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REPORTS OF CASES

DECIDED BETWEEN

MARCH 2, 1963 and NOVEMBER 22, 1963

IN THE

Supreme Court of Nebraska

JANUARY TERM 1963 and SEPTEMBER TERM 1963

VOLUME CLXXV

WALTER D. JAMES
OFFICIAL REPORTER

GANT PUBLISHING COMPANY
LINCOLN, NEBRASKA
1964

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For the benefit of the State of Nebraska

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CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

JANUARY TERM, 1963

HAROLD M. HAGUE ET AL., APPELLEES, V. DONALD STERNS, APPELLANT.

120 N. W. 2d 287

Filed March 8, 1963. No. 35335.

1. **Appeal and Error.** In the absence of a bill of exceptions it is presumed that issues of fact presented by the pleadings are established by the evidence and the only issue that will be considered on appeal is the sufficiency of the pleadings to sustain the judgment.
2. **Landlord and Tenant.** In the absence of a statute to the contrary a tenancy cannot be terminated for the breach of a covenant, condition, or collateral agreement by the lessee unless there is an express and distinct provision in the lease for a forfeiture or right of reentry on the occurrence of the breach.
3. ———. Forfeitures of estate under leases are not favored in law and the right to forfeit must be clearly stipulated. If a forfeiture has not been stipulated for, a covenant or condition which is merely implied, or an express one not clearly within the forfeiture clause, will not sustain a claim of forfeiture for breach.
4. ———. The general rule as to forfeiture and the right of reentry has no application in this state to a breach of covenant for the nonpayment of rent in a forcible entry and detainer action by virtue of section 27-1402, R. R. S. 1943.
5. **Pleading: Judgments.** A petition that does not contain facts sufficient to constitute a cause of action will not support a judgment rendered thereon.

Appeal from the district court for Holt County: WILLIAM C. SMITH, JR., Judge. Reversed and remanded with directions to dismiss.

Edward E. Hannon, for appellant.

William W. Griffin and D. R. Mounts, for appellees.

Heard before WHITE, C. J., CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

CARTER, J.

The plaintiffs, as lessors of the real estate described in the petition, commenced this action in the district court for Holt County against the defendant, as lessee, to declare a forfeiture of the 3-year written lease entered into by them. The trial court found for the plaintiffs, declared a forfeiture of the lease, and directed that plaintiffs be placed in possession of the lands involved. The defendant has appealed.

There is no bill of exceptions in this case. The only question before the court is whether or not the pleadings sustain the judgment. Johnson v. School Dist. No. 3, 168 Neb. 547, 96 N. W. 2d 623. In the absence of a bill of exceptions it will be presumed that issues of fact presented by the pleadings are established by the evidence. Defendant contends the action is one at law and that he was erroneously deprived of a jury trial. This question was not presented to the trial court by defendant's motion for a new trial. Under such circumstances that question cannot be raised on appeal. King v. Cass County, 141 Neb. 263, 3 N. W. 2d 449.

The defendant demurred to the petition on the ground that the petition did not state a cause of action. He also alleged the insufficiency of the petition in his answer. The only question properly raised by the appeal is whether or not the petition states a cause of action or, in other words, whether or not the pleadings support the judgment.

The petition alleged that plaintiffs entered into a written lease with the defendant on February 5, 1962, for a period of 3 years. Copy of the lease was attached to and made a part of the petition. It provided for rent on a share-crop basis. The lease contained some of the

usual covenants, some unusual conditions, and some collateral agreements.

The lease contained the following provision: "As to all acreages which are now the subject of Soil Bank agreements, and which are idle, the parties of the first part shall be entitled to have and receive all government payments or benefits therefrom, and second party shall have no right or interest therein, and will agree to sign any such additional documents as may be required to release any interest or claim therein on his part." The petition alleged that on or about March 9, 1962, defendant received a diverted-acres payment in the sum of $1,699.30, which defendant refused to pay over to plaintiffs on demand. Plaintiffs alleged their election to forfeit the lease and demanded that defendant forthwith quit and surrender the leased premises, which he refused to do.

The lease contains no provision for the forfeiture or right of reentry for the breach of any covenant, condition, or collateral agreement. The absence of a forfeiture or reentry provision in the lease and the failure to allege such a provision in the petition is fatal to plaintiffs' cause of action.

"In the absence of a statute to the contrary, a tenancy cannot be terminated for a breach of a covenant by the lessee unless there is an express and distinct provision in the lease for a forfeiture or right of reentry on the occurrence of the breach or unless the breach disaffirms or impugns the title of lessor and tends to defeat the reversion." 51 C. J. S., Landlord and Tenant, § 104, p. 683. "The landlord has no right of reentry for breach of covenant unless the covenant is valid and enforceable, and there is a stipulation in the lease that the breach shall work a forfeiture or termination of the tenant's interest, or confer on the landlord a right of reentry, * * *." 52 C. J. S., Landlord and Tenant, § 718, p. 581. See, also, 52 C. J. S., Landlord and Tenant, § 730, p. 591; 32 Am. Jur., Landlord and Tenant, § 848, p. 720.

In Chesnut v. Master Laboratories, 148 Neb. 378, 27 N. W. 2d 541, this court said: "Forfeitures of estate under leases are not favored in law and the right to forfeit must be clearly stipulated. If a forfeiture has not been stipulated for, a covenant or condition which is merely implied, or an express one not clearly within the forfeiture clause, will not sustain a claim of forfeiture for breach." See, also, Ocean Grove Camp Meeting Assn. v. Sanders, 68 N. J. L. 631, 54 A. 448; Dillingham v. Williams (Tex. Civ. App.), 165 S. W. 2d 524; Chopot v. Foster, 51 Wash. 2d 406, 318 P. 2d 976.

The foregoing rule has no application in this state to a breach of covenant for the nonpayment of rent in a forcible entry and detainer action by virtue of section 27-1402, R. R. S. 1943. The present action is not one for forcible entry and detainer and this statute is not pertinent to the instant case.

The petition in the instant case shows that the lease contained no forfeiture or reentry provisions. It is not an action within the scope of section 27-1402, R. R. S. 1943. The right of forfeiture or reentry does not therefore exist as a matter of law. The petition does not state a cause of action and the judgment entered thereon is not sustained by the pleadings. See Sallander v. Prairie Life Ins. Co., 112 Neb. 629, 200 N. W. 344, wherein we said: "We further conclude that, as the judgment was rendered on a petition which does not state a cause of action, it cannot be sustained, and should be and is set aside." The petition affirmatively shows that a cause of action for forfeiture does not exist.

The judgment of the district court is reversed and the cause remanded with directions to dismiss the petition.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

BENNETT A. ROBINS, APPELLEE, V. GERALD F. SANDOZ, APPELLANT.

120 N. W. 2d 360

Filed March 8, 1963. No. 35348.

1. **Automobiles: Negligence.** As a general rule it is negligence as a matter of law for a motorist to drive an automobile so fast on a highway at night that he cannot stop in time to avoid a collision with an object within the area lighted by his headlights.
2. ———: ———. In a case where there is evidence that the operator of a motor vehicle on a highway at night collided with an object on account of his failure to see it, although it was within the range of his headlights, and on account thereof it may be said that he was guilty of negligence as a matter of law, and there is also evidence of negligence on the part of the party injured or damaged by the collision, a question for determination by a jury is presented under the comparative negligence statute.
3. **Negligence.** The fact that a party may be guilty of negligence as a matter of law does not bar him from asserting the benefits of the comparative negligence statute.
4. **Appeal and Error.** A party is not entitled to appeal from an order or the rendition of a judgment which was made with his consent or upon his application.

Appeal from the district court for Sheridan County: ALBERT W. CRITES, Judge. Reversed and remanded.

Everett A. Anderson, for appellant.

Frank F. Aplan, Charles A. Fisher, and Charles F. Fisher, for appellee.

Heard before WHITE, C. J., CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

YEAGER, J.

This is an action for damages to personal property by Bennett A. Robins, plaintiff and appellee, growing out of a collision between an automobile of the plaintiff and one which was owned and operated by Gerald F. Sandoz, defendant and appellant. The action was based on alleged negligence on the part of the defendant. The defendant filed an answer in which he denied that he was guilty of any negligence. He also filed a cross-

petition in which he charged that the collision was caused by the negligence of the plaintiff. The purpose of the cross-petition was to recover damages on account of personal injuries he claimed he had sustained and property damage to the automobile which he had operated.

A jury was duly impaneled and evidence was adduced by the parties. After the evidence of the parties had been adduced the plaintiff moved in the alternative for a directed verdict in favor of the plaintiff and against the defendant on the cross-petition, or to dismiss the cross-petition.

The defendant moved for a directed verdict in his favor.

The plaintiff then renewed his motion for directed verdict, and also moved that the court submit to the jury for determination only the question of the property damage to the plaintiff's automobile and his glasses.

The court sustained the motion to dismiss the cross-petition; found in effect as a matter of law that the plaintiff was guilty of no negligence and that the defendant's negligence was the sole cause of plaintiff's damage; and by recital in the bill of exceptions the court directed the jury to return a verdict in favor of plaintiff and against the defendant "in the sum of the stipulated amount of $1866." The stipulation referred to is the following: "It is stipulated and agreed that the amount of damages sustained by the plaintiff, the property damage to the 1960 Buick automobile and the glasses is $1866, and the jury may return a verdict for that amount." No formal written instruction appears in the record, but a verdict was accordingly returned and judgment rendered thereon.

The judgment contains the following: "The parties then stipulated that the damages sustained by the plaintiff were the sum of $1,866.00, and that the jury should be directed to enter verdict in this amount, not waiving the right of defendant, to appeal, or claim error on other

matters than the amount of the damages. The Court then directed the jury to return verdict for the plaintiff of $1,866.00 * * *." Motion for new trial or for judgment notwithstanding the verdict was duly filed which motion was overruled. From this judgment and the order overruling the motion the defendant has appealed.

A number of assignments of error as grounds for reversal are set forth in the brief, but the total substance of all of the contentions is found in one of them, as follows: "The trial court erred in finding and holding that there was no issue to be submitted to the jury under the defendant's theory of the case."

By his answer and cross-petition the defendant alleged that the negligence of the plaintiff solely and proximately caused the collision. The effect of the adjudication was to say that the evidence in the case was insufficient to justify a submission to the jury of the question of whether or not the plaintiff was guilty of negligence which proximately caused or contributed to the collision. The defendant alleged that the plaintiff was guilty of negligence in the following particulars: In stopping and parking upon the highway in a negligent manner and in violation of section 39-757, R. R. S. 1943; in failing to maintain a proper lookout; in failing to warn the defendant that the plaintiff's vehicle was parked in the defendant's lane of traffic; and in maintaining signal lamps and devices on his automobile in a defective condition.

By the assignments of error the question of whether or not there was evidence supporting these allegations or any of them sufficient for submission of the case for determination by a jury is presented. This requires a summary of the pertinent evidence, much of which is not in dispute.

On July 4, 1961, at about 9 p.m., the plaintiff was driving his 1960 Buick automobile in a northerly direction on Highway No. 87 and when he reached a point about 2 miles south of White Clay, Sheridan County,

Nebraska, the right rear tire became flat and he drove over to the right or east side of the road and stopped to change the tire. He got out and prepared to change the tire. After he had been stopped for a period of time, estimated at from 15 to 20 minutes, the defendant came also from the south and drove an automobile into the rear end of the plaintiff's automobile. The front end of the defendant's automobile struck the rear end of plaintiff's automobile. As a result the two automobiles were piled up on the east side of the highway. The defendant estimated that his automobile was at the time moving at a rate of speed of 55 to 60 miles an hour. The night was dark but the weather condition was good. The view of the location to the south was not obstructed for as much as a quarter of a mile, and to the north there was no highway obstruction having a bearing on the accident.

There is no information as to the established width of the highway at the point involved, but it did have a traveled surface of a width of about 23 feet. At the approximate center was a white line. A witness testified, and the testimony is not disputed, that the width of the traveled surface to the west of the dividing line was 12 feet and to the east 10 feet 8 inches. The automobile of the plaintiff was stopped with its right rear wheel a short distance off the surface to the east which gave him needed opportunity to place the jack on the traveled surface for the purpose of changing the tire. There was some evidence bearing on the question of whether or not there was space farther to the right which the plaintiff could have occupied for the purpose of changing the tire, which would have afforded more space for passing in the north-bound driving lane. There was no obstruction between the west side of plaintiff's automobile and the west edge of the traveled surface. The clear space to the west or left-hand side of the highway was the portion west of the dividing line plus the distance

from the dividing line to the west side of the plaintiff's automobile at the time of the collision.

In dispute is the question of whether or not the rear lights on plaintiff's automobile were lighted when it was run into. The testimony of the plaintiff is that they were. He testified that the lens in the right light was broken but that both lights were on. The testimony of the defendant was that he did not see the lights and his conclusion was that they were not on. The defendant testified that he did not and could not see plaintiff's automobile until he was from 40 to 60 feet from it and on this account he did not have time or opportunity to stop or turn aside and avoid striking it. There was some evidence on behalf of defendant that a car coming from the north had its dim lights on. It is not disputed that the automobiles of plaintiff and defendant were on their right side of the highway at the time of collision.

It is obvious that the trial court concluded that the collision was caused solely by the negligence of the defendant and that the plaintiff was free from negligence or contributory negligence. If the record sustains this conclusion then the action of the court was proper and in such event the judgment was proper. If however there was evidence of contributory negligence the comparative negligence rule applies and a question for the jury was presented.

In Hilferty v. Mickels, 171 Neb. 246, 106 N. W. 2d 40, it was said: "Because of the comparative negligence statute, even though appellee was guilty of negligence as a matter of law and if it may be found that appellant was guilty of only slight negligence, the question of whether or not the negligence of appellee was gross in comparison therewith would still be a factual one for determination of the trier of the facts." See, also, Bezdek v. Patrick, 170 Neb. 522, 103 N. W. 2d 318.

The first point of negligence charged against the plaintiff is that he was negligently parked in violation of section 39-757, R. R. S. 1943. The last sentence of this

provision only has strict application in the case here. Under the facts disclosed it is clear that an emergency as contemplated existed and the plaintiff had, under the circumstances, a temporary right to stop for the purpose of changing the tire. That right however was contingent upon his exercise of due care under the circumstances.

In Anderson v. Robbins Incubator Co., 143 Neb. 40, 8 N. W. 2d 446, this court pointed out, in a situation similar to the one involved here, that this is evidence of negligence to be taken into consideration with all of the other facts and circumstances in determining whether or not negligence existed. In other words a jury question was presented. The main difference in the two cases is that there the owner of the parked car was at the trial denied a right to recover on the ground that negligence on his part in parking defeated his right of recovery, whereas here the holding was that parking could not be asserted as a defense.

To defeat the right of the defendant to assert and to have submitted his charge of negligence and contributory negligence of the plaintiff, the plaintiff relies on the general rule announced in Roth v. Blomquist, 117 Neb. 444, 220 N. W. 572, 58 A. L. R. 1473, as follows: "As a general rule it is negligence as a matter of law for a motorist to drive an automobile so fast on a highway at night that he cannot stop in time to avoid a collision with an object within the area lighted by his lamps." There has been no departure from this as a general rule in the later cases. See, Guerin v. Forburger, 161 Neb. 824, 74 N. W. 2d 870; Davis v. Dennert, 162 Neb. 65, 75 N. W. 2d 112.

In the briefs in this case the defendant does not urge that there was no evidence of negligence on his part. He bases his presentation on the proposition only that there was evidence that the plaintiff was guilty of negligence or contributory negligence necessary to be submitted to a jury for comparison with the negligence of the de-

fendant pursuant to the comparative negligence statute.

It becomes clear therefore that, although there are numerous cases wherein the defensive rights of motorists who have run into objects on highways in the nighttime have been considered and referred to as exceptions to the quoted pronouncement in Roth v. Blomquist, *supra,* and while there is some relation in subject matter, neither the rule nor these cases may be regarded as determinative of the question involved here. The question here is that of whether or not the defendant may defend on the ground of negligence of the plaintiff. There is nothing in the rule in that case or in the exceptions which denies to him that right.

In a situation such as this, where the evidence is in dispute, a question is presented for determination by a jury. See, Miers v. McMaken, 147 Neb. 133, 22 N. W. 2d 422; Segebart v. Gregory, 156 Neb. 261, 55 N. W. 2d 678; Haight v. Nelson, 157 Neb. 341, 59 N. W. 2d 576, 42 A. L. R. 2d 1; Fick v. Herman, 159 Neb. 758, 68 N. W. 2d 622; Guerin v. Forburger, *supra.* This is made particularly clear in Anderson v. Robbins Incubator Co., *supra.*

In the light of these observations and the evidence it becomes apparent that there was a disputed question of fact as to whether or not the plaintiff was guilty of negligence which caused or contributed to the collision which question should have been submitted to a jury for determination.

This conclusion disposes adversely to the plaintiff of all questions presented by the assignments of error. There does remain, however, a contention of the plaintiff, the effect of which is to say that the defendant, by the stipulation as to the amount of plaintiff's damages, has destroyed and waived his right to a review by this court.

It is of course true that a party is not entitled to prosecute error upon the granting of an order or the rendition of a judgment when the same was made with his con-

sent, or upon his own application. See Pahl v. Sprague, 152 Neb. 681, 42 N. W. 2d 367. This rule has no application here in the light of what is disclosed by the record.

The bill of exceptions discloses that the trial court announced that all matters except the amount of plaintiff's damages were decided in his favor, but the determination of the amount of damages would be submitted to the jury. The defenses in this area had been rejected by the court. After this had been announced the parties stipulated that the amount of damages was $1,866 and the jury was instructed to return a verdict for this amount.

The face of the stipulation in the bill of exceptions does not make exactly clear what was intended. The judgment from which the appeal herein is taken does make clear the intention of the parties and of the court. It is thus made clear by the part of the judgment which has been quoted herein that the intention and purpose was to say only that the collision caused damage to the property of the plaintiff in the amount of $1,866. The right of appeal was not waived but was expressly reserved. The right of the defendant to appeal has not been destroyed by the stipulation.

For the reasons herein stated the conclusion reached is that there was evidence adduced sufficient for the submission of the pleaded defense for a determination by the jury, and accordingly the judgment of the district court is reversed and the cause remanded for a new trial on all of the issues presented by the pleadings.

REVERSED AND REMANDED.

CITY OF MILFORD, NEBRASKA, A MUNICIPAL CORPORATION, APPELLANT, V. EDWARD SCHMIDT, APPELLEE.

120 N. W. 2d 262

Filed March 8, 1963. No. 35353.

1. **Municipal Corporations.** All ordinances of a general nature in

a city of the second class shall be published before they take effect.

2. **Municipal Corporations: Nuisances.** The only power which a city has to declare the maintenance of a trailer coach a nuisance is to find that it violates the interests of peace, public health, public morality, public safety, or the general welfare of the city.
3. **Municipal Corporations.** The exercise of the police power delegated to municipal corporations cannot be invoked on purely esthetic grounds.
4. ———. A code provision requiring a permit does not clothe the issuing body with an arbitrary power to refuse to issue permits.
5. ———. Authority to regulate does not give power to suppress.
6. **Zoning: Municipal Corporations.** Generally, the test of validity of zoning action or a zoning ordinance is whether or not such action or ordinance is in accord with a comprehensive plan of zoning as required by enabling statutes, and whether or not it is lawfully designed to promote the general welfare or other objectives specified in the enabling statutes, rather than merely to benefit individual property owners or to relieve them from the harshness of the general regulation as applied to their property.
7. **Municipal Corporations.** A municipal corporation is a creature of the law established for special purposes, and its corporate acts must be authorized by its charter and other acts applicable thereto. It therefore possesses no power or faculties not conferred upon it, either expressly or by fair implication, by the laws which created it or by other laws, constitutional or statutory, applicable to it.

Appeal from the district court for Seward County: H. EMERSON KOKJER, Judge. Affirmed.

Ivan A. Blevens, for appellant.

John McArthur, for appellee.

Heard before WHITE, C. J., CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

SPENCER, J.

This is an action by the city of Milford to enjoin Edward Schmidt, hereinafter referred to as Schmidt, from maintaining a house trailer on property owned by him in said city. The trial court denied the injunction and the city of Milford perfected its appeal to this court.

Milford is a city of the second class, with a popula-

tion of 1,480. Hereafter, for convenience, it will be referred to as city. It is the home of the Nebraska Trade School, which is located on a 10-acre tract across the road from the Schmidt property. Schmidt's property, which has been devoted to business or commercial use for several years, is located on the south side of U. S. Highway No. 6 which runs along the eastern and southern edge of the city. The city has two trailer courts. One is on the eastern edge across the highway and approximately 200 feet from the Schmidt property. The other is on the western edge of the city. Schmidt lives in and maintains his trailer next to and west of his place of business, which is a restaurant building in two sections. One of these sections is operated as a restaurant and the other as a soft ice cream facility.

The city's petition alleges that under its general statutory police powers it had enacted certain ordinances for the protection of the public health, safety, and welfare. It then sets out section 10-105 of the Revised Municipal Code of Milford, Nebraska, 1953, which is as follows: "Permits must be secured from the Board of Trustees of Milford, for the locating of Trailer Houses in said Village, if they are to remain in said Village for a period of time exceeding 30 days."

It then sets out the provisions of Article 1, chapter 5, of the Code, which defines "nuisances" generally and specifically and authorizes their abatement by injunction. The only provision of Article 1 which could be even remotely pertinent to this action is the following: "(5) The erection or maintenance of any building or structure in such a manner as to be unsafe, injurious or annoying to the public health or safety or so unsightly as to depreciate the value of property in the vicinity thereof."

The petition then alleges that ordinance No. 297, which is attached to the petition, was duly passed and adopted by the city on September 28, 1961. Ordinance No. 297 is a very comprehensive ordinance for the licens-

ing of trailer courts within the city. The title of ordinance No. 297 is as follows: "An ordinance defining and regulating trailer courts in the city of Milford, and within an area of one-half mile from the corporate limits of said city, establishing minimum standards governing the construction and maintenance of trailer courts; establishing minimum standards governing the provided utilities and facilities, and other physical things and conditions to make trailer courts safe, sanitary and fit for human habitation; fixing the responsibilities and duties of owners and operators of trailer courts; authorizing the inspection of trailer courts; to prohibit the placing, keeping, or maintaining of a trailer coach within said city, or within an area of one-half mile from the corporate limits of said city, at a location other than a duly licensed trailer court; and to regulate an area within one-half mile of the corporate limits of said city under the provisions of section 17-1001, Revised Statutes of Nebraska, 1943, Supplement of 1958; and fixing penalties for violation."

Sections II and III, of ordinance No. 297, are applicable to and are the only provisions applicable to a single trailer coach. They are as follows: "SECTION II. REGULATION. It shall be unlawful for any person to place, keep, maintain, or to permit the placing, keeping, or maintenance of a trailer coach used for human habitation, either temporary or permanent, on any street, alley, drive, plot or lot, within the City of Milford for more than twenty-four hours at any location other than within a duly licensed trailer court. The removal of wheels, or the placement of a trailer coach on a permanent foundation shall not constitute an exception to this section.

"SECTION III. REGULATION. It shall be unlawful for any person to place, keep, maintain, or to permit the placing, keeping, or maintenance of a trailer coach at any place within an area of one-half mile from the corporate limits of the City of Milford, which said area

is hereby so regulated under the provisions of Section 17-1001, Revised Statutes of Nebraska, 1943, Supplement of 1958, except within a duly licensed trailer court. The removal of wheels, or the placement of a trailer on a permanent foundation shall not constitute an exception to this section."

The petition alleges that prior to the placement of the trailer within the city, Schmidt requested a permit to maintain the trailer coach within the city but that the request was denied by the mayor and council of the city. It alleges that in violation of the above ordinances, Schmidt is maintaining the trailer coach on private property within the city. It further alleges that the trailer constitutes a structure annoying to public health and safety and is so unsightly as to depreciate the value of the property in the vicinity and constitutes a nuisance. Digressing for a moment, on the allegation of being unsightly, the testimony of the witnesses for the city is that Schmidt's trailer is a "good looking trailer," and would be readily admitted in the existing trailer courts.

Schmidt's answer in substance alleges his ownership of the property on which the trailer is maintained, the establishment of facilities for a mobile home prior to the enactment of the ordinances mentioned in the city's petition, and that the ordinances are unconstitutional and void as to him.

The mayor, the chief witness for the city, testified that when Schmidt first talked to him there was an ordinance which permitted the issuance of a permit, but that the city was not issuing them. He testified further that it is the city's position that under no circumstances will it permit Schmidt to live in a trailer house on his own land. The reason given by the mayor for the city's position is that a trailer depreciates the value of other property surrounding it, and if the city permitted Schmidt to have a trailer coach on his property, anyone else in town could do the same thing.

Ordinance No. 297 was adopted at a special meeting

called for that purpose on September 28, 1961. The ordinance provided that it should be in effect from and after the 28th day of September 1961. There was no publication of the ordinance until October 11, 1961, when it was published in the Milford Times, a legal newspaper. Section 17-613, R. R. S. 1943, provides in part: "All ordinances of a general nature shall, *before they take effect,* be published, within one month after they are passed, * * *." (Italics supplied.) In certain limited emergencies, none of which is applicable herein, ordinances may become effective upon proclamation of the mayor.

There is no dispute in the record that the utility connections being used by the trailer are not code installations, because the city refuses to approve or authorize such connections. The connections being presently used are attached to the utility facilities serving the business located on the premises. The evidence is also undisputed that Schmidt is willing and anxious to comply with the code regulations covering the utility connections if the city will issue him a permit for the trailer at its present location and will permit proper code installations.

The trial court found generally for Schmidt. The ordinances were held not to be unconstitutional, but as construed not to effect Schmidt if he complies with the ordinances requiring proper sewer, water, and electricity connections.

The city appeals, alleging three assignments of error: (1) The court erred in finding that ordinance No. 297 could not be construed to prohibit the defendant from maintaining a trailer coach on his own land; (2) the court erred in finding defendant could maintain said trailer coach without a permit from the city; and (3) the court erred in finding the act of the defendant in maintaining his trailer coach did not constitute a nuisance. We will consider these assignments in inverse order.

Schmidt's trailer coach is described by the city's witnesses as a "good looking trailer." It is located on a highway in an area which has been and is devoted to commercial pursuits and is within 200 feet of an existing trailer court. The record is very meager on this point but it is fairly evident that the trailer is entirely compatible with the area. The code does not define the maintenance of a trailer as a nuisance, and, if it did, the mere definition would not make it so unless it was a nuisance in fact. The only power which a city has to declare the maintenance of a trailer coach a nuisance is to find that it violates the interests of peace, public health, public morality, public safety, or the general welfare of the city. See, Jewel Tea Co. v. City of Geneva, 137 Neb. 768, 291 N. W. 664; Clough v. North Central Gas Co., 150 Neb. 418, 34 N. W. 2d 862.

It is difficult to understand how an acceptable trailer house, within 200 feet of a trailer court, in a commercial area and located on the owner's property, without further showing can be said to be a nuisance per se. The utility installations are not in compliance with the code, but that deficiency is the result of the city's attitude and its refusal to permit city employees to authorize the installations, and has been covered by the trial court's judgment. There is not sufficient evidence in this record to sustain a finding that the maintenance of the trailer coach where located is a nuisance.

As to the second assignment, it is true that Schmidt has never obtained a permit for the location of his trailer coach. He did, however, attempt to comply with the ordinance. The city's petition affirmatively states that a permit was denied by the mayor and council of the city. This request was made before ordinance No. 297 was operative and at a time when the municipal code provided for such permits. The judgment of the trial court essentially determined that Schmidt's application was timely made and the refusal to issue a permit was an abuse of discretion or an arbitrary action on the part

of the city council. We see no reason to disturb that finding.

The reason given for the action of the mayor and council was that they did not want trailers in Milford except in trailer courts. In this regard, we might observe that the exercise of the police power delegated to municipal corporations cannot be invoked on purely esthetic grounds. City of Scottsbluff v. Winters Creek Canal Co., 155 Neb. 723, 53 N. W. 2d 543. A code provision requiring a permit does not clothe the issuing body with an arbitrary power to refuse to issue permits. The action of the mayor and council of the city is susceptible of no other inference but that they assumed they possessed such power. As we said in State ex rel. McMonies v. McMonies, 75 Neb. 443, 106 N. W. 454, authority to regulate does not give power to suppress.

The city argues that ordinance No. 297 is not intended as a zoning ordinance but as an exercise of the police power to protect the health, safety, and morals of the community. The ordinance purports to be an exercise of the zoning power and not an exercise of the police power. Its legality as a zoning ordinance need not be decided here since it as such could have no retroactive effect on Schmidt. It could not become operative before October 11, 1961. Schmidt had attempted to get a permit and his trailer was located on his premises by at least September 29, 1961. The ordinance cannot be construed to operate retroactively to divest Schmidt of his interests under the previous code provision.

Schmidt contends ordinance No. 297 is strictly a zoning ordinance and is an unreasonable exercise of the zoning power. It is not necessary to determine the validity of ordinance No. 297 as a zoning regulation in view of our holding that it is not applicable to Schmidt. However, unless there are some provisions which are not a part of this record, we do note that the city does not appear to have any comprehensive zoning plan. Sec-

tion 19-903, R. R. S. 1943, referring to zoning regulations, provides: "Such regulations shall be made in accordance with a comprehensive plan and designed to lessen congestion in the streets; to secure safety from fire, panic, and other dangers; to promote health and the general welfare; to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentration of population; to facilitate the adequate provision of transportation, water, sewerage, schools, parks, and other public requirements. Such regulations shall be made with reasonable consideration, among other things, of the character of the district and its peculiar suitability for particular uses, and with a view to conserving the value of buildings and encouraging the most appropriate use of land throughout such municipality."

We said in Weber v. City of Grand Island, 165 Neb. 827, 87 N. W. 2d 575: "Generally, the test of validity of zoning action or a zoning ordinance is whether or not such action or ordinance is in accord with a comprehensive plan of zoning as required by enabling statutes, and whether or not it is lawfully designed to promote the general welfare or other objectives specified in the enabling statutes, rather than merely to benefit individual property owners or to relieve them from the harshness of the general regulation as applied to their property."

The municipal code, exhibit No. 2, contains some zoning regulations dividing the city into three districts: Business districts, railroad districts, and residence districts. The business districts are defined as the area where business houses are located as of December 8, 1953. At that time, there was a filling station on what is now Schmidt's property. This was destroyed by a subsequent tornado and was rebuilt as a restaurant by one of Schmidt's predecessors in interest. The residence districts are defined to include all of the village except those portions included in the business and railroad dis-

tricts. No attempt is made in the code to define in any manner what activities may be carried on in the business districts, and no standards are provided for the definition of business. Ordinance No. 297 seeks to force all trailer houses into licensed trailer courts, but does not restrict trailer courts to any particular part of the city or set up standards as to their locations, nor does it prevent their location in any of the three districts. As we view the code and ordinance No. 297, we do not believe that they constitute the comprehensive zoning plan contemplated by section 19-903, R. R. S. 1943.

A city of the second class has no power except that conferred by statute. As we said in Dell v. City of Lincoln, 170 Neb. 176, 102 N. W. 2d 62: "A municipal corporation is a creature of the law established for special purposes, and its corporate acts must be authorized by its charter and other acts applicable thereto. It therefore possesses no power or faculties not conferred upon it, either expressly or by fair implication, by the laws which created it or by other laws, constitutional or statutory, applicable to it."

Finding no merit in the assignments of error, we determine that the judgment of the trial court is correct and should be affirmed.

AFFIRMED.

SCHOOL DISTRICT OF OMAHA IN THE COUNTY OF DOUGLAS IN THE STATE OF NEBRASKA, APPELLEE, V. CITY OF OMAHA ET AL., APPELLANTS, IMPLEADED WITH SCHOOL DISTRICT NO. 54 OF DOUGLAS COUNTY ET AL., APPELLEES.

120 N. W. 2d 267

Filed March 8, 1963. No. 35360.

1. **Fines: Penalties. Where fines, penalties, and license money arise and are paid in under the general laws of the state, such money shall be paid over to the counties respectively wherein**

the same may be levied or imposed, and appropriated exclusively to the support of common schools in the several school districts of such county.

2. **Constitutional Law: Penalties.** Forfeited recognizances and cash bonds are penalties arising under the general laws of the state as provided in Article VII, section 5, Constitution of Nebraska, and should be distributed to the several school districts of the county in which they accrue.

3. ———: ———. Penalties which are required by the Constitution to be paid over to the common schools cannot be diverted to any other purpose by the Legislature or by a city.

Appeal from the district court for Douglas County: EDWARD A. MULLERY, Judge. Affirmed.

Herbert M. Fitle, Bernard E. Vinardi, Irving B. Epstein, Frederick A. Brown, Edward M. Stein, Sebastian J. Todero, and Frederick S. Giehs, for appellants.

W. Ross King, Seymour L. Smith, Wells, Martin, Lane, Baird & Pedersen, and Clayton H. Shrout, for appellees.

Heard before WHITE, C. J., CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

BOSLAUGH, J.

The School District of Omaha, Nebraska, brought this action to determine the proper disposition and distribution of funds received from forfeited recognizances and cash bonds in the municipal court of the city of Omaha, Nebraska, in proceedings for violation of city ordinances. The defendants are the city of Omaha; its treasurer; School District No. 54 of Douglas County, Nebraska; School District No. 66 of Douglas County, Nebraska; and the members of the city council of the city of Omaha as trustees of its police relief and pension fund. The controversy in this court is between the three school districts and the city. The defendant school districts claim a right to receive a proportionate share of the funds involved.

The district court held that bond forfeitures are penalties arising under the general laws of the State of Ne-

braska and should be paid into the county school fund and distributed to the several school districts of the county as provided by law. The motion of the city of Omaha and its officers for a new trial was overruled and they have appealed. There is no cross-appeal. For convenience, the appellants will be referred to as the City.

The Constitution provides that, "All fines, penalties, and license money, arising under the general laws of the state, except fines and penalties for violation of laws prohibiting the overloading of vehicles used upon the public roads and highways of this state, shall belong and be paid over to the counties respectively, where the same may be levied or imposed * * *. All such fines, penalties, and license money shall be appropriated exclusively to the use and support of the common schools in the respective subdivisions where the same may accrue * * *." Art. VII, § 5, Constitution of Nebraska.

In State ex rel. Pepper v. Speice, 24 Neb. 386, 38 N. W. 837, James Robert Williams was indicted for forgery in Butler County. The accused obtained a change of venue to Platte County where a recognizance was given. Williams failed to appear at the next term of court and the recognizance was forfeited. Thereafter judgment was recovered against the surety and the amount recovered was paid to the clerk of the court. The county treasurer of Butler County then brought an original action in this court for a writ of mandamus to compel the clerk of the district court for Platte County to pay the amount of the forfeited recognizance to Butler County. In holding that the writ must be denied, this court said: "There are other provisions requiring the payment of fines and penalties into the county treasury for the use of the common schools of the county. It will thus be seen that the recognizance must be given in the county where the accused is required to appear at court. If he fails to appear, the recognizance is to be declared forfeited, and the county attorney of that county is authorized to recover the amount of the recognizance.

The amount, when recovered, is to be paid into the treasury of that county. The matter is regulated entirely by statute. Where the venue is changed, the statute provides that the county in which the crime is alleged to have been committed shall bear the expense of the trial in the second county, but there is no provision that in case the person recognized fails to appear, the forfeiture shall inure to the benefit of the first county. The purpose of a recognizance is to secure the attendance of the party recognized. The payment of the penalty is considered a mere possibility—to be paid only in case of the failure to produce the body of the defendant. The law favors sureties, and aids them as far as possible to secure the body of the accused, and enforces the penalty as a last resort. In the administration of the criminal law the procedure pointed out in the statute is to be substantially followed, and costs and penalties imposed as therein directed. The court, no doubt, in a proper case may adjust the equities between counties, but it cannot without statutory authority take the money derived from a forfeiture of a recognizance in Platte county and compel its payment to the treasurer of Butler county. Neither can the criminal law be used as a source of revenue to any county; nor is the money derived from forfeiture of recognizance so considered."

In School Dist. No. 54 v. School Dist. of Omaha, 171 Neb. 769, 107 N. W. 2d 744, this court affirmed a judgment of the district court for Douglas County, Nebraska, which provided: "'* * * that all money from fines and penalties, including bond forfeitures, arising under the general laws of the State of Nebraska * * *'" and received from the municipal court of the city of Omaha, Nebraska, should be distributed among all of the school districts of Douglas County, Nebraska, as provided by law.

The authorities referred to are controlling in this case. The funds received from forfeited recognizances and cash bonds in the municipal court of the city of Omaha,

Nebraska, are penalties arising under the general laws of the state within the meaning of Article VII, section 5, of the Constitution of Nebraska, and must be distributed to the several school districts of the county as provided by law.

The City relies upon subsection (5) of section 14-610, R. R. S. 1943. Section 14-610, R. R. S. 1943, provides for the establishment of a police relief and pension fund in cities of the metropolitan class. Subsection (5) thereof provides: "All cash deposited in lieu of bail for appearances in the police court of such city, whether deposited with the police magistrate or any official having the right to receive the same, and such money so forfeited shall be monthly turned over by the police magistrate or other officer receiving the same to the treasurer of such city, and to the credit of the police relief and pension fund * * *." To the extent that section 14-610, R. R. S. 1943, attempts to direct the payment of forfeited cash bail into the police relief and pension fund of the City it is in direct conflict with Article VII, section 5, of the Constitution of Nebraska and is invalid. The Constitution provides that such penalties shall be paid over to common schools, and neither the Legislature nor the City may divert them to any other purpose. School Dist. of McCook v. City of McCook, 163 Neb. 817, 81 N. W. 2d 224.

The City also relies upon section 14-227, R. R. S. 1943, which provides in part as follows: "All fines, penalties, and forfeitures collected for offenses against the ordinances of the city, or for misdemeanors against the laws of the state, committed within the city, shall, unless otherwise provided by law, be paid by the person receiving the same to the city treasurer."

In School Dist. No. 54 v. School Dist. of Omaha, *supra*, this court held that the exception "unless otherwise provided by law" in section 14-227, R. R. S. 1943, refers to both the Constitution and the statutory law. The Constitution does provide otherwise and is controlling.

The judgment of the district court is correct and it is affirmed.

AFFIRMED.

TERRY CARPENTER, INC., APPELLEE, V. NEBRASKA LIQUOR CONTROL COMMISSION ET AL., APPELLANTS.

120 N. W. 2d 374

Filed March 8, 1963. No. 35367.

1. **Intoxicating Liquors: Administrative Law.** Under sections 53-116, 53-118, and 53-119, R. R. S. 1943, of the Nebraska Liquor Control Act, the Nebraska Liquor Control Commission has the power to regulate all phases of the control of the manufacture, distribution, sale, and traffic in alcoholic liquors, except as otherwise specifically delegated in the act, and for that purpose may promulgate such reasonable rules and regulations as it may deem necessary to carry out the intent, purpose, and requirements of the act.
2. ———: ———. However, the Nebraska Liquor Control Commission may not adopt rules and regulations which are in conflict with the act as the power to regulate must be exercised in conformity with all the provisions of the Nebraska Liquor Control Act and in harmony with its spirit and expressed intent.
3. ———: ———. The officers of the Nebraska Liquor Control Commission carry into effect legislative policies embodied in the statute in accordance with the legislative standard therein prescribed.
4. ———: ———. The Nebraska Liquor Control Commission is charged with the enforcement of no policy except the policy of law.
5. **Constitutional Law: Administrative Law.** The Legislature may not lawfully delegate its legislative powers to an administrative agency.
6. ———: ———. In the grant of power to an administrative agency to legislate, such power must be limited to the expressed purpose and administered in accordance with standards prescribed in the legislative act.
7. **Constitutional Law.** The constitutional guaranties of our Bill of Rights contemplate that every person legally possesses the right of acquiring the absolute and unqualified title to every species of property recognized by law, with all rights incidental thereto, and the right to dispose of such property as he pleases, and

to sell it at such price as he can obtain in fair barter.

8. **Constitutional Law: Statutes.** The Legislature, under the guise of regulation, may not indulge in arbitrary price fixing or the destruction of lawful competition.
9. **Trial: Appeal and Error.** In a case tried to the court, either in law or in equity, the presumption obtains that the trial court in arriving at decision considered only such evidence as was competent and relevant, and this court will not reverse a case so tried because other evidence was admitted, if there is sufficient competent and relevant evidence in the record to sustain the judgment.

Appeal from the district court for Lancaster County: HERBERT A. RONIN, Judge. Affirmed.

Clarence A. H. Meyer, Attorney General, and Robert R. Camp, for appellants.

Healey & Healey, for appellee.

Heard before WHITE, C. J., CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

MESSMORE, J.

The plaintiff, Terry Carpenter, Inc., a corporation, brought this action in the district court for Lancaster County against the members of the Nebraska Liquor Control Commission, hereafter referred to as the commission, for the purpose of obtaining a declaratory judgment determining that Rule 46 promulgated by the commission be held invalid, void, unenforceable, and unconstitutional, that the plaintiff be entitled to carry on its business without regard to Rule 46, and that the members of the commission each be permanently enjoined from enforcing Rule 46. The trial court rendered judgment in favor of the plaintiff to which a motion for new trial was filed and overruled, and thereafter the trial court rendered a modified judgment wherein it declared and adjudged that Rule 46 promulgated by the Nebraska Liquor Control Commission be declared invalid, void, unenforceable, and unconstitutional insofar as it requires the filing of a price schedule for alcoholic liquors, including beer, and prohibits sale at a lower price; that the

plaintiff be entitled to carry on its business without regard to purported Rule 46; and that the members of the commission, and each of them, be permanently enjoined from enforcing or attempting to enforce Rule 46 insofar as it requires the filing of a price schedule for alcoholic liquors, including beer, requires sale according to price schedule, and limits discounts that may be granted. The commission filed a motion for new trial as to the modified judgment, which was overruled by the trial court. The commission perfected appeal to this court.

The plaintiff is a domestic corporation authorized to do business in this state, with its principal place of business at Terrytown, Scotts Bluff County, Nebraska. It is the holder of a retailer's license for the sale at retail of alcoholic liquors and beer, which was duly issued in accordance with the laws of Nebraska, and is engaged in the retail sale of alcoholic liquors and beer pursuant to its license in the county of Scotts Bluff and the State of Nebraska. The commission is an administrative agency within the meaning of the term as defined in section 84-901, R. S. Supp., 1961. It was created under and by Chapter 53, R. R. S. 1943, and possessed of the general powers described in sections 53-116 and 53-119, R. R. S. 1943, which was admitted to be true at the time the plaintiff's petition was filed on November 28, 1960.

On November 14, 1952, the commission adopted Rule 46 which, insofar as necessary to be considered, provides in substance as follows: This regulation shall apply to sales by all manufacturers, distributors, and wholesalers licensed by the State of Nebraska and pertaining to sales by such manufacturers, distributors, and wholesalers of intoxicating liquors, including beer, to any retailer licensed under the laws of Nebraska. Within 15 days after these regulations become effective, each manufacturer, distributor, and wholesaler must file with the commission, in such form as prescribed by the commission, a complete schedule of all prices to be charged

by such manufacturer, distributor, or wholesaler F.O.B. municipality of shipment for each brand of liquor or beer sold by such manufacturer, distributor, or wholesaler. Such price schedule shall set forth the unit price per case for all such liquor or beer of each brand; the unit price per bottle, or other container, for all liquor or beer of each brand sold in broken-case lots, the size of the bottle or other container to be specified; and any quantity discount to be allowed, which quantity discount, however, shall be within limitations provided by section 7 of these regulations.

Section 7 provides that no quantity discount whatsoever shall be allowed on any sale of intoxicating liquor, including beer, by a manufacturer, distributor, or wholesaler to a retailer except on a sale with a single delivery of more than 10 cases of such intoxicating liquor of the same brand. Such discount shall not exceed 25 cents a case in such sales in excess of 10 cases. In sales of beer in barrels, half barrels, and quarter barrels, such discount shall not exceed 25 cents per barrel regardless of size of such barrels in excess of 10. This discount is allowed on a finding by the commission that the actual savings in handling expense and other items to such manufacturer, distributor, or wholesaler by reason of such quantity sales does not exceed the amount specified herein, that if the basic charges are fair the margin of net profit does not allow a larger discount, and that a larger discount would serve no purpose other than to afford a subterfuge for discrimination as between large and small purchases.

The commission assigns as error that the trial court erred in holding that Rule 46 is void, unenforceable, and unconstitutional; in permanently enjoining the commission from enforcing Rule 46, as it requires the filing of a price schedule for alcoholic liquors; and in admitting evidence offered by the plaintiff as to a competitive situation in Colorado that affects the plaintiff, as to the price of alcoholic liquors in the city of Denver as compared

to prices in Terrytown, and as to the application of Rule 46 between liquor and beer. It is also assigned as error that the judgment of the trial court is not sustained by sufficient evidence and is contrary to law.

On December 15, 1958, the commission held a hearing to consider whether or not Rule 46 should be amended or repealed, at which time individuals representing certain interests appeared before the commission and gave their reasons as to why Rule 46 should be repealed or kept in force.

On January 6, 1959, the commission found that Rule 46 should be retained without change or modification.

Terry Carpenter was the only witness called at the trial of this case which was held on September 27, 1961. He testified that he was associated with Terry Carpenter, Inc., a corporation, as a stockholder and secretary and treasurer of the corporation; that the corporation was originally organized in 1940, with its principal place of business in Terrytown, Scotts Bluff County, Nebraska; that the corporation is engaged in a number of businesses; that the corporation, in its present location which is and has been in the legally incorporated village known as Terrytown, since 1950 has engaged in the sale of alcoholic liquor and beer in accordance with a license legally issued to it; that the trade area served by the corporation would be within a range of 100 miles; that its competition is in the area in which the corporation operates, and it is also competitive to a degree with like dealers in Colorado and other places because of the price situation; that the corporation is located 50 to 75 miles from the border of the State of Colorado; that the trade area extends to Denver, Colorado; that the large retailers in Colorado can sell liquor at retail prices below the prices which the corporation can purchase liquors from the wholesalers; that numerous people, when they go to Denver for some purpose, bring back substantial amounts of liquor because of the price differential; that since 1950 this witness has engaged actively

in the business of the corporation including retail liquor sales; that the State of Colorado does not have a rule such as Rule 46, and wholesalers are free to allow substantial quantity discounts to Colorado retailers subject to federal regulations requiring every wholesaler to make equal offers to every retailer willing to purchase the same quantity; that before Rule 46 was adopted in 1952, Terry Carpenter, Inc., was able to purchase liquors at substantial quantity discounts; and that this corporation has carried on a price policy of selling liquor at a price of cost plus 16 or 17 percent, based on volume sales, compared to 25 percent to one-third for most other dealers.

This witness further testified that before the adoption of Rule 46 by the commission to limit the discount to 25 cents per case for liquor, Terry Carpenter, Inc., was able to obtain a discount of $5 per case in some instances, due to the quantity of liquor purchased, generally 100 cases of mixed brands and various sizes; and that by purchasing in large case loads this corporation was able to get a better price than the retailers who did not purchase in such large quantities.

Appearing in the record is an official Nebraska price list of intoxicating liquors for September 1961, and an advertisement showing the retailers' prices of intoxicating liquors in Denver, Colorado, and the difference in the prices of liquors between Nebraska and Colorado.

The following sections of the statutes are involved in this appeal.

Section 53-119, R. R. S. 1943, provides: "The commission may make such reasonable rules and regulations as may be deemed necessary for the administration of the duties vested in it by the provisions of this act."

Section 53-116, R. R. S. 1943, provides: "The power to regulate all phases of the control of the manufacture, distribution, sale, and traffic in alcoholic liquors, except as specifically delegated in this act, is hereby vested exclusively in the commission."

Section 53-118, R. R. S. 1943, provides in part: "The rules and regulations established by the commission shall include, among such other things as the commission may determine, the following * * * (7) including any and all the other details which are necessary or convenient to the enforcement of the intent, purpose, and requirements of this act."

The commission asserts that the Legislature, in passing the above-mentioned sections of the statutes, was aware that in the field of intoxicating liquor the Legislature was required to delegate and vest discretionary authority in the commission to regulate all phases of the traffic and sales of intoxicating liquors, due to the nature of the product and the problems developed in the administration of the law governing such subject matter.

In this connection, the commission cites Griffin v. Gass, 133 Neb. 56, 274 N. W. 193, wherein this court held: "The Nebraska liquor control commission is empowered, under the provisions of the Nebraska liquor control act, by reasonable regulations, to determine the permissible hours for the sale of beer, regardless of alcoholic content, on secular days, outside the corporate limits of cities and villages."

The commission contends that the right to engage in the sale of intoxicating liquors is not one of the privileges or immunities of citizens of the United States which the states are thereby forbidden to abridge, nor is price fixing, where the public interest is involved, as in the sale of intoxicating liquor, unconstitutional.

In this connection, section 53-149, R. R. S. 1943, is cited, and provides in part: "A license shall be purely a personal privilege, good for not to exceed one year after issuance unless sooner revoked as in this act provided, and shall not constitute property, nor shall it be subject to attachment, garnishment, or execution, nor shall it be alienable or transferable, voluntarily or involuntarily, or subject to being encumbered or hypothe-

cated. Such license shall not descend by the laws of testate or intestate devolution, but it shall cease upon the death of the licensee; * * *." Therefore, the plaintiff's engagement in the liquor business is a mere privilege, revocable at the will of the commission, by power given by the Legislature, and it cannot be concluded that the price-posting rule has deprived the plaintiff of its property without due process of law.

The commission cites Marsh & Marsh v. Carmichael, 136 Neb. 797, 287 N. W. 616. This case held: "The state, by fixing uniform standards for containers, may take away the right of licensees to sell alcoholic liquors at wholesale in quart bottles, though the effect of such a regulation is to reduce or destroy the value of property formerly used in the traffic therein; nor does such a regulation amount to the taking of private property for a public use or deprive the owners of it without due process of law. * * * The statute creating the Nebraska liquor control commission and authorizing that administrative body to make rules and regulations fixing and determining the nature, form and capacity of all containers used for alcoholic liquors and the order of the commission fixing such standards, though forbidding sales in quart bottles, are valid exercises of the police power and do not violate any provision of the federal or state Constitutions."

It will be observed that the above-cited cases do not in any manner deal with the subject matter of this action and are not applicable thereto.

The commission further contends that the rules and regulations which are not in conflict with the laws as passed by the Legislature are valid, enforceable, and constitutional. The commission cites State ex rel. Nebraska Beer Wholesalers Assn. v. Young, 153 Neb. 395, 44 N. W. 2d 806. This was a mandamus action brought against the members of the Nebraska Liquor Control Commission to require them to revoke Rule 44, particularly paragraphs 3 and 4 thereof. Section 53-168, R.

S. 1943, was involved and, so far as material, prohibited any manufacturer, distributor, or wholesaler of intoxicating liquor from giving, either directly or indirectly, money or anything of value to any retail licensee of intoxicating liquor or to the manager, representative, agent, officer, or director of such licensee. This court remanded the cause with directions to modify the decree, that is, in place of requiring the commission to rescind and revoke paragraphs 3 and 4 of Rule 44, it should permanently enjoin the members of the commission, and each of them, from enforcing them. The court said: "Under section 53-116 and 53-119, R. S. 1943, and 53-118, R. S. Supp., 1949, of the Nebraska Liquor Control Act the commission has the power to regulate all phases of the control of the manufacture, distribution, sale, and traffic in alcoholic liquors, except as otherwise specifically delegated in the act, and for that purpose may promulgate such reasonable rules and regulations as it may deem necessary to carry out the intent, purpose, and requirements of the act.

"However, the commission may not adopt rules and regulations which are in conflict with the act.

"As stated in Griffin v. Gass, 133 Neb. 56, 274 N. W. 193: '* * * the power to regulate must be exercised in conformity with all the provisions of the Nebraska liquor control act, and in harmony with its spirit and expressed legislative intent.' "

The commission cites the above authorities on the theory as to whether Rule 46 is reasonably necessary to carry out the intent, purpose, and requirements of the act; that the fact that the plaintiff desires to purchase large quantities of alcoholic liquor and to secure the same at a price below which its competitors can purchase such items and thereby allowing the plaintiff to undersell its competitors, would not be sufficient to declare the rule invalid; that in order to declare the rule invalid as a matter of law, it would have to be established that it was not reasonably calculated to carry out the pur-

pose of the act; and further that the evidence adduced in the trial court was not sufficient to accomplish that purpose.

The evidence referred to relates to the price of alcoholic liquors in Denver, Colorado. The contention is that the commission's power does not extend beyond the borders of Nebraska, consequently the market price of liquor in Denver, Colorado, has no relevancy to Rule 46 adopted by the commission, and the evidence referred to was inadmissible and prejudicial.

There are cases cited from foreign jurisdictions that the commission contends support its position in the instant case. A review of these cases discloses an entirely different grant of power by the Legislature to the administrative body dealing with the control of alcoholic liquors or the commissioner charged with such duties, as the case may be, than the grant of power to the Nebraska Liquor Control Commission by the Legislature of this state.

The contentions of the commission as they relate to this appeal are not applicable thereto.

The following are pertinent to a determination of this appeal.

The plaintiff contends that Rule 46 is invalid for the reason that the regulation has no relation to any legislative public purpose, and is in excess of any power given to the commission by the Nebraska Liquor Control Act, therefore it is an usurpation by the commission of legislative authority, without the guidance of standards expressed by the Legislature.

There is no legislative standard expressed in the Liquor Control Act which authorizes a mandate of price fixing, and the act expresses no policy of price fixing and furnishes no ascertainable standard authorizing the promulgation of such a policy by this administrative body.

In State ex rel. Johnson v. Chase, 147 Neb. 758, 25 N. W. 2d 1, the court described the limited powers of the

commission as follows: "The officers of the Nebraska Liquor Control Commission carry into effect legislative policies embodied in the statute in accordance with the legislative standard therein prescribed. * * * It is charged with the enforcement of no policy except the policy of law."

The Nebraska Liquor Control Commission owes its existence to an act of the Legislature, but the Legislature, in creating an administrative body, cannot delegate to such administrative body the legislative power which is conferred solely upon the Legislature by the Constitution.

Article II, section 1, of the 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."

Article III, section 1, of the Constitution of Nebraska, provides in part: "* * * the legislative authority of the state shall be vested in a Legislature consisting of one chamber."

Article XVII, section 6, of the Constitution of Nebraska, provides: "The Legislature shall pass all laws necessary to carry into effect the provisions of this constitution."

Under the separation of powers which inheres in our system of government, legislative power governing the rights and duties of persons is conferred entirely on the elected legislative body.

In Lincoln Dairy Co. v. Finigan, 170 Neb. 777, 104 N. W. 2d 227, this court said: "It is fundamental that the Legislature may not delegate legislative power to an administrative or executive authority. Smithberger v. Banning, 129 Neb. 651, 262 N. W. 492, 100 A. L. R. 686. The Legislature does have power to authorize an administrative or executive department to make rules

and regulations to carry out an expressed legislative purpose, or for the complete operation and enforcement of a law within designated limitations. Such authority is administrative in its nature and its use by administrative officers is essential to the complete exercise of the powers of all departments. State ex rel. Martin v. Howard, 96 Neb. 278, 147 N. W. 689. It is fundamental, also, that in the legislative grant of power to an administrative agency such power must be limited to the expressed legislative purpose and administered in accordance with standards prescribed in the legislative act."

We are unable to find, by an examination of Nebraska cases, any legislative authority granted to the commission to establish a price-fixing policy, nor is there any standard of guidance for the commission to establish any such policy.

The foregoing contention of the plaintiff is sufficient to sustain the trial court's judgment in the instant case. However, we set forth the following contention of the plaintiff which is also applicable.

It is the further contention of the plaintiff that the enactment of price-fixing schemes and the favoring of one method of carrying on business at the expense of another are of doubtful constitutional validity even if established by the Legislature. At any rate, resolution of such controversial questions of policy cannot be left to the unguided decision of an administrative body.

The plaintiff cites State ex rel. English v. Ruback, 135 Neb. 335, 281 N. W. 607, wherein this court held: "The constitutional guaranties of our Bill of Rights contemplate that every person legally possesses the right of acquiring the absolute and unqualified title to every species of property recognized by law, with all rights incidental thereto, and, in connection with the right of personal liberty, it includes the right to dispose of such property in such innocent manner as he pleases, and to sell it at such price as he can obtain in

fair barter." Numerous cases are cited in the opinion sustaining the above proposition.

In Nelsen v. Tilley, 137 Neb. 327, 289 N. W. 388, 126 A. L. R. 729, this court held: "The legislature, under the guise of regulation, may not indulge in arbitrary price fixing, the destruction of lawful competition, or the creation of trade restraints tending to establish a monopoly." This was an action for a declaratory judgment interpreting the statute regulating and licensing the sale of motor vehicles. The court further held: "A provision in a regulatory statute limiting the issuance of a motor vehicle dealer's license for the sale of new cars to persons enfranchised by the manufacturers of new motor vehicles is an unlawful restriction upon the right of a person to adopt and follow a lawful industrial pursuit. * * * A section of a regulatory statute providing that the administrator may deny an application or revoke a license for wilfully discriminating in favor of one purchaser of a motor vehicle against another such purchaser is void for indefiniteness, where the element of wrongful intent is not included, all such wilful discriminations not being of themselves unlawful." The court went on to say: "Certainly, a person may sell his property for any price he cares to sell it for, unless it be accompanied by an intent to accomplish a purpose that is unlawful. If the statute purports to prohibit every wilful discrimination in price, every agreement to furnish services, every allowance of a discount or rebate, and every sale of a motor vehicle at other than a fixed standard price, it conflicts with constitutional restraints imposed on the legislature with reference to the acquisition, ownership and enjoyment of property, and the guaranty that no person shall be deprived of life, liberty or property without due process of law."

The Legislature of Nebraska in 1937 enacted what was designated as the Fair Trade Act. In McGraw Electric Co. v. Lewis & Smith Drug Co., Inc., 159 Neb.

703, 68 N. W. 2d 608, after reviewing certain sections of the act, this court said: "On its face the act is a price-fixing act, not, it is true, one wherein the Legislature itself has assumed to fix prices, but one wherein it delegates to the extent and under conditions named that power without restriction or reservation to private parties.

"This court has said that in the absence of appearance of public interest the Legislature may not itself impose prices. Boomer v. Olsen, 143 Neb. 579, 10 N. W. 2d 507. May it constitutionally confer upon others a right which it does not itself possess?"

The cited case also cites Liquor Store, Inc. v. Continental Distilling Corp. (Fla.), 40 So. 2d 371, wherein it is said: "This statute is, in fact, a price fixing statute. The power to fix the price is vested in an interested person who is not an official. There is no review of his act. He is required to consult with no one and in no sense is required to take into consideration the cost of the article or the reasonableness thereof."

Rule 46 in the instant case is subject to the same objection heretofore mentioned. The manufacturer, distributor, or wholesaler is given complete and absolute power to fix prices in the first instance, without regard to reasonableness. Those prices so fixed are then wholly immunized from the forces of competition by the commission's rule. The rule precludes a retailer from the exercise of free bargaining with respect to the prices he will pay. And the rule even prevents the manufacturer, wholesaler, or distributor from revising prices from time to time in view of situations caused by competition, except by justifying the change on the basis of cost, experience that the price previously charged was insufficient or excessive, etc., supported by proper data. In essence, the buyer is precluded from having any voice in making contracts for the goods it is to buy.

The conclusion must be reached that Rule 46 is a price-fixing rule pure and simple, and doubtless the

purpose of the rule was to protect the little retailer from the volume dealer, in other words, to favor the small dealer over the volume seller by nullifying the natural competitive advantage of volume sales.

With reference to the contention made by the commission relating to certain evidence as being inadmissible, which is heretofore summarized, the following rule is applicable: "In a case tried to the court, either in law or in equity, the presumption obtains that the trial court in arriving at decision considered only such evidence as was competent and relevant, and this court will not reverse a case so tried because other evidence was admitted, if there is sufficient competent and relevant evidence in the record to sustain the judgment." Pierce v. Fontenelle, 156 Neb. 235, 55 N. W. 2d 658. See, also, Omaha Paxton Hotel Co. v. Board of Equalization, 167 Neb. 231, 92 N. W. 2d 537.

Even without such evidence, the judgment of the trial court is amply supported.

In the light of the foregoing, other assignments of error raised by the commission need not be discussed.

For the reasons given in this opinion, we conclude that the judgment of the trial court should be affirmed.

AFFIRMED.

CARTER, J., not participating.

LIDA MAE DARNELL, ADMINISTRATRIX OF THE ESTATE OF BOONE DARNELL, DECEASED, APPELLEE, V. PANHANDLE COOPERATIVE ASSOCIATION, APPELLANT.

120 N. W. 2d 278

Filed March 8, 1963. No. 35378.

1. **Gas: Negligence.** A propane supplier has no duty to inspect service pipes owned and controlled by others on private property unless it has knowledge of a probable defective condition in the pipes or has knowledge of circumstances rendering it probable that gas is escaping therefrom. Where a supplier has good cause

to believe that an inspection should be made of the propane system of one of its customers, the failure to make an inspection of the system may be negligence.

2. ———: ———. The duty of a propane supplier is to exercise a degree of care commensurate with the danger involved in the handling of propane which is a powerful and dangerous product. If a propane supplier has knowledge of circumstances which reasonably indicate that the propane system of a customer is defective and that gas is escaping from it, the supplier is required to do whatever is reasonably necessary under the circumstances to prevent any injury to the customer or his property. If a propane supplier under such circumstances fails to do what a reasonable and prudent person exercising the high degree of care required of a propane supplier would have done, then the supplier is liable for any damages which are proximately caused by its negligence.

3. **Appeal and Error.** It is reversible error to submit issues to a jury which find no support in the evidence.

4. ———. Conflicting instructions are erroneous and prejudicial unless it is apparent from the record that the jury was not misled thereby.

5. **Evidence.** Hearsay evidence is generally inadmissible and does not become admissible because of the death of the person whose statement is sought to be proved.

6. ———. When evidence which is not generally admissible is offered for a limited purpose, the proper procedure is for counsel to state the limited purpose for which the evidence is offered and for the trial court to admonish the jury that the evidence is received for a limited purpose only and that it cannot be considered by the jury for any other purpose.

7. ———. As a general rule, textbooks, although standard authorities, are not competent independent evidence.

8. **Trial.** A jury should not be instructed as to the amounts prayed for in the petition of the plaintiff, and an instruction that a verdict for the plaintiff may not exceed such specific amounts should not be given.

9. **Death: Damages.** In an action for wrongful death the measure of the damage is the pecuniary loss to the statutory beneficiaries.

10. **Negligence: Trial.** If, on the trial of an action brought to recover damages for injuries to a person or to his property caused by the negligence of another, plaintiff is found to be guilty of negligence directly contributing to the injury complained of, he cannot recover, even though defendant was negligent, unless the contributory negligence of plaintiff was slight and the negligence of defendant was gross in comparison therewith; and if, in comparing the negligence of the parties, the contributory neg-

ligence of the plaintiff is found to exceed in any degree that which, under the circumstances amounts to slight negligence, or if the negligence of defendant falls in any degree short of gross negligence under the circumstances, the contributory negligence of plaintiff, however slight, will defeat a recovery. And even when plaintiff has established his right to recover under this rule, it is the duty of the jury to deduct from the amount of damage sustained such amount as his contributory negligence, if any, bears to the whole amount of damage sustained.

11. **Negligence.** The doctrine of assumption of risk is applicable where an injured party knows that a danger exists and voluntarily assumes the risk of injury from that danger. The rule does not apply to an unknown and hidden danger. Assumption of risk is a defense which is independent of the defense of contributory negligence although both defenses may arise under the same facts.

Appeal from the district court for Scotts Bluff County: TED R. FIEDLER, Judge. Reversed and remanded.

Holtorf, Hansen & Fitzke and Alfred J. Kortum, for appellant.

Wright, Simmons & Hancock, for appellee.

Heard before WHITE, C. J., CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

BOSLAUGH, J.

Boone Darnell died as the result of an explosion and fire at his home on March 3, 1960. He was survived by his widow, Lida Mae Darnell, who, as administratrix of his estate, brought this action to recover damages for his wrongful death. The jury returned a verdict in favor of the plaintiff and against the defendant, Panhandle Cooperative Association. The defendant's motion for new trial was overruled and it has appealed.

From our examination of the record we have determined that the judgment must be reversed and the cause remanded for a new trial. For that reason, only those errors assigned which require a reversal or which are likely to occur upon the retrial will be discussed.

In 1956 Boone Darnell and his wife, the plaintiff,

moved to a farm near Minatare in Scotts Bluff County. Soon thereafter they purchased a propane system from the defendant. The propane system consisted of a 500-gallon storage tank located outside of the house and copper tubing running from the tank to a kitchen stove, a hot water heater, and a heating stove in the house. The defendant installed the system and connected it to the appliances. The defendant laid the tubing upon the surface of the ground but later Mr. Darnell buried the tubing 6 or 8 inches in the ground. All of the propane which Mr. and Mrs. Darnell used was purchased from the defendant.

At a later date Mr. Darnell accidentally cut the tubing while digging a hole near the house. Mr. Darnell repaired the break in the line himself. On the next day the repair was inspected by one of the defendant's employees who told Mr. and Mrs. Darnell that the repair was safe and could be covered up.

In 1957, Mr. and Mrs. Darnell installed a sewer system in their home. The system consisted of a septic tank near the house and a cesspool farther away. The drain lines from all of the fixtures except the toilet led directly to the cesspool. The line from the toilet emptied into the septic tank and from there into the cesspool. The line from the toilet was vented at the edge of the house.

In the fall of 1959 the Darnells became concerned about the amount of propane which they were using. There was evidence that they discussed the amount of usage with several employees of the defendant. There was also evidence that Boone Darnell discussed the matter of an odor about the property with an employee of the defendant. The evidence as to these conversations is in dispute.

For some time before the explosion the Darnells and other persons had noticed an objectionable odor in their home. Mr. Darnell had also suffered from stomach aches and headaches and some of the plants in the house

had died. In an effort to remove the odor from the house they pumped out the septic tank and aired the house on the day before the explosion. On the following morning the odor was very strong. Mrs. Darnell was in the kitchen and Mr. Darnell was about to leave the house when the explosion occurred.

After the explosion both Mr. and Mrs. Darnell were in the crawl space under the house. Mrs. Darnell crawled out and went to a neighbor's house to get help so that Mr. Darnell could be removed from the wreckage. When Mrs. Darnell returned the house was on fire. Mr. Darnell died shortly after that without having been removed from the wreckage.

A deputy state fire marshal made an investigation at the site of the explosion and fire several days later. As a part of the investigation the propane line between the storage tank and the house was uncovered. When the dirt was removed from around the tubing near the house at the place where Mr. Darnell had repaired the line, it was discovered that a flare nut had cracked or split into two pieces. The flare nut was a part of the fitting that Mr. Darnell had used to repair the line.

There was evidence from which the jury could have found that propane gas had escaped from the supply line through the broken fitting, had seeped into the crawl space under the house, had been ignited by a spark from an electric motor attached to a water pump in a pit under the house, and had caused the explosion and fire.

The plaintiff's allegations of negligence related to the repair of the propane line and the failure of the defendant to inspect the propane line. Any issue concerning the installation of the propane system was eliminated by the defendant's motion for summary judgment. The plaintiff's theory of the case was that there would have been no leak in the propane line if a proper fitting had been used in the repair of the line; and that if the defendant had inspected the propane system, the leak

would have been detected and the explosion and fire would have been prevented.

The defendant admitted that Boone Darnell died as the result of the explosion and fire on March 3, 1960. The defendant's theory of the case was that the explosion and resulting fire was caused by sewer gas. The defendant also alleged that the plaintiff and Boone Darnell were guilty of contributory negligence and that they assumed the risk of an explosion by remaining in their home when they knew that some form of gas was present.

In instruction No. 3 the trial court summarized the pleadings. The trial court advised the jury that the plaintiff alleged that the proximate cause of the death of Boone Darnell was the negligence of the defendant in the following particulars: "a. Made a defective repair in 1955 which, upon inspection should have been revealed. * * * b. In failing to inspect plaintiff's propane system in 1955 and at the time of each delivery of propane thereafter. * * * c. At the time of the repair of the ruptured line in that it failed to inspect and warn plaintiff of the hazard of such improper installation. * * * d. Defendant was negligent when, upon being notified by plaintiff of the excessive consumption of gas on the premises, it failed thereafter to properly inspect the permises (premises) for a gas leak. * * * e. Defendant was negligent in that it failed to inspect and see that which should have been seen when complaint of odor of gas was made by Boone Darnell. * * * f. Defendant was negligent in that it failed to inspect and see that which should have been seen when it had reason to believe that an inspection should be made. * * * g. Defendant was negligent in advising plaintiff and Boone Darnell that it had inspected said premises and that there was no leak in the above described propane system."

It is reversible error to submit issues to a jury which find no support in the evidence. Swanson v. Murray, 172 Neb. 839, 112 N. W. 2d 11. Instruction No. 3 was

erroneous and prejudicial in that it submitted allegations of negligence which were not supported by the evidence. There was no evidence that the defendant made any repairs to the propane system in 1955 or at any time. There was no evidence that at any time the defendant advised the plaintiff and Boone Darnell that it had inspected the premises and that there was no leak in the propane system.

Instruction No. 3 was also erroneous and prejudicial because it placed a higher duty upon the defendant than the law requires. Under the facts and circumstances in this case the defendant had no duty to inspect the plaintiff's propane system in 1955 and at the time of each delivery thereafter.

A propane supplier has no duty to inspect service pipes owned and controlled by others on private property unless it has knowledge of a probable defective condition in the pipes or has knowledge of circumstances rendering it probable that gas is escaping therefrom. Where the supplier has good cause to believe that an inspection should be made of the propane system of one of its customers, the failure to make an inspection of the system may be negligence. Clay v. Butane Gas Corp., 151 Neb. 876, 39 N. W. 2d 813. There is no evidence that in 1955 and at the time of each delivery of propane thereafter the defendant had knowledge of a probable defective condition in the Darnell propane system or of circumstances rendering it probable that gas was escaping therefrom.

Instructions Nos. 23, 24, 25, 26, 27, and 28, given by the trial court, were as follows:

"INSTRUCTION NO. 23

The defendant is not an insurer of the safety of the customer. The defendant which did not own, or control the pipes or appliances in a customer's building is in no way responsible for the condition in which they are maintained, and consequently is not liable for injuries caused by a leak therein of which it has no knowledge.

"INSTRUCTION NO. 24

The law imposes a duty on a gas company distributing bottled gas as follows: Propane or bottled gas is a dangerous agency. Its distribution is accompanied by many possible dangerous consequences and it is therefore well established that a higher degree of care and vigilance is required in dealing with such agency than is required in the ordinary affairs of life. A degree of care commensurate to the danger involved is required of a distributor of propane to avoid injury and damage. In case of failure to exercise such care, and injury results, it is liable.

"INSTRUCTION NO. 25

It is the law that, although the law does not impose upon the distributor of propane the duty of inspection in every case, yet when its agent has good cause to believe that an inspection should be made it is negligent not to inspect it and if so, it is liable for damages caused by such negligence.

"INSTRUCTION NO. 26

It is the duty of the gas propane company, as soon as it receives notice of a leak, to take all necessary steps to prevent an explosion. It matters not through what source it receives information that there is a leak, it must act at once.

"INSTRUCTION NO. 27

A company engaged in the sale of a dangerous fuel commodity such as propane must have employees efficient in their line and is bound to anticipate injuries resulting from the use of such commodities.

"INSTRUCTION NO. 28

Generally a company supply (supplying) gas, whether the same is natural gas or bottled gas, is not under the duty of inspecting or keeping in repair supply pipes on private property in the absence of notice of leaking or otherwise defective conditions, but you are instructed that where the company has notice of fumes and suspicion of gas escaping it has the duty of inspecting the

premises to determine the source of the dangerous condition and if by proper inspection the leak in the customer's line could have been discovered, the company's duty is to cut off the supply until the line can be repaired and is liable for the consequences if it does not. Whether or not in this case defendant had notice of fumes and suspicion of gas escaping is for you to decide from the evidence."

Instructions Nos. 23 through 28 did not cure the errors contained in instruction No. 3. The most that can be said of these instructions is that they tend to conflict with instruction No. 3. Conflicting instructions are erroneous and prejudicial unless it is apparent from the record that the jury was not misled thereby. Carlson v. Chambers, 173 Neb. 166, 112 N. W. 2d 729.

The duty of the defendant, as a propane supplier, is to exercise a degree of care commensurate with the danger involved in the handling of propane which is a powerful and dangerous product. If the defendant had knowledge of circumstances which reasonably indicated that the Darnell propane system was defective and that gas was escaping from it, the defendant was required to do whatever was reasonably necessary under the circumstances to prevent any injury to Mr. and Mrs. Darnell or their property. If the defendant, under such circumstances, failed to do what a reasonable and prudent person exercising the high degree of care required of a propane supplier would have done, then the defendant is liable for any damages which were proximately caused by its negligence.

As we view the record, the evidence of the plaintiff tended to sustain two principal allegations of negligence. These were that the defendant was negligent in failing to warn Mr. and Mrs. Darnell that the repair made by Mr. Darnell was defective, and that the defendant was negligent in failing to inspect the Darnell propane system because it had knowledge of circumstances which in the exercise of due care required it to inspect the

system. The instructions of the trial court should have been confined to these matters.

There is no contention in this case that the defendant knew that there was a leak in the Darnell propane system. Instructions concerning what the duty of the defendant would have been if it had known that there was a leak in the propane system could only serve to confuse the jury and should not have been given.

The trial court permitted the plaintiff to testify to conversations that she had with Boone Darnell long before the explosion and to relate to the jury what Boone Darnell had said to her about conversations that he had had with employees of the defendant. This evidence was admitted over the objection of the defendant that it was hearsay and self-serving. Hearsay evidence is generally inadmissible and does not become admissible because of the death of the person whose statement is sought to be proved. Colbert v. Miller, 149 Neb. 749, 32 N. W. 2d 500.

In one instance the plaintiff testified that Boone Darnell had talked to Willard Philson, an employee of the defendant, about the amount of propane that the Darnells had used and about the odor which they had noticed; that Philson had said that "sewer gas smelled practically the same as propane"; that the odor could be "from the tank"; and that Philson was "pretty sure it had to be sewer gas." After the answer had been received, an objection was made and sustained but the answer was not stricken and the jury was not admonished that it should disregard the answer. This evidence was highly prejudicial because it tended to prove the plaintiff's allegations that Boone Darnell had complained to the defendant about the odor of gas.

The plaintiff argues that this evidence was admissible to prove that Boone Darnell thought that the odor was caused by sewer gas. It would have been possible to prove that fact without relating the statements made by Philson to Boone Darnell. The reason given is not

sufficient justification for permitting the plaintiff to testify to conversations that she had with her husband concerning statements made to him by the defendant's employees.

The plaintiff further argues that there was no error because instruction No. 13 limited the use of this evidence. Instruction No. 13 was as follows: "In this case there is testimony concerning statements made by Boone Darnell to various persons. You are instructed that this evidence, when offered by the plaintiff, was admissible solely to show the mental state of Boone Darnell, pain, his knowledge, his attitude and his plans. It is not offered to show the specific truth of the facts set forth in any statements reported of Boone Darnell. You will therefore consider it only for the purpose for which it is admitted."

It was proper for the trial court to give a cautionary instruction relating to this testimony but we do not think that instruction No. 13 alone was sufficient in this case to eliminate the prejudicial effect of permitting the plaintiff to testify as to admissions made by the defendant's employees to her deceased husband. When evidence of this nature, which is not generally admissible, is offered for a limited purpose, the proper procedure is for counsel to state the limited purpose for which the evidence is being offered and for the trial court to admonish the jury that the evidence is being received for the limited purpose only and that it cannot be considered by the jury for any other purpose.

The plaintiff called a deputy state fire marshal as an expert witness. On redirect examination and over objection this witness was allowed to read from a manual furnished by the State Fire Marshal's office. There was no identification of the author of the manual other than by name, and the manual did not purport to be a regulation or an official document of any kind. The material was prejudicial to the defendant because the jury was advised that underground pipes containing

butane should be installed below the frost line and that heavier type fittings referred to as frostproof should be used in outside work in areas subject to freezing temperatures because lighter type flare fittings will sometimes crack and cause a leak.

The general rule is that textbooks, although standard authorities, are not competent independent evidence. Van Skike v. Potter, 53 Neb. 28, 73 N. W. 295. The error was not cured by testimony of the witness that it was his opinion that the statements read were accurate and correct. To be admissible, the opinion expressed must be that of the expert witness.

By instruction No. 15 the trial court cautioned the jury that a verdict for the plaintiff could not exceed certain amounts, and set out the amounts contained in the prayer of the petition. Such an instruction has been disapproved and should not be given. Chicago, B. & Q. R.R. Co. v. Krayenbuhl, 65 Neb. 889, 91 N. W. 880, 59 L. R. A. 920. The danger is that the jury may infer that a verdict may be returned for the entire amount prayed for. In effect, it amounts to a comment on the evidence and invades the province of the jury. The jury should base its findings as to the amount of damages sustained, if any, upon the evidence in the case. The verdict should not be influenced in any way by the size of the demand which appears in the pleadings.

In instruction No. 17 the trial court referred to the plaintiff as being entitled to recover damages because of a "loss of earnings." In an action for wrongful death the measure of damage is the pecuniary loss to the statutory beneficiaries. § 30-810, R. R. S. 1943; Kroeger v. Safranek, 161 Neb. 182, 72 N. W. 2d 831. Although the plaintiff may introduce evidence as to the earnings of the deceased, the plaintiff may not recover the value of the earnings lost. The instructions should clearly state that so far as earnings are concerned, the recovery must be limited to the value of the amount which the benefi-

ciaries would have received from the earnings of the deceased.

The trial court submitted the issue of contributory negligence to the jury but failed to give an adequate instruction as to the comparative negligence rule. § 25-1151, R. R. S. 1943. The jury must be advised that if the plaintiff, or her decedent, is found to be guilty of negligence directly contributing to the injury complained of, she cannot recover, even though the defendant was negligent, unless the negligence of the plaintiff, or her decedent, was slight and the negligence of the defendant was gross in comparison therewith; and if, in comparing the negligence of the parties, the contributory negligence of the plaintiff, or her decedent, is found to exceed in any degree that which, under the circumstances amounts to slight negligence, or if the negligence of the defendant falls in any degree short of gross negligence under the circumstances, the contributory negligence of the plaintiff, or her decedent, however slight, will defeat a recovery. And even when the plaintiff has established her right to recover under this rule, it is the duty of the jury to deduct from the amount of damage sustained such amount as her contributory negligence, or the contributory negligence of her decedent, if any, bears to the whole amount of damage sustained. Main v. Sorgenfrei, 174 Neb. 523, 118 N. W. 2d 648.

The trial court did not submit the issue of assumption of risk to the jury. The doctrine of assumption of risk is applicable where the injured party knows that a danger exists and voluntarily assumes the risk of injury from that danger. The rule does not apply to an unknown and hidden danger. Hickman v. Parks Construction Co., 162 Neb. 461, 76 N. W. 2d 403, 62 A. L. R. 2d 1040. Assumption of risk is a defense which is independent of the defense of contributory negligence although both defenses may arise under the same set of facts. Brackman v. Brackman, 169 Neb. 650, 100 N. W. 2d 774.

The evidence in this case established that Boone Dar-

nell knew that some form of gas was present in the house. There is evidence that he thought the gas came from the sewer system. There is no evidence that he knew the source of the gas until the morning of the explosion. We conclude that the evidence was not sufficient to present a question for the jury as to assumption of risk.

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

REVERSED AND REMANDED.

JOHN J. GUNIA ET AL., APPELLANTS, V. CHARLES H. MORTON, APPELLEE.

120 N. W. 2d 371

Filed March 15, 1963. No. 35341.

1. **Courts.** A court of record has inherent authority to amend its records so as to make them conform to the facts.
2. **Judgments.** The proper function of an order nunc pro tunc is to correct a record which has been made so that it will truly record the action had, which through inadvertence or mistake has not been truly recorded.
3. ———. It is not the purpose of an order nunc pro tunc to correct, change, or modify action previously taken by the court.
4. **Pleading: Trial.** A party may at any time invoke the language of his opponent's pleading, on which the case is tried, on a particular issue, as rendering certain facts indisputable.

Appeal from the district court for Douglas County: EDWARD A. MULLERY, Judge. Affirmed.

Gross, Welch, Vinardi, Kauffman, Schatz & MacKenzie, for appellants.

Swarr, May, Royce, Smith, Andersen & Ross, for appellee.

Heard before WHITE, C. J., CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

BOSLAUGH, J.

The plaintiffs, John J. Gunia and Irene R. Gunia, brought this action to compel the defendant, Charles H. Morton, to remove dirt and debris from the plaintiffs' land and to construct a retaining wall to protect the plaintiffs' land from further encroachment.

The petition alleged that the defendant owned Lots 1 and 2 in Block 3, Club Terrace Addition to the city of Omaha, Nebraska; that the plaintiffs owned Lot 3 and a part of Lot 4 in Block 3, Club Terrace Addition to the city of Omaha, Nebraska; that the plaintiffs' land was immediately south of and adjacent to the defendant's property; and that the defendant had placed dirt and debris upon the plaintiffs' land which varied "in depth from one to eight feet" and which extended from a point approximately 12 feet south of the northeast corner of Lot 3 to the southwest corner thereof, and which contained "approximately one thousand cubic yards of dirt, fill and debris, more or less." The defendant's answer admitted that some dirt had been deposited upon a part of the plaintiffs' land when it was owned by the city of Omaha, Nebraska. The answer alleged that the dirt deposited upon the plaintiffs' land became attached to and a part of the land; and that the defendant disclaimed any interest in the plaintiffs' land. The reply was a general denial.

The case was tried on June 1, 1959, to the Honorable James M. Patton, one of the judges of the district court for Douglas County, Nebraska. The matter was taken under advisement and the parties were granted time in which to file briefs.

On July 29, 1959, Judge Patton wrote a memorandum opinion in the form of a letter to the attorneys for the parties which stated in part as follows: "The plaintiff should remove all dirt and other debris extending over his northerly lot, which was there when he purchased it, and that dirt which was washed down on his property afterwards. Within thirty days after the removal of

this dirt and debris notice that the plaintiff has removed the dirt and debris from his lot should be served on the defendant, and then the defendant should begin to erect a wall between his property and the plaintiff's property to keep the dirt or debris from falling or washing down on plaintiff's lot; this wall to be completed within a reasonable time. * * * Let a decree be drawn in accordance with this memorandum."

On November 13, 1959, during the September 1959 term of the district court, a typewritten decree, signed by Judge Patton, was entered on the records in the office of the clerk. The decree finds that in 1953 the defendant dumped or caused to be dumped upon the plaintiffs' land dirt fill and debris which "varies in depth from one to eight feet and is in the amount of 3,500 cubic yards, more or less. That since said dirt and debris was deposited on plaintiffs' land as hereinabove set forth, more dirt and debris has fallen onto and washed down from defendant's land * * *." The decree orders the plaintiffs to remove all dirt and other debris extending over and upon their northerly lot "which was at any time dumped upon said lot by the defendant or which has washed upon said lot from the property of the defendant"; that the plaintiffs shall notify the defendant after the dirt and debris have been removed; and that the defendant shall then erect a retaining wall upon the defendant's property to restrain dirt and debris from falling on or washing onto the plaintiffs' property.

Both the plaintiffs and defendant filed motions for new trial which were overruled on May 13, 1960.

Judge Patton retired from office in January 1961.

On October 2, 1961, during the September 1961 term of the district court, the plaintiffs filed a motion for an order amending the decree of the district court nunc pro tunc to conform with the announced findings of the court. At the hearing on this motion both parties presented evidence. After taking the matter under advisement the trial court overruled the motion. The plain-

tiffs' motion for new trial was overruled and the plaintiffs appealed.

The controversy here concerns the finding in the decree that the dirt fill and debris deposited upon the plaintiffs' land "varies in depth from one to eight feet and is in the amount of 3,500 cubic yards, more or less." The plaintiffs contend that the trial court actually found that the plaintiffs were to remove "all dirt and debris" from their property, and that the reference in the decree to the depth of the dirt fill and debris was a clerical error which was made in recording the judgment of the court.

A court of record has inherent authority to amend its records so as to make them conform to the facts. It is proper for a court to make an entry nunc pro tunc so that its records will speak the truth. Fisher v. Minor, 159 Neb. 247, 66 N. W. 2d 557. Such an order is proper to correct the record of a judgment, but not to correct the judgment itself. Clerical errors may be corrected by an order nunc pro tunc but judicial errors may not.

The proper function of an order nunc pro tunc is to correct a record which has been made so that it will truly record the action had, which through inadvertence or mistake has not been truly recorded. O'Grady v. Volcheck, 148 Neb. 431, 27 N. W. 2d 689. It is not the purpose of an order nunc pro tunc to correct, change, or modify action previously taken by the court. Ricketts v. Continental Nat. Bank, 169 Neb. 809, 101 N. W. 2d 153.

In support of their motion for an order nunc pro tunc the plaintiffs called Judge Patton as a witness and offered his letter of July 29, 1959. Judge Patton recalled writing the letter of July 29, 1959, but he had no independent recollection of the other matters which are in dispute at this time. Judge Patton did not remember signing the written decree but the evidence establishes that it was prepared by the attorneys for the plaintiffs and submitted by them to the trial court for approval and signature. Although Judge Patton's let-

ter of July 29, 1959, did not mention the depth of the dirt fill and debris upon the plaintiffs' land, the finding in the decree that the dirt fill and debris "varies in depth from one to eight feet" is not necessarily inconsistent with the letter.

The fact that the finding in question coincides with the allegations of the petition is a strong circumstance against the plaintiffs. A party may at any time invoke the language of his opponent's pleading, on which the case is tried, on a particular issue, as rendering certain facts indisputable. Knuth v. Singer, 174 Neb. 182, 116 N. W. 2d 291. There is no showing that the plaintiffs at any time made an effort to amend their allegation as to the depth of the dirt fill and debris upon their land, or that at the time of the trial in 1959 there was any evidence before the trial court that the depth of the dirt fill and debris exceeded 8 feet.

The evidence in this case does not establish that the finding that the dirt fill and debris upon the plaintiffs' land varied in depth from 1 to 8 feet was included in the judgment of the district court as the result of a clerical error. Therefore, the motion to amend the judgment by an order nunc pro tunc was properly overruled.

The judgment of the district court is correct and it is affirmed.

AFFIRMED.

YEAGER, J., not participating.

WATKINS PRODUCTS, INCORPORATED, A CORPORATION, APPELLANT, V. GEORGE OREN RAINS ET AL., APPELLEES.
120 N. W. 2d 368

Filed March 15, 1963. No. 35358.

1. **Principal and Surety: Limitations of Actions.** The statute of limitations commences to run against a surety when his obligation to pay accrues.
2. ———: ———. Partial payments made without the authority

or consent of a surety, unless ratified by the surety, do not toll the statute of limitations as to such surety.

3. ———: ———. Knowledge of the making of partial payments by the principal does not of itself affect the liability of the surety, nor operate to toll the statute of limitations as to him.
4. **Pleading.** A motion for judgment on the pleadings, like a demurrer, admits the truth of all well-pleaded facts in the pleadings of the opposing party and all reasonable inferences to be drawn therefrom.
5. **Principal and Surety: Limitations of Actions.** Where a petition alleges a sale of merchandise to a principal debtor having a written suretyship contract, and it appears on the face of the pleadings that the suit was commenced after the running of the statute of limitations, the cause of action is barred as to the sureties as a matter of law in the absence of allegations showing that the statute has been tolled as to them.

Appeal from the district court for Buffalo County: S. S. SIDNER, Judge. Affirmed.

Dryden & Jensen, for appellant.

Richard A. Dier, William J. Ross, and Ward W. Minor, for appellees Mattson et al.

Heard before WHITE, C. J., CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

CARTER, J.

This is an action by Watkins Products, Incorporated, to recover from George Oren Rains, as principal, and Ingve A. Mattson, George L. Gifford, and Mrs. G. L. Gifford, as sureties, a balance of $1,350.47 with interest at 6 percent per annum from September 6, 1956. The defendants filed a motion for judgment on the pleadings. The motion was sustained as to the sureties and overruled as to the principal. The plaintiff has appealed.

The record shows that on March 27, 1956, plaintiff entered into a written contract with the defendant Rains for the sale of merchandise to Rains. On the same written instrument the three sureties promised, agreed, and guaranteed to pay for the merchandise and the prepaid transportation charges thereon in the manner provided

by the contract between plaintiff and Rains. The petition alleges that between April 1, 1956, and August 24, 1956, plaintiff sold merchandise to the defendant upon his order and pursuant to the terms of the agreement in the amount of $1,865.93. Credits were allowed by the plaintiff in the amount of $515.46, leaving $1,350.47 due and unpaid. The account attached to the petition shows that the last credit was by the return of merchandise in accordance with the contract on November 27, 1956. It is the contention of the sureties that the petition shows that more than 5 years have elapsed between the date on which the cause of action accrued and the date on which the action was brought, and that the claim against the sureties was barred by the statute of limitations. § 25-205, R. R. S. 1943.

This action was commenced on September 28, 1961, more than 5 years after the liability of the sureties was incurred. The action against the sureties is barred unless there was a tolling of the statute. Plaintiff contends that a return of merchandise in the amount of $105.73 on November 27, 1956, had that effect. The petition shows that Rains returned this merchandise to plaintiff, who advised the sureties that it had been credited on Rains' account. There is nothing to indicate that the sureties consented to the return of this merchandise for credit and they invoke the rule that payments made without the authority or consent of a surety or joint obligor do not toll the statute of limitations as to such surety or joint obligor. In re Estate of Soukup, 142 Neb. 456, 6 N. W. 2d 615; W. T. Rawleigh Co. v. Smith, on rehearing, 142 Neb. 529, 9 N. W. 2d 286.

In order for a part payment to operate to toll the statute of limitations as to a surety the payment must have been made by the surety in person, or for him by his authority, or for him without authority and subsequently ratified by him. The mere fact that the surety has knowledge of partial payments being made by the

principal is not sufficient to toll the statute as to the surety.

Where a petition alleges the sale of merchandise to a principal debtor with a written contract of suretyship signed by the sureties, and it appears on the face of the petition that the suit was commenced after the running of the statute of limitations, the cause of action is barred as to the sureties in the absence of an allegation showing that the statute has been tolled as to them. W. T. Rawleigh Co. v. Smith, *supra*.

A motion for a judgment on the pleadings is in the nature of a demurrer. Like a demurrer, it admits the truth of all well-pleaded facts in the pleadings of the opposing party, together with all reasonable inferences to be drawn therefrom. Brown v. Royal Highlanders, 140 Neb. 54, 299 N. W. 467; Vaughn v. Omaha Wimsett System Co., 143 Neb. 470, 9 N. W. 2d 792. The pleadings nowhere indicate the existence of any fact that would toll the statute of limitations as to the defendant sureties and the sustaining of the motion for judgment on the pleadings is therefore correct. The plaintiff cites cases showing that a payment of money or its equivalent, including a return of merchandise by the principal debtor, amounts to a part payment that would toll the statute. While this is true, it would operate only to toll the statute of limitations as to the principal debtor who made the payment, but not as to a surety who did not voluntarily pay, authorize, or ratify it.

AFFIRMED.

ELIZABETH K. MATSON, APPELLEE, V. CLAUS MELVIN MATSON, APPELLANT.

120 N. W. 2d 364

Filed March 15, 1963. No. 35372.

1. **Divorce. The decree of the trial court in a divorce action insofar as minor children are concerned is never final in the sense**

that it cannot be changed but is subject to review at any time in the light of changing conditions.

2. ———. In the case of an award of custody of a minor child to the mother in a divorce action the father should ordinarily have the right of visitation of such child, provided that his conduct is proper, that he does not molest the mother or the child, and that he does not interfere with the peaceable occupancy of the mother in her home.

3. ———. As a general rule the allowance of alimony as an annuity, or by requiring the husband to pay a fixed sum each month during the life of the other party, or for an indefinite period of time, will not be approved except where the situation of the parties and the contingencies are such that the amount of alimony cannot be placed in a lump sum without danger that such an allowance may prove unjust and inequitable.

4. ———. The court in determining 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 the marriage 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 Dodge County: ROBERT L. FLORY, Judge. Affirmed in part, and in part reversed and remanded with directions.

Lyle B. Gill, for appellant.

Kerrigan, Line & Martin, for appellee.

Heard before WHITE, C. J., CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

YEAGER, J.

This is an action for divorce by Elizabeth K. Matson, plaintiff and appellee, against Claus Melvin Matson, defendant and appellant. The case was tried to the court and a decree of divorce was rendered in favor of the plaintiff. By the decree also the defendant was required to pay plaintiff $50 a month for the support of a child born of the marriage of the parties and $100 a month as alimony for the plaintiff. There was no limitation of time over which the payments of alimony should extend.

A division of property was decreed concerning which there is no contest. The plaintiff was awarded the custody of the child of the parties, and as to this there is no contest. The defendant was granted the right to visit the child in the home of plaintiff for periods of not more than 2 hours and not more often than once a week.

From the decree which was rendered the defendant has appealed. The propriety of the portion of the decree granting a divorce to the plaintiff is not presented as an issue on the appeal.

Only three questions are presented for consideration here. By one of these the defendant insists that it was error to award alimony of $100 a month for an indefinite period of time. Another is that the allowance of $100 a month as permanent alimony to plaintiff is excessive. The third is that the fixation of the right of visitation of the child of the parties was erroneous.

As to the matter of the fixation and control of the right of visitation, this is a matter which resides in the sound discretion of the district court and is subject to change at any time on proper and sufficient showing. The appropriate rule is stated as follows in Koser v. Koser, 148 Neb. 277, 27 N. W. 2d 162: "The decree of the trial court in a divorce action insofar as minor children are concerned is never final in the sense that it cannot be changed but is subject to review at any time in the light of changing conditions." See, also, Sims v. Sims, 148 Neb. 771, 29 N. W. 2d 378; § 42-312, R. R. S. 1943.

In view of the right of the court to change the matter of custody and the evidence adduced it appears that the restriction on the right of visitation by the defendant with his child is at least for the present unreasonable. There is evidence of bitter antagonism between the parties to the action which, to say the least, would not likely contribute to pleasant, satisfactory, and harmonious visitations, but while the conduct of the defendant as described in the evidence is not of a commendatory character, there is nothing in it the effect of which

would be to say that it could be reasonably assumed that longer periods of visitation or visitations away from the home of the plaintiff would result in physical, mental, or moral harm to the child. The major complaint as to the conduct of the defendant flows from addiction to the use of intoxicating liquor.

Notwithstanding this evidence it is shown that he has been regularly employed as a railroad brakeman for about 12 years and has not failed to support his family. The only basis for the limitation is a suggested inference that he might or would expose the child to the observation attendant upon his use of intoxicating liquor. Unless and until there is some manifestation to the contrary this father should not be deprived of the right of reasonable visitations with his child. If such manifestations should develop, as has been pointed out, the remedy is at hand.

To what extent and in what manner the restriction should be changed is difficult to determine. In Taminosian v. Taminosian, 117 Neb. 285, 220 N. W. 271, in a situation in certain respects similar to this case, this court said: "The father should also have the right to have the son with him one day in each week, if the boy wants to go with him, provided the father does not molest or interfere with the mother or her peaceable occupancy of the home premises."

It does not appear improper, in the light of this observation and what appears reasonable, to conclude that the decree should be modified so as to permit the defendant to have for visitation the child of the parties out of the presence of and away from the home of the plaintiff 1 day a week until the further order of the court.

As to the award of alimony to the plaintiff, it is pointed out that no consideration of a division of property or the value thereof is required. The parties had no property of great value. On separation the plaintiff appears to have taken what she desired and the remain-

der was left to the defendant, and the record does not disclose that either has complained of this.

At the time of trial the defendant was employed as a railroad brakeman and had an income of from $420 to $450 a month. On the trial it was disclosed the monthly obligation to be paid out of his wages was in the vicinity of $200 but there were obligations for payment totaling at least $1,000. This did not include the $50 a month the defendant was required to pay for the support of the child of the parties.

At that time the plaintiff was employed part time. What she received was not disclosed, but she was capable of earning $165 a month. She was entitled to receive $50 a month for the support of the child and was receiving $25 a month for the support of a child by a former marriage.

It was in the light of this that the court rendered its decree awarding the plaintiff alimony of $100 a month without specification or limitation of total amount. At the time the plaintiff was of the age of 40 years and the defendant was of the age of 36 years. There was no evidence indicating that either of them was not in good health.

The defendant urges that this award is improper and excessive. In this connection it is pointed out that there is no hard and fast rule for guidance in the determination of these questions.

It is contended that it is improper in that the rights of the parties are not definitely fixed, that is, the award is without time or limitation, but as to this the decisions of this court admonish but do not command. The attitude of this court in such a situation is expressed in Reckling v. Reckling, 172 Neb. 731, 111 N. W. 2d 627, as follows: "Generally, we do not approve of allowing alimony in the form of an annuity, or requiring the husband to pay a fixed sum each month during the life of the other party, or for an indefinite period of time."

Notwithstanding this general attitude, it is pointed

out that in instances such an allowance may be found to be proper. It was said in Dunlap v. Dunlap, 145 Neb. 735, 18 N. W. 2d 51: "There are cases, and we have so held, where the situation of the parties and the contingencies are such that the amount of alimony cannot be placed in a lump sum without danger that such allowance may prove unjust or inequitable to one or the other of the parties and it is therefore proper for the court to provide for the payment of a stated sum at fixed periods over an indefinite period."

The case of Reckling v. Reckling, *supra,* approved this observation and also described the attitude which should be observed by the courts in the consideration of the question of alimony and division of property, as follows: "In determining the question of alimony or division of property as between the parties, the court, in exercising its sound discretion, will consider the respective ages of the parties to the marriage; their earning ability; the duration of and the conduct of each during the marriage; their station in life; the circumstances and necessities of each; their health and physical condition; their financial circumstances as shown by the property owned at the time, its value at that time, its income-producing capacity, if any, and whether accumulated or acquired before or after the marriage; and from all such elements the court should determine the rights of the parties and all other matters pertaining to the case."

An examination of other cases which have been before this court, in the light of this declaration of principle and the evidence here, fails by comparison to disclose a precedent which would justify the allowance of alimony for the plaintiff of $100 a month and without limitation upon the length of period or of total amount.

Without going into further detail the conclusion is reached that the portion of the decree with reference to alimony is erroneous and should be modified. It appears that a reasonable and proper allowance as alimony

would be $3,000 payable at the rate of $50 a month.

That part of the judgment of the district court awarding a divorce to the plaintiff and that part awarding payment of $50 a month for the support of the child of the parties are affirmed. The part awarding custody of the minor child of the parties to the plaintiff is also affirmed, subject however to the right of the defendant to visitation with the child 1 day a week out of the home and presence of the plaintiff. That part which requires the payment of $100 a month as alimony for the plaintiff is reversed and the amount of alimony is fixed at $3,000 payable at the rate of $50 a month until the total amount is paid.

The judgment is therefore affirmed in part and reversed in part and the cause is remanded to the district court with directions to render judgment in accordance with this opinion.

The plaintiff is awarded $100 as a fee for the services of her attorney in this court and the costs are taxed to the defendant.

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

IN RE CONDEMNATION BY THE STATE FIRE MARSHAL. FIRST INVESTMENT COMPANY, APPELLANT, V. STATE FIRE MARSHAL OF THE STATE OF NEBRASKA, APPELLEE, ETHEL S. LOWE ET AL., INTERVENERS-APPELLEES.

120 N. W. 2d 549

Filed March 15, 1963. No. 35377.

1. **Easements.** Where an easement is necessary for the enjoyment of the estate conveyed, an implied grant is constructively implied in the conveyance.
2. **Vendor and Purchaser.** The conveyance of a thing imparts a grant of it as it actually exists at the time the conveyance is made, unless the contrary intention is manifested in the grant.
3. **Party Walls: Easements.** Owners of a party wall are not tenants in common, but each owns in severalty the part thereof

situated on his own land, with an easement of support from the other part.

4. ———: ———. Where a wall is entirely upon the property of one party, the right of an adjoining owner to have support therefrom, whether derived from contract or acquired by prescription, is in the nature of an easement, which is terminated upon destruction of the building by accident or casualty.

5. ———: ———. Where a facility becomes so dilapidated as to be no longer usable for the purpose for which it was intended, the law implies an abandonment and termination of the right of user.

6. ———: ———. The easement of each proprietor in the tenement of the other ceases with the existence of the state of things which had created it, and there is no right in either, in case the other refuses to cooperate, to rebuild the wall and claim contribution.

7. ———: ———. There is no obligation to repair where the grant of an easement is an implied one.

8. **Easements.** An easement for one purpose established by mere user cannot by legal intendment be extended to another purpose.

9. **Party Walls: Easements.** The owners of a party wall do not have a reciprocal easement of support from each other's building, but either of them may remove his own building without liability for the resulting damage to the other, providing he gives proper notice of removal and uses reasonable care and caution to protect the wall and remaining building.

10. **Buildings: Party Walls.** The removal of a part of a building pursuant to an order of condemnation creates no obligation on the part of the owner of the part of the building removed to provide future protection for an interior division wall which then becomes an exterior wall for the portion of the building remaining.

Appeal from the district court for Buffalo County: NORRIS CHADDERDON, Judge. Reversed and remanded.

Mitchell, Taylor & Beatty, for appellant.

Robert A. Munro, for appellee.

Ward W. Minor, for interveners-appellees.

Heard before WHITE, C. J., CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

SPENCER, J.

This is a condemnation action brought by the State

Fire Marshal against the First Investment Company to condemn a portion of a building in the city of Kearney, Nebraska. The trial court entered judgment that the First Investment Company either repair or demolish its portion of the building, and if it demolishes it, that it be required to pay one-half the cost of erecting a tile wall from the first floor ceiling to the roof. First Investment Company perfected an appeal to this court.

Prior to February 14, 1914, W. T. Scott and Theodore W. Bolte were each the owner of an undivided one-half interest in Lot 115 and the south half of Lot 116 in the original town of Kearney Junction. At that time, a two-story building, which had been erected in 1887, was on the property. The east half and the west half of the building were separated by a 12-inch brick or masonry wall from the basement through the first floor to the ceiling of the first floor. This wall is stipulated to be on the dividing line between the east half and the west half of the building. The second floor was divided by a two by four wood partition that was lathed and plastered. This gave a 5-inch lathe and plaster partition over the brick division wall through the second floor to the roof. This partition was entirely on the portion of the wall situated on the west half of the building, being approximately ½ inch at its south end to 1½ inches at its north end west of the west property line of the east half of the building.

On February 14, 1914, W. T. Scott and Theodore W. Bolte divided the premises by cross-deeds. The east half of said property was conveyed to Scott and the west half was conveyed to Bolte. These conveyances accomplished the severance of the joint tenancy, and whatever rights of easement which have existed with respect to the dividing walls took their rise and form in this transaction. These properties will hereinafter be referred to as the east half and the west half.

The two properties have remained separated since that time, and the respective titles have been conveyed

on several occasions. In 1945, Ethel S. Lowe and Stephen G. Lowe, hereinafter referred to as Lowes, became the owners of the west half. On November 6, 1959, the First Investment Company, hereinafter referred to as Company, became the owner of the east half.

On February 12, 1962, the State Fire Marshal, pursuant to sections 81-513 and 81-515, R. R. S. 1943, filed an order in the district court for Buffalo County, directing that the east half of the building situated on Lot 115 and the south half of Lot 116 in the original town of Kearney, be either demolished or repaired.

The Company admitted the dilapidated condition of the east half of the building, and alleged that the Lowes claimed some interest in the building by virtue of a party wall. The Lowes, by answer and cross-petition, alleged that because of the absence of a proper supporting wall, demolition of the east half of the building could not be accomplished without causing irreparable damage to the part of the structure owned by them. They then prayed that any order of demolition first require the construction of a proper supporting wall between the structures at the cost of the Company, and that the order further provide for damages.

At the trial, the Company stipulated that it wished to comply with the portion of the order of the State Fire Marshal requiring the east half of the building to be demolished. It was also stipulated that the brick wall running from the basement to the second floor was on the dividing line between the properties and is not included in the condemnation.

After a hearing and an inspection of the premises by the court, a judgment was entered directing the Company to make the repairs required or to start demolishing the east half of the building within 30 days, and if it fails to do so, directing the State Fire Marshal to demolish said building, as provided in section 81-519, R. R. S. 1943. The judgment provided that said demolition should be done in such a manner as not to disturb the

wall now between said building and that of the Lowes, but permitting the Company to remove the east wall of a closet in the north room on the second floor which extended into the east half of the premises. The judgment further directed that the Lowes should build a tile wall from the top of the brick wall between the buildings through the second floor to the roof, and that the Company should pay one-half of the cost thereof.

The Company perfected its appeal to this court, alleging substantially that in the absence of a specific agreement the owner of one part of a divided building has no obligation to repair or improve his part of the building for the benefit of the owner of the other side, and further that in any event he is not responsible for the cost of extending the wall unless he is using the extension.

There is no question in this case involving the brick partition extending from the basement floor to the first floor ceiling. The wall in question is the lathe and plaster wall resting on the brick partition wall dividing the second story of the building. It extends through the second floor to the roof, and all of it is on the west half of the premises, or the portion owned by the Lowes.

The severance of the premises in 1914 by the common owners made the walls dividing the premises party walls. The record does not indicate the grant of an easement in express terms in those conveyances, yet because an easement is necessary for the enjoyment of the estate conveyed, an implied grant is constructively implied in the conveyance. See, Union Nat. Bank of Lowell v. Nesmith, 238 Mass. 247, 130 N. E. 251; 3 Tiffany, Real Property (3rd Ed.), § 779, p. 253. The conveyance of a thing imparts a grant of it as it actually exists at the time the conveyance is made, unless the contrary intention is manifested in the grant. Znamanacek v. Jelinek, 69 Neb. 110, 95 N. W. 28, 111 Am. S. R. 533.

It is the actual existence of the wall as a part of both portions of the building from which the grant and reser-

vation of a party wall must be implied. The land covered by the wall is the several property of the owner of the portion on which it stands, yet the title of each is qualified by the easement to which the other is entitled. See cases cited in note 47, 2 Thompson on Real Property (Perm. Ed.), § 627, p. 251. We said in Shiverick & Co. v. Gunning Co., 58 Neb. 29, 78 N. W. 460, that owners of a party wall are not tenants in common, but each owns in severalty the part thereof situated on his own land, with an easement of support from the other part.

It makes no difference to a decision herein whether the division wall has become a party wall by the implied grant, as we here determine, or by prescription, as contended by the Lowes. It has been used and enjoyed in common by the various owners of both buildings for almost 50 years. For the purposes of discussion herein, we determine the lathe and plaster wall to be a party wall to the extent of the use practiced during such period. This lathe and plaster wall, which hereinafter will be referred to as the wall, is strictly an interior wall. It is entirely on the west half, and so is owned by the Lowes subject to a support easement in favor of the Company. The removal of the east half will expose the wall to the elements, and, unless an exterior wall is provided, damage will result to the structure. Consequently, the easement claimed by the Lowes against the east half, while referred to by them as one of support, is essentially one of protection or shelter.

Party wall rights usually originate in a contract, and their duration under such circumstances obviously depends on the intention of the parties as determined from the contract. Here, however, we do not have a contract but an implied grant or easement, and our problem is to determine the duration of an implied grant under the facts of this case. Is it as equally obvious that an implied grant should not be carried beyond the limits fairly and reasonably to be contemplated when the im-

plied grant is made? Is that what the parties can be presumed to have intended?

In 1914, when the ownership of the building was separated, the building had been standing for 27 years. In 1962, when the State Fire Marshal started these proceedings, the building had been in existence for 75 years. Does the law presume the intention to be that an implied grant creates a perpetual easement? The term perpetual is one of infinite duration. Does it run into eternity? The answer seems implicit in the question when it is put in this form.

The law of decay is inexorable. Nothing can escape it. Sooner or later the time will even come when the brick wall, which is not here involved, will be so deteriorated as to require replacement or demolition. Here, through the failure to repair and the erosion of time, the east half of the building became so dilapidated that it was no longer usable for the purpose intended. The evidence indicates repair was inadvisable and demolition appeared to be the obvious answer. The judgment of the trial court, however, gives the option, and decrees repair or demolition.

Suppose, for the purpose of discussion, although the record does not support it, the Company, which acquired its interest in 1959, and its predecessors in interest, could be charged with willful neglect to repair its portion of the building. To answer this supposition, it should first be conceded that there is an obligation on each owner to use his own property so as not to injure his neighbor. However, can it be maintained from this obligation that the right of support and shelter to which each is entitled, and which may not be taken away by the wrongful act of the other owner, imposes also the affirmative duty to repair the premises and to maintain the existing condition of things? Unless this is so, the judgment of the trial court herein cannot be sustained. There is no question that if a contract right were involved, one owner would not be permitted to defeat an

easement by his failure to repair. Barr v. Lamaster, 48 Neb. 114, 66 N. W. 1110, 32 L. R. A. 451. This, however, is not the present situation because we are concerned not with a contract right but with an implied easement.

Generally, the easement of support of adjoining buildings by the party wall ordinarily ceases when the wall ceases to exist, or is accidentally destroyed, or has been made unfit for its purpose by accident or age, or has become so decayed as to require rebuilding from the foundation. Similarly, when the buildings are accidentally destroyed, the easement ceases. See 69 C. J. S., Party Walls, § 11b, p. 8.

In Bowhay v. Richards, 81 Neb. 764, 116 N. W. 677, 19 L. R. A. N. S. 883, we adopted the rule first enunciated in Sherred v. Cisco, 4 Sandf. (N. Y.) 480, that a destruction of the building destroyed the easement. In that case, we said: "Where a wall is entirely upon the property of one party, the right of an adjoining owner to have support therefrom, whether derived from contract or acquired by prescription, is in the nature of an easement, which is terminated upon the destruction of the building by fire." This is the general rule where the destruction is by accident or casualty.

Jackson v. Bruns, 129 Iowa 616, 106 N. W. 1, 3 L. R. A. N. S. 510, is an interesting case on the subject of repair. It held the owner of the second story of a building had no equitable right to compel the owner of the first story to keep the foundation and walls of the first story in repair for the purpose of furnishing continuing support to the second story in the absence of any express or implied contract on the part of the owner of the first story to keep the walls in such repair. We quote the following from that case: "The owner of one portion of a building cannot recover damages against the owner of another portion (in the absence of any contractual relation between them giving rise to a duty on the part of the latter to keep his portion of the prem-

ises in repair) for damages resulting from the failure to make repairs. Cheeseborough v. Green, 10 Conn. 318 (26 Am. Dec. 396); Pierce v. Dyer, 109 Mass. 374 (12 Am. Rep. 716). Nor can the owner of one portion compel the owner of another portion to contribute to or bear the expense of making necessary repairs. Loring v. Bacon, 4 Mass. 575; Ottumwa Lodge v. Lewis, 34 Iowa 67. In Campbell v. Mesier, 4 Johns. Ch. (N. Y.) 335, (8 Am. Dec. 570) the equitable right to contribution is upheld; but that case has not been followed, in New York or elsewhere. In the case of a party wall it has been held that either owner may repair or replace (Schile v. Brokhahus, 80 N. Y. 614), but that neither one is bound to repair for the purpose of protecting the property of the other. Colebeck v Girdlers Co., 1 Q. B. D. 234."

Cross-easements in a stairway, hall, and party wall erected by the joint construction of a building, were involved in Louis Pizitz Dry Goods Co. v. Penney, 241 Ala. 602, 4 So. 2d 167. In that case, the court held that if such facility became so dilapidated as to be no longer usable for the purposes for which it was intended, the law would imply an abandonment and termination of the right of the user. The Company, by admitting the dilipidated condition of the building and agreeing to condemnation, indicated a clear intent to abandon any easement it might have.

Partridge v. Gilbert (1857), 15 N. Y. 601, 69 Am. Dec. 632, cited in Bowhay v. Richards, 81 Neb. 764, 116 N. W. 677, 19 L. R. A. N. S. 883, involved two brick dwelling houses erected in 1794 with a common wall, each of which, by subsequent conveyances, was acquired by separate owners. That case held: "When one of the buildings thus supported becomes so dilapidated as to be unsafe and unfit for occupation, and the removal of the front and rear walls of such building, with the floors and beams, would occasion the destruction of the whole wall, the owner of such building may, upon rea-

sonable notice to the tenant of the adjoining building, lawfully take down the whole wall; and if he occupy no unnecessary time in completing the work, and use proper care and skill in its execution, is not responsible to the tenant of the adjoining building for damages resulting from its exposure to weather, from loss of business or inability to let the upper lofts.

"It seems that the easement of each proprietor in the tenement of the other ceases with the existence of the state of things which had created it, and that there is no right in either, in case the other refuses to cooperate, to rebuild the wall and claim contribution."

The following observations in Partridge v. Gilbert, *supra,* by Denio, Chief Justice, a portion of which is set out in Bowhay v. Richards, *supra,* are of interest here: "In a case which was determined in the Superior Court of New York, that court held that the mutual easement ceased with the destruction of the buildings and the wall by fire, and that the respective parties were remitted to their original unqualified title to the division line. (Sherred v. Cisco, 4 Sandf. S. C. R., 480.) I do not perceive any solid distinction between a total destruction of the wall and buildings, and a state of things which should require the whole to be rebuilt from the foundation. In either case there is great force in saying that the mutual easements have become inapplicable, and that each proprietor may build as he pleases upon his own land, without any obligation to accommodate the other. Circumstances may have materially changed since the adjoining proprietors were content with such walls as would have supported two adjoining dwellings. If the right of mutual support continues, by means of the original arrangements, or by prescription, it is for just such an easement as was originally conceded, or which has been established by long enjoyment. But in the changing condition of our cities and villages, it must often happen, as it did actually happen in this case, that edifices of different dimensions, and an entirely differ-

ent character, would be required. And it might happen, too, that the views of one of the proprietors, as to the value and extent of the new buildings, would essentially differ from those of the other; and the division wall, which would suit one of them, would be inapplicable to the objects of the other."

The nature, extent, and duration of the easements or servitudes imposed by implication on the two estates are not too well defined in the reported cases, but it does seem clear that there is no obligation to repair where the grant is an implied one.

A case which is very analogous to the instant one because of the condemnation feature is McKenna v. Eaton (1902), 182 Mass. 346, 65 N. E. 382, 94 Am. S. R. 661. This case involved a double house. The city board of health ordered the destruction of the half belonging to Eaton. Eaton, pursuant to the order, demolished his half, leaving no support or shelter to McKenna. McKenna brought action against Eaton for damages for the removal, without replacing the support and shelter which came from Eaton's house. In a decision by Holmes, Chief Justice, the court held that although McKenna had rights against Eaton, in the event of a voluntary destruction of the support furnished by the house torn down, he could not recover where the act was done under the valid direction of the board of health. The court said: "* * * we are of opinion that the plaintiff's rights were at an end, and that he stood no differently when the superior power by which the defendant's building was removed was the law, than he would have stood if it had been fire or an earthquake or time. It is decided that the defendant would not have been liable for a failure to keep his house in repair, even if the omission was with a design to harm the plaintiff. Pierce v. Dyer, 109 Mass. 374. Adams v. Marshall, 138 Mass. 228, 234. In Pierce v. Dyer it was intimated that if the houses were destroyed by the action of the elements the respective easements would be at an end. 109 Mass. 377.

That plainly is the law in the analogous case of party walls. Heartt v. Kruger, 121 N. Y. 386. Hoffman v. Kuhn, 57 Miss. 746. Antomarchi v. Russell, 63 Ala. 356. Jones, Easements, § 709. It is true that these cases of destruction have been cases of destruction of the whole wall, but the same principle would apply to a destruction of a half, if it were possible, as is shown by Pierce v. Dyer."

It may be suggested that in the instant case the Company was given an option by the trial court to repair or demolish. It is a distinction without any legal difference. If one party does not desire to restore his building to a safe and sound condition for his own benefit, he should not be compelled to maintain it for the benefit of another in the absence of a specific agreement. Certainly then, he should not be required to provide an exterior wall where none existed previously and which wall will be a definite improvement of the remaining property.

The following from Calmelet v. Sichl, 48 Neb. 505, 67 N. W. 467, 58 Am. S. R. 700, which involved a dispute over the extension of a party wall and the erection of a fourth story, is pertinent on this point: "That courts have no power, however, to enlarge contract rights of parties requires no citation of authority to establish. It is, moreover, very clear that an easement for one purpose established by mere user cannot, by legal intendment, be extended to another purpose."

Essentially, we are here determining whether there is any duty on the Company to preserve its building for the protection of the party wall. Stated more generally, do the owners of a party wall have reciprocal easements of support from each other's building? A distinction is made in the cases between the removal of the wall itself and the rest of the building, which is the situation in the instant case. In that latter instance, the authorities generally hold that a coowner of a party

wall is not required to preserve his building for the sake of the party wall. See, Annotation, 9 A. L. R. 1329, as well as Annotation, 85 A. L. R. 288, covering a change in conditions as terminating party wall agreements on easements. We believe the rule to be that the owners of a party wall do not have a reciprocal easement of support from each other's building, but either of them may remove his own building without liability for the resulting damage to the other, providing he gives proper notice of removal and uses reasonable care and caution to protect the wall and remaining building. Clearly then, when the action is instituted by the State Fire Marshal for the protection and welfare of society, there should be no question about the right to remove without liability.

The fact that in the instant case the east half of the building can be wholly removed without damage to the west half should not be ignored. The removal of the east half will not require the removal of any part of the second floor wall. It is only the fact that the wall is strictly an interior wall and was not intended to protect against the wind and the weather that makes it probable that future damage could result to the remaining structure unless an exterior wall is provided. The Lowes had notice of and are parties to this action of condemnation. Their witness testified that the tile wall ordered by the trial court would provide ample protection to the second story of their building. This tile wall is solely for the benefit of the Lowes, and we are unable to find any reason, certainly no legal reason, why the owner of the east half, whose building is being ordered removed, should be required to contribute in any way to the cost of the tile wall. We therefore determine that the removal of the Company's portion of the building pursuant to an order of condemnation creates no obligation on its part to provide future protection for an interior division wall which became an exterior wall for the portion of the building remaining.

For the reasons given, the judgment of the trial court is reversed and the cause is remanded with directions to enter a judgment in conformity with this opinion.

REVERSED AND REMANDED.

STATE OF NEBRASKA, APPELLEE, V. GEORGE EGGERS, APPELLANT.

120 N. W. 2d 541

Filed March 22, 1963. No. 35327.

1. **Evidence: Appeal and Error.** An offer to prove, to lay the foundation for the proper presentment of error in the exclusion of proposed testimony as answer to a question to which an objection is sustained, must be of matter which would have been admitted as relevant, responsive, and pertinent in answer to the rejected interrogatory.
2. **Criminal Law: Evidence.** Section 28-1214, R. R. S. 1943, provides that the issuance of an insufficient fund check shall be presumptive evidence of intent to defraud and of knowledge of insufficient funds in the bank.
3. ———: ———. This is a rebuttable presumption and does not shift the burden of proof, and the presumption of innocence is still a matter of evidence to which the defendant is entitled, but along with it the jury is entitled to consider the presumption provided by this statute as to knowledge and intent.
4. **Banks and Banking: Criminal Law.** The crime of obtaining money by means of an insufficient fund check is completed at the time the check is uttered and passed.
5. ———: ———. Unless subsequent transactions have some bearing on the transaction involved in the issuance of the check, they are immaterial and incompetent.
6. **Evidence: Appeal and Error.** An offer of proof is required for the purpose of making it appear to the court that the question put to the witness calls for competent evidence. Unless it does so without equivocation, it is not error to overrule the offer.
7. ———: ———. It is not error to reject an offer not within the limits of the question on which the offer is based.
8. **Criminal Law: Juries.** The question of the competency of a venireman to sit in the trial of a criminal case cannot be raised by a motion for a continuance.
9. ———: ———. It is the duty of a trial court to see that de-

fendants in criminal cases are tried by a jury such that not even the suspicion of bias or prejudice can attach to any member thereof.

10. ———: ———. The right to challenge jurors for cause is a right which may be waived.

11. **Criminal Law: Trial.** Where a motion for a directed verdict is made at the close of the evidence of the State in a criminal action, the introduction of evidence thereafter by the defendant waives any error in the ruling on the motion. The defendant, however, is not prevented from questioning the sufficiency of the evidence in the entire record to sustain a conviction.

Appeal from the district court for Custer County: S. S. SIDNER, Judge. Affirmed as modified.

William S. Padley, for appellant.

Clarence A. H. Meyer, Attorney General, and Richard H. Williams, for appellee.

Heard before WHITE, C. J., CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

SPENCER, J.

This is a criminal action filed in the district court for Custer County, Nebraska, charging defendant, George Eggers, with the issuance of an insufficient fund check in the amount of $40. The jury returned a verdict of guilty. Defendant's motion for a new trial was overruled, and he was sentenced to 3 years in the State Penitentiary. He has perfected an appeal to this court.

On October 4, 1961, defendant purchased a load of hay from Robert L. McDowell, the complaining witness, which came to slightly over $200. The parties agreed on a figure of $200. According to the State's evidence, the defendant tendered $175 in cash, and, because he had no money to get home, McDowell gave him back $15, taking the $40 check in question. This check was dated October 4, 1961, and was drawn on the Crawford State Bank, Crawford, Nebraska. The check was returned, marked "Not Sufficient Funds." Defendant's ledger sheet at the Crawford State Bank, which was produced

by the State, indicated that the defendant had a bank balance of 3 cents on October 4, the date the check was issued.

Defendant had been tried on a similar offense to the same jury panel on the 5th and 6th of March 1962, and was found not guilty. The information in this case was filed in the district court on March 6, 1962. Defendant was arraigned on March 30, 1962, and entered a plea of not guilty. His trial was set for April 26, 1962. On March 30, 1962, defendant filed a motion to quash the complaint and information, and to abate the prosecution because the cause was to be tried to the same jury panel as a previous complaint in a similar action. This was argued on that date and was taken under advisement by the court.

Defendant's counsel, who was a resident of Broken Bow, thereafter withdrew from the case. On April 19, 1962, defendant secured new counsel from Gothenburg, Nebraska. On April 25, 1962, a motion for a continuance was filed, supported by the affidavit of the new counsel. The motion was premised on three grounds: First, counsel had not had sufficient time to prepare for trial; second, the testimony of witnesses in South Dakota, which could only be secured by deposition, was required for a proper defense, and time was insufficient to secure the testimony; and, third, defendant could not have a fair trial before a jury selected from the present panel, because he had previously been tried to a jury selected from said panel on a similar offense.

On April 26, 1962, the motion to quash and abate was overruled. The motion for a continuance was then heard and overruled, and a jury was impaneled. The defendant made no further objections to the panel and none of the jurors selected were challenged for cause.

Defendant sets out six assignments of error. The first one is as follows: "The Court erred in excluding competent, relevant, material and proper evidence offered by the plaintiff in error with respect to the issuance of

said check and the fact that it was to be retained by the payee until the return of the Plaintiff in Error to purchase a second load."

His sixth assignment of error, which will be considered with the first one, is as follows: "The court erred in refusing to admit testimony with respect to the entire transaction and dealings as between the complaining witness and the accused, offer having been made to prove with respect to the facts surrounding the transaction."

There is no question but that the trial court attempted to restrict the defendant in his defense to matters which occurred before or at the time of the issuance of the check. We find, however, only two offers of proof in the bill of exceptions.

The first offer is on the cross-examination of the complaining witness, and was made when the court sustained an objection to two questions. The record is as follows: "Q But in any event you did let him keep back $15 to have some money to be able to make his trip. A Yes, sir. Q Now, did you receive a telephone call from him later on? Mr. Evans: Objected to as incompetent, irrelevant and immaterial. The Court: Sustained. Q Did you ever talk to the man again after this date? Mr. Evans: Objected to as incompetent, irrelevant and immaterial. The Court: Sustained. Mr. Padley: I want to make an offer. (Offer made out of presence of jury.) Mr. Padley: By this witness the defense offers to prove that the transaction between the parties involved the purchase of a subsequent load of hay which the defendant later refused to purchase for the reason that he complained to this witness of the poor quality of the load of hay purchased in the transaction of Ocober 4th, and that as the result thereof he did not by his agreement pick up the check which was given on October 4th." While the questions were proper as foundational questions, the offer shows the error to be without prejudice. Clearly, the offer is much broader

than the question and is within the rule announced in Perkins v. Tilton, 53 Neb. 440, 73 N. W. 930, that: "An offer to prove, to lay the foundation for the proper presentment of error in the exclusion of proposed testimony as answer to a question to which an objection is sustained, must be of matter which would have been admitted as relevant, responsive, and pertinent in answer to the rejected interrogatory."

Defendant, by proper questions, could have elicited everything that was said and done in the transaction which resulted in the giving of the check. The quality of the load of hay and his reason for not returning are immaterial to the question involved in this prosecution.

Section 28-1214, R. R. S. 1943, provides that the issuance of an insufficient fund check shall be presumptive evidence of intent to defraud and of the knowledge of insufficient funds in the bank. This is a rebuttable presumption and does not shift the burden of proof, and the presumption of innocence is still a matter of evidence to which defendant is entitled, but along with it the jury is entitled to consider the presumption provided by this statute as to knowledge and intent. See Lahners v. State, 118 Neb. 184, 223 N. W. 951.

The crime of obtaining money by means of an insufficient fund check is completed at the time the check is uttered and passed. Unless subsequent transactions have some bearing on the transaction involved in the issuance of the check, they are immaterial and incompetent. See discussion in Haines v. State, 135 Neb. 433, 281 N. W. 860.

The other offer of proof was made during the direct examination of the defendant. The record is as follows: "Q On October 4th, 1961, did you have any other conversation with Mr. McDowell, - other than that which you have testified to, - concerning any further transactions with him? A I was to come back and get another load of hay. Mr. Evans: I ask that the answer be stricken as incompetent, irrelevant and immaterial. The

Court: Overruled. Q When were you to come back and get another load of hay, if you know. Mr. Evans: That is objected to for the reason that it is incompetent, irrelevant and immaterial. The Court: Sustained. (Out of hearing of jury). Mr. Padley: By this witness the defense offers to prove that the defendant instructed the complaining witness McDowell to hold the $40 check which is Exhibit 1, until he returned to load another load of hay. The defense also offers to prove that the load of hay obtained on October 4th was of inferior quality, the inferior quality being concealed from this defendant, and that an argument arose between the defendant and Mr. McDowell with respect to the quality of the hay on October 6th, 1961; that Mr. McDowell refused to make any adjustment and as the result the defendant did not return to pick up the next load of hay and as the result did not pick up the check which had been given to Mr. McDowell to be held, which check was Exhibit 1. Mr. Evans: To which offer the State objects as being incompetent, irrelevant, immaterial, and beyond the scope of the issues here before the court. The Court: The objection is sustained."

Previously, the defendant had been permitted to testify that he had told the complaining witness to hold the check, which is the point embraced in the first sentence of the offer. The additional portion of the offer is much broader than the question, and the objection made was properly sustained. As we said in Havlik v. St. Paul Fire Marine Ins. Co., 87 Neb. 427, 127 N. W. 248: "An offer of proof is required for the purpose of making it appear to the court that the question put to the witness calls for competent evidence. Unless it does so without equivocation, it is not error to overrule the offer."

The material portions of the offer could have been elicited by proper questions. We hold that it is not error to reject an offer of proof not within the limits of the question on which the offer is based. See, Barr v.

Post, 56 Neb. 698, 77 N. W. 123; Exchange Elevator Co. v. Marshall, 147 Neb. 48, 22 N. W. 2d 403.

Defendant's second assignment of error is the refusal of a continuance for the purpose of taking depositions. This is not argued in the brief and so needs no discussion herein. We do, however, observe that no prejudice could have resulted from the ruling. We find nothing in the affidavits presented which would have been material or competent evidence in the trial.

Defendant's third assignment of error is as follows: "The Court erred in compelling the Plaintiff in Error to be tried before a jury selected from the same jury panel which tried him on a similar charge of issuing an insufficient fund check on March 5th and 6th, 1962, and compelling him to be tried before a jury on which four of the members had been members of the previous jury. That the action of the court is prejudicial error." Defendant never properly presented this issue to the trial court and has waived any objection by his subsequent action.

Obviously, the motion to quash the information was not proper to raise the question. Section 29-1808, R. R. S. 1943, provides: "A motion to quash may be made in all cases when there is a defect apparent upon the face of the record, including defects in the form of the indictment or in the manner in which an offense is charged." Defendant's motion does not involve any defect apparent upon the face of the record. Further, the motion does not ask that the jury panel be discharged and another summoned, but asks that the information be quashed and the prosecution against him be abated.

Defendant's motion for a continuance also included an attack on the jury panel. In Seaton v. State, 106 Neb. 833, 184 N. W. 890, 19 A. L. R. 1056, we held: "The question of the competency of a venireman to sit in the trial of a criminal case cannot be raised by a motion for a continuance." In that case, nine of the jurors who sat at the trial of a codefendant who had been granted a

separate trial, were retained in the trial of the defendant. On this point, we approved the rule that: " 'A juror,' * * * 'is incompetent where he has sat on a jury that tried another jointly indicted defendant, even though he says he has formed no opinion and can try defendant impartially.' "

In that case, we also approved the following from Jacobs v. State, 1 Ga. App. 519: " ' "It is the duty of a trial court to see that defendants in criminal cases are tried by a jury such that not even the suspicion of bias (leaning) or prejudice (prejudgment) can attach to any member thereof." Unless the jury be absolutely impartial, the jury system becomes an "awkward instrument of justice," and the constitutional guaranty that "every person charged with an offense against the laws of this state * * * shall have a public and speedy trial by an impartial jury" * * * is worthless.' "

In the instant case, the defendant was represented by counsel who knew the proper method of raising the question of disqualification of jurors. For his own reasons he elected not to do so and passed the jurors selected for cause. By passing the jurors for cause, the defendant waived any objection to their selection as jurors. The right to challenge jurors for disqualification is a right which may be waived even in a capital case. Bufford v. State, 148 Neb. 38, 26 N. W. 2d 383. Defendant is not permitted to change his mind after an unfavorable verdict.

Defendant's fourth assignment of error pertains to the refusal of the trial court to dismiss the action at the close of the State's case. A sufficient answer to this is found in State v. Kimbrough, 173 Neb. 873, 115 N. W. 2d 422, in which we held: "Where a motion for a directed verdict is made at the close of the evidence of the State in a criminal action, the introduction of evidence thereafter by the defendant waives any error in the ruling on the motion. The defendant, however, is not prevented from questioning the sufficiency of the evi-

dence in the entire record to sustain a conviction."

Defendant did not renew his motion to dismiss at the close of all of the evidence, and the sufficiency of the evidence to sustain the conviction is not in issue in this case. We have, however, carefully reviewed the evidence and find a motion would have been of no avail because clearly a jury question was presented.

Defendant's fifth assignment of error involves the severity of the sentence under the circumstances and facts of this case. From our examination of the record, we are convinced that the ends of justice will be served by a sentence of 1 year in the State Penitentiary.

The jury found the defendant guilty as charged. We find no prejudicial error in the record and affirm the verdict and judgment of conviction, but reduce the sentence to 1 year in the State Penitentiary.

AFFIRMED AS MODIFIED.

VIOLET CRAWFORD, APPELLANT, V. WALDEMAR C. SOENNICHSEN, DOING BUSINESS AS SOENNICHSEN'S I.G.A. GROCERY, APPELLEE.

120 N. W. 2d 578

Filed March 22, 1963. No. 35328.

1. **Trial.** In testing the sufficiency of the evidence for determining the propriety of a directed verdict, the plaintiff is entitled to have all controverted facts resolved in her favor, and she is entitled to have the benefit of every inference that can reasonably be drawn from the evidence.
2. ———. Where the facts adduced to sustain an issue are such that but one conclusion can be drawn when related to the applicable law, it is the duty of the court to decide the question as a matter of law and not submit it to a jury.
3. **Negligence.** A business inviter owes the duty to exercise ordinary care to keep an adjacent parking area, and the approaches to his business, maintained by him for the use of patrons and customers, properly on the premises, in a reasonably safe condition.
4. ———. Generally, there is no liability on the part of an inviter

owner to protect a customer against hazards which are known to the customer, and are so apparent that he may reasonably be expected to discover them and protect himself.

5. ———. The liability of an owner or occupant of the premises is predicated on proof of his superior knowledge, actual or constructive, of dangers to which invitee is subjected and of which invitee is unaware.

6. ———. Proof of knowledge, either actual or constructive, may not be predicated upon conjecture, surmise, or speculation.

7. ———. Generally, a store owner may not be charged with negligence by reason of the natural accumulation of ice and snow due to weather conditions, where he has not created the condition, and where the hazardous condition is as well known to the invitee as to the store owner.

Appeal from the district court for Cass County: JOHN M. DIERKS, Judge. Affirmed.

Schrempp & Lathrop and Henry C. Rosenthal, Jr., for appellant.

Edward G. Garvey and James R. McGreevy, for appellee.

Heard before WHITE, C. J., CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

WHITE, C. J.

This is a negligence action for damages allegedly sustained by the plaintiff on January 26, 1959, as the result of an accidental daytime fall at about 2:30 p.m., on snow and ice ruts present on a store owner's hard-surfaced parking lot maintained by him for the use of customer invitees. At the conclusion of all of the evidence in the case, the trial court directed a verdict for the defendant.

The question presented to this court by the assignments of error is whether or not there was sufficient evidence in the record to warrant submitting to the jury the issue of failure by the defendant store owner to exercise ordinary care for the reasonable safety of the plaintiff, which was the proximate cause of her fall and injuries.

In testing the sufficiency of the evidence for determining the propriety of a directed verdict, the plaintiff is entitled to have all controverted facts resolved in her favor, and she is entitled to have the benefit of every inference that can reasonably be drawn from the evidence. Pupkes v. Wilson, 165 Neb. 852, 87 N. W. 2d 556. Where the facts adduced to sustain an issue are such that but one conclusion can be drawn when related to the applicable law, it is the duty of the court to decide the question as a matter of law and not submit it to a jury. Milk House Cheese Corp. v. Chicago, B. & Q. R. R. Co., 161 Neb. 451, 73 N. W. 2d 679; Kohl v. Unkel, 163 Neb. 257, 79 N. W. 2d 405.

The testimony in this case, insofar as pertinent to the issue presented here, is undisputed. Giving maximum reach to plaintiff's testimony, it proves the following facts: Defendant's retail grocery store has checkout stands at both the front and rear, the rear entrance being to the south. Across an alley to the south, the defendant maintained a parking lot for the use and benefit of employees and customers. The plaintiff was employed in a restaurant abutting the southwest corner of the parking lot. She left her place of employment at about 2:30 p.m., on January 26, 1959, to go to the defendant's grocery store, as she had numerous times before. Plaintiff walked part of the way across the parking lot, noticing patches of snow and spots of pavement, to a point almost across the parking lot and directly south of the rear entrance to the grocery store. She accidentally fell and slipped on some snow ruts at this point. The sole testimony as to the existence and nature of the snow ruts and the condition, which was the occasion of plaintiff's fall, is her own testimony as follows:

"Q. Well, Mrs. Crawford, after you came up and stopped at the ruts, what did you do then? A. Well, for a couple or three seconds I was looking to see which was the best way to go, to go to the store, and I figured that was just as good a place as any because they were

all ruts and I went to step across with my right foot and down I went on the buttocks and that is the last I remember."

She further testified that it was her right foot that slipped. She does not state whether she stepped clear over the ruts or not; but that the ruts were 5 or 6 inches wide and 3 or 4 inches deep; that she had crossed 3 or 4 days prior and this condition was not present; and that if she remembered right it had snowed 3 days before, "* * * I think, it had, if I remember right."

As to the presence of snow, there was testimony from the official weather bureau records at the Omaha Airport and from Nebraska City, to the effect that there was snow of 2.9 inches on January 20 and 21, 1959, and that after the 24th of January, when the temperature went to 50°, the snow went back to a trace.

There is no issue in this case as to the status of plaintiff as a business invitee while crossing the parking lot, or the duty of the business inviter to exercise ordinary care to keep the adjacent parking area in a reasonably safe condition. Broadston v. Beddeo Clothing Co., 104 Neb. 604, 178 N. W. 190; Rogers v. J. C. Penney Co., 127 Neb. 885, 257 N. W. 252; Malolepszy v. Central Market, 143 Neb. 356, 9 N. W. 2d 474. The defendant specifically concedes this, makes no contention as to issue of contributory negligence, and rests his position solely on the proposition that under the law no duty was owed to the plaintiff under the circumstances of this case.

Precisely, then, we address ourselves to the question of the measure of duty the defendant owed the plaintiff under the circumstances. It is elementary that negligence and the duty to use care does not exist in the abstract, but must be measured against a particular set of facts and circumstances. We refer now to the evidence previously recited, and particularly to the fact that this accident occurred at 2:30 p.m., in broad daylight.

In Taylor v. J. M. McDonald Co., 156 Neb. 437, 56

N. W. 2d 610, we classified cases of this nature and stated that the first class consists of cases where *inadequate* lighting of a hazardous condition permitted recovery. A second class of cases extends the range of duty to those cases where the defendant *created* a hazardous condition, such as improperly oiled floor in an aisle, or soap and water on a tiled floor. Glenn v. W. T. Grant Co., 129 Neb. 173, 260 N. W. 811; Rankin v. J. L. Brandeis & Sons, 135 Neb. 86, 280 N. W. 260. We have, furthermore, drawn a distinction between conditions existing inside and outside an inviter's place of business, holding, in effect, that the duty as to maintenance of floor conditions is higher inside the inviter's place of business for the reason that invitees are examining merchandise, and that the inviter invites a condition in which their attention is diverted to the inspection of merchandise and the other ordinary incidents of the inviter's business. Glenn v. W. T. Grant Co., *supra;* holding followed and affirmed in Brown v. Slack, 159 Neb. 142, 65 N. W. 2d 382.

Perhaps our closest cases, both denying recovery, are Thompson v. Young Men's Christian Assn., 122 Neb. 843, 241 N. W. 565, and Sokolof v. First National Bank, 122 Neb. 892, 240 N. W. 547. In the Thompson case, the plaintiff slipped on a wet and slippery outside step, but there was no showing that the defendant created the condition, or that there was any notice, actual or implied. In the Sokolof case, the plaintiff entered the lobby of a bank building and slipped on a wet and soapy floor, and there was no evidence of creation of the condition, or actual knowledge by defendant.

The distinction between these cases and this one is obvious. Here, we have a condition of natural accumulation of snow from weather conditions, a complete absence of proof as to the creation of the condition by the defendant, no proof of knowledge by the defendant, and conclusive proof by the plaintiff herself of the snowy and rutty condition she encountered in attempting to

cross. Further, the plaintiff testifies that these conditions were not present approximately 3 days before, and then she testifies that she does not remember, but she thinks that it snowed about 3 days before. From this status of the record, it is conjectural and speculative as to when and how the snow ruts, about which the plaintiff testified, came into being. There is no testimony in the record by which a reasonable inference could be drawn of either actual knowledge of this condition by the defendant, or that it existed for a period of time which could charge the defendant with constructive knowledge of the condition.

We feel, therefore, that this case comes within the general rule as to the range of duty as to known and obvious conditions on inviter's premises.

There is no liability on the part of an inviter owner to protect a customer against hazards which are known to the customer and are so apparent that he may reasonably be expected to discover them and to be able to protect himself. Generally, the liability of an owner or occupant of the premises is predicated on proof of his superior knowledge, actual or constructive, of dangers to which invitee is subjected and of which *invitee is unaware.* 38 Am. Jur., Negligence, § 97, p. 757, and cases cited thereunder; Prosser, Torts, p. 642; 65 C. J. S., Negligence, § 50, p. 543.

No Nebraska cases are cited by either counsel covering an invitee parking lot condition resulting from snow and ice accumulations. However, the general rule seems clearly to be that a store owner cannot be charged with negligence by reason of natural accumulation of ice and snow where the condition is as well known to the plaintiff as the defendant. Annotation, 14 A. L. R. 2d 780, notes 6 and 9; Wise v. Great Atlantic & Pacific Tea Co., 94 Ohio App. 320, 115 N. E. 2d 33; Turoff v. Richman, 76 Ohio App. 83, 61 N. E. 2d 486; Levine v. Hart Motors, Inc., 75 Ohio L. Ab. 265, 143 N. E. 2d 602; Brent v. Bank of Aurora, 132 Colo. 577, 291 P. 2d 391; Bersch v. Holton

Street State Bank, 247 Wis. 261, 19 N. W. 2d 175; Oerter v. Ziegler, 59 Wash. 421, 109 P. 1058; Beckstead v. Riverside Bank of Miami (Fla.), 85 So. 2d 130; Woods v. Naumkeag Steam Cotton Co., 134 Mass. 357, 45 Am. R. 344; Purcell v. English, 86 Ind. 34, 44 Am. R. 255; Sawyer v. McGillicuddy, 81 Me. 318, 17 A. 124, 10 Am. S. R. 260.

Brevity forbids a review of the above cases and annotations. It is clear that the cases permitting recovery happened at nighttime, or as a result of an unlighted condition, or under circumstances in which the injured person was reasonably unaware of the dangerous condition causing the fall, or under circumstances constituting a trap.

Realizing the lack of authority in this jurisdiction that applies to this situation, the plaintiff cites and argues only two cases in her brief for her position, both from other jurisdictions. In Evans v. Sears Roebuck & Co. (Mo. App.), 104 S. W. 2d 1035, factually the case involved a sloped and inclined driveway on which there was a layer of ice covered by a recent dry snow, and was not observed by the plaintiff until after her fall. Even in that case, the court held that the defendant could not be held liable for the failure to remove the ice and snow from its parking lot. In Morris v. Atlantic & Pacific Tea Co., 384 Pa. 464, 121 A. 2d 135, the facts were that the plaintiff slipped on the parking lot while unloading a pushcart of groceries into her car. In that case, the court, in effect, held that the defendant had created the condition by an inefficient cleaning operation and inferred that there was positive proof that this condition had existed for about 2 days before the accident. That case is the only one we find that in any measure supports the position of the plaintiff. It is distinguishable factually in that here we have no proof by which a reasonable inference could be drawn of the creation of the condition by the defendant or proof of knowledge by the defendant. Despite this, it is noted that there was a

dissent stating that since the plaintiff had full knowledge of the condition, the court was changing the well-established rule of no liability under these circumstances.

The judgment of the trial court holding that there was no liability of the defendant under the circumstances was correct, and it is affirmed.

AFFIRMED.

IN RE ESTATE OF RUBY LEE SMITH, DECEASED. FARMERS CO-OPERATIVE MERCANTILE COMPANY (NON-STOCK) OF SCRIBNER, NEBRASKA, A CORPORATION, APPELLANT, V. A. C. SIDNER, ADMINISTRATOR WITH THE WILL ANNEXED OF THE ESTATE OF RUBY LEE SMITH, DECEASED, APPELLEE.

120 N. W. 2d 537

Filed March 22, 1963. No. 35376.

1. **Executors and Administrators.** By the terms of section 30-603, R. S. Supp., 1961, the court is empowered to fix the time within which creditors may present claims against the estate of a decedent.
2. ———. By the terms of section 30-601, R. R. S. 1943, it is required that notice by publication shall be given to creditors of the estate of a decedent.
3. ———. By section 30-605, R. R. S. 1943, it is provided that in an instance where a creditor has failed to present his claim within the time fixed, he may, within 3 months, apply for additional time not exceeding 3 months.
4. ———. The right to the extension on application under section 30-605, R. R. S. 1943, is dependent upon a showing of good cause.
5. **Notice.** By section 25-520.01, R. S. Supp., 1961, it is provided that within 5 days after the first publication of notice a copy of such notice shall be mailed to every party whose name and post-office address are known appearing to have a direct legal interest in the action or proceeding, and that an affidavit of the mailing of notice shall be filed within 10 days after the mailing, which affidavit shall state that after diligent investigation and inquiry there was inability to ascertain and there was no knowledge of any other party having a direct legal interest.
6. **Notice: Executors and Administrators.** A claim for unliquidated damages, unasserted by the claimant or in his behalf

within the time fixed by statute for the filing of claims, is not, within the meaning of section 25-520.01, R. S. Supp., 1961, a direct legal interest in an action or proceeding.

Appeal from the district court for Dodge County: ROBERT C. FLORY, Judge. Affirmed.

Spear, Lamme & Simmons, for appellant.

Sidner, Lee, Gunderson & Svoboda, for appellee.

Heard before WHITE, C. J., CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

YEAGER, J.

On March 5, 1961, Ruby Lee Smith, a resident of Fremont, Dodge County, Nebraska, died as the result of a collision in Douglas County, Nebraska, between an automobile operated by her and a motor vehicle owned by Farmers Co-operative Mercantile Company of Scribner, Nebraska, a corporation, designated as plaintiff and appellant, and operated by an employee of the plaintiff. A. C. Sidner, designated herein as defendant and appellee, was duly appointed administrator with will annexed of the estate of Ruby Lee Smith. This appointment was made April 11, 1961.

On April 28, 1961, the time for filing claims was fixed by order of the county court. Notice was duly published and by the order and notice the final date for filing claims was fixed as August 14, 1961, and the date for hearing on claims was set for 10 a.m., August 15, 1961. No individual or formal notice was given to plaintiff as a creditor. The plaintiff filed no claim. An order was entered August 15, 1961, barring all claims which had not been presented.

On March 13, 1962, the plaintiff filed an application to have vacated the order barring claims and for permission to file its claim for $3,418.54 based upon the allegations that the collision which caused the death of the deceased was a result of her negligence and that as a further result of her negligence the vehicle of the plain-

tiff was damaged in consequence of which it was entitled to recover from the estate $3,418.54. On April 16, 1962, the application was denied.

An appeal to the district court from the denial of the application was presented there. The matter was presented to the district court by petition of the plaintiff and by motion of the defendant for judgment on the pleadings. This motion was sustained and judgment was accordingly rendered. The effect of this was to sustain the refusal of the county court to set aside its order barring claims and disallowing the filing of a claim by the plaintiff. The appellant by the appeal here seeks a reversal of this judgment. The assignments of error are: "The lower court erred in refusing to set aside the Decree and Order Barring Claims," and "The lower courts erred in refusing to allow plaintiff to file its claim."

As to the matter of filing claims against estates, by the terms of section 30-601, R. R. S. 1943, it was and is required that notice by publication shall be given to creditors.

By section 30-603, R. S. Supp., 1961, the court is empowered to fix the time within which creditors may present claims.

By section 30-604, R. S. Supp., 1961, the court is empowered to extend the time for presentation of claims.

Section 30-605, R. R. S. 1943, provides that where a creditor has failed to present his claim within the time allowed he may, within 3 months, apply for additional time and the court may allow such additional time not exceeding 3 months.

The record here discloses that the statutory duty of the court was performed and a date fixed for the filing of claims. The plaintiff however did not make such an application as would entitle it to an extension of time for filing its claim. Its application was not made within 3 months, but after almost 7 months.

In the light of this it may not be said that it is en-

titled to any relief under these provisions. As to this it has been said: "The only way a creditor can give the county court authority to make an order extending the time in which to file his claim is to make such application within 3 months after the expiration of the time previously allowed for filing claims and then only by showing good cause for doing so. § 30-605, R. R. S. 1943." Supp v. Allard, 162 Neb. 563, 76 N. W. 2d 459. See, also, Storm v. Cluck, 168 Neb. 13, 95 N. W. 2d 161.

The primary theory, however, on which the plaintiff bases its right to a reversal of the judgment is that its claim for damages is a direct legal interest in the estate of the deceased, and that within the meaning and proper application of other statutory provisions it was not given and did not receive required notice and hence its right to make claim has not been destroyed or impaired.

Prior to 1957 the only notice required to be given to claimants against decedents' estates was by posting or by publication in a legal newspaper of the county for 3 successive weeks. § 30-601, R. R. S. 1943.

By act of the Legislature in 1957 other requirements were added. This appears as Laws 1957, chapters 80 and 81, pages 325 and 326. One section was amended in 1959 in a manner not of consequence herein. Laws 1959, c. 97, p. 415. These sections, with the one amended, appear in the Revised Statutes as sections 25-520.01, 25-520.02, 25-520.03, and 25-520.04, R. S. Supp., 1961.

The provisions by declaration therein contained are not amendatory but are new and independent legislation. They are applicable in all cases wherein constructive service is permitted or required.

By the terms of section 25-520.01, R. S. Supp., 1961, it is provided that in any instance where a notice by publication is authorized by law, a party instituting or maintaining such an action or proceeding shall within 5 days after the first publication of notice mail a copy of the published notice to each and every party appearing to have a direct legal interest in the action or proceeding,

whose name and post-office address are known to him; that an affidavit of the mailing of notice shall be filed within 10 days after the mailing of notice; and that the affidavit shall be required to state that after diligent investigation and inquiry there was inability to ascertain and there was no knowledge of any other party appearing to have a direct legal interest in the action or proceeding.

By the petition of the plaintiff filed in the district court the series of events, with the dates thereof, which have already been set out here, were pleaded, and of them there is no pleading in denial. Also by the petition it is pointed out that there was no compliance with the requirement for notice pointed out herein as being contained in sections 25-520.01 to 25-520.04, R. S. Supp., 1961. Of this there is no denial.

The response to the petition is a motion for judgment on the pleadings made by the defendant, the grounds of which motion were in substance that the petition discloses on its face that the application to set aside the order barring claims was not made within 3 months after the order was entered, hence by the terms of section 30-605, R. R. S. 1943, no right existed to have it set aside; and that the failure of the defendant to mail a copy of the published notice and file the affidavit described in the petition was not a jurisdictional defect.

On the question of whether or not the court was without jurisdiction to bar the right of the plaintiff to assert its claim, it becomes necessary to ascertain the true meaning of "a direct legal interest in such action or proceeding," as it appears in section 25-520.01, R. S. Supp., 1961. If the unliquidated damage claim asserted by the plaintiff in its petition, as the plaintiff contends, was a direct legal interest in the estate of the deceased, or in the probate action, then of course the plaintiff's rights were abridged and it was deprived of the notice to which it was entitled under the statutes in force and referred to herein relating to notice. In other words,

if this claim amounted to a direct legal interest in the estate, the court was without jurisdiction to bar the claim of the plaintiff without the notice required by statute.

The gist of the defendant's contention in this area to sustain the judgment of the district court is that this claim for damages was not a direct legal interest in the estate or the action and therefore no right or rights to the notice and affidavit under the notice and affidavit provisions of section 25-520.01, R. S. Supp., 1961, existed in favor of plaintiff, and that this being true the plaintiff was in no position to claim any rights flowing from the failure of the defendant to comply with the provisions of the section relating to notice and affidavit. In other words, the contention of the defendant is that the provisions of section 30-605, R. R. S. 1943, were applicable and that the failure, which is disclosed by the pleadings, to comply therewith deprived the plaintiff of the right to have the order barring claims vacated and set aside.

Neither the Legislature nor this court has declared the meaning of the term "direct legal interest" appearing in the statute. No decision of any other court has attached to the full terminology a declaration of meaning.

It is reasonably inferable from the language employed by the Legislature that the reference was to property of the estate and property in which the law recognized that the claimant had an existing interest.

The claim of plaintiff was an unliquidated and unestablished claim for damages. The question then arises as to whether or not such a claim may be regarded as property or an interest in property. In Miller v. Miller, 44 Pa. St. 170, a case in point of fact not similar to the case here, the court announced the principle that unliquidated damages are not property. The same principle was announced in Hopkins v. Fogler, 60 Me. 266. The rule however, as it is set out in 73 C. J. S., Property, § 9, p. 175, is that damages are personal property.

It follows of course that if they are not property they

cannot be an interest in property, or an interest in an estate. From an examination of the pronouncements on the subject it appears that it ought to be said that a claim of unliquidated damages should be regarded as a claim of ownership of a property right.

It does not follow however that the claim could be regarded as a direct legal interest in or to an estate against which claim is made.

Assuming that the claim asserted in the petition was property, did it amount to a claim of a direct legal interest in the estate of the deceased? It is difficult to see how, without establishment of liability and amount of damage, the plaintiff could be said to have a direct legal interest in the estate of the deceased. There could be no direct legal interest in the estate in the absence of fixation of damage.

In refutation of the contention that the claim which is the basis of the application amounted to a direct legal interest in the probate action or proceeding, it must be said that the petition contains no pleading of fact the effect of which was to say that this was apparent to any party required to give and mail notice or to make affidavit. In substance all that the petition does in this connection, directly or by an exhibit which is made a part thereof, is to recite the details of the claimed accident, the probate proceeding, that the truck involved in the collision with the automobile of the deceased belonged to the plaintiff, and that from these things it was apparent to the defendant that the plaintiff had a direct legal interest in the estate proceedings.

There is no fact pleaded the effect of which is to say that the plaintiff had or intended to claim any right of recovery on account of the collision prior to the date of the order barring claims or that it sought relief prior to the expiration of 3 months thereafter.

In view of the conclusion that involved was not a direct legal interest within the meaning of the statute, sections 25-520.01 to 25-520.04, R. S. Supp., 1961, have

no application to the situation involved here. It follows therefore that no rights can flow therefrom to the plaintiff.

In the light of what was said with reference to the application of these statutory provisions in Lindgren v. School Dist. of Bridgeport, 170 Neb. 279, 102 N. W. 2d 599, which case itself has no similarity to this one, the conclusion is reached that, since these provisions have no controlling force or effect in this instance and the proceedings were held in conformity with statutes otherwise, the plaintiff may not be heard to complain of a failure of defendant to give notice.

The judgment of the district court is affirmed.

AFFIRMED.

JESSIE MAYE JONES, APPELLANT, V. NEBRASKA BLUE CROSS HOSPITAL SERVICE ASSOCIATION ET AL., APPELLEES.

120 N. W. 2d 557

Filed March 22, 1963. No. 35408.

1. **Judgments: Appeal and Error.** An order by the district court vacating a default judgment and permitting a party to defend upon the merits is a final and appealable order.
2. **Judgments.** A district court has inherent power to vacate or modify its own judgment at any time during the term in which it is rendered.
3. ———. Ordinarily, where a judgment has been entered by default and a prompt application made at the same term to set it aside, with a tender of an answer disclosing a meritorious defense, the court may, on reasonable terms, sustain the motion and permit the cause to be heard upon the merits.
4. **Judgments: Appeal and Error.** An order of the district court setting aside a default judgment will not be set aside in the absence of proof or showing that there was an abuse of discretion.
5. ———: ———. In the absence of any evidence in a bill of exceptions, it will be presumed by this court on appeal that the district court has not abused its discretion in setting aside a default judgment.

Appeal from the district court for Dawson County: CLARENCE S. BECK, Judge. Affirmed.

Wells C. Jones, for appellant.

Tye, Worlock & Knapp, for appellees.

Heard before WHITE, C. J., CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

WHITE, C. J.

The sole question involved in this case is whether the district court erred in sustaining defendants' motion to vacate the plaintiff's default judgment.

On appeal by defendants from a county court judgment for plaintiff, plaintiff filed her petition on appeal on August 20, 1962, within 50 days of the rendition of the judgment in county court. The third Monday after 50 days from the rendition of the judgment elapsed on September 10, 1962, without the defendants having filed any answer or responsive pleading. § 25-821, R. R. S. 1943. The district court entered a default judgment against the defendants on September 12, 1962. Two days thereafter, the defendants filed a motion to vacate the default judgment or for a new trial, together with an answer consisting of a general denial and setting up an affirmative defense. Within the same term, and on September 19, 1962, the court sustained the motion, vacated the default judgment of September 12, 1962, and permitted the answer to stand.

From subsequent overruling of the motion for new trial, the plaintiff appeals, assigning as error that it was an abuse of legal discretion to vacate the default judgment of September 12, 1962.

The order vacating the judgment is an appealable one. See, § 25-1902, R. R. S. 1943; Sang v. Lee, 20 Neb. 667, 31 N. W. 85. The district court has inherent power to vacate or modify its own judgments at any time during the term in which they are rendered. Lyman v. Dunn, 125 Neb. 770, 252 N. W. 197; Bradley v. Slater, 58 Neb.

554, 78 N. W. 1069; Barney v. Platte Valley Public Power & Irr. Dist., 147 Neb. 375, 23 N. W. 2d 335.

The record and briefs in this case are in dispute as to whether the defendants' answer date was September 10, 1962, or September 17, 1962. It is not necessary to determine that question. The record shows that 2 days after the default judgment and 1 day after receiving a copy of the default judgment, the defendants filed their motion to vacate and their answer. The record discloses no notice to defendants, or their attorneys of record, of either the petition on appeal, or the hearing on the default judgment. There is no bill of exceptions or evidence in this case, except the defendants' offer, and the court's reception of the court files now before us.

In the light of this situation, was there any abuse of legal discretion by the trial court in setting aside the default judgment 7 days after its entry? We think not. We feel that directly applicable here is the language from Lacey v. Citizens Lumber & Supply Co., 124 Neb. 813, 248 N. W. 378, where the court held it was an abuse of discretion not to set aside a default judgment under similar circumstances. The court said: "Ordinarily, where a judgment has been entered by default and a prompt application made at the same term to set it aside, with a tender of an answer disclosing a meritorious defense, the court should, on reasonable terms, sustain the motion and permit the cause to be heard upon the merits. * * * In the instant case, it appears that defendants tendered a meritorious defense and have been deprived of a hearing upon the merits simply because through inadvertence their counsel failed to file answer within the proper time. The court, in the exercise of a sound discretion, we think, should have sustained the motion upon such terms as it deemed just. The courtesy that should prevail between opposing counsel to a cause ordinarily requires that counsel for one party should, before taking a default, give notice to counsel for the other side of his intention so to do."

Directly pertinent here also is the following from Barney v. Platte Valley Public Power & Irr. Dist., *supra*, citing Sang v. Lee, *supra*: " 'It is certainly within the power of the court at any time during the term at which a judgment by default has been rendered to set the same aside, and allow an answer setting up a meritorious defense to be filed.' "

From what has been said, it appears on the record before us that the district court was correct in the exercise of its discretion. Beyond this, there is no showing or evidence before us from which an inference of abuse of discretion could be inferred. In reviewing orders affecting procedure in a case, this court will presume, in the absence of evidence to the contrary, that the district courts have not abused their discretion. And in such a situation, the only question before this court is whether the pleadings support the trial court's judgment. Benson v. General Implement Corp., 151 Neb. 234, 37 N. W. 2d 223; Dryden & Jensen v. Mach, 150 Neb. 629, 35 N. W. 2d 497; Lichtenberger v. Worm, 41 Neb. 856, 60 N. W. 93.

The only record and evidence presented to this court are the pleadings and orders of the court relating thereto. The district court acted properly within its powers in setting aside the default judgment and permitting the defendants to answer on the merits. There is no evidence of any abuse of discretion. The judgment of the district court is affirmed.

AFFIRMED.

MARVIN WAITE, APPELLANT, V. MRS. LELAND BRIGGS, ALSO KNOWN AS LILLIAN BRIGGS, DOING BUSINESS AS LOVELAND ROCKBROOK BUS LINES, APPELLEE.

120 N. W. 2d 547

Filed March 22, 1963. No. 35414.

1. **Automobiles: Negligence.** Generally it is negligence for a mo-

torist to drive a motor vehicle 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.

2. ———: ———. Where the driver of a motor vehicle approaching a through street or highway stops and looks and sees an approaching vehicle on the favored street or highway but erroneously judges its speed or distance or for some other reason assumes he can proceed with safety and not have a collision, the question of whether he was guilty of contributory negligence which was the proximate cause of the collision is usually a jury question.

Appeal from the district court for Douglas County: FRANK G. NIMTZ, Judge. Reversed and remanded.

Wear, Boland, Mullin & Walsh and McCormack, McCormack & Brown, for appellant.

Kneifl & Kneifl, for appellee.

Heard before WHITE, C. J., CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

BOSLAUGH, J.

The plaintiff, Marvin Waite, brought this action to recover the damages to his automobile which were caused by an accident in Omaha, Nebraska, on January 26, 1960. The defendant is Mrs. Leland Briggs, also known as Lillian Briggs, doing business as Loveland Rockbrook Bus Lines. At the close of the plaintiff's evidence the trial court sustained the defendant's motion to dismiss the action. The plaintiff's motion for new trial was overruled and he has appealed.

The only evidence which the parties present in this court is whether the evidence of the plaintiff was sufficient to create a question for the jury on the issue of the defendant's negligence. That question must be determined pursuant to the rule that the defendant's motion to dismiss the action admits, for the purpose of the decision on the motion, the truth of the material and relevant evidence of the plaintiff, and the plaintiff is entitled to have every controverted fact resolved in

his favor and to have the benefit of every reasonable inference that may be deduced from the evidence. Sterner v. Lehmanowsky, 173 Neb. 401, 113 N. W. 2d 588.

The accident occurred on Center Street just east of the intersection of Eighty-second Avenue. Center Street is a state highway running east and west. Eighty-second Avenue runs south from Center Street and is surfaced with gravel. The first intersection west of Eighty-second Avenue is Eighty-fourth Street. Center Street slopes downhill from Eighty-fourth Street to a point approximately 200 feet west of Eighty-second Avenue. From that point east there is a slight upgrade to the top of the next hill east of Eighty-second Avenue.

The accident happened at about 4:40 p. m. It was raining and sleeting at the time and the brick surface of Center Street was icy and very slippery. The plaintiff's automobile was not equipped with chains or snow tires.

The plaintiff testified that he drove his automobile north on Eighty-second Avenue and stopped at Center Street; that he let an eastbound car go by; that he looked to the west and saw the school bus coming over the hill; that the bus was about halfway down the hill and over 500 feet west of the intersection when he drove onto Center Street; that he had trouble getting traction and his wheels were spinning; that he was moving slowly and was two or three car lengths east of the intersection when the bus struck the rear of his automobile; that the impact pushed his automobile off of the road and into the ditch on the south side of the road; that there is a cement post by a culvert on the south side of the highway east of the intersection; that there was westbound traffic on Center Street near the place of the accident at the time of the accident; and that after the accident he stated that he did not believe that the bus driver could have avoided the accident.

As we view the record, the evidence tended to estab-

lish the allegations of the plaintiff that the operator of the defendant's bus was negligent in failing to keep a proper lookout and in failing to keep the bus under proper control. Generally it is negligence for a motorist to drive a motor vehicle 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. Schwartz v. Hibdon, 174 Neb. 129, 116 N. W. 2d 187. See, also, Eden v. Klaas, 166 Neb. 354, 89 N. W. 2d 74. The evidence in this case was sufficient to create a question for the jury as to whether the defendant was negligent and, if so, whether the defendant's negligence was the proximate cause of the accident.

The amended answer alleged that the proximate cause of the accident was the negligence of the plaintiff which was more than slight. The defendant argues that the evidence establishes, as a matter of law, that the plaintiff was guilty of contributory negligence which was more than slight and which precludes him from any recovery.

Where the driver of a motor vehicle approaching a through street or highway stops and looks and sees an approaching vehicle on the favored street or highway but erroneously judges its speed or distance or for some other reason assumes he can proceed with safety and not have a collision, the question of whether he was guilty of contributory negligence which was the proximate cause of the collision is usually a jury question. Biggs v. Gottsch, 173 Neb. 15, 112 N. W. 2d 396.

The evidence in this case does not establish, as a matter of law, that the plaintiff was guilty of contributory negligence which was more than slight and the proximate cause of the accident. The defendant's motion to dismiss the action should have been overruled.

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

REVERSED AND REMANDED.

NORMA L. BECK, APPELLANT AND CROSS-APPELLEE, V. WESLEY BECK, APPELLEE AND CROSS-APPELLANT.

120 N. W. 2d 585

Filed March 29, 1963. No. 35297.

1. **Divorce.** 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 legal custody of her minor children.
2. ———. Condonation is forgiveness, express or implied, for a breach of marital duty, with the implied condition that the offense shall not be repeated.
3. ———. Where in an action for divorce both parents are found to be unfit or unsuitable to have the care and legal custody of the minor children of the parties, the welfare and best interest of the children will constitute the sole consideration in determining the right of custody.
4. ———. Under the provisions of section 43-236, R. R. S. 1943, where the parents of minor children are unfit or unsuitable to have their custody, the separate juvenile court may properly place their legal custody in the chief juvenile probation officer on such terms and conditions as the court may prescribe.
5. ———. Where adultery by a wife is established in an action for divorce, she is not entitled to an award of alimony and ordinarily will not be allowed an attorney's fee to be paid by the husband.
6. ———. An allowance of child support against a husband will not ordinarily be disturbed on appeal in the absence of evidence of inadequacy or excessiveness.

Appeal from the separate juvenile court of Lancaster County: W. W. NUERNBERGER, Judge. Affirmed as modified.

John McArthur, for appellant.

Wagener & Marx and Gladwyn A. Youngs, for appellee.

Heard before WHITE, C. J., CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

CARTER, J.

The plaintiff, Norma L. Beck, brought this suit against the defendant, Wesley Beck, to obtain a divorce, the

custody of the children, child support, alimony, attorney's fees, and costs, alleging cruelty on the part of the defendant as the ground therefor. The defendant denied the allegations of plaintiff's petition and by cross-petition sought a divorce from the plaintiff, the custody of the children, and the settlement of property rights, alleging cruelty and adultery by the plaintiff as grounds therefor. The case was heard and determined by the separate juvenile court of Lancaster County. The court denied a divorce to the plaintiff, granted a divorce to the defendant on the ground of adultery on the part of plaintiff, granted the custody of the children to the plaintiff, fixed the child support to be paid by the defendant at $180 per month, approved a division of property made by the parties, quieted title to the real estate and remaining personal property in the defendant, denied an allowance of attorney's fees to the plaintiff, and taxed the costs of the action to the defendant. The plaintiff appealed and defendant has cross-appealed.

Plaintiff and defendant were married on September 10, 1946. Plaintiff had a child, William Beck, by a previous marriage, who had been adopted by the defendant and who was 18 years of age at the time of trial. Five children were born of the marriage: Ruth, age 14; Deborah, 5; Leon and Deon, twins, 3½; and Toria, 2. At the time of trial plaintiff and defendant were each 39 years of age. They resided on a farm near Central City, Nebraska, from the date of their marriage until their separation.

Sometime prior to March 30, 1960, plaintiff commenced a suit for divorce in the district court for Merrick County which she later dismissed. On March 30, 1960, plaintiff commenced a suit for a divorce in the district court for Hall County to which the defendant filed a general denial. On January 23, 1961, after trial, the court denied plaintiff a divorce and dismissed her petition. No appeal was taken from this final judgment. On June 1, 1961, plaintiff filed the present suit for a divorce

in the district court for Lancaster County with the result hereinbefore stated.

The evidence shows that, beginning in 1954, plaintiff and defendant were close friends with Leo Haight and his wife Donna. During 1957, 1958, and the forepart of 1959, plaintiff commenced a series of clandestine meetings with Leo Haight on a little-used county road. Neighboring farmers testified to seeing them there many, many times. Two of them testified to seeing plaintiff and Haight in the most compromising of positions. Plaintiff admits meeting Haight at the place described by defendant's witnesses. The reasons she gave for these meetings with Haight were incredible and unworthy of belief. It would serve no useful purpose to recite the lurid details testified to by the witnesses having no interest in the result of the litigation. The evidence clearly establishes that plaintiff carried on a clandestine and adulterous relationship with Haight, as alleged. The plaintiff under such circumstances is not entitled to a divorce, as the trial court found.

Plaintiff contends that the trial court erred in not finding that defendant condoned the misconduct of the plaintiff. Condonation is forgiveness for a breach of marital obligation with the implied condition that the breach of obligation shall not be repeated. See Wright v. Wright, 153 Neb. 18, 43 N. W. 2d 424. There is some evidence in the record that defendant favorably considered a reconciliation at one time following the trial of the divorce proceeding in Hall County. It failed to materialize because of the expressed attitude of the plaintiff as to what her relationship to the defendant would be in the event of a reconciliation. There clearly was no condonation as a result of any resumption of the marital relation. We find no evidence in the record that would sustain a finding that there had been a condonation of plaintiff's conduct.

Plaintiff complains of the division of property made by the trial court. The evidence shows that on the day be-

fore plaintiff filed her first petition for divorce she went to the family home and removed furniture, dishes, cooking utensils, her clothing and that of the six children, and other articles that she needed. She also took possession of the family station wagon. She came back on two other occasions and took additional articles from the home. The defendant appears to have acquiesced in her taking this property. The trial court decreed her right to retain this property. In this we find no error. It is the rule in this state that where a wife is found to be guilty of adultery she is not entitled to an award of alimony. Baker v. Baker, 166 Neb. 306, 89 N. W. 2d 35; § 42-318, R. R. S. 1943. The trial court did not err in refusing to grant alimony to the plaintiff.

Plaintiff asserts that the allowance for child support is inadequate. The trial court allowed child support in the amount of $30 per month for each of the 6 children until each child becomes self-sustaining or 21 years of age. No evidence was offered on this subject. We find nothing in the record to sustain the inadequacy of this allowance.

Plaintiff assigns as error the failure of the trial court to allow an attorney's fee as a part of the costs. The rule is that where a wife is found guilty of adultery she is not ordinarily entitled to an award of attorney's fees to be taxed against the husband. Baker v. Baker, *supra*. The trial judge saw fit not to allow plaintiff an attorney's fee. This is in accordance with the general rule and we find no reason to interfere with the judgment of the trial court in this respect. Yost v. Yost, 161 Neb. 164, 72 N. W. 2d 689.

The defendant contends on his cross-appeal that plaintiff is an unfit person to have the custody of the minor children, as a matter of law. This court has stated the rule to be that where a wife is found to be guilty of adultery she is an unfit person to have the care and custody of her minor children as against the husband she

has wronged. Yost v. Yost, *supra;* Baker v. Baker, *supra.*

The evidence shows that plaintiff has properly cared for the children, before and after her separation from the defendant. There is no evidence in this record that plaintiff is not now properly caring for the children. At the time of trial four of the children were under 6 years of age. That these four children require a mother's care is hardly subject to question. Defendant bases his right to the custody of the children solely on the unfitness of the mother, resulting from her adulterous relationship with Haight. In a similar case this court said: "In any event, a proper regard for the welfare of her children required the defendant to refrain from conduct which would reflect upon her and produce harmful effects upon these small children." Speck v. Speck, 164 Neb. 506, 82 N. W. 2d 540. We can come to no other conclusion than that plaintiff is an unfit person to have the legal custody of her children and by her conduct has forfeited her superior right as their mother to such care and custody.

The defendant contends for the rule that upon the death or unfitness of the parent having the legal custody of minor children, the other parent has a legal right to their care and custody. This rule is qualified, however, by the requirement that such parent be a fit, proper, and suitable person to have the care and custody of the children. The evidence shows that the defendant is residing on the home place near Central City. He has a brother and his wife living with him. He testified that he had arranged for the brother and his wife to care for the children.

There is no evidence in this record as to the nature of the arrangement made, or the suitability of the brother and his wife for this undertaking. Their ages, fitness, and character are not established by the evidence. They did not testify. It was brought out that they have four children of unspecified ages. The tender years of

four of the children here involved makes it highly improbable of the success of this arrangement.

There is evidence that defendant is well regarded in the community and that he is a suitable person to have the care and custody of the children. His good conduct and standing in the community is not, however, without blemish. The evidence shows that he furnished no support for the children during the separation of the parties. He has made little attempt to visit the children since they were taken from his home on January 31, 1960. He attempts to excuse this because of plaintiff's continued association with Haight. It is evident that he could have communicated with them by mail or telephone, which he did not do. Support, including gifts for festive events, could have been provided by means other than personal delivery. It appears that defendant permitted his feelings concerning the conduct of his wife to take precedence over the welfare of his children. We conclude that the evidence is insufficient to show, when considered with all the surrounding circumstances, that defendant is a suitable person to have the care and custody of these minor children, particularly those of tender years. Since these children have lived together as a family group for so many years, it does not appear advisable to separate them if a separation can be avoided.

Where both parents are found to be unfit or unsuitable to have the care and custody of their minor children, the custody of the children will be determined solely by the welfare and best interests of the children. Gorsuch v. Gorsuch, on rehearing, 143 Neb. 578, 11 N. W. 2d 456.

The parents are unfit or unsuitable to have the care and custody of the minor children in this case. The mother, with the aid of the child support directed to be paid by the father, is able to care for the children. The father is also financially able to do so. No other fit and proper person has offered to take them. Considering the ages of the four youngest children and the im-

portance of not separating them, we think, as did the trial court, that the best interests of the children require that they be kept together. We fully realize the inherent danger to the children in placing their care and legal custody in an unfit mother. We do not think such a disposition is warranted in the instant case.

In 1959 the Legislature enacted the Separate Juvenile Court Act. §§ 43-228 to 43-239, R. R. S. 1943. The act applies to counties having a population of 50,000 or more inhabitants. Lancaster County is within the scope of the act. Section 43-236, R. R. S. 1943, provides in part: "The judge of a separate juvenile court shall appoint a chief juvenile probation officer and a sufficient number of assistant juvenile probation officers and other employees, including a court reporter when needed, to carry out the work of the court. The chief juvenile probation officer shall be selected by the judge with reference to his experience and understanding of problems of family life and child welfare, juvenile delinquency, community organization, and training in the recognition and treatment of behavior disorders." We think this section provides the remedy to be invoked in the instant case.

We direct that the legal custody of the six minor children in the instant case be placed in the chief juvenile probation officer of Lancaster County, with instructions to leave their physical custody with the mother, Norma L. Beck, under the supervision of such probation officer, during such time as she shall properly care for them under an environment that is not inimical to their best interests and welfare. If and when Norma L. Beck fails in her obligation to act in accordance with the best interests and welfare of the children, the matter shall be called to the attention of the court for such further disposition as the court deems necessary and proper under the law and the evidence. The decree of the trial court is hereby modified to the extent set forth in this paragraph of the opinion.

The defendant contends that the allowance made by the trial court for the support of the minor children is excessive. We find no evidence in the record regarding the amount of funds that are reasonably required for the support of these children. In the absence of evidence of excessiveness, no reason exists why this court should interfere with the award for child support made by the trial court.

For the reasons stated, the judgment of the trial court is affirmed as modified.

AFFIRMED AS MODIFIED.

EDITH DLOUHY, APPELLANT, V. CITY OF FREMONT, A MUNICIPAL CORPORATION, ET AL., APPELLEES.

120 N. W. 2d 590

Filed March 29, 1963. No. 35371.

1. **Municipal Corporations.** A city council has no authority to determine the civil service rights of a discharged employee under the Civil Service Act. Ch. 19, art. 18, R. R. S. 1943.
2. ———. One of the duties of the civil service commission is to determine the civil service rights of the members of the police department in cities where the Civil Service Act is applicable.
3. **Appeal and Error.** The purpose of a proceeding in error in the district court brought to review the proceedings of an inferior tribunal is to determine whether the final order of the inferior tribunal is in accordance with law. The determination as to whether errors of law occurred in the proceedings before the tribunal must be made from the record of the proceedings before the tribunal. The record of the proceedings before the tribunal is the transcript of the proceedings that must be filed in the district court with the petition in error.
4. ———. Where evidence is required to establish an error of law by an inferior tribunal, it must be presented in the district court by a bill of exceptions. New evidence may not be introduced in the district court to show that errors of law occurred in the proceedings before the tribunal.

Appeal from the district court for Dodge County: ROBERT L. FLORY, Judge. Affirmed.

Richards, Yost & Schafersman, for appellant.

Lyle B. Gill and Spear, Lamme & Simmons, for appellees.

Heard before WHITE, C. J., CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

BOSLAUGH, J.

This is a proceeding in error commenced by Edith Dlouhy against the city of Fremont, Nebraska, the mayor, and members of the city council. Upon the motion of the trial court, the civil service commission of the city of Fremont, Nebraska, was made an additional party defendant.

The petition in error alleged that the plaintiff was employed as a desk clerk in the police department of the city of Fremont, Nebraska, on December 1, 1961, and for more than 1 year prior thereto; that on November 20, 1961, the chief of police caused to be served upon the plaintiff a notice of termination of employement; that on December 1, 1961, the plaintiff reported for work at the police station but was refused the right to work by the chief of police; that on December 6, 1961, the plaintiff served a notice upon the chairman of the civil service commission of the city of Fremont, Nebraska, requesting a public hearing and investigation under section 19-1808, R. R. S. 1943; that on December 6, 1961, the plaintiff also served a written demand upon the mayor and city clerk of the city of Fremont that she be reinstated to her duties and to pay for time lost; that on December 12, 1961, at a regular meeting of the city council, the council voted to ignore the plaintiff's demand; and that on December 13, 1961, the civil service commission refused to take jurisdiction of the matter and refused to grant the plaintiff a public hearing or investigation. There are other allegations in the petition but they are not important to the disposition of this case. A transcript of the proceedings of the city council,

containing a copy of the written demand of the plaintiff and the minutes of the meeting of the city council on December 12, 1961, relating to the plaintiff's demand, was filed with the petition.

The defendants, by various pleadings, alleged that the petition failed to state a cause of action. After a hearing upon the merits, the trial court found that the Civil Service Act was not applicable to the employment of the plaintiff and dismissed the action. The plaintiff's motion for new trial was overruled and she has appealed.

The principal issue in this case is whether the plaintiff has any rights under the Civil Service Act. It is a mixed question of fact and law. The plaintiff contends that she was a member of the police department and could not be discharged except for cause. The defendants contend that the plaintiff was a clerical employee and that the Civil Service Act is not applicable to such employment.

The Civil Service Act, sections 19-1801 to 19-1823, R. R. S. 1943, is applicable to "all full-paid employees of the fire or police department" of certain cities who "devote their whole time to firefighting or law enforcement." §§ 19-1803, 19-1823, R. R. S. 1943. The act regulates the hiring and discharge of such employees. It prohibits the discharge of employees for political or religious reasons but provides that employees may be discharged for cause. It does not designate who shall have the authority to hire and discharge employees, but it regulates the exercise of that authority by the proper officials.

The Civil Service Act provides for the appointment of a civil service commission in each city where the act is applicable. One of the duties of the commission is to determine the civil service rights of the members of the police department. Simpson v. City of Grand Island, 166 Neb. 393, 89 N. W. 2d 117. Discharged employees who allege that they were discharged in violation of the law may file a written demand for a public hear-

ing before the civil service commission. § 19-1808, R. R. S. 1943.

There is no contention made in this case that the city failed to comply with the provisions of the Civil Service Act relating to the appointment of a civil service commission. The plaintiff alleged that she requested a hearing before the civil service commission but that the commission refused her request. The act further provides that a discharged employee may appeal to the district court from the action of the civil service commission. § 19-1808, R. R. S. 1943. The plaintiff, however, did not pursue that remedy.

In Simpson v. City of Grand Island, *supra,* this court suggested that the remedy provided by the Civil Service Act for the enforcement of civil service rights is exclusive. It is unnecessary for us to decide that question in this case. However, it must be determined whether the remedy selected by the plaintiff in this case was a proper one.

The Civil Service Act contains no provision which authorizes a city council to determine the civil service rights of a discharged employee. The plaintiff has cited no authority which suggests that a city council has authority to determine such rights. We conclude that the city council in this case had no authority to determine the civil service rights of the plaintiff. Consequently, the council had a right to refuse the plaintiff's demand that she be reinstated to her duties and for pay for all time lost.

The purpose of a proceeding in error in the district court brought to review the proceedings of an inferior tribunal is to determine whether the final order of the inferior tribunal is in accordance with law. The determination as to whether errors of law occurred in the proceedings before the tribunal must be made from the record of the proceedings before the tribunal. The record of the proceedings before the tribunal is the transcript of the proceedings that must be filed in the dis-

trict court with the petition in error. § 25-1905, R. R. S. 1943; Dovel v. School Dist. No. 23, 166 Neb. 548, 90 N. W. 2d 58.

Where evidence is required to establish an error of law by an inferior tribunal, it must be presented in the district court by a bill of exceptions. New evidence may not be introduced in the district court to show that errors of law occurred in the proceedings before the tribunal. Dovel v. School Dist. No. 23, *supra*.

The record presented to the district court in this case consisted of the plaintiff's demand and the action of the city council in regard to it. The city council had no authority to determine the civil service rights of the plaintiff. Therefore, the action of the city council in refusing to grant the plaintiff's demand was proper. The record failed to show a final order of an inferior tribunal that was not in accordance with law. The petition in error was properly dismissed.

The judgment of the district court is correct and it is affirmed.

AFFIRMED.

ROBERT C. SHIPLEY, APPELLANT, V. DOROTHY M. SHIPLEY, APPELLEE.

120 N. W. 2d 582

Filed March 29, 1963. No. 35391.

1. **Divorce.** An application for a modification or a change, with respect to an allowance of child support in a divorce decree, may be made subsequent to the time of the decree, but must be founded upon new facts and circumstances which have arisen subsequent to the entry of the decree.
2. ———. In the absence of proof of new facts and circumstances arising since the time of the original decree, an allowance of child support provided for therein will be deemed res judicata.
3. ———. The circumstances surrounding the remarriage of the father in a divorce case may be considered by this court, but

the remarriage of a father of itself does not relieve him of the obligations fixed by the decree.

4. ———. The normal incidents and obligations of a remarriage alone do not justify a reduction of an amount of child support properly awarded in a decree of divorce.

5. **Marriage.** A remarriage does not bear directly on the legal duty of a father to contribute to the support of his minor children by a former marriage.

Appeal from the district court for Sarpy County: JOHN M. DIERKS, Judge. Affirmed.

Webb, Kelley, Green & Byam, for appellant.

Frost, Meyers & Farnham and John B. Abbott, for appellee.

Heard before WHITE, C. J., CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

WHITE, C. J.

The plaintiff appeals from an order of the district court for Sarpy County denying a motion to modify and reduce child support in the sum of $250 per month which was awarded in a decree of divorce.

On March 18, 1960, a divorce decree was entered providing for custody of a son, James, 15 years of age at time of the trial, to the plaintiff. Custody of a son, Stephen, 7 years of age at time of the trial, was awarded to the defendant, together with child support in the sum of $250 per month, this amount being stipulated and agreed to by the parties and approved by the decree.

The plaintiff remarried on April 28, 1962, and filed this application for reduction of child support on May 18, 1962. An application for a change, with respect to an allowance of child support, may be made subsequent to a decree of divorce but must be founded upon new facts and 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. Griess v. Griess, 161 Neb. 1, 71 N. W. 2d 513; Schrader v. Schrader, 148 Neb. 162, 26 N. W. 2d 617;

Morris v. Morris, 137 Neb. 660, 290 N. W. 720.

The evidence in this case consists entirely of plaintiff's testimony. For purposes of clarity, we summarize the plaintiff's testimony insofar as pertinent to any change in conditions subsequent to the decree of divorce as follows:

1. Plaintiff's remarriage. The plaintiff remarried on April 28, 1962. The plaintiff's son, James, of whom he has custody, and the 81-year-old mother of the plaintiff's wife by the remarriage live with them. The record in this case is devoid of testimony as to any circumstances with relation to the new marriage and home that could be considered other than the normal and usual incidents attached to and flowing from the remarriage. We have held that the circumstances surrounding a remarriage by the plaintiff in a divorce case may be considered under some circumstances with relation to the revision of a decree, and we have held that the remarriage of the father, and the normal incidents relating thereto, does not relieve him of the obligations fixed by the decree. Winter v. Winter, 95 Neb. 335, 145 N. W. 709, 50 L. R. A. N. S. 697; Phillips v. Phillips, 162 Neb. 649, 77 N. W. 2d 152. We have directly held that remarriage alone does not justify reduction in child support, and have held that remarriage does not bear directly upon the legal duty of a father to contribute to the support of his minor children by a former marriage. Phillips v. Phillips, *supra*. We feel that two observations are pertinent in this connection. First, the stipulation and the divorce decree in this case contemplated that the plaintiff would have to maintain a suitable and proper home and living conditions for the son, James, of whom he has custody. Second, there is no evidence in the case by which a comparison can be made with relation to the actual circumstances existing as to the plaintiff's expenses at the time of the original decree.

2. Income. Without dispute, the plaintiff's earnings are exactly the same as when he voluntarily en-

tered into the original stipulation and are the same as they were at the time the decree of divorce was entered. He is a major in the Air Force with a gross income of $1,037.58 per month, including base pay of $630, quarters and subsistence allowances of $167.58, and flight pay of $240. The plaintiff's new wife has a net take-home pay of $240 per month. It is reasonably inferable from the record that the total income available for the plaintiff's family expenses has increased.

3. Expenses. The plaintiff testified as to certain expenses that he was presently paying at the time of the hearing approximately 2½ months after his remarriage. He testified that each month he was paying the following amounts: Packers National Bank, $55; Household Finance Company, $44; life insurance on his son, James, $19; gas, oil, tires, and automobile maintenance, $60; cleaning and laundry, $25; bill for jewelry, $25; utility bills, $38; house payment, $80; furniture payment, $55; medical and dental expenses, $15; clothing, $25; food expenses of approximately $100; and various other miscellaneous items, including entertainment, club dues, and membership in the Officers Club in the sum of approximately $50. This testimony contains no comparison with the conditions existing or contemplated at the time of the decree of divorce. Obviously, many of these items, if not all of them, were liabilities and necessary expenses being expended at the time of the original decree. By maximum inference, this evidence does not reach the level of showing either a change in conditions since the time of the decree, or that they were not the natural incidents contemplated and normally flowing from the obligations incidental to the remarriage. As we have pointed out above, the original stipulation and decree also contemplated that the plaintiff would necessarily incur normal obligations as to maintaining a suitable and proper home for the son, James, of whom he has custody. There is no testimony that these expenses incurred during the normal course of his new

family relationship related to any unusual, compelling, or extraordinary necessity arising from his remarriage. In any event, the significant part of the plaintiff's testimony in this respect is that since the time of the decree, *there has been a reduction in his aggregate or total indebtedness.* It is obvious from this that his ability to pay the amount of the award herein has not been reduced. A large portion of the plaintiff's testimony is devoted to an attempt to show a reduction of his income 3 years from now when his retirement becomes effective. He intends and desires to send the older boy, James, who is in his custody, to a college in Texas away from the family home, and also that there may be a possible change in his health due to the necessity of wearing glasses. There is no testimony in this record reflecting any actual change in the health, physical condition, or earning capacity of any of the parties concerned. This testimony as to a possible change in future conditions is not pertinent to this inquiry. It also may be said that these same possibilities were reasonably in contemplation by the parties at the time the plaintiff voluntarily entered into the original stipulation in this case. The trial court permitted this testimony in the record, but properly rejected it as having any bearing upon the conclusion that was reached in the case.

This application was filed immediately after the remarriage of the plaintiff and was heard by the trial court approximately 2½ months later. As we have noted above, the normal incidents and obligations of a remarriage alone will not justify a reduction in child support.

We may summarize the contention of the plaintiff to the effect that we should reconsider, on its merits, the amount of child support fixed in the original decree. Second, that the normal obligations and circumstances of a remarriage of the plaintiff require a reduction in child support. Both of these contentions are without merit. The plaintiff's ability to pay remains undiminished from the time of his original stipulation and agree-

ment and the decree of the court. There has been a reduction in his total indebtedness since the time of the original decree. His expenses are the normal and voluntarily incurred obligations incident to his new family relationship. The record does disclose an entire absence of any proof of new or changed circumstances which would legally justify a consideration of the reduction of the amount of child support voluntarily agreed to at the time of the original decree and approved by the court.

The judgment of the trial court is correct, and it is affirmed.

AFFIRMED.

JOHN RAYMOND FLYNN, APPELLEE, V. UNION STOCK YARDS COMPANY OF OMAHA (LIMITED), A CORPORATION, APPELLEE, IMPLEADED WITH B. ROTHSCHILD AND COMPANY, A CORPORATION, APPELLANT.

120 N. W. 2d 900

Filed April 5, 1963. No. 35326.

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. **Appeal and Error.** An appeal from an order of the district court granting or denying a motion for a judgment notwithstanding the verdict requires this court to consider the entire record and to determine whether it does or does not justify the action of the trial court.
3. **Trial.** 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.
4. **Negligence: Trial.** The burden of proving a cause of action is not sustained by evidence from which negligence can only be surmised or conjectured.

5. **Torts: Trial.** Where there are two or more possible causes of injury, for one or more of which defendant is not responsible, plaintiff, in order to recover, must show by evidence that the injury was wholly or partially the result of that cause which would render defendant liable. If the evidence in the case leaves it just as probable that the injury was the result of one cause as of the other, plaintiff cannot recover.
6. **Negligence.** Negligence is not presumed; the mere happening of an accident does not prove negligence.

Appeal from the district court for Douglas County: ROBERT L. SMITH, Judge. Reversed and remanded.

Morris J. Bruckner and Cassem, Tierney, Adams & Henatsch, for appellant.

George B. Boland and Boyle & Hetzner, for appellee Flynn.

Kennedy, Holland, DeLacy & Svoboda, for appellee Union Stock Yards Co.

Heard before WHITE, C. J., CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

BROWER, J.

This action was brought in the district court for Douglas County, Nebraska, by the plaintiff John Raymond Flynn against the defendants Union Stock Yards Company of Omaha (Limited), a corporation, and B. Rothschild and Company, a corporation. These defendants will at times be designated hereafter respectively as Stock Yards and Rothschild. When the term defendant alone is used, it will designate Rothschild. Plaintiff will be designated as he was in the district court, or as Flynn. Its purpose was to recover damages for personal injuries sustained by plaintiff, a self-employed order buyer at the Stock Yards, when attacked by a cow as he was attempting to cross one of the main north-south cattle alleyways of the Stock Yards at Omaha.

At the trial to a jury in district court the defendants at the conclusion of the plaintiff's evidence separately

moved for a directed verdict or a dismissal of the action as to each of them. The trial court sustained the motion of the defendant Stock Yards and dismissed the case as to it and overruled the motion as to the defendant Rothschild. No appeal was taken from the order of dismissal as to the defendant Stock Yards and it is no longer a party to the action.

Evidence was then introduced by defendant Rothschild, and the parties having rested it renewed its motion to direct a verdict in its favor or dismiss the action. This motion was overruled and the cause was submitted to the jury which resulted in a verdict and judgment for the plaintiff.

The defendant Rothschild thereafter filed a motion for a judgment notwithstanding the verdict. This was overruled and from the order overruling this motion defendant has brought the cause to this court by appeal.

No motion for a new trial was filed, hence the only question before us is whether the trial court erred in not sustaining Rothschild's motion for judgment notwithstanding the verdict. Therefore, the matter before us is whether the evidence was sufficient to permit the trial court to have submitted the cause to the jury.

The defendant Rothschild assigns as error that there was no competent evidence that the animal which injured plaintiff belonged to it or to show defendant was guilty of any negligence. There were other assignments of error which, in view of our decision, need not be discussed.

In considering the questions before us this court has stated the rule in Colvin v. Powell & Co., Inc., 163 Neb. 112, 77 N. W. 2d 900, as follows: "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."

It now becomes necessary to discuss the evidence with this rule before us.

The Stock Yards at Omaha, Nebraska, is the largest stockyards in the world, having a large area devoted to handling livestock. It is in close proximity to the packing houses and cattle are shipped there for sale and re-sale. The yards are divided into pens and blocks of pens which are maintained by dealers in livestock generally. There are alleyways connecting the various pens with each other and with the various scale houses where livestock are weighed, and chutes whereby shipments are loaded and unloaded. Among the various scales is scale No. 15 which is a short distance south of L Street which runs along the northerly portion of the stockyards. Along this street are chutes from which cattle are unloaded. To the immediate east and west of the scale house are cattle pens where cattle are kept before and after passing over the scales. After being weighed the cattle in many instances are kept in these pens temporarily until called for by the buyers or their representatives. An alley, 10.9 feet wide, extends in a southerly direction along the west side of the holding pens to the east of scale No. 15 and is crossed at right angles by a larger alley dividing the holding pens on its north from larger pens on the south where cattle are held for sale. The alley leading from the holding pens extends further south in a straight line from this intersection through the larger sale pens but is thereafter 13.8 feet to 13.7 feet in width, the additional width being on the east. It is called throughout this litigation the main north-south alley and will be so designated herein, though from an aerial photograph other alleys in the stockyards are longer and wider and apparently as important. To the east of this main north-south alley are the livestock pens operated by Buchanan and Son, livestock dealers. Three alleys extend westerly through these pens from the east to the main north-south alley

which are referred to as the Buchanan alleys. Gates are maintained near the intersection of the Buchanan alleys with this main alley. Each gate area is recessed along the east side of the main alley, the gates being installed 2.7 feet east of the east side of the alley. The north side of the southernmost of the Buchanan alleys, known as the south Buchanan alley, is approximately 141 feet south of the alley extending along the south side of the holding pens. The south Buchanan alley is 13.5 feet wide and its gate is recessed in the same manner. Across the main north-south alley to the west from the Buchanan pens are the livestock pens of Stock Growers & Tagg, livestock dealers. It will be referred to as Stock Growers as the witnesses generally termed it. It also has gated alleys opening in the main north-south alley but the gates are not recessed on the west side thereof. All of the alleys and pens are enclosed and separated by board or plank fences with gates at the opening of pens on the alleys, at the intersection of the alleys, and at various places along the alleys, which gates can be conveniently opened or closed that cattle may be driven from place to place throughout the yards by means of alleys closed off between certain points at convenient times. The closing off of the gates in the alleys so the cattle are restricted in the direction of their movement that they may not scatter in different directions is termed "lining the gates."

On August 25, 1959, plaintiff had entered the pens of Buchanan from the east by way of the south Buchanan alley, where he made a purchase of cattle. Thereafter he left the pens and re-entered the south Buchanan alley, walked west therein, and approached the main alley enroute to the Stock Growers pens across the main alley. He met in the south Buchanan alley Paul McCoy, a lifetime Stock Yards acquaintance. The gate from the south Buchanan alley to the main alley was closed and hooked. It was hinged to the north and was hooked on the south end on the main alley side. It swings open only to the

east. McCoy and plaintiff stopped and talked briefly some feet from it. Thereafter, plaintiff unhooked the gate and proceeded out into the main alley.

Until stepping out in the main alley plaintiff's vision was obscured because of the recessed gate, a wire fence, and a rack manger full of hay running to the top of the fence on the west end of the Buchanan pens.

Plaintiff testified he looked both ways when he stepped into the main alley. He could see approximately 100 to 150 feet to the north. He was sure he looked to the north again after taking a second step out into the alley but saw nothing either time he looked. He did not look again. The gates to the north were open. Plaintiff also looked south and saw neither animals nor persons, but couldn't remember whether the gates to the south were open or closed. After proceeding three or four steps west and possibly a little north he was struck by an animal that came from the north which he never saw or heard before the accident and cannot describe. He was thrown against the hinged side of a gate to the Stock Growers pens and the post to which it was anchored, and the calf of his leg was badly injured by an end of a bolt that protruded therefrom. He said the animal could have hidden in the recessed gate on the east side of the main alley 46 feet north of the point where the accident occurred.

Paul McCoy, the man with whom plaintiff was visiting was the only person to see the cow as it struck plaintiff. McCoy testified when plaintiff opened the gate McCoy reached through and hooked it behind him. Flynn continued across the alley going northwesterly. While hooking the gate McCoy took his eyes off the plaintiff for a split second. The next thing he knew he heard an animal snort. On looking toward plaintiff again he saw a cow was right on Flynn. Plaintiff was then headed north or a little northeast and the animal was moving southwesterly. The witness was not aware the animal was present until he heard it snort. He could

not see up the main alley north because of being in the recessed area. The cow struck plaintiff twice, once on the leg and again in the stomach. Flynn had gotten clear across the alley before being struck. After striking Flynn the second time the animal whirled, jumped over him, and came over to the corner toward McCoy who was still behind the gate. McCoy described the animal only as a white-faced Hereford range cow with a nub horn which was a subject animal. In what respect McCoy noticed the animal which attacked Flynn was a subject he does not state. The term "subject animal" will be explained later. After the cow came toward McCoy it turned and went back northward. He never saw it again and there is no evidence of its recapture or of what happened to it. After the cow went north McCoy entered the alley. There were no animals or other persons then in the alley that he saw. The gates to the north in the main alley were open but the gate in the main alley to the south of the Buchanan alley was closed. He helped the injured plaintiff to re-enter the Buchanan alley, seated him at a bench, and went to telephone for an ambulance. A crowd assembled in the alley where plaintiff was seated.

The plaintiff's injury appears to have occurred about 9:30 o'clock in the morning. There is some variance in the testimony as to the time this injury occurred and the time in which the cattle now to be mentioned were driven down the main alley beyond the entrance to the Buchanan south alley. There is evidence however from which the jury might believe the injury occurred but a few minutes afterward.

On the morning of August 25, 1959, at about 9 a.m., Edward Jimerson, a cattle driver for Rothschild, arrived at scale No. 15 to pick up some cattle purchased on the previous day. He contacted Richard Plambeck, employed by Stock Yards as a delivery or key man, because he held the key to the holding pens which must be unlocked to deliver the cattle. Jimerson signed a

book acknowledging receipt of the cattle at the scale house. Plambeck, testifying for plaintiff, said he then left the scale house, Jimerson went to line the gates in the main alley, and Plambeck went to the holding pens to release the cattle. The animals were identified by a tab given to the key man showing the pens, block, and number of cattle which were purchased. The same information is on the book Jimerson signed at the scale house. On the tab for the animals released was the word "wild," which had been written on it by someone the day before. This notation is customarily made in case a wild animal is included in those designated on the tab. Plambeck told Jimerson there was a wild cow in the "bunch" as they were leaving the scale house. He had however never seen the animal and got his information wholly from the tab. Plambeck went down the east alley to unlock the pens. The animal marked "wild" was in a pen by herself. He released the other animals first and then the subject cow, which was a cancerite and had sores, but he didn't remember anything concerning its horns. She immediately joined the other animals. He released them in alley No. 80 which runs east and west. He herded them down this alley until they got into the alley going south. After they got into the main north-south alley, Plambeck shut the gate behind them. Jimerson was then ahead of them a little way and the cattle were going south all in a group. Mr. Plambeck had counted the cattle and Jimerson had the correct number.

Jimerson, the cattle driver for Rothschild, testified for the defendant as to going to scale No. 15 much the same as did Plambeck. He said he received other cattle also, being from 7 to 12 in all. Jimerson said the subject cow he received was white-faced with a cancerous eye. He did not remember about its horns. Plambeck told him he had a wild cow. After signing the key book at the scale for the cattle he went south from scale No. 15 to line the gates. One of the gates closed was that

on the west end of the south Buchanan alley. After Jimerson lined the gates, the subject cow joined the others and all the cattle released by Plambeck followed him down the main north-south alley. It is shown that it is customary for one driver to so handle the cattle and to precede them. At a point between the pens of Buchanan and Stock Growers he met William Echtermeyer and told him he had been told he had a wild cow. His cattle were then strung out over 30 feet. Proceeding past the south Buchanan alley he closed and hooked a gate in the main alley behind the cattle. He proceeded thereafter again ahead of his cattle, lining the gates as he went, first south a short distance, then west about 70 feet to another north-south alley. There he turned south lining the gates and went approximately 300 feet south to what is called Reeves shanty. In this last north-south alley which is in the vicinity of Daugherties alley, he again hooked off another gate. Going back to the Daugherties alley he checked up and had all his cattle south of the gate. He then took them and other cattle he had left in the double alley west to scale No. 5.

William Echtermeyer, a self-employed cattle trader for 16 or 17 years, testified for the defendant. He testified that on August 25, 1959, he saw Jimerson while walking north in the main alley between Buchanan's, Stock Growers', and Tate's pens. It was in the morning between 9 and 10 or 10:30 o'clock. The cattle were behind Jimerson about 120 or 130 feet. Jimerson warned him that he had a wild cow in the group. Echtermeyer walking north in the main alley did not see Flynn or McCoy. He met Jimerson almost at the point where Flynn was hurt and passed the cows without incident. He went north into the next alley and turned off. He was there from 3 to 5 minutes and then came back. Later, when asked if it was 4 or 5 minutes, he said: "Well, whatever it was. It was a short time." On coming back there were then no cattle in the alley or going north to the gate in the north-south alley.

Flynn was injured when Echtermeyer came back and was lying down in the east Buchanan alley about one-third of the way down the Buchanan alley near the "Shanty." When he came back the gates toward the south down this main north-south alley were not closed.

This is the substance of all the evidence that relates to the cow that struck plaintiff or the handling of the cattle by Jimerson on August 25, 1959.

Joe Hrbek, a salesman for Stock Growers Live Stock Commission Company, testified for defendant that on August 24, 1959, he sold some cattle for that company to Mr. Haines, a representative of Rothschild. They were in Stock Grower's pens south of scale No. 15 immediately across the main alley from the Buchanan pens. There were several sold but he did not remember the exact number. Among them was a subject animal with a cancerous eye. He wasn't able to tell whether it had a stub horn. He said he didn't think the cancer was too bad and the eye not eaten out. After making the sale he cut these cattle out, pushed them out of the pen, and started them in the alley towards scale No. 15, but didn't go to the pen or see them weighed. The cow was not wild when he saw it.

Gordon Haines, a cattle buyer for Rothschild, testified for defendant to the same incident and said he bought 6 to 8 or 10 cows from Hrbek on August 24, 1959, including a subject animal with a cancerous eye. He gave no further description of it. It did not appear wild.

The deposition of John Maxwell, taken January 4, 1962, was read on behalf of the plaintiff. He was employed for 23 years by the Omaha Livestock Exchange as a cattle inspector and had been employed in and about the yards for 40 years. He was stationed at scale No. 15 on August 24, 1959. He inspects the cattle as they approached the pocket near the scales before they are weighed. If they are subject to various diseases, including lump jaw, cancers, wheezing, or if they just do not look right, he calls out to the men and they are not

weighed with the other cattle, but placed separately in a chute for tagging. When they are in the chute he puts a hog ring through their ear by means of pliers and on the ring is a tag one and one-half inches by one-half inch in dimension on which is a number. Such cattle must be slaughtered separately under further inspection. Animals tagged in this manner are termed "subject animals." At sometime on this particular day he tagged a cow from Stock Growers to Rothschild. The men in charge were warned she was a wild cow before she was placed in the pocket by a salesman whom he thinks was Joe Hrbek. Joe Hrbek took these cattle out of the alley. The cow was very wild and they lost 5 minutes getting her into the pocket and 10 to 15 minutes getting her into the tagging chute. He was pretty sure the horseman who put her in was John McLaughlin and that his horse just pushed her in. He thought she charged the horse once but was not sure. This cow was white-faced and had a cancerous eye. The whole eye was rotted out and there was simply a hole with what appeared to be meat inside. It had a nub horn. She was the only vicious one in that herd of the 6 to 12 cattle that were weighed together. He often has trouble with wild cattle. He does not put "wild" on the tabs. That is done by the counter-off man. The inspector would tag as high as 30 cattle as a subject in a 6 or 7-hour day of weighing. Especially is this true in the fall when they get western range cattle. There are more cancerite cattle at that time also, and many wild or unruly ones. The run of range cattle starts in late August. Sometimes there are 3 or 4 cancerite cattle in a row and sometimes not many more for a week. He cannot tell how many cattle he tagged that day. He could have had as many as 30 subject cattle that Monday and 5 or 10 white-faced cancerite ones.

John McLaughlin, an employee of Stock Yards, testified for the plaintiff. On August 24 and 25, 1959, he was a horseman at scale No. 15. A horseman flogs the cattle

from the scales after they are weighed and places them in the holding pens. He remembered an incident that occurred with a wild cow the day before Flynn was hurt. He guessed he placed this animal in pen No. 82 which pen is used for wild animals. He saw the cow and it had a cancerous eye but he gave no other description of it. He first said there were several wild cows that day but later that he did not know how many other wild cows there were that morning or how many cancer-eyed ones. He had no difficulty with the animal.

Michael Plasa testified for plaintiff. He was employed by Stock Yards. He was scale-counter at scale No. 15 on August 24 and 25, 1959, and had 6 or 7 men under him. As cattle come off the scales he counts them and assigns them to certain pens by lot number. The information is put on a tab left at the scale house and on a book called the counter-off book. If they are assigned to several pens that information is put down. He also writes "wild" on the records if an animal is wild. The animal is not described on the tab, the one word "wild" being put on the tab given out for the group. It is placed there as a warning. On August 24, 1959, he tabbed a wild cow sold to Rothschild. He had no remembrance of the cow so tabbed. There are several animals marked "wild" per day at that time of year. He was unable to say whether there were other wild animals in the vicinity. They probably weighed 2,000 cattle at that one scale on August 24th. He fixes the date from records which apparently he did not have with him and are not in evidence.

Henry Talmon who testified for plaintiff was weighmaster on August 24 and 25, 1959, at scale No. 15. He remembers weighing a wild animal on August 24, 1959. He recalled she was a subject animal, though why she was tagged he did not know. Later he says she was never tagged. He did not remember the color of the cow or anything else about it and said he wouldn't have known her if he saw her the next day.

Richard Kelly testified for plaintiff. He was employed by Stock Yards on August 24, 1959, as a catcher at scale No. 15. A catcher waits in the alley leading to the scales. He opens the gates and when the cattle are pushed into the pocket, closes the gates behind them. On the day before plaintiff's injury he remembers a wild cow with which he came into contact which was white-faced and had one stub horn. He doesn't remember how many wild cows he saw that day. He does not state who sold the cow or to whom it was sold and knew nothing of what became of it.

Paul Waldron was called by the plaintiff. The day before Flynn was hurt someone, who he believes was the horseman John McLaughlin, warned him that there was a wild cow "down there" in a pen. He went down to a pen and saw a cow which he supposed was the one of which he had been warned. It was white-faced and had a cancerous eye and a broken horn which you might call "stub." It gave off a smell. He does not remember the pen except it was east of scale No. 15. She was just standing there. Nothing is shown as to who owned the cow.

The plaintiff maintains that the admissions of the defendant introduced by plaintiff included an admission that the cow that injured the plaintiff was owned by the defendant. Examining them closely it appears that they are answers to questions concerning the cow owned by the defendant. They contain an answer to an interrogatory in which defendant denied it knew who owned the cow which injured the plaintiff.

Plaintiff claims his injuries were inflicted by the subject cow owned by the defendant tabbed as wild at the scale on August 24, 1959. This claim is based, first, on the identification of the cow which attacked the plaintiff which the witness McCoy described as a white-faced Hereford subject cow with a nub horn. It is next urged that the proximity of the time of injury to the time of the defendant's driving its cattle down the main alley,

coupled with this identification, is sufficient for the jury to infer that the cancer-eyed cow of the defendant escaped from the custody of its driver and was the cause of the injury, though there is a complete lack of other evidence that it did escape.

Concerning the description, every witness who identified a subject cow as one sold to the defendant or owned by it either on that day or the day on which the injuries occurred all agree that it was cancerite. The witness Plambeck who released it to the defendant merely states it was cancerite and had sores but does not specially relate the cancer to its eye and was not asked concerning its eye. Every other witness who in any way described this cow and relates it to the one sold to or owned by the defendant states it had a cancerous eye. The admissions of the defendant in interrogatories asked it introduced by the plaintiff stated that the cow purchased and received by it was a subject animal having a cancerous eye. This defect in the cow owned by the defendant is common to the description given by the witnesses. It seems to have been the most distinguishing mark of identification as it was noticed by all. Though this cow wheeled around and came directly towards the witness McCoy, he failed to observe this condition.

Though certain witnesses spoke of the animal with a nub or stub horn, there is no evidence as to the frequency of this characteristic in cattle.

There is positive evidence that the driver Jimerson closed two gates behind his cattle after passing the south Buchanan alley. The witness McCoy testified the gate was closed. The plaintiff urges the jury might infer Jimerson left it open. This the plaintiff assumes might be gathered from testimony of the witness Echtermeyer who said the gate was open when he returned 4 or 5 minutes "or whatever it was—it was a short time" later. When Echtermeyer returned, however, Flynn had been hurt, after which a crowd assembled.

The testimony shows that 2,000 cattle were weighed at

scale No. 15 on August 24, 1959. The evidence discloses that in a run of that number there are often 30 or 40 subject animals and a considerable number are wild. No witness relates that he knew how many were wild on August 24, 1959, and several say there might have been a considerable number of them. Some witnesses who testified as to a wild cow passing through the scales that day do not describe it or relate it to the one purchased by the defendant and it is impossible to tell whether they are describing the one so purchased or another.

The evidence shows drivers generally are free to use the alleys at any time. Cattle at any time may be driven to and from pens, scales, or chutes throughout the Stock Yards. The alleys at the place of injury were in close proximity to scale No. 15 which handled a large number of cattle. Other cattle might have been driven in the main north-south alley or across it near the scales at or near the time of the injury. There is a total lack of any evidence concerning the run of other cattle at or about scale No. 15 on August 25, 1959, the day when the plaintiff was injured, or as to incidents on that day concerning wild cattle or subject ones at the scale. The witnesses were not interrogated in that regard concerning that day though several of them testified they were then in attendance at the scale.

From a description of the offending animal, which appears lacking in a most essential feature, and from some evidence of the proximity of the time of the injury to the driving of the defendant's cattle, the plaintiff urges the evidence is sufficient. He claims the jury might infer that the cow escaped from the defendant's driver; that the gates behind the cattle were not closed on the one hand, or were closed without taking the defendant's cow south of them in the alley on the other hand; and also that the subject cow hid in the recess to one of the gates of the Buchanan alleys. All of this plaintiff contends may be inferred, though there is no

other evidence that any such events really happened.

In Mischnick v. Iowa-Nebraska Light & Power Co., 125 Neb. 598, 251 N. W. 258, this court, citing St. Marys Gas Co. v. Brodbeck, 114 Ohio St. 423, 151 N. E. 323, said: "* * * negligence cannot be predicated upon an inference drawn from another inference, for it is well settled that actionable negligence may not be predicated upon an inference drawn from another inference, but if the negligence is only supported by an inference, such inference must be supported by some fact established by direct evidence."

In Mimick v. Beatrice Foods Co., 167 Neb. 470, 93 N. W. 2d 627, this court laid down the following rules: "An appeal from an order of the district court granting or denying a motion for a judgment notwithstanding the verdict requires this court to consider the entire record and to determine whether it does or does not justify the action of the trial court.

"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.

"The burden of proving a cause of action is not sustained by evidence from which negligence can only be surmised or conjectured."

In 86 C. J. S., Torts, § 59, p. 984, it is said: "Where there are two or more possible causes of injury, for one or more of which defendant is not responsible, plaintiff, in order to recover, must show by evidence that the injury was wholly or partly the result of that cause which would render defendant liable. If the evidence in the case leaves it just as probable that the injury was the result of one cause as of the other, plaintiff cannot recover." The same rule is set forth in 65 C. J. S., Negligence, § 244, p. 1089.

In Bowerman v. Greenberg, 142 Neb. 721, 7 N. W. 2d 711, this court said: "The evidence fails to disclose the

cause of the plaintiff's fall. We can only surmise and speculate as to its cause, and a verdict cannot be based on mere speculation or conjecture."

As held in Bowers v. Kugler, 140 Neb. 684, 1 N. W. 2d 299: "Negligence is not presumed; the mere happening of an accident does not prove negligence.

"The burden of proving a cause of action is not sustained by evidence from which negligence can only be surmised or conjectured."

In view of all the evidence in the case we are of the opinion that the plaintiff only established that the offending animal was possibly that of the defendant and that it is equally as possible or probable that the injury was caused by some other animal. The evidence leaves it a matter of speculation or conjecture as to whether or not the animal belonging to defendant caused the injury. In such a case the cause should never have been submitted to a jury and the motion for judgment notwithstanding the verdict should have been sustained.

The judgment is reversed and the cause remanded with directions to sustain the motion of the defendant Rothschild for judgment notwithstanding the verdict.

REVERSED AND REMANDED.

LEONE M. CONNOR ET AL., APPELLANTS, V. STATE OF NEBRASKA, DEPARTMENT OF ROADS, APPELLEE.

120 N. W. 2d 916

Filed April 5, 1963. No. 35345.

1. **Appeal and Error.** A judgment of the district court must stand or fall upon the statutory record of the case, that is, on the pleadings, the finding and judgment, and the bill of exceptions.
2. **Pleading: Appeal and Error.** Exhibits unless made so by appropriate reference are not a part of the pleadings, and, to be otherwise a part of the record on appeal, must be contained in a bill of exceptions or some substitute therefor.
3. **Pleading.** The prayer for relief is a part of the petition, but

it is no portion of the statement of facts which are required to constitute a cause of action, and it may be in excess of what the court is empowered to grant in the action.

4. **New Trial: Appeal and Error.** In a case where the court gives no reason for its order granting a new trial the appellant meets the duty placed upon him when he brings the record here with his assignments of error and submits the record to critical examination with the contention that there was no prejudicial error. The duty then rests upon the appellee to point out the prejudicial error that he contends exists in the record and which he contends justifies the decision of the trial court. The appellant then in reply has the right, if he desires, of meeting those contentions.
5. ———: ———. Those errors will then be considered and determined here so far as necessary to the appeal, subject, of course, to the right to notice and consider plain errors not assigned.
6. **Trial: Appeal and Error.** Where testimony is offered and admitted in evidence without objection being made thereto, error cannot be predicated thereon on appeal. The rule also applies to the district court when reviewing its own proceedings on motion for a new trial.
7. ———: ———. Where a verdict of a jury is clearly against the weight and reasonableness of the evidence it will be set aside and a new trial granted.
8. **Eminent Domain: Witnesses.** In a condemnation action the weight and credibility of testimony of either lay or expert witnesses regarding value of land taken or value of remainder immediately before and immediately after taking is for the jury.
9. **Evidence: Trial.** Under ordinary circumstances expert opinion evidence is to be considered and weighed by the triers of fact like any other testimony.
10. **Eminent Domain: Trial.** The amount of the damages sustained by a landowner for a right-of-way condemned across his land is peculiarly of a local nature to be determined by a jury, and its verdict will not ordinarily be interfered with if it is based on the testimony.
11. ———: ———. In a condemnation action, when the evidence is conflicting, the verdict of a jury will not be set aside unless it is clearly wrong.

Appeal from the district court for Douglas County: FRANK G. NIMTZ, Judge. Reversed and remanded with directions.

Gaines, Spittler, Neely, Otis & Moore, for appellants.

Clarence A. H. Meyer, Attorney General, Harold S. Salter, Asa A. Christensen, and James J. Duggan, for appellee.

Heard before WHITE, C. J., CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

YEAGER, J.

This is an action growing out of an award of appraisers appointed by the county judge of Douglas County, Nebraska, wherein in an action for condemnation of real estate instituted by the State of Nebraska, Department of Roads, lands of Leone M. Connor, Donald C. Connor, Francis Connor, and Marjorie Connor, plaintiffs in the district court and appellants here, were condemned and appraised, and the valuation fixed.

The plaintiffs appealed to the district court for Douglas County, Nebraska, on the ground that the valuation and damages awarded were insufficient. The State of Nebraska, Department of Roads, was defendant and will be so referred to for the purposes of this opinion.

A trial was had to a jury in the district court and a verdict was returned in favor of plaintiffs for $68,149.62. The amount of the claim asserted in the petition was $80,000 and later increased to $97,265. Judgment was rendered on the verdict. Thereafter a motion for new trial was filed by the defendant. This motion was sustained and the verdict and judgment were vacated and set aside, and a new trial was ordered. From the order vacating and setting aside the verdict and judgment and the order granting a new trial, the plaintiffs have appealed.

The order, dated June 15, 1962, vacating and setting aside the verdict and judgment contains no statement of reason or ground therefor. No legally authentic reason or ground therefor is contained in the record.

It is true that in the transcript prepared by the clerk of the court is a document headed "Exhibit" which appears to have been filed June 26, 1962. By whom it was filed is not disclosed. It is not identified as an

attachment to any pleading or as a part of an order or entry of any kind made by the court. It does not appear to have been presented as a part of or in the nature of a bill of exceptions. By what appears on its face alone it is a copy of a letter sent by the judge to the attorneys for the plaintiffs and for the defendant. This instrument contains the following: "I feel that testimony of a highly prejudicial character was allowed to be presented to the jury and that the same should have been excluded by the Court."

This however may not be treated as a recognizably stated reason for setting aside the verdict and judgment. This court said in Phenix Ins. Co. v. Fuller, 53 Neb. 811, 74 N. W. 269, 40 L. R. A. 408, 68 Am. S. R. 637: "The judgment of the district court must stand or fall upon the statutory record of the case—that is, the pleadings, the finding and judgment, and the bill of exceptions made a part of the record." No departure from this rule has been found in the later cases.

In Dolen v. Dolen, 155 Neb. 347, 51 N. W. 2d 734, the following from 4 C. J. S., Appeal and Error, § 738, p. 1216, was quoted with approval: " 'It is generally held that exhibits are not part of the pleadings, and, to be made a part of the record on appeal, must be contained in a bill of exceptions or some substitute therefor.' "

Thus this case comes to this court without the aid of any declared reason or basis for the final order which was rendered.

At this point it appears that the factual background should be set forth, to the extent necessary for the purposes of the case. At the time of the condemnation the plaintiffs were the owners of 10.43 acres of land in a designated industrial area to the southwest of Omaha, in Douglas County, Nebraska. The east side abutted on Sixtieth Street. By condemnation 4.74 acres were taken outright by the defendant, an easement over 2.48 acres was taken, and the remainder was not taken. The action here is by the plaintiffs to recover a judgment for the

value of the land taken, for the damage to the land included in the easement, and for the damage to the land not taken but caused by the taking of land and of the easement. The easement upon the land was between the land taken and that which was not taken. The items for which recovery is sought will for convenience be referred to collectively as damages.

In the light of the matters to be considered on this appeal and the fact that the right to take is not a matter of controversy, it does not appear necessary to further describe the property involved or the surrounding area.

The plaintiffs called four witnesses who gave testimony as to the amount of damages which had been sustained. Two of these were co-owners having knowledge of the property and two testified as experts by opinion as to the value of and damage to the property. Each of these witnesses testified to his opinion as to the amount of damages which was considerably in excess of the amount of the verdict and the judgment.

No objection was interposed by the defendant at the trial to the foundation laid for this testimony, its competency, its relevancy, or its materiality. Furthermore, no error was asserted in the motion for new trial attacking this evidence on any of these grounds.

It is pointed out here that witnesses for plaintiffs gave testimony as to damages in excess of the amount claimed in the petition, which was objected to. It is urged substantially in the brief here that to allow such testimony to stand was error. The contention however is without merit.

In Missouri Valley Land Co. v. Bushnell, 11 Neb. 192, 8 N. W. 389, it was said: "A demurrer to a petition only lies to the statement of facts constituting the supposed cause of action, not to the prayer for relief, which may be much in excess of what those facts warrant the court to grant." See, also, Burnham v. Bennison, 121 Neb. 291, 236 N. W. 745.

In Central Nebraska Public Power & Irr. Dist. v. Wal-

ston, 140 Neb. 190, 299 N. W. 609, it is pointed out that notwithstanding the prayer for relief is a part of the petition, it is no portion of the statement of facts which are required to constitute a cause of action.

The defendant called two witnesses who gave testimony as to the amount of damages which the plaintiffs sustained. These two testified as experts by opinion as to the value of the land and damage to the plaintiffs. As in the case of the witnesses for plaintiffs there was no objection as to foundation, competency, relevancy, or materiality, and there was no motion to strike or withdraw the evidence from the consideration of the jury.

The opinions of these witnesses as to value was far below that testified to by the witnesses for the plaintiffs and also far below the valuation fixed by the verdict of the jury and the amount for which judgment was rendered.

The opinions of the witnesses on both sides were approximations. The range however of damage which was testified to by the witnesses for the plaintiffs was from $79,250.07 to $97,264.71. The range of the value fixed by the testimony of defendant's witnesses was from $23,650 to $32,200.

With regard to the matter of proof of damages this was the state of the record when the case was submitted to the jury. The result of that submission has been pointed out.

After judgment a motion was filed which contains 13 asserted grounds for a new trial, which, as pointed out, was sustained.

The case then becomes controllable by rules laid down in Greenberg v. Fireman's Fund Ins. Co., 150 Neb. 695, 35 N. W. 2d 772, which was a case wherein the district court gave no reason for its order granting a new trial. They are the following:

"If the trial court gave no reasons for its decision, then the appellant meets the duty placed upon him when he brings the record here with his assignments of error and

submits the record to critical examination with the contention that there was no prejudicial error. The duty then rests upon the appellee to point out the prejudicial error that he contends exists in the record and which he contends justifies the decision of the trial court. The appellant then in reply has the right, if he desires, of meeting those contentions.

"Those errors will then be considered and determined here so far as necessary to the appeal, subject, of course, to the right to notice and consider plain errors not assigned.

"Where testimony is offered and admitted in evidence without objection being made thereto, error cannot be predicated thereon on appeal. The rule applies to the district court when reviewing its own proceedings on motion for a new trial." See, also, Pongruber v. Patrick, 157 Neb. 799, 61 N. W. 2d 578; Fuss v. Williamson, 159 Neb. 525, 68 N. W. 2d 139; Gain v. Drennen, 160 Neb. 263, 69 N. W. 2d 916; Borsen v. Moskowitz, 163 Neb. 223, 79 N. W. 2d 178; Maska v. Stoll, 163 Neb. 857, 81 N. W. 2d 571; Hilligas v. Farr, 171 Neb. 105, 105 N. W. 2d 578; Law v. Gilmore, 171 Neb. 112, 105 N. W. 2d 595; Haith v. Prudential Ins. Co., 171 Neb. 281, 106 N. W. 2d 169; Barker v. Wardens & Vestrymen of St. Barnabas Church, 171 Neb. 574, 106 N. W. 2d 858.

In pursuance of the requirements of these rules the plaintiffs appealed and as grounds for reversal by assignments of error they state (1) that the court erred in sustaining the defendant's motion for new trial, and (2) that there was no error prejudicial to defendant in the admission of evidence. They relied in their briefs on their proof of damage, which has been adverted to herein, and argument the effect of which was to say that no prejudicial error was committed in the admission of evidence.

The defendant in its brief set forth nothing in the nature of specific reason in support of the order vacating the verdict and judgment and granting a new trial. The

motion for new trial contained 13 assignments of error, but only one of them is considered specifically in the brief. That one is to say that the court erred in giving instruction No. 2. Others which are argued generally are (1) that the verdict and judgment are not sustained by sufficient evidence; (2) that the verdict is clearly wrong in that it indicates that it was found through passion, prejudice, mistake, and other means not apparent in the record; (3) that there were errors in ruling on admissibility of evidence; and (4) that the verdict is excessive and not supported by competent evidence.

For the second of these four there is no basis in the evidence at all. An affidavit is found in the transcript which for reasons already stated may not be regarded for any purpose, but even if it could, nothing is contained in it which would support the contention made.

As to the third, the record has been searched and no incidents of erroneous admissions of evidence have been found.

The first and fourth will be considered together. They are related to the sufficiency and competency of the evidence to sustain the verdict. The competency of the evidence for the plaintiffs has not been brought into question. Under the rules already stated the question of competency is not available to the defendant.

There being no question of competency to be considered, in the light of the record made, the question of the sufficiency of the evidence was one for submission to and determination by the jury.

This court has said with reference to verdicts of juries in actions for damages on account of condemnation: "Where a verdict of a jury is clearly against the weight and reasonableness of the evidence it will be set aside and a new trial granted." Twenty Club v. State, 167 Neb. 37, 91 N. W. 2d 64. See, also, Leffelman v. City of Hartington, 173 Neb. 259, 113 N. W. 2d 107.

In Langdon v. Loup River Public Power Dist., 144

Neb. 325, 13 N. W. 2d 168, it was pointed out that in a condemnation action the weight and credibility of testimony of either lay or expert witnesses regarding value of land taken or value of remainder immediately before and immediately after taking is for the jury.

In Medelman v. Stanton-Pilger Drainage Dist., 155 Neb. 518, 52 N. W. 2d 328, it was said: "Under ordinary circumstances expert opinion evidence is to be considered and weighed by the triers of fact like any other testimony."

As to the attitude to be taken by this court on review of the verdict of a jury in a condemnation action, it was said in Kennedy v. Department of Roads & Irrigation, 150 Neb. 727, 35 N. W. 2d 781: "The amount of damages sustained by a landowner for a right-of-way condemned across his land is peculiarly of a local nature to be determined by a jury and this court will not ordinarily interfere with the verdict if it is based upon the testimony.

"When the evidence is conflicting, the verdict of the jury will not be set aside unless it is clearly wrong."

From an analysis of the record in the case here it cannot be said that the verdict of the jury was clearly against the weight and reasonableness of the evidence. The qualifications of the opposing experts must be regarded as sufficient and nothing appears the effect of which is to challenge their credibility. The testimony of the two co-owners was based on a knowledge of the property, its surroundings, and probable uses. The evidence of damages was widely conflicting, but there is nothing in the record to justify a finding that the damage fixed by the jury was clearly wrong. The general argument of the defendant presented with reference to assignments of error contained in the motion for new trial is without substantial basis

As pointed out objection was made in the motion for new trial to instruction No. 2 which was given. Instruction No. 3 also was objected to in the motion for

new trial but no objection to it is presented here. The two instructions however must be considered together.

Instruction No. 3 declared the basis for the ascertainment of the right of recovery in the case of the absolute taking of property in a condemnation action. No fault is found with this declaration.

Instruction No. 2 declared that 4.74 acres were so taken and that the plaintiffs were entitled to recover for this. The declaration is correct.

This instruction called attention to the fact that an easement over 2.48 acres was also condemned. The jury was told that the measure of damage was the difference in value before and after taking. This is correct and it is not otherwise contended.

The instruction called attention comprehensively to the fact that by the condemnation proceeding 3.21 acres of the original total land area remained and, if this was damaged, the measure of the damage was the difference between the value before and after taking of the other land and of the easement. It is not contended that this is not the proper measure for this.

The instruction was not erroneous particularly when analyzed and construed in the light of other instructions and proper principles of law about which there is no dispute.

There remains only for consideration the rule that this court has the right to consider plain errors not assigned and to adjudicate accordingly. In this case no such errors have become apparent.

In the light of the record which is before this court the conclusion reached is that the judgment of the district court setting aside the verdict of the jury and the judgment rendered thereon, and the order granting a new trial, were erroneous.

Accordingly the judgment of the district court is reversed and the cause remanded with directions to reinstate the verdict of the jury and the judgment thereon.

REVERSED AND REMANDED WITH DIRECTIONS.

IN RE APPLICATION OF YELLOW CAB COMPANY ET AL. YELLOW CAB COMPANY ET AL., APPELLANTS, V. NEBRASKA STATE RAILWAY COMMISSION, APPELLEE.

120 N. W. 2d 922

Filed April 5, 1963. No. 35350.

1. **Public Service Commissions: Appeal and Error.** An order of the Nebraska State Railway Commission which fails to make findings of ultimate facts is irregular and will be set aside upon appeal.
2. **Public Service Commissions.** The term "agencies" set out in the title to L. B. 362, Laws 1959, chapter 456, page 1510, includes the Nebraska State Railway Commission.
3. **Constitutional Law: Statutes.** If an act has but one general object, no matter how broad that object may be, contains no matter not germane thereto, and the title fairly expresses the subject of the bill, it does not violate Article III, section 14, of the Constitution of Nebraska, providing that no bill shall contain more than one subject and the same shall be clearly expressed in the title.
4. ———: ———. L. B. 362, set out in Laws 1959, chapter 456, page 1510, is not in violation of Article III, section 14, of the Constitution of Nebraska, providing that no bill shall contain more than one subject because its provisions apply to the Nebraska State Railway Commission and other administrative agencies.

Appeal from the Nebraska State Railway Commission. Reversed.

Carl E. Sanden and Clarence A. Davis, for appellants.

Clarence A. H. Meyer, Attorney General, Homer G. Hamilton, and Clarence E. Danley, for appellee.

Heard before WHITE, C. J., CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

BROWER, J.

The Yellow Cab Company and Lincoln Cabs, Inc., doing business as Capital Cab Company, both corporations, each engaged in doing business in Lincoln, Lancaster County, Nebraska, joined in this proceeding by filing an application before the Nebraska State Railway

Commission, hereinafter referred to as the commission.

Their purpose was to secure an order of the commission to effectuate a change in the rates permitted to be charged for their services to those using their taxicabs. The proposed changes will not be set out herein except to say they resulted in reducing the fares on very short trips, raising them in a large number of longer trips, and in raising the rates charged for waiting time.

Due notice of the hearing on the application which was set for August 4, 1961, at 9 a.m., was given by the commission and no one appeared to contest the same. Thereupon, on the day set a hearing was had on the application and evidence was adduced by the applicants. The evidence consisted in part of summaries of the applicants' business operations tending to show that except in certain years they were operating at a loss. On September 20, 1961, the commission ordered the application to be referred to the motor transportation department for further hearing. On November 8, 1961, the commission entered an order requiring the applicants to furnish certain additional listed information by way of exhibits or otherwise, which were thereafter furnished. In the meantime the hearing was continued until February 6, 1962, and notice given accordingly.

On that day further evidence was produced by the applicants, including exhibits containing the several items of information requested by the commission. This was followed by evidence by an expert certified public accountant and attorney employed by the commission, consisting largely of his report, testimony given by him in regard thereto, the results of his examination of the applicants' exhibits, and his conclusions made therefrom.

On April 20, 1962, the examiner filed his report and recommendations which, aside from reciting the commission's action in bringing the matter to trial and holding of hearings, concluded only with a finding that the report and recommendations of the expert may be of considerable help in determining a method of book-

keeping whereby the commission can give a fair decision upon the matters. It stated that while he was sure the applicants were complying with bona fide accounting procedures for federal tax purposes, it is questionable whether those procedures were acceptable for rate-making purposes. It made no further finding of fact and recommended only that the commission "follow that accounting procedure which must (sic) correctly assists in presenting an undistorted picture whereby a rate base may be established. * * * On the basis of facts brought out at the hearing, it would not be consistent with the public interest to grant the present application."

On May 2, 1962, the commission entered its order refusing authority to change the rates as requested. The order failed to make findings of fact but merely found that the applicants had failed to prove that the proposed change of rates was necessary and that it would not be consistent with the public interest to grant the application.

Applicants timely filed a petition for rehearing and a supplemental motion in support thereof. The petition and motion being overruled, the applicants have brought the matter to this court by appeal.

Applicants as appellants assign as error of the commission its failure to make any findings of fact as required by section 84-915, R. S. Supp., 1961, or findings of fact concerning a rate base upon which rates might be determined. There are other errors assigned based on claims by the applicants of supposed erroneous factual decisions of the commission drawn from the evidence before it. In view of the absence of findings of fact errors, if any, in this respect cannot be considered by this court on appeal.

In Basin Truck Co. v. All Class I Rail Carriers, 172 Neb. 28, 108 N. W. 2d 388, this court said: "An order of the Nebraska State Railway Commission which fails to make findings of ultimate facts is irregular and will be set aside upon appeal."

In the cited case the court pointed out that in case the commission made no findings of fact as required by section 84-915, R. S. Supp., 1961, there is no basis upon which to review the order of the commission and to determine whether it is reasonable or arbitrary.

The commission, as appellee herein, however contends that it is not required to make findings of fact in this case and now urges this court to overrule the case of Basin Truck Co. v. All Class I Rail Carriers, *supra,* basing its argument on three propositions.

First, it alleges that section 84-915, R. S. Supp., 1961, when read in pari materia with section 84-901, R. S. Supp., 1961, does not include or apply to permits, certificates of public convenience and necessity, franchises, rate orders, and tariffs, or any rules of interpretation thereof. The commission cites as its principal authority for this proposition, City of Scottsbluff v. United Tel. Co. of the West, 171 Neb. 229, 106 N. W. 2d 12, quoting at length from that opinion. An examination of the holding in the cited case shows that the court was interpreting sections 84-901 to 84-908, R. R. S. 1943, as they existed previously to the amendatory statute contained in Laws 1959, chapter 456, page 1510, now sections 84-901 and 84-909 to 84-915, R. S. Supp., 1961. The act at the time of the decision in the cited case by the express terms of subdivision (2) of section 84-901, R. R. S. 1943, defining the meaning of the word "rule," did not affect regulations concerning the internal management of the agency not affecting private rights or interests, and did not affect rate tariffs and any rules of interpretation thereof. Neither did it have provisions concerning contested cases such as now exist in section 84-915, R. S. Supp., 1961. In the case of City of Scottsbluff v. United Tel. Co. of the West, *supra,* the court had before it a case involving rates as affected by an occupation tax ordinance of the City of Scottsbluff. The city contended the provisions of sections 84-901 to 84-908, R. R. S. 1943, as they then existed, requiring an agency's rules to be filed with

the Secretary of State, applied to the rate questions under consideration. This court in that case properly held that those sections then under consideration had no application to such matters.

By Laws 1959, chapter 456, section 8, page 1513, section 84-915, R. S. Supp., 1961, was added with other sections. It reads in part as follows: "Every decision and order adverse to a party to the proceedings, rendered by an agency in a contested case, shall be in writing or stated in the record and shall be accompanied by findings of fact and conclusions of law. The findings of fact shall consist of a concise statement of the conclusions upon each contested issue of fact." Section 84-901, R. R. S. 1943, was amended also by section 1 of Laws 1959, chapter 456, page 1510, and in addition to that portion defining the word "Rule" as used in the act, a third provision was added to that section as follows: "(3) Contested case means a proceeding before an agency in which the legal rights, duties, or privileges of specific parties are required by law or constitutional right to be determined after an agency hearing." These sections, 84-901 and 84-915, R. S. Supp., 1961, clearly apply to decisions of the commission and require that its decisions in rate cases contain findings of fact and conclusions of law.

The commission however argues that if sections 84-901 and 84-915, R. S. Supp., 1961, when construed together require that the commission make such findings of fact and conclusions of law, the act insofar as it applies to the commission is unconstitutional. It does not dispute the power of the Legislature to regulate the commission but contends the enactment of these sections by L. B. 362 set out in Laws 1959, chapter 456, page 1510, was in violation of Article III, section 14, of the Constitution of Nebraska. This it asserts is because the title to the act is not sufficient to include regulations affecting it and that if it is broad enough to include regulation of the commission the bill then contains more than one subject.

A quotation, in part, of the title to L. B. 362, as it appears in Laws 1959, chapter 456, page 1510, follows: "AN ACT to amend section 84-901, Reissue Revised Statutes of Nebraska, 1943, relating to state officers; to define and redefine terms; to provide a construction clause as prescribed; to provide a uniform procedure for proceedings before administrative agencies; to provide for the adoption of rules of agencies; * * * to provide procedures for the conduct of contested cases before agencies; * * * to provide for the issuance of decisions or orders by agencies * * *; to provide that this act shall be independent and cumulative of existing laws; and to repeal the original section."

The commission's second contention therefore is that the inclusion of regulations concerning it in L. B. 362, set out above, renders the provisions affecting it unconstitutional because this title cannot be said to include it. This is because the title purports to make rules and regulations in regard to administrative agencies. It argues that the commission is not an administrative agency but has independent legislative, judicial, and executive or administrative powers. It urges the Legislature must act with specific reference to it in order that it be affected. The commission cites in support of this theory, In re Lincoln Traction Co., 103 Neb. 229, 171 N. W. 192, where this court held the commission, under Article IV, section 20, of the Constitution of Nebraska, did have powers attributable in certain areas to all three departments of government.

The fact that the commission has certain legislative and judicial powers which may distinguish it in certain respects from other agencies which exercise purely administrative powers does not prevent it from being an agency of the state in a broad sense. That the Legislature intended the provisions of Laws 1959, chapter 456, page 1510, to apply to the acts of the commission cannot be doubted from its definition of an agency set out in subdivision (1) of section 84-901, R. S. Supp., 1961. It seems

clear also that in the title to L. B. 362, Laws 1959, chapter 456, page 1510, the Legislature used the term "agencies" in the broadest sense. It refers to administrative agencies at first and thereafter simply to agencies. The Supreme Court of Wisconsin in construing a similar act in Clintonville Transfer Line, Inc. v. Public Service Commission, 248 Wis. 59, 21 N. W. 2d 5, said: "We find it necessary to advert to one other matter. The Public Service Commission is an agency within the definition of that term found in ch. 227, Stats., relating to administrative procedure and review and its proceedings are governed by the provisions of that chapter. It should proceed accordingly. Sec. 227.13 Stats., provides: 'Every decision of an agency in a contested case shall be in writing accompanied by findings of fact and conclusions of law. The findings of fact shall consist of a concise and separate statement of the ultimate conclusions upon each contested issue of fact without recital of evidence.'" In Trybulski v. Bellows Falls Hydro Electric Corp., 112 Vt. 1, 20 A. 2d 117, after holding its powers, though to a certain extent legislative and judicial, were validly vested in it under the Constitution, further held that the public service commission of that state was to be classed as an "agency" of the Legislature and is not a "court" in the strict sense. In Lennox v. Housing Authority of the City of Omaha, 137 Neb. 582, 290 N. W. 451, this court said: "The constitutional provision does not require that the title be a synopsis of the law. The purpose of the constitutional inhibition was to prevent surreptitious legislation by advising legislators of the nature of the measures they are called upon to support or oppose. If by a fair and reasonable construction the title calls attention to the subject-matter of the bill, it may be said that the object is expressed in the title." In view of the broad meaning of the term "agency" applied by courts to regulatory bodies we are satisfied the title to this act clearly includes the commission as one of the agencies to be regulated. In the

present case we hold that the term "agencies" as set out in the title to L. B. 362, Laws 1959, chapter 456, page 1510, includes the Nebraska State Railway Commission.

The commission's third contention is that L. B. 362, as set out in Laws 1959, chapter 456, page 1510, is unconstitutional in that it contains more than one subject in violation of Article III, section 14, of the Constitution of Nebraska. Again it asserts that the commission is more than an administrative agency and has been held to have both judicial and legislative powers under the Constitution. It then urges that to include in one legislative bill the regulation of the commission and other administrative agencies of the state is to violate the provisions of Article III, section 14, of the Constitution of Nebraska, providing that no bill shall contain more than one subject.

It seems clear that the general purpose of the act is to regulate matters of procedure before all state agencies. We have hitherto discussed and decided that the commission is an agency of the state.

In Nebraska Mid-State Reclamation Dist. v. Hall County, 152 Neb. 410, 41 N. W. 2d 397, the court quoted other cases and adopted their holdings as follows: " 'If an act has but one general object, no matter how broad that object may be, and contains no matter not germane thereto, and the title fairly expresses the subject of the bill, it does not violate section 14, art. III of the Constitution, providing that no bill shall contain more than one subject and the same shall be clearly expressed in the title.' Beisner v. Cochran, 138 Neb. 445, 293 N. W. 289."

Having carefully considered the statute in controversy, we are convinced that L. B. 362, Laws 1959, chapter 456, page 1510, is not in violation of Article III, section 14, of the Constitution of Nebraska, providing that no bill shall contain more than one subject because its pro-

visions apply to the Nebraska State Railway Commission and other administrative agencies.

Having found the enactment of the legislative acts under consideration constitutional, we hold that the provisions of section 84-915, R. S. Supp., 1961, apply to the commission's decision rendered herein. As hitherto held in Basin Truck Co. v. All Class I Rail Carriers, *supra*, in the absence of such findings of fact, there is no basis upon which to review the order of the commission and to determine whether it is reasonable or arbitrary.

Therefore, for want of such findings of fact, the order is reversed.

REVERSED.

FRANKLYN H. RAYMOND, APPELLEE, V. ALBERT A. COTNER ET AL., APPELLANTS.

120 N. W. 2d 892

Filed April 5, 1963. No. 35362.

1. **Habeas Corpus: Parent and Child.** Where the custody of a minor child is involved in a habeas corpus action the custody of the child is to be determined by the best interests of the child, with due regard for the superior rights of a fit, proper, and suitable parent.
2. **Parent and Child.** The courts may not properly deprive a parent of the custody of a minor child unless it is affirmatively shown that such parent is unfit to perform the duties imposed by the relationship, or has forfeited that right.
3. ———. The right of a parent to the custody of his minor child is not lightly to be set aside in favor of more distant relatives or unrelated parties, and the courts may not deprive a parent of such custody unless he is shown to be unfit or to have forfeited his superior right to such custody.

Appeal from the district court for Cass County: JOHN M. DIERKS, Judge. Affirmed.

Francis M. Casey, Thomas Conis, and Guy C. Chambers, for appellants.

Richard J. Spethman and Gross, Welch, Vinardi, Kauffman, Schatz & MacKenzie, for appellee.

Heard before WHITE, C. J., CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

CARTER, J.

This is a suit in habeas corpus brought by Franklyn H. Raymond, the father of Lin Dee Raymond, against Albert A. Cotner and Edna L. Cotner, the maternal grandparents of the child, to obtain the custody of the child. The trial court awarded the custody of Lin Dee Raymond to her father and the grandparents have appealed.

The evidence shows that plaintiff and Charlotte Cotner were married on October 23, 1945. On December 5, 1950, a child, Lin Dee Raymond, was born to this union. On March 12, 1952, a decree of divorce was granted to Charlotte Raymond by the terms of which she was granted the custody of Lin Dee Raymond, then approximately 15 months of age. The right of visitation at reasonable times and places was granted to the father. The decree also awarded child support to the mother in the amount of $40 per month, payable $10 per week.

At the time of the separation of the parties, which occurred shortly after the birth of the child, they resided in Pacific Junction, Iowa. After separating from the plaintiff, Charlotte Raymond returned to the home of her parents near Plattsmouth, Nebraska, where she and the child resided until Charlotte's death on November 11, 1961. Immediately following the death of Charlotte Raymond plaintiff demanded the custody of Lin Dee Raymond, which was refused by the defendants. On March 23, 1962, this habeas corpus action was filed.

The evidence shows that plaintiff is 37 years of age. He was born in Pacific Junction, Iowa, and has lived there most of his life. He was graduated from high school, which is the extent of his formal education. He is presently employed as a stationary engineer by a

contracting firm engaged in the construction of missile bases at a wage of $450 per month. He owns his home in Pacific Junction, which he purchased in 1957 for $3,500, all of which has been paid. The home is a two-story frame house, having 10 rooms, four of which are bedrooms. It is equipped with a furnace and a private water and sewerage system.

On May 22, 1953, plaintiff was married to Marcella Cuhel, who has a 12-year-old daughter by a previous marriage. This daughter of Marcella's was adopted by the plaintiff and lives in the family home. Two children were born of the marriage, Larry age 6 and John age 8 years, who also live in the home. Marcella is 33 years of age and testified that she will care for Lin Dee and give her the same care and affection as the other children. She testified that plaintiff is a good husband and father, who provides well for his family. There is evidence that Marcella is neat and clean and keeps the home in good order. The children in the home are well cared for. They attend school and Sunday School regularly. The home is described by third persons as a good Christian home.

The evidence shows that plaintiff has paid child support for Lin Dee as it became due, as required by the divorce decree. Plaintiff testified that he saw Lin Dee three or four times a year when she was very small. He has not seen her in the last 9 or 10 years because, as he says, his former wife thought it would be best that he not do so. The evidence shows that his parents visited Lin Dee at the home of her maternal grandparents on the average of once a month, and that he was continuously informed by them concerning the welfare of the child.

The defendants, whom we shall refer to as the Cotners, reside on a farm 2 miles west of Plattsmouth, Nebraska. They rent out the farm land and live in the farm home. The farm house is about 50 years old, but is in good condition. It is an eight-room, frame house

which is equipped with lights and an oil burner for heat. There are no water or sewerage facilities in the house. He owns the farm, which is wholly paid for. The evidence indicates that the home is clean and well kept. The home is described by third persons as a good Christian home.

The evidence shows that Mr. Cotner is 69 years of age and is generally in good health for a man of his years. He takes Lin Dee to and from school morning, noon, and evening. He testified to his intention to make a will in favor of Lin Dee. Mrs. Cotner is 67 years of age and in good health except for a controlled diabetic condition. Mr. Cotner testified that plaintiff came to the Cotner home on two occasions in an intoxicated condition shortly after the divorce was granted. This was denied by the plaintiff, who stated that he had never been a drinking man. Mr. Cotner also testified that plaintiff shook Lin Dee excessively for getting candy stain on her snow suit when she was approximately 18 months old. He further stated that when a specialist was needed for Lin Dee at an early age, plaintiff stated that he had no money and would not be responsible for the expense. Plaintiff stated that she was taken to a child specialist in Omaha and that he paid Charlotte the $15 doctor bill the following week. Mrs. Cotner testified to the incident relating to the employment of the child specialist. She stated that Charlotte and Lin Dee lived with them until Charlotte's death. She cared for the child while Charlotte was working, which was most of the time after Lin Dee became 3 years old.

The Cotners testified that they had great affection for the child and that they had the means and desire to raise and educate her. They testified that they had never forbidden the plaintiff to see the child, nor did they ever say anything to prejudice the child against her father. They have the feeling that the plaintiff did not treat the child properly and are convinced that the

best interests of the child require that she remain in their care.

Lin Dee Raymond was 11 years of age at the time of the trial. She was not in good health for 6 months after her birth but is presently in good health. There is some evidence that she became emotionally upset when informed that her father wanted to take her into his home. She attends school regularly and her school reports indicate she is a very good student. She was called as a witness and testified to her affection for the Cotners. She testified to the things provided for her care, comfort, and amusement. She said she had never seen her father until the day of the trial and that he was a complete stranger to her. She further stated that she was very happy with her grandparents, the Cotners, and that she did not want to leave them and go with her father, whom she does not know.

The evidence sustains the following conclusions: Both the plaintiff and the defendants are suitable and fit persons to have the care and custody of Lin Dee Raymond. Both the plaintiff and defendants have suitable homes for caring for her. Both plaintiff and defendants have the means of supporting her. Both plaintiff and defendants live in communities which provide proper school and church facilities. Both plaintiff and defendants desire the custody of the child in order to properly train, educate, and provide the needs and comforts of this motherless 11-year-old girl. The problem confronting this court, as it was in the trial court, is the determination of what is best for Lin Dee Raymond under such circumstances.

The applicable law to a case such as we have before us may be summarized as follows: When the custody of a minor child is involved in a habeas corpus action, the custody of the child is to be determined by the best interests of the child, with due regard for the superior rights of a fit, proper, and suitable parent. The courts may not properly deprive a parent of the custody of a

minor child unless it is affirmatively shown that such parent is unfit to perform the duties imposed by the relationship, or has forfeited that right. Williams v. Williams, 161 Neb. 686, 74 N. W. 2d 543; Caporale v. Hale, 169 Neb. 751, 100 N. W. 2d 847. The right of parents to the custody of minor children of tender years is not to be lightly set aside and the court may not deprive parents of such custody unless they are shown to be unfit to perform the duties imposed by that relationship, or have forfeited their right. Osterholt v. Osterholt, 173 Neb. 683, 114 N. W. 2d 734; State v. Gross, 173 Neb. 536, 114 N. W. 2d 16. A decree of divorce, which awards the custody of a minor child to the mother and in which there is no finding of unfitness of the father, does not deprive the father of the natural right of custody of his child except as against the mother. In re Guardianship of Peterson, 119 Neb. 511, 229 N. W. 885.

It is true that the rights of a father to the custody of his minor child, upon the death or unfitness of the mother to whom legal custody was granted, may be defeated by his abandonment of the child, his complete indifference to its welfare, or by his own unfitness to have its custody. When the superior right of the father has been forfeited, the natural right of a father to have the custody of his minor child must give way to the best interests of the child, even though it results in placing the custody of the child in more distant relatives or unrelated persons. See, Gorsuch v. Gorsuch, on rehearing, 143 Neb. 578, 11 N. W. 2d 456; Williams v. Williams, *supra*.

The evidence shows that plaintiff and defendants have suitable homes in which to care for this young girl. There is no evidence that the Cotners have failed in any respect in caring for her. They are suitable and fit persons to have her care and custody. The plaintiff is likewise a suitable and fit person to have the care and custody of his 11-year-old daughter. The decision must therefore rest on other considerations.

The father has a superior right to the custody of his daughter, unless he has forfeited that right. The issue resolves itself into the question of whether or not he has forfeited his natural right as the girl's father to have her custody. The evidence shows that the father has a good, well-kept home. His wife said she is willing to care for Lin Dee the same as the other children in the home. The step-sister and two half brothers in plaintiff's home would afford companionship ordinarily beneficial to a child of 11 years. The ages of the plaintiff and his present wife are a fact in favor of the plaintiff when measured against the advanced years of the defendants. We find nothing in plaintiff's home and surroundings that mitigates against his right to the child's custody.

The plaintiff and Charlotte were divorced on March 12, 1952, when Lin Dee was 15 months of age. The child was properly placed in the care of her mother. Plaintiff was required to provide child support. The plaintiff has made every payment of child support as it came due. The plaintiff visited the child when she was very small. He has not visited her during the last 9 years, although he has resided less than 100 miles distant. Plaintiff said he did not visit the child for the reason that he was requested by Charlotte not to do so because she did not believe it to be in the best interest of the child. If his failure to visit the child was in deference to the wishes of Charlotte and what he thought was the best interests of the child, an indifference to the child's welfare would not be indicated. The evidence shows that plaintiff did keep himself informed of the child's welfare through his own parents, who visited the child on an average of once a month. Some evidence was offered that plaintiff was intoxicated on two occasions more than 9 years previous to the trial. Plaintiff denied the truth of this statement. The subsequent conduct of the plaintiff as testified to by disinterested parties does not support a finding that he used intoxicants to the detriment of himself or family, if he used

them at all. Plaintiff has not failed to support the child. He has not abandoned the child. He has not voluntarily relinquished the child to the Cotners with the expectation that they would furnish care and support. We think the evidence shows that plaintiff is a fit and proper person to have the custody of his child and that he has done nothing that would sustain a finding that he had forfeited his superior right to her custody.

The record shows that the defendants have had the child in their home for a period of 10 years and that they have become attached to the child. The child has also become much attached to them and prefers to remain with them. The unfortunate situation arose, however, because the mother, who had the legal custody of the child, took her there. It was not because of any consent or abandonment of the child on the part of the father. It cannot be said that the natural result of the attachment of the grandparents and Lin Dee for each other was in any manner the result of a choice on the part of the plaintiff. It is one of those domestic situations which cause great concern on the part of this court as it did the trial court. The case of Baumann v. Baumann, 169 Neb. 805, 101 N. W. 2d 192, is almost on all fours on its facts and result as the case presently before us. The reasoning of that case is decisive of the issues raised by this appeal.

The record discloses that the trial court exhaustively reviewed the evidence and the law at the time the judgment was rendered. It indicates a careful consideration of every pertinent fact. The trial court had the opportunity to see and hear the witnesses, an advantage which this court does not have. While this court is required to try the case de novo on the record, where the evidence is in unreconcilable conflict, the findings of the trial court with respect thereto are entitled to great weight. After a consideration of the evidence, the law, and the findings of the trial court as above stated, we can find no legal basis for interfering with the judgment

of the trial court, and its judgment is affirmed.

AFFIRMED.

WHITE, C. J., SPENCER, and BOSLAUGH, JJ., dissenting.

We respectfully dissent from the holding of the majority of the court in this case. The opinion of the court states: "When the superior right of the father has been forfeited, the natural right of the father to have the custody of his minor child must give way to the best interests of the child * * *." We submit that the statement quoted is an accurate summarization of the holding of the court. We do not agree that it is a correct statement of the law. We believe that parental rights in child custody proceedings are preferential, not absolute; and that the rights, desires, and wishes of parents should be considered and respected in such proceedings except where they conflict with the welfare of the children involved. In most cases the best interests of the child require that its custody be awarded to its parent. The difficulty arises when the best interests of the child require that its custody be awarded to someone other than its parent.

"Wherever a controversy arises between different claimants to the custody of a child, the probable welfare of the child is the controlling consideration to which all questions of superior legal rights are entirely subordinated." 27 Am. Jur., Infants, § 108, p. 829. "The court, in passing upon the writ in a case involving the custody of a child, deals with a matter of an equitable nature; it is not bound by any mere legal right of parent or guardian, but is to give his or her claim to the custody of the child due weight as a claim founded on human nature and generally equitable and just. Therefore, these cases are decided not upon the legal right of the petitioner to be relieved from unlawful imprisonment or detention, as in the case of an adult, but on the court's view of the best interests of those whose welfare requires that they be in custody of one person or another; and hence, a court is in no case bound to deliver a child into the

custody of any claimant or of any person, but should, in the exercise of a sound discretion, after a careful consideration of the facts, leave it in such custody as the welfare of the child at the time appears to require. In short, the child's welfare is the supreme consideration, irrespective of the rights and wrongs of its contending parents, although the natural rights of the parents are entitled to due consideration." 25 Am. Jur., Habeas Corpus, § 80, p. 204.

In an early case, Sturtevant v. State ex rel. Havens, 15 Neb. 459, 19 N. W. 617, 48 Am. R. 349, this court held that in a controversy for the custody of a child the order of the court should be made with a single reference to the best interests of the child. This court stated: "Were the question of the *right* of the father the only question to be considered, we should, perhaps, coincide with the conclusions of law as stated by the district court. It is true this legal right was at one time, in the early history of our jurisprudence, fully recognized both by the courts of England and of this country; and it is, in part, made the law of this state by section 6, chapter 34 of the Compiled Statutes, which provides that, 'The father of the minor, if living, and in case of his decease, the mother, while she remains unmarried, being themselves respectively competent to transact their own business, and not otherwise unsuitable, shall be entitled to the custody of the person of the minor and to care for his education.' * * * It is true that this section is declarative of the law in its general sense, but we cannot agree with the defendant's counsel and decide the cause upon the rule there laid down, unaided by recent judicial decisions or the circumstances of the case. But rather, taking our statute as a general guide, we will look to the particular necessities of the case and give our special attention to the best interests of the child about whom this unfortunate controversy has arisen. * * * From a careful examination of the authorities at our command we think the prevailing rule in this country may be briefly stated

to be, that in controversies similar to this, especially where the infant is of the tender age of the one contended for, the court will consider only the best interest of the child, and make such order for its custody as will be for its welfare, without any reference to the wishes of the parties."

The Sturtevant case was followed for many years. In recent years the court has qualified the rule of the Sturtevant case by stating that custody is to be determined by the best interests of the child "with due regard for the superior rights of fit, proper, and suitable parents." Apparently this statement of the rule had its origin in a supplemental opinion in Gorsuch v. Gorsuch, 143 Neb. 578, 11 N. W. 2d 456. See, also, Lakey v. Gudgel, 158 Neb. 116, 62 N. W. 2d 525, in which the court announced that Kaufmann v. Kaufmann, 140 Neb. 299, 299 N. W. 617, was overruled to the extent that it was in conflict.

In the case at bar the court now holds that a parent has a superior right to custody and that the best interests of the child shall not be considered unless the right of the parent has been forfeited. "Due regard" has become "absolute right" and the right of the parent is the controlling and mandatory consideration, unless the court finds affirmatively that the superior right has been forfeited. The judicial point of origin of "the best interests of the child" is only reached after the elimination, by forfeiture, of the absolute right to have the custody of the child. We submit that judicial eyes should be open at all times to the paramount and overriding considerations of the best interests of the child. We do not quarrel with the proposition that the parental and blood relationship is normally a most potent producer of the care, love, and affection which is vital to the best interests of a child, and that such relationship should be given highly preferential consideration. We do quarrel with elevating a highly preferential consideration to the level of absolute right. Besides creating a judicial blindness as to the true considerations present, it results in a tortuous

wrestling with the narrowed legal concept of "fitness" of a parent. It results in situations where, in order to permit the child to remain in an established and developed parental relationship with all that that imports, we are forced to strain the evidence in order to find the blood parent "unfit." The harshness and the rigidity of the old common law rule was carefully examined and rejected in the early history of our law in this state. It would seem now that the court returns to the common law rule of the early cases discussed in the Sturtevant and Kaufmann cases.

The district judge, in announcing his decision in this case, made this summary of the evidence of the appellants: "Now, the evidence on behalf of the grandparents, as well as the child, indicates and demonstrates that they have become very attached to the child during the approximate nine years that the child has made its home as a member of their household, and it has been in that home that she has largely been reared since she was two years old, and probably to a large extent by the grandparents because the mother was working, except toward the very end, the mother was actually working most of the time up until her last illness. It really is the only home, you might say, that the child has ever known since she has been old enough to know where home was. She states she is happy with her grandparents and doesn't want to leave them and in fact indicated that she didn't even know her father, that he was a stranger to her." This statement by the trial court is not only borne out conclusively by the record in this case, but it may be enlarged by the undisputed evidence as to the effect of this fine home and upbringing upon the development of the girl. She is a top student in school scholastically, is happily adjusted with her friends and schoolmates in the community, and is in ideal health.

The majority opinion orders a destruction and shattering of this established home and the love and security relationship implicit therein. The effect of this situation

on the girl herself was dramatically illustrated in the record.

Lin Dee L. Raymond testified that the first time that she could remember having seen her father, the appellee, was when he appeared in court on May 28, 1962. The appellee admitted that the last time he had seen Lin Dee, before the trial, was in December 1953.

Lin Dee's mother died on November 11, 1961. Shortly thereafter Lin Dee learned that her father wanted to obtain custody of her. Lin Dee became worried and depressed, and on November 26, 1961, the appellants took Lin Dee to a physician. The doctor found no organic illness and prescribed a sedative. On December 6, 1961, her condition had become more serious and she was unable to sleep. On that date the physician prescribed an additional medicine which she takes at night for sleep.

The opinion of this court holds that this child should be taken from a stable and adjusted home where a normal parental relationship with love and security attachments has developed and that she should be thrust into a home among complete strangers. Her actual custody, control, and supervision will be that of a stepmother who has a child by a previous marriage and two children by the appellee. The appellee is absent from the home 7 days at a time on missile base work and is home once between each 7 days.

In this case the child's happiness and welfare are assured, for the present at least, if the appellants are allowed to retain custody. To make a change in the custody would, at best, be an experiment which the court has refused in other cases. See, In re Burdick, 91 Neb. 639, 136 N. W. 988, 40 L. R. A. N. S. 887; Williams v. Williams, 161 Neb. 686, 74 N. W. 2d 543. In the Williams case, where the grandparents were allowed to retain the custody of an 8-year-old boy as against his father, this court said: "A court may well hesitate to take the child from such surroundings to try an experiment elsewhere."

We would find that Lin Dee should be allowed to re-

main with the appellants at this time. In the event that a change of circumstances occurs in the future so that it then becomes in the best interest of Lin Dee that a change in her custody be made, appropriate proceedings may be had at that time.

MESSMORE, YEAGER, and BROWER, JJ., concurring.

We quite agree that the effect of the majority opinion is to hold that a fit, proper, and suitable parent, who has not forfeited his natural right as a parent, has a right superior to that of the state to control, rear, and educate his own children. It has long been the rule in this state that where the custody of a minor child is involved in a habeas corpus action the custody of the child is to be determined by the best interests of the child with due regard for the superior rights of a fit, proper, and suitable parent. The dissent complains that "due regard" has become "absolute right." We accept this statement as being correct where the parent is a fit, proper, and suitable person and has done nothing to forfeit his natural right as a parent.

In the case of Norval v. Zinsmaster, 57 Neb. 158, 77 N. W. 373, 73 Am. S. R. 500, this court said: "We are aware that this court has several times asserted that in such controversies as the present the order should be made with sole reference to the best interests of the child. But this has been broad language applied to special cases. The court has never deprived a parent of the custody of a child merely because on financial or other grounds a stranger might better provide. The statute declares and nature demands that the right shall be in the parent, unless the parent be affirmatively unfit. The statute does not make the judges the guardians of all the children in the state, with power to take them from their parents, so long as the latter discharge their duties to the best of their ability, and give them to strangers because such strangers may be better able to provide what is already well provided. If that were the law, it would be soon changed, by revolution if necessary."

In Clarke v. Lyon, 82 Neb. 625, 118 N. W. 472, 20 L. R. A. N. S. 171, this court held: "The unfitness which deprives a parent of the right to the custody of his children must be positive, and not comparative, and the mere fact that the children would be better nurtured or cared for by a stranger is not sufficient to deprive the parent of his right to their custody."

We are in agreement with the dissent that the present rule of this court has been followed since Gorsuch v. Gorsuch, on rehearing, 143 Neb. 578, 11 N. W. 2d 456, decided in 1943.

The dissent criticises the rigidity of the long-adopted rule of this court. The same could be said of the Ten Commandments and the Bill of Rights. In cases where the rights of a citizen are being protected against the power of the state, a precise and unqualified statement of the rule, labeled as rigidity by the dissent, is most appropriate to insure the maintenance of the right.

Unless the language "with due regard for the superior rights of a fit, proper, and suitable parent" means that such a parent has a superior right to all others, including the state, the words afford the parent no superior right that he can enforce. It is axiomatic that to grant a right and withhold a remedy is tantamount to the existence of no right at all.

The dissenting opinion asserts that the transfer of Lin Dee to her father is an experiment that should not be permitted. If the placing of the child with her own father is to be described as an experiment, it is one that has proved successful over the years irrespective of the fact that a parent occasionally fails in his duties and obligations to his child. On the other hand, the leaving of the child with her aging grandparents, after she lost the love and care of a mother by the latter's untimely death, is likewise an experiment. The dissent states that Lin Dee should remain with her grandparents and, in the event of a change of circumstances affecting her best interests, a change in her custody can be made.

The same remedy exists if the father, after obtaining custody of his child, fails in his duties and obligations to his child.

This case, stripped of its nonessentials, raises the issue as to whether or not the power of the state over minor children is superior to that of a parent who has failed in no respect in his duties and obligations to his child. It is the position of the dissenting opinion that the right of the state is superior to the rights of the natural parent, however fit, proper, and suitable he may be. It is the position of the majority that a fit, proper, and suitable father, and not the state, has the primary right to nurture and rear his child and to direct its training, education, and religious instruction. We assert that the rights of the state, exercised by the powers of a court of equity, are subordinate to the rights of a parent except where the parent is not a fit, proper, or suitable person or has forfeited his natural right as a parent. It is our position that such a parent is, as a matter of law, the proper person to determine the best interests of the child until it is affirmatively shown that he has become disqualified from doing so. We submit that the courts are not the guardians of all the children in the state. The right of a court to assume jurisdiction over minor children arises when parents have failed in their responsibilities or forfeited their natural rights as parents, excluding, of course, the determination of which of two contesting parents shall have the care and custody of their minor children.

IN RE KAYKA SERAPHINE GRASS, LOUIS DEAN GRASS, AND LOIS GRASS, NEGLECTED CHILDREN. MONA JANE GRASS MORIMOTO ET AL., APPELLANTS, V. NEBRASKA CHILDREN'S HOME SOCIETY ET AL., APPELLEES.

121 N. W. 2d 26

Filed April 5, 1963. No. 35380.

1. **Infants: Juvenile Courts.** In a proceeding brought under sections 43-205 and 43-206, R. R. S. 1943, it is essential to the jurisdiction of the court that service of summons be had upon the person or persons having the custody or control of the child, or with whom the child may be when the action is commenced.
2. ———: ———. A temporary interruption of the custody or control of a child, without fault on the part of the person having its custody or control, will not operate to excuse the failure to serve a summons as required by section 43-206, R. R. S. 1943.
3. **Judgments.** A judgment which is void for failure to cause a summons to be served on a necessary party may be collaterally attacked by a petition to vacate the judgment.

Appeal from the district court for Scotts Bluff County: TED R. FEIDLER, Judge. Reversed and remanded with directions.

Wright, Simmons & Hancock, for appellants.

Tracy J. Peycke, Donald L. Wood, and Marvin L. Holscher, for appellees.

Heard before WHITE, C. J., CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

CARTER, J.

This is an appeal from an order of the district court for Scotts Bluff County refusing to vacate a decree by which the three children of petitioners were found to be neglected children within the meaning of the law, and their custody, care, and control placed in the Nebraska Children's Home Society, Omaha, Nebraska.

The evidence shows that Mona Grass Morimoto is a Sioux Indian who was born on the Sioux Indian Reservation. On September 27, 1961, she was married to Louis

Morimoto, a farmer of Japanese descent living near Mitchell, Nebraska. Some 12 years before the trial in the instant case Mona and Louis commenced living together as man and wife without going through the formalities of a marriage ceremony. Three children were born to this relationship,—Kayka Seraphine, age 6; Louis Dean, 3; and Lois, 1. Louis and Mona each testified that Louis was the father of the three children. Admittedly, Mona was unmarried at the time of the births of the three children.

On May 23, 1961, an action was commenced in the county court of Scotts Bluff County, the purpose of which was to have the children declared to be neglected children. Service of summons was had on Mona, but no service of summons or notice was had upon Louis, the putative father. An appeal was taken to the district court. On September 5, 1961, a hearing was held in the district court. The children were found to be neglected and custody of the three children was awarded to the Nebraska Children's Home Society. No appeal was taken from this order. On February 20, 1962, Mona and Louis filed their petition in the district court to procure the vacation of the order of September 5, 1961. The trial court denied the prayer of the petition. A motion for a new trial was filed and overruled. An appeal was thereupon taken to this court.

The petition to vacate the order of September 5, 1961, asserted that the petitioners were prevented by unavoidable casualty and misfortune from defending the action and that the order was void in that service of summons was not had upon Louis Morimoto, who had the actual physical custody of the two older children at the time the original action was commenced.

Section 43-206, R. R. S. 1943, provides in part: "Upon the filing of the complaint, a summons shall issue requiring the person having custody or control of the child, or with whom the child may be, to appear with the child at a place and time stated in the summons,

* * *." The evidence shows without dispute that the two older children were with Louis Morimoto and in his custody and control at the time the original action was commenced.

It is the contention of the State that a natural father of an illegitimate child is not a parent within the meaning of section 43-206, R. R. S. 1943. We point out, however, that the claim of the necessity for service of summons on Louis Morimoto is based on his having the children with him and under his control when the suit was commenced, and not on the basis of his relationship as father of the illegitimate children.

It is contended by the State that the acknowledgment of paternity by Louis Morimoto is of no import in the instant case. Section 13-109, R. R. S. 1943, provides: "A person may state in writing that he is the father of a child or perform acts, such as furnishing of support, which reasonably indicate that he considers himself to be the father of such child, and in such case he shall be considered to have acknowledged the paternity of such child. A child whose parents marry is legitimate."

The evidence is undisputed that Louis Morimoto cared for and supported these three children from birth. It is the contention of the State that section 13-109, R. R. S. 1943, imposes duties and obligations on the acknowledged father of an illegitimate child but grants him no rights with relation to the custody of the children. This raises a question that is not necessary to a decision in this case. The fact remains that Louis Morimoto had the actual physical custody of the two older children when they were taken into custody by the sheriff. By the express provisions of section 43-206, R. R. S. 1943, service of summons upon him was necessary to give the court jurisdiction by virtue of their being with him and under his control when the action was commenced.

It may be argued that the judgment was valid insofar as the award of custody of the youngest child, Lois, was concerned. The record shows that Mona was confined

in the county jail on the day the original action was commenced. She was permitted to keep the child with her in the jail, the child being less than three months old. The evidence shows that Louis had supported the child since birth by paying the laying-in hospital expenses of Mona when the child was born and affording the child support thereafter. He was the acknowledged father of the child. His custody and support of the child was interrupted when Mona was committed to jail, a matter over which he had no control. The temporary loss of custody and support while the child was occupying the county jail with her mother did not operate to divest Louis of the custody and support which he had afforded the child since her birth. For all practical purposes he had the same custody and control of Lois while she was occupying the jail with her mother as a matter of convenience as he had prior thereto. The evidence is not disputed that the child resided on the farm with Louis and Mona, and that she was then in the custody and under the joint control of Louis and Mona. We think it was necessary to the jurisdiction of the court to serve a summons on Louis in order to make a valid order finding Lois to be a neglected child and to award her custody to a third party. We therefore hold that in a proceeding under sections 43-205 and 43-206, R. R. S. 1943, it is essential to the jurisdiction of the court that a summons be served on the acknowledged father of an illegitimate child where such father has the custody and control of such child, as under the circumstances here shown at the time the action was commenced.

The judgment of the district court, rendered on September 5, 1961, was therefore void and subject to collateral attack by a petition to vacate it. For the reasons stated, the judgment of the district court is reversed and the cause remanded with directions to vacate the judgment of September 5, 1961.

REVERSED AND REMANDED WITH DIRECTIONS.

JOHN K. HAMMER ET AL., APPELLANTS, V. DEPARTMENT OF ROADS, STATE OF NEBRASKA, ET AL., APPELLEES.

120 N. W. 2d 909

Filed April 5, 1963. No. 35406.

1. **Constitutional Law: Eminent Domain.** There is no constitutional limitation in this state on the right to take private property for public use under the power of eminent domain, except as to the right to just compensation.
2. **Eminent Domain: Highways.** As a general rule, action taken by a governmental agency within its legally constituted authority is presumed to be valid.
3. ———: ———. The burden to prove otherwise is on the litigant contesting its validity.
4. **Highways.** In designating the highway system of this state, as provided by the provisions of sections 39-1301 to 39-1362, R. R. S. 1943, the Legislature places a high degree of trust in the hands of those officials whose duty it shall be, within the limits of available funds, to plan, develop, construct, operate, maintain, and protect the highway facilities of this state, for present as well as for future uses.
5. **Estoppel: Municipal Corporations.** Ordinarily the doctrine of equitable estoppel cannot be invoked against a municipal corporation in the exercise of governmental functions but exceptions are made where right and justice so demand, particularly where the controversy is between one class of the public as against another class.
6. ———: ———. The doctrine of equitable estoppel may be invoked against a municipal corporation where there have been positive acts by the municipal officers which may have induced the action of a party and where it would be inequitable to permit the corporation to stultify itself by retracting what its officers had done.

Appeal from the district court for Buffalo County: S. S. SIDNER, Judge. Affirmed.

Tye, Worlock & Knapp and Dier & Ross, for appellants.

Clarence A. H. Meyer, Attorney General, Harold S. Salter, William J. Orester, and Ward W. Minor, for appellees.

Heard before WHITE, C. J., CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

SPENCER, J.

This is an action brought by John K. Hammer, Francis L. Richards, and Richard A. Dier, appellants, hereinafter referred to as plaintiffs, to enjoin the Department of Roads, State of Nebraska, and City of Kearney, from denying them access to a portion of a controlled access highway being built by the State in the City of Kearney. Plaintiffs perfected an appeal to this court from the denial of relief.

The Department of Roads, State of Nebraska, hereinafter referred to as State, and the city of Kearney, hereinafter referred to as city, after negotiations extending over a 6-year period, entered into a series of contracts under which they proposed to relocate State Highway No. 10 from Central Avenue to Second Avenue. Under the plan, the city would construct the segment from Eleventh Street north through the city of Kearney to Thirty-ninth Street on a city-federal matching basis, with the State acting as liaison between the city and the Federal Bureau of Roads. The State would assume the responsibility for constructing the highway south from Eleventh Street to Interstate Highway No. 80, approximately a distance of 1 mile, through agricultural or undeveloped rural territory, of which approximately ½ mile is within the city limits. This segment is to be constructed on a state-federal matching basis, with the city paying no part of the cost.

The plaintiffs own a 3-block area extending 1,040 feet north and south along the west side of Second Avenue. This area is bounded on the north by Eleventh Street and on the south by Eighth Street. The area south of Eighth Street is an unplatted area. From Eleventh Street south to Interstate Highway No. 80 the highway is to be a controlled access highway, with access permitted at only four points: Eleventh Street; Eighth Street; a point approximately 1,500 feet south of Eighth Street but still within the city limits; and at a county road which is outside the city. There is no access control

on any portion of the highway being built by the city north of Eleventh Street. The block between Eleventh and Twelfth Streets is undeveloped. The area north of Twelfth Street is a built-up residential area. The highway north of Eleventh Street through the city will have a center median 10 inches in height, which will permit crossing only at street intersections.

Sometime in the latter part of 1961, the plaintiffs learned of the access control feature of the road and attempted to secure a change. On December 6, 1961, they accompanied the mayor and the city manager of Kearney to Lincoln and discussed the matter with officials of the State. During this session there was some discussion about the opening of a road onto Second Avenue, to be designated as Tenth Street. There is a dispute as to exactly what was said, but accepting the plaintiffs' version, the testimony of the mayor is as follows: "Q And they said that they wouldn't allow that access. A I don't believe they said they wouldn't allow it. They said they didn't want it. Q They did not agree to the allowance of this 10th Street to have access. A They did not agree to it, no. Q Do you recall telling them that it was actually going to be dedicated? That wasn't mentioned, was it? A I believe we told them we were contemplating it. Q Contemplating it. A Yes, sir."

The city manager, who also was a witness for the plaintiffs, however testified as follows: "Q You were one of those that were in the conference in Lincoln on the 6th day of December, 1961. A Yes, sir. Q And at that time was it your impression that the state indicated to the people who were there from The City of Kearney that there would be any relaxation of access between 8th and 11th Streets? Did you come away from that conference with that kind of an impression? A I felt that Mr. Coffey, the design engineer, made it plain that he did not want access or openings onto Highway 10 between 8th and 11th."

Subsequent to this trip to Lincoln, and on January 3,

1962, the city received the dedication of Tenth Street, and on January 9, 1962, accepted it. Up to the time of the trial, however, Tenth Street had not been opened up for use as a street. It still remained the field that it was prior to the dedication.

On February 13, 1962, an agreement prepared by the State covering the project was presented to the city council for action. By this agreement the city agreed to review the plans for the construction work to be done by the State within the corporate limits of the city and to indicate approval by signing the agreement. The agreement also contained the following provision: "The City hereby agrees: * * * (d) To require that all future entrances from private property to the public right of way within the limits of this project receive prior approval of the State Engineer or his authorized representative." Attached to the agreement were the plans which provided for the access at Eleventh Street and Eighth Street but none at the then-dedicated but unopened Tenth Street. This agreement was approved by the city council as presented, and one of the plaintiffs, who was a city councilman, voted for approval.

Plaintiffs brought this action against the State to enjoin the denial of the access, alleging such denial was unreasonable, arbitrary, and discriminatory.

The State, by amended answer, denied that its action was unreasonable, arbitrary, or discriminatory, but rather was reasonable and proper to safeguard the traveling public. By way of cross-petition against the city, the State alleged that after extended negotiations, the agreement was signed; that previous to the signing of the agreement, Tenth Street was dedicated; that this fact was never brought to the attention of any representative of the State; that the State has proceeded with its plans for building said project; that said project is tied to other highway construction projects; that any change of plans could result in the withdrawal of federal participation and a great increase in expense to the State;

and requested the court to set aside the dedication of Tenth Street. The city answered the cross-petition, denying generally and praying that Tenth Street as dedicated be permitted access.

The trial court denied the injunction requested by the plaintiffs, denied the vacation of Tenth Street, but held that the city was estopped to claim that Tenth Street should open onto Second Avenue, and that the city should be enjoined from interfering with the construction of the project under the agreement.

The plaintiffs set out three assignments of error: "1. The court erred in finding there was a necessity for the denial of access to the property in question. 2. The court erred in finding that the action of the defendants, City of Kearney and State of Nebraska, in denying access to these three blocks, inside the city limits of Kearney, was not discriminatory, arbitrary and unreasonable. 3. The court erred in finding an estoppel against the City of Kearney for its city street opening onto Second Avenue."

There is no constitutional limitation in this state on the right to take private property for public use under the power of eminent domain, except as to the right to just compensation. Consequently, the Department of Roads of the State of Nebraska may proceed at will, and the extent, method, and necessity of exercising the power may not be interfered with by the other departments of government. See May v. City of Kearney, 145 Neb. 475, 17 N. W. 2d 448.

This case in no way involves the question of taking property without just compensation. Plaintiffs' petition alleges that the State has notified them of its intention to condemn one-half acre of land off the west edge of their property and to deny them access onto Second Avenue. They brought this action to enjoin the denial of access. Any and all damages sustained by the plaintiffs, including damages for loss of access if they are unsuccessful, will be determined in the condemnation proceeding.

Involved here is the question of the right of the State to deny access under the facts in the case.

Substantially, the first two assignments of error complain that the action of the State in establishing controlled access on Second Avenue between Eleventh Street and Eighth Street is arbitrary, unreasonable, and discriminatory because there is no controlled access north of Eleventh Street on Second Avenue.

The specific right of the State to control access to a highway is granted by section 39-1327, R. R. S. 1943. The plaintiffs do not challenge the right as such, nor do they question the State's compliance with the necessary procedure to establish control of access. Their complaint is that access control in this instance is unnecessary, unreasonable, arbitrary, discriminatory, and capricious.

The plaintiffs tried this case on the theory that it was the duty of the State to show a need for controlled access. As a general rule, action taken by a governmental agency within its legally constituted authority is presumed to be valid. The burden to prove otherwise is on the litigant contesting its validity. See Hillerege v. City of Scottsbluff, 164 Neb. 560, 83 N. W. 2d 76. Applying this rule, it is then necessary for the plaintiffs to establish by clear and unequivocal proof that the denial of access to their property is unreasonable, arbitrary, or discriminatory.

The plaintiffs produced two of the property owners, one the attorney who tried the case in the district court, the other a member of the city council; two other councilmen; the mayor; and the city manager. None of these witnesses had or claimed to have any engineering training or experience. Further, except for the city manager, none of them could in any way be considered as an authority or expert on traffic problems or the control of traffic. On direct examination the city manager, in response to a question as to his opinion on the matter of the need for completely controlled access for the 1,040

feet between Eleventh Street and Eighth Street, testified: "I think it's all right to control access."

The plaintiffs complain that they are discriminated against because there is no access control north of Eleventh Street along the entire stretch of Second Avenue through the city. The area north, however, is mostly built up with residential property, and the testimony is that the cost of access control through that area, because of the improvements, would be prohibitive. All of the construction on Second Avenue north of Eleventh Street is under the control of the city and no state funds are involved. The area south of Eleventh Street is agricultural land and the construction is under the control of the State, with no city money involved. The State's witnesses included two qualified engineers who testified that there was a need for access control and that it was desirable construction in this area. Substantially, the State's testimony is that controlled access was adopted to protect the highway, to minimize the number of turns on and off the highway, and to prevent the development along the highway of hamburger and pop stands and similar enterprises which create traffic problems.

As we view the evidence, there was ample justification for the State to start access control at Eleventh Street. The plaintiffs wholly failed to sustain their burden of proving otherwise. This planning concept is provided by our law, and courts should be slow to substitute their judgment for that of those to whom the planning is delegated. We call attention to section 39-1301, R. R. S. 1943, which provides in part: "Recognizing that safe and efficient highway transportation is a matter of important interest to all of the people in the state, the Legislature hereby determines and declares that an integrated system of highways is essential to the general welfare of the State of Nebraska. * * *

"In designating the highway system of this state, as provided by the provisions of sections 39-1301 to 39-1362, the Legislature places a high degree of trust in the

hands of those officials whose duty it shall be, within the limits of available funds, to plan, develop, construct, operate, maintain, and protect the highway facilities of this state, for present as well as for future uses."

Plaintiffs' third assignment of error concerns the finding of estoppel against the city of Kearney for Tenth Street opening onto Second Avenue. The State in its cross-petition did not ask for estoppel but for the vacation of the street. It did, however, ask for such other relief as may be just and equitable. The city in its answer does ask the court to recognize the dedication and that the street be permitted direct access to Second Avenue.

Plaintiffs' petition indicates that this action was brought when they were informed that the State intended to condemn, and before the actual filing of the condemnation action. So far as this record indicates, no condemnation action has ever been filed concerning the property involved in this action.

Plaintiffs, by their dedication of Tenth Street, transferred the fee in the street to the city, so that the city is now the owner of the portion of the street abutting on Second Avenue. § 17-417, R. R. S. 1943. The trial court properly held that it could not order the vacation of Tenth Street for the reason that it is possible to have the street without access to Second Avenue. Access could be to a service road connected with the access at Eleventh Street and at Eighth Street, or to a street on the other side of the property.

The mere dedication of a street does not ipso facto incorporate it into the construction plans which had been drawn previous to the dedication. The agreement, exhibit No. 3, had been prepared at least before December 26, 1961, because it has a filing stamp of district No. 7, Department of Roads and Irrigation, on that date. The dedication was accepted by the council on January 9, 1962. Exhibit No. 3 was presented to and approved by the council on February 13, 1962.

There is no question that at the time the agreement was presented to the city, the State had no knowledge that the city had accepted the dedication of Tenth Street. Further, an investigation of the premises would not have disclosed the dedication because no work of any kind was done to open up the street. Even at the time of the trial of this action in the district court, the street was unopened and the dedication could not have been discovered except by an inspection of the record.

The plaintiffs urge that the State is bound by the record of the dedication, and further that its representatives had been apprised of intent to open the street. We have set out the evidence of the plaintiffs on this point. The State made it clear that it would not agree to access at Tenth Street, and the most that can be said for the plaintiffs' evidence is that the mayor told a representative of the State they were contemplating opening the street. In this connection, we should also consider the following statement from the mayor's testimony: "And it was my understanding when we left that if access was denied from 8th to 11th then a parallel service road would be built and damages would be allowed to take care of that."

The agreement provides: "Section 1 The City hereby agrees: (a) To review plans for the construction work undertaken by the State within the corporate limits of said City and to indicate their approval by signing this agreement." The plans for construction work attached to the agreement which the city agreed to review provide for access at Eleventh Street and at Eighth Street, but do not provide access at any other point between those two. This fact was known to the council when the agreement was approved, and one of the landowners who instigated this action was present as a councilman and voted for approval of the agreement.

It is evident in this record that the city was fully informed of the State's position. It is equally evident that when the city approved the agreement, the council

understood that the State did not contemplate permitting access for the dedicated but unopened street. While the city may not have intended to deceive, its representatives could not help but be aware of the fact that the State did not know the council had approved the dedication of Tenth Street the preceding month, and if the city intended to insist on the opening of Tenth Street the dedication should have been called to the attention of the State. The agreement made by the city with the department is one specifically authorized by section 39-1336, R. R. S. 1943. By approving the agreement under the circumstances in this case, the city estopped itself from now claiming that Tenth Street should open onto Second Avenue.

It is undisputed that if this additional access is permitted, the Bureau of Public Roads will withdraw the federal funds committed to the project. This necessarily will increase the financial burden on the State. It would be inequitable in the extreme to permit the city to now insist upon the opening of Tenth Street onto Second Avenue.

We said in Talbott v. City of Lyons, 171 Neb. 186, 105 N. W. 2d 918: "Ordinarily the doctrine of equitable estoppel cannot be invoked against a municipal corporation in the exercise of governmental functions but exceptions are made where right and justice so demand, particularly where the controversy is between one class of the public as against another class."

We feel the rule that the doctrine of equitable estoppel may be invoked against a municipal corporation where there have been positive acts by the municipal officers which may have induced the action of a party and where it would be inequitable to permit the corporation to stultify itself by retracting what its officers had done, has application in this case. See May v. City of Kearney, 145 Neb. 475, 17 N. W. 2d 448. While it is true the city did not specifically agree that it would not open up a public way between Eighth Street and Elev-

enth Street, it knew that the State would not approve the project if this was done.

Section 39-1327, R. R. S. 1943, authorizes the Department of Roads to provide for the elimination of intersections at grade with existing roads, streets, or highways if the public interest shall be served thereby, and provides that no road, street, or highway shall be opened into or connected with a controlled access facility without the consent of the department, and in order to carry out the purposes of control of access, the department is given the right to acquire public or private property.

For the reasons given above, the judgment of the trial court is in all respects correct, and is affirmed.

AFFIRMED.

NETTIE CARTER, GUARDIAN OF TROY V. CARTER, INCOMPETENT, APPELLANT, V. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, A CORPORATION, ET AL., APPELLEES.

121 N. W. 2d 44

Filed April 12, 1963. No. 35181.

1. **Railroads: Negligence.** A violation of a city ordinance regulating the speed of railroad trains is not negligence per se, but evidence of negligence which may be taken into consideration with all the other facts and circumstances in determining whether or not negligence is established thereby.
2. ———: ———. An instruction that informs the jury that it is not at liberty to find the defendant railroad negligent on account of the speed alone of a train approaching a railroad crossing, but is at liberty to consider the speed at which the train was proceeding at the time of the accident, together with all the other facts and circumstances established by the evidence with respect to other acts of negligence claimed by the plaintiff and the other defendants, in determining whether or not the railroad was negligent, does not constitute prejudicial error.
3. **Automobiles: Negligence.** A guest by the terms of section 39-740, R. R. S. 1943, is a person who accepts a ride in a motor vehicle without giving compensation therefor.
4. **Negligence.** What amounts to gross negligence in any given

case must depend upon the facts and circumstances. What would amount to gross negligence under certain circumstances might, under different circumstances, be even slight negligence. Ordinarily, the question of negligence, whether slight or gross, is one of fact. If the evidence respecting it is in conflict and is such that ordinary minds might draw different conclusions therefrom, then a question of fact is presented for the jury to determine.

5. ———. Gross negligence means great or excessive negligence in a very high degree.
6. Trial: Appeal and Error. Where the charge to a jury in a particular respect contains a correct general statement of the law, error cannot be predicated on a failure to give a more specific instruction in the absence of a request therefor.
7. ———: ———. 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.
8. ———: ———. Instructions given to a jury must be construed together and if, when considered as a whole, they properly state the law that is sufficient.

Appeal from the district court for Lancaster County: FAY H. POLLOCK, Judge. Affirmed.

John J. Wilson and Healey & Healey, for appellant.

Mason, Knudsen, Dickesen & Berkheimer, Jack Devoe, and Flansburg, Mattson & Sorensen, for appellees.

Heard before CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

MESSMORE, J.

The plaintiff, Nettie Carter, as the duly appointed guardian of Troy V. Carter, an incompetent person, brought this action in the district court for Lancaster County against the Chicago, Burlington & Quincy Railroad Company, a corporation, Roy Vermaas and Earl Vermaas, individually and doing business as Vermaas Service Station, Vermaas Service Station, Inc., a corporation, and United States Rubber Company, a corporation, defendants, to recover damages alleged to have been

suffered by Troy V. Carter, resulting from a collision between an automobile, owned and operated by the defendant Roy Vermaas, and a train owned and operated by the defendant railroad company, occurring at the intersection of North Twenty-seventh Street, Lincoln, Nebraska, and the defendant railroad company tracks, on the evening of December 14, 1955. As a result of the collision Troy V. Carter received grievous and permanent injuries.

The case was tried to a jury which returned a verdict in favor of the defendants, and each of them, and allowed no recovery against any of them.

The United States Rubber Company, a corporation, is in this case on the ground that it was and is obligated, pursuant to the workmen's compensation law of Nebraska, to make certain payments on behalf of Troy V. Carter who, at the time of the accident, was an employee of said defendant United States Rubber Company. This defendant filed an answer because of its claimed subrogation rights under the workmen's compensation law.

The plaintiff, Nettie Carter, guardian of Troy V. Carter, incompetent, filed a motion for new trial against the Chicago, Burlington & Quincy Railroad Company, a corporation, and a motion for new trial against the defendants Roy Vermaas and Earl Vermaas, individually and doing business as Vermaas Service Station, and Vermaas Service Station, Inc., a corporation. The trial court overruled both of the above motions for new trial. The plaintiff appealed to this court.

For convenience Troy V. Carter will be referred to as Carter; the defendant Chicago, Burlington & Quincy Railroad Company, a corporation, as Burlington; the owner and operator of the automobile here involved as Roy Vermaas; the defendants Roy Vermaas and Earl Vermaas, individually and doing business as Vermaas Service Station, and the Vermaas Service Station, Inc., a corporation, as defendants Vermaas, or as Vermaas;

and other witnesses by their last names or by the positions held by them on occasions as may be required, and the first and last names if necessary to be mentioned.

The plaintiff's petition alleged in substance that on the evening of December 14, 1955, while Carter was riding at the request of Roy Vermaas in his Packard sedan and was being driven by Roy Vermaas to the "Steak House" owned by Earl Vermaas so that he could join them for certain contemplated business negotiations, and while proceeding north on North Twenty-seventh Street in the vicinity of the tracks of the Burlington, Roy Vermaas did drive his automobile into the path of a train that was proceeding in an easterly direction, resulting in a collision; and that the collision was the proximate result of the negligent and careless acts of omission and commission of the defendants and each of them, other than the United States Rubber Company, proximately resulting in injuries and damages which are fully set forth in the plaintiff's petition.

By amendment to the plaintiff's petition, the plaintiff pleaded that at all times mentioned there was in full force and effect a city ordinance of the city of Lincoln, limiting the speed of trains within the corporate limits to 18 miles an hour, also a city ordinance providing there shall be a bell of at least 30 pounds' weight attached to every engine, which shall be continuously rung by the engineer or fireman in charge of the engine while passing over any railroad tracks within the corporate limits of the said city; and that the Burlington violated each of said ordinances by running a train at a speed greater than 18 miles an hour, and by failing to continuously ring the bell attached to such engine.

The answer of the Burlington admitted the acts of negligence of the defendant Roy Vermaas alleged by the plaintiff's petition; denied negligence on its part; alleged that the accident was caused by the negligence of the driver of the automobile and set forth the negligent acts of omission and commission of Roy Vermaas as the

driver of the automobile involved in the accident; and prayed that the plaintiff's petition be dismissed.

While the Burlington's answer alleged several acts of omission and commission of negligence on the part of Carter as constituting contributory negligence, it was held in the first opinion on appeal in this case that there was no competent evidence to support such defense. Also in the first appeal this court concluded that there was sufficient evidence to submit to the jury, under proper instructions, the issue of gross negligence on the part of the defendant Roy Vermaas, and that Carter was a guest riding in the Roy Vermaas automobile at the time of the accident. Carter v. Chicago, B. & Q. R. R. Co., 170 Neb. 438, 103 N. W. 2d 152.

It is admitted that the accident in question occurred within the city limits of the city of Lincoln.

It was stipulated by the parties that at the time of or immediately before the accident there were no trains occupying or running upon the Chicago & North Western tracks, or the Chicago, Rock Island & Pacific tracks, or the Omaha, Lincoln, and Beatrice Railway tracks in the vicinity of North Twenty-seventh Street.

It was further stipulated that the locomotive involved in the accident was a SD-7 locomotive equipped with 12 driving wheels of 40-inch diameter, said wheels being of rolled steel, heat treated and rim quenched; also equipped with clasp-type truck brakes operated by 12 brake cylinders, air brakes, and foundation brakes comprised of 14-inch brake shoes manufactured by the American Brake Shoe Company, and an automatic sanding device which operated upon application of the emergency brake system.

It was further stipulated that the passenger coach was Pullman built in 1922 of steel construction, equipped with two 6-wheel trucks, with clasp-type brakes, and of an overall length of 79 feet 2½ inches, and weighed 167,600 pounds.

The record shows that Twenty-seventh Street in Lin-

coln runs north and south. The railroad crossings on North Twenty-seventh Street consist of tracks of the Chicago, Rock Island & Pacific Railroad which are located approximately 180 feet south of the double tracks of the Burlington main line which run in a northeast and southwest direction, making an angle at the intersection at the southwest corner of the crossing of Twenty-seventh Street of approximately 55 degrees. The Chicago & North Western Railroad Company has a single track which crosses the Burlington tracks just to the west of Twenty-seventh Street, and crosses Twenty-seventh Street just north of the Burlington railroad crossing in a southwest and northeast direction. The Burlington crossing has protection devices at Twenty-seventh Street which consist of a signal installed on the east side of Twenty-seventh Street south of the crossing, containing a pair of red flashing lights facing south and mounted approximately 6 feet 3 inches above the level of the pavement, and an identical signal on the west side of Twenty-seventh Street, north of the crossing, facing north. The standard on the south side holding the flashing lights also contains a bell, a reflectorized cross-buck sign located above the flashing lights containing the words "Railroad Crossing," a reflectorized sign stating "3 Tracks," and a reflectorized sign placed below the flashing lights stating "Stop on Red Signal."

South of the Burlington tracks and west of the pavement on Twenty-seventh Street there is located a small signal instrument house, and there are no other obstructions on the east or west side of Twenty-seventh Street between the Burlington and Rock Island railroad tracks.

There is a line of trees running in an east-west direction 432.5 feet south of the Burlington crossing on the west side of Twenty-seventh Street, and a line of houses facing Twenty-seventh Street, south of the trees. There is a whistle post south and west of the Twenty-seventh Street Burlington tracks at a distance of 1,363 feet.

The area in the vicinity of the Burlington crossing and Twenty-seventh Street is substantially level.

Marvin L. McGee testified that he was employed by the United States Rubber Company on December 14, 1955, as a salesman promoting business with various petroleum companies. He was acquainted with Carter, knew him as a salesman for the company, and worked with him. This witness was contacting Champlin oil dealers relative to the sale of United States Rubber Company products, and Carter was working with him in the territory under the supervision of this witness. McGee came to Lincoln on December 13, 1955, to meet Carter and assist him in his work with the Champlin outlets in the territory. Roy Vermaas was one of the outlets. In the evening of December 14, 1955, Carter and McGee drove to the Vermaas place of business where they met Roy Vermaas. There had been previous arrangements made for this meeting. The purpose of the meeting was to have United States Rubber Company products distributed to new and then existing service stations by Vermaas on a wholesale basis to such distributors. Roy Vermaas invited them to come to his house where they arrived sometime past 6 p.m. While there they had one highball, and remained 20 or 30 minutes, then made preparations to go to the Steak House, using Roy Vermaas' new 4-door Packard sedan. Roy Vermaas was driving, this witness was in the back seat behind the driver, Tomsik was to the right of this witness, and Carter was seated in the front seat to the right of the driver. It was cold, there was no snow, the windows of the automobile were not steamed over or frosted, the heater was working, and it was a dark evening. The radio was not turned on. The conversation between the men was rather light. This witness further testified that he was facing the front of the car, and there were no obstructions in front of him. He thought he was making a fairly continuous observation straight ahead and paying fairly close attention. Before the collision,

he did not see any flashing lights come on in front of the automobile. The automobile was running quietly, and there was no loud noise in it as it approached the point where the accident happened. He did not hear the whistle of a train, nor did he hear a bell ringing. There was nothing to prevent him from hearing a bell or whistle. He did not see a headlight of a train in front of him. Roy Vermaas did nothing with reference to driving which attracted his attention. He remembered nothing about the accident.

On cross-examination this witness testified that he was not familiar with that part of the city; and that the plan was that they would eat their dinner, settle their business, and then depart from each other.

Joe E. Tomsik testified that he was a district sales manager of Champlin Oil and Refining Company; that he managed all sales in his district which included southeastern Nebraska; that he was in Lincoln on December 14, 1955, and knew Roy and Earl Vermaas; and that he saw Roy Vermaas at the service station at approximately 5 p.m., or shortly thereafter on that day. Roy Vermaas told him the United States Rubber Company representatives were going out to dinner with him, and he invited this witness to go with them, which invitation was accepted. Roy Vermaas said they were going to dinner, then go back to his home, make the deal, and watch the fight. This witness further testified that he arrived at the Vermaas home at 6 p.m., or a little thereafter; and that they started for the Steak House on the Cornhusker Highway, and proceeded north on Twenty-seventh Street. The headlights of the automobile were on, and the speed of the automobile was between 25 and 30 miles an hour. He further testified that he was familiar with the railroad tracks on North Twenty-seventh Street; that there were flasher lights located at that railroad crossing; that when they were 100 to 200 yards south of the Rock Island crossing he saw some red lights flashing; that these red lights went out just a short while after he saw

them; and that after they went out he watched straight ahead and the flashing lights on the right side never did come on. He further testified that he did not hear a whistle, nor did he see a beam of light from a headlight of an engine, and there was nothing to obstruct his view.

On cross-examination this witness testified that Roy Vermaas told him the purpose of the meeting was to go to the Steak House for dinner, then return to the Vermaas house and write up an order; and that as they were driving north on Twenty-seventh Street there was nothing unusual about the way Roy Vermaas was driving.

Roy Vermaas testified that he was engaged in the business of the Vermaas Service Station, handling Champlin products; that the accident happened at Twenty-seventh Street and the Burlington railroad tracks; that he was driving north en route to the Steak House; that his automobile weighed 4,470 pounds; that the train came from the west traveling northeasterly; that his automobile was operating properly; that he was familiar with the railroad crossing on North Twenty-seventh Street and had traveled North Twenty-seventh Street numerous times; that he was familiar with the signal lights located at the crossing prior to the accident, and prior thereto had seen them operating; that he left his home about 10 minutes until 7 o'clock; that there was nothing to obstruct his vision as he looked ahead or to his right; that he never heard a train whistle; that the windows of the car were rolled up; that he was aware of the fact that he was approaching this crossing; that he did not hear a bell; and that there was no traffic ahead of him. He looked to the right side where he knew the signals were located as he approached the crossing. He saw no flasher lights operating on the Rock Island crossing. After he crossed the Rock Island tracks, he looked to the right side of the road toward the Burlington tracks, saw no flashing signals operating before the accident, and looked to the left as he approached the Burlington

crossing after he had passed the Rock Island crossing. He did not see a train. The speed of the automobile was approximately 30 miles an hour. He did not apply his brakes. The streets were dry. He further testified that no one complained about his driving; and that the headlights on his automobile were on low beam.

On cross-examination this witness testified that he had no financial interest in the Steak House; that he had been there many times; that the Steak House was owned and operated by Earl Vermaas who was in Scottsbluff at the time of the accident; and that between the line of trees and the Burlington tracks there was pretty much open field with no structures other than right at the Burlington crossing.

The engineer on Burlington train No. 305 testified that the engine was a small diesel engine used for freight or passenger service; that he sat on the right side of the engine; that there were just two units to train No. 305, and there were no passengers on the train; and that the total height of the engine was 14 feet 11 inches. This witness further testified that when they leave the depot, tests are run on the brake system, and these tests were conducted on December 14, 1955; and that the braking system was all right, working as it should. On cross-examination he testified that the brakes were in perfect working order on the engine and on the coach at the time of the accident. He explained the different instruments, the automatic brakes and the braking system as it operates the train, and testified as to the sanding device in connection with the braking system. He further testified that he applied the emergency brake at the time of the accident; and that before leaving the depot, he turned on the air power operated bell which then rang continuously until it was shut off, and it was not shut off that night between the time the train left the depot and the time it stopped after the accident. The engine was equipped with a Mars headlight which oscillated in a figure-8 pattern, and with a steady beam light.

This witness further testified that both lights were turned on before starting the train and remained on continuously thereafter. The speed of the train was increased to 31 or 32 miles an hour between the Seventeenth and Twenty-seventh Street crossings. This witness further testified that he gave the regular crossing signal of two long blasts of the whistle, one short blast, and another long blast, until the train reached the crossing at Twenty-seventh Street. He further testified that as he approached the Twenty-seventh Street crossing he watched the overhead signal on the signal bridge west of Twenty-seventh Street which controls the south track. He had seen this signal turn green at the Missouri Pacific crossing at Eleventh Street, and it did not turn red as he approached it. He further testified that he first saw the Roy Vermaas automobile on Twenty-seventh Street south of the railroad crossing when it appeared past the line of evergreen trees north of the last house located on the west side of Twenty-seventh Street; that the headlights of the automobile were on; and that the train was approximately 600 feet from the crossing, and his vision was not obstructed when he looked toward the Vermaas automobile. He further testified that he checked the overhead train signal and looked down the track to see if it was clear, and it was. He estimated the speed of the Vermaas automobile to be 20 to 25 miles an hour. He further testified that he next saw the automobile an instant before the impact. At that time he applied his emergency brakes and the train stopped approximately 600 feet east of the crossing.

A brakeman on train No. 305 testified that he assists the conductor, and assists in the brake tests. He was sitting on the left side of the coach toward the rear just before the emergency brake went on. He was looking northward at the lights on the Cornhusker Highway. He estimated the speed of the train at 35 miles an hour. He observed the signal lights of the railroad

crossing on the north side of the tracks at Twenty-seventh Street, the flasher lights that protect the crossing for automobiles. He saw the white lens in the side of the signal lights. He got off of the train when it stopped and walked toward the wrecked automobile. The lights were on in the coach as the train approached Twenty-seventh Street. The headlight of the engine was on, and he saw the lights shining on the tracks.

The conductor on the train testified that he was in the rear seat of the coach on the south side filling out reports. As the train approached Twenty-seventh Street, the lights were on in the coach. The first thing he noticed was the application of the air emergency brakes. He estimated the speed of the train at 30 miles an hour. At the application of the air, he looked out the window, and across the North Western crossing he noticed the little white signal light which was on the flasher light protecting the crossing on the south side.

The fireman on train No. 305 testified that he sat opposite the engineer, and recalled the accident of December 14, 1955, which occurred about 7 or 7:10 p.m. He further testified that he observed the left side of the right-of-way and would call the block signals to the engineer and what color they were; that he was familiar with the overhead signal located approximately 365 feet west of Twenty-seventh Street, that the headlights of the engine were on continuously during the trip; that the bell on the engine was turned on when the train left the depot and was never turned off; that as the train approached Twenty-seventh Street he could see the south flasher lights working; that these lights control the crossing for motorists on Twenty-seventh Street; that he saw the wide face of it, that is, the red part of the flasher; that as the train proceeded from the depot, he observed the overhead block signal for the south track and it was green and remained green as the train approached the Twenty-seventh Street crossing; and that the whistle on the train was sounded as it approached

the crossing. He further testified that he saw the flasher lights 1,000 feet from the crossing.

Mrs. Thelma Olson testified that she lived a block north and a block west of the Twenty-seventh Street Burlington crossing. She recalled the accident which occurred about 7 p.m. She went to the crossing following the accident and observed the flashing lights operating. She and her husband observe the crossing because they have mail trucks for mail routes, one to Union and one to Beatrice. She further testified that a passenger train coming from the east passes that crossing generally at 2 p.m., and in effect controls the selection of the trucks sent on the routes; that she saw the passenger train that day; and that the flashers were operating when the train went through the crossing at Twenty-seventh Street.

Mrs. Leora Johns testified that she witnessed the accident at about 7 p.m.; that she was driving north on Twenty-seventh Street; that she believed she was on the Rock Island tracks immediately south of the Burlington tracks at the time of the accident; that before she arrived at the Rock Island tracks she looked to the west down the Burlington tracks; and that she could see a headlight of a train, which was a swinging light. She would guess that this was approximately 1 block away. She did not hear a whistle. On cross-examination she testified that she saw the automobile go off the front of the train; and that it flew through the air. On redirect examination she was unable to estimate how far the automobile was thrown into the air.

A signal maintainer for the Burlington testified that the area of North Twenty-seventh Street was within his jurisdiction; that he made an inspection of the signal flasher system once each week; that he made an inspection on December 6, 1955, and on December 14, 1955, the latter being made at 7:45 p.m.; that he also made an inspection on December 20, 1955; that the signals were in operating order on December 14, 1955, and on the

other dates the inspections were made; that he found no broken wires in the lamps and no burned out bulbs; and that the distance at which a train approaching Twenty-seventh Street from the west going east on the south track would activate the flasher signal at Twenty-seventh Street would be 3,069 feet.

Dr. Alfred Hausrath testified that his speciality was determining the way materials such as steel, rubber, plastic, aluminum, and concrete, so-called engineering materials, behave under certain types of loads. This is concerned with dynamics, a study of moving bodies and what happens during the time they come together. He further testified that if he knows the speeds and directions of two objects before they hit, he can determine the speeds and directions after they hit; that he has had experience in testing materials, particularly under impact of rapid loads; and that he used the "conservation of momentum" principle. He examined several exhibits which showed dents on the impact side of the automobile and what parts of the train struck the automobile to cause the dents. He determined that there was no way in which the automobile could have reached its final resting place except by flying through the air. He further testified that from the examination of the facts at his command, he was able to determine the speed of the automobile from the time of the collision until it came to rest, and determined that the automobile had a speed, due to the impact, of about 60 miles an hour from the time it left the point of impact until it came to rest. He determined the speed of the automobile before the collision and after the collision and where it landed, and considered that there were no scratches on the left side of the automobile as the result of the impact. He further considered the weight of the Roy Vermaas automobile, and assumed that with the passengers its total weight was 4,970 pounds. He determined that the train, the engine and passenger car and crew, had a total weight of 497,600 pounds; and that the speed of the

train prior to the impact would be 52 miles an hour.

A consulting engineer who participated in many tests on brake shoes and the stopping abilities of trains testified that in reaching his determination as to the speed of the train, he assumed the characteristics of the train and coach, the testimony of the employees of the Burlington, that the sanding device was automatically applied in the locomotive, and that the brake control lever was thrown into emergency position at the point of impact. He took into consideration the grade, the weight of the automobile, the knowledge he had of brake shoes manufactured by the American Brake Shoe Company, and that the locomotive gets air at least 2 seconds after the emergency brake is thrown. Assuming all the facts, he used a formula which enabled him to determine the speed of the train at 55.2 miles an hour.

Another consulting engineer made a computation as to the speed of the train. He assumed the condition of the terrain on North Twenty-seventh Street, the speed of the automobile, the photographs of the intersection, and by making an inspection of the Burlington tracks where the accident occurred. Using all the facts he was able to obtain, he was able to compute the speed of the train at 52.2 miles an hour.

An associate professor in engineering mechanics at the University of Nebraska with special training in dynamics of automobile collisions testified that from an examination of Dr. Hausrath's testimony, the photographs of the Vermaas automobile, and by examining the scene where the accident occurred, he was of the opinion that when the automobile and the train collided, the automobile became temporarily attached to the front of the train and was carried by it until the train slowed down and the automobile was released and rolled down the embankment. This witness gave an opinion that if the automobile bounced as Dr. Hausrath believed it did, it would have to have been at a height of 18 or 20 feet to move a distance of 180 feet in the air. He did not

believe that the automobile could have bounced that high for the reason that it would require considerable upward thrust to be imposed by the locomotive, and this would require a sloping plane on the front end of it rather than a flat surface such as the locomotive had. He did not think it possible to determine the speed of the train before the accident from an examination of the material that Dr. Hausrath had, nor was it possible to determine very precisely the northerly component speed of the train before the accident because the difference in northerly component speed of the two vehicles would be absorbed when they came together and remained fastened. This would also prevent the formation of particularly large scratches. In his experience and studies he had never heard of one vehicle flying as high as 18 or 20 feet when two vehicles came together, and he testified that it was beyond possibility in this type of collision.

A motorcycle sergeant employed by the Lincoln police department testified that on December 14, 1955, he received a call at 7:14 p. m., and proceeded to the scene of the accident, arriving at approximately 7:20 p. m. He observed a train east of Twenty-seventh Street on the south Burlington track, and an automobile east of Twenty-seventh Street south of the tracks facing north. He made a measurement that disclosed the automobile was approximately 193 feet east of Twenty-seventh Street. The automobile was at a lower level than the height of the tracks. The terrain south of the tracks at that point was more or less like a gully, with probably a dropoff of 10 feet below the track. On cross-examination this witness testified that he observed the flashing signals at the crossing, they were operating when he arrived and continued to do so, and that the bell on the crossing was ringing and it continued to ring. The several lights on the train coach were on.

The plaintiff contends that the trial court committed prejudicial error in giving instruction No. 19 to the jury. The plaintiff bases this contention on the ground that

the evidence disclosed that the train was traveling at an excessive rate of speed in violation of a city ordinance.

The plaintiff makes no claim that excessive speed of a train in violation of a city ordinance is negligence per se, but contends that it is evidence of negligence when proved as an independent ground of negligence.

We set forth the following instructions given by the trial court relative to the above-stated proposition, and will take up the plaintiff's contentions relating to instruction No. 19 as to whether or not it was prejudicially erroneous. In addition we will discuss the matter of the speed of the train later in the opinion.

Plaintiff's requested instruction No. 1 is as follows: "You are instructed that the violation of the Lincoln City ordinance regulating speed does not in and of itself constitute negligence, but the violation of said ordinance is evidence of negligence, and may be considered along with all the evidence and circumstances in determining whether the defendant railroad was negligent. If you find that the train involved in the accident was operated at a speed in excess of the limit prescribed by the ordinance and that such speed, when considered with all the other evidence and circumstances, constitutes negligence which was a proximate cause of the accident, you must find for the plaintiff and against the defendant railroad."

In instruction No. 9, the jury was instructed in part: "In considering whether any of the defendants were negligent in any respect claimed in this action, you should consider whether they exercised ordinary care in the fulfillment of their duties by compliance with the Statutes of the State of Nebraska, the Ordinances of the City of Lincoln, and the other rules of conduct required of them, as set forth in these instructions. If you find from the evidence that any of the defendants violated any of such statutes, ordinances or other rules of conduct, you are instructed that violation thereof, if such you find, does not in and of itself establish negligence

as a matter of law, but is evidence of negligence, which may be taken into consideration with all other facts and circumstances in determining whether or not the defendants or any of them were guilty of negligence."

Instruction No. 19 is as follows: "It was the duty of the defendant railroad and its employees to comply with rules of conduct providing as follows: It is the duty of railroad employees in charge of trains to exercise ordinary care to avoid injury to persons in motor vehicles at street crossings, to maintain a reasonable lookout for approaching vehicles, to operate at a reasonable speed under the circumstances, and to give timely warning of the approach of trains. It is the duty of railroad employees in charge of trains to take such amount of precaution as prudent persons would ordinarily exercise under like circumstances, considering the location of the crossing within the city, the intensity of its use by motor vehicles and trains, the relative angles at which each approach the crossing, the visibility available to their operators, and the warning signals and safeguards provided by the railroad. However, in this case, you are not at liberty to find the defendant railroad negligent on account of speed alone, in approaching the crossing, but you are at liberty to consider the speed at which the train was proceeding at the time of the accident, together with all the other facts and circumstances established by the evidence with respect to other acts of negligence claimed by the plaintiff and the defendants Vermaas, in determining whether or not the railroad was negligent."

The plaintiff claims that instruction No. 19 is prejudicial because it states that it is the duty of the railroad employees "to operate at a reasonable speed under the circumstances," but that the instruction left out the language "but not to exceed 18 miles per hour."

In instruction No. 18, the court instructed the jury in part as follows: "It was the duty of the defendant railroad and its employees to comply with Ordinances of the

City of Lincoln, Nebraska, providing as follows: No train, engine or car, shall be run over any railroad in the corporate limits at a greater rate of speed than 18 miles an hour."

This instruction shows that it was the duty of the railroad and its employees to comply with the city ordinance limiting the speed to 18 miles an hour, and that the violation of the ordinance was evidence of negligence to be taken into consideration with all the other facts and circumstances in determining whether or not the defendant railroad was guilty of negligence.

The above instructions should be construed and considered together in determining whether or not there was prejudicial error as contended for by the plaintiff.

The plaintiff contends that instruction No. 19 is erroneous wherein it sets forth the precautions which railroad employees should take; that the instruction asserts that they should take such amount of precaution as a prudent person would ordinarily exercise under like circumstances, considering, among other things, the warning signals and safeguards provided by the railroad; and that in this case the evidence relating to the alleged warning signals and safeguards provided by the railroad was in conflict, and the instruction omitted the words "if any you find," thereby leaving the conclusion as an established fact that the railroad had provided proper warning signals and safeguards which the employees were entitled to take into consideration in determining the speed at which they should travel.

The instruction states that the railroad employees may consider the warning signals and safeguards provided by the railroad. It does not say that warning signals are provided by the railroad, or whether any, in fact, were provided by the railroad.

The plaintiff alleged that the Burlington failed to maintain proper signal devices to warn motorists of the approach of a train, and that the Burlington maintained defective signal devices at the crossing. Neither of the

above alleged specific acts of negligence so pleaded appear in instructions given by the trial court as being submitted to the jury, and are not assigned as error or argued on this appeal. This constitutes the law of the case. See Buhrman v. Smollen, 164 Neb. 655, 83 N. W. 2d 386.

The plaintiff predicates error in that the trial court failed and refused to give plaintiff's requested instruction No. 2 properly stating the duties of operators of a train with respect to lookout and observation.

The first part of instruction No. 19 covers the same matter as appears in the plaintiff's requested instruction.

We fail to find that the plaintiff has seen fit to argue why it was error for the trial court not to give her requested instruction No. 2, or to cite any authorities in support of her position. Failure to point out the error of an instruction in the argument has been held by this court to be sufficient reason for not considering the assignment of error under Rule 8a 2 (4), Revised Rules of the Supreme Court. See Buhrman v. Smollen, *supra*.

In any event, in the first part of instruction No. 19 the same matter is covered as appears in plaintiff's requested instruction No. 2. Furthermore, instruction No. 9 should be construed in conjunction with instruction No. 19, and also instruction No. 15, as follows: "The obligations, rights and duties of railroads and motorists at railroad street crossings are mutual and reciprocal. Neither has the exclusive right of passage. The railroad has a right to use its tracks, and the public have a right to use public streets. Each is required to exercise ordinary care for the safety of the other and all persons, commensurate with the danger involved.

"Motorists are required to yield the right of way to approaching trains, the privilege of the immediate use of the crossing.

"However, the right of way is not an absolute right which may be exercised under all conditions. If the

situation is such as to indicate to a reasonably prudent person that to proceed would probably result in collision, then it becomes the duty of those in charge of the train to exercise ordinary care to avoid an accident, even to the extent of yielding such right of way, and, a failure to do so under such conditions, if such you find, would be evidence of negligence on the part of the railroad, to be considered together with all other evidence and circumstances, in determining whether or not the railroad was negligent."

When such instructions are construed and considered together they comprehensively cover the duties and obligations of a railroad and its employees with respect to keeping a proper lookout for vehicles at railroad crossings.

As heretofore stated, the plaintiff contends that instruction No. 19 is erroneous because it tells the jury that it may not impose a finding of negligence on the part of the railroad on the ground of excessive and illegal speed which is shown by overwhelming evidence in the record; that the excessive speed is evidence of negligence, and is an independent ground of negligence on the basis of which the jury should properly be allowed to make a finding of negligence; that if the jury believed that the established excessive speed was a proximately contributing cause of the occurrence, the judgment should be for the plaintiff; and that the consideration of speed should not be limited to consideration with respect to other claimed acts of negligence.

Instruction No. 19 states only that speed should be considered with other facts, which is in accord with the plaintiff's requested instruction No. 1 heretofore set out.

The words "speed alone" have generally been used when the speed of the train is to be isolated or unconnected from all other evidence as to the circumstances and surroundings of the accident.

We conclude that instruction No. 19 in the instant case, considered together with the other instructions

relating to the point here involved, does not constitute prejudicial error as contended for by the plaintiff.

The plaintiff contends that it is the duty of the trial court to submit to and properly instruct the jury upon all the material issues presented by the pleadings and the evidence, and that a litigant is entitled to have the jury instructed as to his theory of the case as shown by the pleadings and the evidence, and a failure to do so is prejudicial error. See Harsche v. Czyz, 157 Neb. 699, 61 N. W. 2d 265.

The plaintiff states that in the instant case the trial court committed prejudicial error affecting the plaintiff as against the defendants Vermaas by failing to submit to the jury allegations of negligence made and presented in the plaintiff's pleadings and supported by the evidence, that is, that Roy Vermaas drove at an excessive rate of speed for the then existing conditions; and that in the previous case this court held that the evidence was sufficient to submit to the jury the issue of the gross negligence on the part of Roy Vermaas.

The trial court instructed the jury in instruction No. 13 as follows: "A Nebraska law known as the 'Guest Statute', provides that the owner or operator of a motor vehicle shall not be liable for damages sustained by a passenger riding therein by invitation and not for hire as a 'guest', unless such damages are caused by 'gross negligence' of the owner or operator of such vehicle.

"The Court instructs you that Troy V. Carter was such a guest within the meaning of the statute, and before plaintiff may recover against any of the defendants Vermaas, the burden of proof is upon her to prove her allegations that Roy Vermaas was guilty of negligence amounting to gross negligence; and unless you so find, you will allow no recovery against any of them even though you find that they were guilty of ordinary or slight negligence, if any of such you find."

In instruction No. 21, the trial court instructed the jury as follows: "It was the duty of the defendant Roy

Vermaas, to comply with rules of conduct as follows:

"Every driver of a motor vehicle shall always exercise ordinary care under all circumstances.

"When a motorist on a public street approaches a railroad crossing, it is his duty to keep his vehicle under such reasonable control that he can stop in time to avoid collision with an approaching train, although he is not required to keep it under such complete control that he can avoid an accident under all circumstances.

"It is the duty of a motorist when approaching a railroad crossing where there is restricted vision, and where he is familiar with the crossing, to carefully look for approaching trains in order to determine whether he could safely cross the tracks, to look in both directions and to listen, at a time and place where it will be effective, to see any approaching trains that are clearly visible, and to stop and yield the right of way to such trains unless they are at such distance that it would appear to a prudent person that he could safely cross without the danger of accident; and failure to observe this rule without reasonable excuse, if such you find, is negligence as a matter of law.

"It is the duty of a motorist to exercise ordinary care in the avoidance of accidents, and not to test the obvious danger by driving on the railroad tracks into the path of an oncoming train; * * *."

A guest by the terms of section 39-740, R. R. S. 1943, is a person who accepts a ride in a motor vehicle without giving compensation therefor.

The trial court defined gross negligence as great or excessive negligence, negligence of a very high degree.

In Komma v. Kreifels, 144 Neb. 745, 14 N. W. 2d 591, this court said that what amounts to gross negligence in any given case must depend upon the facts and circumstances. What would amount to gross negligence under certain circumstances might, under different circumstances, be even slight negligence. Ordinarily, the

question of negligence, whether slight or gross, is one of fact. If the evidence respecting it is in conflict and is such that ordinary minds might draw different conclusions therefrom, then a question of fact is presented for the jury to determine. See, also, Thompson v. Edler, 138 Neb. 179, 292 N. W. 236; Bishop v. Schofield, 156 Neb. 830, 58 N. W. 2d 207.

In the latter-cited case this court said: "'As in so many other instances of negligence law, the question whether an operator of an automobile involved in an accident at a railroad crossing was guilty of gross negligence, recklessness, etc., within the meaning of a guest statute, depends upon the facts involved in each case. Accordingly, it is impossible to state any general rule on the question, other than to point out that the general principles laid down by the courts under the guest statutes * * * apply with equal force, of course, in cases involving railroad crossing accidents.' Annotation, 143 A. L. R. 1144."

Under the evidence adduced, and in the light of the instructions given by the trial court on this proposition, we conclude that the trial court did not commit prejudicial error as contended for by the plaintiff.

The plaintiff contends that the engineer saw the automobile in which the plaintiff's ward was riding when the train was approximately 600 feet from the point where the collision occurred; that the engineer did not see the automobile in which the plaintiff's ward was riding at any time between the time he first observed it and the moment of the accident, thus the train traveled approximately 600 feet at a time when it was approaching a crossing known to be a busy crossing, and the engineer did not look for automobiles during this time nor continue to give attention to the Roy Vermaas automobile even though he knew it was approaching the crossing; that the trial court entirely omitted the pertinent allegation made by the plaintiff that the defendant railroad, through its engineer, failed to maintain a proper obser-

vation; that the trial court's instruction No. 2, which involved the plaintiff's claims of negligence against the defendant railroad, entirely omitted this or any similar allegation; and that consequently the trial court eliminated from the consideration of the jury the allegation of improper observation which was pleaded and supported by the evidence.

Instruction No. 19 covered the observation that must be made by the engineer sufficiently on this proposition. The following are applicable.

"Where the charge to a jury in a particular respect contains a correct general statement of the law error cannot be predicated on a failure to give a more specific instruction in the absence of a request therefor." Thurow v. Schaeffer, 151 Neb. 651, 38 N. W. 2d 732, and cases cited therein.

"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.

In Shiers v. Cowgill, 157 Neb. 265, 59 N. W. 2d 407, this court said: "Instructions given to a jury must be construed together and if, when considered as a whole, they properly state the law it is sufficient." See, also, Clausen v. Johnson, 124 Neb. 280, 246 N. W. 458; Suhr v. Lindell, 133 Neb. 856, 277 N. W. 381.

In instruction No. 5, the trial court defined negligence as follows: " 'Negligence' is the doing of something which an ordinarily prudent person would not have done under the same or similar circumstances, or the failure to do something which an ordinarily prudent person would have done under the same or similar circumstances. It is the failure to exercise 'ordinary care', which is such amount of caution as a prudent and reason-

able person would exercise under the existing circumstances."

A definition of negligence similar to that given in the instant case was held to be broad enough to cover generally excessive speed, inability to stop within the range of vision, and no proper lookout, and also any other phase of negligence which might find support in the evidence. See Thurow v. Schaeffer, *supra*.

The instructions given by the trial court on the duty of lookout fully and fairly stated the law to the jury under the pleadings and the evidence.

We conclude that the trial court did not commit prejudicial error as contended for by the plaintiff.

Other matters raised need not be discussed.

For the reasons given in this opinion, the judgment of the trial court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JACK MILLER, APPELLANT.
121 N. W. 2d 39

Filed April 12, 1963. No. 35370.

1. **Criminal Law.** This court, in a criminal action, will not interfere with a verdict of guilty, based on conflicting evidence, unless it is so lacking in probative force that we can say, as a matter of law, that it is insufficient to support a finding of guilt beyond a reasonable doubt.
2. **Rape.** In the prosecution of cases wherein assault with intent to commit rape is pleaded, sections 28-408 and 28-409, R. R. S. 1943, must be considered as in pari materia.
3. **Rape: Criminal Law.** The failure of the court to instruct the jury that a defendant charged with rape cannot be convicted without evidence corroborating the prosecutrix is not error, unless it appears that such an instruction was requested.
4. **Criminal Law.** An instruction is erroneous and should not be given where it is apt to confuse or mislead the jury.
5. ———. If it does not appear from the record that an incorrect instruction to the jury did not affect the result of a trial of a criminal case unfavorably to the defendant the giving of the instruction must be considered prejudicial error.

Appeal from the district court for Scotts Bluff County: TED R. FEIDLER, Judge. Reversed and remanded with directions.

Beatty, Clarke, Murphy, Morgan, Pederson & Piccolo and Neighbors, Danielson & Van Steenberg, for appellant.

Clarence A. H. Meyer, Attorney General, and Cecil S. Brubaker, for appellee.

Heard before WHITE, C. J., CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

BROWER, J.

Appellant Jack Miller, hereinafter referred to as defendant, was charged with the crime of assault with intent to commit rape. He was convicted and sentenced to confinement in the Nebraska State Reformatory for a period of 5 to 6 years at hard labor. Defendant's motion for a new trial was overruled. He brings the cause to this court by appeal to have the conviction and sentence set aside.

Defendant first contends that the trial court erred in overruling his motion for a new trial because there was insufficient evidence to support the verdict.

Terry Gonzales, who will be referred to herein as the prosecutrix, was a student at a beauty academy. She lived alone in an apartment in the city of Scottsbluff, in Scotts Bluff County, Nebraska.

The testimony of the prosecutrix may be summarized as follows:

About 4 weeks previously she met the defendant at the apartment of Lois Lilly and Marge Buck, who attended the same academy. Defendant was then asleep on a couch in that apartment. He was also present there on several other mornings. She had never been out with him and he had never been in her apartment. On March 27, 1962, the prosecutrix had gone to bed in her apartment early in the evening wearing a slip, pants, and a robe. At about 11:20, the defendant knocked at her

door. Thinking it might be a visit from her parents or the girls, Lois and Marge, and believing the screen was hooked, she got up half asleep and opened the door. Instead the defendant was there. He forced his way inside and pushed her against the bed which was in front of her door. He carried a can of beer which he tried to force her to drink. She refused and he tried to kiss her. She attempted to push him away. He became angry and pushed her down on the couch and was on top of her. He tried to take off her pants, clawed at her clothes, and tried to feel her sex organs. Defendant said he had always thought about doing this and repeatedly told her to be nice to him. He tore her slip but she succeeded in forcing him off of her and ran into a closet as he was between her and the door. While she was in the closet he took out an open pocketknife and placed it against her stomach and said he was going to kill her. While they were at the closet he tried to tear her slip off and feel of her breast. He told her to take off her clothes and be nice to him; that he would kill her if she didn't take her clothes off. Prosecutrix finally persuaded defendant to allow her to lock the door. She escaped as she went to the door and fled the apartment. She ran a block and a quarter to the home of Reverend Ward and Leone Conklin, rang the doorbell several times, and succeeded in gaining admittance. The defendant ran after her but was caught by a clothesline.

Leone Conklin testified that the bell rang several times and the dog was barking. When she got the door open the prosecutrix appeared to be going down the steps as if she thought it wasn't going to be opened. Prosecutrix then ran into the house barefooted and dressed in her nightclothes. She rushed to sit down and appeared frightened and breathless. She said a man was after her and she had fled. Her feet were sore from running in the rough alley. She said she was all right but the man had a knife and it frightened her. She had fallen over a fence or the doghouse in the Conklins'

yard, hurt her leg, cut a toe, and tore her slip again. Mrs. Conklin at her request called the police.

Reverend Conklin came later. Prosecutrix was seated upon the davenport when he came in and appeared frightened. She told him a man had entered her apartment and made advances toward her. Her legs were injured beneath the knees and they applied a band-aid.

A police officer testified they found the defendant about 1:30 a.m., on March 28, 1962, sleeping in a car at the Junior High School parking lot. He was searched and a pocketknife was taken from his person which was later identified by the prosecutrix as the one he had threatened her with. Defendant had scratch marks and a bruised area under his chin. His photograph, showing the chin area and a long mark on the throat under it, was introduced in evidence. He said he got it from walking into a wire, but denied it was done while chasing a girl.

Defendant testified he went to the apartment of the prosecutrix that night by invitation and was admitted by her. He said he had gone to her apartment to have sexual intercourse with her. He denied any attempt at forcing her to drink beer, drawing a knife, tearing her clothes, or threatening her in any way. He started kissing her and she asked for beer. Because she was only 18, he at first refused to get any for her but after repeated entreaties he started to get some which he had in the car. She slammed the door when he went outside. In going to the car he ran into the clothesline which flipped him. He then crawled into the car and drove around for a time before going to the school parking lot to wait for a friend.

"This court, in a criminal action, will not interfere with a verdict of guilty, based on conflicting evidence, unless it is so lacking in probative force that we can say, as a matter of law, that it is insufficient to support a finding of guilt beyond a reasonable doubt." Reizenstein v. State, 165 Neb. 865, 87 N. W. 2d 560. The evi-

dence is sufficient to support the verdict and there was no basis for the assignment of error.

The next assignment of error is that the court erred in not instructing that consent or failure to resist when opportunity appears was an absolute defense as to the crime charged. The court's instruction No. 8 reads as follows: "Rape is defined to be the unlawful carnal knowledge by a man of a woman or a female child, forcibly and against her will." Instruction No. 14 given by the court is as follows: "To warrant a conviction for an assault with intent to commit a rape, the evidence must show, beyond a reasonable doubt, that the accused not only intended to have sexual intercourse with the prosecutrix, but that he intended to use whatever force might be necessary to overcome her resistance and accomplish his object." These instructions clearly state that the acts of the defendant must be against the will of the prosecutrix. They likewise state that the defendant must have intended to overcome her resistance and accomplish his object. It is true that the instructions are brief and do not elaborate or emphasize the extent of the resistance required by the victim of those lustful designs. The defendant contends that under the holding of this court in Frank v. State, 150 Neb. 745, 35 N. W. 2d 816, more extensive instructions on the subject of consent and the resistance of the prosecutrix should have been given. Doubtless the court would have given further instructions if they had been tendered by the defendant. No such instructions were tendered and this court cannot say the instructions given were erroneous or prejudicial in the absence of others requested by the defendant. "Where the trial court has instructed generally as to the issues of a criminal prosecution, error cannot be predicated on its failure to instruct as to a particular phase of the case, where no proper instruction has been requested by the party complaining." Welton v. State, 171 Neb. 643, 107 N. W. 2d 394. The asserted error cannot be sustained.

The defendant next urges as error the failure of the court to instruct the jury that corroboration of the prosecutrix was necessary before a conviction could be had. The only mention of corroboration is in instruction No. 13, hereinafter separately discussed. In Frank v. State, *supra,* this court said: "It will be noted that in the prosecution of cases wherein assault with intent to commit rape is pleaded, sections 28-408 and 28-409, R. S. 1943, must be considered as in pari materia. Davis v. State, 31 Neb. 247, 47 N. W. 854; Hall v. State, 40 Neb. 320, 58 N. W. 929; Liebscher v. State, 69 Neb. 395, 95 N. W. 870, 5 Ann. Cas. 351."

In Hanks v. State, 88 Neb. 464, 129 N. W. 1011, this court has held: " 'The failure of the court to instruct the jury, that a defendant charged with rape cannot be convicted without evidence corroborating the prosecutrix, is not error, unless it appears that such an instruction was requested.' Edwards v. State, 69 Neb. 386." The same rule applies to prosecutions for assault with intent to commit rape. Welton v. State, *supra.*

The defendant specifically assigns as error the giving by the trial court of instructions Nos. 9 and 13. The State asserts the assignment of errors in regard to these instructions need not be considered because in defendant's motion for new trial the error concerning these instructions was urged collectively with other instructions, some of which were patently correct. The State bases its argument on a rule at one time followed by this court but since expressly abrogated. Klause v. Nebraska State Board of Agriculture, 150 Neb. 466, 35 N. W. 2d 104. The instructions will be considered by us.

The first paragraph of instruction No. 9 which defendant alleges was erroneously given by the trial court and which is the only portion thereof pertinent to the question before us, reads as follows: "You are instructed that the intent to commit rape is a necessary element of the crime charged against the defendant. Intent is a mental process, and as such generally remains hidden

within the mind where it is conceived. It is rarely, if ever, susceptible of proof by direct evidence, but may be inferred from outward manifestation, by the acts of a person, and all the facts and circumstances in evidence *whether or not the defendant committed the acts complained of, and whether at such time he had such criminal intent.*" (Italics ours.)

There is no complaint as to the first two sentences of the quoted portion of the instruction. It is contended however that the last sentence is confusing and as such is erroneous. Defendant asserts that the word "it" at the beginning of this last sentence refers to "intent," as did the previous two sentences. Claim is made that this sentence is a consolidation of two sentences in some standard instruction which it is asserted reads as follows: "It is rarely, if ever, susceptible of proof by direct evidence, but may be inferred from outward manifestation, *by the words* and acts of a person, and all the facts and circumstances. *It is for you to determine from all the facts and circumstances* in evidence whether or not the defendant committed the acts complained of, and whether at such time he had such criminal intent." (Italics ours.) The words in italics are those contended to have been omitted in instruction No. 9.

If the two sentences set out are used the meaning is of course clear. The question however now before us is the meaning of the last sentence as used in the trial court's instruction. Defendant contends that the sentence as given permits the jury to infer criminal intent, whether the defendant committed the acts complained of or whether he did not commit them and whether at such time he had such criminal intent. It is unnecessary for us to determine the exact meaning thereof. Indeed it is difficult to do so. It is however apparent, after careful study of the sentence from the instruction, that it is unintelligible and confusing. Criminal intent is not defined elsewhere in the instruction. Such intent is a vital part of the crime charged. An instruction is errone-

ous and should not be given where it is apt to confuse or mislead the jury. See 23A C. J. S., Criminal Law, § 1306, p. 742. In Hoffman v. State, 160 Neb. 375, 70 N. W. 2d 314, this court said: "If it does not appear from the record that an incorrect instruction to the jury did not affect the result of a trial of a criminal case unfavorably to the defendant the giving of the instruction must be considered prejudicial error." Because of error in the instruction given the judgment must be reversed.

Instruction No. 13 which defendant claims was erroneous is as follows: "You are instructed that testimony of an alleged complaint by the witness Terry Conzales (sic) to Leone Conklin and Ward Conklin may be considered by you only as corroborative of her testimony as to an asault having taken place, and may not be considered by you as corroborative of her testimony as to the assailant or as to the identify (sic) of such assailant." Defendant argues that in giving this instruction the court infringed on the right of the jury to pass on the credibility and weight of the evidence. He contends this instruction in effect tells the jury that the testimony of Leone Conklin and Ward Conklin is sufficient corroboration of the claim of the prosecutrix that an assault had taken place. According to the defendant the trial court should have instructed that this testimony might be considered by the jury in determining "whether or not" it amounted to such corroboration. The instruction says such testimony "may" be considered by the jury. It speaks of an "alleged complaint." The language appears permissive only, and not mandatory. We think the instruction was not objectionable as usurping the function of the jury. As hitherto previously pointed out the defendant could have requested further instruction on corroboration. In the absence of such an instruction the assignment of error is without merit.

Defendant assigns as error the trial court's admitting over objection the testimony of a doctor that he had examined the prosecutrix and that in his opinion she had

never had sexual intercourse. Defendant cites certain cases from other jurisdictions purporting to hold that though the unchastity of the prosecutrix may be gone into in a prosecution of this nature, the converse is not true; that her good character cannot ordinarily be shown until it has been attacked. We do not deem it necessary to decide this question in view of the evidence as reflected by the record in this case.

A witness Marjorie Buck testifying for the defendant said that the prosecutrix had told her she spent the night of March 16, 1962, with the defendant. Lois Siewert, also a witness for the defendant, volunteered the statement that the defendant was "supposed" to have stayed all night with Terry on that night, and stated the prosecutrix told her the next day that Jack had stayed with her all night. Defendant testified he went to the apartment of the prosecutrix on the night mentioned and he "had stayed with her." He later, in response to a question as to whether or not he had had sexual intercourse with her, refused to answer because it might incriminate him.

We think this was an attack on her character tending to show she was not chaste and that the rebuttal evidence was admissible under the circumstances. The assignment of error is not sustained.

The sentence imposed on the defendant was to serve from 5 to 6 years imprisonment in the Nebraska State Reformatory. The sentence is alleged by defendant to be excessive and also erroneous because it is an indeterminate one under section 29-2620, R. R. S. 1943, and that such sentences are not permitted with respect to a crime of violence. That an indeterminate sentence in this case was improper because of this statute is conceded by the State. Inasmuch as the case must be retried because of the erroneous instruction, the question of excessiveness of the sentence need not be discussed.

For the reasons set out in this opinion, the judgment

is reversed and the cause remanded with directions to proceed in accordance with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

IN RE APPLICATION OF ALBERT ROY ANDREWS, DOING BUSINESS AS ANDREWS TRANSFER & STORAGE, NORFOLK, NEBRASKA. ALBERT ROY ANDREWS, DOING BUSINESS AS ANDREWS TRANSFER & STORAGE, NORFOLK, NEBRASKA, APPELLANT, V. NEBRASKA STATE RAILWAY COMMISSION, APPELLEE.

121 N. W. 2d 32

Filed April 12, 1963. No. 35388.

1. **Judgments: Public Service Commissions.** The rules relating to nunc pro tunc orders are generally applicable to administrative and quasi-judicial commissions.
2. **Judgments.** The proper function of a nunc pro tunc order is not for the purpose of correcting some affirmative action of the court which ought to have been taken, but its true purpose is to correct the record which has been made, so that it will truly record the action really had, but which through some inadvertence or mistake has not been truly recorded. In other words, it is an order to make the record speak the truth.
3. ———. The order nunc pro tunc may be supported by the judge's notes, court files, or other entries of record. It may also be based upon other evidence, oral or written, which is sufficient to satisfy the court that the order is required to make the record reflect the truth.
4. **Public Service Commissions: Appeal and Error.** On appeal to the Supreme Court from an order of the Nebraska State Railway Commission, while acting within its jurisdiction, the question for determination is the sufficiency of the evidence to prove that the order is not unreasonable or arbitrary.
5. ———: ———. In the absence of a bill of exceptions, no question will be considered, a determination of which requires an examination of the evidence produced at a hearing before the Nebraska State Railway Commission.

Appeal from the Nebraska State Railway Commission. Affirmed.

Nelson, Harding & Acklie and Richard A. Peterson, for appellant.

Clarence A. H. Meyer, Attorney General, and Homer G. Hamilton, for appellee.

Heard before WHITE, C. J., CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

MESSMORE, J.

Albert Roy Andrews, hereinafter referred to as appellant, filed a petition with the Nebraska State Railway Commission, hereinafter referred to as commission, on December 30, 1954, for an order nunc pro tunc, seeking an order correcting and clarifying the order of the commission entered on March 31, 1938, which granted and issued to appellant a certificate of public convenience and necessity. This certificate authorized the transportation of general commodities over irregular routes from Madison County, to and from Omaha, and occasionally to and from various points within the State of Nebraska. The purpose of the appellant's petition was to correct this certificate to properly reflect the authority authorized by a report of an examiner for the commission which was approved by the commission; and in addition, to reflect the scope of appellant's operations as the same had been conducted on and prior to April 1, 1936, and to authorize operations which appellant has conducted since that time.

The proceedings before the commission appearing in the transcript from which appeal was taken by the appellant will be referred to later in the opinion.

The appellant assigns as error that the order of the commission entered on June 10, 1955, is unreasonable, arbitrary, and contrary to law by denying the appellant's petition for an order nunc pro tunc, and in overruling the appellant's motion for rehearing and reconsideration.

The appellant in his petition alleged in substance that he was engaged in business under the trade name and

style of Andrews Transfer & Storage, Norfolk, Nebraska, a motor common carrier of property in Nebraska in intrastate commerce and also in interstate commerce, and moved the commission for an order nunc pro tunc, correcting and clarifying the order of the commission entered on March 31, 1938, which granted and issued grandfather certificate No. 2611, under application No. M-1110 to the appellant.

In support of this request for an order nunc pro tunc, the appellant showed to the commission the following: Chapter 142, section 7 (a), Laws 1937, which is the so-called "grandfather" clause, provides in part as follows: "Ninety days after the effective date of this Act it shall be unlawful for any common carrier by motor vehicle subject to the provisions of this Act to engage in any intrastate operations on any public highway in Nebraska unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operations: Provided, however, subject to Section 9 of this Act, if any such carrier or predecessor in interest was in actual bona fide operation as a common carrier by motor vehicle on April 1, 1936, over the route or routes or within the territory for which application is made, and has so operated since that time * * * the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation and without further proceedings if application for such certificate is made to the Commission as provided in paragraph (b) of this section and within sixty days after the effective date of this Act. * * * (b) Application for certificates shall be made in writing to the Commission, be verified under oath, and shall be in such form and contain such information as the Commission shall by regulation require."

The petition further alleged that on or about August 24, 1936, within the 60-day period, appellant filed his written "grandfather" application on form M-1-1 as pre-

scribed by the commission; and that as disclosed by the application, the appellant sought a grandfather certificate of public convenience and necessity which would authorize him to continue as a common carrier of property by motor vehicle and to render the same type of service to the shipping public as had been performed by him since 1920. The appellant attached certain sworn statements to his application indicating that the appellant had hauled merchandise and general commodities between points in Nebraska for many years prior to the filing of his application.

The petition further alleged that on February 9, 1937, the appellant amended his grandfather application by letter, and advised the commission that his grandfather certificate "should read we move Household gds. fixtures and genl. mdse. any where, any time. Including pool car distribution, in fact anything, anyplace, anytime. Business was established in year 1920"; that this letter was acknowledged by a letter directed to the appellant on February 15, 1937, signed by B. L. Knudson, Director, Motor Transportation, and appellant was advised that the additional information contained in his letter of February 9, 1937, would be filed and attached to his grandfather application; and that in order to determine whether the appellant was in bona fide operation as a common carrier by motor vehicle on April 1, 1936, the matter was set for hearing at Madison, Nebraska, on October 11, 1937, before examiner H. L. Holtzendorff.

The petition further alleged that on March 31, 1938, the commission entered its order in application No. M-1110 granting and issuing a certificate of public convenience and necessity to the appellant as follows: "SERVICE AUTHORIZED: Commodities generally. ROUTE OR TERRITORY AUTHORIZED: Irregluar routes from Madison County, to and from Omaha, and occasionally to and from various points within the State of Nebraska at large"; that after receiving a copy of his grandfather certificate, the appellant believed that some confusion

might arise as to the proper interpretation of his operating certificate; that a discussion was had with the Director of the Motor Transportation Department with reference to the matter; that relying upon the representations made by such Director, appellant continued to perform non-radial, statewide service without respect to a base hub or territory; that as business developed, the appellant added additional equipment and personnel and openly carried on the business which he contends is shown by delivery receipt freight bills prepared by him, an abstract of representative shipments of general commodities transported between points in Nebraska from January 5, 1943, a map substantially disclosing the same information as contained in the abstract of his business which he presented, signed delivery receipts, an abstract of heavy hauling shipments transported by him between points in Nebraska since June 1946, and alleging that said abstract of representative heavy hauling shipments, as well as a map illustrate the same information as that contained in the abstract; that the appellant also prepared from his books and records an abstract of representative shipments of household goods transported by him from January 1943 between points in Nebraska, as well as a map illustrating the same information as that contained in the abstract; that the appellant has held his services out to the public generally to transport commodities generally between points in Nebraska since the date of issuance of his grandfather certificate; that such service was performed without interruption until September 18, 1953, at which time the Director of the commission's Motor Transportation Department advised the appellant by letter that it was his opinion that any shipment handled by the appellant which did not either originate or terminate in Madison County would be outside the scope of his territorial authority; that further correspondence resulted in appellant being allowed to continue the same operations until the matter could be brought before the commission; and that in processing

the numerous motor carrier grandfather applications after the examination when such applications were granted or approved and signed by the commissioners, they were placed in the hands of stenographers for the preparation of the final order, and due to the thousands of applications so processed in a very short period of time, many inadvertent errors were committed by the stenographers, and the findings and intentions of the commission, as shown by the approved report, were not fully and correctly reflected in the final orders entered by the commission.

The appellant's petition then referred to the examiner's note sheet and his report as recommending approval by the commission to grant the appellant a nonradial statewide authority, and alleged that if that was not accomplished, it was incumbent upon the commission to correct the descriptive wording appearing in said certificate so as to correctly authorize the operations sought and approved by the commission in the grandfather proceeding; and that by reason of all of the facts and circumstances outlined above, appellant was of the opinion and believed that an order nunc pro tunc should be entered by the commission correcting the order entered on March 31, 1938, to properly reflect the findings and intentions of the commission as expressed in the examiner's report.

The petition further alleged that the appellant offered to voluntarily surrender certain portions of the operating authority and suggested the following certificate of public convenience and necessity: "(a) SERVICE AUTHORIZED: Commodities generally, except those requiring special equipment. ROUTE OR TERRITORY AUTHORIZED: Between points and places in Nebraska over irregular routes. (b) SERVICE AUTHORIZED: Household goods as defined in Practices of Motor Carriers of Household Goods, 17 MCC 467; uncrated office, hospital, and store fixtures and emigrant movables. ROUTE OR TERRITORY AUTHORIZED: Between

points and places in Nebraska over irregular routes. (c) SERVICE AUTHORIZED: Heavy commodities and articles and commodities of unusual size or weight requiring special equipment or handling, including all commodities and articles too heavy or of such size not feasible to move in ordinary vehicles or without special handling. ROUTE OR TERRITORY AUTHORIZED: Between points and places in Nebraska over irregular routes."

The appellant prayed that the commission grant an order nunc pro tunc correcting the order of the commission entered on March 31, 1938, in M-1110 granting and issuing a grandfather certificate to the appellant, and if such relief is granted the corrected certificate of public convenience and necessity be restricted and amended at appellant's request so as to authorize the operations set forth in the last preceding paragraph.

There is no bill of exceptions in this case.

The examiner's memorandum or note sheet on application No. M-1110 under date of October 11, 1937, contains the following: Point or territory where main volume of traffic is obtained: Norfolk, Madison County; point or territory to which main volume of traffic is transported: Omaha; additional points in state to which traffic is transported: Statewide; the character of traffic: Commodities generally.

The examiner, on October 28, 1937, recommended that an order be entered by the commission in accordance with the above findings, and signed the same. Commissioners approving were F. L. Bollen, chairman, and F. A. Good.

By an order by the commission, application No. M-1110 was granted and a certificate of public convenience and necessity issued to the appellant to operate as a common carrier of property by motor vehicle upon the highways of Nebraska, and to render the service over the route or routes or within the territory therein authorized, showing: "SERVICE AUTHORIZED: Com-

modities generally. ROUTE OR TERRITORY AUTHORIZED: Irregular routes from Madison County, to and from Omaha, and occasionally to and from various points within the State of Nebraska at large." This order was entered on March 31, 1938, and was signed by F. L. Bollen, chairman, and George E. Truman, secretary.

The appellant sought to have the order of the commission, entered March 31, 1938, on application No. M-1110, corrected and clarified by an order nunc pro tunc to authorize the following operations: SERVICE AUTHORIZED: Commodities generally. ROUTE OR TERRITORY AUTHORIZED: Between points in Nebraska over irregular routes, dated December 30, 1954.

On June 10, 1955, the commission, by order, denied the appellant's petition for an order nunc pro tunc, stating: "The Commission is of the opinion that nothing contained in the original or amended grandfather application, the Examiner's notes, report and recommendation, is inconsistent with the issuance of a certificate of public convenience and necessity authorizing radial territorial operations. Examination of the supporting evidence submitted with the petition affirmatively demonstrates that the Commission did not enter an order other than the one intended."

On July 7, 1955, motion for rehearing and reconsideration was filed, claiming that the commission erred in denying the appellant's request for an order nunc pro tunc and setting forth the alleged errors committed by the commission. This matter was set for hearing on April 1, 1957, at 9:30 a.m., in the commission hearing room, Capitol Building, Lincoln, Nebraska.

By an order entered on January 17, 1958, this motion was overruled. Thereafter, in an order entered on January 31, 1958, the commission set aside and held for naught its order of January 17, 1958, and restored the appellant's motion for rehearing and reconsideration to its original status for consideration at a future date. The commission entered an order on August 29,

1962, overruling the appellant's motion for rehearing and reconsideration.

In Watson Bros. Transp. Co. v. Red Ball Transf. Co., 159 Neb. 448, 67 N. W. 2d 475, this court held: "The rules relating to nunc pro tunc orders are generally applicable to administrative and quasi-judicial commissions. * * * The proper function of a nunc pro tunc order is not for the purpose of correcting some affirmative action of the court which ought to have been taken, but its true purpose is to correct the record which has been made, so that it will truly record the action really had, but which through some inadvertence or mistake has not been truly recorded. In other words, it is an order to make the record speak the truth." See, also, Frankfort Ky. Nat. Gas Co. v. City of Frankfort, 276 Ky. 199, 123 S. W. 2d 270; Hargleroad Bulk Carriers, Inc. v. Ruan Transp. Corp., 173 Neb. 151, 112 N. W. 2d 743.

The appellant argues that on appeal from an order of the commission in a proceeding in which no hearing was held, a bill of exceptions, as such, is unnecessary to a determination on the merits where the evidence before the commission appears elsewhere in the record. The appellant further argues that the certified transcript, which consists of the petition for an order nunc pro tunc and the attachments thereto which consist of certified copies of the original grandfather certificate application; certified copies of affidavits which were submitted with the original grandfather application; correspondence amending and clarifying the original application and acknowledgment and receipt of this amendment; certified copies of the commission's records in the original proceeding including the examiner's note sheet, the examiner's report, and the commission's order of March 31, 1938; maps and abstracts of shipments representing the statewide operations conducted by the appellant under the certificate issued as a result of the grandfather application; exhibits showing a certified copy of the commission's minute entry of November

16, 1937; and the affidavit of the appellant which was received by the commission, placed in the record, and considered by the commission in making the determination now complained of, was sufficient to warrant the commission to grant the appellant an order nunc pro tunc as set forth in the petition.

The appellant cites section 75-407, R. R. S. 1943, which provides as follows: "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.*" (Emphasis supplied.)

The appellant contends that the emphasized language set out is sufficient to warrant this court to consider all subject matter such as exhibits, abstracts relating to transportation, letters, etc., and determine from the same the question of appellant's right to have a nunc pro tunc order granted as prayed for by him in his petition and as shown by the transcript.

An analysis and interpretation of the above-cited statute clearly indicates that the evidence before the 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. In this connection, the statute is plain.

We are unable to find that the part of the statute just above referred to has been complied with, and it must be complied with to acquire a true bill of exceptions. The appellant's contention cannot be sustained.

The commission had before it certain exhibits contained in a transcript which could have been identified, offered in evidence, and preserved in and made a part of

a bill of exceptions so that they would constitute evidence to be considered by the commission. This the appellant failed to do.

The commission contends that the only fact of importance in this case is that there is no bill of exceptions, consequently there is no evidence before this court for its consideration, and this being true, a discussion of the merits of the case is not here involved.

In Watson Bros. Transp. Co. v. Red Ball Transf. Co., *supra,* this court said: "We have also held: 'The order nunc pro tunc may be supported by the judge's notes, court files, or other entries of record. It may also be based upon other evidence, oral or written, which is sufficient to satisfy the court that the order is required to make the record reflect the truth.' Fisher v. Minor, ante (159 Neb.) p. 247, 66 N. W. 2d 557.

"We review the order subject to the following established rule: 'On appeal to the Supreme Court from an order of the Nebraska State Railway Commission, while acting within its jurisdiction, the question for determination is the sufficiency of the evidence to prove that the order is not unreasonable or arbitrary.' In re Application of Moritz, 153 Neb. 206, 43 N. W. 2d 603.

"What, then, is the evidence upon which the challenged order was based?" The opinion then sets out a summary of the evidence contained in the bill of exceptions to enable this court to arrive at a decision.

In the case of Peterson v. George, 168 Neb. 571, 96 N. W. 2d 627, the court said: "Here there is no bill of exceptions. In view of that fact the following from Spidel Farm Supply, Inc. v. Line, (165 Neb. 664, 86 N. W. 2d 789) *supra,* has application: 'At the hearing of the motion for summary judgment affidavits were presented by the parties and considered by the court. * * * There is no affidavit preserved or contained in the bill of exceptions in this case. The effect of this omission is that any affidavit considered by the district court is not before and may not be considered by this court. An affi-

davit used as evidence in the district court cannot be considered on an appeal of a cause to this court unless it is offered in evidence in the trial court and preserved in and made a part of the bill of exceptions. Berg v. Griffiths, 127 Neb. 501, 256 N. W. 44, 102 A. L. R. 1124; Harder v. Harder, 162 Neb. 433, 76 N. W. 2d 260.' "

As stated in Palmer v. Capitol Life Ins. Co., 157 Neb. 760, 61 N. W. 2d 396, quoting from Wabel v. Ross, 153 Neb. 236, 44 N. W. 2d 312: " 'In the absence of a bill of exceptions, no question will be considered, a determination of which requires an examination of the evidence produced in the trial court. It follows that any assignment of error that requires an examination of evidence cannot prevail on appeal in the absence of a bill of exceptions.' " There are other cases too numerous to mention which hold to the same effect and which we deem unnecessary to cite.

The above rules likewise apply to the Nebraska State Railway Commission under the circumstances of the instant case.

None of the alleged exhibits heretofore mentioned, attached to the appellant's petition and appearing in the transcript, appear in a bill of exceptions. There is no evidence from which his right to an order nunc pro tunc can be determined in this court due to the state of the record before us. Therefore, we hold that the commission did not act in an arbitrary and unreasonable manner as contended for by the appellant.

We affirm the order of the commission.

AFFIRMED.

RUTH ANN DORLAND, APPELLEE, V. WARREN B. DORLAND ET AL., APPELLANTS.

121 N. W. 2d 28

Filed April 12, 1963. No. 35393.

1. **Pleading.** Where there is no response to an answer, and no

objection or exception is taken thereto, the affirmative allegations of the answer will be regarded as having been generally denied.

2. **Contracts.** Consideration for an agreement or a promise is sufficient if there is any benefit to the promisor or any detriment to the promisee.
3. ———. If negotiations between parties result in an agreement in reference to the subject matter thereof and if they reduce it to writing, execute, and deliver it, the writing, in the absence of fraud, mistake, or ambiguity, is the only competent evidence of the contract.
4. **Judgments.** By the terms of the declaratory judgment statute any person interested under a deed, will, written contract, or other writings constituting a contract, or whose rights, status, or other legal relations are affected by a statute, municipal ordinance, contract, or franchise, may have determined any question of validity arising under the instrument, statute, ordinance, contract, or franchise and obtain a declaration of rights, status, or other legal relations thereunder.
5. ———. By the terms of the declaratory judgment statute a contract may be construed either before or after there has been a breach thereof.

Appeal from the district court for Richardson County: VIRGIL FALLOON, Judge. Affirmed.

Frank A. Hebenstreit and Bayard T. Clark, for appellants.

Wiltse & Wiltse, Paul P. Chaney, and Emory P. Burnett, for appellee.

Heard before WHITE, C. J., CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

YEAGER, J.

This is an action by Ruth Ann Dorland, plaintiff and appellee herein, against Warren B. Dorland and Cetha Floy Dorland, defendants and appellants, for a declaratory judgment determining the rights of these parties under a written agreement entered into by and between these parties, bearing date and declared effective date of April 1, 1959, and for judgment in favor of the plaintiff and against the defendants for the amount claimed by

the plaintiff payable to her from the defendants at the time an amended petition was filed, which was $2,875, and for such a further amount as she claimed would become payable by the time of judgment, with interest.

By answer the defendants denied the right of the plaintiff to the declaratory relief which she claimed, and prayed for an accounting between the parties. From the standpoint of pleading the case was presented on an amended petition and an amended answer.

The plaintiff filed no pleading in response to the answer. The effect of this failure, there being no objection, was to regard the allegations as having been generally denied. See, Crilly v. Ruyle, 87 Neb. 367, 127 N. W. 251; Central Constr. Co. v. Highsmith, 155 Neb. 113, 50 N. W. 2d 817; Dinkel v. Hagedorn, 156 Neb. 419, 56 N. W. 2d 464; Anson v. Grace, 174 Neb. 258, 117 N. W. 2d 529.

The case was tried to the court and a judgment was rendered declaring the rights of the parties under the agreement and awarding judgment in favor of the plaintiff for an amount due at that time of $3,301. From this judgment the defendants have appealed.

An understanding of the matters involved in this action requires a statement of its background which, to the extent necessary to relate, is the following: The plaintiff here and the defendant Warren B. Dorland were, prior to July 28, 1959, wife and husband. Some time prior to that date this defendant left the State of Nebraska, where the parties resided, and went to the State of Florida where he commenced an action for divorce. The parties had three minor children. In that action a decree of divorce was rendered on July 28, 1959.

Prior to the rendition of the decree of divorce the parties to the action entered into a written stipulation by which the parties, among other things, agreed upon the placement and custody of the children, upon provision for their support and maintenance, and upon alimony or support for the wife. By the terms of the stipulation, it was subject to approval of the court in case

of the rendition of a decree of divorce. The stipulation was dated April 1, 1959, signed by the parties, acknowledged by plaintiff in that action on April 10, 1959, and by the defendant there on April 4, 1959.

By the terms of the stipulation the plaintiff there obligated himself to pay to the defendant there $50 a month for each of the children until they should respectively reach the age of 21 years or are married, and to pay to the defendant there $100 a month until death or remarriage. It was required that the payments should be made monthly in advance. Other matters were agreed upon but they do not require mention herein. The stipulation was ratified and confirmed by the Florida court in its decree.

At the same time that the stipulation was made an agreement was made between these two parties which contained the same substance as that in the stipulation with reference to support and maintenance for the children and for the wife. The obligations of this agreement, like the stipulation, depended upon the granting of the decree of divorce.

Cetha Floy Dorland, the other defendant in the present action, was a party to, signed, and acknowledged the agreement. For considerations stated in the agreement she bound herself to the following:

"And the undersigned Cetha Floy Dorland hereby contracts, agrees and assures the payment, in the event that a divorce may be granted, to the said Ruth Ann Dorland of monthly payments as above provided by Warren B. Dorland irrespective and regardless of the performance of Warren B. Dorland of the agreements and obligations hereunder; and independently of any judgment that may be entered in the State of Florida in connection with the divorce proceedings aforesaid. It is the intent of the parties to this agreement that the total monthly payments to the defendant Ruth Ann Dorland by the plaintiff Warren B. Dorland shall not exceed $250.00."

At the time of the commencement of the action here the plaintiff by her petition contended that the defendants were in arrears under this agreement. The district court, after full hearing, rendered the judgment which has been indicated herein.

As grounds for reversal the brief of defendants contains numerous assignments of error. However all of them do not require specific mention and others do not require consideration at all since they are not argued in the brief.

The first one presented is based on the theory that the action is one the purpose of which is to enforce the terms of a decree of divorce rendered in Florida. This is not such a situation. The action here is one based upon a Nebraska agreement. By its terms the decree of the court in Florida did nothing more than to approve the stipulation and the agreement. This is not to say that action to enforce the decree could not be had in the courts of Florida, but only that this is in nowise an action to enforce a decree, but is only an action on a contract. There is no contention made that as a contract it is not enforceable in Nebraska.

By a group of assignments of error the defendants present the question of whether or not there was consideration for the agreement which the defendant Cetha Floy Dorland signed. These have apparently been abandoned since the brief contains no argument in their support. In any event the evidence fully supports the allegations of consideration. Consideration for an agreement or a promise is sufficient if there is any benefit to the promisor or any detriment to the promisee. See, Phelps v. Blome, 150 Neb. 547, 35 N. W. 2d 93; Pike v. Triska, 165 Neb. 104, 84 N. W. 2d 311.

It is urged in argument that the defendants were entitled to and did not get credits for medical services furnished to the children involved after the effective date of the agreement by the defendant Warren B. Dorland,

and for appropriation of funds belonging to him after that date.

Evidence on this subject was admitted and the conclusion reached by the district court was contrary to the contention of the defendants. It cannot be said that the conclusion was erroneous.

Another contention made, as interpreted here, is that there is ambiguity in the agreement which required explanation and the court, to the detriment of the defendants, rejected parol evidence the purpose of which was to clarify the ambiguity. A reading of the agreement, together with the stipulation and the Florida decree, fails to disclose any such claimed ambiguity.

Another contention is, again substantially, that in negotiations prior to the execution of the instruments conversations were had in which an intention different from the one expressed in the instruments involved was arrived at, and that the court erred in refusing to admit parol evidence of these negotiations.

The instruments are clear and explicit on their face, and there is no claim of fraud or undue influence. The ruling in this respect was not erroneous. The rule which controls in this situation is as follows: "If negotiations between parties result in an agreement in reference to the subject matter thereof and if they reduce it to writing, execute, and deliver it, the writing, in the absence of fraud, mistake, or ambiguity, is the only competent evidence of the contract." Preferred Pictures Corp. v. Thompson, 170 Neb. 694, 104 N. W. 2d 57.

The remaining question to be considered is that of whether or not the plaintiff was entitled to maintain this as a declaratory judgment action. There can be no doubt under the statute that she was so entitled. Section 25-21,150, R. R. S. 1943, provides as follows: "Any person interested under a deed, will, written contract or other writings constituting a contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have de-

termined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise and obtain a declaration of rights, status or other legal relations thereunder." See, also, Nebraska Seedsmen Assn. v. Department of Agriculture & Inspection, 162 Neb. 781, 77 N. W. 2d 464; County of Douglas v. OEA Senior Citizens, Inc., 172 Neb. 696, 111 N. W. 2d 719.

Section 25-21,151, R. R. S. 1943, provides: "A contract may be construed either before or after there has been a breach thereof."

In the case here the question of the rights of the plaintiff and the declaration of the respective obligations of the defendants were questions for determination and were matters presentable in a declaratory judgment action. The district court by its judgment found in essence that the liability of the defendants was equal and several.

In the light of these observations the conclusion is reached that the judgment of the district court should be and is affirmed.

AFFIRMED.

MARY F. MURPHY, APPELLEE AND CROSS-APPELLANT, V. ANDREW MURPHY, APPELLANT AND CROSS-APPELLEE.
121 N. W. 2d 404

Filed April 19, 1963. No. 35340.

1. **Divorce.** A divorce from bed and board may be granted on the petition of the wife when the husband, having sufficient ability to provide suitable maintenance and support, does grossly, wantonly, or cruelly refuse to do so.
2. ———. Even if a wife fails to establish her right to a divorce from bed and board, she is entitled to an award for support and maintenance by the husband, as provided by section 42-337, R. R. S. 1943.
3. ———. Where a wife has prayed for a divorce from bed and board and supported the same by sufficient evidence, and the

husband has prayed for an absolute divorce but failed in his proof, the trial court has no discretion in granting the remedy but must decree a divorce from bed and board as prayed.

Appeal from the district court for Douglas County: FRANK G. NIMTZ, Judge. Affirmed.

Floersch & Floersch, for appellant.

Joseph T. Votava, for appellee.

Heard before WHITE, C. J., CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

CARTER, J.

Plaintiff commenced this suit to obtain a divorce from bed and board on the ground of nonsupport in that defendant refused to provide suitable maintenance, although he had the financial ability to do so. The defendant denied the allegations of the petition and filed a cross-petition for a divorce on the ground of extreme cruelty. The trial court denied a divorce to the defendant and granted the prayer of plaintiff's petition. Separate maintenance in the amount of $135 per month was granted to the plaintiff. The defendant appealed, and plaintiff has cross-appealed, asserting the insufficiency of the award of $135 per month.

The plaintiff was a childless widow when she married the defendant on March 31, 1959. She was 59 years of age at time of trial on May 29, 1962. The defendant was a childless widower, 75 years of age at the time of trial.

In 1957 plaintiff and her sister, Margaret McGargill, moved to Omaha. At that time plaintiff had an equity of $12,000 in her former home at Imogene, Iowa, household goods worth $2,500, an old Rambler automobile that had been driven 12,000 miles, and $10,000 in cash. The plaintiff and her sister purchased a home in Omaha for $10,000, which they held in joint tenancy, and spent an additional $2,085.04 in remodeling it. Plaintiff and her sister occupied the first floor of the house and the second floor was converted into a furnished apartment,

which they rented for $80 per month. Since December 1, 1957, when the sisters commenced living together, they kept an accurate account of all their living costs and other expenditures. The sister was not in good health, and her contributions to their living expenses consisted of her earnings as a baby sitter. The plaintiff worked at odd jobs from time to time. In December 1958, plaintiff worked a couple of days at St. Vincent's Old Peoples Home, where she met the defendant.

The defendant is a retired mail carrier. He drew retirement pay in the amount of $195 per month. After his marriage to the plaintiff he drew a veteran's pension of $78.75 per month. He had an equity in a contract of sale of his former home in the amount of $8,466.63. He had cash in banks and bonds in the amount of $18,-707.62. His total assets in addition to his retirement and pension rights were $27,174.25. At the time he first met the plaintiff he was living at St. Vincent's Old Peoples Home, where he was paying $130 per month for his care and comfort.

The parties, before their marriage, discussed some of the financial problems involved. Plaintiff informed defendant of her relationship with her sister. He was informed that the second floor of the home was rented as a furnished apartment. Defendant suggested that plaintiff discontinue renting the upstairs, so that they could use it after their marriage. This was done, causing plaintiff and her sister to lose the $80 per month, which they had used as part payment on their living expenses. It was understood that the home owned and occupied by the two sisters would become the home of the parties after their marriage. Defendant advised plaintiff of his retirement and pension income and, according to plaintiff's testimony, stated that if it was not enough there was other money available. Defendant said that he agreed to contribute only $130 per month to the family expense. For the first 9 months he contributed only $130 per month which necessitated plain-

tiff, partly because of her loss of the apartment rentals, to expend her own personal savings for living expenses.

The difficulties between the parties stemmed from the refusal of defendant to make larger payments on the $300 per month required to maintain the home. The defendant did make larger contributions to the living expenses for several months before they separated.

In January 1961, plaintiff moved downstairs and lived with her sister, evidently to coerce defendant into making larger contributions to the living costs of the three occupants of the home. Such coersive measures proved ineffective when applied to this 74-year-old defendant. On May 10, 1961, defendant moved out and returned to St. Vincent's Old Peoples Home, where he now resides at an expense to him of $145 per month.

The defendant admits the plaintiff was a fine housekeeper and cook. She took him where he wanted to go in her automobile. He concedes that he was well treated. Plaintiff and her sister painted the house and did the lawn work. The defendant stated that he was of the executive type and did not come there as a handy man. Defendant contends that plaintiff nagged him for security, which she denies. It is plain, however, that the difficulty between the parties arose over the payment of living expenses, the defendant contending he was to pay $130 per month and plaintiff and her sister the balance, although their income had been substantially reduced by the loss of the apartment rentals.

The defendant contends that the trial court should have granted him an absolute divorce on the ground of cruelty. The evidence on which he relies is that plaintiff's efforts to get him to pay more money for her support constituted "nagging." Under all the circumstances and evidence shown in this record, we do not think there was sufficient evidence of cruelty to sustain a decree of divorce. In any event, there is no corroboration, a necessary element to the granting of a divorce.

We think the evidence was sufficient to sustain a de-

cree of divorce from bed and board in favor of the plaintiff on the ground of nonsupport. Regardless of the difficulties of these parties over financial matters during the time they lived together, the fact remains that defendant left the home on May 10, 1961. Thereafter, he paid nothing toward plaintiff's support except when ordered by the court to do so during the pendency of this proceeding. He owed the obligation of a husband to support his wife on and after that date. He failed to do so. This constitutes nonsupport and affords adequate basis for the granting of a divorce from bed and board. See, § 42-302, R. R. S. 1943; Svanda v. Svanda, 93 Neb. 404, 140 N. W. 777, 47 L. R. A. N. S. 666. Whether or not a divorce from bed and board is granted, plaintiff is entitled to an award for support. In section 42-337, R. R. S. 1943, it is said: "In case of an application for a divorce from bed and board, although a decree for such divorce be not made, the court may make such order or decree for the support and maintenance of the wife and children, or any of them, by the husband, or out of his property, as the nature of the case may render suitable and proper."

Even if a wife should fail in making proof for a divorce from bed and board, a husband is not thereby released from his obligation to support his wife. In Earle v. Earle, 27 Neb. 277, 43 N. W. 118, 20 Am. S. R. 667, this court said: "While the statute books of this and other states amply provide for the granting of divorces in meritorious cases, yet we do not apprehend that it is the purpose of the law to compel a wife, when the aggrieved party, to resort to this proceeding, and thus liberate her husband from all obligations to her, in order that the rights which the law gives her, by reason of her marital relations with her husband, may be enforced. Such a conclusion would not generally strike the conscience of a court of equity as being entirely equitable."

While an absolute decree of divorce is usually a more preferable solution than the granting of a divorce from bed and board, the latter may not be forced upon a

party who does not desire it. In Shomaker v. Shomaker, 166 Neb. 164, 88 N. W. 2d 221, this court said: "We have also concluded that where a party has prayed for a divorce from bed and board and has adduced sufficient proof duly corroborated in support thereof, and in the same action the other party has prayed for an absolute divorce but has not adduced sufficient proof duly corroborated in support thereof, then the trial court has no discretion in granting the remedy, but must grant the divorce from bed and board as prayed."

Plaintiff complains that the allowance of separate maintenance is insufficient. The evidence indicates that the marriage was primarily one of convenience. Each of the parties retained his own property. Plaintiff has been placed in the same position as before the marriage, including the restoration of the second floor of her home to a rent-producing furnished apartment. The trial court heard the witnesses and concluded that defendant should pay $135 per month to the support of his wife. We find no evidence in the record that would warrant an increase in the amount by this court.

Plaintiff asks for an allowance of attorney's fees for the services of her attorney in this court. We allow $250 to be taxed as costs for this purpose. The costs are taxed to the defendant.

We find the judgment of the district court to be free from error, and the judgment is affirmed.

AFFIRMED.

AUGUST LONGE, A RESIDENT ELECTOR AND TAXPAYER OF SCHOOL DISTRICT NO. 42 OF WAYNE COUNTY, NEBRASKA (OR A RESIDENT ELECTOR AND TAXPAYER OF SCHOOL DISTRICT NO. 60-R OF DIXON, WAYNE, AND THURSTON COUNTIES, NEBRASKA), IN HIS OWN RIGHT AND ON BEHALF OF ALL PERSONS SIMILARLY SITUATED WHO WISH TO JOIN IN THIS PETITION, APPELLANT, V. COUNTY OF WAYNE, NEBRASKA, ET AL., APPELLEES.

121 N. W. 2d 196

Filed April 19, 1963. No. 35381.

1. **Appeal and Error.** It is only when a tribunal acts judicially that a review by error proceedings is allowed under section 25-1901, R. R. S. 1943.
2. **Schools and School Districts.** Section 79-426.17, R. R. S. 1943, is mandatory upon the county superintendent of schools and his actions in carrying out the expressed decision of the electors is ministerial only.
3. **Schools and School Districts: Elections.** The special election authorized by section 79-426.15, R. R. S. 1943, is governed by the general election laws and is subject to the contests provided in section 32-1001, R. R. S. 1943.
4. **Elections: Quo Warranto.** The statute has provided an adequate remedy for the settlement of the rights of parties in election cases by either contest or quo warranto and these remedies are exclusive.

Appeal from the district court for Dixon County: JOHN E. NEWTON, Judge. Affirmed.

Budd B. Bornhoft, for appellant.

Harry N. Larson, C. M. Kingsbury, Charles E. McDermott, and Ronald K. Samuelson, for appellees.

Heard before WHITE, C. J., CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

BROWER, J.

August Longe, the appellant, brought this action by petition in error in the district court for Dixon County, Nebraska, seeking to attack the reorganization and consolidation of 15 school districts in the Wakefield area

into one district known as School District No. 60-R of Dixon, Wayne, and Thurston Counties.

The defendants in error and appellees herein are very numerous and include the three counties of Wayne, Dixon, and Thurston; the county superintendents, assessors, treasurers, and county clerks of each of said counties; the special committee for reorganization of school districts for Wayne, Dixon, and Thurston Counties, hereinafter called the special committee; the Dixon County Committee for reorganization of school districts, hereinafter called the county committee; the members of each of said committees; and all the 15 school districts involved in the reorganization, as well as the new district formed by the consolidation.

The consolidation was undertaken by the election method under the Reorganization of School Districts Act, sections 79-426.01 to 79-426.19, R. R. S. 1943. Territory in the three counties being involved, the plan of reorganization, known as the Wakefield Plan of Reorganization, was prepared by a special committee composed of members from each of the three counties of Dixon, Wayne, and Thurston, as provided in section 79-426.09, R. R. S. 1943. It will hereafter be referred to as "the plan."

The plan was prepared and adopted after meetings of the special committee, including two public hearings thereon. It was then submitted to the State Committee for Reorganization of School Districts, which reviewed and approved it on April 12, 1961, and advised the special committee that it be submitted to the electors of the proposed district. The county committee of Dixon County, because that county appears to be the one in which the largest number of electors reside, proceeded to call and hold an election, pursuant to subsection (4) of section 79-426.15, R. R. S. 1943.

The election was held on June 13, 1961, at which time the plan was approved by a majority of all electors voting in the Class I districts by a vote of 200 in favor

of the proposition and 181 against it. It was likewise approved by the Class III district, including the city of Wakefield, by a vote of 359 in favor and 133 against the proposition. The canvassing board certified to the result of the election on June 16, 1961, as required by section 32-496, R. R. S. 1943.

Thereafter, pursuant to section 79-426.17, R. R. S. 1943, the county superintendents of the three counties, on June 28, 1961, joined in one certificate or order showing the changes of the school districts involved and the realignment and adjustment thereof. The certificate was directed to the several county clerks, assessors, and treasurers of the three counties involved. It set out the districts which were reorganized and the boundaries of the new district created by the consolidation.

On July 24, 1961, the appellant, a resident elector and taxpayer of one of the Class I school districts, reorganized with the other districts to form School District No. 60-R of the said three counties, brought this error proceeding on behalf of himself and all others similarly situated.

The cause was tried on the petition of appellant, the appellees' answers thereto, and the appellant's replies. On August 7, 1962, the district court rendered its judgment dismissing the petition. In the journal of judgment the district court held against the appellant, both upon the merits and upon procedural grounds. It held the reorganization proceedings were free from fatal defects and that a petition in error was not the proper remedy to challenge the election and the proceedings prior thereto.

A motion for new trial having been overruled, appellant brings the cause to this court by appeal.

The appellant contends the trial court erred in holding that the order or certificate of the county superintendents realigning and adjusting the district, as provided in section 79-426.17, R. R. S. 1943, was a ministerial instead of a judicial function and as such not reviewable

in error proceedings. There were numerous other assignments of error but they refer to the proceedings of the special committee or the county committee, and in view of our decision are not required to be considered.

Appellant contends that under the holdings of this court the order realigning and adjusting the school districts made by the three county superintendents, on June 28, 1961, was reviewable by error proceedings under section 25-1901, R. R. S. 1943. He cites as authority for this proposition Olsen v. Grosshans, 160 Neb. 543, 71 N. W. 2d 90; Keedy v. Reid, 165 Neb. 519, 86 N. W. 2d 370; School Dist. No. 49 v. Kreidler, 165 Neb. 761, 87 N. W. 2d 429; and Dovel v. School Dist. No. 23, 166 Neb. 548, 90 N. W. 2d 58. It is to be noted that all of the cited cases were brought to review, in error proceedings, decisions of the county superintendent made under the petition method of reorganization set out in section 79-402, R. S. Supp., 1961.

In the petition method of proceeding, the petitions of the electors are presented to the county superintendent or superintendents of schools of the county or counties involved with sworn lists of the electors of the various school districts presented with them. The county superintendents under the petition method are required to determine the sufficiency of the petitions and whether the required 55 percent of the electors of the several districts have signed the petitions. In such cases it has been held that the county superintendent's acts have the connotation of an adjudication and are not ministerial. Olsen v. Grosshans, *supra*.

The ultimate authority for changing the boundaries and the reorganization of school districts under both the petition method, as provided in section 79-402, R. S. Supp., 1961, and by the election procedure, rests with the electors of the several districts involved. The action of the county superintendent however under the two methods is quite different. Under the petition method the county superintendent must determine whether the

request of 55 percent of the electors in each district has authorized the proposed change. In doing so the superintendent acts judicially to a certain extent. It is only when the tribunal acts judicially that a review by error proceedings is allowed under section 25-1901, R. R. S. 1943.

In the case before us the electors have made known their decision by and through the election. The results of the election have been certified to the superintendents by the canvassing board. These results disclose the will of the electors. The county superintendents have no power or authority to change this result. Section 79-426.17, R. R. S. 1943, provides in part as follows: "If the plan of reorganization is adopted, the county superintendent of schools *shall* proceed to cause the changes, realignment and adjustment of districts to be carried out as therein provided." (Emphasis ours.) Section 79-426.17, R. R. S. 1943, is mandatory upon the county superintendent of schools and his action in carrying out the expressed decisions of the electors is ministerial only.

Appellant cites certain portions of this court's opinion in Nickel v. School Board of Axtell, 157 Neb. 813, 61 N. W. 2d 566. That case was an injunction action in which the court was considering the question of the constitutionality of the Reorganization of School Districts Act under which the consolidation now before us was effected. The court held the constitutionality might be tested by injunction. Appellant stresses that in the cited case this court discusses the constitutionality of the act with respect to the contention then advanced that there was no provision in the act for an appeal. In the opinion in the cited case certain decisions of this court, including Pollock v. School Dist. No. 42, 54 Neb. 171, 74 N. W. 393, were discussed to show that if no method of appeal was provided and a decision to a certain extent judicial in its character and subject to review was involved, the review could be had through error proceedings as provided by section 25-1901, R. R. S. 1943.

Some of the cases so cited, including Pollock v. School Dist. No. 42, *supra,* were those involving the petition method of reorganization of schools under section 79-402, R. S. Supp., 1961. Appellant maintains that because Nickel v. School Board of Axtell, *supra,* was a case involving the election method of reorganization, the citation and discussion of these prior decisions of this court at least implied that the same procedural remedy exists to review the order of the superintendent in an election case, as had existed in cases under section 79-402, R. S. Supp., 1961. We do not agree with the appellant's contention. It is to be noted that the court in Nickel v. School Board of Axtell, *supra,* concluded this discussion with these remarks: "If any action taken by the county committee was appealable, a question we need not and do not decide, these statutes fully meet the requirements of the Constitution." Apparently this court was discussing the possibility of bringing error proceedings to review any action of a committee leading to the election that might involve some judicial discretion. It was not necessary for this court to determine this question discussed at that time nor is it necessary for us to do so now. No error proceeding in this cause was brought within 1 month of any decision of any such committee as required by section 25-1931, R. R. S. 1943. There is certainly nothing in the cited case that may be said to infer that a review by error proceeding lies from the action of the county superintendent in implementing the changes and realignments as provided by section 79-426.17, R. R. S. 1943, after a reorganization has already been effected by the electors themselves. No such question was before the court in that case.

In Arends v. Whitten, 172 Neb. 297, 109 N. W. 2d 363, it was determined that the election provided in the Reorganization of School Districts Act was a special election and not a school election. The court then held: "The special election authorized by section 79-426.15, R. R. S. 1943, is governed by the general election laws

and is subject to the contests provided in section 32-1001, R. R. S. 1943." The case cited School Dist. No. 49 v. School Dist. No. 65-R, 159 Neb. 262, 66 N. W. 2d 561, in which this court stated: "The statute has provided an adequate remedy for the settlement of the rights of parties in election cases by either contest or quo warranto and these remedies are exclusive."

The appellant instead of bringing an action to contest the election, as provided by sections 32-1001 to 32-1036, R. R. S. 1943, allowed the election to be held and the decision of the electors thereat to be determined, ascertained, and certified by the canvassing board. He then seeks to review the election and the steps leading thereto through error proceedings brought to review the action of the county superintendents in implementing the results of that election under section 79-426.17, R. R. S. 1943, a step involving no judicial discretion on their part.

Having determined that the action of the county superintendents thereunder was ministerial only, it follows that the action cannot be maintained and that the trial court did not commit error in dismissing the action, and its judgment should be affirmed.

AFFIRMED.

BLAINE FRANKFORTER ET AL., APPELLEES, V. GLENN E. TURNER, COUNTY SUPERINTENDENT OF SCHOOLS OF LANCASTER COUNTY, NEBRASKA, ET AL., APPELLANTS, IMPLEADED WITH DEWEY A. GANZEL, COUNTY SUPERINTENDENT OF SCHOOLS OF SALINE COUNTY, NEBRASKA, APPELLEE.

HAROLD BECK ET AL., APPELLEES, V. GLENN E. TURNER, COUNTY SUPERINTENDENT OF SCHOOLS OF LANCASTER COUNTY, NEBRASKA, ET AL., APPELLANTS, IMPLEADED WITH DEWEY A. GANZEL, COUNTY SUPERINTENDENT OF SCHOOLS OF SALINE COUNTY, NEBRASKA, APPELLEE.

EMIL L. VOKOUN ET AL., APPELLEES, V. GLENN E. TURNER, COUNTY SUPERINTENDENT OF SCHOOLS OF LANCASTER COUNTY, NEBRASKA, ET AL., APPELLANTS, IMPLEADED WITH DEWEY A. GANZEL, COUNTY SUPERINTENDENT OF SCHOOLS OF SALINE COUNTY, NEBRASKA, APPELLEE.

121 N. W. 2d 377

Filed April 26, 1963. Nos. 35363, 35364, 35365.

1. **Appeal and Error.** When the time for filing a petition in error expires and objection is timely made, the right to a review is lost and the petition in error should be dismissed.
2. ———. In a proceeding under section 25-1901, R. R. S. 1943, it is mandatory that a petition in error and the transcript be properly authenticated and timely filed to vest the appellate court with jurisdiction of the subject matter.
3. ———. An appellate court may not consider or decide a case within its appellate jurisdiction unless its authority to act is invoked in the manner prescribed by law.
4. ———. If a district court was without jurisdiction of the subject matter of litigation, this court does not acquire jurisdiction thereof by an appeal to it from a final order of the district court therein.

Appeal from the district court for Saline County: JOSEPH ACH, Judge. Reversed and remanded with directions.

Paul L. Douglas, William D. Blue, Floyd A. Sterns, William L. Walker, and Earl Ludlam, for appellants.

Muffly & Snyder and Gerald J. Hallstead, for appellees.

Heard before WHITE, C. J., CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

MESSMORE, J.

Here are three cases consolidated for the purpose of briefs and argument before this court.

The plaintiffs in error filed three petitions in the trial court, one in each case, and in this court filed a transcript and bill of exceptions in each case.

School districts Nos. 11, 72, and 158 of Lancaster County are Class I school districts as defined by the laws of Nebraska. The school district of the city of Crete in Saline County is a Class III school district, and is also known as school district No. 2 of Saline County, being the county which has the largest number of pupils residing in the proposed joint district.

The proceedings originate under section 79-402, R. S. Supp., 1961, as last amended, Laws 1959, c. 385, § 1, p. 1334, effective date September 28, 1959, providing that the county superintendent shall change the boundaries of existing school districts upon petitions signed by 55 percent of the legal voters of each district affected, and that territory may be annexed to a district from an adjoining county upon joint action by county committees as provided in sections 79-426.08 and 79-426.09, R. R. S. 1943.

The defendant in error Glenn E. Turner is the duly elected, qualified, and acting superintendent of schools of Lancaster County. Dewey A. Ganzel is the duly appointed, qualified, and acting superintendent of schools of Saline County.

The trial court found that it had jurisdiction of the parties and of the subject matter of the actions; that the error proceedings were timely filed and sufficient; that under the record there was no genuine issue of material fact; that the motions of the plaintiffs in error for summary judgment be sustained; that there was no proper, valid, and sufficient evidence before the county

superintendents upon which they could deny the petitions; that as may be applicable in the respective cases, legal voters of Class I school districts, within the time petitions were being held, could withdraw their names or could withdraw or revoke a withdrawal; that qualified legal voters of such districts may add their names to such petitions; that upon the original submission thereof and at the time of the superintendents' hearing to determine the validity and sufficiency valid signatures of at least 55 percent of the legal voters of such Class I school districts were contained in the respective petitions, and with the concurring petition of such Class III school district, had properly petitioned that the boundaries of their respective districts be changed; that the petitions were valid and sufficient; that annexation be decreed pursuant to the findings of superintendent Ganzel, by the joint action of said superintendents within 10 days or the order of the court stand in lieu thereof; and that costs be taxed against the defendants in error.

The trial court overruled the motions for summary judgment of the defendants in error.

For convenience we will refer to defendant in error Glenn E. Turner, county superintendent of schools of Lancaster County, as Turner, and to Dewey A. Ganzel, county superintendent of schools of Saline County, as Ganzel.

A motion for new trial was filed by defendant in error Turner to set aside the order sustaining motion for summary judgment of the plaintiffs in error and overruling the motion for summary judgment of the defendants in error upon the ground that the court erred in finding plaintiffs in error were entitled to judgment as a matter of law; and that the order of the trial court entered June 4, 1962, was contrary to law.

The defendant in error, Warren E. Williams, filed a motion to set aside and vacate the judgments rendered by the trial court on June 4, 1962, or for a rehearing, or in the alternative for a new trial, substantially in

accord with the motion for new trial filed by the defendant in error Turner, and in addition set forth that the trial court erred in finding and ordering that said petition in error and alleged transcript were filed within 30 days after the final order was entered by defendant in error Turner.

Motions for rehearing and in the alternative for a new trial, to the same effect as above mentioned, were filed by other defendants in error in the other two cases.

All of the above motions were overruled, and motions for supersedeas bonds and cost bonds were sustained and approved by the trial court.

Section 79-402, R. S. Supp., 1961, has been in substantially its present form since 1957. It sets out a comprehensive, orderly procedure for dissolving and annexing school districts by petition. First, the petitions with 55 percent of the legal voters of each district are submitted to the county committee. Second, within 40 days the county committee submits the petition or petitions to the state committee. Third, the state committee, after study and recommendation, returns the petitions to the county committee. Fourth, within 15 days the county committee advertises and holds a public hearing, which in the three cases here involved was held on October 3, 1961. Fifth, the county committee holds the petitions for 10 days at which time, October 13, 1961, in the cases involved here, the petitions are filed with the county superintendent or superintendents as the case may be. Sixth, the county superintendents then advertise and hold a hearing, which was held in these three cases on October 24, 1961.

A joint meeting of the Saline and Lancaster County School Reorganization Committee was held at the Saline County courthouse in Wilber, on August 30, 1961, wherein it was unanimously agreed that the petitions of the electors of the respective school districts be accepted and notice forwarded to the State Committee for Reorganization of School Districts, and that said petitions consti-

tuted a part of the Saline County comprehensive plan. The State Committee for Reorganization of School Districts, at a meeting held September 20, 1961, reviewed the petitions, voted approval of the same, and recommended that the county committee should proceed with the hearing and other requirements necessary to complete action on the petitions. On October 3, 1961, after the joint notice by chairmen of the Saline and Lancaster County school reorganization committees published September 28, 1961, hearing was held at the courthouse at Wilber, Saline County, at which time the recommendations of the state committee were presented to the legal voters of the respective school districts.

In the three cases, after notice had been published on October 19, 1961, in the Crete News, a newspaper of general circulation located in Crete, Saline County, Ganzel and Turner met multilaterally on October 24, 1961, and held a public hearing at the courthouse in Saline County to determine the validity and sufficiency of the petitions that had been filed with the respective superintendents by school districts Nos. 11, 72, and 158, to dissolve and annex the respective areas of each of said school districts to school district No. 2 of Saline County in the city of Crete.

On October 27, 1961, Turner rendered a decision on the validity and sufficiency of the petitions to dissolve school districts Nos. 11, 72, and 158 of Lancaster County and annex the same to school district No. 2, school district of the city of Crete, Saline County. After examination of the petitions and the circumstances pertinent thereto, it was his opinion that the petition of school district No. 158 was insufficient, and that the petitions of school districts Nos. 11 and 72 were not valid due to misrepresentations made in procuring signatures. As a result thereof, no order would be signed by him dissolving school districts Nos. 11, 72, and 158.

On October 27, 1961, Turner wrote a letter to Ganzel stating that he was not signing an order for the dis-

solution of any or all of school districts Nos. 11, 72, and 158.

On January 10, 1962, Ganzel rendered an order affecting changes of school district boundaries wherein he found and determined that upon properly filed and validly executed petitions therefor, pursuant to section 79-402, R. S. Supp., 1959, school districts Nos. 11, 72, and 158, Class I school districts of Lancaster County, be dissolved and annexed to school district No. 2, city of Crete, Saline County.

On January 10, 1962, Ganzel wrote a letter to Turner informing him of his decision that the petitions were valid, and that the boundaries of school districts Nos. 11, 72, and 158 should be changed and the annexation to school district No. 2 of Saline County should be made, and requesting that Turner concur in his, Ganzel's, order. There is nothing to show or indicate that Turner concurred in Ganzel's order.

The appellants predicate error as follows: That the trial court's judgment is contrary to law; and that the trial court erred in failing to find that the plaintiffs' petitions in error were not timely filed.

With reference to jurisdiction, the original jurisdiction of the proceedings in the case at bar was in Saline County, where the board or tribunal, composed of two county superintendents acting multilaterally in a quasi judicial capacity, met, held a hearing on the merits, and were required to adjudicate the issues.

It is axiomatic that error proceedings from judgments rendered or final orders made by such board or tribunal as that at bar, should be taken to the district court for the county in which the board or tribunal as such had its jurisdictional forum, where the hearing was held, and its judicial functions were performed. See School Dist. No. 49 v. Kreidler, 165 Neb. 761, 87 N. W. 2d 429.

Section 25-1901, R. R. S. 1943, provides in part: "A judgment rendered, or final order made, by a * * * tribunal, board or officer exercising judicial functions,

and inferior in jurisdiction to the district court, may be reversed, vacated or modified by the district court."

Section 25-1902, R. R. S. 1943, defines a final order as: "An order affecting a substantial right in an action, when such order in effect determines the action and prevents a judgment, and an order affecting a substantial right made in a special proceeding, or upon a summary application in an action after judgment, is a 'final order' which may be vacated, modified or reversed, as provided in this chapter."

Section 25-1903, R. R. S. 1943, provides in part: "The proceedings to obtain such reversal, vacation or modification shall be by petition entitled 'petition in error,' filed in a court having power to make such reversal, vacation or modification, setting forth the errors complained of, and thereupon a summons shall issue and be served, * * * as in the commencement of an action."

Section 25-1931, R. R. S. 1943, provides in part: "No proceedings for reversing, vacating, or modifying judgments or final orders shall be commenced unless within one calendar month after the rendition of the judgment or making of the final order complained of; * * *."

When the time for filing a petition in error expires and objection is timely made, the right to a review is lost and the petition in error should be dismissed. See Keedy v. Reid, 165 Neb. 519, 86 N. W. 2d 370.

On October 27, 1961, as heretofore mentioned, Turner rendered his order wherein he refused to sustain the validity of the petitions of the legal voters who signed the same in school districts Nos. 11, 72, and 158, primarily on the basis that such petitions were insufficient to justify dissolution of said school districts and the annexation of the same to school district No. 2 in the city of Crete, Saline County. Over 2 months after the date of October 27, 1961, Ganzel rendered his order finding the petitions of the legal voters who signed such petitions of school districts Nos. 11, 72, and 158, to be sufficient and valid, and rendered an order that said districts

be dissolved and annexed to school district No. 2 in the city of Crete, Saline County.

Plaintiffs in error filed their three petitions in error in the three cases in the district court for Saline County on February 8, 1962. It will be noted that the petitions in error were filed after the 1-month period provided for filing petitions in error. See § 25-1931, R. R. S. 1943.

For all purposes, the order rendered by Turner terminated the proceeding and was a final, appealable order to this court. To permit one county superintendent to withhold his decision for 2 months or more would clearly indicate that any superintendent of schools in the same situation might hold or retain his decision perhaps 6 months, or for an indefinite period. The law does not permit of such acts on the part of county superintendents. The following are applicable.

In Harms v. County Board of Supervisors, 173 Neb. 687, 114 N. W. 2d 713, this court held: "In proceedings under section 25-1901, R. R. S. 1943, it is mandatory that a petition in error and the transcript be properly authenticated and timely filed to vest the appellate court with jurisdiction of the subject matter." The court said, quoting from Anania v. City of Omaha, 170 Neb. 160, 102 N. W. 2d 49: " 'An appellate court may not consider or decide a case within its appellate jurisdiction unless its authority to act is invoked in the manner prescribed by law.

" 'If a district court was without jurisdiction of the subject matter of litigation, this court does not acquire jurisdiction thereof by an appeal to it from a final order of the district court therein.' * * * Furthermore, it is not possible to consider them as proceedings in error as neither the petition nor the transcript in either case was filed in district court within 1 month of the decision of the county board of supervisors as required by section 25-1931, R. R. S. 1943. Keedy v. Reid, 165 Neb. 519, 86 N. W. 2d 370; * * *."

Keedy v. Reid, *supra,* was an appeal from an order

of the district court for Gage County dismissing a petition in error, the object and purpose of which was to reverse and set aside an order entered by the county superintendent of schools of Gage County merging school district No. 161 with school district No. 114 under the provisions of section 79-402, R. S. Supp., 1955. This court said that error proceedings from such an order are governed by section 25-1931, R. R. S. 1943, and must be commenced within 1 month after the rendition of the order; that the amendment of the petition in error was made long after the 1-month period provided for the filing of a petition in error; that no petition in error was filed within 1 month against the real parties in interest; and that the failure to comply with the provisions of the statute required a dismissal of the petition in error in accordance with the action taken by the trial court.

Other matters are raised by the appellants which we deem unnecessary to determine.

For the reasons heretofore set forth in this opinion, we conclude that the judgment of the trial court should be reversed and the cause remanded with directions to dismiss the petitions in error. All costs are taxed to appellees.

REVERSED AND REMANDED WITH DIRECTIONS.

INSURANCE COMPANY OF NORTH AMERICA, A CORPORATION, APPELLANT, V. MAXIM KUNIN ET AL., APPELLEES.

121 N. W. 2d 372

Filed April 26, 1963. No. 35385.

1. **Appearances.** The general rule is that an appearance is special when its sole purpose is to question the jurisdiction of the court. It is general if the party appearing invokes the power of the court on any question other than that of jurisdiction.
2. ———. A special appearance is in the nature of a plea in abatement and is governed by the same rules.
3. ———. When a party appears specially before judgment and

denies the truth of any material fact alleged in the affidavit for service by publication, the court must then determine the truth of the allegation contained in the affidavit.

4. **Foreign Corporations: Appearances.** Where the defendant is a nonresident of the state, or a foreign corporation, and the validity of service by publication upon the defendant depends upon the defendant owning property, or having debts owing to him within the state which are sought to be taken by a provisional remedy or to be appropriated by judicial proceedings, the defendant may appear specially and deny that he owns any property or has any debts owing to him within the state.
5. **Appearances.** The filing of an amended special appearance without having obtained leave of court is not a general appearance.
6. **Appearances: Garnishment.** The filing of a special appearance containing allegations relating to the validity of a garnishment is not a general appearance where the jurisdiction of the court depends upon the validity of the garnishment.

Appeal from the district court for Douglas County: FRANK G. NIMTZ, Judge. Affirmed.

Haney, Walsh & Wall, for appellant.

Monsky, Grodinsky, Good & Cohen, Gross, Welch, Vinardi, Kauffman, Schatz & MacKenzie, and Gaines, Spittler, Neely, Otis & Moore, for appellees.

Heard before WHITE, C. J., CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

BOSLAUGH, J.

On February 2, 1960, a department store operated by Herzberg's, Inc., in Omaha, Nebraska, was damaged by fire. This action was brought by Insurance Company of North America against Maxim's of Nebraska, Inc., a corporation, to recover the amount which the plaintiff alleged that it had paid to Herzberg's, Inc., under an insurance policy as a result of the fire. The petition alleged that the fire was caused by the negligence of the defendant and its employees.

The plaintiff also commenced garnishment proceed-

ings against another insurance company in an effort to reach funds which the plaintiff alleged were due the defendant from the garnishee. The garnishee answered that the funds due the defendant had been assigned by the defendant to Maxim's of Oregon, Inc., and that there were no funds due the defendant from the garnishee which were payable in Nebraska.

The plaintiff then filed an amended petition naming Maxim Kunin, Jeannette Kunin, Maxim's of Iowa, Inc., and Maxim's of Oregon, Inc., as additional defendants. The plaintiff alleged that Maxim Kunin and Jeannette Kunin were residents of Minneapolis, Minnesota, and that Maxim's of Oregon, Inc., was a foreign corporation. The plaintiff attempted to obtain jurisdiction over the property of these defendants by proceeding under subdivision (3) of section 25-517, R. R. S. 1943. This subdivision of the statute authorizes service by publication in actions against nonresidents or foreign corporations having property in this state which is sought to be taken by any of the provisional remedies.

In lieu of service by publication, a summons was served upon Maxim Kunin, Jeannette Kunin, and Maxim's of Oregon, Inc., at Minneapolis, Minnesota. The plaintiff also filed the affidavit of one of its attorneys which alleged that the affiant believed that Herzberg's, Inc., had in its possession property of the defendant Maxim Kunin which was held under the name of Maxim's of Iowa, Inc., and which could not be levied upon by attachment. A summons in garnishment was served upon Herzberg's, Inc., as garnishee. The garnishee answered that it held $643.78 for the account of Maxim's of Iowa, Inc., which included $347.63 due the United States of America.

Maxim Kunin, Jeannette Kunin, Maxim's of Iowa, Inc., and Maxim's of Oregon, Inc., filed separate special appearances. Later, Maxim Kunin, Jeannette Kunin, and Maxim's of Oregon, Inc., filed separate amended special appearances which were sustained and the action

was dismissed as to these defendants. The plaintiff's motion for new trial was overruled and it has appealed.

The plaintiff contends that the amended special appearances of Maxim Kunin, Jeannette Kunin, and Maxim's of Oregon, Inc., should have been overruled because they amounted to a general appearance in the district court. The only question which must be determined by this court is whether these defendants made a general appearance in the district court.

The separate amended special appearances alleged that the defendants Maxim Kunin, Jeannette Kunin, and Maxim's of Oregon, Inc., did not have any property or any debts owing to them in the State of Nebraska at the time the summons issued or at any time since then; that the garnishment proceedings were void because the affidavit had been sworn to before an attorney for the plaintiff as notary public; and, that the demand was not founded on contract and there was no allowance on the petition of the amount in value of the property that might be attached as required by section 25-1001, R. R. S. 1943. Affidavits were filed in support of the special appearances which alleged that the defendants did not have any property or debts owing to them in the State of Nebraska at the time the summons was issued or at any time since then. These affidavits were received in evidence. The plaintiff introduced no evidence except the defendants' brief.

As a preliminary matter, the plaintiff contends that the filing of the amended special appearances without leave of court was a general appearance because the defendants had no right to file such amended pleadings without leave of court.

The record fails to show any objection by plaintiff to the filing of the amended pleadings and no question was raised in the trial court concerning the right of the defendants to be heard upon the amended special appearances. The plaintiff has waived any right to object to the filing of the amended pleadings. Grotte v. Nagle,

50 Neb. 363, 69 N. W. 973. See, also, Behr v. Duling, 128 Neb. 860, 260 N. W. 281, in which the defendant was granted leave in open court to amend his answer but was held not to have made a general appearance.

The principal contention of the plaintiff is that a nonresident defendant, or a foreign corporation, who attempts to appear specially and object to the jurisdiction of the court over his person upon the ground that he has no interest in the property which the plaintiff has levied upon by attachment or garnishment, makes a general appearance in the action.

In Welch v. Ayres, 43 Neb. 326, 61 N. W. 635, the court discussed the right of a nonresident defendant to deny ownership of any property in the state as a ground for a special appearance. The court pointed out that jurisdiction under subdivision (3) of section 77 of the Code of Civil Procedure, now section 25-517, R. R. S. 1943, was dependent upon the defendant being a nonresident of the state or a foreign corporation, the owner of property or of debts owing to him within the state, and that such property or debts are sought to be taken by a provisional remedy or to be appropriated by judicial proceedings; and that if any of these conditions do not exist, jurisdiction of the defendant is not acquired by service by publication. The court concluded that such a defendant is entitled to show the nonexistence of any fact essential to confer jurisdiction, such as the fact that the defendant owns no property situated within the state and that a motion to quash the service should be sustained under such circumstances.

In Kneeland v. Weigley, 76 Neb. 276, 107 N. W. 574, the defendant was a nonresident who was served by publication. The defendant alleged by special appearance, and later by answer, that he had no interest in the property which had been attached and had no interest in any property, or debts owing to him, in the state. The special appearance was overruled and a demurrer to the answer was sustained. This court held

that the judgment of the district court should be affirmed because the defendant was not entitled to attack the jurisdiction of the court upon the ground that he did not own the property which had been attached. The court noted that a defendant is not entitled to have an attachment quashed upon the ground that he is not the owner of the property; that the defendant cannot be injured by an attachment if he does not own the property; that if a nonresident defendant does not own the property which has been attached, the entire proceeding is void; and that the opinion in Welch v. Ayres, *supra,* should be modified accordingly.

In Barkhurst v. Nevins, 106 Neb. 33, 182 N. W. 563, this court held that when a plaintiff seeks by attachment and garnishment to subject the property of a nonresident defendant to the payment of the debt and to obtain constructive service in the manner provided by law, and when the defendant appears specially for the purpose of objecting to the jurisdiction of the court over his person and disclaims that the garnishee has any money or other property belonging to him and disclaims any interest or right to the property named in the affidavit of garnishment, the defendant has made a general appearance because the appearance invokes the jurisdiction of the court upon matters outside of the question of the jurisdiction of the court. The holding was based upon Fowler v. Brown, 51 Neb. 414, 71 N. W. 54.

The defendants attempt to distinguish Barkhurst v. Nevins, *supra,* upon the ground that a denial of ownership of any property within the state is not the same as a disclaimer of any interest in specific property which has been attached or garnished. We do not think that such a distinction can be made. However, the disclaimer which was filed in Fowler v. Brown, *supra,* was entirely different from the denial of ownership made by the defendants in this case. Fowler v. Brown, *supra,* was a foreclosure case in which two of the defendants filed a disclaimer to the premises described in the peti-

tion and prayed that the action be dismissed as to them. The defendants made no attempt to appear specially and this court held that the defendants had made a voluntary appearance. The Fowler case is not authority for the rule declared in the Barkhurst case.

The opinion in Kneeland v. Weigley, *supra,* recognizes that the jurisdiction of the court depends upon the ownership by the defendant of the property which has been attached. The opinion states that the whole proceeding is void if the defendant does not own the property which has been attached.

The basis for the holding in Kneeland v. Weigley, *supra,* is the general rule that a disclaimer of ownership is not a ground for dissolving an attachment. It may be argued that the defendant cannot be injured by an attachment of property which he does not own, but we believe that there are other aspects of the question which should be considered. Orderly procedure requires that the parties to an action be able to litigate questions of jurisdiction in the proceeding itself before judgment. It does not seem unreasonable to require the plaintiff to prove the facts upon which the jurisdiction of the court depends. If the entire proceeding is void because of a lack of jurisdiction, why should any court be required to devote further time or effort to such a proceeding. We think that the better rule is that a nonresident defendant may establish that he does not own the property which has been attached where the attachment is the basis for the jurisdiction of the court. The holdings in Kneeland v. Weigley, *supra,* and Barkhurst v. Nevins, *supra,* should be reconsidered in the light of the rules generally applicable to special appearances.

The general rule is that an appearance is special when its sole purpose is to question the jurisdiction of the court. It is general if the party appearing invokes the power of the court on any question other than that of jurisdiction. Ivaldy v. Ivaldy, 157 Neb. 204, 59 N. W. 2d 373.

A special appearance is in the nature of a plea in abatement and is governed by the same rules. Gaines v. Warrick, 113 Neb. 235, 202 N. W. 866.

When a party appears specially before judgment and denies the truth of any material fact alleged in the affidavit for service by publication, the court must then determine the truth of the allegation contained in the affidavit. Jackman v. Miller, 119 Neb. 463, 229 N. W. 778; County of Douglas v. Feenan, 146 Neb. 156, 18 N. W. 2d 740, 159 A. L. R. 569; Katz v. Swanson, 147 Neb. 791, 24 N. W. 2d 923.

We conclude that where the defendant is a nonresident of the state, or a foreign corporation, and the validity of service by publication upon the defendant depends upon the defendant owning property, or having debts owing to him within the state which are sought to be taken by a provisional remedy or to be appropriated by judicial proceedings, the defendant may appear specially and deny that he owns any property or has any debts owing to him within the state. Welch v. Ayres, *supra.* See, also, Jones v. Danforth, 71 Neb. 722, 99 N. W. 495; Tanner v. DeVinney, 101 Neb. 46, 161 N. W. 1052; LaVarre v. International Paper Co., 37 F. 2d 141; Greenwood Grocery Co. v. Canadian County Mill & Elevator Co., 72 S. C. 450, 52 S. E. 191, 110 Am. S. R. 627, 2 L. R. A. N. S. 79, 5 Ann. Cas. 261; Schlater v. Broaddus (La.), 7 Martin 527; Harris v. Taylor, 35 Tenn. 536, 67 Am. Dec. 576; Pennsylvania Co. v. United Railways of Havana, 26 F. Supp. 379; Ribundo v. Kemp, 12 La. App. 512, 126 So. 577. Accordingly, the opinions in Kneeland v. Weigley, *supra,* and Barkhurst v. Nevins, *supra,* are modified to the extent that they conflict with this opinion.

The remaining question is the effect of the allegations that the affidavit in garnishment was void and that the plaintiff had failed to obtain an allowance on the petition of the amount in value of the property which might be attached. We need only determine whether these

allegations converted the special appearances into general appearances.

The plaintiff relies upon Aultman & Taylor Co. v. Steinan, 8 Neb. 109. In that case, which was a replevin case, the defendant attempted to appear specially but included a number of objections in his pleading which went to the merits of the action and requested that the order of delivery be quashed and the suit be dismissed. This was held to be a general appearance. The decision is not authority for the contention made by the plaintiff in this case.

Although the allegations relating to the alleged defects in the garnishment proceedings would have been proper in a motion to dissolve the garnishment, under the circumstances in this case, the inclusion of the allegations in the special appearances filed by the defendants did not result in the defendants making a general appearance. See, Coffman v. Brandhoeffer, 33 Neb. 279, 50 N. W. 6; McCartney v. McCartney, 128 Neb. 671, 260 N. W. 184.

We conclude that the record in this case fails to show that Maxim Kunin, Jeannette Kunin, and Maxim's of Oregon, Inc., made a general appearance in this action. The special appearances of these defendants were properly sustained.

The judgment of the district court is affirmed.

AFFIRMED.

H/K COMPANY, A NEBRASKA CORPORATION, APPELLANT, V. BOARD OF EQUALIZATION OF THE COUNTY OF LANCASTER, STATE OF NEBRASKA, ET AL., APPELLEES.

121 N. W. 2d 382

Filed April 26, 1963. No. 35390.

1. **Taxation: Appeal and Error.** An appeal to the district court from the action of the county board of equalization is heard in equity, and upon appeal to this court is tried de novo.

2. **Taxation.** The burden of proof is upon the taxpayer to establish his contention that his property has been unreasonably valued in an amount greater than its actual value, or that its value has not been fairly and properly equalized with all other property resulting in a discriminatory and unfair assessment.
3. ———. The valuation of property made by an assessor for taxation purposes is presumed to be correct if it reflects his own information and judgment.
4. ———. However, if he does not inspect the property and accepts the valuation fixed by another person, this presumption does not exist.
5. ———. All tangible property and real property in this state, not expressly exempt therefrom, shall be subject to taxation, and shall be valued at its actual value which shall be entered opposite each item and shall be assessed at thirty-five percent of such actual value. Such assessed value shall be taken and considered as the taxable value on which the levy shall be made. § 77-201, R. R. S. 1943.
6. ———. Actual value of property for taxation shall mean and include the value of property for taxation that is ascertained by using the following formula where applicable: (1) Earning capacity of the property; (2) relative location; (3) desirability and functional use; (4) reproduction cost less depreciation; (5) comparison with other properties of known or recognized value; and (6) market value in the ordinary course of trade. § 77-112, R. R. S. 1943.
7. **Constitutional Law: Taxation.** The Constitution of Nebraska requires taxes on all tangible property to be levied by valuation, uniformly and proportionately. Art. VIII, § 1, Constitution of Nebraska.

Appeal from the district court for Lancaster County: HERBERT A. RONIN, Judge. Affirmed.

Mason, Knudsen, Dickeson & Berkheimer, for appellant.

Paul L. Douglas, William D. Blue, Ronald D. Lahners, Floyd A. Sterns, and Walter D. Weaver, for appellees.

Heard before WHITE, C. J., CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

SPENCER, J.

This is an appeal from a judgment of the district court involving issues of tax valuation and equalization for the

tax year 1959 on improved commercial property in Lincoln, Lancaster County, Nebraska.

The appellant, H/K Company, a Nebraska corporation, which will hereinafter be referred to as plaintiff, is the owner of two separate but contiguous properties, referred to as tracts I and II. Tract I is described as Lot 1, and the east 10 feet of Lot 2, Original City, Block 39, Lincoln, Lancaster County, Nebraska. Tract II covers the west 40 feet of Lot 2 and all of Lot 3, Original City, Block 39, Lincoln, Lancaster County, Nebraska.

The county assessor of Lancaster County determined the actual values of the land and improvements for tax purposes for the year 1959 to be as follows:

	Tract I	Tract II	Total
Land	$106,270	$ 74,875	$181,145
Improvements	62,710	117,885	180,595
TOTALS	$168,980	$192,760	$361,740

The county assessor determined the assessments on these values to be as follows:

	Tract I	Tract II	Total
Land	$ 33,475	$ 23,585	$ 57,060
Improvements	19,750	37,130	56,880
TOTALS	$ 53,225	$ 60,715	$113,940

Lot 1 is the corner lot at the southwest corner of Fourteenth and P Streets in the city of Lincoln, Nebraska, with a frontage on Fourteenth Street of 142 feet and a frontage on P Street of 50 feet. The improvements during 1959 consisted of an old three-story brick building with wood joists. The building was in poor condition but was being rented. The second and third floors of the building were maintained as a rooming house. The first floor of the building was leased to small stores and shops. The east 10 feet of Lot 2 consisted of a stairway and entrance to another building which was situated on the balance of Lot 2 and on Lot 3 which adjoin Lot 1 on the west. The improvements

on Lots 2 and 3 are a two-story building which during 1959 was occupied by a cafeteria, a sport shop, and the offices of the American Bus Lines which were on the second floor. The stairway on the east 10 feet of Lot 2 led to the offices of the American Bus Lines.

The district court found that the valuation of the building improvements on tract I, as determined by the county assessor, was unreasonable, excessive, and arbitrary, and reduced the actual value of the improvements to $25,835, which, allowing for adjustment for the stairway, is the actual value of the improvements as determined by the plaintiff's expert. The district court further determined that the actual value of the land in tract I, as determined by the assessor, was arbitrary and unreasonable because evidence did not disclose that the same percentage of reduction had been applied to tract I as to tract II, and reduced the actual value of the land to $89,498, which is a little over $20,000 above the figure given by plaintiff's expert. It then found that the assessed value should be determined by taking 31.5 percent of the actual value of the said property, so that the assessed value of the land in tract I was reduced to $28,191.87, and the assessed value of the improvements to $8,138.03, making a total assessed value of tract I of $36,329.90.

No change was made by the district court in the actual or assessed values of tract II, so that the total assessed value of both tracts I and II was determined by the district court to be $97,044.90.

Plaintiff perfected an appeal to this court, alleging five assignments of error, which may be grouped as follows: The court erred (1) in failing to equalize the assessments with other property in Lancaster County; (2) in determining the assessed values of tracts I and II exceeded $65,972; and (3) in refusing to admit certain evidence of ratio studies.

The evidence discloses that this property was purchased by the plaintiff in June 1959, for a total consid-

eration of $275,000. For the purpose of securing a loan on the property, the plaintiff was required to obtain two independent appraisals of the loan value of the property. One of these appraisers testified for the plaintiff. It was his opinion that the fair market value of the property when he appraised it in 1959 was $280,590, which, broken down for comparison with tracts I and II, would be approximately as follows:

	Tract I	Tract II	Total
Land	$ 69,000	$ 81,000	$150,000
Improvements	20,590	110,000	130,590
TOTALS	$ 89,590	$191,000	$280,590

E. T. Wilkins & Associates completed a mass appraisal of all urban and rural property in Lancaster County in the spring of 1954. This appraisal was undertaken to equalize the assessed valuation on real estate and improvements in Lancaster County. All the findings by the Wilkins company were turned over to the county assessor of Lancaster County. There is extensive testimony as to the methods employed by the Wilkins company to determine the values fixed by it. Because the actual value figures used by the assessor are the same as the Wilkins company figures, the plaintiff complains that the assessor made no independent appraisal, but merely accepted the Wilkins' figures. However, the testimony of the county assessor is that the actual figures on his books are based on his own opinion of the valuations. When the Wilkins appraisers were present on a portion of this property in 1954, he was there with them. When the data was put on the Wilkins' card, he checked each item on the card. He did not personally inspect the property in 1959, but did send his chief deputy to do so, and the deputy reported back to him that there had been no changes in the property.

An appeal to the district court from the action of the county board of equalization is heard in equity, and upon appeal to this court is tried de novo. See LeDioyt v.

County of Keith, 161 Neb. 615, 74 N. W. 2d 455. The burden of proof is upon the plaintiff to establish its contention that its property has been unreasonably valued in an amount greater than its actual value, or that its value has not been fairly and properly equalized with all other property resulting in a discriminatory and unfair assessment. See Newman v. County of Dawson, 167 Neb. 666, 94 N. W. 2d 47.

Generally, the valuation of property made by an assessor for taxation purposes is presumed to be correct if it reflects his own information and judgment. However, if he does not inspect the property and accepts the valuation fixed by another person, this presumption does not exist. See Baum Realty Co. v. Board of Equalization, 169 Neb. 682, 100 N. W. 2d 730.

It is the plaintiff's position that the valuations fixed for tracts I and II are those of the Wilkins company and not those of the assessor. The assessor did inspect the property personally, checked the individual items appearing on the Wilkins' cards which went into the valuation, agreed with the figures, and adopted them as his own. While the assessor did not inspect the property in 1959, he did send his chief deputy to do so. We do not accept the plaintiff's premise that the county assessor gave no opinion based on his own analysis. We find the evidence to indicate otherwise.

To prove the property to be valued in an amount greater than its actual value, plaintiff proved its sale price in 1959, and produced witnesses who fixed its actual value between $275,000 and $280,590. The district court found the valuation placed by the assessor on tract I excessive on both the land and the improvements, and reduced the valuation. Plaintiff complains that the reduced valuation on tract I is still excessive.

Section 77-201, R. R. S. 1943, provides as follows: "All tangible property and real property in this state, not expressly exempt therefrom, shall be subject to taxation, and shall be valued at its actual value which shall

be entered opposite each item and shall be assessed at thirty-five per cent of such actual value. Such assessed value shall be taken and considered as the taxable value of which the levy shall be made."

"Actual value" is defined by section 77-112, R. R. S. 1943, as follows: "Actual value of property for taxation shall mean and include the value of property for taxation that is ascertained by using the following formula where applicable: (1) Earning capacity of the property; (2) relative location; (3) desirability and functional use; (4) reproduction cost less depreciation; (5) comparison with other properties of known or recognized value; and (6) market value in the ordinary course of trade."

The county assessor testified that each of the factors enumerated above were considered in connection with his personal assessments of the property in arriving at his opinion of the actual value of tracts I and II. Plaintiff challenges this statement because the assessor has not changed the assessment since 1954 and the first five of these particular factors did not become a part of the statute until 1955. The testimony, however, is undisputed except by this inference. We cannot say from this record that the assessor did not review his assessment in the light of these factors and decide to make no change.

As to tract II, the assessor's actual valuation after making adjustment for the east 10 feet is only $1,760 above the market value fixed by plaintiff's expert. This difference is so minimal that it is evident that the actual valuation fixed by the assessor could not be considered unreasonable. We are concerned, therefore, with the reasonableness of the actual value of tract I and the question as to whether the assessed valuation on both tracts has been fairly and proportionately equalized with all other property.

With reference to the location and functional use of tract I, there was a difference in the appraisal approach between the assessor and the plaintiff's witnesses.

The assessor fixed his value based on the 142-foot frontage on Fourteenth Street. Plaintiff's witnesses considered the value based on the 50-foot frontage of Lot 1 on P Street. During 1959, the use of the property was on Fourteenth Street. All of the shops faced on that street, and the main entrance to the apartments on the second and third floors was on Fourteenth Street. While plaintiff's expert did not feel this should make any difference in the valuation, we believe there is room for argument on this point so far as the highest and best use of the property is concerned. We approve the formula adopted by the assessor in determining the actual value of tract I by relating it to front footage on Fourteenth Street.

There is no evidence in the record on the actual value in 1959 of comparable properties, or of the other properties in the vicinity. Plaintiff's expert did, however, use six sales between 1950 and 1956 of properties in the general area for comparison purposes. The assessment date was March 1, 1959. § 77-1301, R. R. S. 1943. The property was not purchased by plaintiff until June 1959. Actual value is a matter of opinion based upon the use of the statutory formula. While the sale price three and one-half months later is entitled to considerable weight, it is not the sole controlling factor. We have carefully reviewed the adjustments made by the trial court on actual value, and have come to the conclusion that it cannot be said that the values fixed by the trial court are so unreasonable as to require further adjustment.

We determine that plaintiff has failed to sustain the burden of proving its property has been unreasonably valued in an amount greater than its actual value. We are now concerned with the contention that the assessed value is greater than that of other property in the county.

Section 77-201, R. R. S. 1943, requires that all property shall be assessed at 35 percent of its actual value. In Lancaster County, commercial property is assessed at

31.5 percent of its actual value as determined by the assessor. This has been the practice since 1954 when the State Board of Equalization reduced assessments reported by Lancaster County 10 percent. Instead of reducing the actual value figures, the assessor reduced the assessed value figures the 10 percent. The result is the same, but the rate in Lancaster County is 31.5 percent rather than 35 percent. While it makes no difference in this case, we disapprove of the method followed and state that the statutory method of determining assessed value must be strictly followed. The actual value of all property for tax purposes must be determined and the property assessed at 35 percent of that value as required by law. It is plaintiff's contention that other property in Lancaster County in 1959 was assessed at 23.99 percent of actual value as determined by a ratio study to which reference will be made later.

The assessor, on cross-examination, described the method used by him in 1954 to equalize the assessed valuation of all property in Lancaster County. The State Board of Equalization equalized the real estate of all counties in 1953. The assessor took the equalization figure for Lancaster County for 1953, and because he had used different figures for commercial, rural, and residential properties, he applied a percentage valuation of 70 percent, 65 percent, and 60 percent respectively of the 1953 valuation in an endeavor to equalize the basic or actual value. At that time, assessed value was 50 percent of basic value. This figure was not changed to 35 percent until 1957. To arrive at the assessed or taxable valuation, the assessor then took 50 percent of the figures he had obtained, and arrived at a percentage figure of the 1953 valuation of 35 percent for commercial properties, 32.5 percent for rural properties, and 30 percent for residential properties, rather than 50 percent for all real estate as required at that time by section 77-201, R. R. S. 1943. These figures were further reduced 10 percent by the State Board of Equalization.

There have been statutory changes since that time, both in the definition of actual value and in the assessment percentage. There is no evidence in this record as to the method used subsequent to 1954. The Constitution of Nebraska requires taxes on all tangible property to be levied by valuation, uniformly and proportionately. Art. VIII, § 1, Constitution of Nebraska. There is no authority for setting up classes for the assessment of real estate. In the absence of proof to the contrary, we must presume that the assessor in 1959 followed the law and that all property has been assessed uniformly.

To prove that its property was not assessed proportionately, uniformly, and equally with other property in Lancaster County, plaintiff relies mainly on a ratio study made by an employee of the Nebraska State Tax Commissioner, included as a part of an official state report and used by the State Board of Equalization. The ratio study is based upon the percentage relationship of assessed value to the sales price of property in the county. Ratio studies are prepared from the material supplied under section 77-1320, R. R. S. 1943, which provides as follows: "The register of deeds and the county clerk, if he or she is the ex officio register of deeds, of each county shall, on or before March 1 of each year, transmit to the State Tax Commissioner a report made upon blank forms to be prepared and furnished by the State Tax Commissioner showing all sales or transfers, except judicial sales, of farm lands and town property of and filed for record in the county of such officer during the previous calendar year."

It is to be noted that the report is to cover *all sales or transfers except judicial sales.* The register of deeds of Lancaster County testified that with the approval of the State Tax Commissioner he instructed the employees who prepared the report to select only 5 percent of all sales in the county on a random basis, and to report these. When this 5 percent was processed by the State Tax Commissioner's office, all transactions where the re-

lationship of the assessed value to the sale was less than 10 percent or more than 89 percent were discarded. The balance was then used to determine the ratio of the assessed valuation to the sales price. The percentage of this sampling for 1959 was 23.99 percent, which was obtained by dividing the total assessed value of the sales used by the total sales price. Actually, exhibit No. 15 indicates that 558 sales were reported to the State Tax Commissioner from Lancaster County for 1959. Only 466 were considered for the ratio study, so 92, or almost one-fifth, were eliminated. If many of those eliminated were in the bracket above 89 percent, it is evident that the average percentage figure for those reported would be too low. In any event, without a detailed discussion of some of the elements which might give a probative value to a ratio study, we find that the random sampling of so small a portion of the 1959 sales in Lancaster County is not sufficient to meet the burden of proof required for the plaintiff to prove that its property was not assessed proportionately, uniformly, and equally with other property in the county.

Plaintiff also claims that the trial court erred in refusing to admit ratio studies for the years 1958 and 1960. Without passing on the admissibility of the evidence, in view of what we have said relative to the 1959 study, plaintiff could not have been prejudiced by the exclusion of this evidence.

We find on trial de novo that the plaintiff has failed to meet the burden imposed by our law to prove the assignments discussed and that the judgment of the district court should be affirmed.

AFFIRMED.

JACK B. LEWIS, APPELLEE, V. ELBERT M. GALLEMORE, SR., ET AL., APPELLEES, KENNETH H. DRYDEN ET AL., INTERVENERS-APPELLANTS.

121 N. W. 2d 388

Filed April 26, 1963. No. 35407.

1. **Attorney and Client.** The statute providing for an attorney's lien, section 7-108, R. R. S. 1943, is in derogation of the common law and will be strictly construed.
2. **Attorney and Client: Receivers.** A court-appointed receiver is not an adverse party within the meaning of section 7-108, R. R. S. 1943, and an attorney can obtain no lien upon the funds in the possession of such receiver.
3. ———: ———. The basis of the payment of attorney's fees and expenses by a court from funds in the possession of a court-appointed receiver is founded on general equitable principles which are proper only for dominating reasons of justice.
4. **Attorney and Client.** Where an attorney acting for his client induces a settlement of litigation by the client giving security, he will not ordinarily be permitted to assert a prior right to such security for attorney's fees where he had knowledge of and failed to disclose such claim at the time the settlement was entered into. The doctrines of waiver and estoppel bar such a result.
5. **Equity.** A court of equity will not lend its aid to one under such circumstances on the principle that one seeking the aid of a court of equity must come into court with clean hands.

Appeal from the district court for Buffalo County: S. S. SIDNER, Judge. Affirmed.

Dryden & Jensen, for appellants.

Tye, Worlock & Knapp, for appellee United Pacific Ins. Co.

Richard A. Dier, for appellee Lewis.

Heard before WHITE, C. J., CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

CARTER, J.

This is an appeal from the judgment of the district court for Buffalo County holding that an attorney's lien filed by Kenneth H. Dryden and John P. Jensen,

attorneys, was inferior in priority to the lien of the United Pacific Insurance Company on money in the hands of the receiver of Radio Station KRNY located in Kearney, Nebraska.

We deem it necessary to discuss the background of this litigation. An action was commenced in the district court for Buffalo County by Jack B. Lewis to have the nature and extent of his interest in the radio station determined. The trial court found that Lewis owned a 25 percent interest in a joint venture in the ownership of the radio station and granted his prayer for the appointment of a receiver pending the determination of other issues involved in the litigation. The judgment was affirmed on appeal to this court. Lewis v. Gallemore, 173 Neb. 211, 113 N. W. 2d 54.

On March 10, 1961, the trial court appointed a receiver. On March 16, 1961, the receiver recommended that the radio station be sold immediately. On March 18, 1961, the court ordered the sale of the radio station to the highest bidder. This was done. The sale was confirmed on April 12, 1961. On August 14, 1961, the court directed the receiver to complete the sale of the radio station upon the payment of the purchase price. An appeal was taken to this court. We dismissed for the reason that the order appealed from was not a final order. Lewis v. Gallemore, 173 Neb. 441, 113 N. W. 2d 595.

On September 7, 1962, the court determined that E. M. Gallemore, Sr., had a capital interest in the proceeds of the radio station in the amount of $30,610.27, less the claim of the First State Bank of Beaver City, Nebraska, in the amount of $1,318.36, and less a contingent liability of the First Investment Company in the amount of $1,386.88. Jack B. Lewis was found to have a capital interest in the radio station in the amount of $3,831. The court further held that any funds remaining from the sale of the radio station after the payment of its credi-

tors would be divided between Gallemore and Lewis in the above proportions.

Dryden and Jensen were the attorneys for Gallemore from the beginning of this litigation. On January 9, 1962, Dryden filed a notice of attorney's lien in the district court for Buffalo County. On September 7, 1962, Dryden and Jensen filed their petition in intervention to obtain the enforcement of their attorney's lien in which they admitted that the district court had previously held: "The Court finds that lien of United Pacific Insurance Company is a lien against Elbert M. Gallemore's share in the net proceeds of the partnership, but not a lien on the assets of the partnership, as such. And, it is therefore inferior to the claim of the General Creditors of the partnership." It is conceded by United Pacific Insurance Company and Dryden and Jensen that the rights of each are limited to the share of Gallemore in the proceeds of the sale after all creditors of the partnership have been paid.

The claim of the insurance company is based upon a performance bond furnished to E. M. Gallemore Construction Company and guaranteed by E. M. Gallemore, Sr. Judgments were obtained against E. M. Gallemore Construction Company in the amount of $7,009.07, which were paid by the insurance company and assignments taken from the judgment creditors. Included in the claim filed by the insurance company is an item of attorneys' fees in the amount of $1,500 and an item of court costs in the amount of $113.95 which Gallemore agreed to pay. The insurance company asserts the total due to be $8,509.07, although the sum of the items listed, which were approved by the court, is $8,623.02.

The evidence shows that on December 7, 1960, after paying and receiving assignments of the judgments, the insurance company caused executions to be issued and levied on the assets of the radio station. To avoid a sale of the radio station to satisfy the executions, a written settlement agreement was entered into between

the insurance company and E. M. Gallemore Construction Company and E. M. Gallemore whereby the insurance company agreed to withold execution and sale of the property levied upon if E. M. Gallemore Construction Company and E. M. Gallemore would do the following: 1. Execute a first real estate mortgage to the insurance company on three lots owned by Gallemore. 2. Execute a chattel mortgage on Gallemore's interest in the radio station. 3. Agree to pay the insurance company $500 on January 15, 1961, and the sum of $500 on the 15th day of each month thereafter until the amount due was wholly paid. The settlement agreement was complied with by Gallemore and the executions were recalled on January 18, 1961, by the insurance company.

After the date of the levy of the executions on December 7, 1960, and the signing of the settlement agreement on January 17, 1961, Dryden and Jensen on January 9, 1962, filed their claim for an attorney's lien. The record shows that these attorneys represented Gallemore in negotiating the settlement agreement and had full knowledge of its terms. They at no time revealed during the negotiations that they were claiming an interest in the property or the proceeds thereof which were being transferred or mortgaged to the insurance company as security for Gallemore's indebtedness to it. Dryden and Jensen now assert that their attorney's lien, approved by the court in the amount of $3,500, dates from the beginning of their employment in the case and is superior to the rights of an execution creditor, or to a subsequent attachment or garnishment, or other liens thereon subsequent in point of time.

An attorney's lien was unknown at the common law and, like other statutes granting rights in derogation of the common law, it is subject to strict construction. Under our statute an attorney has a lien for attorney's fees on papers and money of his client in his possession and in the hands of the adverse party in an action or

proceeding from the time of giving notice of the lien to that party. § 7-108, R. R. S. 1943.

At the time the lien was filed in the instant case the money upon which a lien is sought was in the possession of the receiver appointed by the court. Money in the hands of a court-appointed receiver is not in the hands of an adverse party. A court-appointed receiver is an officer of the court who acts under the direction of the court for the benefit of all the parties to the litigation. The filing of a claim of lien on the money in the hands of a receiver is not within the provisions of section 7-108, R. R. S. 1943, and consequently Dryden and Jensen have no attorney's lien. This question was decided, and we think correctly, in Culhane v. Anderson (Neb.), 17 F. 2d 559. While a court under certain circumstances may allow attorney's fees from funds in the hands of a receiver, it is done under the equitable powers of the court and not by virtue of an attorney's lien.

In their petition in intervention Dryden and Jensen pray for general equitable relief. They allege that all of the efforts of E. M. Gallemore and his attorneys have been directed toward the preservation of the fund on which the insurance company has a lien and that it would be inequitable to permit the insurance company to have a claim or lien on any amounts due these attorneys.

It is not disputed that these attorneys represented Gallemore from the commencement of this litigation and that they have earned an attorney's fee. Their contention, however, that they have used their best efforts to build up the fund for the benefit of a class or for the benefit of all the parties to the litigation cannot be sustained. The plaintiff, Lewis, was represented by attorneys in asserting and maintaining his rights. The defendant, Gallemore, was represented by Dryden and Jensen in alleging and proving his interest in the litigation. Upon the appointment of a receiver, the receiver employed his own attorney. The insurance company, when it came into the litigation, had its own attorneys

employed. The case was an adversary one in which the fruits which came to Gallemore were wholly incidental to the receivership and the rights of the insurance company who had a contractual lien on the radio station and an equitable lien on the interest of Gallemore in the proceeds of its sale. The case bears no similarity to the cases of Blacker v. Kitchen Bros. Hotel Co., 133 Neb. 66, 273 N. W. 836; Gamboni v. County of Otoe, 159 Neb. 417, 67 N. W. 2d 489; and Summerville v. North Platte Valley Weather Control Dist., 171 Neb. 695, 107 N. W. 2d 425, cited by the interveners. A basis for the allowance of these attorneys' fees by the district court as against the lien of the insurance company on the ground of a class representation is not sustained. They did not represent a class of litigants. They represented Gallemore only. Linn v. Linn, 146 Neb. 666, 21 N. W. 2d 283.

The intervening attorneys allege that it would be inequitable for the court to hold the lien of the insurance company to be superior to their claim for attorneys' fees. In this respect the evidence shows that the insurance company levied its executions on Gallemore's interest in the radio station. In order to avoid a sale the insurance company, at the instance of Gallemore, released its executions and accepted a real estate mortgage on some lots and a chattel mortgage on the property in the radio station. This was pursuant to a written settlement agreement which these attorneys assisted in negotiating. They remained silent as to any claim of a lien or claim of attorneys' fees. On behalf of their client they induced the insurance company to change its position by withholding the execution sale of the property and accepting what it was led to believe was a first lien on the property on which the attorneys now claim a prior right. Even if they had a lien, they would be estopped to assert it as a prior lien to that of the insurance company under the circumstances here shown. Certainly, they are in no position to appeal to a court of equity for relief in the situation here existing. It is a general rule that

where an attorney permits a creditor's lien to attach to the property of his client, with full knowledge of the facts and without disclosing his interest therein, he will not ordinarily be permitted subsequently to assert a claim to the prejudice of such lienor where by his silence he has permitted the lienor to justifiably believe that such a claim did not exist.

For the foregoing reasons the judgment of the district court is correct and it is affirmed.

AFFIRMED.

IN RE APPLICATION OF UNITED MINERAL PRODUCTS COMPANY.
UNITED MINERAL PRODUCTS COMPANY, APPELLEE, V. NEBRASKA RAILROADS OF WESTERN TRUNK LINES COMMITTEE, APPELLANT.
121 N. W. 2d 492

Filed May 3, 1963. No. 35374.

1. **Public Service Commissions: Appeal and Error.** On appeal from an order of the Nebraska State Railway Commission fixing rates for common carriers, the only questions for determination are whether or not the Commission acted within the scope of its authority, and whether or not the order made is reasonable and not arbitrarily made.
2. **Public Service Commissions: Carriers.** The Nebraska State Railway Commission shall have the power, and it shall be its duty, as between points within the state, to fix all necessary rates and to correct abuses and prevent unjust discriminations as to such rates.
3. **Public Service Commissions.** The rate-fixing power of the Nebraska State Railway Commission, if properly exercised, is legislative in character and has the force and effect of a statute on the subject.
4. **Public Service Commissions: Carriers.** In the fixing of rates, the railroads may not give any undue preference or advantage to any particular person or locality, or subject any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

5. ———: ———. Where the circumstances of the transportation are substantially similar, the maintenance by a group of carriers of rates on a higher level from one point than another to the same destinations, with consequent injury to the point having the higher level, is discriminatory and preferential.
6. ———: ———. Where discrimination as to rates is an issue, the commodity price comparison with rates of transportation may be an important issue.
7. ———: ———. Rate discrimination is a fact issue peculiarly committed to the discretion of the Nebraska State Railway Commission, based upon an application of all the facts and circumstances, and its decision may not be disturbed unless arbitrary and unreasonable and outside of the scope of its authority.
8. ———: ———. The lowest rates published, or charged, for substantially the same kind of service are prima facie evidence of a reasonable rate for the services under investigation.
9. ———: ———. In establishing through joint rates, the Nebraska State Railway Commission is required to consider average rates charged by the railroads for shipments within this state for like distances over their respective lines.
10. ———: ———. Railroads may not reduce rates to meet competition at one point and refuse to meet it at other points where the circumstances are substantially similar.

Appeal from the Nebraska State Railway Commission. Affirmed.

Mason, Knudsen, Dickeson & Berkheimer, for appellant.

Nelson, Harding & Acklie and Richard A. Peterson, for appellee.

Heard before WHITE, C. J., CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

WHITE, C. J.

This is an appeal from a Nebraska State Railway Commission order fixing reduced rates on the carriage of limestone dust. The general questions involved concern the power of the commission to correct discriminatory rates and whether the newly established rates are reasonable.

This action was commenced by the appellee shipper before the commission to establish a reduced joint line, single car commodity rail rate on limestone dust in covered hopper cars from Weeping Water to Ord, Allen, and Hastings, Nebraska, respectively. The limestone dust shipped from Weeping Water to these destinations is required to be shipped by the Missouri Pacific Railroad Company and the Chicago, Burlington & Quincy Railroad Company. The rate for this carriage will hereinafter be referred to as joint line rate. The Burlington alone ships limestone dust from Ashland, and the rate for this carriage will hereinafter be referred to as the single line rate. The appellee and shippers from Ashland are in competition for furnishing limestone dust on state highway contracts at the respective destinations of Ord, Allen, and Hastings. The rate structure per ton, at the time the application was filed, referred to hereinafter as the former rate structure, was as follows:

	TO ORD		TO ALLEN		TO HASTINGS	
From	Mileage	Rate	Mileage	Rate	Mileage	Rate
Weeping Water	195.8	4.30	151.6	3.93	131.1	3.75
Ashland	185.5	2.94	128.6	2.39	120.8	2.39

The rates to Ord, Allen, and Hastings were respectively $1.36, $1.54, and $1.36 per ton higher than the rates from the adjacent shipping point of Ashland with differences in mileage of approximately 10 miles on the movements to Ord and Hastings, and 23 miles to Allen. The appellee alleged that it was unable to compete on an equitable basis for the business of supplying construction projects at the destinations involved because of the magnitude of the rate preference, and that this preference constituted an unjust discrimination as to rates between shippers resulting in an obstruction of competition to the detriment of the appellee and the public. The appellant, Nebraska Railroads of Western Trunk Lines Committee, is a group of railroads organized to represent the railroads in rate matters and thus avoid duplication of effort, and the Burlington

represents this committee in this proceeding on behalf of itself and the Missouri Pacific, the two railroads directly involved.

After a hearing, the commission found that it had previously approved a differential of 54 cents per ton on the commodity for joint line rates over the single line rates, this being a switching charge for transfer from the Missouri Pacific to the Burlington at Lincoln for the Ord and Hastings shipments, and at Louisville for the Allen shipments. Integrating this joint line differential with the previous rate structure from Ashland, it established new rates from Weeping Water to Ord, Allen, and Hastings of $3.48, $2.83, and $2.93 per ton, respectively, to the different destinations.

The appellant railroads, in substance, contend that the new rates are not reasonable or compensatory and that the commission may not adjust the rates to equalize differences between competing shippers.

The problem in this case breaks down into two precise questions:

1. Could the commission reasonably find that the existing rates from Weeping Water to the destinations involved were unjustly discriminatory as between shippers of limestone dust at Ashland and Weeping Water?

2. If the old rates were discriminatory, did the commission act arbitrarily and unreasonably in establishing the new schedule of rates?

The testimony in this case consists, in a large part, of cost estimates based on system averages computed by the railroads over all of their lines in a district comprising several states. Based on these estimates, the rate experts for the railroads have converted these basic costs into application to the specific movements in controversy in this case, demonstrating by charts and mathematical computations that the ordered new rates are noncompensatory in nature as between Weeping Water and the three destinations involved. We summarize the portion of this mass of testimony that is

pertinent to the questions involved here as follows:

1. The appellee is a limestone material shipper, competitive with shippers of the Burlington at Ashland, Nebraska, and others.

2. Directly involved in this controversy were bidding and shipments of 1,190, 830, and 1,090 tons of limestone dust to be shipped to Ord, Allen, and Hastings, respectively.

3. Limestone dust is a heavy, low cost product moving in carload lots of 58 to 68 tons, with a value F.O.B. of $5 per ton. The carriage rates of $2.39 to $4.30 per ton bear a high proportion to the value of the product itself.

4. From Ashland to destinations involved here, the Burlington alone ships. This is known as a single line carriage and rate. The Missouri Pacific from Weeping Water hauls only to Lincoln and Louisville, a small percentage of the total distance, and then switches to the Burlington which completes the carriage. This is known as the joint line rate, and the switching charge at the points involved is known as the joint line differential.

5. The switching charge, or joint line differential, is agreed to by the parties and reflected in the order as being 54 cents per ton.

6. The rails, *in order to meet truck competition at Ashland on this commodity,* applied for and secured a special lower or depressed rate under a previously existing standard rate scale called the normal single line scale. This rate we will call the truck-compelled single line rate. This rate is obligatory and is roughly 40 to 50 cents per ton lower than the normal single line scale. There is no truck-compelled joint line rate from Weeping Water, and this is, in essence, why the complaining shipper filed this application.

7. The chief contention of the protesting railroads is the noncompensatory nature of the new rates. No actual cost figures were introduced by the rails to sustain this position. The opinion testimony of the rail-

road experts as to the actual costs involved were based, as mentioned before, on 1960 system-wide averages in several states. The effect of this testimony is to show that the old joint line rate from Weeping Water was compensatory, and that the Burlington truck-compelled competitive rates, as well as the normal single line rates, were substantially beneath the system average costs, with the competitive costs about 40 to 50 cents a ton underneath the normal rate. There is a variance in ton loadings, experts for the railroads using 60 tons for rate comparison, but there is testimony to sustain a finding that the shippers load up to 68 tons per covered hopper car, a differential making an obvious difference in costs per ton on each car.

Was the former rate structure discriminatory? Section 75-502, R. R. S. 1943, prohibits the railroads from giving any undue preference or advantage to any particular person *or locality,* or subjecting any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever. The commission, by section 75-208, R. R. S. 1943, is directed to make and is given the power "to correct abuses and prevent unjust discrimination." These powers are legislative in character, and when properly exercised, have the force of a statute on the subject. Nebraska Limestone Producers Assn. v. All Nebraska Railroads, 168 Neb. 786, 97 N. W. 2d 331; Farmers Union Livestock Commission v. Union Pacific R. R. Co., 135 Neb. 689, 283 N. W. 498. We have held directly that the power to compel a common rate on gravel and crushed rock to prevent *economic preference* in favor of gravel shippers to the extent shown, raises an issue peculiarly within the province of the commission to decide. Nebraska Limestone Producers Assn. v. All Nebraska Railroads, *supra.*

It is established law that this court may not and will not interfere with a commission order fixing rates if it

acts within the scope of its authority and if its order is not unreasonable or arbitrarily made.

The evidence in this case shows that shippers from Weeping Water to the destinations involved are paying rates per ton from 45 to 70 percent higher than the comparable truck-compelled competitive rates established by the railroads from Ashland. The mileage and joint line or switching differential between these points is the only justification offered for this disproportion in rates. Rate differences were $1.36, $1.54, and $1.36 a ton on movements ranging from only 10.3 to 23 miles further. The commission held, in effect, that the circumstances of the transportation were substantially similar, that the maintenance by a group of carriers of rates on a higher level from one point than another to the same destinations, with consequent injury to the point having the higher level, was discriminatory and preferential. This was a proper and reasonable exercise of its declared duty and power. New Orleans Traffic & Transp. Bureau v. Aberdeen & R. R. Co., 296 I. C. C. 59; Ohio-Kentucky Associated Industries v. Ahnapee & W. Ry. Co., 243 I. C. C. 579; Washington Potato & Onion Shippers Assn., Inc. v. Union Pacific R. R. Co., 300 I. C. C. 537. In the above cases, under a virtually identical statute, 49 U. S. C. A., § 3, (1), (2), (3), p. 219, it is pointed out that the unjust discrimination results from compelling the shippers to absorb, in a highly competitive market, rate differences disproportionate to any established difference in service or the condition of the transportation. Rate differences of a few cents per ton on a commodity of this type may be sufficient to divert the contract from one shipper to another.

The difference in rates is obviously disproportionate to the small mileage differential. The small mileage difference does not serve to obscure the discriminating nature of this competitive rate structure. Furthermore, with relation to mileage differences in fixing rates, the

fixing of zone on common destination territories and points of origin within a locality as to rates has long been recognized as a proper and even necessary practice and will not justify a charge that the rate-fixing body's action is unreasonable and arbitrary. Ohio-Kentucky Associated Industries v. Ahnapee & W. Ry. Co., *supra;* Washington Potato & Onion Shippers Assn., Inc. v. Union Pacific R. R. Co., *supra;* New Orleans Traffic & Transp. Bureau v. Aberdeen & R. R. Co., *supra.*

The commodity cost of limestone dust is $5 a ton compared with an existing rate structure from Weeping Water running from $3.75 to $4.30 per ton. The high proportion of transportation cost to product value makes acutely significant a rate difference from adjacent points for competitive shippers, especially where the railroads have accomplished a special truck-compelled rate reduction from one point only for an acknowledged competitive purpose. The effect of a discriminatory rate structure in this situation is magnified. Further, the Burlington, in performing from 90 to 100 percent of both hauls should not be permitted to compensate its low truck-compelled rate by maintaining a higher or compensatory rate against a competitive shipper. Where discrimination is an issue, the commodity price comparison with rates of transportation is an important issue. Allegheny Ludlum Steel Corp. v. Pennsylvania P. U. Commission, 166 Pa. Super. 173, 70 A. 2d 475. Discrimination is a fact issue peculiarly committed to the discretion of the administrative body, based upon an application of all the facts and circumstances, and its decisions are not to be disturbed unless unsupported by evidence or for some reason amount to an abuse of power. New York v. United States, 331 U. S. 284, 67 S. Ct. 1207, 91 L. Ed. 1492; Swayne & Hoyt, Ltd. v. United States, 300 U. S. 297, 57 S. Ct. 478, 81 L. Ed. 659; Board of Trade of Kansas City v. United States, 314 U. S. 534, 62 S. Ct. 366, 86 L. Ed. 432.

From what has been said as expository of the evidence

as to discrimination, it is abundantly clear that the commission findings in this respect are not arbitrary, discriminatory, or beyond its range of granted powers.

We turn now to an examination of the validity of the newly ordered rates. The new rates from Weeping Water are the truck-compelled competitive rate from Ashland on the Burlington with the switching charge or joint line differential of 54 cents added.

Rate fixing is legislative in character, and carries a presumption of being just, reasonable, and lawful. Nebraska Limestone Producers Assn. v. All Nebraska Railroads, *supra*. *The lowest rates published, or charged, for substantially the same kind of service are prima facie evidence of a reasonable rate for the services under investigation.* § 75-402, R. R. S. 1943. In establishing *through* joint rates, section 75-308, R. R. S. 1943, in substance, requires the commission to consider average rates charged by the railroads *for shipments within this state for like distances over their respective lines.*

The main attack on the new rates is that they are noncompensatory and thus arbitrary and unreasonable. This position is premised on a voluminous showing in the evidence as to costs based on system-wide averages over several states based on 60-ton loads. Significantly absent from the evidence is any showing as to actual costs or a contention or suggestion as to the noncompensatory nature of the truck-compelled competitive rates of the Burlington's carriage from Ashland. System-wide average costs, especially for comparatively short hauls, are of little value by themselves in determining the compensatory nature of proposed rates. Iron & Steel Articles from Chicago, Ill. to South Dakota, 313 I. C. C. 185; Glassware from Michigan to Marion, Ind., 68 M. C. C. 337; Drugs, Trucks, Hides to and from Rocky Mountains, 61 M. C. C. 118. A rate comparison, however, forms a reasonable basis for rate determination. §§ 75-308, 75-402, R. R. S. 1943; Salt from Michigan to Joliet, Ill., 305 I. C. C. 118. There is evidence in

the record that limestone dust is loaded as high as 68 tons per load, and the commission also found that heavy carload commodities, such as limestone dust, do not move at the fully distributed cost level, but at a considerably lower level. Even assuming the application of a system-wide average of costs, the application by the commission of comparative rates and other factors cannot be found to be unreasonable and arbitrary. The real question is whether the new rate structure is substantially as compensatory as the unchallenged truck-compelled competitive rates adopted by the Burlington and the railroads at Ashland. These unchallenged rates are presumptive of the reasonableness of the new Weeping Water rates.

Railroads may not reduce rates to meet competition at one point and refuse to meet it at another where the circumstances are substantially similar. New River Co. & White Oak Coal Co. v. Chesapeake & O. Ry. Co., 245 I. C. C. 115; R. Robinson, Inc. v. Baltimore & O. R. R. Co., 269 I. C. C. 566. There is evidence in this record supporting the conclusion that the cost-rate ratio and the cost-revenue comparison of the two hauls only varies within a very small percentile range.

The appellant argued error in the commission's use of the Ashland truck-compelled rate as a base for the rates and not allowing anything more in the new rates than the 54 cents switching charge as a joint line differential, there being a small proportionate distance in mileage to the destination points. There is an allowance of 54 cents for a joint line differential, however, and this argument is based on a hypothetical comparison of single line rates existing from both places, and there is no single line rate from Weeping Water to make such a comparison. Furthermore, as pointed out previously, reasonable rate fixing does not require differential rates for small proportionate differences in mileage from adjacent points in the same locality. In the Burlington's truck-compelled rate shown by exhibit 5, the same rates

are applied to mileage differences, from the same point of origin on a single line, ranging from 5 to 50 miles. For example, the same rate of $3.75 is applied between the rates for 200 miles and the rate for 240 miles. See Ohio-Kentucky Associated Industries v. Ahnapee & W. Ry. Co., *supra,* applying the same rates as between Cincinnati, Louisville, St. Louis, and destination territories in eastern Wisconsin.

The appellant finally argued that the commission has no power to adjust rates to equalize competition and cites and quotes many cases. This principle is true, but it must correct discriminatory rates which injure competitive shippers which is the case here.

The record shows that an inadvertent error crept into the record by mutual mistake in basing the new rates on the assumption that the old rate from Ashland to Allen was $2.29, when it actually was $2.39. This should be corrected but forms no basis for overturning the commission's order.

The contention that the commission's action was unreasonable and arbitrary cannot be sustained. There was a reasonable basis for ordering rates which would be nondiscriminatory to Weeping Water shippers, and at the same time provide an overall return commensurate with the truck-compelled competitive rates established by the railroads at Ashland. Nothing that is said herein should be construed to limit the commission's power to readjust the level of the rates from both places, in a proper case and on sufficient evidence, to a different cost level. The appellant suggests that this court enact such rates. We have no such authority or power. The order of the commission is affirmed.

AFFIRMED.

MARTIN PETERSON ET AL., APPELLANTS, V. KENNETH COOK ET AL.. APPELLEES.

121 N. W. 2d 399

Filed May 3, 1963. No. 35375.

1. **Elections.** If an election is held in fact, it is valid, though there may have been interference by the elements.
2. **Elections: Courts.** In the absence of fraud, the courts will not ordinarily consider the effect of votes not actually cast at an election or the effect of fixing of a particular time for the election which is allegedly more favorable to one side than the other.
3. ———: ———. It is generally held that courts will presume that all electors failing to vote at an election assent to the affirmative vote as shown by the returns.
4. **Statutes.** The Legislature in enacting a law may properly delegate to the governmental subdivisions involved the authority and discretion necessary to effectuate its execution.
5. **Elections: Schools and School Districts.** Section 10-703.01, R. S. Supp., 1961, is not unconstitutional because of its providing that the school board or board of education shall designate the polling places at which the elections are to be held.
6. ———: ———. Under a statute providing for a school district election which leaves the selection of the number and location of the polling places to the school board, its decision will be final unless it is clearly shown to be arbitrary and unreasonable.

Appeal from the district court for Keya Paha County: WILLIAM C. SMITH, JR., Judge. Affirmed.

Robert V. Hoagland and George F. Johnson, for appellants.

Thurman G. Weddel, Julius D. Cronin, and Edward E. Hannon, for appellees.

Heard before WHITE, C. J., CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

BROWER, J.

This action was brought by the appellants Martin Peterson, Elmer Richardson, George Doyle, and Raymond Gipson, as residents and taxpayers of Keya Paha County, Nebraska, against the appellees Kenneth Cook, Marvin Williams, Leonard McCormick, A. F. Rowan,

Jr., first and real name unknown, and Willard E. Snyder, the members of the Board of Education of Keya Paha County High School District, hereinafter referred to as the school district board, praying that an election held to issue bonds to build new school facilities be declared null and void and to enjoin the issuance of the bonds.

In the summer of 1961, certain persons connected with the State Department of Education advised that the facilities of the school district were not adequate for an accredited school. Thereupon a countywide citizens committee was organized in Keya Paha County to analyze and investigate the school facilities and recommend what, if anything, should be done. This committee conferred with Doctor Stoneham of the University of Nebraska, and an architect. On February 5, 1962, after an investigation and analysis, the citizens committee recommended to the school district board that new facilities be constructed to cost $320,000. It further recommended that the question of issuing bonds in that amount be submitted to the voters at an election to be held on March 16, 1962, and that there be one polling place in Springview, Nebraska, the county seat.

On February 16, 1962, the school district board voted to submit to the electors a bond issue in the sum of $320,000 at one polling place in Springview on March 16, 1962. The school district boundaries are the same as those of the county.

On Sunday, March 11, 1962, the whole area was subjected to a blizzard. Winds continued until sometime in midday on March 13, 1962. The witnesses are not in complete agreement as to whether there was snowfall after March 12, 1962, but it is clear that snow continued to blow and drift until March 13, 1962, or later.

On Wednesday, March 14, 1962, the wind had gone down considerably. According to most witnesses, Thursday, March 15, 1962, was a nice day and there was general agreement that election day, March 16, 1962, was

a mild, sunny day with some thawing. The state and federal highways in the county were opened by 5:30 p.m., March 15, 1962, and a considerable number of other roads were open also. Others remained snowbound.

More than 60 persons testified concerning the storm. A substantial number of electors who were wholly or partially isolated by drifts could not get out to vote. Others could have gone to the polls but they preferred to care for the livestock or perform other chores instead. In some instances certain members of the family home went when others, because of age and frailties or by reason of their desire to take care of their livestock or other duties, or merely from lack of interest, stayed at home. Some, with tractors and plows or other machinery, with difficulty, opened a way to the road and either went to the polls or, because of lateness of the hour, returned to attend to chores or other matters. In some instances electors arrived too late to vote. The testimony of the witnesses, as well as photographs in evidence, leaves no doubt as to the severity of the storm and the great depth of the drifts remaining thereafter. Most of the witnesses said it was as severe a storm as they had ever had in that vicinity. There were many drifts 10 to 15 feet high.

At the election 494 votes were cast of which 307 were in favor of the proposition and 184 were against it. The total votes at the general elections in that county in previous years were 917 in 1956; 762 in 1958; and 905 in 1960. At the primary elections there were 473 in 1954; 467 in 1956; 546 in 1958; 368 in 1960; and 498 in 1962.

The trial in the district court resulted in a judgment in favor of the defendants and appellees, holding the election was legally called and held, and denying the injunction.

The motion for new trial of plaintiffs and appellants being overruled they bring the cause to this court by appeal.

Appellants first contend the blizzard kept a sufficient number of electors from the polls to have changed the result of the election and assign error to the trial court in not nullifying the election because thereof.

Appellants cite Article I, section 22, of the Constitution of Nebraska, which states that all elections shall be free, and there shall be no hindrance or impediment to the right of a qualified voter to exercise the elective franchise. They follow this with a citation of numerous texts and cases holding that where electors were prevented from voting by intimidation, violence, fraud, mistake, negligence, or erroneous decisions of election officers or officials, such circumstances may in certain cases where the number of electors affected is sufficient to have changed the result, nullify the election. All of these cases involve interference by human beings. That such hindrance to orderly elections might under certain conditions vitiate them is quite obvious and needs no discussion. 29 C. J. S., Elections, § 220, p. 323.

Appellants argue that interference caused by an act of God should be held to nullify an election in the same manner as that caused by human beings. They contend also that with such bad weather preceding March 16, 1962, the school district board had notice that many electors would be unable to vote and that the board should have postponed the day of election. We have found only one case discussing the effect of bad weather upon elections and have been cited to none other. The case was State ex rel. School Dist. No. 56 v. Schmiesing, 243 Minn. 11, 66 N. W. 2d 20. The factual situation presented there was also a severe snowstorm that had rendered travel throughout the territory difficult and in some parts, according to the testimony, impossible. As a result the polls were never opened in 3 out of 10 rural districts. A few electors went to the closed polling places but were unable to vote because there were no officials present to receive their votes. The court in the cited case held that those who presented themselves

to vote and could not do so were insufficient in number to change the result. In regard to those electors, however, who were unable to get to the polls, the court in the cited case in discussing the situation, said: "The trial court found that the school election of February 20, 1953, was not invalid because of the fact that no voters appeared at certain polling places due to a severe snowstorm and blocked roads.

"The relators argue that the election could have been called by those charged with that duty under the statute at some other time of the year and thereby severe weather and the possibility of a snowstorm and blocked roads could have been avoided. * * * It is the prerogative of the survey committee and the superintendent to exercise their judgment and discretion in that regard, and the courts have no right to interfere with the exercise of that duty to the extent of passing upon their wisdom or lack of it in selecting a certain day in the future for voting. If the statute is otherwise complied with as to election requirements, if good faith has been exercised by the election officials so that thereby no one has been misled, and if the officials have not under the law failed to perform their statutory duties, then the date set will have to stand. State and national elections have fixed dates. No change therein can be made even after consulting the weatherman. Elections must of necessity be held in all kinds of weather. If an election is held in fact, it is valid, though there may have been interference * * * by the elements. The vote may be reduced thereby or the outcome changed, but qualified voters who fail to go to the polls to vote under the circumstances will be bound by the expressed will of those who do. Of course, natural conditions over which man may exercise control may prevent an election in fact, but we think that interference short of that may not be classed as jurisdictional.

"This must of necessity be the rule, or there would be no solid ground upon which candidate or voter could

stand, for endless confusion and uncertainty would otherwise result."

In the case before us in spite of the difficulties experienced, the number of votes cast compared favorably with those counted at the primary elections held in the county. In some areas of the county a considerable distance from Springview and in certain rough portions where roads were the worst, a smaller proportion of electors were able to vote than elsewhere. This will not however permit the courts to nullify the election. In the absence of fraud, the courts will not ordinarily consider the effect of votes not actually cast at an election or the effect of fixing of a particular time for an election which is allegedly more favorable to one side than the other. State ex rel. Hopper v. School District 13, 13 Neb. 466, 14 N. W. 382. It is generally held that courts will presume that all electors failing to vote at an election assent to the affirmative vote as shown by the returns. Treat v. DeJean, 22 S. D. 505, 118 N. W. 709; State ex rel. School Dist. No. 56 v. Schmiesing, *supra.* The contentions of the appellants with respect to the trial court's ruling that under the circumstances shown the election should not be nullified by it on account of the blizzard are without merit.

The appellants assert that the trial court erred in not holding section 10-703.01, R. S. Supp., 1961, was unconstitutional in that it granted the school district board authority to designate the polling places, and that the board did not abuse its discretion in designating only one such polling place.

"It is a well-settled rule, supported with practical unanimity by the authorities, that the general doctrine prohibiting the delegation of legislative authority has no application to the vesting in political subdivisions of powers to govern matters which are local in scope. * * * In addition to the most frequent exercise of this power, in the case of municipalities, this principle has been employed to sustain a delegation of powers ordinarily

exercisable only by the legislature to such subdivisions as township committees, park commissioners, school districts, and counties or county boards." 11 Am. Jur., Constitutional Law, § 223, p. 934. In McDougall v. Lueder, 389 Ill. 141, 58 N. E. 2d 899, 156 A. L. R. 1059, the court in discussing the delegation of power by the Legislature, said: "The Legislature may authorize others to do that which it cannot do itself in the carrying out of valid laws. * * * The power to make a law and the conferring of authority and discretion as to its execution, which authority is to be exercised under and in pursuance of the law, mark the true distinction between powers which the Legislature can delegate and those which it cannot delegate." We conclude that the Legislature in enacting a law may properly delegate to the governmental subdivisions involved the authority and discretion necessary to effectuate its execution.

Appellants complain that the Legislature by section 10-703.01, R. S. Supp., 1961, delegated to the school district boards the power to designate polling places without providing standards or guideposts. The appellants do not suggest what standards or guideposts were necessary. Establishing polling places is a detail only in the school election laws and is a means of carrying out the legislative enactments. If standards or guideposts are necessary to implement such details, statutes would be replete with them. School bond elections are necessary throughout the state and are carried out in districts which vary greatly in area and population. Highways, streams, and bridges limit communication between points differently in the several districts. The Legislature cannot be informed of conditions in all areas. It appears proper and necessary that establishing the location of polling places be delegated to authorities who are informed of local conditions. No power of broad legislation is involved. Section 10-703.01, R. S. Supp., 1961, is not unconstitutional because of its providing that the school board or board of education shall designate

the polling places at which the elections are to be held.

In the case before us the election involved the voters of one countywide district who were voting on a single issue. There is evidence that the courthouse at Springview was chosen as the place of holding the election in order that the voters could view the existing school facilities and examine the plans for those proposed. Another reason for providing one polling place was to save costs. The election was set for Friday when it was hoped many parents would come in to get their children who attended high school. Springview is the county seat near the center of the district. Complaint is made that at a general election a considerable number of polling places are provided. Whether several county commissioners or supervisors or other local officers are then chosen which might require polling places in different districts is not shown by the evidence. It would appear that most of the polling places designated at general elections would have been as inaccessible as Springview.

Appellants maintain section 10-703.01, R. S. Supp., 1961, speaks of polling places in the plural and that no authority was conferred on the school district board to designate one only. Section 49-802, R. R. S. 1943, provides in part: "Unless such construction would be inconsistent with the manifest intent of the Legislature, rules for construction of the statutes of Nebraska hereafter enacted shall be as follows: * * * (6) Singular words may extend and be applied to several persons or things as well as to one person or thing. (7) Plural words may extend and be applied to one person or thing as well as to several persons or things." Under a statute providing for a school district election which leaves the selection of the number and location of the polling places to the school board, its decision will be final unless it is clearly shown to be arbitrary and unreasonable. In the case before us no such abuse of discretion appears and the contention of appellants cannot be sustained.

Appellants contend the trial court erred in holding that the action of the school district board relative to the bond election was its own action. They maintain that the decisions were made by the citizens committee and thereafter forwarded by letter to a corporation that had contracted to buy the bonds that were to be issued. The necessary resolutions and proceedings were thereafter drawn by the corporation or its attorney and forwarded to the attorney for the school district board. The minutes of the school district board however show clearly the necessary steps were taken by it relative to calling the election. It is obvious that if the board in fact acted, it is immaterial that its action was in accordance with advice or recommendations previously received from others. No discussion of this aspect of the trial court's judgment is necessary. This error assigned by the appellants has no merit.

The last contention of the appellants is that the corporation which contracted to buy the bonds agreed to furnish the assistance of its attorney with respect to the election and the preparation of the necessary history of the proceeding. Appellants argue the corporation cannot practice law or hire lawyers to carry on the business of practicing law, and that the contract was against public policy and void. Appellants claim that for some reason this contract if illegal and void would affect the legality of the election. The contract shows that the corporation's attorney was to consult with the school district's attorney in that respect. If indeed the contract concerning the employment of attorneys was void, a matter which we do not decide, it was purely collateral and had nothing to do with the validity of the election. Chamberlain v. Grimes, 42 Neb. 701, 60 N. W. 948; Omaha & R. V. Ry. Co. v. Brady, 39 Neb. 27, 57 N. W. 767.

Finding no error in the rulings of the trial court, its judgment is affirmed.

AFFIRMED.

MAJOR VON BOKELMAN, ALIAS GENE FURGESON, APPELLANT, v. MAURICE SIGLER, WARDEN, NEBRASKA STATE PENITENTIARY, APPELLEE.

121 N. W. 2d 572

Filed May 10, 1963. No. 35379.

1. **Habeas Corpus: Judgments.** Habeas corpus is a collateral, and not a direct, proceeding, when regarded as a means of attack upon a judgment sentencing a defendant; and when the judgment is regular upon its face and was given in an action in which the court had jurisdiction of the offense and of the person of the defendant, no extrinsic evidence is admissible in a habeas corpus proceeding to show its invalidity.
2. **Criminal Law.** The habitual criminal law does not set out a distinct crime, but provides that the repetition of the criminal conduct aggravates the offense and provides heavier penalties.
3. **Habeas Corpus.** In order to release a person from a sentence and imprisonment by habeas corpus, it must appear that the sentence was absolutely void.
4. ———. Habeas corpus will not lie to discharge a person from a sentence of penal servitude when 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.
5. ———. Habeas corpus will not lie on behalf of a convicted prisoner on the ground that the sentence to imprisonment is in excess of the statutory period, since such sentence is erroneous merely, and not void.

Appeal from the district court for Lancaster County: ELMER M. SCHEELE, Judge. Affirmed.

Frederick W. Carstens, for appellant.

Clarence A. H. Meyer, Attorney General, and Richard H. Williams, for appellee.

Heard before WHITE, C. J., CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

SPENCER, J.

This is an appeal from a judgment of the district court for Lancaster County denying an application for a writ of habeas corpus filed by the appellant, Major Von Bok-

elman, alias Gene Furgeson, hereinafter referred to as petitioner.

Petitioner alleges that he is unlawfully imprisoned in the State Penitentiary on a void sentence. His application for a writ of habeas corpus sets out the information filed against him in the district court for Dodge County, which involved two counts. The first count charged the petitioner with breaking and entering with the intent to steal property of value. The second count set out two previous convictions for felonies, and requested that upon conviction on the first count petitioner be deemed an habitual criminal. Petitioner alleges that he never entered a plea to said information; that he was deprived of counsel; that no valid sentence was imposed on him; and that no proper or sufficient hearing was ever had on the habitual criminal charge.

The only evidence presented by petitioner in the habeas corpus hearing is a transcript of the proceedings on three appearances in the district court for Dodge County, covering the arraignment, plea, and sentencing of the petitioner. The court denied the writ and dismissed the application. Petitioner prosecutes his appeal to this court.

Petitioner alleges four assignments of error which are as follows: "1. That the judgment rendered by the Court was contrary to the evidence.

"2. That the judgment rendered by the Court was contrary to law.

"3. That the judgment of the Court was erroneous, for the reason that the record shows that this petitioner was deprived of counsel at his trial in the District Court of Dodge County, Nebraska, from which Court he was sentenced to the State Penitentiary.

"4. That by reason of the irregularities in the proceedings in the District Court for Dodge County, Nebraska, this petitioner was deprived of a fair trial and the right to be represented by counsel."

The record does not support petitioner's contention

that he was deprived of counsel at his trial in the district court for Dodge County. He was advised by the court that he was entitled to counsel and that if he was without funds the court would appoint counsel for him. He asked for the appointment of a specific attorney and was advised that if an attorney was appointed he would not be one of petitioner's choice but would be one chosen by the court. Petitioner then said he would try to see an attorney himself. At his next appearance he advised the court that he had been unable to get counsel, and when the court advised him he would check the list of attorneys and appoint counsel, the petitioner wanted to know if he could visit with the county attorney. A recess was taken to permit him to do so. After the recess, the county attorney advised the court that the petitioner wished to plead to the information. Defendant pleaded guilty. By so doing he waived his right to counsel.

We held in In re Application of Carper, 144 Neb. 623, 14 N. W. 2d 225: "While a defendant in a criminal case is entitled to defend by counsel, such right is not inalienable and not conferred by consideration of public policy. He may, by judicial confession of guilt, waive the constitutional rights guaranteed him by the federal and state Constitutions."

On petitioner's allegation that he never pleaded to the information, we quote the following from the transcript offered by the petitioner on the habeas corpus hearing: "Mr. Kuhlman: (County Attorney) Are you prepared at this time to plead to the information? The Court: You understand that this is two counts? Major Von Bokelman: Yes. The Court: The breaking and entering charges carries a penalty of one to ten years. Mr. Kuhlman: The penalty for the habitual criminal charge would be ten to twenty years. You understand that? Major Von Bokelman: Yes. Mr. Kuhlman: And what is your plea? Major Von Bokelman: Guilty."

This point is not argued nor discussed in petitioner's

brief. However, in his statement of facts, petitioner suggests that there is nothing in the record to show that the court was aware of his plea of guilty. Attached to petitioner's application is a certified copy of the proceedings from Dodge County, including the journal entry. This recites that the petitioner entered a plea of guilty and that the court found him guilty and also found him to be an habitual criminal, and that the defendant was informed by the court of the findings of the court.

In Hulbert v. Fenton, 115 Neb. 818, 215 N. W. 104, we held: "Habeas corpus is a collateral, and not a direct, proceeding, when regarded as a means of attack upon a judgment sentencing a defendant; and when the judgment is regular upon its face and was given in an action in which the court had jurisdiction of the offense and of the person of the defendant, no extrinsic evidence is admissible in a habeas corpus proceeding to show its invalidity."

The exact point involved in the fourth assignment is not specifically pointed out in petitioner's brief, but, from the application for the writ, we assume it pertains to the fact that after the defendant's plea of guilty, the court did not fix a time for a further hearing on the habitual criminal charge, and no waiver of the 3-day notice of hearing is shown. After the plea, the court permitted the county attorney to offer information on seven previous felony convictions of the petitioner, including the ones set out in the information. The proceedings were then continued to permit the court to personally visit with the defendant. Eleven days thereafter, the defendant was returned to the court and was sentenced to the State Penitentiary for 11 years.

The penalty provided by statute for the crime of breaking and entering is 1 to 10 years. § 28-532, R. R. S. 1943. Section 29-2221, R. R. S. 1943, our habitual criminal statute, provides for a term of not less than 10 nor more than 20 years. The habitual criminal law does

not set out a distinct crime, but provides that the repetition of the criminal conduct aggravates the offense and provides heavier penalties. See Jones v. State, 147 Neb. 219, 22 N. W. 2d 710. It is evident from the information that this was the only purpose of the second count.

Habeas corpus is a collateral and not a direct proceeding when regarded as a means of attack upon a judgment sentencing a defendant. It cannot be used as a substitute for a writ of error. In re Application of Carper, 144 Neb. 623, 14 N. W. 2d 225.

Petitioner cites Kuwitzky v. O'Grady, 135 Neb. 466, 282 N. W. 396, as authority for his right to a writ of habeas corpus. In that case there were two separate sentences, one of them on the specific offense which brought the defendant into court, the other on an habitual criminal charge, as though it were a distinct crime. We there held habitual criminality is a state, not a crime; the separate sentence on that count was void; and that after the sentence on the first count had been served, the application for a writ of habeas corpus was a proper procedure to review the sentence on the habitual criminal charge. That case has no application to the facts herein. Here there is only one sentence, which is not void. The habitual criminal provision was used only to justify a heavier penalty than that provided for the offense charged in the first count.

In order to release a person from a sentence and imprisonment by habeas corpus, it must appear that the sentence was absolutely void. Habeas corpus will not lie to discharge a person from a sentence of penal servitude when 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. Truman v. Hann, 154 Neb. 501, 48 N. W. 2d 418.

Accepting for the moment petitioner's premise that the provisions of the habitual criminal act do not apply and that the sentence being for 11 years is above the

maximum which could be imposed without the habitual criminal act, this action still must fail.

In McElhaney v. Fenton, 115 Neb. 299, 212 N. W. 612, the defendant was sentenced to a term of not more than 20 years nor less than 3 years. The statute provided for a term of not more than 10 years nor less than 1 year. We said: "The fixing of the sentence at not more than twenty years was erroneous, but did not render the judgment void. It stands as valid and enforceable for the term that the statute authorized the court to impose sentence, to wit, for not more than ten years. However, while error was thus committed in entering the judgment, if the proper proceedings had been had looking to the correction thereof, the judgment would have been modified to conform with the provisions of the statute. As we have seen, such proceedings were not had, hence, while the error remains, 'Habeas corpus will not lie on behalf of a convicted prisoner on the ground that the sentence to imprisonment is in excess of the statutory period, since such a sentence is erroneous merely, and not void.' In re Fanton, 55 Neb. 703."

For the reasons stated, the writ was properly denied and the application dismissed. The judgment of dismissal is affirmed.

AFFIRMED.

IN RE APPLICATION OF HAROLD H. EVERTS ET AL.
HAROLD H. EVERTS ET AL., APPELLEES, V. SCHOOL DISTRICT NO. 16, FILLMORE COUNTY, NEBRASKA, APPELLANT.
IN RE APPLICATION OF HERMAN A. EVERTS ET AL.
HERMAN A. EVERTS ET AL., APPELLEES, V. SCHOOL DISTRICT NO. 16, FILLMORE COUNTY, NEBRASKA, APPELLANT.

121 N. W. 2d 487

Filed May 10, 1963. Nos. 35400, 35403.

1. **Appeal and Error.** Section 25-1912, R. S. Supp., 1961, provides that the transcript shall contain the judgment, decree, or final

order sought to be reversed, vacated, or modified, and all other filings made with the clerk of the district court, unless otherwise ordered by the appellant or appellants by the filing of a praecipe at the time of filing of notice of appeal.

2. ———. Section 25-1140, R. S. Supp., 1961, provides in part that the party appealing may order a bill of exceptions by filing in the office of the clerk of the district court a praecipe therefor within the time allowed for filing of a notice of appeal.
3. ———. The bill of exceptions is the only vehicle for bringing evidence before this court on appeal.
4. **Evidence.** The word "evidence," in its technical meaning and common acceptation, includes all the means by which any fact in dispute at a judicial trial is established or disproved.
5. **Appeal and Error.** The bill of exceptions contains the evidence adduced at the trial of the cause, and the transcript contains the judgment or decree of the court and other pleadings filed in the cause.
6. **Pleading: Appeal and Error.** The allegations of a petition require proof by evidence incorporated in the bill of exceptions.
7. **Pleading.** When a party affirmatively pleads a fact which is material to the issue, he thereby assumes the burden of proving the existence of such fact.
8. **Courts.** The doctrine of presumptions in favor of the regularity of proceedings in courts of general jurisdiction does not apply to courts or tribunals of inferior or limited jurisdiction who act in a judicial capacity, but as to such courts or tribunals the facts necessary to confer jurisdiction must affirmatively appear upon the face of the record.
9. **Schools and School Districts.** Section 79-403, R. S. Supp., 1961, requires the giving of notice by publication and also by posting notice in certain places, and where the proof of such notices does not appear in the bill of exceptions, the action of the board in granting the request for change of school district boundaries will be held void for want of jurisdiction.
10. **Evidence: Appeal and Error.** An affidavit used as evidence in the trial court cannot be considered on an appeal of a cause to this court unless it is offered in evidence in the trial court and preserved in and made a part of the bill of exceptions.

Appeal from the district court for Fillmore County: JOSEPH ACH, Judge. Reversed and remanded with directions.

John A. Bottorf, for appellant.

Robert L. Walker, for appellees.

Heard before WHITE, C. J., CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

MESSMORE, J.

Harold H. Everts and Dorothy L. Everts, husband and wife, Herman A. Everts and Margaret Frances Everts, husband and wife, freeholders, filed petitions with the county superintendent, county clerk, and county treasurer of Fillmore County, hereinafter called the board, seeking, under section 79-403, R. S. Supp., 1961, to have certain lands owned by the freeholders or petitioners, hereinafter referred to as petitioners, set off from the Grafton school district No. 16, Fillmore County, and attached to the Geneva school district No. 75, Fillmore County. At a public hearing held before the board on August 1, 1962, members of the board of education of school district No. 16 appeared and contested the right of the petitioners to obtain such a change of territory and have their lands attached to school district No. 75. The board granted the petitioners' request to have their lands set off from school district No. 16, in which school district the lands were situated, and attached to school district No. 75. The school board of school district No. 16 appealed to the district court from the order of the board above mentioned. The petitioners elected to present the issue on appeal to the district court on the original freeholders' petitions for the change of school district boundaries filed before the board heretofore mentioned.

The school board of school district No. 16 filed an answer to the petitions of the freeholders denying all allegations therein contained. This answer alleged other matter not material to a determination of this appeal.

The trial court found that the land was owned by the petitioners and was located in a school district adjoining the school district to which it was to be attached; that each of the petitioners lived more than 2 miles from each schoolhouse; and that school district No. 75 was

maintaining a school bus route at least one-half mile nearer to each of the petitioners' residences than school district No. 16. The court rendered judgment that the quarter section of land upon which each of the petitioners actually resided and where children of school age lived should be transferred to school district No. 75, and that the unimproved real estate not the residence of children of school age should remain in school district No. 16, and to that extent reversed the decision of the board.

The board of school district No. 16 filed a motion for new trial which was overruled. Upon the overruling of the motion for new trial, the board of school district No. 16 perfected appeal to this court. The board of school district No. 16 is hereinafter referred to as the defendant.

The defendant assigns as error that the judgment of the trial court is not sustained by sufficient evidence and is contrary to law; and that the trial court erred in overruling defendant's motion, made at the close of petitioners' evidence and renewed at the close of all of the evidence, to dismiss the petition of the petitioners and reverse the decision of the board for the reason that there was insufficient evidence upon which to grant jurisdiction to the trial court.

Section 79-403, R. S. Supp., 1961, provides in part: "Any freeholder or freeholders, * * * may file a petition with a board consisting of the county superintendent, county clerk, and county treasurer, asking to have any land described therein set off from the district in which it is situated and attached to some other district. The petition shall state the reasons for the proposed change and show: (1) That the land therein described is either owned by the petitioner or petitioners * * *; (2) that the land is located in a district that adjoins the district to which it is to be attached; (3) that the territory proposed to be attached has children of school age residing thereon with their parents or guardians; and (4) that

they are each more than two miles from the schoolhouse in their own district, and at least one half mile nearer to the schoolhouse or a school bus route of the adjoining district, which distance shall be measured by the shortest route possible upon section lines or traveled roads open to the public * * *. The petition shall be verified by the oath of the petitioner or petitioners. The board may, after a public hearing on the petition, thereupon change the boundaries of the districts so as to set off the land described in the petition and attach it to such adjoining district as is called for in the petition whenever they deem it just and proper and for the best interest of the petitioner or petitioners so to do. Notice of the filing of the petition and hearing thereon before the board shall be given at least ten days prior to the date of such hearing, by one publication in a legal newspaper of general circulation in such district, and by posting a notice on the outer door of the schoolhouse in each district affected thereby, which notice shall designate the territory to be transferred; * * *."

The transcripts in the two cases here involved show the petitioners' petitions to the board, also the report of the board, and the order of the board changing the boundary lines of school districts Nos. 16 and 75. The supplemental transcripts show the certificate to the county clerk of Fillmore County of the change of school district boundaries signed by the county superintendent of schools of Fillmore County on August 2, 1962; the decision of the board made on August 1, 1962, that the county superintendent shall notify the county clerk, county treasurer, and county assessor of Fillmore County that the described lands set forth in the petition shall be set off from school district No. 16 Fillmore County and attached to school district No. 75, Fillmore County, signed by the county superintendent, county clerk, and county treasurer of Fillmore County; an affidavit of counsel for the petitioners disclosing the mailing of notice of publication which was authorized

on July 23, 1962, and published in the Nebraska Signal on July 19, 1962, sent by United States mail to the president of the board of education and the secretary of the board of education of school district No. 16 in Grafton, and to the petitioners; an affidavit of publication by the bookkeeper for the publisher of the Nebraska Signal, a legal newspaper of general circulation, showing that the legal notice of the hearing on the freeholders' petitions was published in the said newspaper for 1 week, the first publication being on July 19, 1962; a notice of the public hearing to be held by the board August 1, 1962, signed by members of the board; and the freeholders' petitions requesting change of school district boundaries.

In considering this appeal it is necessary to distinguish between a transcript and a bill of exceptions as the same are considered in this jurisdiction.

Section 25-1912, R. S. Supp., 1961, provides in part: "The transcript shall contain the judgment, decree or final order sought to be reversed, vacated or modified, and all other filings made with such clerk (clerk of the district court), unless otherwise ordered by the appellant or appellants by the filing of a praecipe at the time of filing of notice of appeal, * * *."

Section 25-1140, R. S. Supp., 1961, provides in part: "Upon appeal from the district court to the Supreme Court, the party appealing may order a bill of exceptions by filing in the office of the clerk of the district court a praecipe therefor within the time allowed for filing a notice of appeal."

The bill of exceptions is the only vehicle for bringing evidence before the court on appeal. See Sovereign Camp, W. O. W. v. Wiggins, 238 Ala. 424, 191 So. 470.

In O'Brien v. State, 69 Neb. 691, 96 N. W. 649, the court said: "Evidence, as defined by lexicographers and law writers, includes all the means by which, in a judicial trial, it is sought to establish or disprove any material allegation of a civil or criminal pleading. Any

circumstance which affords an inference as to whether the matter alleged is true or false is, therefore, evidence and is commonly understood to be within the meaning of that term." The court further said: "The word 'evidence,' in its technical meaning and common acceptation, includes all the means by which any fact in dispute at a judicial trial is established or disproved."

It will be noted that in accordance with the above, the bill of exceptions contains the evidence adduced at the trial of a cause, and the transcript contains the judgment or decree of the court and other pleadings filed in the cause.

The allegations of a petition require proof by evidence incorporated in the bill of exceptions.

When a party affirmatively pleads a fact which is material to the issue, he thereby assumes the burden of proving the existence of such fact. See, Fairchild v. Fairchild Clay Products Co., 141 Neb. 356, 3 N. W. 2d 581; Fenske v. Strait, 121 Neb. 177, 236 N. W. 441; Cohen v. Swanson Petroleum Co., 133 Neb. 581, 276 N. W. 190.

The burden of proof was upon the petitioners in this case to prove the jurisdictional facts, that is, to prove that the trial court had jurisdiction of the subject matter of the action.

The bill of exceptions in the instant case contains no evidence that section 79-403, R. S. Supp., 1961, was complied with relative to the notice required by the provisions of such statute.

In Olsen v. Grosshans, 160 Neb. 543, 71 N. W. 2d 90, this court said: "The doctrine of presumptions in favor of the regularity of proceedings in courts of general jurisdiction does not apply to courts or tribunals of inferior or limited jurisdiction who act in a judicial capacity, but as to such courts or tribunals the facts necessary to confer jurisdiction must affirmatively appear upon the face of the record." See, also, Shambaugh v. Buffalo County, 133 Neb. 46, 274 N. W. 207.

In Proudfit v. School Dist. No. 49, 109 Neb. 173, 190 N. W. 874, this court said: "The posting of this notice (speaking of section 6703, Rev. St. 1913, relating to the changing of boundaries of school districts and requiring notice to be posted, somewhat analogous to the requirements of notice as provided by section 79-403, R. S. Supp., 1961) is jurisdictional. Until this provision of the statute was complied with the county superintendent had no power to change the boundaries of the several school districts. * * * No copy of the notice appears in the record. * * * All jurisdictional facts should appear on the face of the record."

While the court did not differentiate between the transcript and the bill of exceptions, it is obvious the court meant the proof of notice required by the statute did not appear in the bill of exceptions, and in order to be considered it must be part of the proof and be incorporated in the bill of exceptions.

In the instant case the defendant objected to the jurisdiction of the court in its motion to dismiss the action at the conclusion of the petitioners' evidence and at the conclusion of all of the evidence. The failure of the petitioners to furnish proof of jurisdictional requirements was again presented to the trial court in defendant's motion for new trial, and is assigned as error in this court.

The petitioners contend that an uncontroverted finding by a court of limited or special jurisdiction that notices were posted and published as required by statute is sufficient proof of those facts to confer jurisdiction upon the district court where want of jurisdiction does not appear on the face of the record, citing Lindgren v. School Dist. of Bridgeport, 170 Neb. 279, 102 N. W. 2d 599, and State ex rel. Draper v. Freese, 147 Neb. 147, 22 N. W. 2d 556. Suffice it is to say that proof of notices required by statute in the two above-cited cases was incorporated in the bills of exceptions

and was considered by this court as evidence of such notices.

An affidavit used as evidence in the trial court cannot be considered on an appeal of a cause to this court unless it is offered in evidence in the trial court and preserved in and made a part of the bill of exceptions. See, Berg v. Griffiths, 127 Neb. 501, 256 N. W. 44, 102 A. L. R. 1124; Harder v. Harder, 162 Neb. 433, 76 N. W. 2d 260.

The affidavit of proof of publication of notice in the instant case, or the affidavit of counsel for petitioners relating to the mailing of notice of publication sent to the president of the defendant school board, the secretary thereof, and the petitioners heretofore mentioned, were not offered in evidence in the trial court, preserved in and made a part of the bill of exceptions in this case. Therefore, this court is in no position to consider such affidavits under the above-cited authorities.

We have refrained from summarizing the evidence due to the fact that the trial court did not have jurisdiction of the subject matter of these actions. The defendant's motion or motions above mentioned should have been sustained by the trial court.

For the reasons given in this opinion, the judgment of the trial court is reversed and the cause remanded with directions to dismiss the petitioners' petitions.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V. GARRY C. MAY, APPELLANT.

121 N. W. 2d 564

Filed May 17, 1963. No. 35211.

SUPPLEMENTAL OPINION

Criminal Law: Trial. An instruction which informs the jury that when there is conflict in the evidence it is its duty to reconcile

the evidence if it can, and if it cannot, then to determine which is true and which is untrue, does not infringe upon the right of the jury to judge the credibility of witnesses and the weight to be given their testimony.

Appeal from the district court for Saline County: JOSEPH ACH, Judge. On motion for rehearing. See 174 Neb. 717, 119 N. W. 2d 307, for original opinion. Former opinion modified. Motion for rehearing overruled.

Jack L. Craven and Martin A. Cannon, for appellant.

Clarence A. H. Meyer, Attorney General, and Cecil S. Brubaker, for appellee.

Heard before WHITE, C. J., CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

CARTER, J.

The State contends in its motion for a rehearing that this court was in error in holding in its former opinion that the giving of instruction No. 17 constituted prejudicial error. See State v. May, 174 Neb. 717, 119 N. W. 2d 307. After a further consideration of the question we conclude that instruction No. 17 was free from error and that this court incorrectly held to the contrary.

Instruction No. 17 was as follows: "You are the sole judges of the credibility of the witnesses and the weight to be given to their testimony. In determining the weight which the testimony of the witnesses is entitled to receive, you should take into consideration their interest in the result of the suit, if any; their conduct and demeanor while testifying; their apparent fairness or bias or relationship to the parties, if any such appears; their opportunity for seeing or knowing the things about which they have testified; their ability to remember and relate accurately the occurrences referred to in their evidence; the extent to which they are corroborated, if any at all, by circumstances or the testimony of credible witnesses; the reasonableness or unreasonableness of their statements; and all other evidence, facts and cir-

cumstances proved tending to corroborate or contradict such witnesses. Insofar as there may be any conflict in the evidence it is your duty to reconcile it if you can; if you cannot, then to determine which is true and which is untrue, and give such weight to the testimony of any witness as in your judgment it should have under all the circumstances of the case." The effect of our former opinion was to hold that the last sentence of the instruction prejudicially infringed upon the right of the jury to judge the credibility of the witnesses and the weight to be given to their testimony.

We cited Wilson v. State, 150 Neb. 436, 34 N. W. 2d 880, and Frank v. State, 150 Neb. 745, 35 N. W. 2d 816, in support of this holding. We think these two cases were correctly decided but that they have no application to the instruction we have in the case before us. In those cases the instructions told the jury that it had no right to reject the testimony of any of the witnesses without good reason and that it should not do so unless the jury found it irreconcilable with other testimony which it may find to be true. These instructions were prejudicially erroneous in that the jury was told that it could not disbelieve a witness unless his evidence was irreconcilable with other testimony which it found to be true. A jury has the right, of course, to disbelieve a witness, whether or not there is credible evidence in conflict with the evidence of the witness.

It is contended here that an instruction, which tells the jury that it is its duty to reconcile conflicting evidence if it can, and if it cannot, then to determine which is true and which is untrue, infringes upon the right of a jury to be the sole judge of the weight and credibility of evidence. We do not think that an instruction, which tells the jury to harmonize conflicting evidence if it can, and if it cannot, to determine which is true and which is untrue, in any manner invades the province of the jury. The identical instruction now before us was before the court in Franz v. State, 156 Neb. 587, 57 N. W.

2d 139. We there held that the instruction did not violate the rule that the credibility of witnesses and the weight to be given their testimony are for the jury and, within its province, it has the right to reject the whole or any part of the evidence of any witness. This court has approved instructions of similar import in many cases. Driscoll v. Troughton, 22 Neb. 260, 34 N. W. 497; Albright v. Brown, 23 Neb. 136, 36 N. W. 297; Ballard v. Hansen, 33 Neb. 861, 51 N. W. 295; Hirschberg Optical Co. v. Michaelson, 1 Neb. (Unoff.) 137, 95 N. W. 461. No holdings of this court have been pointed out to us, nor have we found any, which conflict with this line of cases.

We have searched the decisions of other jurisdictions on the question here presented. Our present holding is supported by the following cases: Holdridge v. Lee, 3 S. D. 134, 52 N. W. 265; Rudolph v. Lane, 57 Ind. 115; Warnack v. State, 7 Ga. App. 73, 66 S. E. 393; Smith v. State, 102 Ga. App. 685, 117 S. E. 2d 546; Hengstler v. State, 207 Ind. 28, 189 N. E. 623; People v. Madden, 76 Cal. 521, 18 P. 402; Adams v. State (Tex. Cr.), 20 S. W. 548; Lancaster v. State, 36 Tex. Cr. 16, 35 S. W. 165; McLeod v. State, 128 Fla. 35, 174 So. 466; Shelton v. State, 144 Ala. 106, 42 So. 30. We have found no decisions to the contrary.

We have concluded that our former opinion was in error in holding instruction No. 17 to be prejudicially erroneous. We withdraw that part of our opinion in State v. May, *supra,* dealing with instruction No. 17 and substitute this opinion therefor. After making this change in the former opinion we overrule the motion for a rehearing.

FORMER OPINION MODIFIED.
MOTION FOR REHEARING OVERRULED.

SPENCER, J., dissenting.

The objectionable part of instruction No. 17 is the following: "Insofar as there may be any conflict in the evidence it is your *duty to reconcile* it if you can: if

you cannot, *then to determine* which is true and which is untrue, * * *." (Italics supplied.)

Possibly one trained in the law would understand that when the jury is told it is the sole judge of the credibility of the evidence, the word "duty" as used does not have its usual connotation, but would a layman so understand it?

Webster's New International Dictionary (2d ed., Unabridged), p. 802, defines "duty" as: "That which is required by one's station or occupation"; and "That which a person is bound by moral obligation to do or not to do; * * *."

If a jury *must reconcile,* we are restricting its right to discard or reject undisputed testimony. This is emphasized by the words "if you cannot (reconcile), *then to determine* which is true and which is untrue; * * *."

If testimony can be reconciled, and the jury still does not believe it, must it be accepted? The inference is that it must.

What does this wording do in a criminal case to the presumption of innocence if the defendant does not testify?

If an instruction, particularly in a criminal case, could be misconstrued, should we not presume that it was so misconstrued?

I believe instruction No. 17 to be prejudicial to the rights of the defendant.

Judges Yeager and Boslaugh have authorized me to say that they join in this dissent.

WHITE, C. J., concurring.

As the supplemental opinion points out, this identical, or almost identical, sentence as a part of the credibility instruction, has been declared faultless in many Nebraska cases, as late as Franz v. State, 156 Neb. 587, 57 N. W. 2d 139. No case can be discovered to the contrary. An admonition to reconcile *evidence* and to conform it to reason, if possible, is something quite different from a mandate to reject a witness' testimony on certain

conditions, which was the basis of the holdings relied upon in the original opinions in Wilson v. State, 150 Neb. 436, 34 N. W. 2d 880, and Frank v. State, 150 Neb. 745, 35 N. W. 2d 816. The Franz holding, clearing this instruction from an identical attack, was after the Wilson and Frank cases, and without dissent.

"Should" is the past tense of the word "shall." Webster's New Twentieth Century Dictionary (2d ed.), p. 1679, gives this primary meaning, "an auxiliary used to express obligation, *duty*, propriety, *necessity*." (Italics supplied.) Let us look at this whole instruction quoted in the supplemental opinion, the other portions referred to here being our classic jury instruction and unchallenged in our instructional history. First, we tell the jurors that they are the "sole judges" of credibility and "weight" of the evidence. Then, we tell them that in weighing the evidence they should (i.e., obligation to, their duty to) consider:

1. The interest of the witness in the result of the case.
2. His conduct and demeanor.
3. His apparent fairness or bias.
4. His memory and opportunity for observation.
5. The extent of corroboration.
6. *The reasonableness or unreasonableness of his testimony.*

We have never considered this direction as to principles to be used in evaluating weight as touching on or invading the jury's sole prerogative to determine weight and credibility. No one suggests that an inference of judicially directed rejection may be inferred from the language used. Now if a jury "should," if it has the duty to, determine the reasonableness or unreasonableness of the testimony, then in order to perform that "duty," it follows that it should determine the reconcilability of evidence, *if it can*. To reconcile (Webster's New Twentieth Century Dictionary, 2d ed.) means "to settle or compose a difference," "to bring into harmony."

Reasonable means "amenable, conformable, or agreeable to reason." Is the testimony harmonious with, amenable to, and agreeable to human reason and experience?

To reconcile *the evidence,* to settle and compose it, and make it agreeable to reason, *if you can,* is nothing more than a guideline to the jury to apply the fundamental processes of human reason. Resolving conflicts in the *evidence,* embracing but not synonymous with credibility is almost the total function of the jury.

The original opinion and dissent to the supplemental opinion seem to assume that the court by using the language in question, requires the jurors to reconcile or harmonize evidence which they might independently find to be untrue.

There is no language in this instruction that says this. Because of the chronology of pronouncement in the challenged sentence, it is apparently assumed that there is a bar to credible consideration until reconciliation is disposed of. Such a hair-splitting differential ignores the context and the total impact of the contextual meaning disclosed on full reading. This is made abundantly clear in the conjunctive admonition at the end, "and give *such weight* to the testimony *of any witness as in your judgment it should have under all the circumstances of the case.*" (Italics supplied.)

There are two further considerations here which are important:

1. There is no restriction on the range of the jury's original determination of what evidence it shall consider to be "conflicting or irreconcilable."

2. A jury is a legal unit, but in the deliberative process, it is composed of 12 individual persons also. The composing of differences and the reconciliation process are of the essence of its function. Irreconcilability often reveals falsity in evidence or testimony that is apparently credible, and reconciliation may support an otherwise apparently poor witness.

These processes are interwoven in the attempt to reach the truth. And, finally, what recourse would a jury have, irreconcilability having been determined, other than an independent determination of truth or untruth. If the jurors were told that they must reconcile evidence they would otherwise find to be untrue, or to reject the testimony of any witness, then the holdings in the Wilson and Frank cases would become applicable.

The power and the freedom to determine credibility is not invaded. The admonitions and guidelines of principle for the evaluation of weight are properly enjoined upon the jury. Nothing less should be asked of the jury, and nothing more can be required by the court.

MEREDITH COLE, BY MYRTLE COLE, HIS MOTHER AND NEXT FRIEND, APPELLEE, V. ARTHUR R. WENTWORTH III ET AL., APPELLANTS.

121 N. W. 2d 567

Filed May 17, 1963. No. 35425.

1. **Automobiles: Negligence.** By statute it is provided that the owner or operator of a motor vehicle shall not be liable for any damages to any passenger or person riding in such motor vehicle as a guest or by invitation and not for hire, unless such damage is caused by the driver of such motor vehicle being under the influence of intoxicating liquor or because of the gross negligence of the owner or operator in the operation of such motor vehicle.
2. **Negligence.** There is no fixed rule for the ascertainment of what is gross negligence, but whether or not gross negligence exists must be determined from the facts and circumstances in each case.
3. **Automobiles: Negligence.** Gross negligence within the meaning of the motor vehicle guest statute is great and excessive negligence in a very high degree. It indicates the absence of slight care in the performance of a duty.
4. **Negligence.** Ordinarily the question of gross negligence is one of fact for a jury, but if the evidence respecting it is not in

conflict or is so conclusive that ordinary minds may not draw different conclusions therefrom the question is one of law for the court.

5. **Automobiles: Highways.** Section 39-748, R. R. S. 1943, provided that drivers of vehicles proceeding in opposite directions should pass each other to the right, each giving to the other at least one-half of the main traveled portion of the roadway as nearly as possible.
6. ———: ———. Section 39-746, R. R. S. 1943, provided that upon all highways of sufficient width, except upon one-way streets, the driver of a vehicle should drive the same upon the right half of the highway unless it was impracticable to travel on such side.
7. **Automobiles: Negligence.** In an action for gross negligence under the motor vehicle guest statute, where there is adequate proof of negligence, a verdict should be directed for defendant only where the court can clearly say that the evidence fails to approach the level of proof of negligence in a very high degree under the circumstances. In all other cases, it must be left to the jury to determine whether it amounts to gross negligence or to mere ordinary negligence.

Appeal from the district court for Hitchcock County: VICTOR WESTERMARK, Judge. Affirmed.

Charles E. McCarl, for appellants.

Jack H. Hendrix and Bosley & Bosley, for appellee.

Heard before WHITE, C. J., CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

YEAGER, J.

This action as originally instituted was one for damages by Meredith Cole by Myrtle Cole, his mother and next friend, plaintiff and appellee, against Arthur R. Wentworth III and Arthur R. Wentworth, Jr., defendants and appellants. At the time the action was instituted the plaintiff was a minor and was living with his parents in Trenton, Hitchcock County, Nebraska. In the action the plaintiff filed a petition charging that the plaintiff was injured and damaged as the result of a collision between an automobile in which the plaintiff was riding and which was being operated by the defendant Arthur

R. Wentworth III and which was owned by Arthur R. Wentworth, Jr., the other defendant. The action was pleaded in two causes of action. The first was for damages directly to plaintiff as a minor. The second was for damages due and to become due to Roy F. Cole and Myrtle Cole, parents of the plaintiff, for cost of present and future medical and hospital services, for care of the plaintiff, and for the loss of services to which they would have become entitled, which cause of action was assigned to the plaintiff.

An answer was filed to the petition by the defendants which was responded to by a general denial.

On the issues joined by these pleadings a trial was had to a jury. The jury returned a verdict in favor of the plaintiff and against the defendants on the first cause of action for $2,500 and on the second for $3,500. Motion for new trial or in the alternative for judgment notwithstanding the verdict was duly filed by the defendants. The motion as to the verdict on the first cause of action was overruled and judgment was rendered in favor of plaintiff for $2,500. As to the second cause of action the court found that the verdict exceeded the amount proved by $1,030 and the plaintiff was granted permission to file a remittitur in that amount. By the judgment on this cause of action the plaintiff was awarded judgment in the amount of $2,470 conditioned upon his filing a remittitur in the amount of $1,030 within 10 days, and if he failed to file the remittitur a new trial on this cause of action was ordered.

Whether or not the remittitur was filed is not disclosed by the record. This however has no determinative significance in the appellate proceeding since the appeal here relates only to the first cause of action. It is set forth for the sole purpose of a comprehensive presentation and understanding because of its relation to the questions involved on this appeal.

From the judgment on the verdict returned in the first cause of action the defendants have appealed. There

are but two assignments of error set forth in the brief as grounds for reversal. They are that the court erred in overruling the motion of the defendants for a directed verdict at the close of plaintiff's evidence and renewed at the conclusion of all the evidence, and that the court erred in overruling the motion of the defendants to set aside and vacate the verdict of the jury and enter judgment for the defendants notwithstanding the verdict as to plaintiff's first cause of action. As already indicated, the concern here is with the first cause of action, therefore hereinafter, unless otherwise pointed out, the discussion shall be treated as having reference only to the first cause of action.

The petition by which the action was commenced contains allegations which in pertinent summary are as follows: On December 12, 1959, the plaintiff Meredith Cole was an invited guest riding in a 1954 Ford automobile owned by the defendant Arthur R. Wentworth, Jr., and operated by the defendant Arthur R. Wentworth III; that Arthur R. Wentworth, Jr., is the father of Arthur R. Wentworth III and that the automobile in question was a family automobile and was used by Arthur R. Wentworth III for general family purposes; that about 9:40 p.m. on the date mentioned the defendant Arthur R. Wentworth III with the plaintiff as an invited guest riding on the right side of the rear seat and two other guests, one riding on the left side of the rear seat and one riding on the right side of the front seat, drove the automobile southwesterly out of Trenton, Nebraska, and when he was about 2.2 miles southwest of Trenton this automobile collided with a 1957 Plymouth automobile being operated by one Gary L. R. Hedke in the opposite direction; and that as a result of the collision the plaintiff was seriously injured and damaged. It is alleged that the collision and the damage were caused by the gross negligence of the defendant Arthur R. Wentworth III. Specifications of alleged gross negligence contained in the petition are unlawfully driving

to the left of the center of the highway generally and while going around a curve; failing to turn the automobile to the right of the center of the roadway on the approach of the Hedke automobile; driving the automobile at a speed greater than was reasonable under existing conditions; failing to decrease the speed of the automobile when approaching and going around a curve; failing to yield the right-of-way to the Hedke automobile; failing to keep a proper lookout for traffic on the highway; and failing to signal the approach of his automobile by sounding his horn or otherwise.

There are allegations in the petition which declare the character of the injury and damage to the plaintiff as a result of the collision but a statement as to them herein is not required, since on the trial there was no contention that the plaintiff did not receive the injuries on account of which he seeks to recover damages in the action.

The answer contains brief reference to other matters, but in actuality, as is disclosed, the defense made at the trial was against the charge made in the petition that the defendant Arthur R. Wentworth III was guilty of gross negligence in the operation of the automobile in which the plaintiff was a guest.

The contention that the plaintiff was a guest and not a passenger for hire in the automobile operated by Arthur R. Wentworth III is not in question. Section 39-740, R. R. S. 1943, provides in part: "The owner or operator of a motor vehicle shall not be liable for any damages to any passenger or person riding in such motor vehicle as a guest or by invitation and not for hire, unless such damage is caused by * * * the gross negligence of the owner or operator in the operation of such motor vehicle."

As to what may be regarded as gross negligence this court has said: "There is no fixed rule for the ascertainment of what is gross negligence, but whether or not gross negligence exists must be determined from the

facts and circumstances in each case." Pester v. Nelson, 168 Neb. 243, 95 N. W. 2d 491. See, also, Landrum v. Roddy, 143 Neb. 934, 12 N. W. 2d 82, 149 A. L. R. 1041; Schlines v. Ekberg, 172 Neb. 510, 110 N. W. 2d 49; Robinson v. Hammes, 173 Neb. 692, 114 N. W. 2d 730.

The general definition of such negligence is as follows: "Gross negligence within the meaning of the motor vehicle guest statute is great and excessive negligence or negligence in a very high degree. It indicates the absence of slight care in the performance of a duty." Holliday v. Patchen, 164 Neb. 53, 81 N. W. 2d 593. See, also, Pester v. Nelson, *supra;* Robinson v. Hammes, *supra.*

This court has said with regard to the question of whether or not gross negligence has been proved the following: "Ordinarily the question of gross negligence is one of fact for a jury, but if the evidence respecting it is not in conflict or is so conclusive that ordinary minds may not draw different conclusions therefrom the question is one of law for the court." Johnson v. Jastram, 155 Neb. 376, 52 N. W. 2d 245. See, also, Lincoln v. Knudsen, 163 Neb. 390, 79 N. W. 2d 716; Werner v. Grabenstein, 165 Neb. 231, 85 N. W. 2d 297.

At the time the incident occurred which is the basis of this action section 39-748, R. R. S. 1943, provided: "Drivers of vehicles proceeding in opposite directions shall pass each other to the right, each giving to the other at least one half of the main traveled portion of the roadway as nearly as possible."

Section 39-746, R. R. S. 1943, provided, to the extent of importance here, as follows: "Upon all highways of sufficient width, except upon one-way streets, the driver of a vehicle shall drive the same upon the right half of the highway * * * unless it is impracticable to travel on such side * * *."

In Robinson v. Hammes, *supra,* it was said: "In an action for gross negligence under the automobile guest statute, where there is adequate proof of negligence, a

verdict should be directed for defendant only where the court can clearly say that the evidence fails to approach the level of proof of negligence in a very high degree under the circumstances. In all other cases, it must be left to the jury to determine whether it amounts to gross negligence or to mere ordinary negligence."

The factual situation, to the extent necessary to relate it here, on which the determination must depend, summarized, is as follows: The plaintiff and Arthur R. Wentworth III, who were friends, in the evening of December 12, 1959, rode about for a time in the automobile operated by this defendant, and some time during the evening they picked up two young ladies who became passengers in the automobile. One of the ladies was seated in the front seat to the right of this defendant. The other was seated to the left of the plaintiff in the rear seat. They were at the time in Trenton, Nebraska. They started south on State Highway No. 25. There is no testimony from which it may be said with any degree of certainty that the automobile was being operated at an excessive rate of speed. There are estimates ranging from 40 to 50 miles an hour. There is no evidentiary contention or suggestion that it was being operated in violation of any statutory speed limit. The highway extends in a southwesterly-southerly direction from Trenton, Nebraska. After this defendant's automobile had gone about 2.8 miles on this highway it collided practically head-on with an automobile operated in the opposite direction by one Gary Hedke. The Hedke automobile was moving at an estimated speed of about 50 miles an hour. When the two automobiles collided they were within what was described as a sharp curve in the highway. From evidence based in part on measurement and in part on estimate it is made to appear that the traveled surface of the highway was slightly more than 23 feet. It appears that when the two automobiles collided the front end of this defendant's automobile was about 5 feet from its left

edge of the highway and the rear end about 4 feet, 5 inches. The right side was about 13 feet from the right side. The Hedke automobile was on its right side of the highway with its right side at the front about 2 feet, 8 inches, from the right edge and the rear about 1 foot, 4 inches, therefrom. Thus its left side was about 16 feet, 2 inches, from the right edge of this defendant's right side of the highway. There was no direct evidence as to this defendant's line of travel prior to the collision, and none from which a reasonable inference could flow that the location of his automobile did not indicate his line of travel before the collision.

It is not made certain that the operator of either automobile saw the other prior to the actual collision, but if either did it was not for more than 50 feet away.

The surface of the roadway at the point of collision was rough and where the vehicles were sitting the surface was gravel with some sand, and it was what is called "wash-boardy." The curve was sharp and there was a high bank making it difficult to see around from either direction and impossible to see across in either direction. No tracks were visible and there was no evidence of skid or brake marks.

There is no evidence that this defendant saw the Hedke automobile before the collision. There is evidence that the plaintiff saw headlights, but whether this was a beam from or lamps on the automobile is not made clear. The plaintiff and this defendant were apparently rendered unconscious and on that account were unable to give any descripton of what occurred. At the time it appears that the plaintiff was engaged in receiving and placing the coat of the lady in the front seat above the back seat of the automobile, and on that account did not have an opportunity to see the approach of the other automobile.

On the evidence thus summarized and the legal principles set out here, the question of whether this defendant was guilty of gross negligence which should have

been submitted to a jury for determination, or if it was one for determination as a matter of law in favor of the defendants, is presented.

The evidence discloses without dispute that this defendant was operating the automobile in violation of the statutory provisions referred to herein. Also there is no evidence of justification or excuse therefor. The evidence is sufficient to sustain a finding that he was not exercising care and caution essential to the protection of himself, the occupants of the automobile, and vehicles properly approaching from the opposite direction.

It cannot therefore be said that the jury could not properly find that he was guilty of negligence which was the proximate cause of the collision. It appears also that under the definitions announced by this court that the jury could also find that the negligence was gross. There is no evidence of emergency, or momentary inadvertence, or of anything discussed in the reported cases which would be the basis for saying that it was improper for a jury to find that this defendant was guilty of gross negligence

The evidence was of either a willful violation of safety statutes and rules conformance with which is recognized as essential in the operation of automobiles on the highways, or an inexcusable failure to recognize and conform to such statutes and such rules.

The judgment of the district court is therefore affirmed.

AFFIRMED.

CITY OF ORD, NEBRASKA, A MUNICIPAL CORPORATION, APPELLEE, V. CORNELIUS BIEMOND, APPELLANT.
122 N. W. 2d 6

Filed May 24, 1963. No. 35420.

1. **Aviation: Municipal Corporations.** The Legislature, by virtue of section 3-215, R. R. S. 1943, has empowered municipalities to

impose charges for the privilege of using municipal airport facilities.

2. **Municipal Corporations.** Where no police inspection, supervision, or regulation of the manner of the conduct of a business is provided for in an ordinance or resolution by the city council, and a fee or permit charge is established for the privilege of operating a commercial business, it is a revenue measure and its validity must be tested as such.
3. ———. Municipalities may properly classify different business or commercial occupations for the purpose of imposing a revenue charge or fee authorized by statute.
4. ———. A rent or use charge imposed upon a business or an occupation for revenue purposes must be definite in its application to those upon whom the burden falls, reasonable in amount, and uniform as to the class upon which it operates.
5. ———. The general rule is that a municipality may classify commercial enterprises into different classes for the purpose of the imposition of a rent or use charge, that different amounts may be imposed upon the various classes, and that a classification of businesses or occupations for such purpose will not be interfered with by the courts unless it manifestly appears that the classification is unreasonable and arbitrary.
6. **Constitutional Law: Taxation.** Constitutional provisions requiring equality and uniformity of taxation do not apply to rent or use charges for revenue purposes, and there need be no uniformity as between occupations or businesses.
7. **Municipal Corporations.** The presumption is, unless the contrary appears by competent proof, that a use charge for revenue purposes is reasonable, and the burden of proof to establish otherwise is on the protestant.
8. ———. Whether a use or permit fee is reasonable or confiscatory relates to its operation on the class to which it applies and not to its effect on a particular defendant or an isolated case.
9. ———. An imposition of a use charge, otherwise valid, on a monthly basis to a business essentially seasonal in nature is not thereby unreasonable.

Appeal from the district court for Valley County: WILLIAM F. MANASIL, Judge. Affirmed.

John R. Sullivan, for appellant.

Leonard W. Cronk, for appellee.

Heard before WHITE, C. J., CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

WHITE, C. J.

The sole question involved in this case is the validity of a resolution of the city council of Ord, Nebraska, fixing a rental or permit fee of $100 per month for the privilege of operating a commercial aerial spraying service from the Ord Municipal Airport. The facts are undisputed that the defendant used the facilities of the Ord Municipal Airport for 2 months in a commercial aerial farm spraying operation, and that he failed to pay the use or rental charge which was fixed by the city in an appropriate resolution. The City of Ord sued to recover $200, the amount of the rental for 2 months. After trial, the court rendered judgment for the plaintiff for the sum of $200, and the defendant appeals to this court.

Analyzing the assignments of error presented and argued, there are two questions involved, the resolution of which is necessary for a decision in this case.

1. Did the City of Ord have the power to fix a use or rental charge for the use of its facilities in the operation of a commercial aerial spraying service and was the classification a reasonable one?

2. Was the amount of the charge reasonable?

The Legislature in 1945 enacted a comprehensive "Revised Airports Act," sections 3-201 to 3-238 and 18-1502, R. R. S. 1943, designed to empower municipalities to acquire, establish, construct, improve, operate, and regulate municipal airports. Wide powers, including that of eminent domain, were granted to accomplish this purpose. The power to rent, lease, purchase, and sell equipment is provided for. The act has for its comprehensive design a policy of making available, improving, and facilitating the increasing demand for air transportation.

The statute contemplates the derival of revenue from the imposition of fees or charges for the privilege of using airport facilities and contemplates appropriate and reasonable classification for such purposes in empower-

ing the municipality under section 3-215, R. R. S. 1943: "To determine the charges or rental for the use of any properties under its control and the charges for any services or accommodations, and the terms and conditions under which such properties may be used; Provided, that in all cases the public shall not be deprived of its rightful, equal, and uniform use of such property. Charges shall be reasonable and uniform for the same class of service and established with due regard to the property and improvements used and the expense of operation to the municipality. To enforce the payment of charges, the municipality shall have a lien and may enforce it, substantially as is provided by law for liens and enforcement thereof, for repairs to or the improvement, storage or care of any personal property; * * *."

The imposition of the charge in this case is obviously for revenue purposes alone, pursuant to the power granted in the statute. The pertinent provisions of the enacted resolution provide: "That any person desiring to use or now using said public field, hangar or premises for commercial purposes or using the same incidental to one's own business shall apply to the Mayor and Council for such permission and receive a permit in writing authorizing such use. * * * that the reasonable lease and rental fee of airport premises, hangars and facilities at the Ord Municipal Airport for persons operating a commercial spraying business therefrom, with or without permission of the local governing body, shall be $100.00 per month * * *."

We determine whether the character of the resolution or ordinance is regulatory under the police power, or primarily for revenue purposes. Testing this resolution on its face, it has no other purpose than the declared requirement of the payment of the fee or charge. No police inspection, supervision, or regulation of the manner of the conduct of the business is established, and no standards are set for the licensee or user to establish or maintain. All that is required is the payment of

$100 per month, and he or anyone else conducting a commercial spraying business may operate without hindrance. It, therefore, becomes a revenue measure only. State ex rel. School Dist. v. Boyd, 63 Neb. 829, 89 N. W. 417, 58 L. R. A. 108; Rosenbloom v. State, 64 Neb. 342, 89 N. W. 1053, 57 L. R. A. 922. The defendant introduced evidence to the effect that the motivation of the city council was regulatory in objective and that the purpose of the resolution was prohibitive in nature. It is clear that the validity of this action by the city council must be tested by its declared purpose and action which are manifest from an inspection of the pertinent provisions herein attacked. Authorities are cited that relate to the restricted power of a municipality when the fee or charge imposed is for a license for regulatory purposes under the police power. These authorities do not apply because this is a revenue measure and must be tested by the applicable rules of law relating thereto.

The statute here properly delegates the power to the municipality to impose a revenue charge for the use of the facilities of the airport and for the privilege of operating a particular type of business. The validity of the statute, hereinbefore quoted, is not questioned. The statute does require and does declare that charges shall be reasonable and uniform for the same class of service, and imports that the classification shall be reasonable. This court has repeatedly held that a classification separating out commercial businesses or occupations as distinct from the use by the general public is a reasonable classification. It is further held, with reference to such classification upon a business or occupation, that it must be definite in its application to those upon whom the burden falls, reasonable in amount, and uniform as to the class upon which it operates. Gooch Food Products Co. v. Rothman, 131 Neb. 523, 268 N. W. 468; Western Union Telegraph Co. v. City of Fremont, 39 Neb. 692, 58 N. W. 415, 26 L. R. A. 698; Petersen Baking Co. v. City of Fremont, 119 Neb. 212, 228 N. W. 256;

Norris v. City of Lincoln, 93 Neb. 658, 142 N. W. 114, Ann. Cas. 1914B 1194.

Classifications have been upheld imposing different amounts of revenue charges on both widely diverse and closely related commercial enterprises. See, 38 Am. Jur., Municipal Corporations, § 343, p. 32, § 361, p. 50, et seq.; State ex rel. School Dist. v. Boyd, *supra;* Rosenbloom v. State, *supra;* Western Union Telegraph Co. v. City of Fremont, *supra;* Gooch Food Products Co. v. Rothman, *supra;* City of Grand Island v. Postal Telegraph Cable Co., 92 Neb. 253, 138 N. W. 169. For further cases, see 7 Neb. Digest, Licenses, Key Nos. 5½, 6(2), and 7.

The use charge or rental fee that is imposed here for revenue purposes is not a tax, but it is obvious that the Legislature intended that the same restrictions as to classification and uniformity be imposed upon the municipality in making such charges. Testing the applicable resolution by these rules of classification, we can find nothing unreasonable, in either the delegatory statute or the resolution of the Ord city council implementing it, in classifying separately commercial businesses or occupations, or in designating a commercial aerial spraying business as a separate and distinct classification. On the other hand, the record here affirmatively discloses, both directly and by fair inference, that specialized equipment and materials are used, that a truck of the defendant is used frequently on the premises in connection with the business, and that while operating this business the runways and other aviation facilities are used with considerable frequency during the periods of time of the operation of the business. Such considerations clearly indicate a reasonable basis for the exercise of the declared and delegated power invoked in the statute, either for regulatory or revenue purposes.

The defendant further asserts that the resolution is violative of Article I, section 25, of the Constitution of Nebraska, that he is deprived of the equal protection of

the laws, and that it is discriminatory in that the business of commercial aerial spraying is the only one that is subjected to the imposition of the rental or use charge.

The contentions as to uniformity and the singling out of the defendant's business for the imposition of the charge were decided in Richter v. City of Lincoln, 136 Neb. 289, 285 N. W. 593, where an occupation tax on taxicabs was challenged on the same grounds. We point out here that when dealing with municipally owned property and the actual use of special facilities furnished by the city, we deem not only analogous but, therefore, even stronger the following language with respect to classification and uniformity: "There seems to be no similarity between the taxicab business and the several employments which are untaxed by city authorities, relied upon by appellee, save and except that all make use of the streets. That alone is insufficient. * * * There can be no complaint of the city of Lincoln's classification of 'taxicabs' as the subject of imposition of an occupation tax. The classification is not arbitrary and has a reasonable relation to the subject of the particular legislation. It necessarily embraces all that are engaged in the business now taxed. The only constitutional requirement applicable to the situation is that all taxes shall be uniform in respect to the class upon which they are imposed. The facts alleged in plaintiff's petition below wholly fail to effectually challenge the propriety and legality of the classification by the mayor and council, upon which the ordinance in suit is based. The undoubted controlling principles invoked by the present situation are, viz.: * * * *'All occupations need not be taxed. One or more may be taxed and others not taxed. * * * Considerations of general policy determine what the selection shall be in such cases, and there is no restriction on the power of choice unless one is imposed by Constitution.* Constitutional provisions requiring equality and uniformity of taxation do not apply to this kind of taxes, and there need be no uni-

formity as between different occupations.' 4 Cooley, Taxation (4th ed.) 3393, sec. 1685." (Emphasis supplied.)

The privilege granted by the rental or use charge imposed herein extends to all facilities of the airport, and is without restriction as to locality, time when used, size of vehicles, limitations on equipment or material used or stored, number of permits for which one might apply, or the number of persons to whom permits would be granted if application were made. It operates uniformly as to all members of the class of commercial aerial sprayers without discrimination. Where such charges for revenue purposes operate alike on all persons similarly situated, they are not invalid as granting special privileges. Erwin v. City of Omaha, 118 Neb. 331, 224 N. W. 692; Richter v. City of Lincoln, *supra*. See generally 16A C. J. S., Constitutional Law, § 464, p. 196.

The defendant challenges the amount, $100 per month, as being unreasonable and confiscatory. In Erwin v. City of Omaha, *supra,* this court had by analogy the same question before it as applied in that case to a tax of $15 a day on peddlers operating "rolling stores" on the streets. In holding such a charge valid, the court said: "In Littlefield v. State, 42 Neb. 223, we held: 'Where such an ordinance is clearly within the general powers of a municipal body it is presumed to be reasonable, and the judicial power of the state will not be exercised to declare it void, unless from its inherent character, or by proofs adduced, it is shown to be unreasonable.' Further, in City of Grand Island v. Postal Telegraph Cable Co., 92 Neb. 253, we held: 'The amount of an occupation tax is not to be measured by the profits of the business taxed, but should be considered as one incident to local self-government, and when thus considered it appears prima facie reasonable in amount, courts of justice should not declare the ordinance void, unless and until it is clearly shown by competent evidence that the license charge is in fact unreasonable or confiscatory.' "

The presumption is, unless the contrary appears, that a use or revenue charge is reasonable in amount, and the burden of proof to establish the contrary is on the protestant. 33 Am. Jur., Licenses, § 46, p. 368, notes 12 and 13, citing Littlefield v. State, 42 Neb. 223, 60 N. W. 724, 47 Am. S. R. 697, 28 L. R. A. 588. Also, the test as to its being reasonable or confiscatory relates to its operation on the class to which it applies, and not its effect on a particular defendant or an isolated case. Gooch Food Products Co. v. Rothman, *supra;* Erwin v. City of Omaha, *supra.*

There is a complete lack of evidence to overcome the presumption applicable or to meet the burden of proof. There is no evidence in the record by which a comparison can be made with the gross or net business revenue of the defendant, or any evidence as to costs of operation, either as to this defendant or as to the class to which the charge applies, or as to the city. There is no evidence as to other material factors that may be considered by the courts. See 53 C. J. S., Licenses, § 19d, p. 522. We observe that the defendant's business is seasonal and may be variable during the crop season. The monthly charge is obviously responsive to these considerations. The courts have upheld license charges based on a seasonal classification. City of Louisville v. Sagalowski & Son, 136 Ky. 324, 124 S. W. 339, 136 Am. S. R. 258.

The use charge for the privilege of operating the business was a reasonable exercise of constitutionally delegated legislative power, and the defendant is subject to and liable therefor. The district court so found, and we affirm its judgment.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ELWOOD STEEMER, APPELLANT.

121 N. W. 2d 813

Filed May 24, 1963. No. 35422.

1. **Automobiles: Criminal Law.** The words "who shall be convicted," contained in section 60-430.01, R. R. S. 1943, apply to the offense charged and not to the penalty.
2. ———: ———. Section 60-430.01, R. R. S. 1943, providing an increased penalty for a second offense, is not ex post facto as to a first conviction prior to its passage, since an offender is not punished under it but on a conviction of an offense after its passage.
3. ———: ———. Section 60-430.01, R. R. S. 1943, deals with offenses committed after its passage, permits inquiry into previous convictions, and in fixing the penalty does not punish for previous offenses but for persistence in violating the statute.

Appeal from the district court for Douglas County: JOHN E. MURPHY, Judge. Affirmed.

William A. Day, for appellant.

Clarence A. H. Meyer, Attorney General, and Cecil S. Brubaker, for appellee.

Heard before WHITE, C. J., CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

CARTER, J.

On October 9, 1962, defendant was convicted in the district court for Douglas County for operating a motor vehicle at a time when his motor vehicle operator's license was suspended, contrary to section 60-418, R. R. S. 1943. The court found that defendant had been convicted of the same offense in 1957 under the same section of the statute. Pursuant to section 60-430.01, R. R. S. 1943, defendant was sentenced to serve 6 months in the county jail and was ordered not to operate a motor vehicle for a period of 2 years from the date of his release from jail. The defendant has appealed.

It is the contention of the defendant that the trial court erred in sentencing the defendant as a second

offender. At the time of defendant's first conviction in 1957, the existing penalty statute, section 60-430, R. R. S. 1943, did not provide for an increased penalty for a second offense. After defendant's conviction in 1957, the Legislature enacted section 60-430.01, R. R. S. 1943, which increased the penalty to be imposed on all convictions subsequent to the first one.

Section 60-430.01, R. R. S. 1943, provides: "Any person who shall be convicted of operating a motor vehicle during any period that his motor vehicle operator's license has been suspended or revoked pursuant to any law of this state, or after such suspension or revocation but before reinstatement of his license or issuance of a new license, shall, upon conviction thereof, be punished as follows: (1) For a first such offense, such person shall be imprisoned in the county jail for thirty days, and the court shall, as a part of the judgment of conviction, order such person not to operate any motor vehicle for any purpose for a period of one year from the date of his final discharge from the county jail; and (2) for each subsequent such offense, such person shall be imprisoned in the county jail for six months, and the court shall, as a part of the judgment of conviction, order such person not to operate any motor vehicle for any purpose for a period of two years from the date of his final discharge from the county jail."

The defendant argues that the words "who shall be convicted," not being in the past tense, do not authorize the court to consider a conviction for the same offense occurring before the effective date of the new penalty statute. The statute defines but one offense. It provides different penalties upon conviction, depending upon whether or not the person found guilty has previously been convicted of the same offense. The words "who shall be convicted" apply to the offense and not to the penalty. The position of the defendant on this point cannot be sustained.

Defendant asserts that to permit the use of a con-

viction had before the enactment of section 60-430.01, R. R. S. 1943, to enhance the penalty for a conviction had thereafter, has the effect of giving the statute an ex post facto application. In support of this proposition he cites In re Estate of Rogers, 147 Neb. 1, 22 N. W. 2d 297, as follows: "An ex post facto law is one which imposes a punishment for an act which was not punishable when it was committed, imposes additional punishment, or changes the rules of evidence, by which less or different testimony is sufficient to convict." The foregoing is a correct exposition of the law but it has no application to the present case. The defendant was convicted of the same offense under the same statute in his first and second convictions. The penalty for a second conviction was in existence when he committed the second offense; it was not increased after his offense was committed. It is not therefore an ex post facto act.

This contention of defendant was considered in Taylor v. State, 114 Neb. 257, 207 N. W. 207, as follows: "In this connection it is urged by the defendant that, his previous conviction having taken place before the enactment of section 10177, the provisions of the statute could not be made to apply; that to do so would make its provisions ex post facto and unconstitutional. We do not consider that the act can in any proper sense be regarded as ex post facto, and for that reason unconstitutional. The statute deals with offenses committed after its passage, permits an inquiry whether the accused has previously served terms in the penitentiary, and in fixing the penalty does not punish him for his previous offences (sic) but for his persistence in crime. Similar statutes are in force in a number of states and, so far as our inquiry goes, have uniformly been upheld. (Citing cases.)" See, also, Haffke v. State, 149 Neb. 83, 30 N. W. 2d 462; Thompson v. Thompson (N. D.), 78 N. W. 2d 395; People v. Andrews, 170 Cal. App. 2d Supp. 840, 339 P. 2d 648; State v. Staples, 100 N. H. 283, 124 A. 2d 187; Drumn v. State (Okl.), 318 P. 2d 893. It will

be noted that some of the foregoing cases involved statutes containing the prospective language "shall be" which defendant mistakenly contends prevents the use of convictions as first offenses had before the amendment of section 60-430, R. R. S. 1943, and the enactment of section 60-430.01, R. R. S. 1943.

For the reasons stated, the trial court correctly applied the controlling statutes in fixing defendant's sentence and its judgment is affirmed.

AFFIRMED.

FIRST NATIONAL BANK & TRUST CO., A CORPORATION, AS ADMINISTRATOR WITH THE WILL ANNEXED OF THE ESTATE OF IDA OELTJEN, DECEASED, APPELLEE, V. ELMER OELTJEN ET AL., APPELLEES, IMPLEADED WITH ELSIE OELTJEN OLSON, APPELLANT.

121 N. W. 2d 816

Filed May 24, 1963. No. 35442.

1. **Wills.** The cardinal rule of testamentary construction is to ascertain the intention of the testator as expressed in the will.
2. ———. In construing a will the court should give effect to the true intention of the testator as shown by the will itself in the light of the attendant circumstances under which it was made, if that intention is consistent with the applicable rules of law.
3. ———. No particular words or conventional forms of expression are necessary to enable one to make an effective testamentary disposition of his property.
4. ———. The intention of the testator is to be ascertained from a liberal interpretation and comprehensive view of all of the provisions of the will.
5. ———. Where possible, a will should be construed so as to give effect to every part of it.

Appeal from the district court for Platte County: ROBERT D. FLORY, Judge. Affirmed.

Kerrigan, Line & Martin, for appellant.

Wagner & Johnson, for appellee First Nat. Bank & Trust Co.

Edward Asche, for appellee Elmer Oeltjen.

Heard before WHITE, C. J., CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

BOSLAUGH, J.

This is an action to construe the will of Ida Oeltjen, deceased, brought by the First National Bank & Trust Company of Columbus, Nebraska, as administrator with the will annexed of the estate of the deceased. The defendants are Elmer Oeltjen, Elsie Oeltjen Olson, and Edna Oeltjen Luedtke, the children of the deceased and the beneficiaries named in her will.

The controversy in this court is between Elmer Oeltjen and Elsie Oeltjen Olson and involves a bequest of the interest of the deceased in livestock, farm equipment, and grain. For convenience the appellant, Elsie Oeltjen Olson, will be referred to as Elsie; the appellee, Elmer Oeltjen, as Elmer; and the decedent, Ida Oeltjen, as Ida. The district court found that the will of the deceased bequeathed her interest in the property to Elmer. Elsie's motion for new trial was overruled and she has appealed.

Paragraphs I and IV of the will are as follows: "I. I hereby give, bequeath and devise unto my son ELMER OELTJEN the Southwest Quarter of Section 5, Township 20 North, Range 1 East of the 6th P. M., situate Platte County, Nebraska, together with all the livestock, farm equipment and grain on the place as of the date of my death, subject that he pays any bills outstanding contracted by my son and myself in operating the joint venture on said farm. I also charge the bequest and devise to him with all estate tax, if any is charged against my estate, so that what I give to my daughters shall be free from estate tax. I also charge the bequest to him with all expenses incident to my last illness and my burial. This includes hospital and doctor bills that are incurred before and after my death so long as they relate to my last illness. * * * IV. I hereby give, bequeath and devise unto my daughter ELSIE

OELTJEN OLSON all cash and all the rest, residue and remainder of my property. I charge the gift to my son Elmer with any part of the cash that is necessarily used for the expenses of my last illness and burial except proceeds of bonds sold that I have by this will given to my daughter Edna and which I have hereinbefore specified should be paid to her."

The land devised to Elmer in paragraph I of the will is a farm on which the Oeltjen family lived for many years. It is referred to in the testimony as the "home place." Elmer was born on this land and has lived there all of his life. While Elmer's father, William Oeltjen, was living, Elmer helped him farm the land.

Ida obtained title to the home place as surviving joint tenant upon the death of her husband in June 1946. In August 1946, the children joined in a bill of sale which conveyed any interest they had in the personal property of their deceased father to Ida. Elmer continued to live on the land and help operate the farm.

Prior to 1947, Elmer had no financial arrangement or understanding with either of his parents. In 1947, Elmer and his mother entered into an agreement for a partnership or joint venture, and Ida gave Elmer a bill of sale to a one-half interest in all of the farm machinery and equipment. The partnership agreement, which was unwritten, provided generally for a grain and livestock-feeding operation. Ida was to furnish the land, Elmer was to furnish the labor, and all other expenses were to be shared equally. All of the grain that was raised was fed. Of the grain raised on rented land, Elmer received one-half, Ida received one-tenth, and the landlord received two-fifths. Ida then furnished additional grain equal to the landlord's share. Profits were divided equally.

The will was made in 1955. At that time both of the daughters were married and living away from home. Ida was living in Creston, Nebraska, having moved from the farm in 1952.

Elsie contends that the livestock, farm equipment, and grain on the place at the time of Ida's death was owned by the partnership; that the language of paragraph I of the will cannot be construed to be a bequest of the interest of the deceased in the partnership because it refers to specific property; that a partner cannot bequeath an interest in specific items of partnership property; and that the interest of Ida in the partnership passes to Elsie under the residuary clause in paragraph IV of the will. Elmer contends that the bequest in paragraph I of all the livestock, farm equipment, and grain on the place was intended as a bequest of the interest of the deceased in that property without regard to whether it was her individual property or partnership property. The problem in this case is to determine what disposition Ida intended to make of her interest in the partnership.

The cardinal rule of testamentary construction is to ascertain the intention of the testator as expressed in the will. Carroll v. Hastings College, 172 Neb. 20, 108 N. W. 2d 223. In construing a will the court should give effect to the true intention of the testator as shown by the will itself in the light of the attendant circumstances under which it was made, if that intention is consistent with the applicable rules of law. Katt v. Claussen, 174 Neb. 603, 118 N. W. 2d 1002. No particular words or conventional forms of expression are necessary to enable one to make an effective testamentary disposition of his property. In re Estate of Zents, 148 Neb. 104, 26 N. W. 2d 793. The intention of the testatrix is to be ascertained from a liberal interpretation and comprehensive view of all of the provisions of the will. Carroll v. Hastings College, *supra*.

When the language of the will is considered in the light of the attendant circumstances under which it was made, we think that it is apparent that the testatrix intended to bequeath all of her interest in the livestock, farm equipment, and grain on the place to

Elmer. The partnership property consisted of the bank account, livestock, farm equipment, and grain. Elmer took the partnership bank account as the survivor under the terms of the deposit. The bequest of the remaining assets of the partnership subject to the liabilities of the partnership was the equivalent of a bequest of her interest in the partnership. We believe that Ida intended that Elmer should receive all of her interest in the livestock, farm equipment, and grain on the place without regard to whether it was individually owned or partnership property.

Elsie suggests that the evidence shows that Ida owned an interest in grain and farm equipment as an individual which would satisfy the bequest of all livestock, farm equipment, and grain on the place. She bases this argument upon the income tax returns which list income from grain and deductions for depreciation for a grain bin and two feeding floors, and upon the inventory filed in the administration proceeding which lists an undivided one-half interest in a 1947 truck.

There is evidence which tends to show that much of the property which Elsie claims was partnership property was individually owned. The bill of sale which Ida gave Elmer in 1947 conveyed a one-half interest in the farm machinery and equipment. The certificates of title to the 1947 truck and the 1961 truck were issued to Ida and Elmer. The bank account used in the partnership operation was payable to either Ida or Elmer or the survivor.

The bequest was of *all* livestock, farm equipment, and grain. There is no evidence that Ida, as an individual, owned any interest in livestock. All of the grain that was raised was fed. Thus, even though the bequest of farm equipment may be satisfied in part out of property which Ida owned as an individual, there is no livestock or grain that is available to satisfy the bequest unless the bequest was intended to include her interest in the partnership. Where possible, a will should be

construed so as to give effect to every part of it.

We conclude that it was the intention of Ida to bequeath all of her interest in the livestock, farm equipment, and grain on the place to Elmer and that the bequest was intended to include her interest in the partnership with Elmer. The judgment of the district court is correct and it is affirmed.

AFFIRMED.

STATE OF NEBRASKA, DEPARTMENT OF ROADS, APPELLEE, V. WILLIAM DILLON ET AL., APPELLANTS.

121 N. W. 2d 798

Filed May 31, 1963. No. 35369.

1. **Eminent Domain.** Generally stated, condemnation is the implementation of the power of eminent domain, or of the right of a nation or state, or some other to whom the power is lawfully delegated, to take or condemn private property for public use.
2. ———. Ordinarily due compensation must be made for property taken under the power of eminent domain.
3. **Constitutional Law: Eminent Domain.** By the terms of Article I, section 21, of the Constitution of Nebraska, the property of no person shall be taken or damaged for public use without just compensation therefor.
4. **Eminent Domain.** In an instance where land is taken by condemnation the owner is entitled to recover the fair market value of the land at the time of taking.
5. ———. If land is damaged by the taking of other land the right of recovery is the difference between the fair market value immediately before and immediately after taking.
6. **Eminent Domain: Crops.** In an instance of the destruction of matured crops of a condemnee the measure of the damage is the value at the time of destruction.
7. ———: ———. In the case of injury to crops the condemnee is entitled to the difference between what they were worth at the time of maturity and what they would have been worth if they had not been injured.
8. **Eminent Domain: Landlord and Tenant.** In a case where land condemned is under lease to and in possession of a third person, and by the taking or damaging the lessee is deprived of his use in whole or in part, he is entitled to recover from the con-

demner on the same character and quality of proof as would entitle the condemnee to recover.

9. ———: ———. In a case where a lessee of the owner of land which has been condemned has established a right of recovery for damage to growing crops or for deprivation of right to produce such crops, the measure of his right of recovery is the difference between the value of his share of the crops at maturity and what would have been the cost of production of the entire crop.

Appeal from the district court for Sarpy County: JOHN M. DIERKS, Judge. Reversed and remanded.

Orville Entenman, for appellants.

Clarence A. H. Meyer, Attorney General, Harold S. Salter, Asa A. Christensen, and James F. Petersen, for appellee.

Heard before WHITE, C. J., CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

YEAGER, J.

This action as it comes to this court is by the State of Nebraska, Department of Roads, plaintiff and appellee, against William Dillon and Margaret Dillon, husband and wife, defendants and appellants. It is one commonly referred to as an action in condemnation. It had its origin in a petition filed before the county judge of Sarpy County, Nebraska, for the appointment of appraisers to appraise the fee simple title damages to a tract of land and all improvements thereon within Sections 3, 4, and 9, Township 12 North, Range 10 East of the 6th P.M., Sarpy County, Nebraska, owned by one Eva I. Dillon. A more accurate description of the land is not required herein. This area was condemned by the plaintiff herein for public highway right-of-way purposes. The right to condemnation is not involved here.

A portion, if not all, of this described land was under an oral 1-year lease, at the time of condemnation, to the defendants on a division of crop basis whereby the defendants were to retain three-fifths of the crops pro-

duced and the owner was to receive two-fifths thereof as rent.

Appraisers were duly appointed and they made an appraisement which was filed on May 12, 1960. The damage to the land was appraised at $30,765.25, and the damage to the leasehold was appraised at $1,740. The appraisal of the damage to the land or any interest of Eva I. Dillon is of no direct concern on this appeal. The damage to the leasehold of the defendants alone is of concern here.

From this appraisal of the damage to the leasehold the plaintiff took an appeal to the district court as did also the defendants. On that appeal the plaintiff filed a petition to which petition the defendants filed an answer. It does not appear necessary to summarize the contents of the petition herein.

By the answer the defendants asserted the existence, the description, the duration, and the character of their leasehold interest, about which there is no dispute. They alleged that their leasehold was damaged by the plaintiff in the taking and damaging of land of Eva I. Dillon. They denied that their damage was only $1,740, but alleged that on the contrary it amounted to $4,000. They asked that damages be awarded to them in the amount of $4,000.

The case was tried to the court, a jury having been waived, and there judgment was rendered fixing the value of the defendants' damage at $414 and $40.44 interest, instead of $1,740, the amount of the appraisal. The elements involved in the computation of the amount of the damage do not directly appear. The trial was started June 4, 1962, and journal entry of the judgment was made June 12, 1962.

The defendants filed a motion for new trial which was overruled, from which ruling and the judgment the defendants have appealed.

By the motion for new trial it was asserted that the decision is not sustained by sufficient evidence; that

the decision is contrary to law; and that there were errors of law occurring at the trial duly excepted to by the defendants.

The errors asserted in the brief as grounds for reversal are that the court erred in overruling the motion for new trial; that the findings and judgment were inadequate and clearly wrong; and that the findings and judgment of the court are not sustained by sufficient evidence.

The record without dispute discloses that 43.13 acres of the leasehold area were condemned for right-of-way; that 1.51 acres were taken for temporary easement for haul roads; that 14.05 acres were taken for temporary easement for borrow pits; and that a permanent channel easement of 2.26 acres was taken. Evidence of the defendants was to the effect that 25 acres of the area taken which was suitable for production of corn would have produced 70 bushels of corn an acre of the value of $1 a bushel, three-fifths of which would produce in revenue $42 an acre, and that a proper deduction for production expense would produce for the defendants a net of $28 an acre, or $700. There was also evidence of necessary expenditures for fencing to permit the use of the leasehold during the term of the lease totaling $955. It was also estimated that there were 43 acres of pasture which would be unavailable for use by the defendants during the term of the lease on which the witness placed a value of $3 an acre, or $129. This testimony came from a witness whose name is Alois T. Gramlich. His total estimate in all areas of damage to the defendants was $1,784.

The defendant William Dillon was called as a witness in his own behalf and gave information as to the leasehold which included the terms, the description, the use to which the area was devoted, and the manner of operation with particular reference to suitability of area.

This witness testified that in his opinion the area suitable for the production of corn would have produced

75 bushels of corn an acre in 1960. No objection was made as to his competency as a witness. There was objection but only on the ground of relevancy, materiality, that the testimony was speculative, and that it did not reflect the proper measure of damages. He testified that corn sold for around $1 a bushel; that the productive value was $75 an acre, his share of which would have been $45 an acre; and that his necessary expense in production would have been about $6 an acre. His total estimate of the loss on account of the taking of the corn area was $975. His estimate in all areas of damage was $2,565. This is made up of the loss on account of inability to produce crops under the lease and $1,590 for fencing around borrow pits, removal of fencing, and other fencing which became necessary on account of the taking and the use of property by the plaintiff.

One witness testified on behalf of the plaintiff. This witness qualified as an expert in the evaluation of land taken such as was involved here and the deprivation of use, and particularly the effect upon the value of the deprivation of the right of use by a tenant upon lands leased for the current year where the rental for the leasehold was on a crop share basis.

As a basis for his calculations and conclusions he took into consideration, and correctly so, that the year involved started March 1, 1960, and ended February 28, 1961. He also took into consideration that April 27, 1960, was the effective date of condemnation. He also took into consideration the fact that after March 1, 1960, and before April 27, 1960, the defendants had done some work on the land taken on which they intended to plant corn. He considered that this date of April 27, 1960, was the date when the right of the defendants to use the land taken came to an end.

The total effect of the testimony of this witness was to say that the total damage of the defendants on account of loss of use of the leasehold was $215. The items making up this amount were loss on account of

borrow pits, $50; on account of haul roads, $45; disking, $70; and fencing, $50. He allowed nothing on account of the value of crops lost by prevention of use of land, and gave as his reason that under the circumstances the defendants were entitled to no damage for loss of crops. The plaintiff adduced no evidence in denial of the evidence of defendants of damage for loss of crops.

There are two phases of this case each requiring a measure of separate consideration. One of these relates to loss of profit caused by the prevention of production of prospective crops, and the other to specific items of damage which items were reasonably ascertainable with the value only uncertain. There was evidence of both parties on the latter phase. It was apparently on this phase that the judgment for $414 was rendered in favor of the defendants. This was far below the damage supported by their evidence. The judgment for $414 included $200 which had been previously received by the defendants. That amount was treated as payment on the judgment for $414.

If this presented the only question for consideration in the case it might be reasonably said that here was a situation involving a dispute in evidence and that on that account the defendants had not sustained a right to reversal of the judgment, which would end the controversy.

This however fails to resolve the other one of the two phases, namely the one dealing with the question of whether or not profits are allowable and, if so, by what measure, if there is a prevention of the production of crops on a leasehold which is in possession of the lessee and which has been taken or damaged by condemnation. This is the phase which has been presented at length by the briefs.

It appears proper at this point herein, because of the character of condemnation, to make clear some of its aspects. Condemnation as used in this case, as is of course well known, generally speaking, is the imple-

mentation of the power of eminent domain. Eminent domain, generally, is the right of a nation or state, or some other to whom the power is lawfully delegated, to take or condemn private property for public use. Ordinarily due compensation must be made for the property taken. See 29 C. J. S., Eminent Domain, § 1, p. 776.

In the State of Nebraska such a proceeding is controlled by the Constitution of the state. Article I, section 21, of the Constitution, is as follows: "The property of no person shall be taken or damaged for public use without just compensation therefor."

Under this declaration of right, of course, land may be taken. An interest in land without a taking of the land in its entirety may also be taken. If land of an owner other than land taken is damaged, the owner is entitled to be compensated for the damage. If land of an owner is taken on which the owner has growing crops for which he received no compensation as a part of the taking he is entitled to damage therefor. If land is under lease to a third party and he has not been paid for his rental on the lease, the owner is entitled to the damage therefor whether the rental is payable in cash or share in crop, if it be a crop rental lease. If, as is true in this case, land condemned is farm land and is under lease and in possession of the lessee on a share crop basis the tenant is entitled to recover damages for the loss of profits brought about by the condemnation.

No great difficulty is found in a consideration of the problems presented in most of these areas. As to the owner of land taken, he is entitled to recover the fair market value of the land taken. Schulz v. Central Nebraska Public Power & Irr. Dist., 138 Neb. 529, 293 N. W. 409.

In the case of remaining land damaged by a taking of other land the right of recovery is the difference between fair market value immediately before and immediately after taking. Schulz v. Central Nebraska Public Power & Irr. Dist., *supra*.

As to the question of damages on account of loss of right of production of crops by a tenant who occupies land on a crop rental basis, an apparent conflict of authority is presented in cases which have been considered by this court. There is no difficulty with the question of liability but only with admissibility of evidence and the measure of the right of recovery. The plaintiff contends that the cases hold that if the crops are not matured nothing can be allowed for the reason that allowance would depend on conjecture and speculation, and that evidence in proof of probable value at the time of maturity would be inadmissible. There is language in these cases to sustain this view.

These cases, when read in the light of their full context and the facts therein involved, and other rules laid down in other cases, do not however necessarily deprive a party of a right of recovery for use of the land in possession of a lessee which use was prevented by condemnation. These rules in actuality deprive of a right of recovery for use where there is a failure of evidence at the trial to reasonably prove the amount of the damage.

The plaintiff in substance urges that the true meaning of the language of the cases is that if the amount of damage cannot be proved at the time condemnation takes place no damage is allowable at all for the reason that at that time an award would have to rest upon conjecture and speculation.

One of these cases is Herpolsheimer v. Christopher, 76 Neb. 352, 107 N. W. 382, on rehearing, 76 Neb. 355, 111 N. W. 359, 9 L. R. A. N. S. 1127. It is a case which has no bearing directly on the character or quality of evidence necessary to prove damage where there is a claim of interference with the right to use of a leasehold by the lessee.

Another case is Shutt v. Lockner, 77 Neb. 397, 109 N. W. 383. The following appears in the opinion in this case: "Kitchen Bros. Hotel Co. v. Philbin, 2 Neb. (Unof.) 340; Shaw v. Hoffman, 25 Mich. 162, and other similar

cases are relied on by the plaintiffs in support of their claim that evidence of their profits, had they been allowed to cut and market the hay, should have been received by the court. In these cases the tenants were in possession of the leased premises, conducting an established business, when the breach and eviction occurred. By the breach and eviction they not only lost the benefit of their lease, but their business was also broken up and injured or destroyed, and this destruction of their business was allowed as an element of damage. That one may recover for an injury to a profitable business is not a question for debate, and, where a wrongful eviction by a landlord has this effect, damage may be recovered therefor. We do not wish to be understood as holding that evidence of the probable crop of hay the land would produce and the ordinary market value thereof might not be shown as facts to be considered by the jury in arriving at the value of the use of the land during the term, and if the rejected testimony had been offered for this purpose it would undoubtedly have been received. * * * What we do hold is that under the circumstances of this case prospective profits, which plaintiffs claim to have lost, was not a proper element of damage."

Special attention is directed to that part of the quotation wherein it is pointed out that in a case such as this evidence of probable crop which would have been produced and the ordinary market value thereof might be shown, and that receipt of such evidence would be proper.

Another of these cases is Philips v. Bossung, 108 Neb. 658, 189 N. W. 172. This case has no controlling significance. The case is one where a party brought action, not for damage in consequence of interference with the right of a lessee to use leased property, but on account of the failure of the owner of land to perform an oral agreement to enter into a lease of land. That case did not turn on any question of after-acquired evidence in the case of a lessee in possession. In that case there

was never a lease and there was no possession.

Still another case is Platte Valley Public Power & Irr. Dist. v. Armstrong, 159 Neb. 609, 68 N. W. 2d 200, which has relation to this subject. It, like the others commented on, cannot be said to bar a lessee of the right to recover damages in case of prevention of production of crops or the right to prove his damage in a case where crops have not been allowed to mature. The opinion contains the following declaration of principle and of right: "In such case we have also said in effect that under appropriate circumstances and conditions a tenant could recover damages to his unmatured crops then growing on the land and damaged by the taking, as well as damages to his leasehold estate then existent."

This negatives the theory that after-acquired evidence is inadmissible in proof of loss or damage to unmatured crops or the probable damage to crops of which production was deprived.

The late case of Patrick v. City of Bellevue, 164 Neb. 196, 82 N. W. 2d 274, contains the following which embodies on its face the theory of the plaintiff: "The measure of damages to a growing crop that is destroyed by wrongful act or omission of another is the value of it at the time of destruction." This is substantially the same as language appearing in Pulliam v. Miller, 108 Neb. 442, 187 N. W. 925; Ricenbaw v. Kraus, 157 Neb. 723, 61 N. W. 2d 350; and Gable v. Pathfinder Irr. Dist., 159 Neb. 778, 68 N. W. 2d 500. The same paragraph containing the above quotation also contains the following which appears to be defeative of this contention of the plaintiff: "Damage based upon the value of an unmatured crop is analagous to profits lost and is governed by the same rule precluding recovery in cases of either uncertainty or remoteness. The question of whether damage based on the destruction of an unmatured crop is speculative is decided by whether there is sufficient data to determine with reasonable certainty the prob-

able value it would have had if it had matured. * * * The proof is not sufficient to permit a determination, with reasonable certainty, of the value of the crop of corn that it is alleged was destroyed."

This latter language cannot be said to exclude evidence of damage acquired after the condemnation taking. In truth another statement in this opinion carries an inference that after-acquired evidence is admissible in proof of damage to unmatured crops. It is the following: "There is no evidence as to the amount of corn that was produced on adjoining land or land in that vicinity during the year 1949."

In the case here there was evidence which was adduced on the trial of the amount and value of corn produced on adjoining land, and attention has not been called to any rule of law the effect of which renders this evidence inadmissible or to be without probative value.

In Gledhill v. State, 123 Neb. 726, 243 N. W. 909, it was said by quotation from 20 C. J., Eminent Domain, § 18, p. 764: " 'The general rule is that damages, to be recoverable, must be direct and certain. Contingent, remote, or speculative damages, such as the loss of speculative profits, will not be allowed.' " This was approved in Ricenbaw v. Kraus, *supra.*

Along with these general pronouncements it was made clear that where there was competent evidence of the damage to unmatured crops a judgment for that amount was proper. See, also, Snyder v. Platte Valley Public Power & Irr. Dist., 144 Neb. 308, 13 N. W. 2d 160, 160 A. L. R. 1154; Ricenbaw v. Kraus, *supra.*

In Gable v. Pathfinder Irr. Dist., *supra,* is contained language which clearly distinguishes what we have referred to as the general rule from the one applicable where there has been damage rather than total destruction by a taking. There it is said: "The evidence indicates that some of the beets were entirely destroyed and some were only damaged. Under law there is a measure for the assessment of damages for crops destroyed and

another where there has been damage but not destruction. * * *

"The measure of damages to growing crops destroyed by the wrongful act or omission of another is the value at the time of destruction. * * *

"The measure where a crop is injured but not rendered entirely worthless as a result of the acts or omissions of another is the difference between the value at maturity of the probable crop if there had been no injury and the value of the actual crop at the time injured less the expense of fitting for market that portion of the probable crop which was prevented from maturing."

In point of fact what the condemnee in the situation here would be entitled to receive from the condemner, if anything, is of no concern since that matter is not being litigated in this proceeding. The analysis of the right is of consequence however in the determination of the rights of the defendants as lessees of the condemnee.

If land which is condemned is under lease to a third party and by the taking or damaging the lessee is deprived of his use in whole or in part he is entitled to recover his damage from the condemner on the same character and quality of proof as would entitle the condemnee to recover. See, James Poultry Co. v. City of Nebraska City, 135 Neb. 787, 284 N. W. 273, on motion for rehearing, 136 Neb. 456, 286 N. W. 337.

The theory of proof necessary to sustain a right of recovery would be the same. In the instance of a right of recovery alone by the condemnee he would be entitled to the entire damage, whereas in the instance of a lessee of a condemnee the rule as to assessment of total damage against the condemner would be the same but the allocation could, and in instances such as the case here would, be different. See, Gledhill v. State, *supra;* State v. Platte Valley Public Power & Irr. Dist., 147 Neb. 289, 23 N. W. 2d 300, 166 A. L. R. 1196; Platte Valley Public Power & Irr. Dist. v. Armstrong, *supra.*

A practical application of the legal principles an-

nounced in these and other cases requires that it be said that these lessees in possession, who have a lease upon certain crop-producing land and upon pasture land, the rental on both of which is two-fifths of the crops produced with nothing in addition for the use of the pasture land, are entitled to receive as damages, if of course the right is sustained by sufficient evidence, in a case of taking or damaging by condemnation, three-fifths of the difference between what was produced on the tillable area and what would reasonably have been produced had there been no condemnation, less the reasonable cost of production of the whole, and plus the reasonable value of the pasturage of which they were denied. See Gable v. Pathfinder Irr. Dist., *supra*.

All of this is in clarification of earlier expressions of this court with a conclusion that in the case of damage to growing crops or loss of crops to be produced on a leasehold in possession of a lessee by condemnation where the damage may not be arrived at with reasonable certainty at the trial no damage may be awarded for loss of growing crops or for the deprivation of right to produce growing crops, but in cases where such damage may, on the basis of evidence, be reasonably arrived at at the time of trial the damage is the value of the crops if they had been allowed to mature less the reasonable cost of total production.

There is another cogent and compelling reason why this should be regarded as the proper attitude to be taken toward the question of proof of damages. Any other rule would have the effect of recognizing an unequivocal right guaranteed to the lessee by the Constitution of the State of Nebraska to damages but would deny any right to recover by reason of a prohibition of evidence necessary to sustain a recovery. The reference here is to the clear terms of Article I, section 21, of the Constitution.

In the case here the defendants adduced evidence which on its face was sufficient to cause these principles

to become applicable. They adduced evidence which this court has said in cases cited herein was competent proof of what the land taken would have produced. They adduced evidence of what the cost of production would have been if there had been no condemnation. The only considerations left in this area were the questions of credibility of witnesses, weight to be given to testimony, and a computation of results, which were questions of fact for the court in view of the fact that a jury had been waived.

The defendants adduced evidence of the value of use of the land not to be used for the production of crops as the plaintiff in effect admitted was, if proved, a basis for recovery of damages.

As already indicated the plaintiff adduced no evidence in refutation of that of the defendants which supported their theory of right of recovery of damage and the amount thereof under that theory, which, as is made clear, is approved herein.

While the record in the case does not in terms so disclose, it has become apparent that the district court in its decision failed to give any consideration to the theory on which the case was presented by the defendants, that is that they were entitled to damage on the basis of what they would have received had there been no condemnation. The only alternative to that conclusion is to conclude that the court simply disbelieved the evidence in support of the defendants' theory.

This alternative cannot in reason be accepted. The margin between the damage proved under the theory of the defendants, which proof was not counteracted by evidence, and the judgment which was rendered was too great to permit of a presumption or assumption that a matter of credibility of evidence was the cause. The only reasonably permissive conclusion is that the defendants were not accorded a trial on issues presented by the pleadings and supported by competent and ma-

terial evidence, and for that reason the judgment is clearly wrong.

In the light of this the judgment of the district court is reversed and the cause remanded for a new trial on all issues presented by the record.

REVERSED AND REMANDED.

BROWER, J., dissenting.

I have been unable to agree with the opinion adopted by the court in this case insofar as it holds that the measure of damages in condemnation to a lessee of land on a share rental basis upon which no crops have been planted is the difference between the value of what his share of the crops would have been at maturity had he planted them and the cost of production of the entire crop. It appears to me that the damages should be measured as of the day of the taking whether or not later developments might establish with a reasonable degree of certainty what would have been realized by the farming operation.

The usual rule of damages to a leasehold interest taken in condemnation is set out in 29 C. J. S., Eminent Domain, § 143, p. 988, as follows: "If a leasehold interest is taken, or injured, the lessee is entitled to a sum which will restore the money loss consequent to the taking or injury. This consists generally of the fair market value of the leasehold or unexpired term of the lease, and is said to be the difference between the rental value of the remainder of the term and the rent reserved in the lease."

This rule seems to me to be logical. In the case of cash rent if the lessee has agreed to pay more than the reasonable rental he has not been damaged by the taking. If he has procured a bargain and is paying less than the place is worth he is entitled to damages. It is computed by subtracting the agreed rental for the remaining term from the reasonable market value of the rental for that period.

If however the rentals are reasonable and proper for

the property taken he has suffered no loss of substance and should receive very little.

This rule was expressed quite clearly in State v. Platte Valley Public Power & Irr. Dist., 147 Neb. 289, 23 N. W. 2d 300, 166 A. L. R. 1196. In that case the lessee of a state school land lease was to pay as rent an amount equal to 6 percent of the appraised value of the premises. Provision was made for reappraisal at times during the term so that the 6 percent rentals would be varied in accordance with changing values. This court held that where the rent reserved equals or exceeds the rental value, the lessee has suffered no loss and cannot recover. The court held there could be no recovery for the unexpired term unless the lessee could prove the place should rent for more than 6 percent of the appraised value of the land.

I think the same reasoning can be applied in case of rents reserved in kind. If a two-fifths share is the going and reasonable rent for corn lands a lessee who has agreed to pay three-fifths rental is not damaged by reason of the taking by condemnation. If however he has been fortunate to have procured a lease for one-third of the crops grown he has something coming. If the rents are the reasonable value for the term on condemnation the term and future rent payments have abated together.

This general rule was followed last year by this court in the recent case of Ballantyne Co. v. City of Omaha, 173 Neb. 229, 113 N. W. 2d 486, which case in turn cited Platte Valley Public Power & Irr. Dist. v. Armstrong, 159 Neb. 609, 68 N. W. 2d 200, and other cases as previous authorities. An extensive note on the elements and measure of the lessee's compensation is set forth in 3 A. L. R. 2d beginning at page 286. The note on measure of damages generally commences at page 290 thereof. The great majority of the cases cited there, including the Nebraska cases, state that where a leasehold interest is taken in condemnation the measure of damages

is the market value of the unexpired term over and above the rent stipulated to be paid. The note however is appended to Korf v. Fleming, 239 Iowa 501, 32 N. W. 2d 85, 3 A. L. R. 2d 270, where the lessee was allowed to prove the value of the crops to be raised, much as is permitted in the court's opinion. It seems however to be at variance with most of the cases cited in the note and is to a considerable extent in conflict with an earlier Iowa case, Des Moines Wet Wash Laundry v. City of Des Moines, 197 Iowa 1082, 198 N. W. 486, 34 A. L. R. 1517.

The opinion adopted in the case before us discusses many of the previous cases decided by this court as to the proper measure of damages in cases where growing crops are injured or destroyed. In my opinion they do not reach to the exact question before us because in the present case no crops had been planted. We are dealing wholly with the measure of damages to be applied to the taking of the remainder of the term. If crops that had been actually planted had been damaged or destroyed the proper measure of damage in that situation would be before us.

The opinion discusses a great number of such cases and it shows quite plainly there is a conflict in some of them. I have read many of them and it appears to me that there are such conflicts, there is considerable amount of dicta in all of them, and that most of them do not cover the situation here presented. Many of them concern the measure of damages to be applied in cases involving eviction of a tenant by a landlord. Others involve trespassers or other tortfeasors. I am not satisfied the measure of damages in such cases should be applied in condemnation cases. The State is no wrongdoer. It simply takes over the property under its sovereign power of eminent domain and should pay for the damages for that which is taken at the time of the taking and not for future profits that might have been realized thereafter.

The landlord is paid for the market value of the property taken at that time and in case part only is taken, for the damage to the remainder not taken. The owner in such cases may show the crops produced in the past to prove the value of the premises when taken. He is not of course allowed to recover profits that might accrue in the future.

The opinion cites the case of Gledhill v. State, 123 Neb. 726, 243 N. W. 909. It was a suit to recover for land damaged by the State. The land however was not taken in condemnation. It was damaged by flooding by the State without any formal condemnation and the owner sought relief by action brought by him. Thus the damage had occurred and the flooded land laid fallow prior to any taking by the State. I doubt if it is the same situation as where future profits are in question after actual taking in condemnation.

Also the closing pages of the opinion in the cited case indicate the damages allowed stemmed in part at least from the statute affecting suits brought pursuant to a legislative resolution. The court, though holding the resolution did not create a liability which did not exist before its passage, does state the ordinary rules of law did not apply at least in the usual strict sense. In this respect the court, in the cited case at the conclusion of the discussion on damages, stated: "The senate authorized the suit to be instituted under authority of section 27-319, Comp. St. 1929. In such a case, section 27-322, Comp. St. 1929, provides: 'The court in which such action may be brought shall hear and determine the matter upon the testimony according to justice and right, as upon the amicable settlement of a controversy, and shall render award and judgment against the claimant, or the state, as upon the testimony right and justice may require.' In Lancaster County v. State, 97 Neb. 95, the court referring to these sections of the statutes said: 'Under this direction it is the duty of the court to brush aside technical defenses and to act in like man-

ner as if the parties were seeking to amicably settle their controversy.' In Commonwealth Power Co. v. State, 104 Neb. 439, this court said: 'The purpose of these sections is to take such cases out of the ordinary rules of law and to place their determination upon a much higher and broader ground, * * * and to make justice and right, as viewed by the court, the basis of its decision.' "

It is generally held that a loss of profits by reason of taking or a damaging of a leasehold interest for a public purpose are not recoverable as an element of damage. See, note hitherto referred to in 3 A. L. R 2d under section 20, page 321, where a considerable number of cases are gathered.

In the present case, I am unable to agree to a rule of law where the measure of damage to a leasehold estate includes loss of future profits as the opinion clearly holds.

The result is to allow damages for profits not earned including those arising from labor not performed, seed not sown, crops not harvested, and machinery not used.

Such a rule in my opinion should not be adopted and will result in trouble and confusion to the court in future opinions.

I think the rule as stated in Ballantyne Co. v. City of Omaha, *supra,* is right and should be adhered to. If the rule in the opinion in the case before us is adopted the owner of condemned land will get the full value of the land. Both the lessee and lessor will receive their proper consequential damages and the tenant would receive his future profits also. These future profits the State in my opinion should not be required to pay either to the lessor or the lessee.

It is to be noted that in Ballantyne Co. v. City of Omaha, *supra,* the court stated the constitutional provision requiring the payment of damages in condemnation did not change the rule with respect to the measure of damages.

Under the facts in the case before us as set out in the court's opinion, the amount of the consequential damages were in dispute in the testimony. The case was heard before the trial court whose findings stand in the same position as the verdict of the jury. Except for that part of the claimed damage that arises by reason of the profits on corn which was to be grown, the findings of the trial court could be sustained under the evidence. In view of the evidence outlined in the court's opinion, I think the trial judge's findings would have to be accepted and the judgment should be affirmed.

Judges Boslaugh and Carter authorize me to state that they concur in this dissent.

JEANNE NEILL, APPELLEE, V. ARTHUR MCGINN, APPELLANT.
122 N. W. 2d 65

Filed May 31, 1963. No. 35395.

1. **Automobiles: Damages.** In an action for damages to an automobile, where the automobile cannot be placed in substantially as good condition as it was before the injury, the measure of damages is the difference between its reasonable market value immediately before and immediately after the accident.
2. ———: ———. The injured party is not permitted to recover in addition thereto damages for loss of use.
3. **Trial: Appeal and Error.** One who has brought out improper testimony on the examination-in-chief of his own witness over proper objections cannot complain of cross-examination of the witness on the same subject.
4. **Trial.** Where the fact of whether or not a party carries liability insurance is not relevant to some issue in the case it is not admissible.
5. ———. If evidence is properly admissible for any purpose, it cannot be excluded for the reason that it tends to prejudice the party because it shows or tends to show that the party carries liability insurance.
6. **Appeal and Error.** Where the plaintiff joins with the defendant in a stipulation made in open court before the jury which discloses the existence of a settlement with a joint tort-feasor and the amount thereof, plaintiff cannot on appeal urge error

because of the previous admission of evidence introduced by the defendant over plaintiff's objections showing such a settlement was consummated.

Appeal from the district court for Douglas County: PATRICK W. LYNCH, Judge. Reversed and remanded with directions.

Matthews, Kelley & Cannon, for appellant.

Alfred A. Fiedler, Herbert F. Spielhagen, and Joseph V. Benesch, for appellee.

Heard before WHITE, C. J., CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

BROWER, J.

Plaintiff and appellee Jeanne Neill brought this action in the district court for Douglas County, for the converting, demolishing, and wrecking of a 1953 Buick automobile owned by her.

Plaintiff's petition, which was filed July 28, 1955, alleged that Harold Mangen and Arthur McGinn, both minors 14 years of age, converted the car to their own use on or about October 11, 1954; that they demolished and wrecked the car; and that its reasonable market value before the loss was $2,800, and its salvage value $150. Plaintiff also alleged she was without an automobile for 3 months and was compelled to expend $300 for transportation service during that period. William Mangen, Evelyn A. Mangen, Frank McGinn, and Virginia McGinn, the parents, respectively, of the two boys, were joined with the minors as defendants and judgment was sought against them in the sum of $2,950.

The cause was not tried in district court until June 13, 1962. Before trial the action was dismissed as to Harold Mangen, William Mangen, and Evelyn A. Mangen, on the payment of $100. At the close of the plaintiff's evidence the trial court sustained a motion to dismiss made on behalf of the defendants Frank McGinn and Virginia McGinn, leaving Arthur McGinn the only

defendant. Immediately thereafter a motion to dismiss the action as to Arthur McGinn, or direct a verdict in his favor, was made on his behalf and was overruled. The defendant Arthur McGinn offered no evidence but a stipulation was entered into by the attorneys of the parties after the conclusion of plaintiff's evidence. Thereupon, both parties having rested the defendant renewed his motion which was again overruled.

The cause was then submitted to the jury which returned a verdict for the defendant Arthur McGinn.

Plaintiff thereupon filed a motion for judgment notwithstanding the verdict or in the alternative for a new trial. Plaintiff's motion for judgment notwithstanding the verdict was overruled but her motion for a new trial was sustained by the trial court. From this ruling sustaining the motion and granting a new trial, the defendant and appellant Arthur McGinn has appealed to this court.

In accordance with the rule governing appeals from an order of the trial court granting a new trial, the parties have sustained their respective burdens. Defendant Arthur McGinn, as appellant, has brought the record here with his assignments of error. The plaintiff, as appellee, has pointed out the prejudicial errors which she contends justified the trial court's decision, and the defendant has replied. Biggs v. Gottsch, 173 Neb. 15, 112 N. W. 2d 396.

The plaintiff's undisputed testimony shows that she lived at 3510 Lincoln Boulevard, Omaha, Nebraska, in the month of October 1954. On October 2, 1954, she purchased a 1953 Buick Roadmaster automobile from Rosen-Novak. She parked the car in front of her residence and it was not there the next morning. It was located at Ninetieth and Military Avenue thereafter with a tire blown out. Later, at 8 p.m., on October 11, 1954, she again parked the car, this time on the street north of her home. She again checked at that location

an hour later and the car was gone. Plaintiff identified photographs of a demolished car.

Joseph W. Davis, testifying on behalf of plaintiff, stated he served as a deputy sheriff for Douglas County from about 1948 to 1956. On October 14, 1954, he was on duty. At about 5:07 p.m. of that day he received a telephone call to go to the office of a Doctor Bonniwell. Accordingly, he went to the doctor's office and there found an injured boy, 14 years old, by the name of Arthur McGinn. On being questioned McGinn told him he had been injured in an accident. After receiving treatment from the doctor, McGinn went with the officer to the scene of the accident and pointed out to him a wrecked car. McGinn voluntarily told the officer he had stolen the car 3 days prior to that time and had parked it during that period near his home. The officer took pictures of the automobile and identified them. These were the same photographs that had been previously identified by plaintiff as photographs of her car.

The trial court assigned as its reasons for granting a new trial that the court erred in admitting evidence concerning a sum of money paid to plaintiff by an insurance company and in not granting a mistrial when timely motion was made, and because of errors in instructions Nos. 3 and 11, given on its own motion.

The plaintiff contends that the reasons assigned by the trial court for granting a new trial were sufficient for it to exercise its discretion to sustain the motion. She also urges that the trial court erred in admitting evidence obtained by cross-examination of plaintiff that she was paid in whole or in part for her loss by other parties; and erred in not holding the answer of the defendant was a judicial admission that defendant Arthur McGinn converted plaintiff's automobile.

These are the only errors suggested by the trial court or urged by the plaintiff and no others are observed by this court from the record.

In the discussion of the question of the assigned errors

as to the admission of evidence with respect to plaintiff having indemnity insurance, and the amount thereof, it will be necessary to review the testimony concerning these matters.

The plaintiff, who first testified, attempted to prove the value of her automobile before the taking and the salvage value thereafter. On direct examination she was permitted to testify, over objections that the questions were irrelevant and immaterial, that she purchased it from Rosen-Novak and paid $2,738 for it and received $150 for the salvage. Over like objection she said she was without transportation facilities for 3 months and paid $100 a month for taxicab services in that period.

Evidence of the purchase price of the automobile, or the sale price of the salvage, or the expenses of transportation while deprived of its use in no way tended to prove the proper measure of plaintiff's damage in this cause. In Lund v. Holbrook, 153 Neb. 706, 46 N. W. 2d 130, this court held: "In an action for damages to an automobile, where the automobile cannot be placed in substantially as good condition as it was before the injury, the measure of damages is the difference between its reasonable market value immediately before and immediately after the accident. The injured party is not permitted to recover in addition thereto damages for loss of use." It is obvious that neither the purchase price nor the amount received as salvage was material to show the reasonable market value of the automobile before and after the injury.

One who has brought out improper testimony on the examination-in-chief of his own witness over proper objections cannot complain of cross-examination of the witness on the same subject. 98 C. J. S., Witnesses, § 378, p. 138; Louis Steinbaum Real Estate Co. v. Maltz (Mo. Rep.), 247 S. W. 2d 652, 31 L. R. A. 2d 1052. This court has hitherto applied this rule where incompetent evidence was elicited on cross-examination with respect to the redirect examination thereafter. Chicago, R. I.

& P. Ry. Co. v. Griffith, 44 Neb. 690, 62 N. W. 868.

Accordingly on cross-examination defendant's attorney interrogated the plaintiff both as to the purchase price and the sale price of the car which she had testified to on direct examination. The existence of such insurance was brought out in the first instance by answers given by the plaintiff to questions concerning the purchase price of the automobile in the following questions and answers: "Q. So $300 of this $2,738.55 was received as just an amount that was set for your old car, is that right? A. Right. Q. And then did you give any money down? MR. FIEDLER: Your honor, I think that is improper cross-examination, incompetent, irrelevant; the purchase price—MR. CANNON: We show this purchase price involved a lot of other things besides the purchase price. THE COURT: Objection sustained. Q. (By Mr. Cannon) Well, Mrs. Neill, do you know what besides the actual purchase price of the car was included in this $2,738.55 that your lawyer tells you you spent? A. Pardon? Q. Was there a finance charge included? A. I am sure there was. Q. Do you know how much? A. I can't remember the finance charges. Q. Were there insurance premiums included? A. No, we called our insurance company ourselves. Q. You got your insurance separately? A. I am sure we did."

When the plaintiff on cross-examination was asked about the proceeds of the salvage she received, insurance was further brought out in the testimony. "Q. Then, Mrs. Neill, you disposed of the remains of your car after it was damaged somehow. Did you have anything to do with that yourself? A. I think the insurance company, and with our attorney, and with Rosen-Novak, helped us on that. Q. They took care of that; you really didn't have much to do with that? A. No. No value to us."

It seems clear that after the plaintiff on direct examination, over objection, testified as to the purchase price of the car and sale price of the salvage that there-

after the defendant could cross-examine in respect thereto. The plaintiff's attorney made no objections to the questions except as above set out. Obviously the existence of insurance shown by answers to proper questions on cross-examination was then before the jury. The evidence does not disclose the exact kind of insurance carried but the rules established by this court logically apply to any liability insurance. In Lund v. Holbrook, *supra,* it was said: "Where the fact of whether or not a party carries liability insurance is not relevant to some issue in the case it is not admissible.

"If evidence is properly admissible for any purpose, it cannot be excluded for the reason that it tends to prejudice the party because it shows or tends to show that the party carries liability insurance."

Further on the cross-examination turned to the subject of the $100 per month concerning which plaintiff had testified that she was forced to pay for transportation.

On cross-examination she was then asked the following questions by defendant's counsel, after which plaintiff's counsel asked for a mistrial as here set out: "Q. And, therefore, the delay that was caused to you was because of the time it took you to get the cash, wasn't it? A. Not necessarily. Q. Oh? A. You know, we just bought a 50-dollar junker when we bought one. We had to use a car, naturally, to get back and forth to work. Q. The reason you had to buy a 50-dollar junker was because your insurance company wasn't paying off properly? MR. FIEDLER: I move for a mistrial. Counsel has no right to inject any insurance companies. I think it's highly irregular. He wants to prejudice the jury." There was no objection at this point going to the question of materiality or relevancy but merely a motion for mistrial on the ground of insurance having been injected in evidence. Insurance however was already before the jury and the trial court committed no error in overruling the motion for mistrial.

It however sustained the objection and the question last set out was never answered.

Thereafter, plaintiff was asked whether she had collected for the loss of her car from someone. Objections to the question were made but she had already answered "No," and the answer was allowed to stand. Defendant's attorney then made an offer of proof attempting to show plaintiff had brought suit against Rosen-Novak and National Auto Insurance, had been paid by them, and had no real interest in the outcome of the suit. Objections with reference to this line of questioning and to the offer of proof were made and sustained. The questions were not answered.

Later however the following questions were then propounded to the plaintiff and were objected to but the court permitted her to answer: "Q. (By Mr. Cannon) Mrs. Neill, have you recovered any amount from any party or any in full or in part, have you recovered any part of your loss that resulted from the destruction of your car? MR. FIEDLER: Object to this, Your Honor, as incompetent, irrelevant, and improper cross-examination. THE COURT: She may answer. (Question read by the reporter) A. Yes. Q. How much? MR. FIEDLER: Object to that, Your Honor, as incompetent, irrelevant, immaterial, tends to introduce an element in this case that is prejudicial, improper cross-examination. THE COURT: She may answer. A. $1300. Q. In order to recover that $1300, or in connection with the recovery of that $1300, did you not make a statement that the actual cash value of your automobile was $1300? A. No. Q. Did you not sign an application or a form to get that $1300, called a Proof of Loss? A. I am not sure whether it was a Proof of Loss. Q. You signed something, didn't you? A. Well, I am not sure. Q. Was it the fact that you declared that the actual cash value of your automobile was $1300? A. No, no, we had to pay the balance. Q. On your note. On your note, is that right, at Rosen-Novak? A. Yes. Q. Nevertheless, you ac-

cepted $1300 in full payment? MR. FIEDLER: I object to that— A. No." The plaintiff's counsel at this point renewed his objections to the questions on the grounds they were immaterial and irrelevant and again moved for a mistrial. The court did not rule on the motion for a mistrial but allowed the answers to stand. It however permitted no further questions concerning the $1,300 received by plaintiff.

Defendant contends that these questions were proper in order to show that plaintiff was not the real party in interest under section 25-301, R. R. S. 1943. It has been generally held, though it is not necessary in the present cause for us to decide the matter, that the issue that the plaintiff is not the real party in interest must be specially pleaded and cannot be raised by general denial as pleaded in this case. 67 C. J. S., Parties, § 113 (3), p. 1116.

Defendant also argues these last questions tended to refute the value of the car claimed by the plaintiff. It appears however that the purpose of the interrogation was to again elicit the existence of insurance and the amount thereof. The court erred in not sustaining the objections but this aspect of the cause will be further considered in relation to instruction No. 11.

The plaintiff was also required by the trial court to answer questions as to a settlement made with another person over like objection. The settlement alluded to was that with the Mangens, including the minor Harold Mangen, the other joint tort-feasor. Her answers disclosed a settlement had been made but not the amount thereof nor the person making settlement. Plaintiff contends this is also erroneous. In Tankersley v. Lincoln Traction Co., 101 Neb. 578, 163 N. W. 850, this court held that it was prejudicial error to allow counsel for the plaintiff to state to the jury the fact of such settlement and the amount thereof. The plaintiff in the case before us contends the rule should be the same in case of evidence sought to be admitted by the defendant.

In the present case however this becomes unnecessary for us to determine since the plaintiff's counsel thereafter in open court before the jury stipulated the settlement had been made and that $100 was the amount thereof. Where the plaintiff joins with the defendant in a stipulation made in open court before the jury which discloses the existence of a settlement with a joint tort-feasor and the amount thereof, plaintiff cannot on appeal urge error because of the previous admission of evidence introduced by the defendant over plaintiff's objections showing such a settlement was consummated.

The court in submitting the cause to the jury gave the following instruction: "INSTRUCTION NO. 11. You are instructed that the testimony concerning the receipt of $1350.00 by the plaintiff should be disregarded by the jury. If you should find for the plaintiff and against the defendant the amount of the verdict should not be lessened because such sum was paid to the plaintiff. In other words, the obligation of the defendant, if you should find him liable, cannot be reduced by the $1350.00 paid to the plaintiff.

"Also, the plaintiff has been paid the sum of $100.00 in partial payment of the damage to her automobile and $452.00 salvage. You are instructed that this amount of $552.00 must be credited to the defendant in arriving at any verdict for the plaintiff in this case." The instruction appears to have been given to correct any erroneous reception of evidence with respect to the payment by the insurance company, the amount of the payment having been corrected and shown to be $1,350 by plaintiff on redirect examination, and the true amount of the salvage paid to plaintiff having been stipulated to have been $452.

The instruction was complained of by the plaintiff because the amount of the payment was again mentioned. The instruction clearly directed the jury to disregard the evidence with respect to the amount there-

of and not to deduct the same from the amount found by it to be due the plaintiff. "Where erroneous evidence is admitted by a court, and in the instructions to the jury such evidence is withdrawn by the court from their consideration, such withdrawal by the court ordinarily cures the error committed in the admission of the evidence." Danner v. Walters, 154 Neb. 506, 48 N. W. 2d 635.

Considering the evidence as a whole, we find no error was committed in receiving evidence which disclosed the existence of insurance because the answers of the witnesses came in response to proper questions on cross-examination. We further find that any error in the subsequent questions which elicited the amount thereof was cured by instruction No. 11 set out above.

The plaintiff further complains of instruction No. 3 which reads as follows: "In their answer to plaintiff's petition the defendants deny the allegations contained in the plaintiff's petition." The contention of the plaintiff with respect to this instruction is that the trial court erred in not including therein the specific denial contained in the second numbered paragraph of the defendant's answer which reads as follows: "2. Your Defendants further specifically and catigorically (sic) deny that the damage occasioned to Plaintiff vehicle was in any way caused by a wilful and intentional destruction by the minor Defendant Arthur McGinn and allege the true fact to be that said minor child at no time had any intenton to purposely damage said vehicle."

This denial was in addition to a general denial set out in the first paragraph. At the time the answer was filed the answering defendants were Arthur McGinn and his parents Frank McGinn and Virginia McGinn, who answered jointly. The parents were on motion dismissed from the action by the trial court at the conclusion of the plaintiff's evidence. Its purpose seems to have been a further defense as to the boy's parents. This because section 43-801, R. R. S. 1943, makes the

parents jointly and severally liable for the willful and intentional destruction of property by their minor or unemancipated children residing with them. The plaintiff contends this paragraph, by denying the destruction was willful and intentional, admitted that the defendant Arthur McGinn did convert the automobile, though not willfully or intentionally; and that it was a judicial admission and because of it the plaintiff was no longer required to prove that defendant converted the car and damaged it. The officer, who testified that the boy at the doctor's office admitted taking the automobile and damaging it, did not particularly identify the defendant Arthur McGinn as the same boy. He does not testify he knew the boy at the hospital or the defendant, and does not point out the present defendant as the same person. There is evidence from which inferences arise that tend to show he was the same person. The trial court in its order sustaining the motion for a new trial states the evidence was sufficient to go to the jury as to the identity of the defendant. We think its conclusion was correct. We do not however find that a general denial is inconsistent with a specific denial that the defendant did not purposely or willfully damage the car, or that the same is a judicial admission that he took the automobile, or that there was error in the giving of instruction No. 3.

For the reasons set out we find no error justifying the trial court in sustaining plaintiff's motion for a new trial. "Where a party has sustained the burden and expense of a trial, and has succeeded in securing the verdict of a jury on 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." Cullinane v. Milder Oil Co., 174 Neb. 162, 116 N. W. 2d 25.

It follows that the judgment of the trial court should be and is reversed and the cause remanded with directions to enter judgment on the verdict.

REVERSED AND REMANDED WITH DIRECTIONS.

CHRIS A. NIELSEN ET AL., APPELLEES, V. MAYME CHAPPELEAR, APPELLANT.

121 N. W. 2d 809

Filed May 31, 1963. No. 35404.

1. Waters. Surface waters are defined as waters which appear upon the surface of the ground in a diffused state, with no permanent source of supply or regular course, which ordinarily result from rainfall or melting snow.
2. ———. Diffused surface waters, which ordinarily result from rainfall and melting snow and having no permanent source of supply or regular course, may be dammed, diverted, or otherwise repelled by an adjoining landowner without liability, if it is necessary and done without negligence.
3. ———. When surface waters concentrate and gather in volume, so as to lose their character as diffused surface waters and flow into a natural depression, draw, swale, or other natural drainway, the flow may not be arrested or interfered with to the injury of neighboring proprietors.
4. ———. The owner of land is the owner of surface waters which fall, arise, or flow upon it, and he may retain them for his own use without liability. He may also change their course on his own land by ditch or embankment, but he may not divert them upon the land of others except in depressions, draws, swales, or other drainways through which such waters were wont to flow in a state of nature.
5. ———. While the flow of surface waters in a natural depression, draw, swale, or other natural drainway may be temporary and occasional, the course which they uniformly take is the controlling factor.

Appeal from the district court for Washington County: DONALD BRODKEY, JUDGE. Reversed and dismissed.

Sidner, Lee, Gunderson & Svoboda, for appellant.

O'Hanlon & O'Hanlon, for appellees.

Heard before WHITE, C. J., CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

YEAGER, J.

This is an action which was instituted by Chris A. Nielsen and Alice I. Nielsen as joint owners in fee simple of certain lands in Washington County, Nebraska, the

purpose of which was to obtain a mandatory injunction against Mayme Chappelear, defendant and the fee simple owner of certain lands in Dodge County, Nebraska, lying immediately to the south of the lands which at the time of the commencement of the action belonged to the Nielsens. Since the commencement of the action Chris A. Nielsen died, and since his death it has been presented by Alice I. Nielsen, sole plaintiff. A county road extending east and west which is the dividing line between Washington and Dodge Counties is also the dividing line between the lands of the parties. The land of the plaintiff is on the north side and that of the defendant is on the south side. The parties have other lands in the immediate vicinity but they require no specific mention herein. The purpose of the action was to obtain an injunction which would prevent the construction and maintenance by the defendant of an obstruction or dike on her land on the south side of the county roadway, the effect of which dike would be to prevent the passage of water from the plaintiff's land into an alleged drainway in a general southerly or southeasterly direction across the land of the defendant.

The defendant filed an answer in which the plaintiff's right to relief was denied. A cross-petition was also filed but its content and purpose will not be stated or considered at this point in the opinion.

The case was tried to the court and a judgment granting the relief sought by the plaintiff was rendered. The defendant filed a motion for new trial which was overruled. From the judgment and the order overruling the motion for new trial the defendant has appealed.

The record discloses that the defendant has 80 acres south of the county road which has been mentioned and immediately to the north the plaintiff has 80 acres, of which about 54 acres are of particular concern herein. Plaintiff's land is flat and in case of rain the course of flow of water is southward to the road. In about the year 1956 this land was leveled for irrigation purposes.

More accurately, the surface was evened but the general level or contour was not changed and the general course of flow of water was not changed, but continued southward to this road. Without this road this general course of flow, it appears, would have been, in the state of nature, across the line and onto the land of the defendant to the south, which land to the south was also practically level with the course of flow southward across it.

This east-west road was constructed at least as early as 1918 and its condition at the time of trial was substantially the same as it had been since 1918. It extended eastward between the lands of the parties about a quarter of a mile to a north and south road. It also extended westward between these lands and beyond an undetermined distance. In the construction the road was elevated above the natural level of the lands on the north and the south sides thereof, and it has so remained through the succeeding years. Its exact height is not disclosed but it becomes apparent that it is sufficiently high to prevent the flow of water across it as it would have flowed in the course of nature.

In the construction of the road a ditch was constructed parallel with the road on the north side and another on the south side. The water flowing southward from plaintiff's land flowed into the ditch on the north side and as to the disposition of it thereafter there is considerable dispute, but as it will appear later herein that matter, while of some significance, is not controlling.

There is no evidence of passage of the surface waters in their diffused state from plaintiff's land to the land of the defendant. It appears that at some time in the past a 12-inch culvert was constructed across the road to carry water from the north side ditch to the south side and from the south to the north.

The apparent theory of the plaintiff was that the design of the culvert was to allow passage of surface waters from her land into the ditch on the north side of the road until the ditch filled up to and above the base of the

culvert when it would cross over to the south side and drain into the ditch on the south side, and on down over the land of the defendant. Her theory embodied a contention that there was a natural drainway for waters passing from her land down across the land of the defendant.

As to the passage of water the defendant contended that in the state of nature there never was a drainway for water coming onto or crossing her land. In point of fact she contended that while some water came across from north to south, except in time of flood, water from the north did not ordinarily drain onto her land but built up in the north and south ditches. After it reached a sufficient elevation the water in the north ditch flows out west through a tile and in the south ditch it just stands.

After the plaintiff did her leveling the surface waters from her land flowed into the ditch and by the action here she contends that she has the right to have the water pass across the road at the culvert and eastward a distance of about 20 or 30 feet and thence southward through what she asserts is a natural drainway over the defendant's land. In other words she insists that she has the right to have the water flowing from her land collected in the ditch on the north side of the road and to have it concentrated at the culvert and caused to flow to the south ditch and thence into what she asserts is a natural dainway.

The defendant refused to allow this and constructed barriers or dikes to prevent it. The question of the right of the defendant to prevent the flow of water across her land is the one involved here. The record without question discloses that the defendant did construct such barriers and has insisted upon and persists in their maintenance.

The record fails to sustain the contention of the plaintiff that there ever was a natural drainway into which surface waters from plaintiff's land naturally collected

and were carried onto and over the defendant's land. Early in the case there was such evidence, but the witness who gave this testimony later retracted it on the basis of more thorough investigation, and testified that there was nothing to indicate a natural drainway on the defendant's land. There is evidence that there was a slightly depressed drainway on the defendant's land, but that it had been artificially created thereon for the purpose of drainage on that land, and not for any other purpose. There is nothing of substantial character to dispute this contention of the defendant.

The claim of the plaintiff is that the waters involved in this case are surface waters, and the plaintiff must prevail, if indeed she may prevail, on that theory. Surface waters are defined as waters which appear upon the surface of the ground in a diffused state, with no permanent source of supply or regular course, which ordinarily result from rainfall or melting snow. See, Courter v. Maloley, 152 Neb. 476, 41 N. W. 2d 732; Nichol v. Yocum, 173 Neb. 298, 113 N. W. 2d 195; Wells v. Miller, 173 Neb. 780, 115 N. W. 2d 137.

The rights and liabilities affected by surface waters, and the earlier decisions of this court in relation thereto, have been considered in Nichol v. Yocum, *supra*. The conclusions therein set out are determinative of the rights and liabilities of the parties herein to the extent that a determination is required. The following statements of principle appear in this case:

"Diffused surface waters, which ordinarily result from rainfall and melting snow and having no permanent source of supply or regular course, may be dammed, diverted, or otherwise repelled by an adjoining landowner without liability, if it is necessary and done without negligence. * * *

"When surface waters concentrate and gather in volume, so as to lose their character as diffused surface waters and flow into a natural depression, draw, swale, or other natural drainway, the flow may not be arrested

or interfered with to the injury of neighboring proprietors.

"The owner of land is the owner of surface waters which fall, arise, or flow upon it, and he may retain them for his own use without liability. He may also change their course on his own land by ditch or embankment, but he may not divert them upon the land of others except in depressions, draws, swales, or other drainways through which such waters were wont to flow in a state of nature.

"While the flow of surface waters in a natural depression, draw, swale, or other natural drainway may be temporary and occasional, the course which they uniformly take is the controlling factor."

No benefit could flow to the plaintiff insofar as the issues involved here are concerned from the first principle since nothing done by the defendant diverted or repelled the flow of surface waters flowing in the state of nature from plaintiff's land. It was diverted by the elevated highway and collected in volume in the ditches.

No benefit could flow to her from the second principle since, if it be assumed that these were concentrated waters which gathered in volume, the outlet sought by the plaintiff was not into a natural depression, draw, swale, or other natural drainway, but into an artificial drainway created by the defendant on her own land. For this same reason no benefit could flow from the third stated principle.

The fourth statement is merely a declaratory statement the effect of which is to say that if there is a right to have water flow into a natural depression, draw, swale, or other drainway, if one exists, flow does not have to be constant, but may be temporary or occasional as in the state of nature is required.

These statements of principle, in the light of the evidence adduced, are inhibitive of the rights asserted by the plaintiff, as has already been pointed out herein.

The conclusion reached as to plaintiff's cause of action

is that the judgment of the district court in favor of the plaintiff on her pleaded cause of action is erroneous.

In this case the defendant filed an answer and also a cross-petition. By the cross-petition it was alleged that plaintiff had filled the ditch on the north side of the road to the injury and damage of the defendant. No specific or general mention of this matter is made in the formal entry of judgment in the case. In the motion for new trial the defendant asserts that the court erred in failing to grant this relief. The matter was referred to in the brief but it will be said without elaboration that on the record made nothing appears which would justify the relief prayed in this respect by the defendant.

For the reasons stated herein the judgment of the district court is reversed and the action dismissed.

REVERSED AND DISMISSED.

SYSTEM MEAT COMPANY, A WYOMING CORPORATION, APPELLEE, V. B. M. STEWART ET AL., APPELLEES, RICHARD KEKEISEN ET AL., INTERVENERS-APPELLANTS.

122 N. W. 2d 1

Filed May 31, 1963. No. 35412.

1. **Appearances.** Where a party filing a special appearance thereafter requests affirmative relief, he waives his special appearance from the time of the subsequent pleading.
2. **Corporations.** The management of corporate litigation is under the direction and control of corporate officials.
3. ———. However, if gross negligence, fraud, or flagrant abuse of discretion is present, courts should interfere to protect the stockholders.
4. ———. In the absence of usurpation, or fraud, or gross negligence, or transgression of statutory limitations, courts of equity will not interfere at the suit of dissatisfied stockholders merely to overrule the discretion of directors on questions of corporate management, policy, or business.
5. **Corporations: Parties.** Where stockholders for sufficient reason are permitted to intervene, they become parties to the liti-

gation until such time as the court, upon a proper hearing, finds it unnecessary for them to participate.

6. ———: ———. Under the facts presented in this case, interveners are entitled to their day in court to contest the fairness of the proposed settlement agreement.

Appeal from the district court for Scotts Bluff County: TED R. FEIDLER, Judge. Reversed and remanded.

Marvin L. Holscher and Malcolm D. Young, for interveners-appellants.

Atkins, Ferguson & Nichols, for appellee System Meat Co.

Wright, Simmons & Hancock, for appellees Stewart et al.

Heard before WHITE, C. J., CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

SPENCER, J.

This is an appeal by interveners from the approval of a settlement agreement between the plaintiff and the defendants. The plaintiff and appellee is the System Meat Company, a Wyoming corporation, hereinafter referred to as plaintiff. The defendants are B. M. Stewart, hereinafter referred to as Stewart; System Investment Corporation of Nebraska, a Nebraska corporation, hereinafter referred to as System of Nebraska; and System Investment Corporation, a California corporation, hereinafter referred to as System Investment Corporation.

The amended petition filed by plaintiff alleges substantially that on or about December 1, 1960, Peter Smith, president of plaintiff, without authority, entered into an oral agreement with Stewart that he would purchase cattle with the funds of the plaintiff and, without consideration, transfer possession and ownership of said cattle to Stewart; and that pursuant thereto, he purchased 729 head of cattle at sales held in Wyoming and Montana, paid for the same with funds of the plaintiff in the amount of $103,144.31, and purported to transfer

said cattle by bill of sale to Stewart. Subsequent to the purchase, the cattle were shipped to Minatare, Nebraska, and at the time of filing of the petition were in possession of the defendant, System of Nebraska, at that point; that a brand owned by System Investment Corporation was placed upon them, and they were mixed with 4,250 other cattle with the same brand; and that it is impossible to separate plaintiff's cattle from the others. It was also alleged that Stewart is the president of both System of Nebraska and System Investment Corporation, and that System Investment Corporation owns all of the stock of System of Nebraska. Plaintiff prayed that the purported bill of sale be declared void; that said cattle be partitioned and sold and the proceeds brought into court to satisfy plaintiff's claim of $103,144.31; for a restraining order; and for other equitable relief. A restraining order was granted.

On March 17, 1961, the district judge found the 729 head of cattle had been commingled with other cattle by defendants, and that a temporary injunction should be granted requiring the defendants to deposit with the clerk of the district court for Scotts Bluff County a proportionate amount of each sale from the 5,000 head of cattle until the sum of $103,144.31 had been deposited.

On May 1, 1961, plaintiff's attorneys, Malcolm D. Young, Atkins and Ferguson, and Clark G. Nichols, were granted leave to file and filed a petition in intervention. The petition alleged that their investigation indicated a conspiracy between Stewart and Smith to defraud plaintiff; that action was brought on behalf of the plaintiff at the request of C. M. Bodensteiner, Smith's successor, as president of plaintiff; that on April 24, 1961, a new board of directors was elected for plaintiff; that one Robert S. Mitchell was elected president succeeding Bodensteiner; and that Mitchell had instructed these attorneys to dismiss the action and had forwarded a resolution of the board of directors directing that the litigation be dismissed. The relief sought was that plaintiff

be prohibited from dismissing the litigation; and that their fees for legal services rendered be determined and the judgment paid out of the funds on hand.

On the same date, May 1, 1961, Leo Bodensteiner and several other stockholders of plaintiff corporation, who will hereinafter be referred to as interveners, were granted leave to file and filed a petition in intervention. They alleged that the new board of directors of the plaintiff was under the influence, domination, and control of Stewart; that Stewart had used his influence to have the president of the corporation removed from office; that Stewart was conspiring with some of the stockholders to have the present case dismissed on terms unfavorable to the plaintiff; and that intervention was necessary to protect the interests of the stockholders. An amended petition in intervention embracing these allegations was subsequently filed by the intervening stockholders who were joined in that petition by several additional stockholders.

At the time of filing the petition in intervention, plaintiff's attorneys also filed a motion for leave to withdraw as counsel. No action appears to have been taken on this motion, and the firm of Atkins and Ferguson and Clark G. Nichols remained in the case representing the plaintiff at subsequent stages. Malcolm D. Young took no further part in the representation of plaintiff, was not notified of or present at the settlement hearing, but did file a motion for a new trial on the approval of the settlement agreement and the dismissal of the petition in intervention.

Stewart, who was served out of the state, filed a special appearance and thereafter filed a demurrer preserving his special appearance. Subsequently, however, he filed several motions requesting affirmative relief, with no attempt to preserve his special appearance. This is not important at this stage of the proceedings and we allude to it only because of plaintiff's suggestion that settlement was advisable because there was a question

as to whether Stewart's special appearance was good.

In Ivaldy v. Ivaldy, 157 Neb. 204, 59 N. W. 2d 373, we held that where a party filing a special appearance thereafter requests affirmative relief, he waives his special appearance from the date of the subsequent pleading.

Defendants filed demurrers to plaintiff's amended petition, but no rulings were ever made thereon. No answers have been filed by any of the defendants. Defendants filed motions attacking the petitions in intervention. These were overruled on September 28, 1961. On October 16, 1961, a stipulation for settlement, signed by Stewart, for the other two defendants by Stewart as president, and for the plaintiff by its then president, Richard H. Shaw, was filed in the district court. This stipulation in substance provided for the settlement of litigation by allowing the defendants setoffs amounting to $47,308.57, and for a judgment against all of the defendants in the principal amount of $55,835.74, plus interest amounting to $3,948 and the costs of the action. It was stipulated that the judgment should be satisfied from the funds impounded with the clerk of the district court, and that the balance of the funds then remaining should be paid to the System Investment Corporation. It was further stipulated that from the amount received by the plaintiff, plaintiff would pay to the Colorado National Bank of Denver such sum as was necessary to make current the note and mortgage to said bank, but not to exceed $35,000. The setoffs provided for by the stipulation represented an amount of $22,108.57, alleged to be due from the plaintiff to System Investment Corporation; the sum of $5,700, representing a loss of cattle which were killed or injured allegedly prior to their delivery to Stewart; and an item of $19,500, representing a judgment obtained by Allbright-Nell against the plaintiff and acquired by the defendant, System Investment Corporation.

At the hearing on October 17, 1961, it was stipulated

that interveners' attorney had received no notice of the settlement agreement until 3 p.m., October 16, 1961, the day it was filed; that at 3:15 p.m., he was notified a hearing would be held in the judge's chambers at 3:30 p.m.; and that he was there at 3:30 p.m., and for the first time saw the agreement. The journal entry is as follows: "NOW on this 16th day of October, 1961, the same being one of the days of the regular October 1961 term of said Court, this matter came on to be heard upon the oral application of the Plaintiff for the approval of the Court of a stipulation entered into by and between the Plaintiff and the Defendants for the settlement of this action. The Plaintiff appearing by its attorney, A. H. Atkins, Defendant by their attorney, Floyd E. Wright and the Interveners, Richard Kekeisen, Carol Kekeisen, George Harper, Adeline Harper, Leo Bodensteiner, Mary Ann Bodensteiner, C. M. Bodensteiner, Tony Amanzio and Paul McCarbilla by their attorney, Marvin Holscher.

"The Interveners having heretofore not been advised of the proposed settlement the matter was continued until October 17, at three o'clock P.M. Ted R. Feidler District Judge."

On October 17, 1961, interveners, by their attorney, filed objections to the stipulation and a motion for a continuance supported by the affidavit of the attorneys. The court overruled the motion for continuance, dismissed the petition in intervention, and approved the stipulation for settlement. Interveners perfected their appeal to this court.

The affidavit suggests the lack of notice; that the attorney had not had time to inform his clients of the stipulation; that it was necessary that he be given sufficient time to complete his investigation and prepare for the hearing; that with reference to the setoff of $22,108.57, many items are set out which indicated that there were meritorious defenses to much of said sum if said items were allowable as a setoff; that with reference to the setoff of $5,700, there was no showing whatever as to

what cattle were killed or injured or the dates involved or the circumstances connected therewith, and that it was impossible to base a determination thereon without further information; and that with reference to the setoff of $19,500 the judgment was in fact purchased by System Investment Corporation for the sum of $17,000, and not $19,500 for which setoff was being asked. There was also included in the affidavit other information as to claims of the plaintiff against Stewart. The affidavit, if true, raised a serious question as to the fairness of the settlement and whether the interests of the stockholders and the corporation were being protected in the settlement.

It is evident from the record that interveners' attorney was required to prepare for a hearing on the stipulation which terminated the litigation in less than 24 hours, and that none of his clients lived closer than 450 miles. The information he was able to obtain had to be obtained from some of them by telephone or telegraph. A trial without time for sufficient preparation to meet the issues raised is a denial of one's day in court. It is hard to understand the urgency which required a hearing without adequate notice if the settlement was as fair as plaintiff and defendants attempt to suggest in their briefs. If interveners were entitled to notice, certainly 24 hours, under the circumstances, were wholly inadequate and the procedure in district court was so summary that it constituted a denial of due process of law to them.

There is no question that the management of corporate litigation is under the direction and control of corporate officials. However, if gross negligence, fraud, or flagrant abuse of discretion is present, courts should interfere to protect the stockholders. The general rule is stated in 13 Am. Jur., Corporations, § 463, p. 507, as follows: "The board of directors of a corporation may, under ordinary circumstances, control an action brought by the corporation and may dismiss it without consulting

the stockholders, and their action is, in ordinary cases, conclusive. The board of directors has no right, however, to dismiss an action through collusion with the defendant." In Royal Highlanders v. Wiseman, 140 Neb. 28, 299 N. W. 459, and Ledwith v. Bankers Life Ins. Co., 156 Neb. 107, 54 N. W. 2d 409, we held that in the absence of usurpation, or fraud, or gross negligence, or transgression of statutory limitations, courts of equity will not interfere at the suit of dissatisfied stockholders merely to overrule the discretion of directors on questions of corporate management, policy, or business. This is not the ordinary case. Its facts put it within the ambit of the exception to the general rule.

Were the interveners entitled to notice? Clearly, plaintiff's attorneys felt intervention was necessary to stop a threatened dismissal and to protect their own fees. Plaintiff, in its statement of the facts, says: "Interveners were permitted to intervene in the law suit to prevent a fraudulent dismissal of the case without a settlement, which was about to be done by a previous president and Board of Directors, * * *." Defendants specifically adopt plaintiff's statement of facts in their brief. There can be little question that unless interveners had been permitted to intervene, there would have been a fraudulent dismissal of the case with the possibility of the dissipation or loss of the funds already sequestered. It is apparent, therefore, that intervention was an actual necessity to prevent a miscarriage of justice.

Plaintiff argues that after interveners were permitted to intervene to prevent a dismissal of the action, there was a change in the personnel of the board of directors and president of plaintiff so intervention is no longer necessary. Even if this were true, interveners cannot be ignored. When they, for sufficient reason, were permitted to intervene, they became parties to the litigation until such time as the court, upon a proper hearing, found it unnecessary for them to participate.

Plaintiff urges that interveners have not exhausted

all available means to obtain relief through the corporation itself. It relies on Kowalski v. Nebraska-Iowa Packing Co., 160 Neb. 609, 71 N. W. 2d 147, in which we held: "A stockholder, before he can proceed in his own name but in behalf of the corporation for the redress of wrongs done to it, must establish that he has exhausted all available means to obtain relief through the corporation itself, unless the circumstances excuse him from so doing. That is a condition precedent."

From what has been said, it is apparent that time was of the essence when interveners were permitted to intervene. Plaintiff contends, however, that sufficient time elapsed after they were permitted to intervene for them to take further action through the corporation. As we view the facts and record in this case, interveners are clearly within the exception noted, and there is no merit to plaintiff's argument.

Under the circumstances presented, the question involved in this appeal is not the fairness of the settlement, but rather whether or not interveners are entitled to their day in court to contest its fairness. Some indication of the need of a full hearing on the settlement agreement is the apparent instability of official tenure in plaintiff corporation. There appear to have been changes in the director personnel connected in some way with this litigation. From the time of the issuance of the bill of sale to the signing of the settlement agreement, a period of 11 months, at least four different individuals acted as president of plaintiff corporation. The previous history of this action and the nature of the settlement should have dictated caution in hurrying through a hearing without proper notice. Interveners should have been given an opportunity to be heard on the merits of the stipulation for settlement. This required a reasonable continuance to prepare for such hearing. The trial court abused its discretion in refusing a reasonable continuance to permit interveners to satisfy themselves as to

the fairness of the proposed settlement or to obtain the evidence to indicate otherwise.

For the reasons stated, the judgment of the district court is hereby reversed and the cause is remanded for further proceedings in conformity with this opinion.

REVERSED AND REMANDED.

CHARLES NEKUDA, JR., APPELLANT, V. ALLIS-CHALMERS MANUFACTURING COMPANY, A CORPORATION, ET AL., APPELLEES.

121 N. W. 2d 819

Filed May 31, 1963. No. 35424.

1. **Sales.** Under the provisions of section 69-449, R. R. S. 1943, notice of a breach of warranty must be given within a reasonable time. Unless such notice be given, the purchaser has neither a right of action for the breach of a promise or warranty in the contract, nor a defense to an action for the purchase price.
2. **Negligence.** The doctrine of res ipsa loquitur is not applicable where there is direct evidence as to the precise cause of an accident and the facts and circumstances surrounding it. The doctrine does not ordinarily apply where the structure or machine alleged to be defective was not exclusively in the possession and under the control of the defendant.
3. **Sales.** It is essential to a recovery on an implied warranty that the implied warranty be established, a breach thereof be shown, and the damages resulting from the breach be proved. Where the evidence fails to show a breach of warranty a basis for recovery is not established.
4. **Appeal and Error.** A judgment will not be reversed for errors against a party not entitled to succeed in any event.

Appeal from the district court for Garfield County: DONALD H. WEAVER, Judge. Affirmed.

Vogeltanz & Grimminger, for appellant.

Tye, Worlock & Knapp and Schaper & Schaper, for appellees.

Heard before WHITE, C. J., CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

CARTER, J.

Plaintiff commenced this action in the district court for Garfield County against Allis-Chalmers Manufacturing Company, a corporation, and Millard D. Anderson and John W. Anderson, doing business as Anderson Brothers Motor and Implement Company, a partnership, on an implied warranty of a seat pan for a tractor. The jury returned a verdict for the defendants. Plaintiff has appealed from the judgment entered on the verdict.

On September 29, 1958, plaintiff purchased a seat pan from Anderson Brothers at their place of business in Burwell, Nebraska. The seat pan had been purchased by Anderson Brothers from Allis-Chalmers and had been sold to the plaintiff in the package in which it had been received. Allis-Chalmers had obtained the seat pan from the Munroe Equipment Company, the manufacturer, who had furnished similar seat pans in quantity on specifications furnished by Allis-Chalmers.

Plaintiff's father was the owner of a WD-45 Allis-Chalmers tractor which had been purchased in 1955. The seat pan involved in the present action was purchased by plaintiff and installed on the Allis-Chalmers tractor in late September or early October 1958. The evidence shows that the tractor was extensively used thereafter during the planting, growing, and harvesting seasons, but was subjected to a limited use only during the winter months. On April 24, 1960, while plaintiff was occupying the seat on the tractor and engaged in pulling a rotary hoe in the field, the seat broke away from the assembly which held it in place, causing plaintiff to be thrown under the right rear wheel of the tractor and causing the injuries to plaintiff for which this suit was brought.

The evidence shows that the seat pan was purchased

from Anderson Brothers without any statement by plaintiff as to its intended use. The seat pan was put on the tractor and used for 19 months. Plaintiff said that it snapped or broke without warning, causing the injuries for which damages are sought. The evidence of the defendant Anderson Brothers is that the seat pan was purchased from Allis-Chalmers at Omaha, Nebraska, and that it was sold to plaintiff in the same package in which it was received. Anderson Brothers deny that any implied warranty was made as to its fitness for any particular use. The evidence of the defendant Allis-Chalmers is that the tractor seat was manufactured by the Munroe Equipment Company upon the specifications provided by Allis-Chalmers. Expert witnesses testified that this type of seat pan was tested in its laboratory and testing grounds. They testified that materials and construction were tested and found to be of good quality. They also testified that the seat pans were tested for stress and endurance on varying conditions and types of ground, and they were found to be fully adequate. Experts in metallurgy testified to the good quality of the materials used in the manufacture of the seat pan. Professor W. F. Wieland qualified as a consulting engineer and as having done research in the field of materials and the properties of such, the effect of corrosion, and the behavior of materials under various conditions. He examined the seat pan after the accident and before the trial. It was his opinion that there was no defect in the materials used in the manufacture of the seat pan, and that its condition was a progressive deterioration of the metal due to corrosion extending over a rather long period of time.

Plaintiff assigns as error the giving of instruction No. 6. By this instruction the court told the jury that a seller is not liable for a breach of warranty unless the buyer gave him notice of such breach within a reasonable time after the buyer knew, or ought to have known, of the alleged defect in the goods. No notice was given

in the instant case except that obtained through the filing of the action on July 7, 1960, following the accident on April 24, 1960. Plaintiff contends that notice is not required under the circumstances of this case and that the trial court erred in so instructing the jury.

The plaintiff relies upon two sections of the Uniform Sales Act in support of his contention that there was an implied warranty of the seat pan. These sections provide in part as follows:

"Subject to the provisions of this act and of any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract to sell or a sale, except as follows: (1) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be reasonably fit for such purpose. (2) Where the goods are bought by description from a seller who deals in goods of that description (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be of merchantable quality." § 69-415, R. R. S. 1943. "In the absence of express or implied agreement of the parties, acceptance of the goods by the buyer shall not discharge the seller from liability in damages, or other legal remedy, for breach of any promise or warranty in the contract to sell or the sale. But, if, after acceptance of the goods, the buyer fails to give notice to the seller of the breach of any promise or warranty within a reasonable time after the buyer knows, or ought to know of such breach, the seller shall not be liable therefor." § 69-449, R. R. S. 1943.

Section 69-449, R. R. S. 1943, requires that notice of a breach of warranty must be given within a reasonable time. Under this section the purchaser has neither a

right of action for the breach of a promise or warranty in the contract, nor a defense to an action for the purchase price, unless the required notice has been given. Marsh Wood Products Co. v. Babcock & Wilcox Co., 207 Wis. 209, 240 N. W. 392; Jan Ree Frocks, Inc. v. Pred, 68 S. D. 356, 2 N. W. 2d 696. This section requires notice of a claim for damages as a condition precedent to a right of recovery. Lumbermens Mut. Cas. Co. v. S. Morgan Smith Co., 251 Wis. 218, 28 N. W. 2d 343; Simonz v. Brockman, 249 Wis. 50, 23 N. W. 2d 464. In the instant case no notice was given. But even if there was an implied warranty and notice given of the breach thereof within a reasonable time, there is a further reason why plaintiff cannot recover.

The evidence in this record will not sustain a finding that there was a breach of warranty even if such warranty existed. Plaintiff's evidence shows that he purchased the seat pan without disclosing the purpose of its use. There is no evidence that he relied on the seller's skill or judgment. He attached it to his tractor and used it for 19 months. He relies entirely on the fact that the seat pan broke around the bolt holding it in place. There is no evidence of any defect in materials or workmanship. Defendants produced evidence that there was no defect of materials, design, or workmanship. The evidence shows that these seat pans had been thoroughly tested, not only as to the quality of materials, design, and workmanship, but as to their endurance and suitability for the purposes for which they were to be used. In addition thereto defendants produced evidence that the seat pan in question had deteriorated as a result of corrosion which brought about a gradual weakening of the seat pan and the resulting accident. This evidence was not disputed.

Some contention is made that the case is one involving the doctrine of res ipsa loquitur. Where there is direct evidence as to the cause of an accident and the facts and circumstances surrounding it, the rule of res ipsa

loquitur has no application. Sleezer v. Lang, 170 Neb. 239, 102 N. W. 2d 435; Miratsky v. Beseda, 139 Neb. 229, 297 N. W. 94; Knies v. Lang, 116 Neb. 387, 217 N. W. 615, 57 A. L. R. 1022. Under this state of the record the plaintiff's evidence failed to establish a breach of any implied warranty as a matter of law. Since a verdict should have been directed for the defendants on this ground, any error in the instructions is not prejudicial to the rights of the plaintiff. A judgment will not be reversed for errors against a party not entitled to succeed in any event. Muenchau v. Swarts, 170 Neb. 209, 102 N. W. 2d 129; Knuth v. Singer, 174 Neb. 182, 116 N. W. 2d 291.

For reasons stated, the judgment is affirmed.

AFFIRMED.

GLEN A. GILLASPIE, APPELLANT, V. NEBRASKA TRACTOR & EQUIPMENT COMPANY, A CORPORATION, ET AL., APPELLEES.
122 N. W. 2d 17

Filed June 7, 1963. No. 35357.

Trial. Where it is clear that a verdict of the jury is based upon compromise and disregard of evidence, it must be set aside.

Appeal from the district court for Douglas County: ROBERT L. SMITH, Judge. Reversed and remanded.

Young, Holm, Miller & McEachen, for appellant.

Kennedy, Holland, DeLacy & Svoboda, William P. Mueller, and Robert A. Skochdopole, for appellees.

Heard before WHITE, C. J., CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

MESSMORE, J.

This is an action at law to recover damages for personal injuries sustained by the plaintiff Glen A. Gillaspie when he was struck by a truck driven by defendant

Donald F. McHugh, an employee of the defendant Nebraska Tractor & Equipment Company, a corporation. The trial court directed a verdict in favor of the plaintiff and against the defendants and submitted to the jury solely the question of damages sustained by the plaintiff as a result of the accident. The jury returned a verdict in favor of the plaintiff in the amount of $3,000. The plaintiff filed a motion for new trial which was overruled. Plaintiff appealed to this court.

There is no dispute that the Nebraska Tractor & Equipment Company is a Nebraska corporation; that there existed in the city of Omaha a "Y" intersection where Howard Street, an east-west thoroughfare, is joined by St. Mary's Avenue, a northeast-southwest thoroughfare, at Seventeenth Street, a north-south thoroughfare; that on the west side of the "Y" intersection there is located a safety island which separates Howard Street and St. Mary's Avenue; that prior to August 11, 1958, the city of Omaha had white lines painted on the surface of the street at this intersection to indicate pedestrian crosswalks; that crosswalks on the west side of the intersection lead to and from the safety island separating Howard Street and St. Mary's Avenue; that on August 11, 1958, a truck owned by defendant Nebraska Tractor & Equipment Company and operated by its employee, defendant Donald F. McHugh, within the scope of his employment, in a northerly direction on Seventeenth Street, was making a turn to the left in the intersection; and that while so turning, the truck collided in the intersection with the plaintiff who was a pedestrian.

The plaintiff's petition and the amendment thereto alleged in substance that while crossing the street in a crosswalk, with a green traffic signal in his favor, the plaintiff was struck by a truck owned by the defendant Nebraska Tractor & Equipment Company, and operated by defendant Donald F. McHugh in the course of his employment by said company; that the accident was proximately caused by the negligence of the defendants;

and that as a result of such negligence the plaintiff suffered personal injuries including an acute coronary infarction, medical expense, loss of wages, and permanent disability.

The defendants in their answer denied plaintiff's allegation of injury and damages alleged to have been sustained by him, and alleged that said accident occurred by reason of the plaintiff's own negligence, which negligence was more than slight and contributed to the accident.

Glen A. Gillaspie will be referred to as plaintiff, and the defendant Donald F. McHugh as McHugh.

The plaintiff, at the time of the trial, was executive secretary of the central branch of the Y.M.C.A. in Omaha. He was 59 years of age. On the date of the accident, which occurred at the intersection of Seventeenth Street and St. Mary's Avenue, he proceeded to cross the street to the traffic island and then go from the island across Howard Street to the Y.M.C.A. At the time of the accident he was in the crosswalk. The traffic light was green and in his favor. Before he attempted to cross the street, he glanced to his right and saw a parked car which he thought might make a turn onto St. Mary's Avenue or Howard Street. The driver of the car nodded his head, indicating that the plaintiff could proceed across the street. It was a clear and dry day. As the plaintiff proceeded to cross the street he was looking straight ahead to make sure he would get to the island before the traffic light would turn red. When he was approximately two-thirds of the way across the space between the curb and the island, he noticed an object out of his side vision. He threw up his arm and turned in a general direction to the left, and then the collision occurred. The accident happened so quickly that he did not know how far the truck was from him. He turned instinctively, and was clipped by the rear-view mirror of the truck which came into contact with him. This rear-view mirror extended from the left

gatepost of the truck and hit his right elbow, and the left rear fender struck his right hip. He was thrown to the pavement and rolled over at least once. When he was next conscious of where he was, he was lying face down on the pavement outside of the crosswalk to the left. He got up and looked for the driver of the truck who got out of the truck and came over to him. The right leg of the plaintiff's trousers was torn down the seam.

The plaintiff testified that his elbow gave him severe pain. His concern was that he might have a chipped elbow bone. His hip was quite bruised from the impact of the truck. He experienced a tightness across the general region of his chest. After he left the scene of the accident he went directly to the Y.M.C.A. and contacted his secretary. He told her what had happened and that he would be away from the office until he could get an X-ray taken of his elbow. This X-ray cost $18. He went to Dr. Simonds' office in the Medical Arts Building and had the X-ray taken, and then returned to his office in the Y.M.C.A. The plaintiff further testified that that evening he was pretty well exhausted and had a tightness in his chest which persisted, causing him not to sleep well. He was awakened once or twice that night with pain in his chest. The next morning he lacked energy and wanted to stay in bed, but felt that he should get back to work, which he did. He worked the next 6 or 7 days and was able to do the planning and desk work required of him at that time of the year. During the 8 days following the accident, while he was sitting at his desk or walking around, he would periodically have sharp pains in the center part of his chest and feel that he was being suffocated. The pain in his chest would last from 15 to 20 minutes and then subside. He would have such pains three or four times a day. As to his physical condition during those 7 or 8 days, he would be short of breath and have a tightness in his chest which seemed to persist. How-

ever, he worked normal hours at his office those 8 days. On the morning of August 19, 1958, it was difficult for him to get out of bed. He was listless but went to work, and while sitting at his desk he felt that the room was stuffy, and he began to get severe pains in his chest. He called Dr. McCarthy's office and was told to come to the office. He started to go to Dr. McCarthy's office and got as far as the lobby of the Y.M.C.A. and realized that he could go no farther. He was perspiring profusely and laid down on a bench in the lobby. He was taken to the Bishop Clarkson Memorial Hospital by the rescue squad vehicle and was admitted to the hospital by an intern. He was first given oxygen, and then Dr. McCarthy arrived. At the time the plaintiff arrived at the hospital, his pain was quite severe and was in the center part of his chest. The pain persisted until he was given a sedative to deaden it. He was admonished to lie perfectly still, was given medicine and sedatives from time to time, and an ice pack was placed on his chest each half hour for 3 or 4 days. He was given oxygen constantly. He remained motionless on his back for about a week. He was in pain all the time and had a tightness in his chest. The plaintiff testified that he had never had anything like that prior to the accident, and had never been treated for a heart condition of any sort. He was in the hospital for 5 weeks and then permitted to go home and remain quiet. During the time he was at home he was treated by Dr. McCarthy. In the early part of December he had tightness in his chest and occasional pain. He was told to take nitroglycerin pills and use them when needed, and he took several of such pills. He went back to the hospital December 16, 1958, and was told by Dr. McCarthy that there was a slight recurrence of what he had had, a myocardial infarction. The treatment was about the same as he had previously had. He remained in the hospital for 2 weeks.

The plaintiff returned to his work at the Y.M.C.A. on

February 16, 1959. The first week he worked 2 hours a day; the second week his work was increased to half a day; the third week it was increased to 5 hours a day; and at the end of March he was able to stay at his office the full 8 hours. His salary was $5,800 a year. His duties consisted of supervision of anything that happened with reference to the Y.M.C.A. activities. He was also supervisor of the dormitory. Prior to the accident he would meet with club officers and boards and work with various program groups at night as well as in the daytime. At the time of trial he was responsible for the whole operation of the central branch of the Y.M.C.A. rather than one department of it. This consisted of having department heads report to him on what was happening in their particular departments. Following his heart condition he was unable to physically perform the work he had previously performed in the Y.M.C.A. He was told by his doctor not to get into jobs or situations where he would get excited or which would unduly cause him concern. Before the accident the plaintiff did some square dancing, liked to garden and do yard work, all of which activities are now curtailed. He was unable to take evenings out socially or work to any extent as he did previously on such matters. During the day he becomes tired by noon and regularly goes to the health department and lies down on a cot and sleeps from 30 minutes to an hour. He needs much more sleep than he previously did. Prior to the onset of the heart difficulty, he was a member of a civic club, very active in United Community Services committees, and was a member of committees of his church.

On cross-examination the plaintiff testified that immediately after the accident he had X-rays taken of his elbow, and when he got home he examined his hip because of the soreness he felt in it. The spot on his hip had not turned black and blue, but it was sore to touch. His hip was never discolored. On the morning of August

19, 1958, he had a tightness in his chest which seemed to be worse. He was aware that he needed medical attention, and the pain was excruciating. He perspired profusely, was lightheaded and dizzy, and had difficulty breathing. Later, he became executive secretary of the central branch of the Y.M.C.A., which he considered an advancement, and he received a salary of $6,400 a year beginning in January 1961.

Viola Burton testified that she was the plaintiff's secretary; that from the time of the accident to the time of his hospitalization his color was poor; that he appeared to be more tired from his duties; and that he seemed not to be himself.

Clella McCoy Anderson testified that she worked under the direct supervision of the plaintiff at the Y.M.C.A. at the time of and immediately following the accident, and had daily contact with the plaintiff from the date of the accident, August 11, 1958, to the date of his hospitalization, August 19, 1958. After the accident and until the plaintiff was hospitalized she noticed his physical appearance to be different than it had been prior to the accident. He looked very pale.

Dr. J. D. McCarthy testified that he was a practicing physician specializing in the field of internal medicine; that he had taught medicine at the University of Nebraska School of Medicine for over 30 years; and that he was a professor of internal medicine and senior consultant. His practice is limited to diagnosis and treatment of the heart and lungs. Dr. McCarthy further testified that on March 6, 1958, he gave the plaintiff a complete general physical examination and found that the plaintiff's physical condition was normal in all respects, and found nothing which indicated any heart difficulty. He next saw the plaintiff on August 19, 1958, when he arrived at the hospital. At that time the plaintiff was in a state of extreme collapse. At the hospital the plaintiff gave a history of chest pains he had had since the accident on August 11, 1958. The

doctor found the plaintiff in a critical condition, and deemed it necessary to consult another physician who was interested in heart treatment, because the plaintiff's case was severe. The plaintiff's condition was diagnosed as coronary infarction which was demonstrated by an electrocardiogram. This doctor gave as his opinion that at the time of the accident something happened to the artery of the heart. The coronary infarction started from the time of the accident, occurred at the time of the accident, and became progressive.

Dr. F. Lowell Dunn, a specialist in internal medicine which includes treatment and diagnosis of heart problems, heart diseases, or any troubles that occur in the heart, testified that he saw the plaintiff for the first time on November 19, 1959, and made a careful history, gave the plaintiff a physical examination, and did some laboratory work relative to the plaintiff's condition. He diagnosed the plaintiff's ailment as a heart infarction. This doctor stated that in his opinion the accident was the direct cause of the heart injury and the following heart damage. He further testified that the plaintiff had not collapsed prior to August 19, 1958, because the injury and damage caused to the heart by the trauma was progressing. This doctor's opinion was that the infarction had commenced within hours after the accident, as a result of the trauma, and the collapse of the plaintiff 8 days later occurred because of the increase in the size of the infarct which had gradually developed in that period. On cross-examination this doctor stated in his report that the plaintiff suffered a coronary thrombosis, which means an occlusion of a blood vessel; and that if he was writing his report over again he would have preferred to have used the word "infarction" because it was a more vague term.

It was stipulated that as a result of the heart disorder for which the plaintiff was hospitalized on August 19, 1958, the plaintiff incurred expenses for hospitalization, ambulance service, laboratory fees, electrocardio-

grams, special nursing services, doctors, and drugs in the amount of $3,086.37.

The undisputed salary of the plaintiff at the time of the accident was $5,800 a year. Plaintiff claims he sustained, during his illness and convalescence, the following loss of wages: From August 19, 1958, to February 15, 1959, total disability, at $483.33 a month, total $2,848.50; and from February 16, 1959, to March 3, 1959, half time (actual resumption of full time did not occur until end of March 1959) $120; total $2,968.50.

McHugh testified that as he was approaching the intersection of Seventeenth Street and St. Mary's Avenue, the traffic light was red for northbound traffic; that he was in the left or outside lane of traffic; that there was another car to his left at the corner of Seventeenth Street and St. Mary's Avenue in the parking lane; that this car was not moving when he first noticed it, and as the light turned green for northbound traffic this car proceeded to make a left turn and this witness proceeded on to make a more sweeping or wider turn onto Howard Street; and that the car that made the left turn on Howard Street was between this witness and the corner of Seventeenth Street and St. Mary's Avenue where the pedestrians (plaintiff) would have stood. As this witness started his turn and was making a slight turn he saw the plaintiff at that moment. The plaintiff threw up his arm about the same time he was hit by the truck. This witness further testified that at the time of impact he was driving his truck at a rate of speed of from 5 to 10 miles an hour. After the impact when the truck was stopped, the plaintiff was 2 or 3 feet from the truck.

Dr. Maurice E. Stoner testified that he was a specialist in internal medicine, which includes the diagnosis of heart troubles. This doctor confines his practice to internal medicine entirely, with a special interest in the diseases of the heart and chest. He examined the plaintiff on March 29, 1961. In the course of his examination

he took a history from the plaintiff of the accident which the plaintiff had and all matters pertaining thereto, and the plaintiff's condition before and after the accident. He studied X-rays taken of the plaintiff in Bishop Clarkson Memorial Hospital, and electrocardiograms taken of the plaintiff at the hospital. He testified that an exhibit, which was an enlargement of an electrocardiogram taken of the plaintiff and admitted in evidence, portrayed a hyperacute infarction which is early in the course of the myocardial infarction. This represents an area that is occluded, which means the same as plugged. He further testified that infarction is that process which occurs beyond the point of occlusion. At first the infarcted area has no circulation and is merely injured, but if the blood supply is continually occluded, then tissue death occurs. From an examination of the exhibit the doctor gave his opinion that the infarction of the plaintiff's heart occurred within a few hours prior to the time the electrocardiogram was taken on August 19, 1958. Basing his opinion on the hospital records and his medical knowledge and experience, he testified that the plaintiff's heart infarction was a sudden event which occurred on August 19, 1958, and it was not preceded by any other condition. Based upon a reasonable degree of medical certainty and a complete study of all the records of the hospital available to him, this doctor found no causal connection between the trauma of August 11, 1958, and the infarction of August 19, 1958. He testified that there are no known precipitating factors in coronary occlusion or coronary thrombosis.

On cross-examination this doctor stated that in his opinion, without physical and laboratory examinations during the period between August 11, 1958, and the plaintiff's collapse on August 19, 1958, any causal connection would be conjectural and open to question.

The principal assignments of error set forth by the plaintiff to be determined on this appeal are as follows:

The verdict of the jury is a compromise verdict and does not represent separate decisions by the jury on the issues of whether the defendants were liable for damages resulting from the coronary infarction; that the amount of damages returned by the jury in behalf of the plaintiff represents a compromise on the issues involved; and that the verdict of the jury is contrary to the law and the evidence.

In its consideration of the question of damages the jury had before it two separate classes of injuries, or two elements to be considered, alleged by the plaintiff to have been caused as the result of the accident: (1) The injuries which occurred on August 11, 1958, the date of the accident, that is, injuries to the plaintiff's right elbow and right hip and the shock occasioned by the accident as a result of injuries, and the $18 X-ray bill for the plaintiff's elbow; and (2) the coronary infarction which plaintiff claimed resulted as a direct and proximate result of the accident and which occurred on August 19, 1958, resulting in hospital, medical, doctor, and nurses expenses of $3,086.37, and a claim of the plaintiff that he had a loss of wages in the amount of $2,968.50. Consequently, when the case was submitted to the jury for its deliberation, the following alternatives were presented: (1) To determine the extent and nature of the injury to the plaintiff's right elbow and hip and shock which occurred to the plaintiff as a result of the accident of August 11, 1958, and to assess the amount of damages which would fairly and reasonably compensate the plaintiff for such injuries; (2) to consider and determine whether or not the coronary infarction which occurred on August 19, 1958, and the expense resulting therefrom were proximately caused by the accident of August 11, 1958; and (3) in the event the jury determined that the plaintiff failed to prove a causal connection between the accident of August 11, 1958, and the coronary infarction which occurred on August 19, 1958, it would then proceed to assess the

amount of damages for the injury sustained by the plaintiff on August 11, 1958, with no allowances for the $3,086.37 hospital, medical, doctor, and nurses expense or for wages due to the loss of time, or for any pain or suffering or disability to which plaintiff testified, as a result of his heart condition. However, in the event the jury determined there was a causal connection between the accident of August 11, 1958, and the coronary infarction suffered by the plaintiff on August 19, 1958, it would then proceed to assess the amount of damages for the injuries sustained by the plaintiff, the medical expenses, loss of time and wages, and also pain and suffering or disability suffered by the plaintiff as the jury would deem to be a fair and reasonable recovery for the same.

While it is true that Dr. Maurice E. Stoner testified that the plaintiff, in giving his history to the doctor, stated that his hip remained painful for nearly a year when he was lying on it, the plaintiff did not testify to any such pain to his hip. There is no indication in the record that the plaintiff lost sleep or had any difficulty by reason of injury to his hip, neither did the injury to the plaintiff's hip or elbow cause the plaintiff any pain or discomfort, perhaps, except for a few days after the accident. The plaintiff expended $18 for an X-ray of his elbow which revealed no fracture. The history given to Dr. Stoner was the only history upon which the doctor could testify as to his opinion. This type of evidence is hearsay evidence and cannot be considered.

Hearsay evidence is defined as follows: "A term applied to that species of testimony given by a witness who relates, not what he knows personally, but what others have told him, or what he has heard said by others." Black's Law Dictionary (3d ed.), p. 882. See, also, Hopt v. Utah, 110 U. S. 574, 4 S. Ct. 202, 28 L. Ed. 262; Morell v. Morell, 157 Ind. 179, 60 N. E. 1092.

The only evidence of injury or damage other than that

caused by the coronary infarction was the injury received by the plaintiff to his elbow and hip at the time of the accident, which necessitated an X-ray of the elbow on the date of the accident. It is obvious from a review of the evidence, if the jury considered the coronary infarction, the verdict was inadequate because, as a result of the coronary infarction the plaintiff incurred expenses stipulated to be of the reasonable value of $3,086.37 which alone was more than the verdict returned by the jury, and in addition loss of time and wages claimed by the plaintiff of the reasonable value of $2,968.50, making a total of $6,054.87 of special damages, in addition to permanent disability, pain, and suffering.

Under the alternatives submitted to the jury, heretofore mentioned, the verdict did not represent a conscientious finding by the jury of damages under such alternatives. It was a compromise verdict, because under alternative No. 1, the verdict was entirely too large, and under alternative No. 2, obviously it was too small a verdict.

There are many cases relating to the subject matter of compromise verdicts. It would unnecessarily lengthen this opinion to cite and quote from all of such cases. We deem the following to be applicable to the instant case on the principle involved here.

In Meyer v. Shamp, 51 Neb. 424, 71 N. W. 57, there was a partnership engaged in selling agricultural implements and machinery. The partnership had become indebted to certain creditors. An interest in the partnership was sold, and the purchaser agreed to assume and pay certain liabilities of the partnership and to save the defendant in error harmless therefrom. The defendant in error was forced to pay the debts and the sums so paid were not paid by the former purchasers of the partnership interest. The debts consisted of different amounts. The least amount of such debts was $18. The jury returned a verdict in the amount of $1. Motion for new trial was filed and sustained. This court said:

"There is no conceivable condition which the evidence could have assumed and a verdict be rendered on this issue, other than by a compromise or disregard of the amount shown to be due, and be for such sum as was this one. * * * It was clear that the jury must have arrived at the verdict rendered by a compromise, or by disregarding the evidence and sustituting for what was thereby shown its own idea or estimate of what would be about justice and right between the parties litigant." This court cited 2 Thompson on Trials, § 2606, as follows: " 'Where the verdict which the jury returns cannot be justified upon any hypothesis presented by the evidence, it ought obviously to be set aside.' " The court held: "Where it is clear that a verdict of a jury is based on a compromise of the differences of opinion of its individual members, and in disregard of the evidence, it is not error to set it aside."

The leading case on this subject appears to be Simmons v. Fish, 210 Mass. 563, 97 N. E. 102, Ann. Cas. 1912D 588. This was a case to recover for the loss of an eye. The jury returned a verdict for $200. On a motion for a new trial, it was claimed that the verdict amounted to a verdict for the defendant, and as shown by the amount for the plaintiff, was a compromise verdict. It was argued that this was a compromise verdict, where certain jurors must have conceded their conscientious belief that the defendant ought to prevail to the end that an agreement might be reached. Chief Justice Rugg speaking for the court said: "In order to pass upon the soundness of this argument, it becomes necessary to inquire what a compromise verdict is, and to ascertain whether this was such a verdict. It was said by Cooley, J., in Goodsell v. Seeley, 46 Mich. 623, at 628, 'It is no doubt true that juries often compromise . . . and that "by splitting differences" they sometimes return verdicts with which the judgment of no one of them is satisfied. But this is an abuse. The law contemplates that they shall, by their discussions, harmonize

their views if possible, but not that they shall compromise, divide and yield for the mere purpose of an agreement. The sentiment or notion which permits this tends to bring jury trial into discredit and to convert it into a lottery.' See also Meyer v. Shamp, 51 Neb. 424, 430. * * * The jury room cannot be entered in order to ascertain what has transpired there. Its deliberations are in secret, and ordinarily cannot be made the subject of testimony by jurors. Woodward v. Leavitt, 107 Mass. 453. What went on there may be learned by other sources. Wright v. Abbott, 160 Mass. 395. It is not infrequently possible to determine with some approximation to accuracy what went on there from the result produced. This is such a case. * * * It seems plain from the record that this was a compromise verdict. * * * It is inconceivable that any jury, having agreed upon the issue of liability, should have reached such a determination as to damages."

In Parizo v. Wilson, 101 Vt. 514, 144 A. 856, it is said: "Where, from the inadequacy of the damages awarded in view of the evidence on the subject and the conflict of the evidence upon the question of liability, or from other circumstances, the plain inference may be drawn that the verdict is the result of a compromise, the error taints the entire verdict, and a new trial should be ordered upon all issues." See, also, Farr v. Fisher, 107 Vt. 331, 178 A. 883, 98 A. L. R. 926.

In Riley v. Tsagarakis, 53 R. I. 261, 165 A. 780, the court said: "Where the court is convinced that a verdict was the result of a compromise on the questions of liability and damages, and the award of damages is inadequate, exception of defendant to refusal of court to grant new trial on all the issues of the case will be sustained." This was an action of trespass on the case for negligence to recover damages for the death of plaintiff's husband caused by the alleged negligence of defendants' servant. The verdict was for $5,000. The deceased was 55 years of age when he was struck and killed by

the defendants' truck. His life expectancy was 17.58 years. After deducting his expenses for each year, the deceased had a net annual surplus of $1,031.16. In view of his life expectancy of 17.58 years, the amount of damages computed by the established rules of law would be about $11,000. The court said: "Upon consideration of the evidence and the award of damages made by the jury, we are convinced that this verdict was the result of a compromise on the questions of liability and damages." See, also, Schuerholz v. Roach, 58 F. 2d 32; Southern Ry. Co. v. Madden, 235 F. 2d 198. There are many other cases to the same effect as those above cited.

Other matters raised by the plaintiff need not be determined.

For the reasons given in this opinion, we conclude that the judgment of the district court should be reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

GERALD L. RATIGAN ET AL., APPELLANTS, V. HERBERT DAVIS ET AL., APPELLEES.

122 N. W. 2d 12

Filed June 7, 1963. No. 35456.

1. **Taxation.** The maxim of no taxation without representation has a very restricted meaning since it is not contained in the Constitution, and representation is not a condition precedent to the levy of an authorized tax.
2. **Taxation: Municipal Corporations.** Where the electors of a municipality have voted a tax upon all tangible property within the city pursuant to authority granted by the Legislature, representation in the Legislature is sufficient to defeat a claim of taxation without representation by electors of the municipality.
3. ———: ———. Where a tax was voted by the electors of a city upon all tangible property not exempt in the city, property within areas subsequently annexed becomes liable for the levy of the tax in the absence of a contrary statutory provision.
4. ———: ———. Where a statute authorizes the electors of a city to impose a tax on tangible property within the city, the

electors in areas subsequently annexed cannot properly question the validity of the tax on the ground that they have no voice in the selection of those charged with the determination and certification of the amount to be levied.

5. ———: ———. Under such circumstances the authority to levy the tax is deemed to flow directly from the Legislature. The levy of the tax is corporate action pursuant to state authority in which electors in subsequently annexed areas cannot void the tax as to them because of no representation on the levying body.

6. **Municipal Corporations.** Except as limited by the Constitution, the Legislature has plenary authority over municipal corporations.

Appeal from the district court for Douglas County: DONALD BRODKEY, Judge. Affirmed.

Haney, Walsh & Wall, for appellants.

William R. King and Seymour L. Smith, for appellees.

Heard before WHITE, C. J., CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

CARTER, J.

Plaintiffs brought this action for themselves and all others similarly situated in School District No. 66, Douglas County, Nebraska, and School District No. 54, Douglas County, Nebraska, who reside within the corporate limits of the city of Omaha, Nebraska, to enjoin the county treasurer of Douglas County and others from collecting taxes assessed against their property within said school districts and within the city limits of Omaha for the benefit of the municipal university of the city of Omaha. The trial court sustained general demurrers to the petition. Plaintiffs stood on their petition and the action was dismissed. Plaintiffs have appealed to this court.

The petition shows that plaintiffs reside in, own property in, and are electors of school district No. 66, and within areas within said district which has been annexed to and become a part of the city of Omaha. By authority of section 14-1301, R. R. S. 1943, the municipal university of the city of Omaha was established.

Section 14-1305, R. R. S. 1943, provides for a board of regents of nine members with staggered terms of 4 years, such members to be selected by the board of education of the city of Omaha. By section 14-1317, R. R. S. 1943, the board of regents is authorized to certify the amount of the levy to the city council of the city of Omaha to be levied upon all tangible property within the city of Omaha for the support of the municipal university. The contention here made is that, as the petitioners reside and own property within the city of Omaha but do not reside or own property within the school district of Omaha, and as the regents of the municipal university are selected by the school board of the school district of Omaha, the petitioners are being taxed without representation and in violation of various sections of the state and federal Constitutions.

Plaintiffs assert that the fixing of the tax to be levied violates the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States. They assert also that the levying of the tax violates the due process clause of the Nebraska Constitution, Article I, section 3, Constitution; the special privileges or immunities clause, Article I, section 16, Constitution; the no discrimination clause, Article I, section 25, Constitution; the free elections clause, Article I, section 22, Constitution; and the definition of electors clause, Article VI, section 1, Constitution.

The board of regents has certified a levy on all the tangible property within the city limits for the year 1962, including the portions of school districts Nos. 66 and 54 that are within such city limits. Plaintiffs concede that at the time when the city and the school district of Omaha were coextensive in their territorial limits, no question of unconstitutionality existed. It is asserted that the annexation by the city of the lands in school districts Nos. 66 and 54 has subjected existing statutes to attack for unconstitutionality, as hereinbefore set forth.

The act authorizing the establishment of the munici-

pal university was enacted in 1929. At that time its board of regents was authorized to certify a tax levy not exceeding one mill on the dollar upon the assessed value of all taxable property in the city. The act was amended in 1951 to provide that by a vote of the qualified electors of the city the levy could be increased to two mills on the dollar. By a vote of the electors of the city, prior to the annexation of the areas in school districts Nos. 66 and 54, the maximum levy was increased to two mills. In Carlberg v. Metcalfe, 120 Neb. 481, 234 N. W. 87, the power of the board of regents to certify the amount of the tax levy for the support of the university was challenged as unconstitutional. The court held that, even if the regents levied the tax and the function of the city council was administrative only, the electors of the city having consented to the delegation of the power to tax to the board of regents, the delegation of power could not be questioned and that the act was constitutional.

The maxim that taxation without representation, or taxation without the consent in some form of those who are to be taxed, is relied on to sustain the position of the plaintiffs. Maxims of government, not contained in the Constitution, are given a very restricted meaning. It does not mean, as many seem to think, that no person can be taxed unless, in the body that determines the amount of the tax to be levied, he is represented by someone for whom he has a right to vote. It has never had such a legal meaning. So construed, a large portion of the people of the state would be exempted from the payment of taxes, including infants, nonresidents, and disqualified voters. Representation is not made the basis of taxation. The principle involved is well stated in the early case of State ex rel. Bulkeley v. Williams, 68 Conn. 131, 35 A. 24, 48 L. R. A. 465, wherein it is said: "The defendant urges that taxation and representation are indissolubly connected by the underlying principles of free government, and that this (the commis-

sion which directs the affairs of the Bridge District and makes requisitions on the towns for such funds as it deems necessary, not having been selected by them) is a sufficient defense against the payment of the order which has been drawn upon him, since it can be paid only out of moneys raised by town taxation. * * * Taxes can, indeed, under our system of government, only be imposed by the free consent of those who pay them, or their representatives; and for purposes which they approve. But the inhabitants of these towns were represented in the General Assembly, by which the laws now brought in question were enacted. The legislative power, after defining the general purposes of taxation, to confer upon local public corporations the right to determine the amount of the levy within the territory under their jurisdiction, is unquestionable; and in its exercise it is immaterial whether the corporations, to which that function is entrusted, or between which it is shared, be called counties or towns, school districts or bridge districts. When a levy is voted, the action is corporate action, deriving its obligatory force wholly from the authority of the State." See, also, Clark v. Leathers, 9 Ky. L. 558, 5 S. W. 576; Gadd v. McGuire, 69 Cal. App. 347, 231 P. 754; Kocsis v. Chicago Park Dist., 362 Ill. 24, 198 N. E. 847, 103 A. L. R. 141.

It seems clear under the foregoing holdings, since plaintiffs were represented in the Legislature that enacted the law, that they had the representation required by the maxim of no taxation without representation. The plaintiffs rely on several cases including State ex rel. Harte v. Moorhead, 99 Neb. 527, 156 N. W. 1067; State ex rel. Wright v. Brown, 131 Neb. 239, 267 N. W. 466; Summerville v. North Platte Valley Weather Control Dist., 170 Neb. 46, 101 N. W. 2d 748; and Anderson v. Carlson, 171 Neb. 741, 107 N. W. 2d 535. These cases deal with the organization of districts and the failure of the organizing authority to follow constitutional requirements. They are distinguishable from the case before

us which deals only with the validity of a tax in an already existing taxing district. We quite agree, as we have consistently held, that the authority which is required to establish districts, whether they be for election, taxation, or other governmental purposes, must comply with the uniformity, equality, and due process provisions of the state and federal Constitutions. But we have no such problem here, except incidentally. Whether or not the tax levy here made is valid is dependent on entirely different considerations. The first consideration is, of course, that representation is not a condition precedent to the right to tax.

The briefs of the parties concede that the electors of the city of Omaha authorized the increase of the levy for the support of the university to two mills at a time when the city limits were coextensive with those of the school district of the city of Omaha and before the areas in school districts Nos. 66 and 54 were annexed to the city. No complaint is made as to the validity of the tax at that time. When the areas in school districts Nos. 66 and 54 were annexed, they did not ipso facto become a part of the school district of Omaha by virtue of section 79-1002, R. S. Supp., 1961.

The Legislature has plenary power over the boundaries of school districts. Nickel v. School Board of Axtell, 157 Neb. 813, 61 N. W. 2d 566. It has complete power over the organization, function, and finances of a school district. Schutte v. Schmitt, 162 Neb. 162, 75 N. W. 2d 656. It may establish different qualifications for electors of school districts. Farrell v. School Dist. No. 54, 164 Neb. 853, 84 N. W. 2d 126. It also has plenary power over all municipal corporations. Except as limited by the Constitution, its power over municipalities is absolute. The question here presented is altogether different from local districts set up and administered by private individuals where the property owner has a right to be heard as a matter of due process, such as in the case of Anderson v. Carlson, *supra*.

Upon the annexation of the areas in school districts Nos. 66 and 54 to the city of Omaha, the property in the areas annexed became liable for all the obligations of the city, including the two-mill levy for the support of the municipal university. This is made abundantly clear in Hustead v. Village of Phillips, 131 Neb. 303, 267 N. W. 919, wherein it is said: "As to the general issues involved in this case, it may be said that, in the absence of specific constitutional limitations, the power of the legislature to change the boundaries of municipal corporations, and to apportion the municipal debts upon such change of boundaries, is absolute. When the act or statute authorizing a change of boundaries is silent as to apportionment of municipal debts, the territory embraced within the new boundaries becomes liable for all prior debts, and the territory excluded from the new boundaries is forever released from all municipal debts." See, also, Lynch v. Howell, 165 Neb. 525, 86 N. W. 2d 364. The Hustead case is one where electors had no vote as to whether or not the boundaries were to be changed. It logically follows that where a two-mill levy was approved by the electors of the city for the support of the municipal university before the annexation of the areas in school districts Nos. 66 and 54, the property in the latter districts became burdened with the tax the same as any other indebtedness of the city. The fact that electors in the annexed areas do not have a voice in the selection of those charged with the function of certifying the amount of the validly imposed mill levy cannot have the effect of voiding the tax properly and legally imposed on tangible property in the annexed areas. Under such circumstances the electors in the annexed areas can no more question the validity of the mill levy than can an infant, a nonresident, or a disqualified elector.

It may be that the Legislature has a function to perform in order to avoid other situations that may arise with reference to constitutional requirements, but under

the facts presented in the instant case we find no constitutional provision, federal or state, having the effect of voiding the two-mill tax levy on the tangible propery within the annexed areas.

We do not deem it necessary to discuss other questions raised. No constitutional provision stands as a bar to the levy of two mills on the dollar on the assessed value of the tangible property in the annexed areas for the support of the municipal university. The trial court correctly sustained general demurrers to the petition of the plaintiffs and its judgment is affirmed.

AFFIRMED.

MAURICE BERG ET AL., APPELLANTS AND CROSS-APPELLEES, v. MIDWEST LAUNDRY EQUIPMENT CORP., A CORPORATION, APPELLEE AND CROSS-APPELLEE, INDUSTRIAL CREDIT COMPANY, A CORPORATION, APPELLEE AND CROSS-APPELLANT.

122 N. W. 2d 250

Filed June 14, 1963. No. 35409.

1. **Corporations: Process.** Jurisdiction over a foreign corporation which is actually doing business in Nebraska may be obtained by service of process upon the Secretary of State even though the corporation has not expressly consented to such jurisdiction. § 21-1201, R. R. S. 1943.
2. ———: ———. It is a question of fact as to whether a foreign corporation is doing business in this state and each case must be decided upon its own facts.
3. **Principal and Agent.** Agency cannot be established by the acts or declarations of the alleged agent, but must be proved by the acts or declarations of the principal.
4. **Sales: Usury.** A time sale made in good faith is valid in this state, but a transaction which is in fact a loan made in violation of the Installment Loan Act is void. It is a question of fact as to whether a particular transaction is a bona fide time sale or the financing of the balance of a cash purchase price. In determining whether a transaction is a bona fide time sale or a loan, the court will look through the form of the transaction and

examine its substance. A transaction is not a valid time sale unless the buyer at the time of the sale was informed of and was given an opportunity to choose between a cash price and a valid time sale price.

Appeal from the district court for Lancaster County: HERBERT A. RONIN, Judge. Reversed and remanded with directions.

Ginsburg, Rosenberg & Ginsburg and Norman Krivosha, for appellants.

Young, Denenberg & Mullery, for appellee Midwest Laundry Equipment Corp.

Perry & Perry and James V. Risser, for appellee Industrial Credit Co.

Heard before WHITE, C. J., CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

BOSLAUGH, J.

This is an action to declare an alleged retail installment contract void and to recover all payments made under the contract. The plaintiffs, Maurice Berg and June Berg, are husband and wife. The defendants, Midwest Laundry Equipment Corp. and Industrial Credit Company, are corporations.

The trial court found that the contract was a valid installment sale, but that Industrial Credit Company had made certain charges in violation of the Installment Sales Act and assessed a penalty against it. The trial court held that the charges and the amount of the penalty should be deducted from the balance due under the contract and that the plaintiffs should pay the remaining installments due under the contract to Industrial Credit Company.

The plaintiffs' motion for new trial was overruled and the plaintiffs have appealed. The defendant Industrial Credit Company has cross-appealed.

The Midwest Laundry Equipment Corp. is engaged in the sale of laundry equipment which is used in the

operation of coin-operated, self-service laundry stores. Industrial Credit Company is engaged in the sales finance business. It is a Minnesota corporation and its principal place of business is in St. Paul, Minnesota.

The plaintiffs alleged that Industrial Credit Company was engaged in the business of making loans to residents of the State of Nebraska. The plaintiffs attempted to obtain jurisdiction over the person of Industrial Credit Company by having a summons served upon the Secretary of State of the State of Nebraska. Industrial Credit Company filed a special appearance in which it denied that it had been doing business in the State of Nebraska at any time. Thereafter, Industrial Credit Company attempted to preserve its special appearance. For the purpose of this opinion, we assume that it did preserve its special appearance. The trial court overruled the special appearance and Industrial Credit Company has cross-appealed from that ruling.

Before a state can subject a foreign corporation to its jurisdiction, the corporation must have expressly consented to such jurisdiction or it must have done sufficient business in the state to constitute a submission to such jurisdiction. Jurisdiction over a foreign corporation which is actually doing business in Nebraska may be obtained by service of process upon the Secretary of State even though the corporation has not expressly consented to such jurisdiction. § 21-1201, R. R. S. 1943; Brown v. Globe Laboratories, Inc., 165 Neb. 138, 84 N. W. 2d 151. It is a question of fact as to whether a foreign corporation is doing business in this state and each case must be decided upon its own facts.

The plaintiffs alleged that Midwest Laundry Equipment Corp. was employed as an agent by Industrial Credit Company for the purpose of soliciting loans to residents of Nebraska. Agency cannot be established by the acts or declarations of the alleged agent, but must be proved by the acts or declarations of the principal. Rodine v. Iowa Home Mutual Cas. Co., 171 Neb.

263, 106 N. W. 2d 391. There is no evidence of any act or declaration of Industrial Credit Company to establish the agency alleged.

There is evidence that Industrial Credit Company has purchased 71 retail installment contracts from Midwest Laundry Equipment Corp. and that 18 of these contracts were executed by residents of Nebraska. What evidence there is as to how these contracts were purchased shows that contracts were offered to Industrial Credit Company by Midwest Laundry Equipment Corp. at St. Paul, Minnesota; that Industrial Credit Company was not obligated to purchase any of the contracts offered to it; that Industrial Credit Company made its own investigation as to the credit of the purchasers of the equipment; that Industrial Credit Company refused to purchase the contract executed by the plaintiffs when it was first offered to it by Midwest Laundry Equipment Corp.; and that the contract was finally purchased after it had been "rewritten" to show a much larger downpayment to Midwest Laundry Equipment Corp. than was actually made by the plaintiffs.

We conclude that the evidence fails to show that Industrial Credit Company was doing business in Nebraska, and its special appearance should have been sustained. This disposes of the case so far as Industrial Credit Company is concerned.

The remaining questions concern the right of the plaintiffs to recover the amounts paid to Midwest Laundry Equipment Corp. under the contract. That depends upon a determination as to the validity of the contract as between these parties. Since there is no jurisdiction over the person of Industrial Credit Company, no determination can be made as to the validity of the contract as between the plaintiffs and Industrial Credit Company in this action.

A time sale made in good faith is valid in this state, but a transaction which is in fact a loan made in violation of the Installment Loan Act is void. Powell v. Edwards,

162 Neb. 11, 75 N. W. 2d 122. It is a question of fact as to whether a particular transaction is a bona fide time sale or the financing of the balance of a cash purchase price. Trailmobile, Inc. v. Hardesty, 173 Neb. 46, 112 N. W. 2d 535. In determining whether a transaction is a bona fide time sale or a loan, the court will look through the form of the transaction and examine its substance. State ex rel. Beck v. Associates Discount Corp., 168 Neb. 298, 96 N. W. 2d 55. A transaction is not a valid time sale unless the buyer at the time of the sale was informed of and was given an opportunity to choose between a cash price and a valid time sale price. Wood v. Commonwealth Trailer Sales, Inc., 172 Neb. 494, 110 N. W. 2d 87.

The record shows that the plaintiffs talked with Raymond A. Erlandson, an employee of Midwest Laundry Equipment Corp., in November 1959, at Fargo, North Dakota. The plaintiffs had answered a newspaper advertisement concerning self-service laundries. The first conversation concerned a store to be located at Grand Forks, North Dakota. The second conversation was about a store to be located at Minot, North Dakota. At the conclusion of the second conversation the plaintiffs paid $500 to Erlandson, and Maurice Berg signed a sale and purchase contract and a financial statement prepared by Erlandson.

The sale and purchase contract was an agreement for the purchase of 30 washers, 12 dryers, and related equipment necessary for the operation of a self-service laundry and was in the form of a contract of conditional sale. The contract provided for a total cash price of $22,437.45; a downpayment of $2,243.45, the balance of which was to be paid before shipment; an amount to be financed of $20,194; a time price differential of $3,937.83; the total amount of the note of $24,121.83; and a total time price of $26,365.28. The contract also provided: "$24,121.83 balance of time selling price to be evidenced by an installment note payable in 35 monthly install-

ments of $670.00 each and a final payment of $671.83. * * * IF OTHER THAN A CASH SALE, THIS CONTRACT IS SUBJECT TO ACCEPTANCE BY THE SELLER AFTER APPROVAL OF PURCHASER'S CREDIT BY FINANCE FACTOR AT ITS HOME OFFICE. ACKNOWLEDGMENT TO THE PURCHASER BY LETTER OF ACCEPTABLE CREDIT BY THE FINANCE FACTOR SHALL BE DEEMED ACCEPTANCE BY THE SELLER."

Maurice Berg testified that Erlandson said that the contract and financial statement would be submitted to the finance company for its approval. Erlandson testified that the "finance factor" referred to in the contract was Midwest Laundry Equipment Corp. Erlandson further testified that he explained to the plaintiffs that the cash price of the equipment was $22,437.45 and that the time price after payment of the full downpayment would be $24,121.83; and that the time price differential of $3,937.83 was obtained by multiplying the cash price less the downpayment by 6½ percent per year for 3 years.

About 2 weeks after the conversations with Erlandson, William W. Siebert, a salesman for Midwest Laundry Equipment Corp., called the plaintiffs by telephone. Siebert said that he had learned that two other stores were to be opened in Minot and that he did not think that the plaintiffs should go ahead with the plan to open a store in Minot.

A week or 10 days later Siebert again called the plaintiffs and stated that a location in Norfolk, Nebraska, was available. Paul A. Pothast, an employee of Midwest Laundry Equipment Corp., talked with the plaintiffs about the Norfolk location and the plaintiffs looked at the proposed location.

After the plaintiffs had looked at the proposed location in Norfolk, they met with Siebert at the office of Midwest Laundry Equipment Corp. in Omaha. During that conversation the plaintiffs agreed to purchase equip-

ment for the store at Norfolk, signed a blank form of a sale and purchase contract, and paid some $1,800 to Siebert. The plaintiffs testified that they were not quoted a cash price and a time price for the equipment which they agreed to purchase for the Norfolk store. Siebert testified that he did not recall discussing a cash price and a time price with the plaintiffs and that he knew their order was going to be a time-sale purchase when it came in. About 2 weeks after the conversation at Omaha the plaintiffs received a copy of the sale and purchase contract.

In December 1959, Maurice Berg was employed for a short time as a trainee salesman by Midwest Laundry Equipment Corp.

In February 1960, Siebert came to the plaintiffs' home in Norfolk, Nebraska, and asked for their copy of the sale and purchase contract for the equipment for the Norfolk store. Siebert then destroyed their copy of the contract and stated that Industrial Credit Company had not accepted the financial statement of Maurice Berg. At this time the equipment had been delivered and its installation in the Norfolk store was nearly complete. Siebert then proceeded to write out a new sale and purchase contract with a retail installment contract, both of which were signed by the plaintiffs. The retail installment contract signed at Norfolk in February 1960 was eventually assigned to Industrial Credit Company by Midwest Laundry Equipment Corp. and is the contract which is the subject of this action.

The new sale and purchase contract and the retail installment contract provided for a downpayment of $4,856.96. However, no additional amount was paid to Midwest Laundry Equipment Corp. by the plaintiffs. The only amounts that were ever paid to Midwest Laundry Equipment Corp. were the amounts that had been previously paid. The new contracts provided for 35 monthly payments of $725 and a final payment of $743.28. The contracts recited a cash sale price of

$26,713.28, cash downpayment of $4,856.96, amount to be financed $21,856.32, time price differential $4,261.92, total amount of note $26,118.24, and total time price of $30,380.16.

The evidence in this case, taken as a whole, shows that Midwest Laundry Equipment Corp. did not intend to make any sale other than a cash sale. In the event that a purchaser was unable to pay the full cash price, the sale was contingent upon Midwest Laundry Equipment Corp. being able to make suitable arrangements for the financing of the balance of the cash price. If financing could be arranged, the purchaser then signed a retail installment contract which was intended to appear to evidence a time sale but which in fact evidenced a loan for the payment of the balance of the cash price. The evidence concerning the "rewriting" of the contract at Norfolk in February of 1960, for the purpose of stating a higher downpayment than was actually made, is convincing evidence that the transaction in question was not a time sale made in good faith.

The contract in this case provided a charge of $4,261.92 to finance a balance of $21,856.32, the entire amount to be paid in 36 equal monthly installments. The Installment Loan Act as amended prohibits any charge in excess of 9 percent per annum where the indebtedness is in excess of three thousand dollars. § 45-138, R. R. S. 1943. The charge which was made is in excess of 9 percent per annum. The contract is, therefore, void. Powell v. Edwards, *supra.*

The plaintiffs are entitled to judgment against Midwest Laundry Equipment Corp. for the $500 paid in November 1959, plus the balance of the downpayment paid in Omaha. Midwest Laundry Equipment Corp. is entitled to a credit in the amount of $725 which the plaintiffs admit having received from Midwest Laundry Equipment Corp. on or about May 3, 1960.

The record does not show the exact amount of the payment made in Omaha. The district court is au-

thorized to receive further evidence, if necessary, to determine the amount of that payment.

The judgment of the district court is reversed and the cause is remanded for further proceedings, if necessary, and with directions to enter a judgment in conformity with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, DEPARTMENT OF ROADS, APPELLEE, V. FLOYD A. WIXSON ET AL., APPELLANTS.

122 N. W. 2d 72

Filed June 14, 1963. No. 35463.

1. **New Trial.** A new trial is to be granted for a legal cause where it appears that a legal right has been invaded or denied. A new trial is not to be granted for arbitrary, vague, or fanciful reasons.
2. ———. 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.
3. ———. As used in this connection "judicial discretion" means the application of statutes and legal principles to all of the facts of a case.
4. **Eminent Domain: Witnesses.** In a condemnation action the weight and credibility of testimony of either lay or expert witnesses regarding value of land taken or value of remainder immediately before and immediately after taking is for the jury.
5. **Evidence: Trial.** Under ordinary circumstances expert opinion evidence is to be considered and weighed by the triers of fact like any other testimony.
6. **Eminent Domain: Trial.** The amount of the damages sustained by a landowner for a right-of-way condemned across his land is peculiarly of a local nature to be determined by a jury, and its verdict will not ordinarily be interfered with if it is based on the testimony.
7. ———: ———. In a condemnation action, when the evidence is conflicting, the verdict of a jury will not be set aside unless it is clearly wrong.
8. **Eminent Domain: Evidence.** The owner of real estate which is taken in condemnation proceedings who is familiar with its value can testify as to its value.

Appeal from the district court for Hall County: DONALD H. WEAVER, Judge. Reversed and remanded with directions.

Luebs, Elson, Tracy & Huebner, for appellants.

Clarence A. H. Meyer, Attorney General, Harold S. Salter, Warren D. Lichty, Jr., and James M. Winter, for appellee.

Heard before WHITE, C. J., CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

MESSMORE, J.

This is a condemnation action instituted by the State of Nebraska, Department of Roads, against Floyd A. Wixson and Evelyn Wixson, husband and wife, joint owners of certain land taken by condemnation proceedings by the State of Nebraska, Department of Roads, plaintiff.

Floyd A. Wixson and Evelyn Wixson will hereinafter be referred to as defendants, or Floyd A. Wixson as Floyd Wixson.

Appraisers were appointed by the county court of Hall County and qualified as provided for by statute. The appraisers fixed the amount of damages due the defendants at $1,000. The plaintiff perfected appeal to the district court for Hall County. The case was tried to a jury. A verdict was rendered by the jury in favor of the defendants in the amount of $10,000. Judgment was entered on the verdict. The plaintiff filed a motion for new trial. The trial court sustained the plaintiff's motion for new trial and set aside the verdict of the jury. The defendants appealed to this court.

The question to be determined in this appeal is whether or not the verdict is excessive under the evidence adduced at the trial.

The plaintiff alleged in its petition that it was reconstructing State Highway No. 281 which is a part of the state highway system of the State of Nebraska; that in

the interest of public safety and for the benefit of public welfare this highway has been designated as a "controlled access facility" to which no access will be allowed from the remainder, except at designated points where access existed to the remainder prior to the highway reconstruction; that the sum assessed by the appraisers greatly exceeded the market value of the land taken, plus damages, if any, to the remainder; and that special benefits will accrue to the remainder which will offset damages, if any, due to the defendants.

The defendants by answer alleged that for many years prior to the commencement of the condemnation procedings, public highways were established and maintained along the westerly and southerly sides of premises owned by the defendants, including the tract of land taken by the plaintiff; that said highways created an intersection at the southwest corner of the defendants' premises; that for many years defendants have operated a cafe and tavern business on their premises in close proximity to the intersecting public roads and to the northeast of the intersection; that the two public roads were of approximately the same elevation as the premises surrounding the defendants' place of business, with free access thereto directly to the public road to the south and off the public road from the west for a distance of more than 100 feet from the southwest corner of their premises and along the westerly edge thereof; that at all times defendants maintained parking facilities for vehicles of all types, including large over-the-road trucks, around their place of business, and prior to the taking of the land here involved many operators of trucks and large vehicles using these roads drove into the place of business operated by the defendants, as customers; that defendants had ample facilities for such vehicles to drive into and out of their parking areas; that by reason of the reconstruction of State Highway No. 281 from its former location to its present location along the westerly side of the defendants' premises, the

highway has been elevated above the former elevation, all access along the westerly side of the premises of the defendants has been closed to traffic, and vehicles leaving said highway to enter the premises of the defendants are now required to make a sharp turn at the intersection of State Highway No. 281 and the public road along the south portion of the defendants' premises and use a grade which interferes with free access to the place of business operated by the defendants; and that it is difficult for large vehicles, including trucks, to turn into the parking area maintained by the defendants, resulting in a loss of business to the defendants. The defendants further alleged that the plaintiff has acquired additional right-of-way to the east of the present paved area for future development and construction of a 4-lane highway; and that when such future construction is completed the easterly edge thereof will be almost adjacent to the premises of the defendants, and the grade from the highway to the east will require traffic to proceed for a considerable distance past the place of business of the defendants before such traffic can turn into their premises. The defendants further alleged that a considerable portion of the parking area for customers heretofore maintained around their place of business is no longer available by reason of the taking by the plaintiff; that the premises are particularly adapted for the operation of a cafe and tavern, being a continuation of a similar business which has been operated at this intersection for more than 50 years, the location and existence of which are common knowledge in the area surrounding Grand Island; and that the construction of the highway has and will permanently damage the premises of the defendants. The answer then sets forth certain expenses which defendants would incur to put their business in condition to properly run and maintain same. The defendants prayed for judgment in the amount of $10,030.

The value of the one-tenth acre of defendants' prop-

erty taken in the condemnation proceedings was $30. This amount is not in dispute.

The factual dispute in this case turns on the issue of damage to the remainder of the defendants' property after the taking away by the plaintiff of the one-tenth acre along the west side of the defendants' premises.

An assistant division engineer employed by the plaintiff testified that he was familiar with the situation regarding the defendants' property that existed prior to the time the construction started; that the road running north and south on the west side of the defendants' property was a graveled county road approximately 24 feet wide, reasonably level, with a standard 66-foot right-of-way; that just north of the defendants' property there was a bridge which was raised a little above the level of the road and was across Wood River; that the road running east and west intersecting with the north-south road was a 24-foot highway similar to the north-south graveled county road; that the elevation of the road compared with the elevation of the parking area drive-in in front of the defendants' building was about the same level as the defendants' property; that the access from the road to the defendants' property was uncontrolled; and that it was possible to drive onto the defendants' property at any location adjacent thereto. The width of the right-of-way on the east side of the new north-south road is 135 feet from the center of the paving, and on the west side about 80 feet. This witness further testified that standing in the center of the present paved portion, it would be 135 feet to the east edge of the present right-of-way, which includes 15 feet along the west edge of the defendants' property. In other words, the west line of the defendants' property was moved to the east approximately 15 feet. This witness further testified that he would estimate that the present road elevation above the ground of the defendants' property would be 5 or 6 feet, and directly opposite the building it is about 6.3 feet higher than the original ground

in that location. The bridge is higher than the normal roadway. The elevation was put at 6.3 feet at this place in constructing the road mainly for a matter of ample freeboard above a possible flood area. There is a new bridge across Wood River where the old bridge was located which has at least doubled the capacity of the old bridge. After the strip of ground, the one-tenth acre, was taken along the west side of the defendants' land, defendants lost their access from the west side and also a part of their parking area. There is a ramp connecting the east-west road with the paved portion of the north-south road. This ramp was approximately a 5 percent gradient leading from the shoulder of the road. The width on top of the ramp is approximately 22 to 24 feet. The shoulder on the east side of the paved strip is 10 feet wide. The slope of the shoulder is considerably more than the slope of the paving, and the grading of the approach road should "hit the normal shoulder elevation at 10 feet." There are no wings constructed for vehicles to pull off of the new road if they want to make a turn. Vehicles pulling off of the paved portion are required to remain on the paved portion until such vehicles make the turn. The approximate length of the ramp from the east edge of the pavement is 100 to 125 feet. The ramp extends down the south side of the defendants' property. The access to defendants' property does not commence until almost when the end of the ramp is reached, that is, coming from the west. The future plans of the plaintiff include a second road, making a 4-lane divided highway. The usual practice is to construct the new road at the same elevation as the existing road. Southbound traffic, getting from the west road onto the east-west road that goes past the defendants' property, will require a left-turn connection constructed between the two paved lanes. It is not the practice of the Department of Roads to eliminate those connections. Southbound traffic would have to turn to the left and cross the traffic in the northbound lane

when the other road is connected. That will call for a ramp from the east edge of the new road similar to that which exists at this time. The strip of land taken by condemnation is about 300 feet long and 15 feet wide.

Floyd Wixson, one of the owners of the land in question, testified that the land is east of the north-south road which is now the highway. With relation to the county road running east and west, his property is located on the northeast corner of the intersection and comprises 11⅓ acres. The land in question was purchased by the defendants in 1958, and they have operated a cafe and tavern on the land for at least 11 years. The road that went along the west side of the property before the construction was a level, graveled road and was a little lower than the defendants' property. To the north this road proceeds up to Webb's livestock sales yard and connects with U. S. Highway No. 30. The new bridge is 3 or 4 feet higher than the old bridge. There is an east-west road running south of this propery which is a graveled, county road of the same width as the north-south road before the construction, and is lower than the ground owned by the defendants. The building is 80 feet long and 24 feet wide, not including the porch. The defendants had parking facilities all around the building, that is, in front of the building, to the east side of it, and to the rear or north. This witness further testified that trucks operating on the north-south highway have not stopped in at his place of business since the reconstruction of that road; that the old road along the west side of the defendants' property was scenic, and on Sundays there was much traffic from Hastings, Prosser, and Doniphan; that it was easy to get off of the old north-south road and stop in at the defendants' place of business for refreshments; that during the week traffic would proceed along the north-south road to Webb's livestock sales yard; that some of the persons patronizing the stock sales stopped at defendants' place of business; that

directly east of the building there is no area available for use at the present time; and that about 2 acres are necessary for the operation of the business. This witness further testified that the business consists of selling beer, steaks, sandwiches, pop, candy, and chewing gum, has been operated in the same area for 75 years, and is well known throughout the community; that during business hours in the daytime farmers would stop enroute to the Webb livestock sales yard to sell cattle, sheep, and hogs; that in the evenings there would be a different type of customers, people who were getting off of work in Grand Island; that on Sundays the business consisted of families; that these customers would drive into the parking area and stop for refreshments; that the road which passes the place of business is higher than it was before the construction, and this construction makes it difficult for customers on either the north-south road or the east-west road to enter defendants' place of business; that in order to have customers enter the area east of the place of business, the ground will have to be sloped and leveled off; that due to the cramped condition of the parking area the building will have to be moved back and it will require an additional 4 acres to properly operate the business, including what is now used for such purposes; that after the second road is constructed and the building moved back, the road ditch will have to be culverted to enable customers to enter defendants' place of business; that by moving the building back, it will be necessary to have big electric signs in order to draw customers into the place of business; that the present road is a state highway with heavy traffic and the speed of the vehicles is rather fast; and that to get on and off of this road it would be necessary for the drivers of vehicles to wait and ascertain the movement of cars going in both directions. This witness testified that the value of the property immediately before the construction and condemnation proceedings were instituted by the plaintiff was about

$30,000, and after the taking the value was $20,000, leaving a difference of $10,000, plus $30 for the strip of land taken.

A real estate broker engaged in the real estate business in Grand Island with extensive experience in the sale and appraisal of all types of real estate testified that he had been acquainted with the defendants' property for many years, had on occasions been a customer, and was familiar with the defendants' property prior to the time of the condemnation proceedings, the general access thereto and the parking facilities in connection therewith, and had been there since the new road was completed; and that he had observed the changes in the access to the defendants' property and the parking facilities. He then described what he considered in appraising the value of the property, with particular attention to the present condition, the elevation of the present road, the ramp, the accessibility to the defendants' property, and the width of the road. He testified that the exit from the highway leading east to the front of the defendants' tavern is approximately 18 feet wide and is supposed to be 20 feet wide, and the grade is, in his judgment, 8 to 10 feet high; that the defendants are utilizing about 2 acres of ground in connection with their business; that prior to the taking by condemnation by the plaintiff, the 2 acres plus the improvements thereon had a value of $15,900; that after the taking by the plaintiff the value was $9,400, and the difference was $6,500; and that prior to the taking the defendants' property was adapted for the use of a cafe and tavern.

On cross-examination this witness testified that more traffic was going by the defendants' property now than there had been before. On redirect examination he testified that access to premises is important; that prior to the taking, the level of the defendants' property was almost the exact level of the road; and that the difference that exists at this time is that the new road creates a condition of lack of access which is a big detriment to

the defendants' business and very definitely affected the value of the property. On recross-examination he testified that when businessmen go into business which is dependent upon traffic, they want on a main-traveled highway with plenty of access to their place of business.

An experienced real estate appraiser employed by the plaintiff testified that when he first saw the property it consisted of about 11 acres lying east and west on the south side of Wood River, bound on the south by a graveled county road and on the west by a graveled county road. The road at that time had not been graded up very high and essentially the road and the defendants' property were about the same elevation. At the west end of the property the defendants had a cafe, and there were some scattered trees over a major portion of the property. The factors he considered in making his appraisal were the market for real estate in the area, its nearness to Grand Island, its location with respect to the road it was on, and the income of the business, which he considered very important. He received information from the defendants as to the income derived from their business which disclosed defendants' income for 1957, 1958, and 1959, but not for 1960. In 1957 the defendants' net income was $3,537.20; in 1958 it was $3,112.35; and in 1959 it was $4,002.37. The average for the 3 years was $3,550.65. This witness further testified that on the day of the taking, February 27, 1961, the reasonable market value of the defendants' property, valuing 11.36 acres, was $17,130; that the value of the remainder of the property not including the one-tenth of the acre taken was $17,100; that the reasonable market value of the defendants' property after the taking or the acquisition on February 27, 1961, was $18,550; that after a study of the market it was his opinion that the defendants' property will be benefited by the additional traffic which would attract business; and that some improvement would need to be made on the property to make it useable, but such damages would be

offset by the benefits. On cross-examination this witness testified that the land other than that used for the cafe or tavern could be used for various projects, but there would be many clearing and leveling costs and hauling from the highway that he did not consider in arriving at his figure of the benefits. He further testified that although trucks may experience a little more trouble getting into the defendants' place of business, they would have a much better road to get into the defendants' premises. He did not know what it would cost the defendants to rearrange the parking facilities.

The plaintiff argues that an average net income of $3,550, over a period of 3 years, based upon a valuation of $30,000 and with no amount charged by defendants for wages, is indicative of the fact that the verdict was excessive. The net income of the defendants was slightly in excess of 10 percent, considered upon a $30,000 valuation. While there is no evidence that defendants took wages out of the business and considered profits over and above the wages, certainly the defendants could run their business as they chose. In any event, the above matters appear in the record and might have been argued to the jury and considered by the jury.

The plaintiff also makes some contention with reference to the trial court being concerned about the foreman of the jury being a son-in-law and employee of a man who had had considerable litigation with the Department of Roads. This concern of the trial court was definitely refuted by an affidavit of the juror. The trial court had no right to consider the personal relationship or standing of the foreman of the jury for the reason that there was no evidence introduced concerning such matter. The information considered by the trial court is not supported by the evidence and is contrary to the true facts. We see no merit to the plaintiff's argument in this respect in considering this appeal. See 20 Am. Jur., Evidence, § 16, p. 46.

We deem the following authorities to be applicable to the instant case.

In Greenberg v. Fireman's Fund Ins. Co., 150 Neb. 695, 35 N. W. 2d 772, this court said: "A new trial is to be granted for a legal cause and where it appears that a legal right has been invaded or denied. A new trial is not to be granted for arbitrary, vague, or fanciful reasons." See, also, Tingley v. Dolby, 13 Neb. 371, 14 N. W. 146; Missouri Pacific Ry. Co. v. Hays, 15 Neb. 224, 18 N. W. 51. This court further said: "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. The word 'discretion' is one of variable meanings depending on its use. In Tingley v. Dolby, supra, we quoted with approval this definition by Lord Mansfield: 'Discretion when applied to a court of justice means sound discretion guided by law. It must be governed by rule, not by humor; it must not be arbitrary, vague, and fanciful, but legal and regular.' As used in the connection here presented it means that the court in its ruling must be guided and governed by applicable law. It means the application of statutes and legal principles to all of the facts of a case. Shopiro v. Shopiro (Cal. App.), 153 P. 2d 62." See, also, Myers v. Platte Valley Public Power & Irr. Dist., 159 Neb. 493, 67 N. W. 2d 739.

In Connor v. State, *ante* p. 140, 120 N. W. 2d 916, this court said: "In a condemnation action the weight and credibility of testimony of either lay or expert witnesses regarding value of land taken or value of remainder immediately before and immediately after taking is for the jury. * * * Under ordinary circumstances expert opinion evidence is to be considered and weighed by the triers of fact like any other testimony. * * * The amount of the damages sustained by a landowner for a right-of-way condemned across his land is peculiarly of a local nature to be determined by a jury, and its verdict will not ordinarily be interfered with if it is based on

the testimony. * * * In a condemnation action, when the evidence is conflicting, the verdict of a jury will not be set aside unless it is clearly wrong."

The owner of real estate which is taken in condemnation proceedings who is familiar with its value can testify as to its value. Johnson v. City of Lincoln, 174 Neb. 837, 120 N. W. 2d 297.

The amount of damages sustained by a landowner for a right-of-way condemned across his land is peculiarly of a local nature to be determined by a jury and this court will not ordinarily interfere with the verdict if it is based upon the testimony. See, Myers v. Platte Valley Public Power & Irr. Dist., *supra;* Kennedy v. Department of Roads & Irrigation, 150 Neb. 727, 35 N. W. 2d 781.

The plaintiff offered no evidence to controvert Floyd Wixson's claim of loss of business, damages allegedly caused by the reduction of the parking space, his claim that the building would have to be moved, or any other claims of loss as shown by his testimony. The jury's belief of Floyd Wixson's testimony inheres in the jury's verdict.

The objections made to Floyd Wixson's testimony by the plaintiff relating to value was that no proper foundation was laid to permit this witness to testify as to its value. There was no objection as to his competency to testify. He was a joint-owner of the property, lived on it, was acquainted with it, transacted business on it for 11 years, and had known the property for many years previously. Without question, a joint-owner of property such as Floyd Wixson, under the law of this jurisdiction, is competent to testify as to its value. There is no merit to the plaintiff's contention in this respect.

In the light of the record which is before this court the conclusion reached is that the judgment of the district court setting aside the verdict of the jury and the judgment rendered thereon, and the order granting a new trial, were erroneous.

Accordingly the judgment of the district court is reversed and the cause remanded with directions to reinstate the verdict of the jury and the judgment thereon.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, DEPARTMENT OF ROADS, APPELLANT, v. EVA I. DILLON, A WIDOW, APPELLEE.

122 N. W. 2d 223

Filed June 21, 1963. No. 35263.

1. **Eminent Domain: Appeal and Error.** In a condemnation action, when the evidence is conflicting, the verdict of a jury will not be set aside unless it is clearly wrong.
2. **Eminent Domain: Trial.** The amount of the damages sustained by a landowner for a right-of-way condemned across his land is peculiarly of a local nature to be determined by a jury, and its verdict will not ordinarily be interfered with if it is based on the testimony.
3. **Witnesses: Trial.** Under ordinary circumstances expert opinion evidence is to be considered and weighed by the triers of fact like any other testimony.
4. **Eminent Domain: Trial.** In a condemnation action the weight and credibility of testimony of either lay or expert witnesses regarding value of land taken or value of remainder immediately before and immediately after taking is for the jury.
5. **Trial: Appeal and Error.** Where a verdict of a jury is clearly against the weight and reasonableness of the evidence it will be set aside and a new trial granted.
6. ———: ———. Where testimony is offered and admitted in evidence without objection being made thereto, error cannot be predicated thereon on appeal. The rule also applies to the district court when reviewing its own proceedings on motion for a new trial.
7. **Eminent Domain: Damages.** For all injuries or damages 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.
8. ———: ———. In fixing the damages sustained by the landowner to remainder property in consequence of the appropriation or injury of such owner's property for a public use there may be taken into account every nonspeculative element of inconvenience, annoyance, and disadvantage resulting from the im-

provement, which would influence an intending purchaser's estimate of the market value of such property, including damages, if any, resulting from the physical severance of the land into separate tracts and the manner of access thereto and from interference with recreational facilities, not by adding them together item by item or allowing them as such but such elements should be considered in determining the extent that, taken as a whole, they detract from the market value of the remaining property as a unitary whole.

Appeal from the district court for Sarpy County: JOHN M. DIERKS, Judge. On motion for rehearing. See 174 Neb. 560, 119 N. W. 2d 87, for original opinion. Original opinion set aside. Affirmed.

Clarence A. H. Meyer, Attorney General, Harold S. Salter, and Asa A. Christensen, for appellant.

Orville Entenman, for appellee.

Heard before WHITE, C. J., CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

WHITE, C. J.

This is an interstate highway condemnation action initiated by the State of Nebraska, Department of Roads, against the condemnee owner, Eva I. Dillon, wherein the State appropriated a portion of the condemnee's land running diagonally across her 540-acre farm. Our original opinion herein, reversing the judgment and remanding the cause for retrial in the district court on the grounds of excessiveness of the verdict, is found in 174 Neb. 560, 119 N. W. 2d 87. On motion for rehearing, we granted reargument, and the case is now before the court for further decision.

We set aside the original opinion and affirm the judgment of the trial court.

We briefly review the history of the litigation. In the county court of Sarpy County, Nebraska, after the State's original petition was filed, the county court, agreeable to the statute, appointed three disinterested freeholders of that county as appraisers. They were

Alois Gramlich, Lester Hauschild, and Mike Hogan. They returned an award of $30,765.25. On appeal by appropriate allegations in the pleadings, the State sought a reduction in the award and the condemnee, hereinafter referred to as the plaintiff, prayed for an award in the sum of $47,200 alleging substantially that the award of the appraisers was insufficient. The case was tried to a jury in the district court. It returned a verdict in the sum of $33,025 upon which judgment was entered. Motion for new trial was overruled and the State of Nebraska, Department of Roads, appealed, assigning as error the excessiveness of the verdict.

The sole question discussed in our previous opinion in this matter, and the sole matter before us at this time, is an evaluation of the weight and credibility of the testimony to determine whether the amount of the verdict and the judgment of the trial court were purely and excessively wrong under applicable rules of law.

This case was tried to a jury which was permitted, by stipulation of the parties, to view the premises prior to the acceptance of oral evidence. The witnesses for the plaintiff consisted of the owner herself, her son, who is a tenant on the farm and has either lived on or been familiar with it for many years, and four witnesses including the three Sarpy County appraisers who entered the original appraisal award in county court. The State's witnesses consisted of two appraisal experts who are employed by the State and who frequently testify for the State in condemnation and highway cases. The residence of one is in Missouri, and the other is in Wayne, Nebraska. Almost all of the testimony in the case was admitted without objection. No objections were made of any nature to the court's instructions to the jury. No objections were made or error claimed with respect to the competency or qualifications of any of the witnesses or jurors.

The grounds for reversal on appeal are that the verdict of the jury and the judgment were clearly against

the weight and reasonableness of the evidence and therefore must be set aside and a new trial granted. Twenty Club v. State, 167 Neb. 37, 91 N. W. 2d 64; Leffelman v. City of Hartington, 173 Neb. 259, 113 N. W. 2d 107.

With this review of the litigation in mind, we review the evidence. The Dillon farm is located in the extreme southwest corner of Sarpy County and bordered on the west and south by the Platte River. The farm consists of approximately 540 acres of land and some additional acres in the river itself, the exact amount of which was not shown during the trial. The interstate highway, a controlled access highway, runs generally north and south through the Dillon farm. The strip condemned by the State, consisting of 43.13 acres of land that were actually taken, runs from the river bank north through the entire length of the bottom land on the Dillon farm and bisects four 80-acre tracts of land. The evidence shows that this was not an ordinary farm. The land consisted of four principal types, timber hill pasture, timber bottom pasture, good bottom land of high productivity, and bottom land recently cleared and not yet capable of growing corn although capable of raising small grains. The farm also had almost 2 miles of river front with facilities for hunting, fishing, and recreation. It was a part of a drainage district, and the evidence shows that none of the land east of the drainage ditch, which is on the west side of the property, has ever been flooded since the year 1944. These different types of property were adjacent to each other and integrated into a total farm unit extending from the river bank to the top of the bluffs to the north, a distance of over 2 miles. The farm was not broken by any public road prior to the taking by the State. The most productive portion of this farm unit was approximately 160 acres of choice bottom land on the western edge of the farm. Diagonally through this portion of the farm, the interstate non-access highway runs. The actual taking for this purpose is 43.13 acres. The evidence shows that

the non-access feature will create a situation where the farm in its present state will abut only property on the north and the east. The interstate runs diagonally through the Dillon farm, creating a separation from the principal portion of the farm, and leaving to the west of the non-access interstate highway a portion of from 35 to 41 acres of land. Of this segregated portion of the original farm, 25 to 31 acres were good bottom land, and 10 to 12 acres were timber land. The evidence further shows that it segregated an additional 27 or 28 acres of timber land from the main portion of the farm unless the owner of the farm constructed a bridge over a drainage ditch. The evidence also shows that the Dillon farm is located within 20 miles of the South Omaha stockyards, and it is a fair inference from the evidence that it is ideal for cattle feeding with proper proportions of fertile productive bottom soil, hill pasture, river timber, and pasture. The evidence shows that it has been devoted to this adaptable use. The evidence also shows, since the interstate highway creates an inaccessible wall on the west side of this property, it will be impossible to get from one segregated parcel of the farm to the other except by way of an overpass located to the north of the Dillon farm which is over 1 mile north of the north line of the Dillon farm and considerably more from the southern or southeastern sections of the farm. The nearest interchange for entering or leaving the interstate is 4 miles north of the owner's land.

As foundation testimony for valuation, there is considerable evidence as to the value of the present and prospective available uses of the timber land for recreational purposes, including hunting rights. This timber land borders on the Platte River. Without objection, considerable testimony was received as to the value of this land as a part of the farm, as a recreational area, and for hunting rights. Its proximity to a large metropolitan area was noted in the evidence. Testimony was received that tracts of this timber land bordering on the

river had been rented for recreational and hunting purposes for substantial sums. We deem it significant here that all of the witnesses, including those of the State, assigned a high percentage of decrease in remainder value to the segregated portions of the timber land, both on the west and east sides of the interstate. One of the State's witnesses fixed a 66% decrease in value on the eastern segregated portion of the timber land of approximately 28 acres. The estimates of the plaintiff's witnesses varied from 75 to 87½%. The principal difference as relates to the end figure of damage in this respect comes from the original value assigned to the property and not to the percentage of decrease. The original values placed on this property vary from $145 per acre set by the witnesses for the State to the minimum of $175 set by the testimony of the witnesses for the plaintiff. The State also condemned three small strips of land for channel purposes, and took two temporary easements for borrow pit purposes covering 14 acres of land and two temporary easements for haul road purposes cutting across portions of the land using approximately 1½ acres. On other available uses, there is also testimony that sand and gravel rights could be sold from the land. There was evidence that options for such use had been sold by the plaintiff in the past.

We go now to the testimony as to valuation. As our original opinion in this matter noted, the evidence as to the value of the tract of land actually taken does not create much of a problem. There is less than a $2,000 difference between the maximum estimate by the State's witnesses and the minimum estimate of the plaintiff's witnesses. Independent of the plaintiff and the plaintiff's son, whose testimony reached a much higher valuation of $47,200, we now summarize the testimony of the witnesses as to valuation by reducing testimony of the independent witnesses and the witnesses for the State in the following chart form:

Valuations Placed by Plaintiff's Witnesses

	Gramlich	Hogan	Warren	Hauschild
Total Value Farm	$ 113,490	$ 129,800	$ 119,840	$ 125,500
Average Value Per Acre	$ 206 -10	$ 240	$ 230	$ 230
Value Part Taken, 43A	$ 11,492	$ 11,600	$ 12,775	$ 11,600
Total Value Rem. Before	$ 101,998	$ 118,200	$ 107,065	$ 113,900
Total Value Rem. After	$ 83,003	$ 97,125	$ 80,036	$ 94,850
Total Value Rem. Damages	$ 18,994	$ 21,075	$ 26,678	$ 19,050
Rem. Damages Itemized				
Bottom Crop:				
Acres East of Hiway	110 @ $ 35	100 @ $ 50	114 @ $ 70	79 @ $ 70
Acres West of Hiway	25 @ $150	25 @ $200	25 @ $262	25 @ $150
By Reason of Borrow	$ 1,110.50		$ 1,837.50	$ 1,500.00
Cleared Land Damage			160 @ $ 35	
Timber Land				
Acres North of Hiway	7 @ $100	35 @ $125	35 @ $131	5 @ $100
Acres South of Hiway	30 @ $175			30 @ $150
Hunting Rights Damage	$ 4,000		$3,750 (in add. land)	

The two witnesses for the State testified as to these items as follows:

	Ewing	Davis
Total Value Farm	$111,000	$116,800
Value Part Taken, 43A	$ 8,075	$ 9,600
Total Value Rem. Before	$102,925	$107,200
Total Value Rem. After	$ 92,700	$101,200
Total Value Rem. Damages	$ 10,225	$ 6,000
Rem. Damages Itemized		
Bottom Crop:		
Acres East of Hiway		No Dam.
Acres West of Hiway		30 @ $50
Timber Land		
Acres North of Hiway		10 @ $45
Acres South of Hiway		29 @ $95
Hunting Rights Damage		Considered

It is obvious from an inspection of the above chart that material differences in the final opinion as to the damages to market value arose, not only because of differences in opinion as to the effect on market value of the taking as it related to the remainder, but that there were material differences as to opinion as to the original value of the remainder. We observe that there is only a $1,200 difference in valuation between the four plaintiff's witnesses as to the total value of the 43.13

acres actually taken. There is approximately a $1,600 difference in opinion as to the State's witnesses on this point. We observe that in fixing the total value of the remainder damages, there was a $2,100 difference, or less, in the opinions of Gramlich, Hogan, and Hauschild. We observe further the difficulty in determining remainder damage on the part of the State's witnesses because there was a $2,225 discrepancy in their opinions as to remainder valuation. From the chart that we have included in this opinion and the chart marked as "Chart B" in the State's reply brief, the highest valuation of the State's witnesses as to remainder, $10,225, included no specific allowance for the remainder damage as to many material items that were considered important by all of the other witnesses including the State's witness, Davis.

We also observe that in the opinion as to original valuation of the total value of the farm that one of the State's witnesses, Davis, testified to a valuation of over $3,000 beyond the testimony of Gramlich, a witness for the plaintiff and one of the appraisers in county court. On the other hand, Ewing, who testified for the State, placed an original valuation of $111,000 on the whole farm while Hogan placed a total valuation for the plaintiff of $129,800. One of the State's witnesses testified to approximately 80% more remainder damage than the other State witness. Comparative discrepancies are observable in many other areas from an inspection of the chart summarizations in this opinion. We make these observations only for the purpose of demonstrating the difficulty of and the peculiar function of the jury in a case of this type to evaluate the weight and credibility of the testimony. The jurors came from the local community. Prior to the taking of the testimony, they visited and saw the premises in question. Their integrity or qualifications are not questioned or challenged in any nature whatsoever. The State does not suggest that the verdict was the result of passion or prejudice

in any respect. The range of damage which was testified to by the witnesses for the plaintiff, plaintiff and son excluded, was from approximately $30,000 to $39,000. The three lowest of the plaintiff's witnesses testified as to a range varying from about $30,000 to $32,775.

Confronted with this situation, we feel that we should adhere to the rules recently announced in Connor v. State, *ante* p. 140, 120 N. W. 2d 916. In that case, although the type of land condemned was different in nature, the range of valuation was from $23,650 to $97,264.71. The amount of the verdict sustained by the court was $68,149.62. As in the present case, the instructions, competency, and foundation for the witnesses' testimony were not questioned. As here, there was no error in the trial that could be asserted as properly related to error in the amount of the verdict. In the Connor case, *supra,* we said: "In Langdon v. Loup River Public Power Dist., 144 Neb. 325, 13 N. W. 2d 168, it was pointed out that in a condemnation action the weight and credibility of testimony of either lay or expert witnesses regarding value of land taken or value of remainder immediately before and immediately after taking is for the jury. * * * In Medelman v. Stanton-Pilger Drainage Dist., 155 Neb. 518, 52 N. W. 2d 328, it was said: 'Under ordinary circumstances expert opinion evidence is to be considered and weighed by the triers of fact like any other testimony.' "

In the Connor case, *supra,* we affirmed our holding giving significance to the peculiarly local nature of damages sustained in a condemnation action when we said: "As to the attitude to be taken by this court on review of the verdict of a jury in a condemnation action, it was said in Kennedy v. Department of Roads & Irrigation, 150 Neb. 727, 35 N. W. 2d 781: 'The amount of damages sustained by a landowner for a right-of-way condemned across his land is peculiarly of a local nature to be determined by a jury and this court will not ordinarily interfere with the verdict if it is based upon

the testimony. * * * When the evidence is conflicting, the verdict of the jury will not be set aside unless it is clearly wrong.' "

Significant here also is the following statement from Phillips Petroleum Co. v. City of Omaha, 171 Neb. 457, 106 N. W. 2d 727, quoting Churchill v. Beethe, 48 Neb. 87, 66 N. W. 992, 35 L. R. A. 442, wherein it is stated: " 'It is now the settled law of the state that 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 this case, as in the Connor case, *supra,* much of the attack now presented by the State in its brief is directed towards the incompetency of much of the evidence presented. As we have pointed out, there is very little merit to this argument as an original matter, but in any event, this contention cannot be considered. In disposing of this same contention in the Connor case, *supra,* our court said as follows: " 'Where testimony is offered and admitted in evidence without objection being made thereto, error cannot be predicated thereon on appeal. The rule applies to the district court when reviewing its own proceedings on motion for a new trial.' See, also, Pongruber v. Patrick, 157 Neb. 799, 61 N. W. 2d 578; Fuss v. Williamson, 159 Neb. 525, 68 N. W. 2d 139; Gain v. Drennen, 160 Neb. 263, 69 N. W. 2d 916; Borsen v. Moskowitz, 163 Neb. 223, 79 N. W. 2d 178; Maska v. Stoll, 163 Neb. 857, 81 N. W. 2d 571; Hilligas v. Farr, 171 Neb. 105, 105 N. W. 2d 578; Law v. Gilmore, 171 Neb. 112, 105 N. W. 2d 595; Haith v. Prudential Ins. Co., 171 Neb. 281, 106 N. W. 2d 169; Barker v. Wardens & Vestrymen of St. Barnabas Church, 171 Neb. 574, 106 N. W. 2d 858."

The qualifications and competency of all of the witnesses, including the experts, are not challenged and must be regarded as sufficient and nothing appears the effect of which is to challenge their credibility. We

observe the complete absence of testimony of any local witnesses on behalf of the State. The evidence as to valuation is conflicting, as usual, in this type of case and the jury's verdict here reflected a consideration of the fact that damages of this type are peculiarly local in nature, and the valuation it fixed is clearly within the reconcilable range of testimony of the local witnesses.

Our original opinion in this matter was devoted almost entirely to the evidence relating to the decrease of the farm productivity of the remainder of the property. By definition, remainder land not actually taken by the condemner is not usually physically affected with respect to its soil productivity. The test is market value and not diminution in the productivity of the land except insofar as it bears upon what effect it would have upon what a willing purchaser would pay and a willing seller would sell. In the early history of the development of the law of eminent domain, value damage to remainder land was not compensated. This rule has long since been changed. The true test is the effect of the severance on market value at the time of the taking. This, in turn, is based upon all of the inconveniences caused by the severance as they might affect a prospective purchaser and the effect of the severance upon every available, reasonable, and probable future use of the property, as they relate to the market value of the remainder of the property considered as a unitary whole. The items of inconvenience as to the present use of the remainder may not be added together by a landowner and be recovered separately as damages. Conversely, the condemner may not separate them out and individually itemize them for the same purpose. They are significant only for the formulation of a basis of an opinion as to the market value of the total unit of the property as before and after the taking. Without objection, either in the trial court or here by the State, the trial judge properly instructed the jury in part as follows: "In fixing the damages sustained by

the landowner in consequence of the appropriation or injury of such owner's property for a public use there may be taken into account every nonspeculative element of inconvenience, annoyance and disadvantage resulting from the improvement, which would influence an intending purchaser's estimate of the market value of such property, including damages, if any, *resulting from the physical severance of the land into separate tracts and the manner of access thereto and from interference with recreational facilities, not by adding them together item by item or allowing them as such but such elements should be considered in determining the extent that, taken as a whole, they detract from the market value of the remaining property.*" (Emphasis supplied.)

We have reviewed the evidence. The value of the land actually taken is not in material dispute. We have reviewed the actual, available, and prospective uses of this land both separately and as a whole, and the actual presently proved inconveniences and decreases in productivity for which the land is now being used. We note the diagonal splitting of the basic part of the farm structure, including the non-access feature of the interstate. We have reviewed the opinion differences as to both original valuation and valuation of the remainder. We have noted the relationship of all of these factors as to its effect on the future development of this unit of land as to available and prospective uses. Mere lack of proof of a change in the productivity of the remainder for the use to which it is now devoted could not lead us to a conclusion that the findings of the board of appraisers, the jury, and the trial judge were clearly wrong.

The trial of this case appears to have been conducted without error. It was based on conflicting, competent, and material testimony received almost without objection. The plaintiff landowner has only one day in court and all damages must be recovered within the limited perspective of the valuations fixed at the time

of the taking. It appears that the rights of the parties were carefully safeguarded by the trial judge in this case.

This court does not have the function or power to substitute its own judgment as to the merits of a case based upon competent and conflicting evidence in the place of the verdict of the jury and the judgment of the trial court. The verdict and the judgment should be and are hereby affirmed.

AFFIRMED.

HARRY GEYER, APPELLEE, V. THE WALLING COMPANY, APPELLANT.

122 N. W. 2d 230

Filed June 21, 1963. No. 35430.

1. **Corporations: Bills and Notes.** A corporation may draw or accept a bill of exchange for the purposes of its business.
2. **Bills and Notes.** The trade acceptances involved herein were negotiable instruments.
3. **Corporations: Bills and Notes.** Where a private corporation has power to issue negotiable paper and the officer or agent of the corporation by whom the instrument is executed, accepted, or endorsed has apparent authority to perform such act, the fact that he does not have actual authority or that the instrument was unauthorized is not a defense as against a bona fide holder of the instrument.
4. **Corporations.** A corporation can act only by its agents, and the presumption is that an act pertaining to its ordinary business when performed by an officer who could ordinarily transact such business is legally done and is binding on the corporation.
5. **Bills and Notes: Trial.** In a suit on an unpaid past-due negotiable instrument, it is error for the trial court to refuse a request for a peremptory instruction in favor of the plaintiff where the uncontradicted evidence shows plaintiff to be a bona fide holder who purchased the instrument for value before maturity without knowledge of any infirmity therein or of facts indicating bad faith in taking it.

Appeal from the district court for Douglas County: PAUL J. GARROTTO, Judge. Affirmed.

Gaines, Spittler, Neely, Otis & Moore and William B. Woodruff, for appellant.

Haney, Walsh & Wall, for appellee.

Heard before WHITE, C. J., CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

SPENCER, J.

This is an appeal by The Walling Company from a judgment entered on a verdict for Harry Geyer on three trade acceptances executed in its name by G. B. Abart, vice president.

While other points are raised, the basic question involved herein is the authority of a vice president to execute trade acceptances for the defendant corporation.

The Walling Company, defendant and appellee, which will hereinafter be referred to as defendant, is a manufacturer's representative for plant equipment used by utility companies. R. A. Walling, its president, testified as follows with reference to his knowledge of the contract signed by G. B. Abart which resulted in the issuance of the trade acceptances: " 'Q. At what point did you become aware of the contract entered into by Mr. Abart on behalf of the corporation with Aluma-Glo? A. As I recall, Gail (G. B. Abart) and Morris (Mr. Greer) came to me and told me about this product and I do quite a little traveling, so that I am not around all the time, and asked me what I thought about it and as I recall, my comment was that it seemed to be a little bit out of their particular line of effort, but I knew that we had problems in protective coating, protecting mechanical equipment, such as coating some of Gail's stuff that stands out in the weather, and if they felt this was a product that would help them, that we could try it as far as I was concerned. I said we might take a look at it and try it.' Page 9 line 6. 'Q. Do you recall whether that was before or after Mr. Abart signed the contract? A. I couldn't say specifically. I expect

it was before or about the same time. Q. And you authorized the entering into the contract or ratified it? A. I agreed before that if they felt it was a good thing that they could try it out, yes, and see what it looked like. I don't recall if there was any discussion of a contract or anything at that time.' Line 23. 'Q. In any event, it was all right with you that they go ahead? A. As long as they didn't expect me to sell it.' "

G. B. Abart, who was a vice president and a director of the defendant, testified that he signed a contract with Aluma-Glo Corporation for the purchase of protective coating for machinery. When he was questioned about the trade acceptances, Abart, who had a mechanical engineering degree from the University of Kansas, was extremely evasive. He could not remember signing them, and while he did not deny the signature thereon was his signature, neither would he admit it was. The most he would say was that it looked like his signature.

Harry Geyer, hereinafter referred to as plaintiff, filed the following request for admissions on April 24, 1961: "Comes now the plaintiff herein and requests the defendant to admit within ten days of the date of service hereof the truth of each of the following statements.

"I That the signatures of G. B. Abart appearing on the originals of the Trade Acceptances, copies of which are attached to plaintiff's Petition, are genuine.

"II That on the date of signing the said original Trade Acceptances, the said G. B. Abart was Vice-President of the Walling Company, a corporation.

"III That the written words 'The Walling Co.' appearing after the printed words 'Buyer's Signature' on each of the said original Trade Acceptances were placed on the said Trade Acceptances by G. B. Abart.

"IV That the written words 'G. B. Abart V. P.' appearing after the printed words 'By Agent or Officer' on each of the said original Trade Acceptances were

placed on said Trade Acceptances by G. B. Abart."

Objections were filed by the defendant. After a hearing, the objections were overruled and the defendant was directed to make due answer to the questions submitted. No answers were ever supplied by the defendant. For the purposes of this case, the requests stand admitted. § 25-1267.41, R. R. S. 1943.

The trade acceptance, payable January 15, 1960, is as follows:

"ALUMA-GLO CORPORATION OF AMERICA
1938 Harrison St. Hollywood, Florida
No. ——— 12 Nov. 1959
To The Walling Co. 1514 Davenport, Omaha, Neb.
On 15 January 1960 Pay to the order of ALUMA-GLO CORPORATION OF AMERICA Four-Hundred-Ninety & 47/100 ---- Dollars ($490.47)
The transaction which gives rise to this instrument is the purchase of goods by the acceptor from the drawer.

Accepted at Omaha, Neb. on)
Nov 12 1959)
Payable at Northside Bank Bank)
Bank Location Omaha, Neb.)
Buyer's Signature The Walling Co.)
By Agent or Officer G B Abart V. P.)

ALUMA-GLO CORPORATION OF AMERICA
By Joel S. Lewis
President"

The other two are exactly the same except that one of them is payable February 15, 1960, and the other one is payable March 15, 1960, and is in the amount of $490.46.

The evidence is undisputed that the plaintiff purchased the trade acceptances in good faith, in due course of trade, before they were due, for a valuable consideration, and without notice of any infirmities. They were endorsed to the plaintiff November 25, 1959, for full value less 6 percent discount. In other words, plaintiff paid 94 percent of their face value for them.

Section 62-156, R. R. S. 1943, provides as follows: "To constitute notice of an infirmity in the instrument, or defect in the title of the person negotiating the same,

the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith."

Section 62-157, R. R. S. 1943, is as follows: "A holder in due course holds the instrument free from any defect of title of prior parties, and free from defenses available to prior parties among themselves, and may enforce payment of the instrument for the full amount thereof against all parties liable thereon."

It appears to be defendant's position that this transaction is covered by section 62-123, R. R. S. 1943, which has been our law since 1905 and is as follows: "Where a signature is forged or made without authority of the person whose signature it purports to be, it is wholly inoperative, and no right to retain the instrument, or to give a discharge therefor, or to enforce payment thereof against any party thereto, can be acquired through or under such signature, unless the party against whom it is sought to enforce such right is precluded from setting up the forgery or want of authority."

Defendant in its brief argues as though the signatures to the trade acceptances were forgeries. This clearly is not the case. We interpret defendant's argument to be that the signatures for the corporation were attached by an officer who did not have authority to execute the instruments, that it is covered by section 62-123, R. R. S. 1943, and that it is not incumbent on the defendant to prove that plaintiff was not a holder in due course. We further assume that defendant's position is that the plaintiff had notice of an infirmity because the notes were signed by a vice president on behalf of the corporation, and were not accompanied by a corporate resolution authorizng their execution.

The 1909 case of Second Nat. Bank v. Snoqualmie Trust Co., 83 Neb. 645, 120 N. W. 182, in which a verdict was directed for the plaintiff, appears to be the only case considered by this court containing facts at all

similar to the instant case. In that case, a corporate promissory note was given, signed only by the secretary. The defense was that the person signing the note was not properly authorized to do so by the corporation. That case, at page 648, reads: "So far as the record discloses, none of the officers, nor all combined, were specifically authorized to execute a negotiable instrument in its name. However, the power to contract necessarily involves the power to create a debt, and, as said by Mr. Justice Gordon in Watt's Appeal, 78 Pa. St. 370, 391: 'A corporation, without such power would be a body without life, utterly effete and worthless.' Richmond, F. & P. R. Co. v. Snead & Smith, 19 Grat. (Va.) 354, 100 Am. Dec. 670. And the record being silent as to the agencies provided by defendant for the exercise of this very essential function, we must look to the facts in the particular instance unenlightened by information concerning its usual course of business in such transactions."

We held in that case that the holder of the instrument who took it before maturity without notice of any defect was a purchaser for value in due course of business. As suggested, the note was signed for the corporation by the secretary. This fact was not sufficient to require the purchaser to make inquiry as to the secretary's authority. We believe that decision is controlling on the facts herein.

There is in the instant case no contention that the issuance of trade acceptances was an ultra vires act of the corporation. A corporation may draw or accept a bill of exchange for the purposes of its business. 4 Cook on Corporations (8th ed.), § 761, p. 3387. The nature of the corporation was such that the right to execute negotiable paper must be presumed in the absence of evidence otherwise. For cases holding trade acceptances in the form of the instant ones to be negotiable instruments, see cases on page 263, Beutel's Brannan Negotiable Instruments Law (7th ed.). Defendant's com-

plaint is that the plaintiff has not shown that the vice president had actual authority to execute the trade acceptances on behalf of the corporation. Defendant, however, does admit that the vice president did have authority to order merchandise and to execute purchase orders in the area in which he represented the corporation. It is also admitted in the following testimony of the president of defendant corporation that Abart, the vice president, was specifically authorized to contract in this instance if he and a Mr. Greer were agreed that the product which was the subject of the trade acceptances "was a good product and that we needed it in our business, that it was satisfactory with me for them to take a try at it."

This is not the usual case which reaches the courts where the vice president was contracting for his own benefit. In this instance, the vice president was contracting for the corporation on an item within his particular area in the corporation with the knowledge and consent of the president of the corporation, which item at least two of the directors of the corporation, Abart and Greer, must have felt was beneficial to the corporation. Further, the plaintiff paid full value for the instruments, before maturity, in good faith, and without notice of any infirmity.

We find this case is within the ambit of the holding in Second Nat. Bank v. Snoqualmie Trust Co., 83 Neb. 645, 120 N. W. 182. We find nothing in the evidence which required an investigation by the plaintiff to ascertain whether the execution of the trade acceptances was authorized. The general rule in other jurisdictions is stated in 10 C. J. S., Bills and Notes, § 506h, p. 1116, as follows: "Where a private corporation has power to issue negotiable paper * * * and the corporation's officer or agent by whom an instrument was executed, accepted, or indorsed had apparent authority to perform such act, the fact that such officer or agent did not have actual authority to perform such act, or that the instru-

ment was unauthorized, although not absolutely prohibited by statute, for the particular purpose for which it was executed, accepted, or indorsed, or that the proceeds were misapplied or misappropriated by such officer or agent, is not a defense as against a bona fide holder of the instrument, the theory being that such holder has the right to presume that the instrument was issued under circumstances which gave the requisite authority."

To hold as defendant contends would be to put a strained construction on the Negotiable Instruments Act. It would also require us to overrule Second Nat. Bank v. Snoqualmie Trust Co., *supra,* which has been the law of this jurisdiction since 1909. To require one purchasing commercial paper, which is regular on its face and for which full value is paid, to first investigate the charter of the issuing corporation to ascertain the authority of the officer who has apparent authority to contract, at the very least would unduly burden commercial transactions. We do not believe that where a transaction appears regular on its face that a purchaser for value is bound at his peril to be suspicious.

This determination is not without support in several Nebraska cases involving principal and agent, which, while not analogous, at least indicate support for the principle involved. An act of an agent, although without actual authority from his principal, may be with such apparent authority as to bind the principal. Union Pacific R. R. Co. v. Gregory Coal Co., 103 Neb. 421, 172 N. W. 362. Such apparent authority of the agent cannot be extended or restricted by by-laws or other instructions to the agent by the principal, in the absence of actual notice thereof. Sindelar v. Hord Grain Co., 116 Neb. 776, 219 N. W. 145.

In Barber v. Stromsberg-Carlson Telephone Mfg. Co., 81 Neb. 517, 116 N. W. 157, 129 Am. S. R. 703, 18 L. R. A. N. S. 680, we held: "The manager of sales of a manufacturing corporation has power to direct and contract

in regard to the usual running business of selling its wares, and persons contracting with such corporation are not bound to know of a by-law thereof limiting the power of such manager to make the customary contracts." In that case, the by-laws required all contracts to be executed by the president when authorized to do so by the board of directors. We said as follows: "The rule that, where the charter provides that a corporate contract shall be signed by certain officers, instruments not so signed are unenforceable, is so harsh and inconvenient that it has been widely departed from and practically abandoned. 2 Cook, Corporations (5th ed.), sec. 725. Persons contracting with corporations are not bound to know of a by-law limiting the power of the agent to make the customary contracts appertaining to the business he is authorized to transact. 2 Cook, Corporations (5th ed.), sec. 725." A corporation can act only by its agents, and the presumption is that an act pertaining to its ordinary business when performed by an officer who could ordinarily transact such business is legally done and is binding on the corporation. See Electronic Development Co. v. Robson, 148 Neb. 526, 28 N. W. 2d 130.

At the conclusion of the evidence, plaintiff moved for a directed verdict because the uncontradicted evidence showed plaintiff to be a holder in due course. This was overruled. Plaintiff then tendered an instruction requesting a directed verdict. This the court refused to give. The court submitted the question of whether plaintiff was a holder in due course to the jury as well as the question of the execution of the instruments and the authority of the vice president to execute them for the corporation. It was stipulated that at the time the trade acceptances were presented at the bank they were dishonored. The jury rendered a verdict for the plaintiff. There is no error in this record of which the defendant can complain.

The plaintiff's motion for a directed verdict should

have been sustained. It is the law of this jurisdiction that in a suit on an unpaid, past-due negotiable instrument it is error for the trial court to refuse a request for a peremptory instruction in favor of plaintiff where the uncontradicted evidence shows plaintiff to be a bona fide holder who purchased the instrument for value before maturity without knowledge of any infirmity therein or of facts indicating bad faith in taking it. See, Piper v. Neylon, 88 Neb. 253, 129 N. W. 277; Minden State Bank v. Sawin, 113 Neb. 691, 204 N. W. 793.

For the reasons given, the judgment of the trial court should be and hereby is affirmed.

AFFIRMED.

G. BARTLING & CO., A PARTNERSHIP, APPELLANT, V. HARRIS TRUCK LINES, INC., A CORPORATION, ET AL., APPELLEES.
122 N. W. 2d 243

Filed June 21, 1963. No. 35435.

Insurance. A contract of insurance which is plain and unambiguous as to its meaning must be enforced according to its terms the same as any other contract.

Appeal from the district court for Douglas County: PATRICK W. LYNCH, Judge. Affirmed in part, and in part reversed and remanded with directions.

Eisenstatt, Lay, Higgins & Miller and Larry T. Reida, for appellant.

Nelson, Harding & Acklie and Charles F. Noren, for appellees.

Heard before WHITE, C. J., CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

YEAGER, J.

This action as commenced was by petition of G. Bartling & Co., a partnership, plaintiff, appellant here,

against Harris Truck Lines, Inc., a corporation, defendant, denominated an appellee here, for the recovery of past-due and owing premiums in the amount of $1,113.51 on an insurance policy issued by the plaintiff to this defendant. The defendant filed a special appearance on the ground that no sufficient personal service was had on this defendant. The special appearance was never ruled upon. The record discloses however, and the parties agree, that the court never did obtain jurisdiction over the person of this defendant. It was never therefore anything more than a nominal party defendant.

Thereafter the plaintiff filed an amended petition which included by reference the allegations of the original petition and in addition pleaded a cause of action against one John Seib, who is the only defendant over whom or which, by agreement of all parties, the court ever obtained jurisdiction. He is designated as defendant and appellee, and is the only appellee subject to the jurisdiction of the court. As was true of the cause of action pleaded against Harris Truck Lines, Inc., this one was for past-due premiums in the amount of $501.69 on an insurance policy. This cause of action was based on a transaction entirely separate from the one on which the first one was pleaded. It related also to an entirely different policy of insurance.

Thereafter Seib entered a voluntary appearance in the action in which he denied all of the allegations of the petition except that he had on October 30, 1959, purchased policies of insurance from the plaintiff.

He also filed a counterclaim the substance of which, to the extent necessary to state here, is that on the basis of deposits made for insurance premiums and on account of debits and credits between him and the plaintiff, the plaintiff is indebted to him in the amount of $3,572.79 for which amount he prays judgment together with interest, attorney's fees, and costs.

The plaintiff filed a reply which is in pertinent substance a general denial.

The next step was a motion by the plaintiff for a summary judgment against the defendants. On the same day the defendant John Seib filed a motion for summary judgment against the plaintiff.

Thereafter a stipulation of facts was filed. Attached thereto were a number of exhibits the authenticity of which was approved. It also contained factual statements to all of which the parties agreed. This stipulation was signed on behalf of the plaintiff by its attorneys, on behalf of Seib by his attorneys, and on behalf of Harris Truck Lines, Inc., by its attorneys. The same attorneys represented Seib and Harris Truck Lines, Inc.

By this stipulation it is agreed effectually that the court was without jurisdiction of Harris Truck Lines, Inc. It is further agreed that Seib should assume all of the rights, duties, and liabilities of Harris Truck Lines, Inc., under the insurance policy issued to it by the plaintiff which provides the basis for plaintiff's first cause of action. The language of the assumption is as follows: "* * * that for the purposes of this case, and only this litigation, defendant John Seib shall assume all of the rights, duties and liabilities of defendant Harris Truck Lines, Inc."

This first cause of action is predicated upon the true meaning and application of the contract of insurance issued to Harris Truck Lines, Inc., by the plaintiff and particularly the following provision: "If the named insured cancels, earned premiums shall be computed in accordance with the customary short rate table and procedure. If the Company cancels, earned premiums shall be computed pro rata. Premium adjustment may be made at the time cancellation is effected and, if not then made, shall be made as soon as practicable after cancellation becomes effective."

By the stipulation it is agreed substantially that the assumption relates to policy No. 211039 which was issued to Harris Truck Lines, Inc., by plaintiff and was in force for approximately 5½ months after which it was

canceled by the plaintiff, and under which, if its terms may properly be interpreted and applied as the plaintiff contends they should be, there is an indebtedness which was due from Harris Truck Lines, Inc., to plaintiff in the amount of $1,093.51.

It is further substantially agreed that if the policy may be properly interpreted and applied as Seib contends it should be, Harris Truck Lines, Inc., is entitled to a refund of premiums from the plaintiff in the amount of $3,629.88.

It is further substantially agreed that if this claimed obligation of the plaintiff in favor of Harris Truck Lines, Inc., is valid, then the plaintiff is entitled to have the amount reduced by $501.69, an amount admittedly owed by Seib to the plaintiff as a balance of premiums due on a different and entirely unrelated insurance policy, the effect of which would be that Seib would be entitled to a recovery against the plaintiff in the amount of $3,128.19.

The case was tried to the court on the basis of the pleadings referred to herein, the stipulation which has been summarized, and the respective motions for summary judgment.

In the light of the procedural complications in the seriatim statement of the case it is deemed advisable to state it in comprehensive essence as submitted to the district court. In actuality it became, under the pleadings, proceedings, and the stipulation which has been referred to, an action by the plaintiff against John Seib as defendant for premiums due on an insurance policy. The amount involved was $501.69 and it was stipulated that this amount was due and owing. The plaintiff claimed a right of recovery for premiums due from Harris Truck Lines, Inc. Harris Truck Lines, Inc., however, never became a party to this action. It asserted overpayment of premiums on its insurance policy which had been canceled by the plaintiff. It, in effect, assigned its claim for overpayment of premiums to Seib and Seib asserted this assigned claim against the plain-

tiff. Seib, along with the assignment from Harris Truck Lines, Inc., assumed the obligation of Harris Truck Lines, Inc., to pay the plaintiff whatever, if anything, was due and owing to it on account of unpaid premiums on the policy which had been canceled.

At the conclusion of the trial the motion of the defendant Seib for summary judgment was sustained and judgment was rendered in his favor and against the plaintiff for $3,128.19, which was the stipulated amount of $3,629.88, the claim of the Harris Truck Lines, Inc., less the amount of $501.69 due to plaintiff from Seib. Motion for new trial was duly filed by the plaintiff which was overruled. From the judgment and the order overruling the motion for new trial the plaintiff has appealed.

Four assignments of error are set forth in the brief but the determination must depend upon whether or not the district court properly interpreted and applied the provisions of the insurance policy issued by the plaintiff to Harris Truck Lines, Inc. If it did, the judgment is correct, but if it did not, then the plaintiff is entitled to judgment on its motion for summary judgment against Seib for $1,093.51 on the Harris Truck Lines, Inc., account, and for $501.69 on his own obligation. The computations as such are not in dispute.

The appeal has not come to this court accompanied by a bill of exceptions, but on a case stated. This case stated embodies by reference all of the essential facts contained in and referred to in the stipulation which was submitted to the district court on the trial of the case. In particular it contains reference to and identifies the insurance policy with the clauses therein and the endorsements thereon which require consideration and on the meaning of which the rights of the parties depend.

The policy of Harris Truck Lines, Inc., was effective from October 13, 1959, and by its terms, until canceled. It has no fixed expiration date. By the terms of the policy it was agreed that the minimum premium for each

12-month period should be $32,750. This was later modified by increasing it to $33,750 for each 12-month period, and further modified by providing that the minimum premium for the first 12-month period should be $23,500.

The policy, by its conditions, further provided as follows with reference to premiums thus declared: "The premium stated in the Declarations is a premium deposit only. Upon termination of this policy or at the end of each policy period, the earned premium shall be computed in accordance with the Company's rates and rating plans applicable to this insurance. If the premium so determined is greater than the advance premium the named insured shall immediately pay the difference to the Company and if less the Company shall credit the difference to the premium account of the named insured."

It becomes clear from this and what has been pointed out that this had no reference to premium rate to be charged but only to the annual premium deposit and the computation and adjustment required at the end of each policy period of 12 months. Thus, as applied to this case, since the matter involved was within the first year, the minimum premium required was $23,500.

The policy, by endorsement No. 1, declares the rate of premium as follows: "The actual premium for this policy shall be $3.75 for each $100.00 of Gross Revenue as herein defined which shall be distributed as follows: * * *." That which follows is a declared pattern for determination of the elements to be considered in arriving at what should be regarded as gross revenue and the amounts attributed thereto. Thus Harris Truck Lines, Inc., was obligated to pay $3.75 as a premium on each $100 of gross revenue, and there is nothing to indicate that this was not a continuing obligation over each 12-month period.

The insurance policy, by item No. 4 of its declarations, contains the following: "Gross Revenue Rate—On or

before the 20th of each calendar month while this policy is in force the named insured shall render to the Company a statement showing the gross revenue, whether or not collected, derived from the use of all automobiles owned, hired or used by the named insured during the preceding calendar month. The premium for each such calendar month shall be computed on said statement at the rate of $3.75 per $100.00 of gross revenue, the premium to be payable to the Company forthwith."

This provision has no relation to policy periods. It leaves the periods at 12 months each. It provides only for monthly accounting periods and dates for monthly payments of premiums. It provides for payments of premiums forthwith. It is true that premium rate is mentioned but there is nothing in it to indicate a departure from the ultimate charge which is exacted under the policy for the designated 12-month periods.

It is however apparently on the basis of this provision of the policy that Seib relies to sustain the judgment which has been rendered in his favor. The insistence in the brief is that "the intent of the parties clearly indicates a month-to-month policy based on monthly gross revenue premiums to which the pro-rata clause applies," and that the designation of 12-month periods has no controlling significance.

If this contention is correct then, taking for granted the agreed-to computation of the parties and the interpretation of the policy provision relating to cancellation contained herein, Seib would be entitled to the judgment rendered in his behalf in this case. The contention however may not be sustained. It is negatived by the specific terms of the policy, the meaning of which is clearly and specifically stated.

The provision upon which Seib relies, which is quoted herein, is within what is termed a declaration of the policy. As to it, by a condition of the policy, which condition is also quoted herein, it is stated: "The premium stated in the Declarations is a premium deposit

only." This is followed by other language which makes it further clear that reference to policy premium period was not intended and there was nothing from which it could be presumed. The policy of insurance is one which is controlled by the rule of construction stated as follows in Adolf v. Union Nat. Life Ins. Co., 170 Neb. 38, 101 N. W. 2d 504: "A contract of insurance which is plain and unambiguous as to its meaning must be enforced according to its terms the same as any other contract."

It follows further, in the light of this interpretation of the policy of insurance issued to Harris Truck Lines, Inc., the stipulation of the parties, and the case stated, that the plaintiff is entitled to judgment against John Seib for $501.69, the admitted balance due for premium on his own policy of insurance, and for $1,093.51, for the claimed unpaid pro rata premium on the policy of insurance issued by plaintiff to Harris Truck Lines, Inc.

This is true since, as is made clear by the stipulation signed by all of the parties and the case stated, the only matter in actual controversy was that of whether the theory of the plaintiff or that of Seib furnished the basis for pro rata computation of premiums on the Harris Truck Lines, Inc., policy in the event of cancellation.

The computation was not left open for consideration. The parties stipulated and agreed that if this question should be decided in favor of plaintiff its judgment would be for these stated amounts and for these purposes, but that if it should be decided in favor of Seib, he would be entitled to the benefit of $3,629.88 for premiums in excess of earned premiums on the policy which was issued to Harris Truck Lines, Inc. Thus if Seib was entitled to recover it would be in the amount of $3,128.19. The parties agreed that the successful party should be entitled to interest at the rate of 6 per cent per annum from April 7, 1960, to the date of judgment.

In the light of the conclusions reached herein the judgment of the district court in favor of Seib is re-

versed except that portion whereby it is adjudged that he is indebted to the plaintiff in the amount of $501.69 due as premiums on the policy of insurance issued to him by the plaintiff, and the cause is remanded to the district court with directions to render judgment in favor of the plaintiff on its causes of action, on the one for $501.69 and on the other for $1,093.51, with interest as agreed to by the parties, and for costs.

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

IN RE ESTATE OF HOMER L. BUELL, DECEASED. EVERETT SATTERFIELD, APPELLANT, V. ESTATE OF HOMER L. BUELL, DECEASED, APPELLEE.

122 N. W. 2d 247

Filed June 21, 1963. No. 35445.

1. **Executors and Administrators: Appeal and Error.** A claimant who appeals from a judgment of the county court disallowing a claim against the estate of a deceased person is required to file a petition in the district court within 50 days from the date of the rendition of the judgment in the county court. § 27-1306, R. R. S. 1943.
2. ———: ———. If the claimant fails to file a petition within 50 days from the date of the rendition of the judgment in the county court, he shall be nonsuited unless the court on good cause shown shall otherwise order. § 27-1307, R. R. S. 1943.
3. ———: ———. It is a question of fact as to whether good cause has been shown to permit such a petition to be filed out of time. Ordinarily, this court will not disturb the finding and judgment of the district court on that issue in the absence of a showing of an abuse of discretion.

Appeal from the district court for Rock County: WILLIAM C. SMITH, JR., Judge. Affirmed.

Robert V. Hoagland, for appellant.

Julius D. Cronin and Edward E. Hannon, for appellee.

Heard before WHITE, C. J., CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

BOSLAUGH, J.

Everett Satterfield, the appellant, filed a contingent claim in proceedings to administer the estate of Homer L. Buell, deceased. Objections to the claim were filed by Bernard T. Buell, the executor of the estate of the deceased. The claim was disallowed by the county court on March 27, 1962. A transcript and a bond on appeal were filed in the district court on April 13, 1962.

On July 20, 1962, the executor filed a motion in the district court to dismiss the appeal because the appellant had failed to file a petition in the district court within 50 days from the date of the rendition of the judgment in the county court. On July 24, 1962, without obtaining prior leave of court, the appellant filed a petition on appeal in the district court. The district court sustained a motion to strike the petition on appeal and dismissed the appeal. The appellant's motion for new trial was overruled and he has appealed to this court.

A claimant who appeals from a judgment of the county court disallowing a claim against the estate of a deceased person is required to file a petition in the district court within 50 days from the date of the rendition of the judgment in the county court. § 27-1306, R. R. S. 1943; In re Estate of Myers, 152 Neb. 165, 40 N. W. 2d 536. If the claimant fails to file a petition within 50 days from the date of the rendition of the judgment in the county court, he shall be nonsuited unless the court on good cause shown shall otherwise order. § 27-1307, R. R. S. 1943. It is a question of fact as to whether good cause has been shown to permit such a petition to be filed out of time. Ordinarily, this court will not disturb the finding and judgment of the district court on that issue in the absence of a showing of an abuse of discretion. Leu v. Swenson, 174 Neb. 591, 119 N. W. 2d 68.

The evidence in this case consists of the transcript of the proceedings in the county court, an affidavit of the attorney for the appellant, and a sworn statement of

the attorney for the executor. There is no substantial dispute concerning the facts.

The judgment of the county court was entered on March 27, 1962. On April 2, 1962, the appellant's attorney suffered a heart attack and did not return to his office until May 1, 1962. The 50 days expired on May 16, 1962. On May 21, 1962, the appellant's attorney wrote to the attorney for the executor suggesting that the case be tried upon the pleadings filed in the county court. On May 23, 1962, the attorney for the executor replied that he preferred that new pleadings be filed and stated that after a petition had been filed he would "thereupon promptly plead." Nothing further of importance occurred until the motion to dismiss was filed on July 20, 1962. A petition on appeal was not filed until July 24, 1962, 119 days after the judgment had been entered in the county court.

The affidavit of the attorney for the appellant states that a backlog of work accumulated during his illness, and that during June 1962, the affiant advised the attorney for the executor several times that a petition would be filed "soon thereafter." The attorney for the executor stated that he asked the appellant's attorney on May 16, 1962, if a petition had been filed, but that he did not recall any conversation with the appellant's attorney in June concerning the filing of the petition. The appellant does not contend that at any time the attorney for the executor agreed to waive objections to a petition being filed out of time. Consequently, the dispute concerning the conversations in June is of no importance.

The evidence in this case shows that the appellant's attorney had recovered from his illness sufficiently to be able to return to his office on May 1, 1962, on at least a part-time basis. Thereafter, there was nothing that prevented him from preparing and filing the petition except the press of other matters. On May 21, 1962, 5 days after the 50-day period had expired, the appellant

sought to obtain a stipulation that the matter be tried upon the pleadings filed in the county court. The attorney for the executor replied promptly that he preferred that new pleadings be filed. The appellant then made no effort to file a petition until more than 60 days later and after a motion to dismiss had been filed. The evidence in this case fails to show good cause which would require the district court to permit a petition to be filed out of time.

The appellant argues that the executor is estopped from asking that the appeal be dismissed because of the failure of the appellant to file a petition in the district court within the time required by statute. The appellant contends that the letter of May 23, 1962, from the attorney for the executor was a representation that the executor would waive any objection to the failure of the appellant to file a petition within time. The letter contained no statement to that effect, but did state that the executor desired to dispose of the matter as soon as possible. The 50-day period had already expired and there is no evidence that the appellant changed his position in any way in reliance upon the alleged representation of the executor.

The letter from the attorney for the executor stated that he would promptly plead after a petition had been filed and that he wanted to dispose of the matter as promptly as possible. This letter could not justify an assumption by the appellant that the executor had no objection to a further 60-day delay.

The judgment of the district court is correct and it is affirmed.

AFFIRMED.

GAIL PRUITT, APPELLANT, V. MCMAKEN TRANSPORTATION CO., ET AL., APPELLEES.

122 N. W. 2d 236

Filed June 21, 1963. No. 35473.

1. **Trial.** Courts must apply a rigid test to explanations offered for previous omissions when material facts are elicited for the first time in a subsequent hearing.
2. **Trial: Evidence.** Triers of fact are not compelled to accept as absolute verity every statement of a witness not contradicted by direct evidence. The persuasiveness of direct evidence may be destroyed even though uncontroverted by direct testimony.
3. **Workmen's Compensation.** To entitle plaintiff to recover, he must sustain the burden of proof by a preponderance of the evidence that he suffered an accident arising out of and in the course of his employment.
4. ———. Mere exertion which is no greater than that ordinarily incident to the employment cannot of itself constitute an accident.
5. ———. Even if exertion, combined with preexisting disease or injury, produced the disability, it does not constitute a compensable accidental injury.
6. ———. A compensation award cannot be based on possibilities or probabilities but must be based on sufficient evidence that the claimant incurred a disability arising out of and in the course of his employment.
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 the claimant shall prove his right to compensation by a preponderance of the evidence, nor does it permit a court to award compensation where the requisite proof is lacking.

Appeal from the district court for Douglas County: JOHN E. MURPHY, Judge. Affirmed.

Cropper & Cropper, Weinberg & Fiedler, and Robert G. Decker, for appellant.

Joseph H. McGroarty, Larry E. Welch, and Gross, Welch, Vinardi, Kauffman, Schatz & MacKenzie, for appellees.

Heard before WHITE, C. J., CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

SPENCER, J.

This is a proceeding under the Workmen's Compensation Act. The appellant, Gail Pruitt, hereinafter called the plaintiff, was and since August 1959, had been an employee of the appellee, McMaken Transportation Co., hereinafter called the defendant.

The action was first tried before one of the judges of the Nebraska Workmen's Compensation Court. After dismissal, it was heard on rehearing before the court en banc and again was dismissed. On review by the district court, the judgment of the compensation court was affirmed and the proceeding was dismissed. Plaintiff, alleging the findings of fact are not supported by the evidence, perfected his appeal to this court where it is to be considered and determined de novo upon the record. § 48-185, R. R. S. 1943.

Plaintiff for several years has had a history of back trouble. In 1954 he sustained an injury to his back and a myelogram was made but the results do not appear in this record. On November 2, 1959, he sustained a back injury when lifting a heavy roll of steel cable.

In his original petition, plaintiff alleged that the injury of November 2, 1959, was aggravated on February 17, 1961, when he picked up a box at defendant's terminal. This resulted in his present disability. This petition, however, was amended at the hearing before the single compensation judge to allege that the sole cause of his disability was the alleged incident of February 17, 1961.

Plaintiff was a dockworker in defendant's employ on February 17, 1961. On that day, he was unloading cardboard boxes from a trailer. On the rehearing before the court en banc, he testified: "Q- Can you give the Court more details concerning how you hurt your back? What you did, what you were doing? A- I was unloading a trailer, and unloading of the trailer, that is take the freight on and off and put it on the four-wheel cart and remove it from the trailer onto the dock, and I

was bent over lifting this one box. It weighs anywhere from 80 to 85 pounds, this box was a little heavier on one end than it was on the other and I turned and put it on the cart, I was in kind of a bind or a twist, and I got a pain across my back like as if somebody hit me with a board."

The box was about 3 feet long, 2 feet wide, and 2 feet thick. In further describing what happened, the plaintiff testified: "Q- Well, go through and tell the Court what motions you went through as you lifted the box, so the Court will have a complete understanding. A- Well, I kind of pulled the box back a little bit so I could kick it with my knees so I could get my hands underneath it, so I was a little bit off balance. There is no doubt about it, so I kicked it with my knees so I could get my fingers under it some way. I lifted it up like that and it was a bad floor in the trailer. Q- It was a bad floor? A- Yes. Q- How do you mean it was a bad floor, sand on it? A- No, there was just the normal dirt in the trailer as far as that goes, but it had bad spots in the floor. There was a few holes in it. Some of it had been repaired with plywood. Q- Do you know whether or not where the box was that you picked up, what the condition of the floor was there where you were standing? A- Well, this was a broken board. It wasn't broken completely out, but when you stepped on it it would give. They put some awful heavy freight in those trailers and the floors don't last too long. Q- Well, all right, now as you rose, just tell the Court exactly what happened. A- Well, I was standing on this weak board. It was broke, but it was still there. I sunk down in it. I picked the box up. I was on a twist. I was a little bit off-balance. Q- All right, now which way did you turn? A- I turned to my right. The box was up against what would be my left-hand side of the trailer. You go into the trailer from the back." Plaintiff testified he did not slip, that he completed the move-

ment, and that he deposited the box on the four-wheel cart.

Much of the record on rehearing is devoted to cross-examination about the fact that no mention was made of a loose or broken board in the trailer floor at the hearing before the one judge, nor does any such statement appear in the history given to the medical examiner. Plaintiff's explanation for the omission is as follows: "Q- You didn't tell the Court or anybody about this until this minute, did you? A- Nobody ever asked me about it before."

Included in the cross-examination is the following: "Q- I will ask you this again. 'Q. You didn't slip, trip, or fall or anything like that? A. No, sir.' Now, you told me that, didn't you? A- I didn't slip, trip, or fall, no. Q- When I said, 'You didn't slip, trip, or fall, or anything like that,' you didn't feel that this board that you are talking about, had anything to do with this accident at the time, did you? A- Well, I didn't really think about it. Q- And you don't really think about it now, do you? A- I do too. Q- When did it first come to your attention that that might have happened? A- After I read that. (The transcript of the first hearing.) Q- How long ago was it when you read this? A- I read it last week. Q- And that is the first time that you ever thought that this breaking of the board or I wouldn't call it breaking of the board but the weak-board had something to do with this? A- I tried to rake my mind why they wouldn't pay the doctor and hospital bill."

Plaintiff argues that the verity of the testimony should have been carefully weighed by the compensation court en banc and by the district court, since it was uncontroverted, and that the apparent inconsistency because this testimony had not been previously elicited should be "instantly melted away by the warm breeze of an explanation." The metaphor is very apt when we consider the hypnotic effect of a warm breeze. Courts must apply a rigid test to explanations offered for previous

omissions when material facts are elicited for the first time in a subsequent hearing. We do not deem it necessary to consider the applicability of the rule enunciated in Carranza v. Payne-Larson Furniture Co., 165 Neb. 352, 85 N. W. 2d 694, and cases therein cited to determine this case. We do, however, say that triers of fact are not compelled to accept as absolute verity every statement of a witness not contradicted by direct evidence. The persuasiveness of evidence may be destroyed even though uncontroverted by direct testimony. Klentz v. Transamerican Freightlines, Inc., 173 Neb. 53, 112 N. W. 2d 405.

Giving the plaintiff the full benefit of every inference apparent in his revised testimony, it is evident that he has failed to prove a compensable accident arising out of and in the course of his employment, as defined by our law.

Section 48-151, R. R. S. 1943, defines an accident as follows: "(2) The word accident as used in this act shall, unless a different meaning is clearly indicated by the context, be construed to mean an unexpected or unforeseen event happening suddenly and violently, with or without human fault, and producing at the time objective symptoms of an injury." Subsection (4) of this same section, so far as material herein, is as follows: "(4) The terms injury and personal injuries shall mean only violence to the physical structure of the body and such disease or infection as naturally results therefrom."

The law is well established in this jurisdiction that to entitle the plaintiff to recover he must sustain the burden of proof by a preponderance of the evidence that he suffered an accident arising out of and in the course of his employment. See Dworak v. City of Omaha, 172 Neb. 209, 109 N. W. 2d 160.

Has the plaintiff proved an accident arising out of and in the course of his employment? His testimony is: "Well, I was standing on this weak board. It was broke, but it was still there. I sunk down in it. I picked the

box up. I was on a twist. I was a little bit off-balance." His foot sank before he started to lift. There was no unusual occurrence after he started lifting except the unexplained pain in his back. In the place where he was working, it was usual to twist the body to lift the box to the cart. Plaintiff, in his brief, suggests that the "sudden and violent sinking of the board" produced the injury. There is no testimony in this record that the sinking was sudden or violent, but only that the board did give when plaintiff stepped on it. Even so, plaintiff's foot had come to rest and he was standing on the board before he started to lift.

This appears to be a case where the exertion incident to his occupation resulted in the back difficulty. We are committed to the rule of law in this jurisdiction that mere exertion which is no greater than that ordinarily incident to the employment cannot of itself constitute an accident. Green v. Benson Transfer Co., 173 Neb. 226, 113 N. W. 2d 61. Even if exertion, combined with preexisting disease or injury, produced the disability, it does not constitute a compensable accidental injury. Hladky v. Omaha Body & Equipment Co., 172 Neb. 197, 109 N. W. 2d 111.

To hold for the plaintiff in this case would be to assume possibilities and probabilities which cannot be fairly drawn from the evidence. As we said in Anderson v. Cowger, 158 Neb. 772, 65 N. W. 2d 51: "A compensation award cannot be based on possibilities or probabilities but must be based on sufficient evidence that the claimant incurred a disability arising out of and in the course of his employment."

Plaintiff argues that because the Workmen's Compensation Act is remedial in nature and its purpose is to do justice to workmen, a liberal construction should be applied in determining whether there was an accident arising out of and in the course of employment which would give rise to compensation. We have repeatedly said that in this jurisdiction 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 the claimant shall prove his right to compensation by a preponderance of the evidence, nor does it permit a court to award compensation where the requisite proof is lacking. See Klentz v. Transamerican Freightlines, Inc., 173 Neb. 53, 112 N. W. 2d 405.

For the reasons given, the judgment of the district court affirming the order of the compensation court in the dismissal of plaintiff's petition was correct and is affirmed.

AFFIRMED.

WILLIAM F. ELDER ET AL., APPELLANTS, V. THOMAS C. DOERR, APPELLEE.
122 N. W. 2d 528

Filed June 28, 1963. No. 35484.

1. **Constitutional Law.** Every person possesses the legal right to acquire the absolute and unqualified title to every species of property recognized by law, with all rights incidental thereto, including the right to sell it at such price as he can obtain in fair barter.
2. ———. The right to engage in a lawful and useful occupation may be subjected to reasonable regulation in the public interest, even though it results in some degree of limitation of the rights of property.
3. **Automobiles: Usury.** A dealer in automobiles may in good faith sell a car on time for a price in excess of the cash price without tainting the transaction with usury, though the difference in prices may exceed lawful interest for a loan.
4. **Sales: Usury.** Whether or not a transaction is a bona fide time sale or the financing of the balance of a cash purchase price is a question of fact.
5. ———: ———. In considering whether or not a transaction is a time sale made in good faith or a loan of money or the forbearance of a debt, the court will look through form and examine its substance.
6. ———: ———. A transaction is not a valid time sale made

in good faith unless the seller informs the buyer at the time of the sale of the cash and time sale prices and gives the buyer the opportunity to choose the one he will accept.

7. **Usury.** Where usury is established, the lender alone is the violator of the law and the borrower has no equitable duty to the lender with reference thereto.
8. **Interest: Usury.** The Legislature may, in the exercise of the police power, fix maximum interest rates for the hire of money or the forbearance of debt.
9. **Interest.** Interest is defined as the number of dollars that may be charged per year on one hundred dollars upon any loan or forbearance of money, goods, or things in action.
10. **Constitutional Law: Interest.** Under Article III, section 18, Constitution of Nebraska, an act regulating interest on money must be general and not special; the act must be made by general law on a reasonable classification of persons or things.
11. ———: ———. The price differential provided in section 45-305, R. R. S. 1943, of the Nebraska Installment Sales Act, is a charge for the hire of money or the forbearance of debt, and is therefore a regulation of interest within the meaning of Article III, section 18, Constitution of Nebraska.
12. ———: ———. The fixing of different interest rates for installment sales contracts in sales of automobiles based on classifications of automobiles according to their ages, is special legislation inhibited by Article III, section 18, Constitution of Nebraska.
13. ———: ———. The fixing of different interest rates on automobiles and other personal property is special legislation inhibited by Article III, section 18, Constitution of Nebraska, in that there is no substantial difference of situation or circumstances that would naturally suggest the justice or expedience of diverse legislation with respect to the object of their classification.
14. **Constitutional Law: Sales.** The Nebraska Installment Sales Act is unconstitutional in that it contravenes Article III, section 18, Constitution of Nebraska, and it is of no force and effect.
15. **Sales: Usury.** An installment sales contract, in which the seller is a nonlicensee, which exacts interest in excess of 9 percent, is usurious and void in that it violates the provisions of the Nebraska Installment Loan Act.

Appeal from the district court for Douglas County: JOHN E. MURPHY, Judge. Reversed and remanded with directions.

Seymour L. Smith, for appellants.

Clarence A. Davis, for appellee.

Lane, Baird, Pedersen & Haggart, amici curiae.

Heard before WHITE, C. J., CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

CARTER, J.

Plaintiffs bring this action for a declaratory judgment to determine their rights in a retail motor vehicle installment contract and for injunctive relief. Issues were made up by the pleadings and a trial was had. The trial court found for the defendant and the plaintiffs have appealed.

The evidence discloses that on March 31, 1962, plaintiffs purchased a 1959 automobile from an Omaha dealer under a retail installment contract which was subsequently assigned to the defendant. The dealer informed the plaintiffs that the cash sale price of the automobile was $2,095. The trade-in value of their old car and the cash down payment amounted to $660, leaving an amount due of $1,435 if the car was sold for the cash price. The dealer advised plaintiffs that the time sale price of the automobile was $2,352.96 and, after crediting the $660 thereon, the unpaid balance of the time price would be $1,692.96, which could be paid off in 24 monthly installments of $70.54 each. The plaintiffs accepted the time sale offer. The parties executed a retail motor vehicle installment contract in accordance therewith which is the subject of this action.

It was stipulated by the parties that the time sale differential is $257.96 and that this amount is less than the maximum time price differential authorized by the Nebraska Installment Sales Act (sections 45-301 to 45-312, R. R. S. 1943). It is also stipulated that the amount of $257.96 is in excess of an amount equal to 9 percent per annum on the unpaid balance if each payment is made in the manner and at the time scheduled. It is further stipulated that the sale and contract complied

with all the requirements of the Nebraska Installment Sales Act.

The plaintiffs allege that the installment contract is void in that it violates the Nebraska Installment Loan Act (sections 45-114 to 45-158, R. R. S. 1943); that the Nebraska Installment Sales Act is unconstitutional in that it violates Article I, section 16, and Article III, section 18, of the Nebraska Constitution; that the plaintiffs have notified the defendant they will make no further payments under the installment contract; and that defendant has threatened to repossess plaintiffs' automobile. A copy of the contract is attached to and made a part of the petition. Plaintiffs pray that the Nebraska Installment Sales Act be declared unconstitutional; that the contract be adjudged void and canceled; and that the defendant be enjoined from attempting to enforce the contract. The defendant alleges that the Nebraska Installment Sales Act is constitutional, but even if it is not, the transaction was a valid time sale and not in violation of the Nebraska Installment Loan Act.

The plaintiffs allege that the installment contract is void because it violates the Nebraska Installment Loan Act. Defendant contends the installment contract is valid in that it complies with all the requirements of the Nebraska Installment Sales Act and, further, that it is a time sale made in good faith and is valid whether or not the Nebraska Installment Sales Act is constitutional. The first question to be determined is whether or not the installment contract is valid irrespective of the constitutionality of the Nebraska Installment Sales Act.

In the determination of this case we must give consideration to the right of property and its incidents as guaranteed by Article I, sections 1 and 25, of our state Constitution. This court has held that these provisions give to every citizen the right of acquiring the absolute and unqualified title to every species of property with all rights incidental thereto, including the right

to dispose of such property in such innocent manner as he pleases and to sell it at such a price as he can obtain for it in fair barter. State ex rel. English v. Ruback, 135 Neb. 335, 281 N. W. 607; Nelsen v. Tilley, 137 Neb. 327, 289 N. W. 388, 126 A. L. R. 729. See, also, 55 Am. Jur., Usury, § 21, p. 338. The right to engage in a lawful and useful occupation, however, may be subjected to reasonable regulation in the public interest, even though it results in some degree of limitation on the rights of property. In Althaus v. State, 99 Neb. 465, 156 N. W. 1038, this court upheld a legislative act requiring the licensing of money lenders and authorizing licensed money lenders to charge a brokerage fee in excess of the maximum rate of interest authorized by law, and in certain specified cases to charge an examination fee of 50 cents in addition to interest. The licensing of money lenders and the regulation of interest is there held to be within the police power of the state. See, also, Mack Investment Co. v. Dominy, 140 Neb. 709, 1 N. W. 2d 295. But this court has adhered to the principle that the Legislature, under the guise of regulation, may not indulge in arbitrary price fixing, the destruction of lawful competition, or the creation of trade restraints tending to establish a monopoly.

Pursuant to this fundamental concept this court has recognized the right of an owner of a motor vehicle to sell it for what he can get for it in fair barter, even thought the whole or a part of the purchase price may be on credit. In a line of cases beginning with Grand Island Finance Co. v. Fowler, 124 Neb. 514, 247 N. W. 429, to the present time, this court has consistently held that a time sale made in good faith at a price in excess of a cash price, even though the difference between the two prices exceeds the lawful interest for a loan, is not invalid as usurious. We adhere to the fundamental principle that a seller may sell his property for what he can get for it so long as the transaction is a sale and purchase made in good faith. See, Trailmobile, Inc. v.

Hardesty, 173 Neb. 46, 112 N. W. 2d 535; Berg v. Midwest Laundry Equip. Corp., *ante* p. 423, 122 N. W. 2d 250.

Difficulties arise in this class of cases when the transaction appears to be a time sale made in good faith but is in fact a loan at a usurious rate of interest. Many see no practical difference in a time sale and a cash sale with interest on the portion on which credit is extended. It is the result of the fact that a purchaser may desire to pay a larger sum to gain time and a vendor may prefer payment of a specifed sum in cash to a larger amount in expectancy. The courts are confronted with the problem of maintaining the fundamental right of property on the one hand and the law against usury on the other. The general rule is that a sale of property for a price fixed by the seller and accepted by the purchaser, if made in good faith, does not involve any question of usury. It is only when it is shown that such a transaction is a scheme, or artifice, to avoid the usury laws that the courts will look through form and determine the real nature of the transaction.

Since the true nature of such a financial transaction can only be determined by the evidence in each particular case, uncertainty has arisen in a field where certainty is desired. This court has consistently held that an installment time sale which is in fact a loan is void if it is made in violation of the Nebraska Installment Loan Act. It is a question of fact as to whether or not a particular transaction is a time sale made in good faith or the financing of the unpaid balance of a cash purchase price. Powell v. Edwards, 162 Neb. 11, 75 N. W. 2d 122; Trailmobile, Inc. v. Hardesty, *supra*. In considering whether or not such a transaction is a time sale made in good faith or a loan, the court will look through form and examine its substance. State ex rel. Beck v. Associates Discount Corp., 168 Neb. 298, 96 N. W. 2d 55. A transaction is not a valid time sale made in good faith unless the seller informs the buyer, at the time of the

sale, of the cash and time sale prices and gives the buyer the opportunity to choose the one he will accept. Wood v. Commonwealth Trailer Sales, Inc., 172 Neb. 494, 110 N. W. 2d 87. The fact that a purchaser has full knowledge and accepts the terms of the proffered sale is not a defense to a charge of usury. The lender alone is the violator of the law, and against him alone are its penalties exacted. Robb v. Central Credit Corp., 169 Neb. 505, 100 N. W. 2d 57.

The defendant contends that the burden is upon the plaintiffs to show that the transaction was not a time sale made in good faith and was in fact a loan. The stipulation of facts upon which the case was tried is silent on this question and would ordinarily require a holding that the installment contract was a valid time sale made in good faith. But the parties stipulated that the installment contract was made in conformity with all the requirements of the Nebraska Installment Sales Act. If the latter act provides for interest in excess of the maximum that a nonlicensee could charge under the Nebraska Installment Loan Act, it would be a violation of that act if the Nebraska Installment Sales Act is unconstitutional. The plaintiffs rely solely on the provisons of the Nebraska Installment Sales Act itself, with which full compliance is stipulated, to show the usurious nature of the installment contract. The parties recognized this fact when they stipulated that an actual and justiciable controversy exists with reference to the constitutionality of the Nebraska Installment Sales Act. It stands to reason that the time differential could not be an interest charge under the Nebraska Installment Sales Act, and something different when applied to the Nebraska Installment Loan Act. We think the crux of the case is whether or not the time differential provided for in the Nebraska Installment Sales Act was in fact an interest charge for the loan of money or the forbearance of a debt. We therefore reach the question: Was the price differential permitted by the Nebraska

Installment Sales Act in fact an interest charge?

The purpose of the Nebraska Installment Sales Act is twofold, first, to insure a reasonable return to money lenders on installment sales contracts where, admittedly, a reasonable return in all cases cannot be had within existing usury statutes and, second, to protect retail installment buyers from exorbitant gouging by greedy money lenders. Traditionally, time sales have not been held to be within the usury acts on the theory that the increase in the time sale price differs from interest on a loan. The Legislature undoubtedly recognized that the exclusion of a time sales contract from the operation of usury statutes left consumers without protection against exorbitant finance charges.

By section 45-303, R. R. S. 1943, of the Nebraska Installment Sales Act, it is provided that each retail installment contract shall be in writing, shall be signed by both the buyer and the seller, and shall set forth the cash sale price, the time sales price, and the time price differential, among others. By section 45-305, R. R. S. 1943, of the act, it is provided that the time price differential shall not exceed the following schedule:

"CLASS 1. Any new motor vehicle designated by the manufacturer by a year model not earlier than the year in which the sale is made—eight dollars per one hundred dollars per year.

"CLASS 2. Any new motor vehicle not in Class 1 and any used motor vehicle designated by the manufacturer by a year model of the same or not more than two years prior to the year in which the sale is made—ten dollars per one hundred dollars per year.

"CLASS 3. Any used motor vehicle not in Class 2 and designated by the manufacturer by a year model not more than four years prior to the year in which the sale is made—thirteen dollars per one hundred dollars per year.

"CLASS 4. Any used motor vehicle not in Class 2 or Class 3 and designated by the manufacturer by a

year model more than four years prior to the year in which the sale is made—fifteen dollars per one hundred dollars per year."

The general statute fixing maximum interest rates in this state provides: "Any rate of interest which may be agreed upon, not exceeding nine dollars per year upon one hundred dollars, shall be valid upon any loan or forbearance of money, goods or things in action * * *." § 45-101, R. S. Supp., 1961. See, also, Peters Trust Co. v. Hecht, 118 Neb. 390, 224 N. W. 866.

The Nebraska Installment Sales Act provides that the cash sale price may include, if itemized, any taxes, registration, certificate of title and license fees and costs for accessories and for the installation, delivery or servicing of goods. The basic time price is defined as the cash sale price of the goods, plus the charge for insurance, less the down payment made in money or goods. The price differential means the amount, as limited by the statute, to be added to the basic time price. The time sale price is defined as the total of the cash sale price of the goods, plus the amount for insurance, and the time price differential. § 45-302, R. R. S. 1943. No charge for insurance is involved in the present case.

The pertinent provision is the one providing for the addition of the time price differential to the time sale price. This differential is the amount permitted to be added by the schedule provided in section 45-305, R. R. S. 1943, which we have hereinbefore quoted in part. As an example, it is provided in Class 2 of the schedule that the time differential shall not exceed "ten dollars per one hunderd dollars per year." This provision does not specify the basis for the allowance of this amount as a part of the time sale price. It is, however, similar to the language quoted in the general statute fixing the maximum rate of interest that may be charged, to wit, "not exceeding nine dollars per year upon one hundred dollars." The only logical conclusion that can be reached is that the price differential was for the for-

bearance of money and is, in fact, an interest charge. Since it is stipulated that the amount of the differential is in excess of an amount equal to nine percent per annum simple interest on the scheduled unpaid balances if each payment were made at the time scheduled, it would appear to be in violation of the Nebraska Installment Loan Act. But the defendant contends that the installment contract meets all the requirements of the Nebraska Installment Sales Act and is therefore valid and enforcible irrespective of the provisions of the Nebraska Installment Loan Act. For us to so hold would permit a usurious loan under the Nebraska Installment Loan Act to become valid by the simple expedient of complying with form irrespective of substance. In any event, this gives rise to the question whether or not compliance with the Nebraska Installment Sales Act has the effect of defeating a claim of usury under the Nebraska Installment Loan Act. If the Nebraska Installment Sales Act is unconstitutional, such an issue is not available to the defendant.

The fixing of interest rates by the Legislature is a classic example of the exercise of the police power in the public interest. It is a power that has been traditionally exercised by the Legislatures of the several states and we shall not at this time undertake to set forth authorities for legislative action in this field. But if, as we hold, the Legislature has fixed interest rates by the schedule contained in section 45-305, R. R. S. 1943, we cannot say it did not act within its legislative power since it has the authority to fix interest rates in the exercise of the police power. Althaus v. State, 99 Neb. 465, 156 N. W. 1038. The question is whether or not it exercised its power within constitutional limitations.

Article III, section 18, of the Constitution, provides in part: "The Legislature shall not pass local or special laws in any of the following cases, that is to say: * * * Regulating the interest on money." Under this section of the Constitution, the Legislature may fix the rates

of interest that may be charged for the hire of money or the forebearance of debt in installment sale contracts, if the classification is reasonable and has relation to the public interest. That a reasonable classification is required in this type of case is made clear in Althaus v. State, 99 Neb. 465, 156 N. W. 1038, wherein it is said: "The law assailed regulates the interest chargeable by two classes—unlicensed lenders of money limited to 10 per cent. per annum, and licensed lenders authorized to make an additional charge, called a 'brokerage fee,' not exceeding one-tenth of the money actually lent and, in exceptional cases, to charge an examination fee of 50 cents. The latter class is open to all who comply with the terms of the statute. One class of borrowers may be required to pay more for their loans than others, but this condition already existed and was not created by legislation. The lawmakers recognized a class of borrowers from whom exorbitant rates of interest had been exacted under existing conditions and attempted to afford them some measure of protection. Those making such loans are required to obtain a license. Their methods of doing business are regulated. The act makes no discrimination against any class of borrowers. It is not unconstitutional as being a 'local or special law * * * regulating the interest on money.' The better rule is that the classification is neither unreasonable nor arbitrary. It is also clear that the act does not deny the equal protection of the laws."

In the last-cited case the classification of all lenders of money in the licensed and unlicensed classes for the purpose of fixing and regulating interest rates was held to be a reasonable classification for that purpose. In the instant case the classification was further broken down into classes of automobiles based on their ages. This furnishes no reasonable classification for the purpose of regulating interest. See, also, Althaus v. State, 94 Neb. 780, 144 N. W. 799. While it is true that motor vehicles may constitute a reasonable class for some pur-

poses as a basis for legislation in the public interest, it does not permit such class to be broken into four separate classes to provide a different rate of interest for each on credit extended. The age of a motor vehicle affords no reasonable classification for the fixing of maximum rates of interest that may be charged on installment contracts given for the unpaid portion of the purchase price. The quoted constitutional provision contemplates that a legislative act fixing maximum rates of interest shall operate uniformly upon a class of persons or property and that such class shall be reasonable and in the public interest. Allan v. Kennard, 81 Neb. 289, 116 N. W. 63; Steinacher v. Swanson, 131 Neb. 439, 268 N. W. 317; Creigh v. Larsen, 171 Neb. 317, 106 N. W. 2d 187.

It is here contended that the fixing of maximum rates of interest for installment sales of automobiles at one amount and for different rates on installment contract sales of all other kinds of personal property constitutes an improper classification for the purpose of fixing maximum rates of interest. It is contended that the lender of money on automobiles under the Nebraska Installment Sales Act accords such lender a special privilege and is, in fact, a special law. We fail to see any reasonable basis for classifying personal property for the purpose of fixing interest rates so that an installment contract on one species of personal property would be lawful and on a similar species of property would be usurious. This question was decided in Althaus v. State, 94 Neb. 780, 144 N. W. 799, in which we said: "A lender who charges extortionate interest and accepts security on the chattels enumerated by the legislature may be punished. Another lender who makes a loan on identical terms, except that he includes in his chattel mortgage an article not enumerated in the act, but similar to those mentioned therein, goes free. If the avarice and greed of those who thrive on the poverty or the misfortune of the owners of 'household goods, musical instruments, wearing apparel, jewelry, diamonds, or

by a deposit of personal property, or by an assignment of wages, credits or choses in action,' are to be wisely and justly curbed by law, as such abominations should be, why should not the law apply also to those who lend money on other chattels of a similar nature? * * * In the eye of the law, why should the owner of household goods, which are being moved from one tenement to another, be protected by statute from the extortion of the lender on chattel security, while the owner of the cart in which such goods are moved is left to the unpunishable avarice of the chattel lienor? * * * In a law regulating the interest on money are the classifications made in the act permitted by the constitution? The answer to these questions is that there is no 'substantial difference of situation or circumstance that would naturally suggest the justice or expediency of diverse legislation with respect to the objects classified.' Reasoning or refinement which would harmonize such classifications with the constitution would make of the supreme law, of the act of the legislature and of the judgment of the court a farce or a delusion. * * * The classifications are on their face unreasonable and arbitrary. The act is the kind of legislation the constitution was intended to prohibit." See, also, State ex rel. Sorensen v. First State Bank, 122 Neb. 109, 239 N. W. 646.

The constitutional provision inhibiting special legislation in regulating the interest on money means that maximum interest rates shall be made by general law on a reasonable classification of persons or things, and to prevent legislation affecting diversely property of like character and persons similarly situated. The Nebraska Installment Sales Act is not in compliance with this constitutional concept and it is void for that reason. State ex rel. Dawson County v. Farmers & Merchants Irr. Co., 59 Neb. 1, 80 N. W. 52.

We conclude that the classification of property in the Nebraska Installment Sales Act for the purpose of fixing maximum rates of interest on installment sales con-

tracts given in payment of the unpaid purchase price is unreasonable, arbitrary, and capricious, and in violation of Article III, section 18, Constitution of Nebraska, prohibiting special legislation. The act does not operate uniformly on the persons and property in the class sought to be regulated. The classification of persons and property for the purpose of fixing interest rates on installment loans thereon is unreasonable, arbitrary, and void. The Nebraska Installment Sales Act is in violation of Article III, section 18, Constitution of Nebraska, and is of no force and effect.

Since the seller of the automobile involved in the transaction, and who appears on the installment sales contract as the seller, is not a licensee, the maximum rate of interest that could be charged is 9 percent per annum. The parties having stipulated that the time differential, which is in fact interest, exceeds that amount, the installment sales contract is in fact a loan and in violation of the Nebraska Installment Loan Act and void.

The judgment of the trial court is reversed and the cause remanded to the district court with instructions to enter judgment in accordance with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

BOSLAUGH, J., dissenting.

I respectfully dissent from the holding of the majority in this case.

The pleadings and the evidence in this case present a question as to the validity of a retail installment contract for the sale of an automobile. The constitutionality of the Installment Sales Act is not an issue in the case unless it is necessary to a decision of the case. The conclusion of a pleader alone cannot raise such an issue.

The Installment Sales Act was intended to regulate valid time sales. The act is not applicable to transactions which in fact are loans made in violation of the Installment Loan Act. Consequently, if the retail installment contract involved in this case was not a valid

time sale, then the Installment Sales Act is not involved and its constitutionality cannot be an issue in this case.

If the retail installment contract involved in this case is in fact a time sale made in good faith, then it is valid under Grand Island Finance Co. v. Fowler, 124 Neb. 514, 247 N. W. 429, which, apparently, is still the law in this state. In that event, the constitutionality of the Installment Sales Act cannot be an issue because the contract is valid without regard to the statute.

In any event, the plaintiffs cannot challenge the constitutionality of the Installment Sales Act because their rights are not affected adversely in any way by the act. The Installment Sales Act imposes controls and limitations upon the seller and creates rights and benefits for the purchaser. In the absence of the statute there is no regulation of time sales made in good faith.

Generally, a statute will not be declared unconstitutional at the suit of a party whose rights are not affected injuriously by the operation of the statute. Johnson Fruit Co. v. Story, 171 Neb. 310, 106 N. W. 2d 182; Hanson v. City of Omaha, 157 Neb. 403, 59 N. W. 2d 622; State ex rel. Nelson v. Butler, 145 Neb. 638, 17 N. W. 2d 683; Erickson v. Nine Mile Irr. Dist., 109 Neb. 189, 190 N. W. 573; Urbach v. City of Omaha, 101 Neb. 314, 163 N. W. 307, L. R. A. 1917E 1163; Peterson v. Anderson, 100 Neb. 149, 158 N. W. 1055; State ex rel. Ridgell v. Hall, on rehearing, 99 Neb. 95, 156 N. W. 16; Cram v. Chicago, B. & Q. Ry. Co., 85 Neb. 586, 123 N. W. 1045, 26 L. R. A. N. S. 1022; State v. Brandt, 83 Neb. 656, 120 N. W. 196.

For these reasons I dissent from the holding of the majority in this case.