury would make such conclusion self-evident.

After the patrolman had been removed from the scene of the shooting, the chief of police brought Leon to the police station at Valentine. Also, the mayor drove the stolen Ford while a police officer guided defendant's towed car into Valentine where they were stopped behind the courthouse. There a written inventory was taken of numerous articles found in the cars. It included a skeleton key, numerous tools both in a box and outside thereof, clothing for both men and women, 3 flashlights, 3 trouble spotlights, a gun holster, 15 packages of cigarettes, a brief case, an electric iron, a glass fish pole, 2 boxes of Christmas tree lights, a camera, a 1953 California car license plate, a suitcase, and other items including 1 full box and a few extra .22 long rifle cartridges found in defendant's car and three-fourths of a box of such cartridges found in the stolen car. Further, two cigar boxes containing money identified by defendant as having been admittedly taken by defendant and Leon from the burglarized store and post office at Wewela, South Dakota, were also previously found in such cars. Certain other items aforesaid were identified by defendant as having been stolen from other cars while they were traveling east from California.

Defendant having escaped, a posse was organized at the courthouse in Valentine, and he was apprehended about 8 a. m., April 9, 1954. He was first sighted by members of the posse about 80 rods from the home of

his former employer where defendant and Leon had visited, eaten, and slept the day before. When defendant saw the armed posse he jumped into the river and started to swim across, but the current was too swift and he was persuaded by his former employer to surrender. When certain patrolmen arrived upon the scene, defendant was searched, handcuffed, placed in a patrolman's car, and taken to the jail at Valentine. When searched, nine .22 long rifle cartridges which would fit defendant's gun were found in defendant's pockets. The .22 pistol which he had when he left the scene of the shooting was never found. It was admittedly thrown away or lost by defendant in his flight.

During the afternoon of April 9, 1954, defendant voluntarily made and read a written confession which, by interlineation, was corrected in certain particulars by defendant in his own handwriting and signed by him on each page thereof in the presence of three witnesses who signed as such. Again, on April 10, 1954, defendant voluntarily gave another transcribed similar statement at the scene of the crime during which he placed the cars, himself, the sheriff, and the patrolman in the positions where they were located at the time of the shooting, and demonstrated what happened there. Again, on the afternoon of April 11, 1954, defendant voluntarily made and read another written confession which also, by interlineation, was corrected in certain particulars by defendant in his own handwriting, and was signed by him on each page thereof in the presence of two witnesses who signed as such. Further, such confession was subscribed and sworn to before a post-office inspector who as such acknowledged same.

Defendant in his testimony claimed that the confessions aforesaid were not voluntarily given, and equivocally denied that he had made several statements contained therein. However, those were matters for determination by the jury under appropriate instructions given by the trial court.

The record discloses beyond dispute that between April 3, 1954, and April 8, 1954, defendant and Leon committed the crimes heretofore recited and were fugitives from justice of at least Wyoming and South Dakota and perhaps other states as well between California and Nebraska; and that they were guilty of at least two federal offenses of stealing and transporting a car across state lines and burglarizing the post office at Wewela, South Dakota. At the time of the alleged offense defendant and Leon were on their way to a hide-out in the sand hills to remove the motor from the stolen car, place it in defendant's car, and then burn the remains of the stolen car in order to destroy the evidence. Their cars were then loaded with stolen merchandise, and each of them then had a stolen .22 pistol loaded with .22 long rifle cartridges in his possession. The evidence fully justifies the conclusion that they were aware of the serious consequences of arrest and had armed themselves in order to kill any person who attempted to stop them, and that defendant shot and killed the patrolman in order to escape. In other words, when the patrolman attempted to arrest him, defendant purposely and deliberately carried out his premeditated plan and shot and killed the patrolman. In the light of the foregoing, we conclude that the evidence was amply sufficient to support and sustain the verdict, judgment, and sentence.

In that respect, the applicable and controlling rules are: "It is not the province of this court to resolve conflicts in the evidence in law actions, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Those matters are for the jury.

"In a criminal case, this court will not interfere with a verdict of guilty based upon the evidence, unless it is so lacking in probative force that we can say, as a matter of law, that it is insufficient to support a finding of guilt beyond a reasonable doubt." Spreitzer v. State, 155 Neb. 70, 50 N. W. 2d 516.

Defendant argued that the trial court erred in admitting part of a conversation which defendant had with a sheriff from South Dakota who was a friend of defendant and present when defendant made a confession on April 11, 1954. The conversation is too long to set forth here. It is sufficient for us to say that the trial court admitted it solely for the limited purpose of helping the jury decide whether or not such confession was voluntary, and the jury was so cautioned by the court. Defendant, in his objections to the conversation said that, "even though it might tend to" so assist the jury, such conversation was inadmissible because it related in part to another crime previously committed by defendant. In that regard, defendant testified at length about such conversation, and, even assuming that a part thereof offered by the State was erroneously admitted, it could not have been prejudicial to defendant's rights. We find no prejudicial error in admission of the evidence under the circumstances.

Defendant also objected to the admission of other evidence adduced by the State which related to commission of the other crimes for which defendant had never been apprehended or tried, and which were allegedly committed by defendant between April 3, 1954, and April 8, 1954, the date upon which the patrolman was killed. We have heretofore discussed the evidence with relation thereto, and it will not be repeated. For like reasons, defendant also objected to the opening statement of the prosecutor with regard to what the State expected to prove with relation thereto and contended that such was misconduct requiring reversal. The trial court overruled defendant's objections and motions for mistrial upon the ground that the evidence was admissible solely and only for the limited purpose of determining whether or not defendant had a motive or intent to shoot the patrolman. Upon the admission of such evidence the trial court upon several occasions so orally admonished the jury, and again in the instructions it was made

crystal clear that defendant could not be convicted of the crime charged by proof of the commission of some other crimes or wrongs, but that such evidence, if believed, should be considered by the jury solely for the purpose of determining defendant's alleged motive, intent, malice, deliberation, and premeditation. We decide that under the circumstances such evidence was admissible for such limited purpose, and as a matter of course it follows that the prosecutor was not guilty of misconduct in making his related opening statement.

In that connection, Fricke v. State, 112 Neb. 767, 201 N. W. 667, held: "As a general rule, evidence of other crimes than that with which the accused is charged is not admissible in a criminal prosecution." However, there are exceptions to such rule. In Swogger v. State, 116 Neb. 563, 218 N. W. 416, this court held: "Except as to crimes having an element of motive, criminal intent, or guilty knowledge, evidence of separate and distinct offenses committed by accused is not admissible. If such evidence is admitted, and is prejudicial, a conviction cannot stand." In the opinion it is said: "Only in crimes involving motive, intent, or guilty knowledge may evidence of independent crimes, wholly disconnected with the one charged, be received."

In Stagemeyer v. State, 133 Neb. 9, 273 N. W. 824, this court held: " 'It is a general rule that, on the trial of one accused of crime, proof of distinct and independent offenses, even of a similar nature, is inadmissible. To this rule there are exceptions; but, in order to make evidence of other independent offenses admissible, it must appear that the evidence offered falls within one of the recognized exceptions.' Abbott v. State, 113 Neb. 524, 206 N. W. 153." See, also, Hertz v. State, 160 Neb. 640, 71 N. W. 2d 113.

In the case at bar, defendant was charged with murder in the first degree, that is, that he purposely and of deliberate and premeditated malice shot and killed the patrolman. The defenses claimed by defendant have been

heretofore recited. It therefore appears that defendant's motive, criminal intent, and guilty knowledge were important elements from the inception of the trial. Thus, it was important and proper for the State to adduce evidence that defendant had committed such other crimes for which he had never yet been apprehended or tried on account of which he was a fugitive from justice, for the purpose of tending to prove that defendant feared arrest, and therefore had a motive for and did intentionally shoot and kill the patrolman in order to effect an escape. Voluminous competent evidence supports that theory.

There are numerous authorities involving comparable situations wherein law enforcement officers were killed which support the foregoing conclusions. In that regard, see, Shelton v. State, 106 Ohio St. 243, 140 N. E. 153; People v. Middleton, 65 Cal. App. 175, 223 P. 448; Sullivan v. State, 163 Ark. 11, 258 S. W. 643; Lawrence v. State, 29 Ariz. 247, 240 P. 863, certiorari denied 269 U. S. 585, 46 S. Ct. 201, 70 L. Ed. 425; Harden v. State, 211 Ala. 656, 101 So. 442; People v. King, 276 Ill. 138, 114 N. E. 601; State v. Calloway, 174 La. 134, 140 So. 2; Eagles v. United States, 25 F. 2d 546; People v. Slater, 199 Cal. 357, 249 P. 177. For discussion of comparable propositions of law under distinguishable facts and circumstances, see, Haunstine v. State, 31 Neb. 112, 47 N. W. 698; Clark v. State, 79 Neb. 473, 113 N. W. 211; and Jurgensen v. State, 135 Neb. 537, 283 N. W. 228.

Also, contrary to defendant's contention, the situation here was not an attempt to prove the bad character of defendant prior to his putting that question in issue. The evidence was received solely and only for the limited purpose heretofore set forth, and the jury was so instructed. Further, it was not admitted for any purpose of impeaching defendant's testimony by showing previous felony convictions. Therefore, contrary to defendant's contention, section 25-1214, R. R. S. 1943, had no application.

Defendant argued that the trial court erred in admitting evidence that shortly before the alleged killing defendant admittedly shot a pheasant with a .22 pistol here involved from one of the cars while it was in motion traveling along the highway in South Dakota. Such evidence was admitted for the sole and limited purpose of showing that defendant had such a pistol at that time and his ability to use it. The trial court so affirmatively instructed the jury and defendant's contention has no merit.

Defendant's wife was called as a witness in his behalf. She testified that prior to the time defendant left California they had been separated for about a month, but that on April 2, 1954, she had seen defendant and a reconciliation looked favorable. She also testified that on New Year's Eve, 1952, defendant had received a severe beating by some young men in Omaha, as a result of which defendant had since had lapses of memory and black-outs, which were reasons, among others, for their marital difficulties. Defendant himself also testified with relation to such beating, which allegedly affected his physical and mental condition, causing him to have mental lapses and black-outs which played quite a part in their marital troubles, but that he had talked to his wife about seeing a doctor and promised to do what he could to improve his mental condition. He also testified that on the night of the shooting things blacked out because of his mental condition, and he could not remember what happened part of the time. Thereafter defendant was asked on cross-examination: "Now, as a matter of fact you were going to divorce your wife to marry a women down here in Omaha, weren't you?" Without objection defendant was permitted to answer, "No, sir." For the purpose of impeaching such testimony of defendant and of his wife aforesaid, and also for the limited purpose of assisting in a determination of defendant's mental condition, the State, over defendant's objections, produced three letters admittedly writ-

ten by defendant to a named woman in Omaha. Upon proper foundation laid, they were received in evidence over defendant's objections. They appear as exhibits Nos. 67, 68, and 70. The prosecutor then said, "May it please the court, I need to read these exhibits to the jury for the limited purpose for which they are received." Whereupon counsel for defendant said, "Before he reads them to the jury will the court tell the jury that they are for the limited purpose for which they are received." Thereupon the court said: "Yes. Gentlemen as I said before a person can never be proved guilty of one charge by proving some other wrong. Sometimes evidence of other matters are received for a limited purpose. The State has offered this evidence and it is received for the limited purpose of going to show the defendant's mental condition—the question of his blackouts and his mental condition and possible motive, if it does have any bearing on it. You can consider it for no other purpose and if it doesn't throw any other light on those questions you should ignore the evidence entirely, and you are not only directed to but you are instructed to and will be instructed on that and I caution you to observe that instruction." Previously also, during foundational questions upon like request by counsel for defendant, the trial court had made an almost identical statement to the jury. Defendant is in no position now to argue that the court by so doing erroneously gave oral instructions to the jury in violation of sections 25-1111 and 25-1115, R. R. S. 1943. Further, instruction No. 16 given by the trial court instructed the jury with regard to the limited purpose of such evidence by use of language comparable to such oral admonitions. In that connection also, defendant argued that in several other respects too voluminous to repeat here, the trial court erroneously gave oral instructions. That contention has no merit. As stated in 64 C. J., Trial, § 582, p. 643: "A statute requiring that instructions be in writing is not to be construed as to require the court to reduce to writing all

the admonitions which it may be proper to give the jury while the trial is in progress." As stated in § 584, p. 644: "Subject to the general rules, it has been held that the court may orally give its opinion on a motion to exclude testimony; in ruling on the admissibility of evidence, explain the rulings; state for what purpose evidence is admitted; limit its application; or direct the jury to disregard it; * * *." See, also, 88 C. J. S., Trial, § 330, p. 867; Lee v. State, 147 Neb. 333, 23 N. W. 2d 316; Rakes v. State, 158 Neb. 55, 62 N. W. 2d 273. Such rules are applicable and controlling here.

Exhibit No. 67, dated March 22, 1954, and exhibit No. 68, dated April 1, 1954, were two letters contained in the same envelope, exhibit No. 69. They were written in Los Angeles but mailed to the woman in Omaha on April 2, 1954, from Bell, California. Insofar as important here, defendant stated therein that his wife was not going to sue him for divorce, so, having sufficient legal grounds, since his wife was to blame, he was going to divorce her. He urged the woman to come to California and get a job so they could be together, have some fun on the beach and in the sun, and so find out whether or not they wanted to marry after his divorce. Defendant warned her not to call his wife or let her know about their plans. Contrary to defendant's contention, we find nothing in such letters saying or inferring that they had been having any immoral relationship or that defendant's marital difficulties were caused by his mental condition.

Exhibit No. 70, addressed to the woman in Omaha, was actually written by defendant on April 8, 1954, the date of the alleged crime, while he was at his former employer's home. It was admittedly dated March 7, 1954, by mistake, and was never mailed but was found in defendant's pocket after the alleged shooting. Referring therein to California, he told the woman that he got away from out there and to stay where she was until he got back there in 3, 4, or 5 days, "because I got to

put a new eingine (engine) in my car but will see you soon left there last Sat. morning but have run into lots of trouble this trip."

In Garcia v. State, 159 Neb. 571, 68 N. W. 2d 151, this court said: "The rule is that one charged with a crime, who becomes a witness in his own behalf upon his trial, is subject to the same rules that govern other witnesses upon cross-examination and may, on cross-examination, be interrogated as to matters brought out on direct examination. See, Crawford v. State, supra; 3 Wharton's Criminal Evidence (11th ed.), § 1303, p. 2174; 3 Jones, Evidence (4th ed.), § 821, p. 1519.

"In this respect we have said: 'Where a defendant in a criminal case testifies in his own behalf, he is subject to the same rules of cross-examination as any other witness, and may be required to testify on his cross-examination as to any matters brought out or suggested by him on his direct examination, and ordinarily he cannot avail himself of the objection that the evidence may incriminate him.' Poston v. State, 83 Neb. 240, 119 N. W. 520.

"And in Peterson v. State, 63 Neb. 251, 88 N. W. 549, we said: 'The scope of the cross-examination of a witness rests largely in the trial court, and its ruling will be upheld, unless an abuse of discretion is shown.' See, also, Griffith v. State, 157 Neb. 448, 59 N. W. 2d 701."

In Washington v. State, 160 Neb. 385, 70 N. W. 2d 378, this court held: "The cross-examination of a witness which relates to the issues and facts pertinent thereto may be pursued by counsel as a matter of right, but when the object of the cross-examination is to collaterally ascertain the accuracy or credibility of a witness, some latitude should be permitted. The scope of such latitude is ordinarily subject to the discretion of the trial judge and, unless abused, its exercise is not reversible error."

Such rules are applicable and controlling here. Contrary to defendant's contention, we conclude that the

trial court did not abuse its discretion and that the admission of the evidence aforesaid, under the circumstances presented in this case, was not prejudicially erroneous.

Defendant argued that instruction No. 9 given by the trial court was prejudicially erroneous. In that regard, instruction No. 4 given by the trial court among other things correctly defined the crime of manslaughter. Such crime was so redefined in instruction No. 9, after which it hypothetically required the State to prove certain specific enumerated elements by the evidence beyond a reasonable doubt before defendant could be found guilty of manslaughter. The instruction is verbose and to recite it here would serve no useful purpose. It is sufficient for us to say that the instruction was favorable to defendant. The applicable and controlling rule is that: " 'A defendant in a criminal action may not predicate error on an instruction that is more favorable to him than is required by the law applicable to the charge made.' " Luster v. State, 148 Neb. 743, 29 N. W. 2d 364. Defendant's contention should not be sustained.

Defendant argued that instruction No. 13 given by the trial court was prejudicially erroneous because it did not inform the jury that if there was a reasonable doubt as to whether or not defendant acted in self-defense, such doubt should be resolved in favor of defendant. In that regard, instructions Nos. 13 and 14, given by the trial court, both related to and submitted the matter of self-defense in sequence by the use of clear and unmistakable related language. The last paragraph of instruction No. 14 read: "Regarding the offense with which the defendant is charged, it is necessary for the State to prove beyond a reasonable doubt that the defendant, Loyd Carroll Grandsinger, was not acting in self-defense and the burden is not on the defendant to prove he was acting in self-defense, and if the evidence in this case does not establish beyond a

reasonable doubt that the defendant was not act (acting) in self-defense, then you should find the defendant not guilty."

In Fullerton v. State, 148 Neb. 811, 29 N. W. 2d 618, we reaffirmed that: "All instructions given should be considered in determining whether a particular instruction is prejudicial." Also, in Kirkendall v. State, 152 Neb. 691, 42 N. W. 2d 374, we reaffirmed that: "Where instructions, considered as a whole, state the law fully and correctly, error will not be predicated therein merely because a separate instruction, considered by itself, might be subject to criticism.

"Where the charge to the jury, considered as a whole, correctly states the law, the verdict will not be reversed merely because a single instruction, when considered separately, is incomplete." Such rules are applicable and controlling. Defendant's contention should not be sustained.

Defendant argued that the trial court erred prejudicially in refusing to give his requested instruction No. 1 which read: "If the jury believe beyond a reasonable doubt that defendant is guilty but have a reasonable doubt as to the degree of his offense they should give him the benefit of that doubt and convict him of the lower degree." The applicable and controlling general rule is that: "It is not error to refuse instructions requested by the defendant where the court on his own motion has given the substance of such requests." Leedom v. State, 81 Neb. 585, 116 N. W. 496. The substance of defendant's request appears in instructions Nos. 3, 7, 8, and 9. As recently as Washington v. State, *supra,* this court held: "A trial court is not required to instruct in the exact language of a requested instruction. If the point is covered by an instruction couched in proper terms it meets all the requirements of the law." Defendant's contention should not be sustained.

Defendant argued that the trial court erred in refusing to give his requested instruction No. 2 which read:

"If the jury believe beyond a reasonable doubt that the defendant is guilty of first degree murder but have a reasonable doubt as to the punishment, they should give him the defendant the benefit of that doubt and fix the lessor (lesser) punishment of life imprisonment." In that connection, section 28-401, R. R. S. 1943, provides: "Whoever shall purposely and of deliberate and premeditated malice * * * kill another * * * every person so offending shall be guilty of murder in the first degree, and upon conviction thereof shall suffer death or shall be imprisoned in the penitentiary during life, in the discretion of the jury." Instructions Nos. 4, 6, and 7, given by the trial court, repeated that language and applied it. In Sundahl v. State, 154 Neb. 550, 48 N. W. 2d 689, we held: "Section 28-401, R. R. S. 1943, does not prescribe or authorize the court to prescribe any rule defining or circumscribing the exercise of the right to determine whether the penalty shall be death or imprisonment for life. The statute commits the whole matter to the judgment and conscience of the jury." Also, in 23 C. J. S., Criminal Law, § 1290, p. 868, it is said: "The doctrine of reasonable doubt has no application in the jury's determination as to the penalty to be imposed." See, also, 41 C. J. S., Homicide, § 399, p. 236, § 434, p. 319; People v. Krauser, 315 Ill. 485, 146 N. E. 593; Hart v. State, 220 Ind. 469, 44 N. E. 2d 346; Watts v. State, 229 Ind. 80, 95 N. E. 2d 570; State v. Tiedt, 360 Mo. 594, 229 S. W. 2d 582; People v. Martin, 12 Cal. 2d 466, 85 P. 2d 880; People v. Harris, 219 Cal. 727, 28 P. 2d 906; Hernandez v. State, 43 Ariz. 424, 32 P. 2d 18. Such authorities discuss at length the reasons for the foregoing rule. To set them forth here would serve no purpose. We conclude that defendant's contention should not be sustained.

Defendant argued that the trial court erred in refusing to give his requested instructions Nos. 3, 4, 17, and 26, all of which related to the weight to be given the testimony of certain witnesses. Instruction No. 3

told the jury in effect that greater care should be exercised in weighing the testimony of police officers, detectives, criminal investigators, and safety patrolmen than in other cases because of their natural and unavoidable tendency and bias of mind to consider everything as evidence against accused and to disregard everything which does not tend to support their preconceived opinion of the guilt of accused. Instruction No. 4 was in substance identical, but simply used the all-inclusive term "law enforcement officers." Instruction No. 17 referred to witnesses employed by the State and told the jury that greater care should be exercised in weighing their testimony than in the case of a disinterested witness. Instruction No. 26 provided in substance that in weighing the testimony of one Bud Frederickson greater care should be exercised because he was an informer or undercover man.

In Garcia v. State, *supra,* this court held: "The mere fact that a witness in a criminal prosecution is a regular public law enforcement officer does not entitle an accused to an instruction that the jury, in weighing his testimony, should exercise greater care than in weighing the testimony of other witnesses.

"Where informers, detectives, or other persons employed to hunt up testimony against the accused are called to testify against him, he is entitled to an instruction to the jury that in weighing their testimony greater care should be exercised than in the case of witnesses who are wholly disinterested."

In Fisher v. State, 154 Neb. 166, 47 N. W. 2d 349, this court held: "The rule that if a person is employed to produce evidence against the accused and he testifies against the accused, the defendant is entitled to an instruction to the jury that in weighing the testimony of the witness greater care and closer scrutiny should be exercised than in considering the testimony of witnesses who are disinterested, is generally not applicable to public officers who are witnesses."

The record discloses without dispute that all police officers, detectives, criminal investigators, and safety patrolmen who testified as witnesses for the State were regular public law enforcement officers employed by the city of Valentine, Cherry County, or the States of Nebraska and South Dakota. Contrary to defendant's contention, there is no evidence whatever that one Jack Knudtson was ever employed, rewarded, or paid by anyone as a criminal investigator or detective to produce evidence against defendant. He had once been a safety patrolman but was then a druggist, and, like many other citizens in the community, he voluntarily gave assistance after the death of patrolman Hansen. In that connection also, contrary to defendant's contention, Bud Frederickson was not an informer or undercover man employed, rewarded, or paid by anyone to produce evidence against defendant. He was simply a private citizen who in performing his civic duty voluntarily gave information and assistance to regular public law enforcement officers after defendant and Leon had informed him of their unlawful activities. We conclude that defendant's requested instructions Nos. 3, 4, 17, and 26 were not erroneously refused.

Defendant argued that the trial court erred in refusing to give his requested instruction No. 6 relating to duties of the jury in arriving at a verdict, and instruction No. 10 relating to the presumption of defendant's innocence. It is sufficient for us to say that the substance of such requested instructions appears in other instructions given by the trial court, particularly in instructions Nos. 3, 26, and 28. Defendant's contention should not be sustained.

Defendant argued that the trial court erred in refusing to give his tendered instruction No. 16 which purported to submit the lesser charge of assault and battery. As stated in 41 C. J. S., Homicide, § 396, p. 232: "In a homicide prosecution, it is not proper to give an instruction as to assault in any of its grades

unless such instruction is applicable and authorized by the evidence." In Clarence v. State, 89 Neb. 762, 132 N. W. 395, it is said: "The eighth instruction asked and refused was to the effect that the jury might find defendant guilty of assault and battery, if they believed the evidence so warranted. This was properly refused, as there was no evidence which could require the instruction to be given." See, also, Mantell v. State, 141 Neb. 15, 2 N. W. 2d 586; State v. Johnston, 221 Iowa 933, 267 N. W. 698. Such authorities are applicable and controlling in the case at bar. Defendant's contention should not be sustained.

Defendant argued that the prosecutor was guilty of misconduct in final argument by appealing to the passion and prejudice of the jury which deprived defendant of a fair trial and required reversal. In that connection, instruction No. 1 told the jury: "In determining any of the questions of fact presented in this case you must be guided solely by the evidence introduced at the trial. The jury has no right to indulge in speculations, conjectures or inferences not supported by the evidence or consider any evidence that has been offered and excluded or ordered stricken or deleted during the progress of the trial. Neither are the opening statements, remarks or arguments of counsel or the rulings and remarks of the Court evidence."

It is elementary that: "* * * the prosecutor may state conclusions which are predicated upon the evidence" and unless an error in argument complained of was prejudicial to the rights of a defendant, the cause should not be reversed. Dobry v. State, 130 Neb. 51, 263 N. W. 681.

In Lee v. State, 124 Neb. 165, 245 N. W. 445, this court held: " 'An appeal for conviction based altogether upon the evidence, however fervent it may be, is not an abuse of the privilege of advocacy.' Parker v. State, 67 Neb. 555.

"It is not misconduct on part of the prosecuting at-

torney, but is indeed his duty, to comment on the conduct and credibility of defendant's witnesses, based on evidence and facts properly before the court.

"Remarks in his argument by the county attorney brought about and made in answer to the arguments of prisoner's counsel, unless necessarily prejudicial to the accused, do not necessitate the reversal of a conviction."

In that regard, section 29-2308, R. R. S. 1943, specifically provides in part: "No judgment shall be set aside, or new trial granted, or judgment rendered in any criminal case, on the grounds of misdirection of the jury, or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, if the Supreme Court, after an examination of the entire cause, shall consider that no substantial miscarriage of justice has actually occurred."

In the light of such rules and others hereinafter discussed, we deem worthy of discussion only that part of the closing arguments of the special prosecutor hereinafter set forth to which defendant made objections and moved for mistrial, which were overruled by the trial court. In that respect also, no request ever was made by defendant's counsel for an instruction telling the jury to disregard any part of the closing argument. In the case at bar, it was the duty of the jury, if defendant was found guilty of first degree murder to also fix the penalty, at either death or imprisonment in the penitentiary during life "in the discretion of the jury" which whole matter was committed by statute to the judgment and conscience of the jury. Sundahl v. State, *supra*. Thus, we call attention to the fact that the closing argument of the special prosecutor discussed herein related solely to the penalty to be imposed if the jury found defendant guilty of first degree murder. With relation thereto, the special prosecutor said: "Do you think it is possible and right that this man should have gone down there to the penitentiary of Nebraska where the meals will perhaps be better than he had in

the jail, and the beds will perhaps be better, where under our Constitution and our laws he has the legal right to attempt to get before the Board of Pardons and Parole * * * and present to them a plea for clemency, and at which you or I or the people that really know about this thing would probably not be present, because you do have the right to know that the Constitution and laws of this State create a Borad (Board) of Pardons and Parole to pass upon those cases and determine whether or not prisoners * * * this prisoner's sentence should be commutted (commuted) or whether there should be a parole, and now those are things, among others, which you have a right to know in determining what ought to be done in this case."

That part of the statement with regard to meals and beds in the jail was predicated upon defendant's complaints with regard thereto appearing in his own evidence. Such remarks could not be prejudicial. We are primarily concerned with the special prosecutor's remarks about pardon or parole.

In Sundahl v. State, *supra,* we said: "Pardon or parole relates to something that may happen after conviction and to action by the executive department. The jury had nothing to do with relation to the punishment except to determine whether it should be death or imprisonment for life. In the event the decision was for life imprisonment, whether or not he should be later paroled or pardoned was not a matter for it to decide. The jury's task at that point was to choose between one or the other of the penalties. That decision should not rest upon whether parole was easy or difficult to secure." By analogy, it was improper for the prosecutor to make the statement heretofore set forth with regard to pardon or parole, and it was error to do so. The question here is whether or not it was prejudicial error. We conclude that it was not prejudicial error in a case such as that at bar where the jury is required to fix the penalty if it found defendant guilty of murder in the first degree,

because the argument of the prosecutor was simply a statement of existing constitutional and statutory law which all men, including the jurors, were presumed to know and doubtless did already know about before the statement was made. It will be noted that no statement was made by the prosecutor that pardon or parole was easy or difficult to secure or that actually or by statistical comparison with other cases defendant would be able to present a plea to the board and obtain a hearing or obtain a pardon or parole. He simply said that defendant had a legal right to attempt to present a plea therefor to a lawfully created Board of Pardons. Such statement was unaccompanied by any other objectionable or prejudicial remarks. Under the circumstances in this case, the statement as made should not require reversal. It would be a perversion of truth and justice to hold otherwise. Those conclusions are supported by Frady v. People, 96 Colo. 43, 40 P. 2d 606, 96 A. L. R. 1052; Sullivan v. State, 47 Ariz. 224, 55 P. 2d 312; State v. Buttry, 199 Wash. 228, 90 P. 2d 1026; Powell v. Commonwealth, 276 Ky. 234, 123 S. W. 2d 279; 23 C. J. S., Criminal Law, § 1107, p. 586; 24 C. J. S., Criminal Law, § 1902, p. 896.

Defendant also complained about other statements which were either conclusions of the prosecutor predicated upon the evidence or reasonable inferences therefrom, or were remarks not necessarily prejudicial, made in answer to arguments of defendant's counsel, or were statements which could not upon any theory have been prejudical or to which no proper objections were made. They require no further discussion except to point out that in a homicide case the prosecutor has a right to urge the jury to fix the penalty at death if the accused is found guilty of murder in the first degree and the scope of his argument in that regard should be given a broad latitude, provided it is predicated upon the evidence or reasonable inferences therefrom.

Finally, defendant argued that unless the verdict and

judgment herein were reversed, this court should reduce the sentence under the provisions of section 29-2308, R. R. S. 1943, upon the ground that there was a great deal of sentiment and prejudice worked up against defendant in Valentine and the immediate vicinity and that the alleged crime happened rapidly without premeditation or plan to kill the patrolman. In that regard, insofar as this record discloses, no request was ever made by defendant for a change of venue. Further, the record contains ample competent evidence of premeditation. There is competent evidence that defendant had armed himself for the express purpose of resisting arrest or apprehension, and when the patrolman attempted to arrest him he carried out his premeditated plan and killed the patrolman, knowing him to be an officer, in an attempt to escape and avoid prosecution for state and federal offenses admittedly theretofore committed by him. The record discloses that defendant had a fair trial and it abounds with competent evidence, not the least of which are defendant's own confessions, statements, and evidence, all of which amply support the jury's conclusion that defendant was guilty of first degree murder and that the penalty should be death as provided by law.

This court discussed at length section 29-2308, R. R. S. 1943, and its application in Sundahl v. State, *supra,* and MacAvoy v. State, 144 Neb. 827, 15 N. W. 2d 45, certiorari denied 323 U. S. 804, 65 S. Ct. 559, 89 L. Ed. 642. Applicable conclusions reached therein need no repetition here. It is sufficient for us to say that because they were warranted by the evidence, we find no justifiable reason for substituting our judgment for that of the jury and the trial court by changing the verdict of the jury fixing the penalty at death, or the judgment and sentence of the trial court rendered in conformity therewith. Finding no prejudicial error in the record, we conclude that the judgment of the district court should be and hereby is in all respects affirmed.

Friday, March 30, 1956, between the hours of 6 a. m. and 6 p. m. of said day is fixed as the date for carrying into effect the sentence of the district court.

AFFIRMED.

MILK HOUSE CHEESE CORPORATION, A CORPORATION, APPELLANT, V. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, A CORPORATION, APPELLEE.
73 N. W. 2d 679

Filed December 16, 1955. No. 33783.

1. **Trial.** A motion for a directed verdict must for the purpose of decision thereon be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed. 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. ———. Where the facts adduced to sustain an issue are such that reasonable minds can draw but one conclusion therefrom, it is the duty of the court to decide the question, as a matter of law, rather than submit it to a jury for determination.
3. **Railroads: Automobiles.** If the operator of a motor vehicle is familiar with a railroad crossing and the surrounding conditions, it is his duty in approaching it to look and listen at a time and place where looking and listening will be effective even though vision of the railroad track is restricted.
4. ———: ———. It is the duty of the driver of a motor vehicle to have it under such control that when he arrives at a place while traveling toward a railroad crossing where it is possible to see and to hear an approaching train he can stop and avoid a collision with it.
5. **Railroads: Highways.** It is the duty of a traveler on a highway, when approaching a railroad crossing, to look and listen for the approach of trains. He must look, where, by looking, he could see, and listen, where, by listening, he could hear, and if he fails without a reasonable excuse to exercise such precautions, then he is guilty of contributory negligence more than slight, as a matter of law, and no recovery can be had for damages resulting from a collision with a passing train.
6. **Railroads: Automobiles.** Generally, a person who drives a motor vehicle on a railroad track at a highway crossing in front of an

approaching train, which he could have seen, had he looked, or could have heard, had he listened, is in law guilty of contributory negligence, and cannot recover damages from the railroad company.

7. **Railroads: Negligence.** Railroad companies may provide lights and gates at crossings for the protection of those crossing, but their presence does not excuse one passing who fails to exercise precaution for his own safety.

8. ———: ———. Neither open gates nor failure of the railroad company to give signals at a railroad crossing relieves one about to cross the tracks from the duty to use due care to look and listen for an approaching train.

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

Baylor, Evnen & Baylor and *Warren K. Urbom,* for appellant.

Jean B. Cain, Joseph C. Reavis, J. W. Weingarten, and *W. P. Loomis,* for appellee.

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

MESSMORE, J.

This is an action at law brought by the Milk House Cheese Corporation, plaintiff, against the Chicago, Burlington & Quincy Railroad Company, a corporation, defendant, in the district court for Richardson County to recover damages to plaintiff's 1951 International L-200 tractor and a 1950 Trailmobile trailer hereinafter referred to as plaintiff's truck, or truck, or trailer, as occasion requires, in a collision between such truck and a train owned and operated by defendant. The case proceeded to trial before a jury. At the conclusion of all of the evidence the defendant moved for a directed verdict for the reason that the evidence was insufficient on which to base a cause of action against the defendant, and for the further reason that the evidence showed plaintiff's driver to be guilty of contributory negligence such as to bar any recovery against the defendant as a

matter of law. The trial court sustained the motion. From the overruling of the motion for new trial filed by the plaintiff, the plaintiff appeals.

Insofar as necessary to consider here, the plaintiff's petition alleged damages to plaintiff's truck proximately resulting from negligence on the part of the defendant. We summarize the charges of negligence as follows: The defendant was negligent in failing to keep a proper lookout, to see plaintiff's truck, to stop the train, slacken its speed, or otherwise avoid the collision; in failing to have its locomotive under reasonable control; in running the train at a greater speed than was reasonable and proper under the existing conditions; in failing to ring a bell or sound a whistle between a point 80 rods from the crossing to the crossing as a warning of an approaching train; in failing to have the headlight on the locomotive operating; and in failing to have the automatic signals and gates at the crossing constructed and operating so as to give warning of the approach of the train on the passing track.

The defendant's answer denied the allegations of negligence set forth in the plaintiff's petition, and alleged that the collision was caused by the negligence of the driver of plaintiff's truck who could and should have seen the approaching train in time to have avoided the collision with it, but who failed to properly look and listen for approaching trains, failed to see and hear the train, failed to have his truck under proper control, and failed to stop the truck or avoid a collision, but drove the truck onto the track immediately in front of the train; and that the negligence of the plaintiff was more than slight in comparison with any negligence on the part of the defendant.

The defendant filed a cross-petition which was dismissed.

The plaintiff's reply to defendant's answer in effect denied the affirmative allegations of negligence contained in the defendant's answer.

The established rule is that: "A motion for a directed verdict must for the purpose of decision thereon be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed. 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." McIntosh v. Union P. R. R. Co., 146 Neb. 844, 22 N. W. 2d 179. See, also, Loudy v. Union P. R. R. Co., 146 Neb. 676, 21 N. W. 2d 431.

In addition to the foregoing rule, it is necessary to bear in mind that: "Where the facts adduced to sustain an issue are such that reasonable minds can draw but one conclusion therefrom, it is the duty of the court to decide the question, as a matter of law, rather than submit it to a jury for determination." Loudy v. Union P. R. R. Co., *supra.*

The record shows that U. S. Highway No. 75 runs north and south across the defendant's railroad tracks through Dawson, Nebraska. It is paved with concrete, 21 feet in width, and is practically level from some distance north of the defendant's railroad crossing and across the same. The defendant's tracks run east and west through Dawson. The main line track is the north track. The track about 10 feet south of the main line track is the passing track. The third track, approximately 40 feet south of the south rail of the passing track, is the industry track. The east end of the depot is 80 feet west of the west edge of Highway No. 75, and there is an outhouse 180 feet west of the west edge of the highway. There is a yellow railroad crossing sign on the highway approximately 400 feet north of the north rail of the main line.

The defendant, with the approval of the Department of Roads and Irrigation and the Bureau of Public Roads of the federal government, constructed a crossing signal at Dawson consisting of automatic gates and lights,

that is, a flashing-light signal with a short arm gate for southbound traffic on the north side of the main line about 15 feet west of the highway and about the same distance north of the north rail of the main line. There is also the same type of signal 15 feet south of the industry track and about the same distance east of the east edge of the pavement of the highway. When a train is on the main line approaching the crossing it operates the signal circuit of the crossing equipment. These approach circuits on the main line are governed by the speed of the train so as to operate the signals at a sufficient time in advance of the arrival of a train at the crossing, and continue to operate until the train reaches or is at the opposite side of the crossing when the signal automatically shuts off. The distance at which a train on the main line actuates the signals is about 1,810 feet. On the passing track, siding, or industry track a center section only is placed at such points as Dawson, and the same type of signal is used throughout the defendant's railroad system. The reason for this is because there are considerable switching movements, trains are broken up on these tracks, and they sit for long periods of time and at various times, which is not the case on the main line. Movements on switch tracks are slow. If there was an approach section on the passing track at Dawson the gates would be down all the time that trains were switching.

The plaintiff owned and operated a 1951 model L-200 International tractor and a 1950 Trailmobile trailer. At the time of the collision, at about 2 p. m., on March 7, 1952, this unit was driven by its employee James H. Moore. The truck was in first-class condition. The length of the tractor and trailer was 44 feet 10 inches. There were six wheels on the tractor and eight on the trailer. The weight of the tractor was about 9,500 to 10,000 pounds. The trailer weighed 11,000 pounds. The gross weight of the cargo of cheese was 33,800 pounds.

The locomotive was silver in color, trimmed in red, and

approximately 70 feet in length. The total length of the engine and five cars attached thereto was approximately 400 feet, or a little more.

The crossing signals met all the rules and regulations that govern the same, and there was no change in this respect at the time of the collision on March 7, 1952, nor was the signal equipment out of repair.

The driver of the truck, an employee of the plaintiff, testified that he picked up a cargo of cheese at Greenwood, Wisconsin, and proceeded toward San Antonio, Texas. He stopped overnight at Tama, Iowa, and left there about 6 a. m., the morning of the collision. The day was cloudy and cold. A little way north of Nebraska City it turned colder and started to snow. When he reached Dawson it was snowing hard. He was driving at 20 to 25 miles an hour until he approached within 200 feet of the railroad track where he slowed to 15 miles an hour. He was familiar with the highway, having been over it several times, and knew he was approaching a railroad track. He had noticed the railroad crossing sign approximately 400 feet north of the railroad track. He testified that he had no reason to know what time a train would come along. As he approached the railroad track it was snowing harder, it was dark, the wind was blowing, and "you couldn't see very far, or too far." The highway was slick and wet. He began to slow down to look for a train so he could stop in case there was one coming. The window on the driver's side of the truck was half-way down. He kept watching in both directions from a distance of 200 feet. He did not hear a bell, or the rumble of a train, or a whistle. No signals were in operation, nor were there any lights in operation. The motor of the truck was running quietly. The highway ran a little down hill at that particular place and he had his foot on the brake, holding the truck back. He knew the signal gates were there before he got to the tracks, but he did not believe he could see the gates or the lights before he got within 100 feet of the tracks. When

he got up to the gates, they were standing upright. The lights did not flash, nor did the gates start to come down. The signals were not working, so he started across the tracks and did not see the train until the front wheels of the tractor were on the main line track. At that time he saw the train coming from just behind the depot 75 to 100 feet away. There was no light on the locomotive. When he saw the train he pulled his truck to the left, changed to a lower gear, and tried to beat the train by getting the truck across the track the train was on. The train hit the front part of the front axle on the right, or west, side of the trailer. After the collision the rear of the trailer was pushed to the left 20 feet. The tractor was right under the signal lights on the south side of the tracks. The hood of the tractor was under the signal arm. He was putting on his overshoes when the signal arm came down and hit the hood of the truck. When the locomotive stopped, the baggage car and half of another car were past the east edge of the crossing. The train struck the truck approximately 30 feet from its front end. On cross-examination he testified he saw the train when the front wheels of the truck got onto the main line track. The front of the train was coming out from behind the depot. At that time he was 125 feet from that particular corner of the depot. He estimated the speed of the train at 30 miles an hour. Driving at a speed of 20 miles an hour, he could stop the truck in 30 to 35 feet. It would take longer on wet roads. He could not stop when he first saw the train for the reason that the truck was on the main line track 12 or 14 feet from where the train was on the passing track. Instead of stopping, he stepped on the gas to try and beat the train across the crossing.

A witness testified that he was driving his automobile at 20 miles an hour, 35 to 50 feet behind the plaintiff's truck, and slowed down as he neared the railroad track. There was a heavy, wet snow that day; and visibility was poor, it was only good for about 300 feet. A train

came into his view when the locomotive, or the front of the train, was about 50 feet from the highway. He did not hear a bell or whistle, or any kind of warning from the train. The signal cross-arms were up, no lights were flashing, and he did not see a headlight on the locomotive. The rear end of the truck was struck by the train. When the train stopped, immediately after the accident, almost all of the locomotive was across the highway. The truck stopped on the other side of the crossing, with the tractor up against the signal on that side. On cross-examination he testified that the train stopped where it usually did, the same as if there had been no accident. Neither the truck nor the train was going very fast. He doubted if the truck could stop, he was too far along.

A witness who farms near Dawson was driving his truck from the south to the north on Highway U. S. No. 75. He was watching and listening for a train. He saw the train involved in the collision when he heard a noise and the wreck happened. It was snowing. He could see for a distance of from 100 to 150 feet. When he first saw the train he was about 150 feet south of the railroad tracks. He heard the whistle when the train "came around the curve." At that time he was about a quarter of a mile south of the tracks and the sound was coming from the northwest. It did not sound plain because it was snowing. He supposed the train was half a mile west at that time. He did not hear any sound after that, such as a bell or whistle, nor did he see a headlight on the locomotive or the flash of red lights or signals.

The station agent testified that he was standing at the window watching for train No. 42 as it came from the west, as he had orders for the crew. He first saw the train at the switch at the end of the passing track, a distance of approximately 2,000 feet west of the depot. He saw the train enter the side track. It was snowing very little. The train moved to in front of

the depot at a speed of 2 or 3 miles an hour, and came to a stop at the same place it usually stopped to unload mail and express and also discharge and receive passengers. He handed the orders to the fireman who sits on the left side of the cab. He further testified that after the impact, the front of the locomotive was about 15 feet across the crossing. The coaches were a little to the west of the depot for the reason that to the front of the train were the baggage and express cars and the coaches were behind these cars. The coaches were a dark green color.

The engineer who operated the locomotive at the time of the collision testified that he had orders to stop the train at Dawson to meet train No. 41 westbound, and to take the siding. To do so, the train stopped at the west passing track switch and when the switch was thrown moved into the siding, when the switch was closed the train moved to the depot. He estimated the switch to be about 3,000 feet from the depot. He sounded the crossing whistle before taking the siding, and when the train was about to the depot the whistle was blowing. The bell rang continuously, it was automatic. The engineer sits on the right side of the cab. As the train approached the highway crossing, he noticed a truck coming down the hill. The train was quite a distance from the depot at that time. He looked across a field north of the depot and saw the truck north of the railroad crossing sign which is approximately 400 feet north of the tracks. It was snowing a little, and the snow melted as soon as it hit the ground. He had no difficulty in seeing the truck. The train was moving about 10 miles an hour, preparing to make its regular stop with its front end 8 or 10 feet over the highway crossing on the east side thereof. He saw the truck just before the train stopped. He stated: "It just popped right in front of me like that." When he saw the truck before the train entered the crossing, the truck was on the main line track. He

was unable to observe its speed due to his position in the cab. When he saw the truck before the train hit it, he set the air brakes, but it was too late. He got out of the locomotive and looked at the front end of it. He could see no snow on the ground. The headlight of the locomotive was on at that time and the bell was ringing. He went over to talk to the truck driver who had stepped out of the cab of the truck, and asked him if he was hurt, and he said "No." "And then I says, 'What's the matter with you, don't you have no respect for railroad crossings when you come to them?' And he says, 'I seen you coming, but I thought I could beat you across.'" The engineer then went back to the locomotive, got inside, and shut off the bell. He further testified that immediately before the impact the train was moving 4 or 5 miles an hour, and that speed was gradually reduced until the train came to a full stop. On cross-examination he testified he set the brakes at about the time of the impact. Normally he would not have set them as hard as he did. He was blowing the whistle when the train entered the crossing and when he saw the truck at the time it came up on the track ahead of the locomotive. He then let go of the whistle and grabbed the brake valve.

The fireman testified that when the train arrived at Dawson it moved onto the passing track which he estimated to be about 1,800 feet west of the depot. No sound of the whistle was given at that time, but the bell was ringing. It was "spitting snow" which melted when it reached the ground. When the train proceeded on the passing track to the depot, it was moving at a speed of about 10 miles an hour. During that time the whistle was blown two long, one short, and two long blasts before the train got to the crossing. It was sounded at the required distance west of the depot. As the train was moving into the station, he could see the truck at a distance of 400 or 500 feet, moving at a speed of about 35 miles an hour. The last time he saw

the truck its speed was about 20 miles an hour. After the impact he left the locomotive and inspected it. The bell was ringing at all times until the engineer shut it off after the impact. There was no snow on the crossing, and it was not slippery. On cross-examination he testified that the train was 700 or 800 feet west of the depot when he first saw the truck 400 or 500 feet north of the crossing. The second time he saw the truck was when the train hit the back end of it. The last sound of the whistle is given at the crossing.

The conductor testified that the train consisted of a Diesel locomotive and five cars. The train stopped at the west switch about 1,800 to 2,000 feet from the depot to take the siding. It was snowing off and on at times, a light snow, and no drifts. As the train left the switch on the passing track, it traveled at a speed of from 8 to 12 miles an hour. When the train stopped, the locomotive was just beyond the crossing, the head car was close to the crossing, and the coaches were in front of the depot.

The expressman on the train testified that the train stopped at the west switch to go onto the passing track. He opened the door of the express car to get ready for station work. At that time it was snowing "a little bit." He was standing in the door on the north side of the train from the time the train was at the west switch until it got to the depot. The train was moving at a speed of 5, 7, or 8 miles an hour when it got onto the passing track to make the stop at the Dawson depot. He heard the whistle blow, that is when the expressmen get ready to do station work. He saw the truck on the highway north of the railroad sign, coming down hill, and at that time the train was west of the outhouse. He had no difficulty in seeing the truck, and watched it until the train got to the depot, then the depot obstructed his view. He estimated the speed of the truck at the time he saw it at 25 miles an hour. When the train reached the other side of the depot, he observed the driver of

the truck seemed to apply his brakes and then let them off. The truck at that time was 200 or 300 feet north of the track and "then he just shot out there like that." He stepped back from the door as he knew the train was going to hit the truck. He was in the third car back of the locomotive. On cross-examination he testified that when the train was at the depot the truck was 200 or 300 feet away.

The flagman testified that when the train approached the switch west of Dawson it headed onto the passing track and stopped to pick him up after he closed the switch. It is approximately 1,800 to 1,900 feet from the depot to the switch. On the passing track the train moved at a speed of 10 miles an hour, or a little better. It was snowing, but there was no snow on the ground and not enough falling to interfere with vision. He could see 3,000 or 4,000 feet and see train No. 41 approaching from the east when he was standing on the main line. He went up to the pavement after the impact, and testified it could have been damp, but it was not wet, there was no snow on it, and the paving would not have been hard to drive on.

A deputy sheriff of Richardson County testified that he arrived at the scene of the accident about 35 or 40 minutes after it happened. He had a conversation with the truck driver who said he did not stop at the crossing. He further testified that visibility was good, and he estimated that he could see a distance of 400 or 500 feet.

A captain of the Nebraska Safety Patrol testified to the distance in which a motor vehicle could be stopped at certain speeds under the conditions existing at the time of the accident, taking into consideration the reaction time, which would indicate the application of brakes. The evidence in the instant case discloses that the driver of the plaintiff's truck, by changing to a lower gear, attempted to pass in front of the train and clear the crossing before the train passed, and there is no

evidence that he applied his brakes at that time. Therefore, under the evidence adduced, the evidence of this witness has little application here.

There is no evidence that the highway had any ice or snow on it to make it slippery. What snow fell about the time of the accident melted as soon as it reached the ground or pavement, and did not accumulate.

The plaintiff assigns as error the following: (1) The trial court erred in sustaining defendant's motion for a directed verdict. (2) The trial court erred in failing to submit to the jury the issue of the defendant's negligence. (3) The trial court erred in holding that the plaintiff as a matter of law was guilty of contributory negligence barring its recovery. Other assignments of error relate to the above and will not be set out.

The following authorities are applicable, under the facts and circumstances, to the instant case.

If the operator of a motor vehicle is familiar with a railroad crossing and the surrounding conditions, it is his duty in approaching it to look and listen at a time and place where looking and listening will be effective even though vision of the railroad track is restricted. See Kennedy v. Chicago, R. I. & P. R. R. Co., 156 Neb. 345, 56 N. W. 2d 446.

It is the duty of the driver of a motor vehicle to have it under such control that when he arrives at a place while traveling toward a railroad crossing where it is possible to see and to hear an approaching train he can stop and avoid a collision with it. See Kennedy v. Chicago, R. I. & P. R. R. Co., *supra*.

It is the duty of a traveler on a highway, when approaching a railroad crossing, to look and listen for the approach of trains. He must look, where, by looking, he could see, and listen, where, by listening, he could hear, and if he fails without reasonable excuse to exercise such precautions, then he is guilty of contributory negligence more than slight, as a matter of law, and no recovery can be had for damages result-

ing from a collision with a passing train. McIntosh v. Union P. R. R. Co., *supra.*

In Rickert v. Union P. R. R. Co., 100 Neb. 304, 160 N. W. 86, it was held that a traveler upon a public highway, who attempts to cross a railroad track in front of an approaching train, if he knew, or ought to have known, of its approach, is guilty of contributory negligence which will prevent a recovery for resulting damages, if the approaching train was in such close proximity to the crossing that a reasonably prudent person could not fairly expect to cross in safety ahead of it. Cases adhering to this principle are, Eggeling v. Chicago, R. I. & P. Ry. Co., 119 Neb. 229, 228 N. W. 361; Haffke v. Missouri P. R. R. Corp., 110 Neb. 125, 193 N. W. 257; Askey v. Chicago, B. & Q. R. R. Co., 101 Neb. 266, 162 N. W. 647; Moreland v. Chicago & N. W. Ry. Co., 117 Neb. 456, 220 N. W. 692; Mundt v. Chicago, R. I. & P. R. R. Co., 136 Neb. 478, 286 N. W. 691; Loudy v. Union P. R. R. Co., *supra.*

The evidence adduced by the plaintiff with reference to not hearing a bell or whistle of the approaching train prior to the time of the collision between the train and the truck is not sufficient to overcome the evidence of reliable and competent witnesses that a bell was ringing and a whistle blowing.

Considering the positive testimony of the defendant's witnesses on the question of the ringing of the bell and blowing of the whistle, in the case of Nanfito v. Chicago, B. & Q. R. R. Co., 103 Neb. 577, 173 N. W. 575, it is said: "The testimony of witnesses, who were near the place of the accident at the time, that they did not hear the bell, without further explanation, is not sufficient to overcome positive evidence of reliable and competent witnesses that the bell was ringing." See, also, Tsiampras v. Union P. R. R. Co., 104 Neb. 205, 176 N. W. 366.

Even assuming, for the purposes of argument only, that the plaintiff adduced competent evidence that the

engineer did not blow the whistle on the train for the crossing or that the bell was not ringing as required by statute, the cases of Askey v. Chicago, B. & Q. R. R. Co., *supra;* Moreland v. Chicago & N. W. Ry. Co., *supra;* Mundt v. Chicago, R. I. & P. R. R. Co., *supra;* and Loudy v. Union P. R. R. Co., *supra,* are authority for the rule that where it is undisputed that a traveler on a highway failed to exercise reasonable precautions by looking and listening at a reasonable point where he could have seen an approaching train in time to stop before reaching the tracks, his negligence, as a matter of law, will defeat a recovery for damages resulting from a collision with a train at a crossing, even though no signal by the locomotive bell or whistle was given as required by law.

Failure of defendant's locomotive engineer to ring the bell or blow the whistle as the train approached the crossing, even though it may have been negligent, would not make the railroad company liable for damages to a motor vehicle in a collision at the crossing, if the driver of the motor vehicle recklessly failed and neglected to have his motor vehicle under control and by looking and listening at the proper time and place could have seen the approaching train in time to stop before reaching the track, but recklessly failed and neglected to do so, whereby there was a collision. See Askey v. Chicago, B. & Q. R. R. Co., *supra.*

Section 74-583, R. R. S. 1943, provides for the equipment to be used on locomotives in this state in the form of a headlight, and designates the power and visibility of the headlight. The visibility required by the statute is intended to be measured by and under ordinary night conditions, and for the sight of a person having usual visual capacity, and does not apply to engines that may be used exclusively between sunrise and sunset. The collision in the instant case occurred at about 2 p. m. Under the statute there was no specific duty on the part of the defendant to have the headlight

on its locomotive lighted at this time of the day. There is no evidence that a headlight on the locomotive would have made the train visible any sooner, or that it would have given any additional warning of the approach of the train. However, the evidence discloses that the headlight of the locomotive was on. The testimony contra is that the plaintiff's witnesses did not see it.

Apparently the plaintiff's driver contends that the failure of the wigwag signals to operate at the crossing to give him warning of the approach of a train on defendant's crossing justified him in assuming that it was safe to cross the tracks without further precaution.

In this connection, section 39-729, R. R. S. 1943, provided that in order to further promote safety, power is conferred upon the Department of Roads and Irrigation to devise warning signals and to erect and maintain them at railroad crossings where they intersect highways. In conformance with this section of the statutes, warning signals were erected at the highway crossing in question.

In connection with the effect of warning signals as the same apply to a driver of a motor vehicle approaching a railroad crossing, the following cases are applicable.

The case of Miller v. Pennsylvania R. R. Co., 299 Pa. 63, 149 A. 85, is similar to the instant case with reference to the location of the tracks, the crossing, the flash signals, and the depot. There was a flashlight signal west of the main line which did not operate for train movements on side tracks. In the opinion the court said: "Railroads may provide lights or gates for the protection of those crossing, but their presence does not excuse one passing who fails to exercise due precaution for his own safety: Zotter v. L. V. R. R. Co., 280 Pa. 14; O'Neill v. Reading Company, 296 Pa. 319."

In Wabash Ry. Co. v. Huelsmann, 290 F. 165, it is said that generally, a person who drives a motor vehicle on a railroad track at a highway crossing in front of an approaching train, which he could have seen, had he

looked, or could have heard, had he listened, is in law guilty of contributory negligence, and cannot recover damages from the railroad company. Neither open gates nor failure of the railway company to give signals at a railway crossing relieves one about to cross the tracks from the duty to use due care to look and listen for an approaching train.

In Calloway v. Pennsylvania R. R. Co., 62 F. 2d 27, at the point where the accident occurred, two tracks of the defendant crossed the street, a main line track and a switch track. The two tracks were parallel and very close together. Automatic electric signal lights were maintained at the crossing by the defendant, but these lights were connected with the main track only and not with the switch. In this respect the signal arrangement was somewhat analogous to the case at bar. The court said: " 'Neither open gates nor failure of the railway company to give signals at a railway crossing relieves one about to cross the tracks from the duty to use due care to look and listen for an approaching train.' Atchison, T. & S. F. R. Co. v. McNulty (C. C. A.) 285 F. 97, 100, certiorari denied 262 U. S. 746, 43 S. Ct. 521, 67 L. Ed. 1212." See, also, Union P. R. R. Co. v. Rosewater, 157 F. 168, 15 L. R. A. N. S. 803, 13 Ann. Cas. 851; Delaware, L. & W. R. R. Co. v. Welshman, 229 F. 82, L. R. A. 1916E 816; Lang v. Byram, 35 F. 2d 489.

In Johnson v. Union P. R. R. Co., 157 Kan. 633, 143 P. 2d 630, referring to Jacobs v. Railway Co., 97 Kan. 247, 154 P. 1023, L. R. A 1916D 783, Ann. Cas. 1918D 384, where the failure of an electric signal bell at a railroad crossing was the basis of the negligence charged against the railway company, and because of that negligence plaintiff claimed exemption from his own amenability to the rule of contributory negligence barring recovery, the court said: " '* * * the failure of an electric bell to ring does not relieve one about to cross a railroad track of the imperative duty to look and listen

before crossing. If he fails to do so, he is guilty of such contributory negligence as will prevent his recovery for any injuries sustained, and there is nothing to submit to the jury.'"

The fact that the accident happened as it did indicates either that the truck driver failed to look and observe the approaching train, or, having seen it, decided to take the chances of an attempt to cross ahead of it. In either case he was negligent and there can be no recovery.

The only reasonable deduction that can be drawn from the evidence is that the driver of the plaintiff's truck either did not look toward the approaching train at a place where a view could have been had a reasonable distance down the track, or, if he did look at such a place, no heed was given to the oncoming train, until it was too late to avoid the accident, and the conduct of the driver of the truck was negligence as a matter of law.

The plaintiff made other contentions, the consideration of which we deem unnecessary to a determination of this appeal, therefore the same will not be discussed.

We conclude that the trial court did not err in sustaining the defendant's motion for a directed verdict.

AFFIRMED.

MYRTLE PESTEL, APPELLANT, V. BERNHARD PESTEL, APPELLEE.

73 N. W. 2d 689

Filed December 16, 1955. No. 33799.

Divorce. The court in deciding the amount of alimony or in making a division of property in a divorce case will consider the ages if 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 Stanton County: LYLE E. JACKSON, JUDGE. *Affirmed as modified.*

Thomas L. Grady, for appellant.

Duetsch & Jewell, for appellee.

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

BOSLAUGH, J.

Appellant sought a divorce from appellee because, as she alleged, he on August 13, 1951, deserted her, had continued such desertion thereafter, and wholly failed to perform any of the obligations of the marriage contract after he deserted appellant. She asked for suitable allowances including permanent alimony. Appellee denied the charges of misconduct made against him by appellant and asserted that on or about August 13, 1951, she ordered appellee to leave and move from the house then occupied by the parties, the title to which was in appellant; that appellee did remove therefrom; and that the separation of the parties was the result of the repeated demands of appellant that appellee leave her and live apart from her. Appellee also alleged the proceedings had in and the result of a prior case to which he was defendant and appellant was plaintiff. Appellee asked that the petition of appellant be denied. The reply of the appellant to the answer of appellee was in essence a denial.

The district court found that jurisdictional requisites existed; that all issues involved should be resolved in favor of appellant and against appellee; that an absolute divorce should be granted appellant; that the parties should retain the property, real and personal, in their respective possession; and that appellant should be awarded as permanent alimony from appellee the sum of $7,500, compensation for her attorney in a designated amount, and costs. A judgment was rendered in harmony with the findings. The motion of appellee for a

new trial and the motion of appellant for a new trial of the issue as to permanent alimony only were denied. This appeal is from the action of the court adjudging the amount of permanent alimony appellant shall have from appellee. He did not appeal. He has not taken a cross-appeal but has expressly waived his right to do so.

The single problem presented to this court by the pending appeal is the amount that should be awarded to appellant as permanent alimony. The amount given her by the finding and judgment of the trial court is considered by her as very inadequate. Appellee claims that it is grossly exorbitant.

In Parker v. Parker, 155 Neb. 325, 51 N. W. 2d 753, it is said: "The court in deciding the amount of alimony or in making a division of property in a divorce case will consider the ages of the parties, their earning ability, the duration of and the conduct of each during the marriage, their station in life, the circumstances and necessities of each, the physical condition of each, the property owned by them, and whether or not it was acquired by their joint efforts, and any other pertinent facts." See, also, Kidder v. Kidder, 159 Neb. 666, 68 N. W. 2d 279; Cowan v. Cowan, 160 Neb. 74, 69 N. W. 2d 300.

The parties to this controversy were married September 15, 1917. They were at that time and have since been residents of Nebraska and residents of Stanton County since February 1926. Appellant is 58 and appellee is 63 years of age. They occupied and operated a rented farm in Cuming County during the 9-year period from their marriage until February 1926. They bought a farm of 160 acres in Stanton County on August 3, 1925, moved on it in February 1926, and continued to occupy and operate it until the spring of 1947. The purchase price was $24,800 and it was satisfied about March 1, 1926, with $10,000 given appellee by his father in 1921 and about $2,000 accumulation thereon, $5,000 borrowed from the father of appellee and secured by mortgage

on the land, $2,000 loaned to appellee by his brother, and the balance of $5,800 was money appellant and appellee had made and saved by the use of the land. Appellee realized $14,000 from gifts by his father in his lifetime and by the terms of the will of his father. The last payment on the mortgage placed on the land was in 1941 or 1942. The title to the land was taken and since has been in the name of appellee.

Appellee estimated at the time of marriage he had between $800 and $1,000 and 6 brood sows. He spent the money for horses and farm equipment. Appellant had 3 cows, a calf, several dozens of chickens, canned food sufficient for their use until a crop was produced, and furniture so that they had only to buy a bed.

The parties during the period of about 20 years from the time they moved on the 160-acre farm they had purchased were industrious, thrifty, prudent, and successful. They worked hard, they were saving, and they accumulated a considerable amount of property and funds. Appellant did the housework. She became the mother of two sons and cared for and raised them. She helped with the farm work, assisted appellee in stacking hay, picking corn, and in doing other farm work. She milked from 5 to 10 cows, and she raised and cared for chickens to the extent of as many as 900. She fed hogs and did other chores. It is not claimed that she had any help with the household duties. It is affirmatively conceded that she did her part. The sole source of income of the parties during this time was from the 160-acre farm.

In the year 1946 appellant with the approval of appellee bought 95 acres of land located about a mile from the 160 acres described above. She paid the purchase price of $8,500 by using a substantial part of what she had inherited from her family. This was supplemented with her earnings and savings from 40 acres of land she had inherited in 1938 and from other sources. Appellee and appellant moved on the 95-acre farm in the spring of 1947 with the mutual intention of decreasing their duties

and labors, improving the farm, and making it their home during their declining years. Appellant continued after they moved to this farm to raise and care for large numbers of chickens and hogs. She realized as much as $2,000 from hogs in a single year. She also got a considerable production of grain from the tilled part of the land. This place was improved with a modern house, appropriate modern appliances, utensils, furnishings, and equipment at an expenditure by appellant of about $9,000. The record justifies a finding that she invested all of her inheritance from her family in purchasing and improving this place and equipping and furnishing the house except one-tenth of 160 acres of land in South Dakota and one-tenth of 320 acres of land in Texas of small and uncertain value. The evidence is not clear and definite as to the exact value of the inheritance she received from her family but it is sufficient to permit an acceptance of her sworn estimate that it was more than $12,000. The improvements made on the 95-acre farm were with the knowledge and approval and, to a considerable extent, with the participation of appellee. He testified he expended about $4,000 exclusive of his labor in improving the fences and building new ones of woven wire and in improving the barn, granary, and other outbuildings. There is dispute in the evidence as to the amount he expended for these purposes but it is conceded that it was more than $2,000. It was paid from the joint account of appellant and appellee.

Appellee left the home of the parties on the 95-acre farm on August 13, 1951. He has since made his home with his son Clarence on the 160-acre farm. There is evidence that the parties to this cause had many disagreements and much unpleasantness for a considerable time before the separation. There is evidence that this situation existed in 1950 and that they infrequently spoke to each other during the 6 months immediately before appellee left appellant.

The property in the name and possession of appellant as shown by the evidence produced by her consists of the 95-acre farm and the personal property thereon, a one-tenth interest in 160 acres of land in South Dakota, a one-tenth interest in 320 acres of land in Texas, a nominal amount of cash, and a 1950 Ford automobile. Her health is not good. She has and is crippled by chronic arthritis. Ordinary exercise such as doing housework affects her legs so that they will not function. She also suffers from an abnormal heart. The 95 acres of land in her name have a value of not more than $15,000.

Appellee claims the property he has is the 160-acre farm in his name which he rents to his son Clarence for an annual rental of $1,000, the amount of the taxes thereon, and Clarence furnishes him a home; United States E Bonds of the maturity value of $4,500; bank account of $2,316.59; a 1941 Ford automobile; and a few items of small tools. The 160 acres of land in the name of appellee have a value of not less than $27,000.

The banking business of the parties was done in the name of appellee until the year 1938. Thereafter he had a bank account in one or more banks and appellant thereafter had an individual bank account. They also had a joint bank account. Appellee withdrew from the joint account the sum of $3,250 on August 2, 1951, which was 11 days before the separation of the parties, and $55 on August 16 or 17, 1951, which was the balance of the account. In September 1953 appellee had bank balances of about $7,000. He says this has been reduced to less than $2,500. His explanation of the disposition of the difference is equivocal, incomplete, and unsatisfactory.

Appellee testified at the trial of the first divorce case referred to above, Pestel v. Pestel, 158 Neb. 611, 64 N. W. 2d 299, supplemental opinion, 159 Neb. 56, 65 N. W. 2d 233, that he had not at any time given property of any kind except some machinery to his son Clarence. It appears in the testimony of appellee and

otherwise in this case that in 1947 or 1948 he gave his son Robert $5,000, that his intention was to treat the sons alike, and that he had given his son Clarence at least $5,000. Appellee was probably then referring to the farm equipment and machinery and the interest in livestock he had given Clarence. Appellee gave Clarence $4,250 in February 1951, and at a later date that year $750. The method of doing this was that appellee deposited money in a bank in the name of Clarence, without his knowledge, and delivered the deposit tickets issued by the bank to him. There was no conversation or understanding about it and appellee got nothing from Clarence on account thereof. There was no situation or happening that affected Clarence that explained this generosity. Clarence had property, was successful in his engagements and business, and he had no pressing obligation. Appellee later, probably August 15, 1951, gave Clarence a check for $1,000. He gave his father nothing on account thereof. About May 1951 appellee had $6,000 maturity value of United States E Bonds reissued to his son Robert as the payee thereof and gave him the bonds. Robert gave his father nothing on account of his receipt of the bonds. The record is silent as to any negotiations or arrangement concerning them. Robert owned property, was operating a going and apparently successful business, and it is not claimed that the transfer of the bonds to him was done to permit him to respond to any present necessity.

The $6,000 appellee gave Clarence in 1951 and the bonds of $6,000 which he gave Robert in 1951 as above stated should, for the purpose of a division of property between the parties to this case, be considered and treated as property owned by appellee. In this view of the case and considering the circumstances shown by the record, the allowance of permanent alimony of $7,500 made to appellant and required to be paid her by appellee is inadequate and it should be modified and changed as hereafter stated. It is found by this

court that the allowance of permanent alimony to appellant should be and is fixed at the sum of $12,000.

It is therefore adjudged that appellant have and recover of and from appellee the sum of $12,000 as permanent alimony without interest or execution for 120 days from the date of the filing of the mandate in the district court, that appellant have and recover of and from appellee the sum of $350 as compensation to her counsel for services in this court to be taxed as costs, and that the costs in this court should be and they are taxed to appellee.

The judgment of the district court as modified should be and it is affirmed.

AFFIRMED AS MODIFIED.

STATE OF NEBRASKA EX REL. ERNEST M. JOHNSON, RELATOR, V. BRUCE HAGEMEISTER, RESPONDENT.
73 N. W. 2d 625

Filed December 16, 1955. No. 33806.

1. **Officers.** One who sues to recover a public office has the burden of proving every fact essential to his title, his recovery depending upon the strength of his own title and not upon the weakness of the claim of his adversary.
2. **Constitutional Law.** The Legislature's action, in confirming or rejecting a nomination or appointment of the Governor, is an executive rather than a legislative act.
3. ———. The Nebraska Constitution expressly provides that "The Legislature shall determine the rules of its proceedings." This provision does not restrict the power given to the mere formulation of standing rules, or to the proceedings of the body in ordinary legislative matters. In the absence of constitutional restraints, and when exercised by a majority of a constitutional quorum, such authority extends to the determination of the propriety and effect of any action as it is taken by the body as it proceeds in the exercise of any power, in the transaction of any business, or in the performance of any duty conferred upon it by the Constitution.
4. ———. When the Legislature finally confirms an appointment made by the Governor it is without power thereafter

to revoke the confirmation. However under the rules of the Legislature, which the Constitution authorized it to adopt, no vote on the confirmation of an appointment to office is final, and consequently there is no such confirmation, until a motion to reconsider an affirmative vote thereon has been disposed of adversely or the time for the making thereof has expired without such a motion being made.

Original action. *Writ denied.*

Charles A. Fisher and *Ernest M. Johnson,* for relator.

Clarence S. Beck, Attorney General, and *Clarence A. H. Meyer,* for respondent.

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

WENKE, J.

This is an original action in quo warranto brought by relator, Ernest M. Johnson, for the purpose of ousting and excluding the respondent, Bruce Hagemeister, from a position of membership on the Board of Education of State Normal Schools of the State of Nebraska and to have the relator adjudged entitled to the position and admitted to the same, with all the rights and privileges thereof.

The relator, on February 10, 1955, requested the Attorney General of the state to bring this action but he refused to do so. Consequently the relator brought it. In view thereof, "He is required to show that his title to the office is better than the incumbent's, and must recover, if at all, upon the strength of his own title and not upon the weakness of the claim of his adversary." State ex rel. Birkhauser v. Moores, 52 Neb. 634, 72 N. W. 1056. See, also, Barrett v. Duff, 114 Kan. 220, 217 P. 918; Wooton v. Wheeler, 149 Ky. 62, 147 S. W. 914.

We accepted original jurisdiction pursuant to and by authority of Article V, section 2, Constitution of Nebraska, which provides, insofar as here material, that: "The supreme court shall have jurisdiction in * * * quo warranto, * * *." See, also, section 24-204, R. R. S.

1943, which provides: "The Supreme Court shall have original jurisdiction in * * * quo warranto * * *." The right to file is provided for by section 25-21,121, R. R. S. 1943.

In 1920 the Board of Education of State Normal Schools was established by the adoption of Article VII, section 13, Constitution of Nebraska. It provided: "The general government of the state normal schools, as now existing, and such other normal schools as may be established by law, shall be vested, under the direction of the Legislature, in a board of seven members to be styled Board of Education of State Normal Schools, six of whom shall be appointed by the Governor, with the advice and consent of the senate, two each for a term of two, four, and six years, and two each biennium thereafter for a term of six years, and the State Superintendent of Public Instruction shall be a member ex-officio." See, also, section 85-301, R. R. S. 1943. We shall hereinafter refer to the Board of Education of State Normal Schools as the board.

The terms of the original members of the board all began on January 1, 1921. See Article XVII, section 1, Constitution of Nebraska, which provides: "The several amendments passed and submitted by this Convention when adopted at the election shall take effect on the first day of January, 1921, * * *." Consequently all subsequent terms of the several members begin on January 1 of odd-numbered years.

In the fall of 1953, during recess of the Legislature, a vacancy occurred in the membership of the board by reason of the death of Edwin D. Crites of Chadron, Nebraska. The term of his membership on the board ran to January 1, 1955.

Article IV, section 11, Constitution of Nebraska, provides: "In case of a vacancy during the recess of the senate, in any office which is not elective, the governor shall make a temporary appointment until the next meeting of the senate, when he shall nominate some

person to fill such office; and any person so nominated, who is confirmed by the senate, (a majority of all the senators elected concurring by voting yeas and nays), shall hold his office during the remainder of the term, and until his successor shall be appointed and qualified."

Then Governor Robert B. Crosby, under and pursuant to the authority granted him, on November 18, 1953, appointed relator to fill the vacancy on the board caused by the death of Crites. Relator took the oath of office and filed it in the office of the Secretary of State on November 30, 1953. He thereafter occupied the office and performed the duties thereof. Subsequently, at its Sixty-sixth (Extraordinary) Session, the Legislature, on April 28, 1954, confirmed relator's appointment to fill the vacancy.

With the term in which the vacancy occurred ending December 31, 1954, with the Legislature meeting in regular session at 12 o'clock noon on January 4, 1955 (see Article III, section 10, Constitution of Nebraska), and with the new Governor not taking office until January 6, 1955 (see Article XVII, section 5, Constitution of Nebraska), the then Governor, Robert B. Crosby, on October 20, 1954, appointed relator to a six-year membership on the board, the term running from January 1, 1955, to January 1, 1961.

On Friday, January 28, 1955, the Sixty-seventh Session of the Legislature, that being its nineteenth legislative day, received a report from its committee on committees reporting favorably on relator's appointment. On the same day his appointment was confirmed by the Legislature. However, on Monday, January 31, 1955, that being its twentieth legislative day, the Legislature adopted a motion made by Senator Bixler to reconsider the action it had taken on Friday, January 28, 1955, confirming the appointment of relator to the board. The Legislature, after taking such action, immediately thereafter adopted another motion made by Senator Bixler that relator not be confirmed. Senator Bixler

had voted for relator's confirmation on January 28, 1955.

Thereafter, on February 2, 1955, Governor Victor Anderson nominated respondent to the term of membership on the board running from January 1, 1955, to January 1, 1961. This nomination the Legislature confirmed on February 28, 1955. Thereafter, on March 2, 1955, the Governor appointed and commissioned respondent who thereupon took the oath of office on March 8, 1955, and filed it in the office of the Secretary of State on March 9, 1955. Respondent is presently occupying the office and performing the duties thereof.

This raises the question, did the Legislature have the right to reconsider its action of Friday, January 28, 1955, confirming the relator's appointment on Monday, January 31, 1955, its next legislative day, no question being raised as to the personal qualifications of either relator or respondent?

We think the appointive power here involved requiring concurrent action of the Governor and the Legislature, although not necessarily in point of time, is executive or administrative in character. As stated in People v. Shawver, 30 Wyo. 366, 222 P. 11: "It is usually held that the senate, in the exercise of its power to consent to or confirm executive appointments, performs an executive or administrative rather than a legislative function." See, also, 22 R. C. L., Public Officers, § 73, p. 424.

"The senate's action, in confirming or rejecting the governor's nominations, is an executive rather than a legislative act." 81 C. J. S., States, § 68, p. 1001.

Article II, section 1, Constitution of Nebraska, provides: "The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial, and no person or collection of persons being one of these departments, shall exercise any power properly belonging to either of the others, except as hereinafter expressly directed or permitted."

While our Constitution thus divides the government of the state into three distinct departments, and prohibits

any person or collection of persons in one department from exercising any power properly belonging to either of the others, however, it expressly recognizes that the provisions in the Constitution transgress this separation and, insofar as they do, the separate departments would have such power. Consequently the Legislature had the power to confirm the appointment although executive or administrative in character.

The Constitution also provides: "* * * the Legislature shall determine the rules of its proceedings * * *." Art. III, § 10, Constitution of Nebraska. It will be observed that this authority does not limit itself to any particular power which the Legislature has or is given but is broad and unlimited in its scope. As stated in Crawford v. Gilchrist, 64 Fla. 41, 59 So. 963: "The constitution expressly provides that 'Each house shall _____ determine the rules of its proceedings;' * * * The provision that each house 'shall determine the rules of its proceedings,' does not restrict the power given to the mere formulation of standing rules, or to the proceedings of the body in ordinary legislative matters; but, in the absence of constitutional restraints, and when exercised by a majority of a constitutional quorum, such authority extends to the determination of the propriety and effect of any action as it is taken by the body as it proceeds in the exercise of any power, in the transaction of any business, or in the performance of any duty conferred upon it by the constitution."

Also as stated in 81 C. J. S., States, § 39, p. 956: "Under provisions of the constitutions of the several states, each house generally has power to determine its rules of procedure, and in such case proceedings in conformity with the legislative rules are valid where not in conflict with the constitution; * * *. The power to determine rules of proceedings is not restricted to proceedings of the body in ordinary legislative matters, but extends to the determination of the propriety and effect of any action taken by the body as it proceeds in the

exercise of any power, in the transaction of any business, or in the performance of any duty conferred on it by the constitution. * * * The power to determine rules of procedure embraces the right to determine as to the reconsideration of action taken, when no provision of the constitution is thereby violated." See, also, Opinion of the Justices, 252 Ala. 205, 40 So. 2d 623; United States v. Smith, 286 U. S. 6, 52 S. Ct. 475, 76 L. Ed. 954.

As stated in Witherspoon v. State ex rel. West, 138 Miss. 310, 103 So. 134: "Counsel for the appellant concede the power of the Senate to 'determine rules of its own proceedings' as to legislative matters, but seek to limit its power so to do in matters of an executive character, but the Constitution, to which alone we should look in this connection, contains no such limitation. How this section of the Constitution can be construed so as to exclude from it the right of the Senate to determine rules of its own proceedings in transacting business of an executive character is not apparent, for the words in which the grant of power to the Senate to adopt rules of procedure is couched are about as broad and comprehensive as the English language contains, and this court is without the right to ingraft any limitation thereon."

We have said of our Constitution:

"The courts should accord to the language of the Constitution the meaning which obviously would be accepted by a layman." Ramsey v. County of Gage, 153 Neb. 24, 43 N. W. 2d 593.

"Where the words of the Constitution are plain, direct, and unambiguous, no interpretation is needed to ascertain their meaning; a mere reading will suffice." Mekota v. State Board of Equalization & Assessment, 146 Neb. 370, 19 N. W. 2d 633.

The rules of procedure adopted by the Sixty-seventh (1955) Session of the Legislature provide: "When a question has been decided, it shall be in order for any member voting with the prevailing side, or not voting, to move a reconsideration thereof; and if the Legislature

shall refuse to reconsider, or upon reconsideration shall affirm its first decision, no further motion to reconsider shall be in order, unless by unanimous consent." Legislative Journal Sixty-seventh Session, p. 2; Legislative Journal Sixty-sixth Session, Rule 10, § 13, p. XXVI.

It will be observed that this section of Rule 10 does not fix the time within which a motion to reconsider may be made, nor does any other section of the rule do so. However, Rule 1 of the rules adopted by the 1955 Legislature to control its proceedings provides: "The rules of parliamentary practice comprised in Gregg's Handbook of Parliamentary Law, Rev. Ed. c. 1940, shall govern the Legislature in all cases to which they are applicable and in which they are not inconsistent with the standing rules of the Legislature." Legislative Journal Sixty-seventh Session, p. 2; Legislative Journal Sixty-sixth Session, Rule 1, p. VIII.

Gregg's Handbook of Parliamentary Law, Rev. Ed. 1940, § VII, p. 36, Motions - To Reconsider, in this regard, provides: "2. It must be made on the same day on which the vote to be reconsidered was taken, or on the next calendar day of the same session."

The action taken by the Legislature was within the time and manner provided by the rules adopted by the Legislature to regulate and control its proceedings.

Relator contends there must be some point of time when there is a finality to an appointment and that when the Legislature confirmed the Governor's appointment on Friday, January 28, 1955, the appointment was complete and beyond recall and the Legislature thereafter could not reconsider what it had done. There are cases cited that so hold although they do not involve any similar or comparable constitutional authority. However, in any event, we do not think we have the right to so limit the power expressly given to the Legislature by the Constitution. A point of time which is final can only be said to have been reached when the constitutional power of appointment has been fully exercised.

The principle here controlling is stated in Witherspoon v. State ex rel. West, *supra,* as follows: "* * * when the Senate confirms an appointment made by the Governor, it is without power thereafter to revoke the confirmation, but under the rules of the Senate which the Constitution authorized it to adopt no vote on the confirmation of an appointment to office is final, and consequently there is no such confirmation until a motion to reconsider an affirmative vote thereon has been disposed of adversely or the time for the making thereof has expired without such a motion being made." The court cited the following cases in support thereof: "Attorney-General v. Oakman, 126 Mich. 717, 86 N. W. 151, 86 Am. St. Rep. 574; People v. Davis, 284 Ill. 439, 120 N. E. 326, 2 A. L. R. 1650; Allen v. Morton, 94 Ark. 405, 127 S. W. 450; Baker v. Cushman, 127 Mass. 105; Putnam v. Langley, 133 Mass. 204; Wood v. Cutter, 138 Mass. 149; Reed v. Deerfield, 176 Mass. 473, 57 N. E. 961; State v. Foster, 7 N. J. Law, 101; Whitney v. Van Buskirk, 40 N. J. Law, 467; Conger v. Gilmer, 32 Cal. 75."

As stated in People ex rel. MacMahon v. Davis, 284 Ill. 439, 120 N. E. 326, 2 A. L. R. 1650: "The question before it is the approval of an executive act of the mayor. Its action is discretionary and deliberative. No good reason is apparent why the council may not establish rules in such cases for the government of its own procedure in arriving at its final judgment as well as in other cases. Orderly procedure requires some rules for the proper dispatch of business and deliberation in its conduct. The confirmation of executive appointments should be deliberately considered, and the rules applicable to ordinary questions to secure such deliberation may well be applied." See, also, Attorney General ex rel. Dust v. Oakman, 126 Mich. 717, 86 N. W. 151, 86 Am. S. R. 574; Thorne v. Squier, 264 Mich. 98, 249 N. W. 497, 89 A. L. R. 126.

Relator's appointment of October 20, 1954, also con-

tained his commission. We think it was proper for the Governor to include it therein since it was his final executive act in regard to the appointment as, upon confirmation of the appointment by the Legislature, the issuance of the commission would be merely ministerial. See McBride v. Osborn, 59 Ariz. 321, 127 P. 2d 134. As stated therein: "* * * this court is committed to the proposition that the governor's power to appoint is in conjunction with the senate and that when the latter has acted favorably upon an appointment made by him, the appointment is final and complete and entitles the appointee to the office. McCall v. Cull, supra (51 Ariz. 237, 75 P. 2d 696); Graham v. Lockhart, supra (53 Ariz. 531, 91 P. 2d 265). We agree with the petitioner that in such a situation the issuance of the commission and the approval of the bond, admittedly sufficient as to amount and sureties, are ministerial acts which could be compelled by mandamus."

However, we do not think, including the commission in the appointment could in any way limit or restrict the Legislature in exercising its constitutional authority in relation thereto. As stated in 16 C. J. S., Constitutional Law, § 169, p. 510: "It is beyond the power of executive or administrative officers or bodies to exercise, question, interfere with, or limit powers conferred on the legislature by the constitution."

The foregoing should not be confused with the procedure provided in Article IV, section 10, Constitution of Nebraska, under which the Governor apparently proceeded in nominating respondent. Article IV, section 10, Constitution of Nebraska, provides: "The governor shall nominate and by and with the advice and consent of the senate, (expressed by a majority of all senators elected, voting by yeas and nays,) appoint all officers whose offices are established by the constitution, or which may be created by law, and whose appointment, or election is not otherwise by law or herein provided for; and no such officer shall be appointed or elected by the

legislature." This constitutional provision contemplates a nomination, confirmation by the Legislature, and pursuant thereto, appointment by the Governor. In such instances the appointment, which would include the commission, is the third and final act in the appointive procedure. See Marbury v. Madison, 1 Cranch 137, 2 L. Ed 60; Harrington v. Pardee, 1 Cal. App. 278, 82 P. 83. As stated in Harrington v. Pardee, *supra:* "As to the trustees of this home, the governor cannot appoint when the senate is in session without the 'advice and consent' of that body. In all such appointments the first step to be taken is the suggestion by the governor to the senate of the name of a person for the office and to ask the advice of the senate, and for its consent for him to appoint such person; the second step is the advice and consent of the senate which is manifested by a resolution certified to the governor and to the secretary of state, and the third and last step is the issuing of the commission signed by the governor, and this is the evidence of such appointment. * * * The appointment is not made until the commission is issued, and issuing the same is the last act, and in issuing the commission of the governor is performing an executive, and not a ministerial act, and is, therefore, acting under his discretionary powers, * * *."

Relator served as a member of the board on Saturday, January 29, 1955. This fact would not alter the situation because, in any event, he would serve until his successor was appointed and qualified. See, Art. IV, § 11, Constitution of Nebraska; § 32-1045, R. R. S. 1943. Relator did not seek to qualify for the six-year term from January 1, 1955, to January 1, 1961, until February 9, 1955, when he took the oath of office and thereafter, on February 11, 1955, filed it with the Secretary of State. In any event we think what was said in People ex rel. MacMahon v. Davis, *supra,* applies. Therein the court held: "The action of the appellees in assuming the offices the next day, while the question of the confirma-

tion of their appointment was pending in the council, and in afterward exercising the powers and duties of the offices, did not have the effect of giving them any title to the offices. The effect of the motion to reconsider the vote to concur in the appointments was to suspend all action based upon that vote until the reconsideration was acted upon. The vote to reconsider at the meeting of June 22 was an annulment of the previous vote, and the subsequent vote was effectual to disapprove the appointments."

Relator cites and seems to rely on United States v. Smith, *supra*. Therein the United States Supreme Court fully recognized the Senate's right to reconsider its confirmation of any nomination made by the President. However, in view of the fact that the resolution of confirmation had been delivered to the President pursuant to act of the Senate taken in accordance with its own rules, the fact that the President had acted thereon and issued the commission before the Senate sought to recall the resolution of confirmation for the purpose of reconsidering the question of its confirming such nomination; the fact that the nominee had accepted the appointment, received his commission, and occupied the position and performed the duties thereof; and the fact that the Senate had, in the past in similar situations, acquiesced in the presidential refusal to return a resolution of confirmation under similar circumstances, the court denied the Senate's right to insist upon its return. No such factual situation exists here. In fact the case is full authority for the right of the Legislature to reconsider the confirmation in this case for the Senate's rule was based on the following provision of the federal Constitution: "Each House may determine the Rules of its Proceedings * * *." Art. I, § 5, Constitution of the United States. The question raised in regard to the rules adopted by the Senate thereunder was stated in the opinion as follows: "The question primarily at issue

relates to the construction of the applicable rules, not to their constitutionality."

As stated in Thorne v. Squier, *supra:* "In United States v. Smith, 286 U. S. 6 (52 Sup. Ct. 475) * * * The case in no way holds that the senate did not have the right to reconsider its confirmation by proper action. The case is not authority for appellant's claim; in fact, the court stated: 'The Constitution commits to the senate the power to make is own rules; and it is not the function of the court to say that another rule would be better. A rule designed to insure due deliberation in the performance of the vital function of advising and consenting to nominations for public office, moreover, should receive from the court the most sympathetic consideration.' "

In view of what we have said it would appear that relator was holding over under his appointment to fill vacancy and that after respondent had been appointed and qualified relator no longer had any right to the office. Consequently the relief which he herein seeks should be denied.

WRIT DENIED.

MARY DIXON, APPELLEE, V. WILLIAM COFFEY, APPELLANT.
73 N. W. 2d 660

Filed December 16, 1955. No. 33820.

1. New Trial. In a hearing upon motion for new trial, the alleged errors that may be considered in the district court are those which appear in the record of the proceedings which resulted in the verdict and judgment about which complaint is made and which are called to the attention of the trial court by the motion or appropriate pleading.
2. ———. Errors sufficient to cause the granting of a new trial must be errors prejudicial to the rights of the unsuccessful party.
3. ———. The district court has the power and is required to consider and determine motions for a new trial by the exer-

cise of its judicial discretion, which means the application of statutes and legal principles to all of the facts in a case.

4. ———. The power of judicial discretion authorizes and requires the court to determine the question as to whether or not a legal reason exists for the granting of a new trial. If a legal reason exists and the complaining party makes his application in writing within the time fixed by statute, the court has no discretion in the matter and the motion must be sustained. If a legal reason does not exist, the court has no discretion in the matter and the motion must be denied.
5. **Parties: Insurance.** Under the statute providing that every action must be prosecuted in the name of the real party in interest, if the insurance paid by an insurer covers only a portion of the loss, the right of action against a wrongdoer who caused the loss remains in the insured for the entire loss, and the action must be brought by him in his own name.
6. **Trial: Appeal and Error.** As a general rule, an actual offer of evidence upon an issue is not necessary in order to preserve the question for review if the trial court has theretofore ruled that no proof upon that issue will be received.
7. **Pleading.** The law of amendments should be liberally construed in order to prevent failure of justice and, except as otherwise provided by statute or rule of court, a party seeking to amend the pleadings is not required to do so in any particular form or manner nor to support his application therefor by affidavit if the court is in some appropriate manner informed of the nature and purpose of the proposed amendments.
8. **Pleading: Continuances.** Amendments of pleadings should be allowed whenever such amendments appear to be in furtherance of justice and when such amendments make a continuance necessary or otherwise increase the costs, such terms should be imposed as are just under the circumstances.
9. **Damages: Appeal and Error.** When the amount of damages allowed by the jury is clearly inadequate under the evidence in the case, it is error for the trial court to refuse to set aside such verdict. However, where the recovery awarded is sufficient to probably do justice to the injured party, an appellate court should not interfere.

APPEAL from the district court for Furnas County: VICTOR WESTERMARK, JUDGE. *Affirmed.*

Russell & Colfer, Davis, Healey, Davies & Wilson, and *Robert A. Barlow,* for appellant.

John Stevens and *Stevens & Scott,* for appellee.

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

CHAPPELL, J.

Plaintiff Mary Dixon brought this action against William Coffey seeking recovery for personal injuries and damages to her car, alleged to have been proximately caused by negligence of defendant. On trial to a jury it returned a verdict, awarding plaintiff $180 for medical expenses, loss of earnings, pain and suffering, and personal injuries, which were the only elements of damage submitted to the jury for its determination. Thereafter plaintiff filed a motion for new trial which, among other things, substantially alleged: (1) That the trial court abused its discretion and erred in refusing to permit plaintiff to amend her petition before trial in order to plead the full amount of damages to her car and in refusing to submit such issue to the jury for its determination; and (2) that the recovery was inadequate to compensate plaintiff for her personal injuries and damages. Upon such grounds plaintiff's motion was sustained, the verdict and judgment rendered were vacated, and plaintiff was granted a new trial. Therefrom defendant appealed, assigning in substance that the trial court erred in granting a new trail. We conclude that defendant's assignment should not be sustained.

With regard to the issues so raised, there are well-established rules. In Greenberg v. Fireman's Fund Ins. Co., 150 Neb. 695, 35 N. W. 2d 772, this court held: "The alleged errors that may be considered in the district court are those which appear in the record of the proceedings which resulted in the verdict and judgment about which complaint is made and which are called to the attention of the trial court by the motion or appropriate pleading.

"Errors sufficient to cause the granting of a new trial must be errors prejudicial to the rights of the unsuccessful party.

"The district court has the power and is required to consider and determine motions for a new trial by the exercise of its judicial discretion.

"As used in this connection judicial discretion means the application of statutes and legal principles to all of the facts of a case.

"The power of judicial discretion authorizes and requires the court to determine the question as to whether or not a legal reason exists for the granting of a new trial. If a legal reason exists and the complaining party makes his application in writing within the time fixed by statute, the court has no discretion in the matter and the motion must be sustained. If a legal reason does not exist, the court has no discretion in the matter and the motion must be denied.

"Where a ground or grounds for a motion for a new trial present a question or questions of fact which are in dispute, the district court becomes the judge of such questions of fact. If a party desires a review of that determination, the showing thereon must be preserved in the record.

"That rule does not authorize the district court to invade the province of the jury and to set aside the verdict and grant a new trial because the court arrived at a different conclusion than the jury on the evidence that went to the jury.

"Where a party has sustained the burden and expense of a trial and has succeeded in securing the judgment of a jury on the facts in issue, he has a right to keep the benefit of that verdict unless there is prejudicial error in the proceedings by which it was secured." See, also, Myers v. Platte Valley Public Power & Irr. Dist., 159 Neb. 493, 67 N. W. 2d 739.

Plaintiff's petition substantially alleged that on May 25, 1954, during daylight hours and outside of the corporate limits of any city, she was driving her car on highway No. 89 to the right of the center thereof, when defendant driving his car overtook plaintiff and attempted

to pass her, but unlawfully and negligently turned back to the right side of the highway before he was sufficiently clear of plaintiff's car, and in doing so struck plaintiff's car suddenly and violently, disabling and hurling it off the highway toward the right causing plaintiff to lose control thereof, as a result of which plaintiff's car, after crossing a roadside ditch, struck a pole, wrecking her car and causing her to be thrown against the side of her car, as a result of which she suffered pain, personal injuries, impairment of efficiency in her work, and was required to expend $84.50 for necessary medical treatment. Plaintiff also alleged that as a result of defendant's negligence her car was damaged $50 over and above the insurance recovered by her. She prayed judgment against defendant for such damages and costs.

Thereafter defendant filed a motion to make plaintiff's petition more definite and certain by setting forth the nature and extent of the damages to her car, the fair and reasonable value of the repairs to same, and the amount received from her insurance company. Subsequently such motion was heard and overruled, whereupon, as requested by defendant, he was given 20 days to further plead. Thereafter defendant filed an answer denying generally and alleging that at the time and place alleged plaintiff and defendant were driving their respective cars east on highway No. 89 and a collision occurred west of Beaver City when plaintiff, having passed defendant and returned to the right side of the highway, sharply reduced her speed. That thereupon defendant overtook and passed her, but upon returning to the right side of the highway ahead of plaintiff she suddenly turned somewhat to the left and increased her speed, causing the left front of her car to collide with the right rear of defendant's car, after which plaintiff failed to gain control of her car or bring it to a stop, but accelerated its forward motion so that it went off the highway into the south roadside ditch, collided with a fence and breaking off posts, then continued east, where

it collided with and broke off a telephone pole, and stopped some distance east therefrom. Defendant admitted that both cars sustained some damage, but alleged that the larger portion of damages to plaintiff's car was caused by her failure and inability to reduce her speed and control her automobile. The answer further alleged that if plaintiff suffered any personal injuries they were minor, not disabling so as to prevent her from carrying on a livelihood, as she had fully recovered from any injuries sustained. Defendant prayed for dismissal of plaintiff's petition. Thereafter plaintiff filed a reply in the nature of a general denial.

Subsequently, on February 21, 1955, the day before a trial upon the merits, a pre-trial hearing was held upon the alleged items of damage to plaintiff's car, whereat the trial court ruled and ordered that as pleaded the damage alleged in plaintiff's petition was not a proper item of damage and that no evidence would be permitted to be adduced during the trial with relation to such damages. In doing so, the trial court evidently had in mind Shiman Brothers & Co. v. Nebraska National Hotel Co., 143 Neb. 404, 9 N. W. 2d 807, wherein we held: "Under a statute providing that every action must be prosecuted in the name of the real party in interest, if the insurance paid by an insurer covers only a portion of the loss, the right of action against the wrong-doer who caused the loss remains in the insured for the entire loss and the action must be brought by him in his own name." See, also, Annotation, 157 A. L. R. 1251.

However, immediately after the court had made such ruling, plaintiff in open court requested leave to file an amended petition to show the full amount of damages to her car, and although the record does not show that defendant made any objection to plaintiff's request, the trial court denied it. Plaintiff excepted to such ruling, and at the trial the next day, although it actually would have presented no new issue and defendant's answer would have been adequate to meet the issue with regard

to the amount of plaintiff's damages to her car, and although there was ample evidence admitted without objection by defendant during the trial with regard to the physical extent of the damages to plaintiff's car, the trial court refused to submit the issue of the amount of damages thereto, and foreclosed plaintiff's right to recover same or any part thereof. Further, during the trial, plaintiff was given leave to withdraw her rest for the purpose of making an offer of proof. Her counsel said: "In view of the court's ruling on our pre-trial discussion yesterday that no evidence would be received as to the amount of the damage to the automobile, the plaintiff offers to prove that the damage to the automobile amounted to $242.64 of which her insurance company has paid her $192.64, leaving a balance of $50.00 for which she has not been reimbursed." Thereupon, counsel for defendant said: "We object to the offer of proof for the reason that to permit an amendment of the petition and to interpose an additional element of damage at this time would be unfair and would constitute an element of surprise to the defendant." The trial court sustained such objection.

Although it might be argued that plaintiff's offer of proof was broader than she would be permitted to establish, no such objection was ever made by defendant. Also, no offer whatever was required to be made by plaintiff in order to preserve a review of the question. The general controlling rule in that regard is that an actual offer of evidence upon an issue is not necessary in order to preserve the question for review if the trial court has theretofore ruled, as it did in this case, that no proof upon that issue would be received in any event, and the alleged error in doing so has been appropriately preserved by motion for new trial or otherwise.

As stated in 3 Am. Jur., Appeal and Error, § 354, p. 98: "But the actual offer of evidence upon an issue is not necessary to preserve the question for the appellate court if the trial court rules that no proof upon that

issue will be received." See, also, LaRault v. Palmer, 51 Wash. 664, 99 P. 1036, 21 L. R. A. N. S. 354.

We turn then to the question of whether or not under the circumstances the trial court erred prejudicially when it refused to permit plaintiff to amend her petition in order to properly present the issue of damages to her car. The trial court in effect held that it was prejudicial error and we sustain that conclusion. Section 25-852, R. R. S. 1943, provides: "The court may, either before or after judgment, in furtherance of justice, and on such terms as may be proper, amend any pleading, process or proceeding, by adding or striking out the name of any party or by correcting a mistake in the name of the party, or a mistake in any other respect, or by inserting other allegations material to the case, or, when the amendment does not change substantially the claim or defense, by conforming the pleading or proceeding to the facts proved. Whenever any proceeding taken by a party fails to conform, in any respect, to the provisions of this code, the court may permit the same to be made conformable thereto by amendment."

This court construed and applied that section in Louis Hoffman Co. v. Western Smelting & Refining Co., 150 Neb. 524, 34 N. W. 2d 889. Therein we held that: "The law of amendments should be liberally construed in order to prevent a failure of justice.

"Except as otherwise provided by statute or rule of court, a party seeking to amend a pleading is not required to do so in any particular form or manner, nor to support his application therefor by affidavit, if the court is in some appropriate manner informed of the nature and purpose of the proposed amendment." In that opinion we said: "With reference thereto, this court said in Curren v. Certain Parcel of Land, 149 Neb. 477, 31 N. W. 2d 405: 'The plaintiff urges that the plain intent of this statute is to determine in one action all conflicting claims of the parties, citing Hanson v. Hanson, 78 Neb. 584, 111 N. W. 368; Draper v. Taylor, 58 Neb.

787, 79 N. W. 709; that in all cases an amendment should be allowed if it is in furtherance of justice (Zancanella v. Omaha & C. B. Street Ry. Co., 96 Neb. 596, 148 N. W. 158); and should be allowed even after the close of the evidence if the adverse party is not prejudiced (Blondel v. Bolander, 80 Neb. 531, 114 N. W. 574). With this contention we are in accord, * * *.'

"As early as Berrer v. Moorhead, 22 Neb. 687, 36 N. W. 118, this court held: 'The law of amendments should be liberally construed in order to prevent a failure of justice.' The progressive evolution of procedure in our courts has not changed that rule, but has demonstrated the necessity of its continuing judicial application. * * *

"Likewise, it was held in Westrope v. Anderson, 98 Neb. 57, 151 N. W. 955: 'Amendments of pleading should be allowed whenever such amendments appear to be "in furtherance of justice." When such amendments make a continuance necessary, or otherwise increase the costs, such terms should be imposed as are just under the circumstances.' "

In the case at bar the record does not disclose that defendant's rights would have been prejudiced in any manner by permitting plaintiff to amend as requested. Assuming otherwise, however, defendant had a remedy, since the trial court in permitting the amendment had the power and duty to impose such terms and conditions upon plaintiff as were reasonable and just to protect defendant's rights. On the other hand, the refusal to permit the amendments arbitrarily and erroneously deprived plaintiff of a substantial right to prosecute her claim for damages to her car and left her without any remedy except by appeal on the merits. The record discloses that the trial court was of necessity informed at the pre-trial hearing of the nature and purpose of the amendments proposed by plaintiff, and we conclude that the trial court abused its discretion in denying plaintiff the right to amend as requested. When plaintiff asked leave on the day before the trial to file an

amended petition to which no objection was made by defendant, it should have been granted. The trial would not of necessity have been delayed, the issues would not have been changed, and defendant would not have been prejudiced. In the light thereof, a new trial was properly granted.

The record in this case discloses ample competent evidence from which the jury could have concluded that defendant was liable, and plaintiff argued that the recovery of only $180 for medical expenses, loss of earnings, pain and suffering, and personal injuries was grossly inadequate. The trial court sustained that contention and we conclude that the trial court was correct in doing so.

In Ambrozi v. Fry, 158 Neb. 18, 62 N. W. 2d 259, this court reaffirmed that: "When the amount of the damages allowed by a jury is clearly inadequate under the evidence in the case, it is error for the trial court to refuse to set aside such verdict." On the other hand, in the same case we reaffirmed that: "'* * * where the recovery awarded is sufficient to probably do justice to the injured party, an appellate court should not interfere.'"

In the light of such rules, we have examined the evidence with regard to plaintiff's medical expenses, loss of earnings, pain and suffering, and personal injuries caused by the accident. It was stipulated that the reasonable value of medical expenses necessarily incurred by plaintiff as a result of the accident was $84.50. Plaintiff was a widow 52 years old. She was a farmer who managed her own farm and taught school as well during 8 months of the year. Her son was in the military service and her two daughters were in college, so she got little assistance from them. Previously, plaintiff's lower right limb had been somewhat disabled by polio, and she operated the accelerator and brake on her regulation 1952 4-door Deluxe Chevrolet car with her left foot. When struck by defendant's car, while admittedly being driven by

defendant at more than 40 miles an hour, plaintiff's own car was thrown suddenly and violently out of control toward the south across a ditch where it struck and broke a fence post or posts, then went on east where it broke off a telephone pole and, disabled, stopped some distance therefrom. As a result, the front of her car was wrecked and plaintiff was thrown around, out of her car seat, against the steering wheel and sides of her car, which caused her to almost black out for several minutes and to have a severe backache, headache, and nervousness. Her body was bruised on both the right and left sides. Both of her lower limbs from knee to thigh were bruised, and her left arm was bruised. Her disability and pain having continued for about 6 days, she consulted a physician at McCook who examined and prescribed for her upon five different occasions during June, July, and August 1954. As directed by her physician, she also consulted an orthopedist from Lincoln who examined her and took X-rays. During August, as directed by her physician who was still unable to relieve her disability, she consulted a chiropractor who gave her three treatments. She was unable to work in her fields for at least 8 days, then she first worked during 1 or 2 hours, and later as much as 4 hours a day. Her back pained her all the time, and she could not rest at night for about 3 months. Even at time of trial she had headaches at night and a slight nervousness. During the 1953-1954 8-months school year she earned $400 a month teaching in a school where 14 students attended. During the 1954-1955 8-months school year such a school was too much of a strain, so she obtained a school with only nine pupils and four grades, which required her to take a cut in salary of $25 a month for the term. During that period she lived in a trailer near the schoolhouse and some week ends drove back and forth to her farm where she had hired help to look after her stock and farming interests.

On February 16, 1955, about a week before the trial,

plaintiff was examined by another physician at request of defendant's counsel. Such physician testified for defendant. On direct examination, he testified that plaintiff did not then complain of any localized pain or tenderness in her back. His X-ray examination did disclose some fairly normal compensating lumbar curvature due to the shortening of her right limb, and some degenerative arthritis, but he believed it was doubtful that such had any relation to her injury received in the accident of May 25, 1954. Plaintiff did then complain to him about nervousness and generalized headaches in the top of her head in the evening after work. On direct examination, he also gave his opinion that his examination showed no residual damages from the accident. However, on cross-examination, he agreed that the difficulty she was experiencing could be reasonably attributed to her condition after the accident, and he testified that in his opinion some aggravation of her degenerative arthritis would be caused by the accident.

In the light of such evidence, we conclude, as the trial court must have done, that if defendant was liable to plaintiff, as concluded by the jury, then the amount of $180 for her personal injuries, pain and suffering, loss of earnings, and necessary medical expenses was so grossly inadequate that the trial court was right in granting a new trial. In that connection we note also that plaintiff was not permitted by the trial court to recover any damages to her car.

We conclude that the trial court was correct in granting a new trial, and its action in doing so should be and hereby is affirmed at costs of defendant.

AFFIRMED.