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REPORTS OF CASES

DECIDED BETWEEN
DECEMBER 1, 1951 AND JUNE 20, 1952

IN THE

Supreme Court of Nebraska

SEPTEMBER TERM 1951 AND JANUARY TERM 1952

VOLUME CLV

WALTER D. JAMES
OFFICIAL REPORTER

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For the benefit of the State of Nebraska

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CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

SEPTEMBER TERM, 1951

ARNOLD J. ANDERSON ET AL., APPELLEES, V. ANNA M. ANDERSON ET AL., APPELLANTS.

50 N. W. 2d 224

Filed December 7, 1951. No. 33039.

1. **Pleading: Trial.** A motion for judgment on the pleadings admits the facts well pleaded in the pleading of the adversary and all reasonable inferences resulting from them, but does not admit conclusions contained therein. It concedes that the allegations of the pleading of the litigant making the motion which are controverted by the pleading of the adversary are untrue.
2. **Evidence.** The general rule is that, while the court will take judicial notice of its records, it will not in one case take such notice of the record in another case.
3. ———. The doctrine that the court will take judicial notice of a final order made by it in another case which is so interwoven and interdependent with the pending case as to justify the application of it is an exception to the general rule, recognized by the necessity of giving effect to a former holding which finally decided questions of fact and law.
4. **Judgments.** All matters in issue in a former action and judicially determined are conclusively put at rest by a judgment therein and may not again be litigated in a subsequent action.
5. ———. The plea of res judicata applies, except in special cases, not only to points upon which the court was required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties might have brought forward therein.
6. **Actions.** A litigant may not split a cause of action. If he might have had complete relief in an action which was prosecuted to final judgment, he may not again vex his adversary with another suit based on the same wrong.

7. **Judgments.** A litigant may not present an issue for determination and avoid the effect of an adjudication or estoppel by withholding proof thereof.
8. **Pleading.** Facts alleged in a petition to which the defendant in his answer pleads a waiver, an estoppel, or a matter to avoid, will be treated as admitted, though the answer also contains his general denial.

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

Eugene D. O'Sullivan, Fred Jack, and *John A. McKenzie,* for appellants.

Swenson, Viren & Turner, for appellees.

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

BOSLAUGH, J.

This is an action for partition of the northwest quarter and the north half of the southwest quarter of Section 19, Township 22 North, Range 10 East of the 6th P. M., Burt County, Nebraska. The pleadings at the time of the entry of decree were the amended and substituted petition of appellees, the answer of appellants, and the motion for judgment on the pleadings made by appellees. The basis of the motion, as stated therein, was that the matters pleaded in the answer had been previously adjudicated by this court adversely to appellants and that they were barred and estopped from interposing them as a defense. The case was submitted to the district court. It found that the motion should be sustained and it rendered a decree of partition of the land. Appellants by this appeal seek a reversal of the decree.

The substance of the petition, so far as necessary to be stated herein, was that: The land was conveyed by warranty deed in fee simple to Charles P. Anderson and his son, Elmer S. Anderson, as tenants in common, to each an undivided one-half thereof. Charles P. Anderson died intestate and left surviving him his heirs

Caroline Anderson, his widow, Elmer S. Anderson, Arnold J. Anderson, Harry R. Anderson, and Clarence A. Anderson, his sons. Clarence A. Anderson and Josie Anderson, his wife, conveyed their interest in the land to Caroline Anderson. Elmer S. Anderson died intestate leaving surviving him his heirs Anna M. Anderson, his widow, Lucile Marie Thorndyke, Gladys Bernice Jack, Clifford E. Anderson, Charles T. Anderson, and Roy I. Anderson, his children. Caroline Anderson died testate. Her will was admitted to probate. She was seized of an undivided one-fourth of the land. She devised her interest in the north half of the northwest quarter of said Section 19 to Clarence A. Anderson, and she devised her interest in the south half of the northwest quarter and the north half of the southwest quarter of Section 19 to the children of Elmer S. Anderson, deceased. The appellees Arnold J. Anderson, Harry R. Anderson, and Clarence A. Anderson, sons of Charles P. Anderson, and appellants Anna M. Anderson, Lucile Marie Thorndyke, Gladys Bernice Jack, Clifford E. Anderson, Charles T. Anderson, and Roy I. Anderson, widow and children of Elmer S. Anderson, deceased, were the owners as tenants in common of the land, and the share of each was specifically alleged. The history of, proceedings had, and the decree rendered in a suit to quiet title to the land brought and prosecuted by the appellants above named against the appellees named above and Josie Anderson, the wife of Clarence A. Anderson, in the district court for Burt County, Nebraska, and the fact that an appeal was prosecuted from the decree and a final determination made by this court adverse to the claims and contentions of the appellants, were alleged and set forth, including allegations concerning the pleadings in the district court, a copy of the decree rendered therein, and a copy of the opinion and decision of this court. Appellees asked for a partition of the land.

The parts of the answer important to a determination

of the appeal are: A denial of the allegations of the petition, except an admission that the warranty deed by which the land was conveyed named Charles P. Anderson and Elmer S. Anderson as grantees, and that the deed was recorded in the office of the register of deeds of Burt County, Nebraska, on March 8, 1920; the allegations therein that Elmer S. Anderson on May 23, 1919, purchased the land and agreed to pay therefor $67,900, and that he during his lifetime and appellants thereafter have paid all of the purchase price except $11,000 represented by a mortgage on the land; that Elmer S. Anderson took possession of the land on the 4th day of March 1920, and thereafter had until his death on the 22d day of March 1940, continuous, exclusive, notorious, and adverse possession thereof, and after his death appellants continued and had like possession and occupancy of said premises until the time of the filing of the answer, and by virtue thereof they were the absolute owners of all of the premises and were in the actual and exclusive possession thereof; that appellees, or any of them, have no right, title, or interest in or to any part of the land, and they, or any of them, have not been in the possession thereof; that an appeal was taken to this court from the decree rendered in the suit to quiet title by the district court, and that the decree was reversed and the case dismissed by this court for the reason that the evidence of plaintiffs in the suit to quiet title (who are the appellants in the pending case) was insufficient to sustain the cause of action to quiet title or the decree rendered by the district court, and that no other matter, question, or issue was considered or determined by this court in the suit to quiet title; and that this court in its opinion or its decision in that case did not determine that appellees in this case were the owners of any part of said property, or were at any time in the possession thereof, or that they ever had any interest of any kind or nature therein. The prayer of the answer was that the court find and

adjudge that appellees have no right, title, or interest in or to the land, and that the partition action be dismissed.

The motion of appellees for judgment on the pleadings admitted the truth of the facts well pleaded in the answer of appellants, and all inferences reasonably drawn therefrom. It did not admit conclusions stated in the answer. It conceded the untruth of the allegations of the petition insofar as they were controverted by the answer. If upon the pleadings appellees were entitled by law to judgment in their favor, the motion was properly granted and a decree was justifiably entered. Gilbert v. First National Bank, 154 Neb. 404, 48 N. W. 2d 401; International Harvester Co. v. County of Douglas, 146 Neb. 555, 20 N. W. 2d 620; Meyer Bros. Drug Co. v. Hirsching-Morse Co., 94 Neb. 309, 143 N. W. 206.

Obviously the correctness of the action of the district court turns on whether or not this court in the prior suit by appellants against appellees for a decree quieting title to the land in appellants adjudicated adversely to them the matters alleged in the answer in this case as a basis for their claim that they are the owners of the land subject only to the mortgage thereon.

Reference is made by statements in the pleadings of the parties to the former action to quiet title, to matters involved therein, the action taken by the district court, the final result of the case as shown by the opinion and decision in this court, and the respective claims of the parties as to the effect thereof on this case. The situation makes appropriate a resort to the doctrine that this court will take judicial notice of a final order made by it in another case which is so interwoven and interdependent with the pending case as to justify the application of the rule. It is an exception to the general rule that the court will not ordinarily take judicial notice of the records in another case, recognized by the necessity of giving effect to a former holding which finally decided questions of fact and law. Witzenburg v. State, 140

Neb. 171, 299 N. W. 533; In re Estate of McCleneghan, 145 Neb. 707, 17 N. W. 2d 923; Glissmann v. Orchard, 152 Neb. 500, 41 N. W. 2d 756.

The deed referred to and relied upon in the suit to quiet title, by which the land was conveyed and in which Charles P. Anderson and Elmer S. Anderson were named as grantees, was recorded on March 8, 1920, and the recited consideration was $67,900. The date of the contract by which it was claimed in that case that Elmer S. Anderson bought the land was May 23, 1919. These facts identify the contract, deed, and transaction under and by virtue of which appellants claim title to the land in the partition case. The record title as alleged and shown in the first case from March 8, 1920, until the time of the decree in the district court in that case, except as affected by the death of Charles P. Anderson and Elmer S. Anderson, the administration of their estates, the death of Caroline Anderson and the probate and provisions of her will, and the deed from Clarence A. Anderson and his wife to Caroline Anderson, was identical with the record title asserted in the present record. Appellants alleged in the former case that Elmer S. Anderson purchased the land by contract of May 23, 1919, under which it was conveyed to him and his father, Charles P. Anderson, as grantee; that Elmer S. Anderson paid or secured the entire purchase price; that his father paid no part of it but did make loans, the proceeds of which were applied by the son on the purchase price; and that the father did not acquire or have any ownership of the land or any part of it. The basis of the claim of appellants in that case was amended by asserting that the father was to loan his son Elmer S. Anderson such amounts as he desired to use in his business, and that the father was named as one of the grantees in the deed to secure the repayments of the loans to him. It was also claimed by appellants in the first case that any claim of ownership of the land or any part of it made by appellees through and as heirs of their father, Charles

P. Anderson, was barred by the statute of limitations and adverse possession of the land since 1920 by Elmer S. Anderson and his wife and children. Anderson v. Anderson, 150 Neb. 879, 36 N. W. 2d 287.

In this case appellants claim and plead, as they did in their former action involving the land, that Elmer S. Anderson bought it on May 23, 1919, for $67,900, and that he and appellants paid all of the purchase price except $11,000, represented by a mortgage on the land, but the deed of the land was made to Charles P. Anderson and Elmer S. Anderson as grantees and was recorded on March 8, 1920; that Elmer S. Anderson took possession of the land on March 4, 1920, and had and continued open, exclusive, hostile, and adverse possession of it from then until his death on March 22, 1940; and that appellants continued such occupancy and possession thereafter and they became and are the absolute owners of the whole of the land, subject only to the mortgage thereon, and appellees, or any of them, have no interest in or title to any part of the land.

It thus affirmatively and definitely is shown that the over-all contention in the suit to quiet title to the land and in this partition action was and is the ownership of the land, and that in each the claim of ownership of the land made by appellants is based upon the ownership of the land by Elmer S. Anderson in his lifetime by purchase and by adverse possession, the fact of his death, and that they succeeded to his rights in the land as heirs. Specifically appellants have attempted in each of the actions to put in issue two questions of fact: One, concerning the original purchase of the land and the nature of the deed conveying it to Charles P. Anderson and Elmer S. Anderson; and the other, ownership of the land by Elmer S. Anderson by adverse possession. These questions were both adjudicated adversely to appellants in the suit to quiet title. Anderson v. Anderson, *supra*. That determination is not only final and binding upon

everyone involved in the present case, but also upon this court.

It has often been said and has recently been repeated by this court in Baum v. McBride, 152 Neb. 152, 40 N. W. 2d 649, that: "It is a fundamental principle of jurisprudence that material facts or questions which were in issue in a former action, and were there admitted or judicially determined, are conclusively settled by a judgment rendered therein, and that such facts or questions become res judicata and may not again be litigated in a subsequent action." See, also, Nelson v. Nelson, 152 Neb. 741, 42 N. W. 2d 654; Callahan v. Prewitt, 143 Neb. 793, 13 N. W. 2d 660; Shepard v. City of Friend, 141 Neb. 866, 5 N. W. 2d 108.

An adjudication by this court extends to all matters decided expressly or by necessary implication and not alone to the questions actually and formally presented but to all existing in the record and necessarily involved in the decision. Kuhns v. Live Stock Nat. Bank, 138 Neb. 797, 295 N. W. 818. A litigant, if he might have had all of the relief he seeks in an action he has brought and prosecuted to final judgment, may not again vex his former adversary with another suit based on the same wrong. If a matter becomes the subject of litigation and is adjudicated, the law requires the parties to bring forward their whole case and will not generally permit the same parties to open the same subject of litigation in respect to a matter which might have been brought forward as a part of the subject contested but which was omitted as a part of the case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties exercising reasonable diligence might have brought forward at the time. A litigant may not be permitted to split a cause of action or present an issue for determination and avoid the effect

of an estoppel by withholding proof of it. Boomer v. Olsen, 143 Neb. 579, 10 N. W. 2d 507; Williams v. Beckmark, 150 Neb. 100, 33 N. W. 2d 352; Pettijohn v. County of Furnas, 150 Neb. 736, 35 N. W. 2d 828.

The incidence that the first suit was to quiet title to the land and the pending case is for partition of the land is unimportant. An issue, pleaded as title by adverse possession was in the former case, is not immune to the adjudication made in the case by the withholding or absence of proof supporting the issue, nor does the fact that there is only a mere mention of an issue in the opinion or decision of the court affect the determination of the issue by the decision made in the case. In Slater v. Skirving, 51 Neb. 108, 70 N. W. 493, 66 Am. S. R. 44, this court said: "A party may not present issues for determination and avoid the effect of an estoppel by withholding proof thereof. * * * Therefore, where a plaintiff alleges several facts, the proof of any one of which entitles him to judgment, and there is a general finding against him, it will be conclusively presumed that each fact so averred was determined against him." See, also, Williams v. Beckmark, *supra;* Shepard v. City of Friend, *supra;* State ex rel. Sorensen v. Newman Grove State Bank, 128 Neb. 422, 259 N. W. 170.

Appellants contend that a general denial was included with the affirmative matters pleaded in their answer, and that the trial court was, because of this, in error in sustaining the motion for judgment on the pleadings. The effect of the answer was to plead an avoidance of the interests in the land alleged in the petition to be owned by appellees as tenants in common with appellants. The matters asserted to avoid the claims of appellees had been, as stated above, determined by a final decision of this court adversely to appellants. The allegations of the petition sought to be avoided by the claims of ownership of the land by purchase thereof by Elmer S. Anderson and title in him by adverse possession must be treated as admitted notwithstanding the

answer also contained a general denial. This has long been the doctrine of this court frequently announced and last applied in Hueftle v. The Farmers Elevator, 145 Neb. 424, 16 N. W. 2d 855: " 'Facts alleged in a petition to which the defendant in his answer pleads a waiver, an estoppel, or a matter to avoid, will be treated as admitted, though the answer also contains a general denial.' Nason v. Nason, 79 Neb. 582, 113 N. W. 139; Fielding v. Publix Cars, Inc., 133 Neb. 818, 277 N. W. 331."

The final decision of this court in the suit to quiet title estopped appellants from claiming any different or greater interest in the land than the shares stated and awarded to them by the decree of partition in this case.

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

AFFIRMED.

CORA POPE, APPELLANT, V. RICHARD H. TAPELT, APPELLEE.
50 N. W. 2d 352

Filed December 7, 1951. No. 33053.

1. **Trial: Evidence.** A litigant may withdraw his motion for a mistrial because of the admission of prejudicial evidence at any time prior to the court's ruling thereon.
2. **Evidence.** A litigant who adduces evidence allegedly prejudicial from a witness on cross-examination, and makes no timely objection thereto, thereby waives any claim of error in its admission.
3. **Negligence.** A litigant injured in an accident who has placed himself in a position of peril is not entitled to an instruction under the last clear chance doctrine where it appears that he had the means at hand up to the time of the accident to have avoided injury. Such a situation involves questions of negligence and contributory negligence and not the last clear chance doctrine.
4. **New Trial: Appeal and Error.** The ruling on a motion for a new trial for misconduct of the jury will not be disturbed on appeal where there is evidence to support it and the finding thereon is not clearly wrong.

5. **Juries: New Trial.** Proof of misconduct on the part of a jury to avoid a verdict must be of such a character that prejudice may be presumed. Evidence of misconduct which is to the advantage of the party complaining does not afford a basis for a new trial.
6. **Trial: Juries.** Matters of supposition or opinion on the part of jurors while deliberating inhere in the jury's verdict and are not competent to be shown in an attempted impeachment of a verdict.

APPEAL from the district court for Douglas County: WILLIAM A. DAY, JUDGE. *Affirmed.*

Pilcher & Haney, for appellant.

Gross, Welch, Vinardi & Kauffman, for appellee.

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

CARTER, J.

This is an action for damages brought by the plaintiff, a pedestrian, who was struck by defendant's automobile while she was crossing a street in the city of Omaha. The jury returned a verdict for the defendant and the plaintiff appeals.

The plaintiff, Cora Pope, was a housewife, age 74 years at the times herein mentioned. On August 4, 1948, she started by streetcar to do some shopping. She alighted from the streetcar about 3:30 p. m., on Farnam Street just west of Turner Boulevard and proceeded on foot from that point. The day was bright and the streets dry. She testified that she walked east until she arrived at a point on the south side of Farnam Street opposite a traffic light on the north side of Farnam Street. She testified that as she started across Farnam Street the traffic light was green and that she started across after looking to the east and west for oncoming traffic. When she got about half way across she saw defendant's car going west on the north side of Farnam Street. After looking to the east a second time she saw defendant's car was about a car length from her. When she was

about half way between the north streetcar track and the north curb of Farnam Street she was struck and injured. She said she moved faster after seeing defendant's car and that she thought she had time to cross ahead of it. She testified that she remembered nothing thereafter until she regained consciousness in the hospital the next evening.

Plaintiff called one Dennis Radford as a witness. He testified that he was driving west immediately behind the defendant's car immediately before and at the time of the accident. He testified that he was driving about two or three car lengths back and to the left of defendant's car, that both cars were traveling about 20 miles an hour, and that he saw plaintiff crossing the street until she was struck by defendant's car. He said defendant's car did not swerve, but that it did stop almost immediately after the accident. He heard no horn sound and observed no application of brakes by the defendant before plaintiff was struck. He said he was moving west on a green light and, consequently, he assumed plaintiff was walking against a red light.

Defendant called as witnesses Mrs. Allen A. Blanchard and her daughter, Mrs. Philip J. Pospisal, who testified that they were standing on the southeast corner of the intersection of Farnam Street and Turner Boulevard waiting for a green light when the accident happened. They say that plaintiff crossed Turner Boulevard from west to east on a green light and turned northeast across Farnam Street on a red light. They testified that she waited for a streetcar going east to pass in front of her and then proceeded until she was struck by defendant's car. They stated that they saw defendant's car and the one following it driven by Radford, both of which were traveling slowly.

Defendant testified that he was proceeding west on Farnam Street prior to the accident. He says he stopped for a traffic light approximately 100 feet east of the point where the accident occurred. He then moved west-

ward on the north side of Farnam Street at 10 or 12 miles an hour. He met a streetcar coming from the west at a point east of the crosswalk near where plaintiff was injured. He testified that when he saw the plaintiff he applied his brakes and swerved his car approximately a foot and a half to the right. He testified that plaintiff was hurrying across the street and was struck by his left front fender and was thrown to the pavement immediately to the left of his left front wheel. He testified also that he had new tires on his car, that the brakes were in good working order, and that he was able to stop in a distance of two and one-half feet.

This evidence clearly raises issues which are for the jury to determine. The jury returned a verdict for the defendant. The evidence is ample to sustain the verdict. Plaintiff's assignment of error that the verdict is contrary to the weight of the evidence and is manifestly wrong is without merit.

Plaintiff urges that the trial court erred in failing to instruct the jury on the last clear chance doctrine. It is plain that the elements required to be present to warrant the giving of an instruction on last clear chance are not shown in the record before us. Whitehouse v. Thompson, 150 Neb. 370, 34 N. W. 2d 385. This issue is controlled by Carter v. Zdan, 151 Neb. 185, 36 N. W. 2d 781, wherein the court, in denying the applicability of the last clear chance doctrine, said: "Thus on appellant's theory it must be said that decedent negligently placed himself in a position of peril immediately before this accident. Could he have escaped by the exercise of ordinary care? Clearly he could have stopped or, if need appeared, stepped back out of the path of the oncoming automobile which he could have seen if he had exercised an appropriate degree of care for his own safety." The foregoing has equal application to the plaintiff in the case before us. There was no error in refusing an instruction on last clear chance.

Plaintiff asserts that the trial court erred in not grant-

ing a mistrial after both parties moved therefor. The record shows that plaintiff in cross-examining one of defendant's witnesses brought out the fact that she had been interviewed previous to the trial by defendant's insurance agent. Defendant moved for a mistrial, which the court took under advisement. Plaintiff made no objection to the statement at the time, but at a later time in the trial sought to join in the motion. Defendant thereupon withdrew his motion and in open court expressly waived any error in the reception of the evidence constituting the basis for the motion for a mistrial. Prejudice, if any, in the admission of the evidence was to the disadvantage of the defendant. Defendant's withdrawal of his motion for a mistrial, and his waiver of any error in the admission of the evidence affording the basis for the motion, has the effect of eliminating a claim of error emanating therefrom. The trial could properly continue as if no objection had been made to the evidence, or a motion for a mistrial had not been made. Plaintiff's motion for a mistrial came too late, assuming that the evidence upon which it was based was prejudicial to her.

The plaintiff assigns as error the failure of the trial court to grant a new trial for misconduct of the jury. The record shows the following situation: (1) During a recess of the trial a juror testified that another juror visited with the witness Mrs. Pospisal and advised her that if she became nervous and confused on the witness stand she should answer "I don't know" to each question asked; (2) one or more jurors stated, during the deliberations of the jury, that to give a verdict for plaintiff would result in defendant's losing his driver's license and the ability to procure insurance in the future; and (3) during a recess of the court a juror testified that another member of the jury stated to several jurors that she had asked the defendant the amount he was being sued for and that defendant had replied he was being sued for $25,000, that he had $10,000 insurance and that

he would be stuck for the $15,000, that his insurance company had offered plaintiff $10,000, that plaintiff had refused the offer, and that during the deliberations of the jury one or more jurors remarked that they had no sympathy for plaintiff because she had refused the $10,000 settlement.

The law applicable to a situation such as is here presented has been clearly stated by this court. It is its application to a given situation that ofttimes becomes difficult. It is a general rule that the affidavits or testimony of jurors are not admissible to impeach or avoid their verdict in respect to matters which inhere in the verdict itself. Scherz v. Platte Valley Public Power & Irrigation Dist., 151 Neb. 415, 37 N. W. 2d 721. A verdict must be based upon the evidence introduced in the case. The trial court passes upon the competency, materiality, and relevancy of the evidence offered to sustain or defeat the issues raised by the pleadings. The evidence must be given under oath with the right of the opposing party to test it by cross-examination, or to meet it by other evidence. If improper and prejudicial evidence is otherwise placed before and considered by the jury, the injured party is denied his right to a fair and impartial trial. Under such circumstances it is reversible error. The misconduct of the jury must relate to a material point in dispute. It must be of such a nature that it tended to prejudice the complaining party. It is also the rule that when a motion for a new trial on the ground of misconduct of the jury requires a consideration of conflicting evidence, the findings of the trial court thereon will not ordinarily be disturbed on appeal unless clearly wrong. Greenberg v. Fireman's Fund Ins. Co., 150 Neb. 695, 35 N. W. 2d 772.

As to the first point (1), the evidence is in conflict. The juror involved denies that she ever made such a statement to the witness, although she states she told other jurors that if she were a witness and became nervous and confused, she would answer "I don't know" to

questions put to her. The record discloses no prejudice arose from this source. The finding of the trial court thereon is sustained by evidence and will not be disturbed.

As to point (2), we think the mention of the possibility that defendant might be deprived of his driver's license, if found by the jury that he was negligent, is a matter that inheres in the verdict. This is described in Scherz v. Platte Valley Public Power & Irrigation Dist., *supra*, as a matter of opinion, supposition, or argument, and then held to be a matter which inhered in the verdict. The statements made as to the probability that defendant would be unable to obtain insurance in the future falls within the same rule. We find no error in the court's ruling denying a new trial on this ground.

As to the alleged misconduct which we have designated as point (3), it is clear from the evidence that information got to the jury from some source that defendant was sued for $25,000, that he had $10,000 insurance and that he would have to pay any judgment above that amount, that the insurance company offered to pay the plaintiff $10,000, and that she refused to accept it. Clearly, the foregoing could not have been properly admitted in evidence at the trial over objection. Consequently it was improperly placed before the jury by one of its members, whatever the source of the information may have been. We fail, however, to see where the plaintiff was prejudiced. That insurance was involved had already crept into the case on the cross-examination of a witness for the defendant. It would seem that a more specific statement of the insurance alleged to have been involved, with the further statement that plaintiff had been offered and had refused a $10,000 settlement, was evidence favorable to the plaintiff. It has always been considered by the courts, and we think correctly so, that it was prejudicial to the defendant and his insurance carrier for the jury to be apprized of the fact that defendant carried insurance. The alleged offer to settle

for $10,000 likewise militates to the advantage of the plaintiff. It affords no basis for a claim of prejudice.

The plaintiff contends that the reported offer to pay $10,000 and its refusal by the plaintiff was prejudicial to the plaintiff in that it made her appear to be greedy and grasping in her efforts to collect for her injuries. The evidence offered to sustain this contention is that of one juror who stated "a number of the jurors remarked that they had no sympathy for Mrs. Pope as she was offered the $10,000 insurance money and had refused it." Eight other jurors were called and they either were silent on the subject or testified that they had no such feeling, that they had made no such statements, and that they had heard no such statement made by any juror. It will be noted that the first juror did not testify that she herself had no sympathy for the plaintiff because of plaintiff's alleged refusal of the $10,000 settlement. This raised a question of fact for the trial court to decide. We cannot say from the record before us that the trial court's finding was not supported by evidence or that it was clearly wrong. The findings of the trial court on this point will not therefore be disturbed.

The errors assigned are without merit and the judgment of the district court is affirmed.

AFFIRMED.

VIRGIL W. DRABBELS, ADMINISTRATOR OF THE ESTATE OF COLEEN ANN DRABBELS, DECEASED, APPELLANT, V. SKELLY OIL COMPANY ET AL., APPELLEES.

50 N. W. 2d 229

Filed December 7, 1951. No. 33054.

1. **Death: Actions.** A child born dead cannot maintain an action at common law for injuries received by it before its birth.
2. ———: ———. Since no cause of action accrues to a child

born dead for prenatal injuries, none survives to the personal representative under the wrongful death statute.

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

Charles A. Fisher, for appellant.

Leo M. Bayer, for appellees.

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

CARTER, J.

This is an action by the administrator of the estate of Coleen Ann Drabbels, deceased, for her wrongful death. The defendants filed identical demurrers to the petition which were sustained. Plaintiff elected to stand on his petition and the trial court thereupon entered judgment dismissing the action. Plaintiff appeals.

The petition alleges that the defendant Skelly Oil Company is engaged in the selling of bottled gas under the trade name of Skelgas and that the defendant Frey is the agent of the Skelly Oil Company at Gordon, Nebraska, for the handling, sale, and delivery of Skelgas to the public. It is further alleged that Virgil W. Drabbels purchased a container of Skelgas from the defendant Frey which, because of the defective condition of the container, exploded and caused the death of the decedent. The explosion occurred on July 2, 1948. The decedent, the unborn child of Audrey Drabbels, wife of Virgil W. Drabbels, was born dead on July 5, 1948. The petition alleges that at the time of the explosion the pregnancy of Audrey Drabbels had advanced to a period of approximately eight months and that the unborn child was viable and capable of separate and independent existence.

The demurrer is directed to the following: That decedent was dead when born, that the child was never an existing person, that there was never a person or estate for which the plaintiff could be appointed the

administrator, and that plaintiff has no legal capacity to sue.

The action was commenced under the wrongful death statute of this state which provides: "Whenever the death of a person shall be caused by the wrongful act, neglect or default, of any person, company or corporation, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who, or company or corporation which would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony." § 30-809, R. R. S. 1943.

The question raised by the demurrer is here for determination for the first time. Briefly stated, the question is whether the administrator of the estate of an unborn child, which dies prior to birth as the result of another's negligence, has a cause of action on behalf of the next of kin of the unborn infant under the wrongful death statute.

The wrongful death statute is plain in stating that the right of action created by it exists only in cases wherein the injured person could himself have maintained an action for damages had he lived. It is clear, therefore, that plaintiff can maintain no action for damages on account of the death of the child unless the child, had it lived, could have maintained an action against the defendants for the injury inflicted upon it before its birth. The cases hold, from a numerical standpoint at least, that damages for prenatal injury may not be recovered either by the injured child if it be born and lives or by its personal representative in the event of its death before birth from such injury. The early common law appears to be to this effect.

In Dietrich v. Northampton, 138 Mass. 14, 52 Am. R.

242, it was said: "Taking all the foregoing considerations into account, and further, that, as the unborn child was a part of the mother at the time of the injury, any damage to it which was not too remote to be recovered for at all was recoverable by her, we think it clear that the statute sued upon does not embrace the plaintiff's intestate within its meaning; * * *."

In Allaire v. St. Luke's Hospital, 184 Ill. 359, 56 N. E. 638, 75 Am. S. R. 176, 48 L. R. A. 225, a leading case on the subject, the court said: "Appellant's counsel substantially admits that there is no precedent for the action. While it is true that this is not conclusive that the action may not be maintained, yet in view of the fact that, as said by Mr. Associate Justice O'Brien, similar circumstances must have before occurred, it is entitled to great weight, especially when the right to maintain the action is, to say the least, doubtful. Mr. Associate Justice O'Brien, in Walker v. Great Northern Railway Co. (28 L. R. Ir. 69) says: 'The law is, in some respects, a stream, that gathers accretions, with time, from new relations and conditions. But it is also a landmark that forbids advance on defined rights and engagements; and if these are to be altered,—if new rights and engagements are to be created,—that is the province of legislation and not decision.' In this we fully concur. That a child before birth is, in fact, a part of the mother and is only severed from her at birth, cannot, we think, be successfully disputed. The doctrine of the civil law and the ecclesiastical and admiralty courts, therefore, that an unborn child may be regarded as in esse for some purposes, when for its benefit, is a mere legal fiction, which, so far as we have been able to discover, has not been indulged in by the courts of common law to the extent of allowing an action by an infant for injuries occasioned before its birth. If the action can be maintained, it necessarily follows that an infant may maintain an action against its own mother for injuries occasioned by the negligence of the mother while pregnant

with it. We are of the opinion that the action will not lie."

In Magnolia Coca Cola Bottling Co. v. Jordan, 124 Tex. 347, 78 S. W. 2d 944, 97 A. L. R. 1513, the court said: "Good reason is found for denial of the right of recovery in the fact that in many cases it would be impossible to establish except by speculation or conjecture that the death or condition of the child was proximately caused by the injury. But, far worse than the indulgence of such speculation and conjecture and the insurmountable difficulty of satisfactorily proving viability, there would follow in the wake of this character of litigation many fictitious claims, with false testimony in their support, which the defendants would always find difficult and often impossible to refute. These considerations, we think, outweigh the denial of justice in the abstract to the meritorius case."

The following cases sustain the view that under the common law no action would lie for the recovery of damages for prenatal injuries: Ryan v. Public Service Co-ordinated Transport, 18 N. J. Misc. 429, 14 A. 2d 52; Drobner v. Peters, 232 N. Y. 220, 133 N. E. 567, 20 A. L. R. 1503; Gorman v. Budlong, 23 R. I. 169, 49 A. 704, 55 L. R. A. 118; Smith v. Luckhardt, 299 Ill. App. 100, 19 N. E. 2d 446; Newman v. City of Detroit, 281 Mich. 60, 274 N. W. 710; Buel v. United Railways Co., 248 Mo. 126, 154 S. W. 71, 45 L. R. A. N. S. 625, Ann. Cas. 1914C 613; Stemmer v. Kline, 128 N. J. L. 455, 26 A. 2d 489. See, also, Restatement, Torts, § 869, p. 404.

In our opinion a child born dead cannot maintain an action at common law for injuries received by it while in its mother's womb, and consequently the personal representative cannot maintain it under a wrongful death statute limiting such actions to those which would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof.

The contrary view regarding the rights of unborn

children is stated in the dissent of Justice Boggs in Allaire v. St. Luke's Hospital, *supra,* wherein it is said: "The law should, it seems to me, be, that whenever a child in utero is so far advanced in pre-natal age as that, should parturition by natural or artificial means occur at such age, such child could and would live separable from the mother and grow into the ordinary activities of life, and is afterwards born and becomes a living human being, such child has a right of action for any injuries wantonly or negligently inflicted upon his or her person at such age of viability, though then in the womb of the mother. That proposition having been established, that an adjustment of damages with the mother could not preclude the child would naturally and necessarily follow." The principal and only case holding that a child born dead has a cause of action for prenatal injuries is Verkennes v. Corniea, 229 Minn. 365, 38 N. W. 2d 838, 10 A. L. R. 2d 634. Other cases and texts indicating similar views are collected in the Verkennes case and will not be cited here.

We adhere to the rule that an unborn child is a part of the mother until birth and, as such, has no juridical existence. There are cases holding that a child born alive may maintain an action for prenatal injuries. Williams v. Marion Rapid Transit, Inc., 152 Ohio St. 114, 87 N. E. 2d 334, 10 A. L. R. 2d 1051; Jasinsky v. Potts, 153 Ohio St. 529, 92 N. E. 2d 809; Bonbrest v. Kotz, 65 F. Supp. 138. This question, however, is not before us and we leave it for determination if and when it arises. But the only case cited to us or that we have been able to find which holds that the personal representative of a child born dead could maintain an action for prenatal injuries is the Verkennes case. It makes no distinctions between cases where the child was born dead or alive after suffering prenatal injury. The Verkennes case is contrary to the great weight of authority in holding that the personal representative of a child born dead, which had suffered prenatal injuries, could main-

tain an action therefor. If the child had been born alive there would have been authority to sustain a recovery, although it appears at present to be a minority view. The viability theory appears to be vulnerable. It is true, of course, that medical science has found the means to sever a viable unborn child from the mother ordinarily without serious injury to the child; but even so, such medical development could not operate to change the common law rule that a child en ventre sa mere is considered a part of the mother insofar as a recovery for prenatal injuries are concerned. Medical science might accelerate the birth, but it cannot ipso facto change the rule. Consequently, medical science may accelerate the birth of a viable child and thereby accelerate the time it came into juridical existence as a person independent of the mother. But we can find no convincing authority that a child born dead ever became a person insofar as the law of torts is concerned.

In Lipps v. Milwaukee E. R. & L. Co., 164 Wis. 272, 159 N. W. 916, L. R. A. 1917B 334, the court aptly said: "The fact that the criminal law protects non-viable infants does not affect the question of their civil rights. The criminal law rests upon grounds of public policy and affects the public; the law of torts relates solely to the rights of private parties. So, too, the fact that for purposes of inheritance, taking under a will, etc., the existence of unborn children is recognized in law has no particular bearing upon the question of their right to recover for injuries sustained before birth. Neither does the medical or scientific recognition of the separate entity of an unborn child aid in determining its legal rights. The law cannot always be scientific or technically correct. It must often content itself with being merely practical."

Since no cause of action accrued to the child born dead, for injuries received before birth, none survived to the personal representative under the wrongful death statute. It would appear, therefore, that an action of this

character may not be maintained unless and until the right to bring it is afforded by legislative enactment. The trial court, therefore, properly sustained the demurrer to plaintiff's petition.

AFFIRMED.

IN RE ESTATE OF ALVIN A. BINGAMAN, DECEASED. JULIAN L. PETERSON, APPELLEE, V. ESTATE OF ALVIN A. BINGAMAN, DECEASED, APPELLANT, IMPLEADED WITH JOHN P. MAINELLI, DOING BUSINESS AS JOHN P. MAINELLI CONSTRUCTION COMPANY, APPELLEE.

50 N. W. 2d 523

Filed December 21, 1951. No. 32995.

1. **Executors and Administrators: Negligence.** An action for personal injuries may be prosecuted against the estate of a decedent whose negligence is alleged to have been the proximate cause of the injury.
2. **Abatement and Revival: Negligence.** The right to an action for personal injury does not abate by reason of the death of the wrongdoer before the action was brought.
3. **Contracts: Master and Servant.** The contract under which service is performed and the performance thereunder determine the relationship between the contracting parties.
4. **Master and Servant: Negligence.** A person in the relationship of a fellow employee to another is not liable for negligent acts committed under the direction and control of the employer except for misfeasance or positive wrong.
5. **Evidence: Trial.** Circumstantial evidence is insufficient to sustain a verdict or to require submission of a case to a jury unless the circumstances proved by the evidence are of such a nature and so related to each other that only one conclusion can be reasonably drawn therefrom.
6. **Trial.** A motion made for a judgment notwithstanding the verdict pursuant to the terms of section 25-1315.02, R. R. S. 1943, requires the trial court to re-examine the legal sufficiency of the entire evidence to sustain the verdict and judgment and if it is found insufficient, to render a proper judgment notwithstanding the verdict and judgment previously rendered.
7. **Appeal and Error.** On appeal from the ruling on such motion

this court is required to examine the evidence in the same way and for the same purpose.

8. **Negligence.** In an action in tort for damages for personal injuries negligence is never presumed and cannot be inferred from the mere fact that an accident happened.

APPEAL from the district court for Douglas County: ARTHUR C. THOMSEN, JUDGE. *Reversed and remanded with directions.*

Cranny & Moore, for appellant.

G. H. Seig and *David D. Weinberg,* for appellees.

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

YEAGER, J.

This is an appeal from the verdict of a jury and a judgment of the district court in favor of Julian L. Peterson, plaintiff and appellee, for $13,875 against the Estate of Alvin A. Bingaman, deceased, defendant and appellant. The cause originated as a claim filed by this appellee against the appellant. The estate was probated in the county court of Douglas County, Nebraska. The claim was denied by the county court and this appellee took an appeal to the district court for Douglas County, Nebraska. It is from the verdict and judgment rendered on the appellate trial in the district court that the appeal herein has been taken.

John P. Mainelli, doing business as Mainelli Construction Company, was a named party to the action in both the county and district courts and is also named herein. He however has been named for the purpose of protecting his right of subrogation, if any he has, against the recovery, if there be any, in favor of Peterson and against the appellant. He is designated as an appellee but will be referred to hereinafter as Mainelli. Peterson will be referred to as plaintiff, the Estate of Bingaman will be referred to as defendant, and the deceased Alvin A. Bingaman as Bingaman.

The action as tried in the district court was for negligence on the part of Bingaman causing personal injury and damage to the plaintiff.

To the extent necessary to an understanding of the questions involved herein the petition charges in substance that on November 6, 1946, Mainelli orally contracted with Alvin A. Bingaman, who owned a certain truck on which was mounted a boom equipped with cables, to unload a carload of steel consisting of various parts of a mash tub and to convey these parts with the boom truck from a railroad siding into the Falstaff Brewery; that on November 7, 1946, Bingaman came to the premises involved and proceeded with the performance of the service contemplated; that the lid to the mash tub was hoisted by cables attached to the boom from the railroad car and the truck with Bingaman controlling and operating it moved to a point in front of the brewery; that after reaching this point Bingaman manipulated the controls in such manner as to cause the boom to come in contact with overhead high voltage electric wires which were suspended and carried on poles in front of the brewery and as a result thereof a great charge of electricity passed through the boom, the cables, and the vat lid into the person of plaintiff, severely and permanently injuring him; that plaintiff was in the employ of Mainelli and at the time was in due course of his employment aiding in the transfer of the lid from the railroad car to the brewery; that operation of the boom and cables by Bingaman was negligent; and that his negligence was the cause of plaintiff's injuries and damage. The specifications of negligence are the following:

"a. In placing and operating the said boom truck in such a position as to cause a high voltage electric current to strike the said boom and cables.

"b. In operating and manipulating the levers and controls on the said boom truck in such a manner as to cause the said boom and cables thereon to come into

contact with an overhead high voltage electric power wire.

"c. In failing to take adequate precaution to avoid coming in contact with said overhead high voltage electric wires."

The defendant denied that Bingaman was in anywise negligent. Other defenses were set forth in the answer but they do not require mention at this point.

There is no denial that the boom either came into contact with the wire or came so close to it that the current therefrom passed down the boom or cable and into the vat lid thus causing serious injury to plaintiff. Plaintiff was injured as were three other employees of Mainelli; also Bingaman was killed. On account of the death of Bingaman the action here is against his estate rather than against him personally.

One of the defenses to this action is that, assuming that Bingaman was guilty of negligence, action therefor being in tort, it did not survive and this action is not maintainable against his estate.

Under the holdings of this court the contention is without merit. The latest pronouncement on this subject is found in Rehn v. Bingaman, 151 Neb. 196, 36 N. W. 2d 856. In that case by quotation from In re Estate of Grainger, 121 Neb. 338, 237 N. W. 153, 78 A. L. R. 597, it was said:

"An action for personal injuries may be prosecuted against the estate of a decedent whose negligence is alleged to have been the proximate cause of the injury.

"The right to an action for personal injury does not abate by reason of the death of the wrongdoer before the action was brought." See, also, Wilfong v. Omaha & C. B. St. Ry. Co., 129 Neb. 600, 262 N. W. 537.

At the close of plaintiff's evidence and again at the close of all of the evidence the defendant moved in the alternative for a directed verdict in its favor or for dismissal on the ground, among others, that the evidence

did not sustain the cause of action. The motions were overruled.

After verdict and judgment the defendant filed motions for judgment notwithstanding the verdict and for new trial. These motions were overruled.

Among numerous other assignments, the orders overruling these motions were assigned by defendant as errors entitling it to a reversal of the judgment.

In this situation it becomes necessary to examine the record in order to ascertain whether or not the cause of action finds support in the evidence.

The record discloses that on November 6, 1946, Lawrence V. Glynn, foreman of ironworkers for Mainelli, went to the place of business of Bingaman and there engaged Bingaman to come to the Falstaff Brewery on November 7, 1946, and bring with him a flat truck and a boom truck. The purpose of the engagement was to unload from a railroad car and deliver to the north side of the brewery the parts of a beer vat.

Pursuant to the arrangement Bingaman appeared with the two trucks at the appointed time. There were lines of electric wire running along the north side of the brewery. One line which was about 29 feet high carried a current of 2,300 volts and another about four feet higher carried 13,200 volts. This fact was discussed as was the further fact that it was not possible to get the current cut off during the period of this operation. This discussion was among four employees of Mainelli, including Glynn, and Bingaman. Everyone participating in the movements involved was informed of the danger of contact with or of too close proximity to the electric line.

The first movement described was the getting of the trucks to the railroad car for the purpose of unloading. This involved lowering the boom on the truck so as to permit passage under the wires. This movement as well as all other movements was under the direction and supervision of Glynn. Signals for all movements were giv-

en by Glynn or other employees of Mainelli. The wall of the vat was circular. It was divided into halves. The next movement was the lifting of one of the halves out of the railroad car and placing it on the flat truck. This was done by using the boom truck. The flat truck with this half was then taken to the brewery doors where an effort was made to back in for unloading. This could not be done. Thereupon at the direction of Glynn, Bingaman brought the boom truck around and after placing it in position removed the half from the flat truck and the flat truck was driven away. It was so placed under the supervision of Glynn. As placed the boom was from 30 to 40 inches from the electric wire carrying 13,200 volts of electricity. This distance Glynn and the others involved including Bingaman regarded as a safe distance. The half was lowered and the boom truck returned to the railroad car where the load line of the boom truck was attached and the second half removed. This half was thus carried to the front of the brewery where it was lowered. The top of the boom was placed in about the same relative position with the electric line as it was when the first half was lowered.

The boom truck was then returned to the railroad car where the load line or cable was attached to the lid of the vat and the lid removed from the car. The line was attached to a cable which passed through two holes in the lid. The holes were off center so that in consequence the load did not hang evenly on the line. Some part of the heavy side of the lid was caused to rest on the rear end of the truck. This lid, according to plaintiff's estimates, weighed around 2,500 pounds. According to the estimates of defendant it weighed about 3,500 pounds. In this position with certain employees of Mainelli steadying it the lid was transported to the front of the brewery. The truck was placed in substantially the same position as on the two previous occasions with the boom of the truck substantially the same distance from the top electric wire.

After the truck was placed in position Bingaman left the cab of his truck and got down and there is evidence that he placed his hands on the instruments by which the boom and the load line are controlled. That he operated these controls there is no direct evidence. After the truck stopped the employees who had participated in the movement from the car sought to disengage the portion of the lid which rested on the truck so as to permit it to be lowered to the ground. The lid became disengaged and turned as suspended on the cable or load line 160 to 180 degrees. At some point in the operation obviously after or coincident with the disengagement of the lid from the truck, current came down through the boom or cable injuring plaintiff, one Eric H. Rehn, one Robert E. Speed, and the already mentioned Lawrence V. Glynn and killing Bingaman. The plaintiff, Rehn, Speed, and Glynn appear to have been touching the lid but all of them were not able to give evidence of that fact. The shock appears to have in a measure destroyed the ability to recall some immediately preceding incidents. The boom was in close proximity to or in contact with the top wire immediately after the accident.

The evidence of plaintiff indicates that the truck stood at about a 35 to 45 degree angle to the top electric wire; that the height of the boom above the point of attachment to the truck was about 36 feet; that the over-all height from the ground was about 40 feet; and that the boom by the use of the controls to lower it could have been brought into contact with or in close proximity to the top electric wire. The boom did not operate sidewise from its point of attachment but only up and down from the point of attachment on a plane parallel with the length of the truck.

The plaintiff has rested his case in chief insofar as negligence is concerned on proof of placement of the boom truck and an inference from the fact that having had his hands on the controls Bingaman operated the controls of the boom after the truck was placed.

The controls operate manually. The power for operation comes from the power unit of the truck. The plaintiff in his case in chief offered no evidence as to known operation or method of operation of controls beyond the fact that all operations were performed by Bingaman on signals from Glynn or other ironworkers, employees of Mainelli; except the inferred operation of lowering the boom into the electric wire or into such close proximity as to cause the claimed injuries to plaintiff and to the others and the death of Bingaman.

The first motion for directed verdict or for dismissal challenged the sufficiency of this evidence to sustain plaintiff's cause of action. That this motion should have been sustained there can be little doubt.

As pointed out there are three specifications of negligence. The first relates to the placing and operating of the truck. This was done by Bingaman in accord with and under the direction and control of Mainelli's foreman. No act of Bingaman in this connection was independent of the control and direction of the foreman. He was therefore an employee and not, as the plaintiff contends, an independent contractor. The right of control and the contract of hiring in this situation created the relationship of master and servant as between Mainelli and Bingaman.

In Mansfield v. Andrew Murphy & Son, 139 Neb. 793, 298 N. W. 749, a case involving the principle under consideration here, this court pointed out that the contract under which service was to be performed and performance thereunder were determinative of the true status of the parties. It was there pointed out also that where in the relationship there was no factual dispute the question of the legal relationship was one for the court and not the jury. There is no material factual dispute in the present instance.

In this relationship Bingaman, not being charged with the duty in the first instance with placing the truck, was not liable for injury to plaintiff, a fellow employee,

resulting from placing or parking the truck where he did under the direction of Mainelli's foreman. Pester v. Holmes, 109 Neb. 603, 191 N. W. 709; Showers v. Lund, 123 Neb. 56, 242 N. W. 258; Wilson v. Thayer County Agricultural Society, 115 Neb. 579, 213 N. W. 966, 52 A. L. R. 1393; Restatement, Agency, §§ 354, 355, pp. 776, 779.

Under these authorities it is pointed out that one in the situation of Bingaman could be held accountable for misfeasance or positive wrong. However there is nothing in the record to indicate that Bingaman was, in the placing of the truck, guilty of misfeasance or positive wrong or even of nonfeasance. There was no evidence upon which to justify a submission of this charge of negligence to a jury.

The third specification of negligence is that Bingaman failed to take adequate precaution to avoid coming in contact with the high voltage electric wire. If this specification was intended to embrace only the question of placement of the truck and boom independent of operation after placement, then it is not materially different from the specification already discussed and the disposition there is appropriate here.

If however it involves operation or claimed operation after placement, then it becomes a part of the second specification. It will be so regarded.

As already pointed out the charge in the second specification is that levers and controls were operated and manipulated in such manner as to cause the boom and cables thereon to come in contact with the electric wire.

Again as has already been pointed out there is no direct evidence of operation or manipulation of levers and controls. There is only evidence that Bingaman was in a position where he could operate and manipulate the controls. There is evidence that the edge of the lid was removed from the truck, but whether this was effected alone by the efforts of the men seeking to remove it or assisted by movement of the boom is a mat-

ter of conjecture and speculation. There is evidence that the boom was against or near the wire after plaintiff was injured but plaintiff in his case in chief offered no evidence of any kind to explain how it got there, that is whether it got there as a result of the operation or manipulation of controls or whether because of the position of the truck and boom the weight of the suspended lid pulled the boom over to the wire.

The theory arguendo of plaintiff at the close of the case in chief is that his evidence circumstantially shows that the contact was brought about by the operation of the controls by Bingaman. The theory of the defendant is that at that time by the evidence the cause of the injury to plaintiff was left in the realm of conjecture and speculation and in consequence there was no question for submission to a jury.

The rule which is applicable here is stated in Jones v. Union P. R. R. Co., 141 Neb. 112, 2 N. W. 2d 624, as follows: "Circumstantial evidence cannot be said to be sufficient to sustain a verdict or to require submission of a case to a jury depending solely thereon for support, unless the circumstances proved by the evidence are of such a nature and so related to each other that the conclusion reached is the only one that can fairly and reasonably be drawn therefrom." See, also, Anderson v. Interstate Transit Lines, 129 Neb. 612, 262 N. W. 445; Bixby v. Ayers, 139 Neb. 652, 298 N. W. 533.

The circumstances of plaintiff's case in chief are not of such a nature and so related to each other that the only conclusion which could be fairly and reasonably drawn therefrom was that Bingaman manipulated and operated the controls so as to cause the boom to come into contact with the electric wire. At least one other fair and reasonable conclusion could be drawn therefrom and that is that the release of the lid from the end of the truck caused it to swing in the direction of the wire thus pulling the boom into it without any act upon the controls by Bingaman. The motion for directed verdict

made at the close of plaintiff's evidence should have been sustained. It was overruled.

The defendant adduced its evidence and plaintiff his rebuttal, whereupon motion was again made for directed verdict or for dismissal, which, as already indicated, was overruled. The case was submitted to the jury and the verdict hereinbefore referred to was returned.

Pursuant to and in conformity with the provisions of section 25-1315.02, R. R. S. 1943, the defendant filed a motion for judgment notwithstanding the verdict and a motion for new trial. The motion permitted and required the trial court to re-examine the legal sufficiency of the entire evidence to sustain the verdict and judgment and if it was found that it was insufficient, to render a proper judgment notwithstanding the verdict and judgment previously rendered. On appeal this court is required to examine the evidence in the same way and for the same purpose. It follows then that we are required to examine the entire record to ascertain whether or not there is evidence legally sufficient to sustain the verdict and judgment.

On behalf of defendant, Ruth Bingaman was called as a witness. She gave testimony regarding the arrangement under which Alvin A. Bingaman went to the brewery. This testimony indicates that he was engaged under a contract of hiring and not as an independent contractor. The only material departure from the plaintiff's evidence in this respect is in the rate of pay.

The next witness called was Howard F. Thomas. He is an engineer. His testimony contained a description of physical conditions surrounding the brewery and the scene of the accident.

The next witness was Lee Bingaman. He described the boom truck and its mode of operation and also the mode of operation of the boom and the load line. He testified that the boom operates manually; that it can be started only manually; that it does not stop automatically; that if the clutch is engaged either for upward or down-

ward movement it can be stopped only by pulling out the clutch; that if the clutch was engaged for downward movement the movement would continue until the boom rested flat on the truck unless the clutch was pulled out; that the control of an upward movement was the same as for a downward movement; and that a similar clutch controls the load line or cable running over the boom. Gears control the upward and downward movements. After the gear is set and the clutch engaged movement may be stopped by pulling out the clutch. To prevent movement while the gear is engaged the clutch must be held out. If the clutch is released it will re-engage and movement will resume.

The position of the defendant is that it is reasonably inferable that Bingaman did not before nor at the time of the accident operate these controls and thereby cause the boom to come into contact with or in close proximity to the electric wire since if he had, movement would not have stopped at the wire but would have continued beyond until someone had manually pulled and held out the clutch.

The next and last witness called by the defendant was Ralf Toensfeldt. He is a consulting engineer in mechanical and electrical work. He examined the truck, the premises at the brewery, the location of the wire, and a photograph of the truck, the wire, and the lid taken very shortly after the accident. According to his testimony the lid was 14 feet 8 inches in diameter and weighed about 3,500 pounds. The boom is secured directly to the bed of the truck about 8 feet from the back end. The boom is 36 feet 3½ inches in length. It moves in a plane at right angles to the truck body. The height of the truck bed is about 4 feet. The top electric wire was about 33 feet 6 inches above ground. The holes in the lid through which the cable to which the load line was attached were 8 feet from one side and 6 feet 6 inches from the other. Before removal about 1,200 pounds of the lid weight was on the truck. The

lid on removal rotated about 180 degrees. On removal and rotation it shifted south or toward the building about 3 feet. The electric wire ran parallel to the building and was between the building and the truck. On account of a depression in which the right rear wheel was standing at the time there was a swing of the boom in the direction of the wire of about 3 degrees. On the basis of this examination and taking into consideration the probable position of the truck and boom, the construction of the truck, the removal of the edge of the lid from the truck, and the probable effect of the removal and the position after removal, and through mathematical calculations, this witness came to the conclusion and gave it as his opinion that it was the removal of the lid and its rotation and swinging on the load line toward the building that caused the boom to come into contact with or in such close proximity to the wire as to cause the current to travel down and injure the plaintiff.

If this was the cause then the causal operation was one in which Bingaman had no part and over which he had no control.

In rebuttal William Freiden, an engineer, was called. This witness examined the truck and the photograph which was submitted to the witness Toensfeldt. He was informed of the weight of the lid and that four men, employees of Mainelli, were steadying and seeking to remove the edge of the lid from the truck.

He gave it as his opinion that the removal of the lid and its swinging and rotation would cause the top of the boom to be affected "maybe 1 or 2 inches"; that this movement would not cause the top of the boom to come into contact with the wire; that the boom was mechanically lowered if the truck was blocked or in a stationary position, or in his own words: "That's the only two reasons, sir, that make that boom touch that line as far as I could see, is by controlling the boom or by the truck moving."

This witness was allowed substantially to assume that

Bingaman had engaged the clutch for downward movement and that he caused downward movement until the boom made contact with the wire. Based on this assumption he said, to use one of his statements: "* * * he could have held onto it long enough to pull the gear lever out of position because they aren't difficult to push in and out; they work very easily."

This testimony was elicited for the purpose of creating an inference in rebuttal of the inference from the defendant's evidence that there could have been no manipulation of controls by Bingaman since if there had been the boom would not have stopped at the wire but that it would have descended until it was down flat on the bed of the truck.

This résumé, it is believed, fairly presents the evidentiary features upon which a determination of whether or not the defendant is entitled to a judgment notwithstanding the verdict must rest. Some points of consideration become clear in this connection beyond peradventure.

Bingaman was engaged to perform a service for Mainelli under a contract of hiring, and the service performed and to be performed, with one exception, if indeed there was an exception, was under the direction of the foreman and other employees of Mainelli. The exception will be noted later.

The evidence wholly fails to sustain any contention of negligent placement of the boom in the first instance with reference to the wire. The evidence of the plaintiff indicates that the truck was parked with the boom a safe distance from the wire.

The exception to performance of service by Bingaman under the direction of the employees of Mainelli is an inference that without direction he lowered the boom on his own initiative while the men were seeking to remove the edge of the lid from the truck.

The question of whether or not Bingaman did in fact lower the boom is dependent wholly and solely on cir-

cumstantial evidence. The evidence is sufficient to reasonably sustain an inference that if he in fact did lower the boom that he did so without direction and of his own volition.

Unless the circumstantial evidence adduced was sufficient to sustain the contention that Bingaman was guilty of a departure in this regard then there was no issue for submission to a jury.

In an approach to a consideration of this matter two rules of law are pertinent. One is the circumstantial evidence rule already set forth. The other is: "Negligence is never presumed, and cannot be inferred from the mere fact that an accident happened." Bixby v. Ayers, *supra.* See, also, Engel v. Chicago, B. & Q. R. R. Co., 111 Neb. 21, 195 N. W. 523; Thompson v. Young Men's Christian Assn., 122 Neb. 843, 241 N. W. 565; Anderson v. Interstate Transit Lines, *supra;* Bergendahl v. Rabeler, 133 Neb. 699, 276 N. W. 673; Meyers v. Neeld, 137 Neb. 428, 289 N. W. 797.

From an examination of the record in the light of these rules it is to be observed that the plaintiff rested the case in chief solely on proof that there was an accident which has been described, and that after the accident and after four men were injured and one killed the boom was shown to be either in contact or in close proximity to the electric wire. No witness, expert or nonexpert, was called to give testimony as to how the contact or proximity was accomplished.

As pointed out, the plaintiff called a witness in rebuttal. The purpose was to rebut testimony of a defense witness who gave it as his opinion that the contact or proximity to the wire was caused by the release, rotation, and swinging of the lid. In this rebuttal testimony, basing it on an examination of the truck, its construction, and various mechanisms, a photograph showing the truck and its location with reference to the wire after the accident, and being informed of the weight of the lid and its location before and after the accident,

the witness gave it as his opinion that the contact or proximity was caused by operation of the controls by Bingaman. This opinion was not unequivocal however. He qualified it by the statement that this could have happened in two ways, one by controlling the boom and the other by the truck moving.

May it be said that the circumstances outlined were of such a nature and so related that the only reasonable conclusion to be drawn from them is that Bingaman operated and manipulated the controls on this truck so as to cause the boom to come into contact or close proximity to the wire? We think it may not. We think that other reasonable conclusions are not excluded by the evidence.

The rebuttal witness admits of one other conclusion. He stated that movement of the truck could have caused it. There is no evidence that the truck did move, and on the other hand there is none which excludes the possibility that it did.

The weight of the conclusion of this witness that Bingaman operated the controls also must be considered in the light of his speculative ability to explain the stoppage of the boom on contact with the wire. As we interpret his testimony in this respect he concludes that there was either a voluntary withdrawal of the clutch and gear before contact or an involuntary reaction which withdrew them after contact. He does not disagree with the proposition that in the absence of withdrawal the boom would have continued on down to the bed of the truck.

As previously pointed out Ralf Toensfeldt was called by the defendant and gave his opinion as to what was the cause of the contact. Of course this may not be weighed against the evidence of plaintiff for the purpose of determining whether or not the evidence of plaintiff was sufficient as proof of a cause of action.

When however the reliance is wholly upon circumstantial evidence to sustain a cause of action it appears

proper to consider other hypotheses which it is contended test the sufficiency of evidence under the circumstantial evidence rule. The testimony of this witness presents such a hypothesis and test.

We are unable to say that the conclusions and opinions contained in the evidence of this witness are subject to rejection as unfair and unreasonable.

This being true it becomes necessary to say that under the circumstantial evidence rule the evidence of plaintiff is insufficient to sustain a cause of action.

The judgment is reversed and the cause remanded with directions to enter judgment notwithstanding the verdict in favor of defendant and against the plaintiff.

REVERSED AND REMANDED WITH DIRECTIONS.

EDWARD KESSLER, APPELLANT, V. BATES & ROGERS CONSTRUCTION COMPANY ET AL., APPELLEES.
50 N. W. 2d 553

Filed December 21, 1951. No. 33025.

1. **Master and Servant.** The fact that an employee is the general servant of one employer does not, as a matter of law, prevent him from becoming the particular servant of another, who may become liable for his acts.
2. ———. The right of control, or want of it, determines if the relation of master and servant, at the particular time in question, existed between the employee and his general employer, or whether there had been a change in relationship and he had become, for the time being, a special employee of another person.
3. **Trial.** It is the duty of the district court to direct a verdict and render a judgment thereon if but one conclusion can reasonably be deduced from all the evidence in the case.

APPEAL from the district court for Sarpy County: THOMAS E. DUNBAR, JUDGE. *Affirmed.*

Gross, Welch, Vinardi & Kauffman, for appellant.

Brown, Crossman, West, Barton & Quinlan, and *Donald T. Fox,* for appellees.

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

BOSLAUGH, J.

Appellant sued Bates & Rogers Construction Company, appellee, for damages on account of personal injuries claimed to have been sustained by him because of negligent acts of William J. Gallagher, an employee of appellee, while, as it is claimed, he was engaged in performing services for, at the direction of, and subject to the control of his employer.

The district court, when the evidence of the parties was concluded, granted the motion of appellee for a peremptory instruction to the jury to return a verdict for it, rendered a judgment on the verdict, and refused appellant a new trial. William A. Pope Company was the employer of appellant, but no negligence is charged or claim made against it. It is a party only because of any subrogation rights it may have because of the Nebraska Workmen's Compensation Act.

Appellant claimed he was injured because of the negligent operation of a crane by William J. Gallagher, an employee of appellee, while pipe, the property of William A. Pope Company, was being unloaded from a railroad car near the site where each of the contractors, Bates & Rogers Construction Company, appellee, and William A. Pope Company, was engaged in construction work; and that at the time of the accident the machine was owned and operated by appellee in its business and the operator thereof was directed and controlled by it. The contention of appellee in this regard was that the machine and the operator thereof were loaned or leased to the Pope Company for a consideration to assist it in unloading a car of large and heavy pipe owned by it; that at the time of the accident the machine was being operated by it in its business and the crane and Gallagher were under the exclusive control and direction of the Pope Company; that Gallagher was then a special em-

ployee of that company; that he and the appellant were at the time of the accident fellow employees of the Pope Company; and that appellee had no interest in, connection with, or control of the machine, the operator thereof, or the work being done at that time.

The Central Nebraska Public Power & Irrigation District desired to construct a large power plant for the generation of electric energy not far from the town of Bellevue, Nebraska, and near the Missouri River. It made a contract with appellee for the construction of the sub-structure and the super-structure of a multiple-story building as a part of the plant. It awarded a separate contract to William A. Pope Company to furnish and install all pipe desired and required in and incidental to the plant. The contractors and the contracts were wholly independent of each other, and neither contractor had any interest in nor responsibility for the performance of the contract of the other.

Appellee owned and had at the location of the construction heavy equipment including cranes, hoists, trucks, tractors, excavating and dirt moving machines, and like equipment necessary and usual to the work its contract required. The Pope Company had no such equipment there. It arranged to secure from appellee any machines or equipment of this character it required in the performance of the work under its contract, and appellee agreed to furnish an operator of any machine which was furnished by it to the Pope Company. Appellee was paid on an hourly basis by the Pope Company for any machine it secured and used, and in addition the wage of the operator.

The Pope Company on July 21, 1948, had a shipment of pipe on the railroad spur track near the place where the construction was being made. It was metal pipe in sections 40 feet long, 2 feet in diameter, and the weight of each was about 3,000 pounds. It was contained in a gondola car longer than the pipe. The pipe filled the car to capacity.

Jack Holt, the foreman of the Pope Company, on the morning of that day arranged with the foreman of appellee to furnish the Pope Company a crane to be used in the operation of unloading the pipe. Harry B. Stewart, superintendent of equipment for appellee, requested William J. Gallagher, a crane operator of 30 years' experience and then engaged as such by appellee, to leave the excavating job on which he was then working and to take the machine he was using to the spur track north of the plant then being constructed. He did as he was requested, and when he arrived with the machine Holt was near the car of pipe. Holt directed where and in what position in reference to the car the crane should be placed and where the pipe should be deposited as it was unloaded. His directions were followed by Gallagher; tests were made as Holt instructed to ascertain if the swing of the crane would cover the proper distance to execute the work as desired; and then, on signal from Holt, the bucket on the crane was set on the ground. Holt fastened a choker to the crane by placing it through the bucket in such manner that when strain on it was applied it would stay in the desired position and would lift and carry a section of pipe from the car to where it was desired to be placed on the ground. The choker was a steel cable of sufficient size to handle the desired load, and of sufficient length to reach from the place where it was fastened to the crane to the ends of a section of the pipe. It is also referred to in the record as a cable, a spreader, and a stringer. Each end of it was equipped with a large steel hook 12 inches long and of proper shape to be inserted in the ends of the pipe. Chokers were hard to get and each contractor had his own. They were identified by the color of paint applied to them.

The crane was rigged by Holt, and for this purpose he used a choker or spreader of his employer. The attention of Holt was directed to the bucket on the crane, and it was suggested that it be removed and the choker

fastened directly to the crane. Holt refused to do this because of the time required to detach it. When a crane is to be used to handle pipe it is rigged for the operation by the owner of the pipe.

The operation after the crane was rigged by Holt was that Gallagher raised the bucket sufficient to clear the top of the car, moved the boom over the car, and lowered the choker. The hooks attached thereto were placed in the ends of a section of the pipe, in the north end by Holt, and in the south end by appellant. The pipe was raised to clear the car, the boom moved to the south and west, and the pipe lowered and spotted in the pile on the ground. After the crane was placed in position by the car containing the pipe, Gallagher did not operate the crane in any way or for any purpose other than in compliance with the directions and signals of Holt, except in spotting the pipe on the pile on the ground, the signal was given by another employee of the Pope Company. About ten sections of the pipe were unloaded from the car in this manner without any unusual happening. Thereafter in the removal of another section of the pipe, the accident happened resulting in injuries to appellant.

Jack Holt, the foreman of the Pope Company, was the boss on the job and directed the activities of everyone who was there, made all of the decisions, and gave the directions and signals to Gallagher who remained in the cab of the crane where the controls were for the operation of it. There is no evidence that Gallagher or anyone connected with appellee had or exercised any authority there or that he supervised or in any manner directed the operation.

The application of the doctrine of respondeat superior in any case depends upon the power of control which the superior possesses and which for the protection of third persons he is required to exercise over the conduct and activities of his subordinates. It follows that the doctrine has application only in cases where the

power of control exists, and it does exist when the employer has the right and power of control of the acts and of the retention or discharge of the employee.

A servant may be loaned by his master to another so that the acts of the servant become the acts of the master to whom he has been loaned, and during the continuance of that status the first or general master is not responsible for the acts of the servant.

In this case it is true that appellee selected and constituted William J. Gallagher its employee and compensated him as such. These are circumstances, if nothing else intervened, that would be strong to show he continued and was the servant of appellee. It was reimbursed for his wages and was paid for the use of the machine while it was engaged in the work of the Pope Company. Gallagher was the servant of appellee in a great many things and generally, but as to the operation of the crane at the time of the accident, he was not its servant but was then bound to and worked under the orders of the Pope Company given by its foreman, and if it had seen Gallagher misconducting himself in working the crane or disobeying its orders, it could have discharged him from that employment.

In determining who is liable for the negligence of a servant in the general employ of one person but who at the time of the injury, because of which suit is prosecuted, was assisting another, the usual test is whose work was being performed and who had the power and right to control and direct the servant in the performance of that work. In Mansfield v. Andrew Murphy & Son, 139 Neb. 793, 298 N. W. 749, it is said: "The fact that an employee is the general servant of one employer does not, as a matter of law, prevent him from becoming the particular servant of another, who may become liable for his acts. * * * The right of control, or want of it, determines if the relation of master and servant, at the particular time in question, existed between the employee and his general employer, or whether there had been a

change in relationship and he had become, for the time being, a special employee of another person." See, also, Westover v. Hoover, 88 Neb. 201, 129 N. W. 285, 19 A. L. R. 215; Forsha v. Nebraska Moline Plow Co., 89 Neb. 770, 132 N. W. 384.

Appellant relies much upon The Standard Oil Co. v. Anderson, 212 U. S. 215, 53 L. Ed. 480, 29 S. Ct. 252. That case is probably more frequently referred to than any other in the area of the law here under consideration. It is a very considerable landmark in a wilderness of judicial and text literature on the subject of whether an operator of a leased machine furnished by the lessor is, during the term thereof, in the employ of the lessor or of the lessee. If the evidence in this case had tended to support the allegation of appellant that the crane, at the time of the accident, was operated by appellee in the furtherance of its business and under and by its direction, this case would have had greater application. There is no evidence of the truth of those statements which were essential to the case of appellant. The work being done was that of the Pope Company and not an undertaking of appellee. It was being done under the control and exclusive direction of the Pope Company. In that case the court spells out the law on this subject as follows: "It sometimes happens that one wishes a certain work to be done for his benefit and neither has persons in his employ who can do it nor is willing to take such persons into his general service. He may then enter into an agreement with another. If that other furnishes him with men to do the work and places them under his exclusive control in the performance of it, those men became pro hac vice the servants of him to whom they are furnished. But, on the other hand, one may prefer to enter into an agreement with another that that other, for a consideration, shall himself perform the work through servants of his own selection, retaining the direction and control of them. In the first case, he to whom the workmen are furnished

is responsible for their negligence in the conduct of the work, because the work is his work and they are for the time his workmen. * * * To determine whether a given case falls within the one class or the other we must inquire whose is the work being performed, a question which is usually answered by ascertaining who has the power to control and direct the servants in the performance of their work." See, also, Western Marine & Salvage Co. v. Ball, 37 F. 2d 1004; Malisfski v. Indemnity Ins. Co. of North America, 135 F. 2d 910; Wylie-Stewart Machinery Co. v. Thomas, 192 Okl. 505, 137 P. 2d 556; McFarland v. Dixie Machinery & Equipment Co., 348 Mo. 341, 153 S. W. 2d 67, 136 A. L. R. 516; Annotation, 17 A. L. R. 2d 1442; Annotation, 55 A. L. R. 1263; Restatement, Agency, § 227, p. 500, and Comment d, p. 503.

There is no dispute as to the arrangement between appellee and the Pope Company for the use of the crane by it in unloading its car of pipe, and what the parties did in carrying out the agreement is likewise not controverted. There is no evidence that appellee reserved or had or exercised any control of the crane or the operator thereof after it arrived at the location of the car containing the pipe during the unloading of it. A verdict based on a conclusion that Gallagher at the time of the accident was an employee of and acting for appellee could not have been sustained. It was the duty of the court to instruct a verdict for appellee. Jensen v. Romigh, 134 Neb. 890, 280 N. W. 223, states the rule: "Where but one rational conclusion can be drawn from all the evidence, it is the duty of the trial court to direct a verdict or to render judgment accordingly." See, also, Buresh v. George, 149 Neb. 340, 31 N. W. 2d 106. Mansfield v. Andrew Murphy & Son, *supra,* a case somewhat similar to this, says: "In such case, whether the right of control, or want of it, existed, is ordinarily a question of fact for the jury; but where the pertinent facts pertaining to the contract and relationship of the

persons involved are not in dispute, and but one reasonable inference can be drawn therefrom, it is a question of law for the court."

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

AFFIRMED.

JACK WEBBER ET AL., APPELLANTS, V. CITY OF SCOTTSBLUFF, NEBRASKA, APPELLEE.
50 N. W. 2d 533

Filed December 21, 1951. No. 33036.

1. **Eminent Domain: Statutes.** Since statutes prescribing proceedings for the condemnation of property and the assessment of compensation are in derogation of general right and of common-law modes of procedure, they must be strictly construed against the condemner and in favor of the landowner.
2. ———: ———. But they should not be so strictly construed as to defeat the purpose sought to be accomplished.
3. **Eminent Domain: Courts.** When it comes to the stage of compensating the owner of the property by ascertaining the value of the property taken, or damaged, this requires the exercise of judicial functions.
4. ———: ———. The owner of the property to be condemned is entitled to notice of the proceedings and an opportunity to protect his rights.
5. **Eminent Domain: Appeal and Error.** On appeal to the district court from the appraisement of damages, if other issues than the question of damages are involved, they must be presented by proper pleadings.
6. **Courts: Appeal and Error.** Jurisdictional defects may be noticed at any stage of the proceedings, for the reason that if the court proceeds without jurisdiction, the whole proceedings are null and void.
7. **Courts: Estoppel.** A party invoking the court's jurisdiction in a case where the court has jurisdiction of the subject matter is estopped to object thereto afterward.
8. **Clerks of Courts.** Money paid to the clerk of the court pursuant to an order or judgment of the court is received by the clerk in his official capacity.

APPEAL from the district court for Scotts Bluff County: CLAIBOURNE G. PERRY, JUDGE. *Affirmed.*

Mothersead, Wright & Simmons, for appellants.

Jack E. Lyman, for appellee.

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

WENKE, J.

This is an appeal by Jack Webber and Mamie Webber from an order of the district court for Scotts Bluff County overruling their motion. The purpose of the motion was to have the district court for Scotts Bluff County enter an order finding that the city of Scottsbluff had obtained no interest in their lands by reason of the proceedings taken under its ordinance No. 739.

This appeal arises out of the same condemnation proceedings as were involved in Webber v. City of Scottsbluff, 150 Neb. 446, 35 N. W. 2d 110, being case No. 32440. It will be herein referred to by that number. Therein we affirmed the judgment of the district court based on a jury's verdict assessing the amount of damages to be paid for the land taken from the appellants by reason of ordinance No. 739.

Chronologically the history relating to the city of Scottsbluff seeking to take appellants' land for a public use is as follows: On June 17, 1947, the city passed and approved ordinance No. 739 to appropriate certain property which it therein determined to be necessary for the use of the city for sewers, water mains, streets, and boulevards. This ordinance described by metes and bounds nine separate tracts that were needed for that purpose. Included therein was tract No. 6, being land owned by appellants, which is the property herein involved. The ordinance appointed three disinterested freeholders of the city of Scottsbluff to assess the damages for each tract of land appropriated and directed them to meet on July 24, 1947, at the hour of 10:00 a. m.

at the office of the city clerk of the city for that purpose. Ordinance No. 739 was published in the Scottsbluff Daily Star-Herald on June 20, 1947. The three assessors appointed by the city to assess damages for the property being taken filed their report with the city on July 24, 1947. Therein they set forth that on July 24, 1947, at 10:00 a. m., they met at the office of the city clerk and proceeded to assess the damages for the lands appropriated by the city, including tract No. 6 which belonged to appellants. The report shows they assessed the damages for tract No. 6 in the total sum of $2,854 and apportioned it as follows: $1,427 to Jack Webber and $1,427 to Mamie Webber. Upon the filing of the appraisers' report the mayor and council of the city, on August 5, 1947, passed and approved a resolution by which the city approved the amounts of damage allowed with respect to each of the nine tracts and directed the city treasurer to pay to the parties, as shown by the report, the amounts due them. It also provided, in the event any of the parties refused to accept such sum, that the amount so refused be deposited with the city treasurer subject to their order. Warrants were issued to each of the appellants for the amount of their damages. Appellants refused to accept payment and returned the warrants. The warrants were thereupon canceled and the amount thereof was deposited to the account of the condemnation.

On August 7, 1947, appellants filed in the office of the city clerk their notice of appeal to the district court for Scotts Bluff County. Therein they set forth they were appealing from the assessment of damages made by the assessors appointed for that purpose and whose report had been approved by the city on August 5, 1947. This appeal was lodged in the district court on August 14, 1947. On appeal to the district court the trial resulted in a verdict for appellants in the amount of $6,463.25. Motion for new trial was filed and overruled. On appeal therefrom to this court the judgment on the verdict was

affirmed and mandate to that effect, dated December 24, 1948, was filed in the office of the district clerk for Scotts Bluff County on December 27, 1948. On September 20, 1949, the city council directed payment to be made of this judgment to the clerk of the district court for Scotts Bluff County and, as a result thereof, there was paid to the clerk of the district court for Scotts Bluff County on September 21, 1949, the sum of $7,153.74, being the amount of the verdict with interest to that date and costs of the proceeding.

The city took possession of this land sometime in January 1950 and made some improvements thereon. This was prior to May 17, 1950, the date the motion, the overruling of which is herein appealed from, was filed.

The record shows there has been no abandonment of this proceeding by the city and that it has, within a reasonable time, taken possession of the property and is proceeding to improve it for the public use for which it was taken.

Before discussing the particular questions herein raised by appellants it would be well to state certain general principles which relate to the subject matter of this appeal.

"Since statutes prescribing proceedings for the condemnation of property and the assessment of compensation are in derogation of general right and of common-law modes of procedure, they must be strictly construed against the condemnor and in favor of the landowner, * * *." 29 C. J. S., Eminent Domain, § 214, p. 1135.

"Proceedings to subject the property of another for public use under the doctrine of eminent domain must be conducted in the manner prescribed by the statute delegating the power." Spencer v. Village of Wallace, 153 Neb. 536, 45 N. W. 2d 473. See, also, State ex rel. Nelson v. Butler, 145 Neb. 638, 17 N. W. 2d 683.

"* * * but they should not be so strictly construed as to defeat the purpose sought to be accomplished." 29 C. J. S., Eminent Domain, § 214, p. 1136.

"When it comes to the stage of compensating the owner of the property by ascertaining the value of the property taken, or damaged, this requires the exercise of judicial functions." In re Appraisement of Omaha Gas Plant, 102 Neb. 782, 169 N. W. 725.

"The owner of the property to be condemned is entitled to notice of the proceedings and an opportunity to protect his rights." 29 C. J. S., Eminent Domain, § 242, p. 1212.

"* * * the proceeding is in its nature judicial, and therefore, in determining whether or not the notice provided is sufficient, the principle governing such proceeding should govern." Albin v. Consolidated School District, 106 Neb. 719, 184 N. W. 141.

" '* * * The due process clause does not guarantee to a citizen of a State any particular form or method of state procedure. Its requirements are satisfied if he has reasonable notice, and reasonable opportunity to be heard and to present his claim or defence, due regard being had to the nature of the proceedings and the character of the rights which may be affected by it.' (Missouri ex rel. Hurwitz v. North, 271 U. S. 40, 46 S. Ct. 384.)" May v. City of Kearney, 145 Neb. 475, 17 N. W. 2d 448.

Appellants call our attention to the fact that in No. 32440 we stated that a judgment had been rendered on the verdict and affirmed such judgment, whereas, the record in that case does not show such to be the fact. It is true the transcript in No. 32440 does not show a judgment was rendered thereon by the court but only that the verdict was filed by the clerk of the court. However, both appellants and appellees in No. 32440 considered such judgment had been rendered. This is shown by their respective briefs. Appellants in their notice of appeal therein stated: "The above named plaintiffs, Jack Webber and Mamie Webber, * * * hereby appeal to the Supreme Court of the State of Nebraska, from the judgment entered in favor of said plaintiffs on the 10th

day of December, 1947, and from the order entered on the 5th day of January, 1948, overruling their motion for a new trial." It was the duty of the clerk of the court to have rendered such judgment when the verdict was received and filed by him. See section 25-1313, R. R. S. 1943, and Crete Mills v. Stevens, 120 Neb. 794, 235 N. W. 453. Whether or not the clerk failed to do so the record does not affirmatively show.

Condemnation is a special statutory proceeding. 29 C. J. S., Eminent Domain, § 209, p. 1127; Pierce v. Platte Valley Public Power & Irrigation Dist., 143 Neb. 898, 11 N. W. 2d 813; Oklahoma City v. Wells, 185 Okl. 369, 91 P. 2d 1077, 123 A. L. R. 662; Todd v. Atchison, T. & S. F. Ry. Co., 134 Kan. 459, 7 P. 2d 79; State v. Williams, 12 Wash. 2d 1, 120 P. 2d 496; City of Lebanon v. Public Service Co., 214 Ind. 295, 14 N. E. 2d 719; Epperson v. Johnson, 190 Okl. 1, 119 P. 2d 818. Consequently, section 25-1902, R. R. S. 1943, is applicable thereto.

But assuming, as appellants state, that no judgment has been rendered on the verdict and that the appeal in No. 32440 involved only the correctness of the jury verdict determining the value of the land involved, we think it will not benefit him in this appeal. It should here be stated that no pleadings were filed by appellants on appeal to the district court and consequently the only question raised by the appeal was the amount of damages. Pierce v. Platte Valley Public Power & Irrigation Dist., *supra*. As held in Trester v. Missouri P. Ry. Co., 33 Neb. 171, 49 N. W. 1110: "On appeal to the district court from the appraisement of damages, if other issues than the question of damages are involved, they must be presented by proper pleadings." See Clarke v. Nemaha Valley Drainage District, 98 Neb. 549, 153 N. W. 584.

As to all questions rising prior to the appeal and verdict, the following rule is applicable: "'* * * jurisdictional defects may be noticed at any stage of the proceedings, for the reason that if the court proceeds with-

out jurisdiction, the whole proceedings are null and void.' (Toledo, A. A. & N. M. R. Co. v. Munson, 57 Mich. 42, 23 N. W. 455.)" Platte Valley Public Power & Irrigation Dist. v. Feltz, 132 Neb. 227, 271 N. W. 787. See, also, County of Douglas v. Feenan, 146 Neb. 156, 18 N. W. 2d 740, 159 A. L. R. 569. As to those arising subsequent to our affirmance and mandate they could be raised directly in the proceeding.

Two questions are raised by the appellants with reference to the appraisal of their property: First, that the ordinance did not set forth the time and place where the assessors appointed were to meet and make their appraisal. Second, that insufficient notice was given to appellants. The second involves two questions: Namely, that the ordinance did not name the landowners whose lands were being taken and that service by publication was not sufficient.

It should be understood that this is not a case where the statutes granting the power of eminent domain have failed to provide adequate provisions in its condemnation procedure to secure to the citizen whose property is being taken a day in court to have its value determined within the due process clause of both the state and federal constitutions as the provisions of section 16-602 and 16-603, R. S. 1943, are adequate for that purpose. Nor is it an action brought to enjoin the proceedings. It presents a situation where the issues are: Has the city, in taking the appellants' property, sufficiently complied with the statutory provisions and, if not, have appellants waived such deficiency by appealing from the award of the assessors to the district court for Scotts Bluff County pursuant to section 16-645, R. S. 1943, and therein raised only the issue relating to the question of damages?

Appellants contend the ordinance does not provide a time and place for a meeting of the assessors to fix the value of the property taken. In this respect the ordinance provides as follows: "* * * said assessors

shall meet on the 24th day of July, 1947, at the hour of 10 o'clock A. M., at the office of the City Clerk of said city and after taking the oath required by law shall proceed from said point to view the property above appropriated and they shall on the same day, or as soon thereafter as practical, make, file and return to the City Clerk in writing a just and fair assessment of the damages for each piece and lot of property, the whole or part of which is so appropriated and where there is more than one party having interest in a piece of property or lot the damages shall be by them justly apportioned and stated to each." This language is almost the exact language of section 16-602, R. S. 1943, insofar as that statute is applicable thereto. No doubt the language setting forth the time and place for the assessors to meet and fix the amount of damages each of the landowners would have by the taking of a part of their lands could have been more clearly stated but certainly no one would be misled thereby. It was at the office of the city clerk at 10:00 a. m., on July 24, 1947. At most it could be nothing more than an irregularity that was waived by not raising it when appeal was taken to the district court.

Appellants owned and resided on lands just outside of the city but adjacent thereto. Tract No. 6 of the lands taken by the city is a part of these lands.

The ordinance provided for the publication thereof in one issue of the Scottsbluff Daily Star-Herald. Publication thereof was made in the issue of that paper published on June 20, 1947. The ordinance provides that such publication shall be sufficient notice to all owners whose lands are being taken who reside outside the city but that a copy of such paper shall be delivered to each of the owners residing in the city, but if not found, to some person at their residence. The provisions for service provided in the ordinance are in accordance with section 16-603, R. S. 1943.

"It is almost universally held, however, that notice

by publication or posting is sufficient, even with respect to persons residing within the jurisdiction where the proceedings are pending." 11 McQuillin, Municipal Corporations (3d ed.), § 32.124, p. 549.

"Notice, however, must be given the property owner so that he may appear before the appraisers and protect his rights. Wilber v. Reed, 84 Neb. 767. The legislature may authorize a municipality to enact an ordinance defining a reasonable procedure for the exercise of its authority. State v. Cosgrave, 85 Neb. 187; Paulsen v. Portland, 149 U. S. 30, 38." Chicago, R. I. & P. Ry. Co. v. Nebraska State Railway Commission, 88 Neb. 239, 129 N. W. 439.

We find the procedure provided by the Legislature to be reasonable and sufficient. The city having complied therewith, we find the publication of the ordinance to be sufficient notice to the owners and parties interested who did not reside in the city.

The ordinance, as approved and passed by the city and as published in the Scottsbluff Daily Star-Herald, did not contain the names of the parties whose lands were being taken.

We have said: "A party invoking the court's jurisdiction in a case where the court has jurisdiction of the subject-matter is estopped to object thereto afterward." McCall v. Hamilton County Farmers Telephone Assn., 135 Neb. 70, 280 N. W. 254.

As stated in Trester v. Missouri P. Ry. Co., *supra*: "Again, the plaintiff in error by taking an appeal to the district court from the award of the commissioners, entered his appearance and waived all objection as to notice. (O'Dea v. State, 16 Neb., 241; R. Co. v. Patch, 28 Kan., 470; Aiken v. Commissioners, 36 Id., 170; R. Co. v. Benham, 28 Mich., 459; R. Co. v. Allen, 100 Ind., 409.)"

We find the appellants, by taking an appeal to the district court from the award of the assessors and raising only the question of damages, entered their appearance therein and waived all objections as to notice.

Appellants contend that the title of the ordinance did not meet the requirements of section 16-404, R. S. 1943, when it failed to include a statement that the lands were necessary for the proper construction of any of the works provided for in section 16-601, R. S. 1943, since the lands of appellants were outside of the city limits.

Section 16-404, R. S. 1943, insofar as here applicable, provides: "Ordinances shall contain no subject which shall not be clearly expressed in the title, * * *."

Section 16-601, R. S. 1943, insofar as here applicable, provides: "The mayor and city council shall have power to purchase or appropriate private property for the use of the city for streets, alleys, avenues, * * * sewers, * * *. When necessary for the proper construction of any of the works above provided, the right of appropriation shall extend for a distance of ten miles from the corporate limits of the city."

The title of the ordinance is as follows: "An Ordinance of the City of Scottsbluff, Nebraska appropriating certain property described in said ordinance and which is within the County of Scotts Bluff, Nebraska, and within ten (10) miles of the corporate limits of said city to the use of the City of Scottsbluff, Scotts Bluff County, Nebraska for sewers, water mains, streets, and boulevards, appointing assessors and fixing the time and place of the meeting of said assessors, and describing their duties and remuneration and providing for the service of notice upon the owners of said real estate."

The ordinance itself, insofar as material, states: "That it is necessary that the following described property within the County of Scotts Bluff, Nebraska, and which said property is within ten miles of the corporate limits of said city, * * * be appropriated and condemned for the use of the City of Scottsbluff, Scotts Bluff County, Nebraska, for sewers, water mains, streets and boulevards."

We think what was said in Gembler v. City of Seward,

136 Neb. 196, 285 N. W. 542, is here applicable: " 'It is intended to prevent the practice of joining in the same ordinance incongruous subjects, having no relation or connection with each other, and foreign to the subject embraced in the title. Matters germane to the general subject expressed in its title may be united. * * * The title need not be an index to the act; nor need it state a catalogue of all the powers intended to be bestowed. "An abstract of the law is not required in the title;" nor need the title state the mode in which the subject is treated, nor the means by which the end sought by the enactment is to be reached.' McQuillin, Municipal Ordinances, sec. 141. See, also, 43 C. J. 523."

We find no merit to this contention as the title fully expresses the subject of what is contained in the ordinance itself.

After the assessors filed their report dated July 24, 1947, with the city clerk the mayor and council of the city on August 5, 1947, passed and approved a resolution finding, with respect to each of the tracts taken, that the assessment of damage made therefor to be fair, just, and reasonable and approved all of them, including that for tract No. 6 owned by appellants. This resolution directed the city treasurer to pay all the parties the amounts due them. This he attempted to do but the appellants refused the tender of the amount found due each of them and returned the warrants of the city that had been made out and delivered to each of them. The resolution also provided that in the event any of the parties refused to accept the amount allocated to them that then the amount so refused should be deposited with the city treasurer subject to their order. This the city treasurer did, returning the amount refused to the account set up for this condemnation. This is in accordance with section 16-604, R. S. 1943.

It is appellants' thought that this statutory right to reject or approve is also applicable to the verdict of the jury as well as to the return of the assessors. Such is

not the language of the statute. The statute refers specifically to the assessments made by the board of assessors appointed by the city. If the Legislature had so intended it could very easily have so provided by proper language. The fact that it took up this subject and provided that a city could, in the first instance, either reject or approve the assessment made by the assessors at the next regular meeting of the council after such assessment was returned, clearly indicates that they did not intend to extend it further. In fact, we are of the opinion that the city, once having approved the fixing of damages, is thereafter obligated, if appeal is taken therefrom, to pay whatever may be finally determined to be the damages.

After our mandate affirming the amount of damages fixed by the jury was filed in the office of the clerk of the district court on December 27, 1948, the city, on September 20, 1949, directed the amount thereof to be paid to the clerk of the district court in satisfaction of the judgment of the appellants. This was done on September 21, 1949. On that date there was paid by the city to the clerk of the district court for Scotts Bluff County the sum of $7,153.74. This was the amount of the damages fixed by the jury together with interest to that date and costs of the proceedings. It is apparent from the record that it would have been a futile gesture to have tendered this payment to the appellants.

Section 16-645, R. S. 1943, provides in part as follows: "The final judgment of the court shall be certified back to the city clerk."

We have said: "That money paid to the clerk of the court pursuant to an order or judgment of the court is received by the clerk in his official capacity, is no longer a disputable proposition in this state. Wheeler v. Barker, 51 Nebr., 846; Dirks v. Juel, 59 Nebr., 353." Bantley v. Baker, 61 Neb. 92, 84 N. W. 603.

We are of the opinion that on appeal, after the amount of damages had been definitely and finally determined,

the city can pay to the clerk thereof the full amount owing. It can thereby stop the accruing of interest and complete the proceedings. There is nothing in the statutes relating thereto that provides otherwise. To hold otherwise would defeat the very purpose for which courts are created, that is, to fully and finally decide the rights of parties and provide a means for the final settlement thereof. Here there was a single issue, the damages caused appellants by the taking of their property. When that was finally fixed it was the right of the city to pay it. Appellants had indicated they would refuse any tender thereof and the only way the city could satisfy the obligation was to pay it to the clerk of the court. This it did. When so paid into court the funds are thereafter in the custody of the law awaiting the direction of the parties entitled thereto.

Having come to the conclusion that the trial court was correct in overruling appellants' motion, its action in doing so is affirmed.

AFFIRMED.

JACK WEBBER ET AL., APPELLANTS, V. CITY OF SCOTTSBLUFF, NEBRASKA, APPELLEE.

50 N. W. 2d 541

Filed December 21, 1951. No. 33037.

Judgments. The rule is well settled that a judgment on the merits in the trial of a civil action constitutes an effective bar and estoppel in a subsequent action upon the same claim or demand, not only as to every matter offered and received to sustain or defeat the claim or demand, but also as to any other admissible matter which might have been offered for such purpose.

APPEAL from the district court for Scotts Bluff County: CLAIBOURNE G. PERRY, JUDGE. *Affirmed.*

Mothersead, Wright & Simmons, for appellants.

Jack E. Lyman, for appellee.

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

WENKE, J.

Jack Webber and Mamie Webber commenced this action in the district court for Scotts Bluff County against the city of Scottsbluff. The purpose of the action is to quiet and confirm in them, as against the city, the title to certain land therein described. After trial the action was dismissed. Plaintiffs filed a motion for new trial and, from the overruling thereof, appealed.

This action involves the same land as was involved in the condemnation action brought by the city and considered by this court in the case of Webber v. City of Scottsbluff, 150 Neb. 446, 35 N. W. 2d 110. It is a companion case to No. 33036, the opinion in which is reported at *ante* page 48.

Appellee pleaded that it was the owner of the real estate by reason of and through the condemnation proceedings which it had initiated. In view of that fact, as to all questions that were or could have been raised in the condemnation proceeding, the following principle is here applicable: "The rule is well settled that a judgment on the merits in the trial of a civil action constitutes an effective bar and estoppel in a subsequent action upon the same claim or demand, not only as to every matter offered and received to sustain or defeat the claim or demand, but also as to any other admissible matter which might have been offered for such purpose." Lowe v. Prospect Hill Cemetery Assn., 75 Neb. 85, 106 N. W. 429.

All the contentions here made are the same as those presented in No. 33036. Therein we disposed of the questions raised contrary to appellants' contention and affirmed the district court's ruling. That opinion is here controlling. In view thereof we find the order of dismissal to be correct and it is affirmed.

AFFIRMED.

KENNETH E. SAUTTER, APPELLEE, V. WILLIAM F. POSS, APPELLANT.

50 N. W. 2d 547

Filed December 21, 1951. No. 33038.

1. **New Trial.** An order granting a new trial will be scrutinized here with the same care as one denying a new trial.
2. ———. There is no burden in the sense of a burden of proof upon either party. The burden is upon both parties to assist the court to a correct determination of the question or questions presented.
3. **New Trial: Appeal and Error.** Under this rule if the trial court gave reasons for the granting of a new trial, the duty rests upon the appellant to present those reasons and in appropriate manner support his contentions that those reasons are not sustainable from the record and applicable rules of law. The appellee has then the duty, if he desires, of meeting those contentions. The appellee has the right to point out and submit additional reasons to sustain the trial court's judgment.
4. **Negligence.** Gross negligence, within the meaning of section 39-740, R. S. 1943, means negligence in a very high degree, or the absence of even slight care in the performance of a duty.
5. **Automobiles: Negligence.** The duty of a guest riding in an automobile is to use care in keeping a lookout commensurate with that of an ordinarily prudent person under like circumstances. The guest is not required to use the same degree of care as devolves upon the driver. If the guest perceives danger, or if at certain times and places should anticipate danger, he should warn the driver. Ordinarily, the guest need not watch the road or advise the driver in the management of the car.
6. ———: ———. When an action under the guest statute is based on gross negligence, the comparative negligence statute is applicable.
7. **Negligence.** Contributory negligence is conduct for which plaintiff is responsible, amounting to a breach of the duty which the law imposes upon persons to protect themselves from injury, and which, concurring and cooperating with actionable negligence for which defendant is responsible, contributes to the injury complained of as a proximate cause.
8. **Negligence: Trial.** If the defendant pleads that the plaintiff was guilty of contributory negligence the burden is upon him to prove the defense and this burden does not shift during the trial of the case. However, if the evidence adduced by the plaintiff tends to prove that issue the defendant is entitled to re-

ceive the benefit thereof and the court must instruct the jury to that effect.

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

Lanigan & Ondracek, for appellant.

William J. Gartland, and *Davis & Vogeltanz,* for appellee.

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

WENKE, J.

Kenneth E. Sautter brought this action in the district court for Greeley County against William F. Poss. The purpose of the action is to recover damages resulting from injuries sustained while riding as a guest in the car of defendant. Verdict was returned for defendant and judgment entered thereon. Plaintiff filed a motion for new trial and, from the sustaining thereof, defendant has appealed.

The court, as a basis for granting the new trial, was of the opinion that by instruction No. 7, which it had given on its own motion, it had placed a greater burden of proof on the plaintiff than the law imposes upon him.

The principles applicable in considering this appeal are as follows:

"The district court has the power and is required to consider and determine motions for a new trial by the exercise of its judicial discretion.

"As used in this connection judicial discretion means the application of statutes and legal principles to all of the facts of a case. * * *

"The power of judicial discretion authorizes and requires the court to determine the question as to whether or not a legal reason exists for the granting of a new trial. If a legal reason exists and the complaining party makes his application in writing within the time fixed by statute, the court has no discretion in the matter and

the motion must be sustained. If a legal reason does not exist, the court has no discretion in the matter and the motion must be denied. * * *

"An order granting a new trial will be scrutinized here with the same care as one denying a new trial.

"There is no burden in the sense of a burden of proof upon either party. The burden is upon both parties to assist the court to a correct determination of the question or questions presented.

"Under this rule if the trial court gave reasons for the granting of a new trial, the duty rests upon the appellant to present those reasons and in appropriate manner support his contentions that those reasons are not sustainable from the record and applicable rules of law. The appellee has then the duty, if he desires, of meeting those contentions. The appellee has the right to point out and submit additional reasons to sustain the trial court's judgment." Greenberg v. Fireman's Fund Ins. Co., 150 Neb. 695, 35 N. W. 2d 772.

The accident, which resulted in appellee being injured, happened about midnight on April 21, 1950, at the intersection of State Highways Nos. 92 and 11 in Howard County. At the time appellee and Kenneth Halm were riding as guests in the car of defendant, the car being a 1949 Ford businessman's coupé. They were intending to go to St. Paul, Nebraska. Appellant's car, which he was driving, approached the intersection, referred to as the Midway Corner, from the north on Highway No. 11. After he entered the intersection appellant was not able to complete the turn to the east onto Highway No. 92 toward St. Paul. As a result the car hit a bank at the southeast corner of the intersection, rolled over, and came to rest in an adjacent field.

Appellant questions the sufficiency of the evidence to present a question of fact for the jury. Since appellee was riding as a guest in appellant's car the evidence adduced must be sufficient to support a finding that appellant was guilty of gross negligence in connection

with his operation thereof. See section 39-740, R. S. 1943.

Gross negligence, within the meaning of section 39-740, R. S. 1943, means negligence in a very high degree, or the absence of even slight care in the performance of a duty. Morris v. Erskine, 124 Neb. 754, 248 N. W. 96; James v. Krebek, 142 Neb. 757, 7 N. W. 2d 637; Landrum v. Roddy, 143 Neb. 934, 12 N. W. 2d 82, 149 A. L. R. 1041.

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

As stated in Landrum v. Roddy, *supra:* "We have held in many cases that the question of the existence of gross negligence must be determined from the facts and circumstances in each case."

There is evidence in the record to the effect that on April 21, 1950, the traveled surface of that part of Highways Nos. 11 and 92 here involved was of oil-mat construction and in good condition; that the weather was clear, visibility good, and the highway dry; that Highway No. 11 ran slightly to the east but mostly south; that defendant drove onto Highway No. 11 at Elba; that about five or six miles south of Elba Highway No. 11 intersects with Highway No. 92; that Highway No. 92 runs east and west, St. Paul being on Highway No. 92 about five miles east of the intersection; that about one mile south of Elba appellant was driving his car south at a fast speed; that about three miles south of Elba he was

driving 85 miles an hour; that about half a mile north of the intersection the car was traveling 95 miles an hour; that as the car approached the intersection it did not slow down; that there was a little gravel on the oil-mat surface in the intersection; that there was a sign on Highway No. 11 indicating they were approaching a junction; that appellant was familiar with the intersection as he had been on it before; that when he got to the intersection he slammed on his brakes; that the tires skidded on the oil-mat; that he was not able to make the turn to the east onto Highway No. 92 because of speed; that the car skidded across the intersection and hit a bank at the southeast corner thereof; and that the car rolled over injuring all those in it, which included appellee.

We conclude that under these facts, if believed by the jury, it could properly find appellant was guilty of gross negligence in the operation of his car. The evidence therefore presents a question for the jury. For a comparable situation see Landrum v. Roddy, *supra.*

That part of instruction No. 7 given by the court on its own motion, which is here material, is as follows: "And in this case if you find from a prepondence (preponderance) of the (evidence) that the defendant was grossly negligent in driving his car at an excessive and dangerous rate of speed at the time and place of the accident and that the plaintiff made no protest or objection to the manner of defendant's driving, then the plaintiff cannot recover, ever (even) though you should further find that the accident and injuries to the plaintiff were the proximate result of the defendant's operating his automobile at an excessive rate of speed. If, however, you find from a prepondence (preponderance) of the evidence that the plaintiff did protest at the speed at which defendant was operating his automobile and that he requested the defendant to reduce said speed and that he warned the defendant of the fact that they were approaching the intersection of Highway 11 and

92 and that defendant paid no heed to such warnings and you further find that defendant was grossly negligent in the operation of his automobile and that such negligence was the proximate cause of the accident, then the plaintiff would be entitled to a verdict for such damage as has been shown by the prepondence (preponderance) of the evidence he has sustained."

This instruction had the effect of determining, as a matter of law, that under the situation disclosed by the evidence appellee was required to protest or object to the manner of appellant's driving. It then placed upon appellee, in order for him to recover, not only the burden of proving that appellant was grossly negligent in the operation of his car and that such negligence was the proximate cause of the accident but also the burden of proving that he protested the speed at which the car was being driven; that he requested appellant to reduce the speed thereof; and that he warned appellant of the fact that they were approaching the intersection of Highways Nos. 11 and 92. Such is neither the legal effect of the evidence produced nor the proper party upon whom to place the burden of showing appellee failed to perform any duty he might have as a guest under the facts and circumstances here established.

"The duty of a guest riding in an automobile is to use care in keeping a lookout commensurate with that of an ordinarily prudent person under like circumstances. The guest is not required to use the same degree of care as devolves upon the driver. If the guest perceives danger, or if at certain times and places should anticipate danger, he should warn the driver. Ordinarily, the guest need not watch the road or advise the driver in the management of the car." Costello v. Hild, 152 Neb. 1, 40 N. W. 2d 228. See, also, Fulcher v. Ike, 142 Neb. 418, 6 N. W. 2d 610; Hamblen v. Steckley, 148 Neb. 283, 27 N. W. 2d 178.

The first paragraph of instruction No. 7 properly informed the jury of this duty.

"When an action under the guest statute is based on gross negligence, the comparative negligence statute is applicable." Landrum v. Roddy, *supra.*

And, "* * * whether or not the conduct of the appellee is such as to defeat any right to recover, to which she may be entitled, is one of contributory negligence * * *." Landrum v. Roddy, *supra.* See, also, Fulcher v. Ike, *supra;* Hendrix v. Vana, 153 Neb. 531, 45 N. W. 2d 429; 61 C. J. S., Motor Vehicles, § 489, p. 107.

"Contributory negligence is conduct for which plaintiff is responsible, amounting to a breach of the duty which the law imposes upon persons to protect themselves from injury, and which, concurring and cooperating with actionable negligence for which defendant is responsible, contributes to the injury complained of as a proximate cause." Mundy v. Davis, 154 Neb. 423, 48 N. W. 2d 394.

If the evidence presents a question of fact for the jury then the following is applicable as appellant pleaded that appellee was guilty of contributory negligence: "If the defendant pleads that the plaintiff was guilty of contributory negligence the burden is upon him to prove that defense and this burden does not shift during the trial of the case. However, if the evidence adduced by the plaintiff tends to prove that issue the defendant is entitled to receive the benefit thereof and the court must instruct the jury to that effect." Mundy v. Davis, *supra.*

Appellee testified that after they had started south from Elba on Highway No. 11 at a point about a mile from Elba when appellant was "going pretty fast" he said to appellant, "Bill, slow up, we're in no hurry"; that about three miles south of Elba, when the speedometer showed he was driving 85 miles an hour, he again told appellant to slow up as there was no hurry; that Kenneth Halm, the other guest, made the same request at that time; that at a point about a half mile north of the intersection he noticed by the speedometer that the car

was going 95 miles an hour and at that time again told appellant to slow up; and that when he saw the junction sign he shouted, "Slow up Bill, here is the corner." Kenneth Halm corroborates this story and said that when he saw the junction sign he also shouted for appellant to slow up for the corner. Appellant denied these protests and warnings were made and testified the only warning appellee or Halm made was just before the car entered the intersection when one or both of them said to put on his brakes.

Whether, under the circumstances here, appellee should have made protests or given warnings; whether or not protests and warnings were made; and whether or not if he should have done so and failed such failure was a proximate cause of the accident, are within the province of a jury's functions. We find they present questions for a jury.

As to questions raised by appellee we find exhibit No. 10 was properly admitted, its weight being for the jury.

As to instruction No. 9, since it relates to instruction No. 8 defining statutory duties of a person operating a car on a highway, it should not be in language relating it to "either of the parties to this action." Since appellee was a guest, any negligence of the appellant relating to such operation is not imputable to him.

In view of the foregoing we find the granting of a new trial was proper and the order of the trial court to that effect is affirmed.

AFFIRMED.

JOE SPREITZER, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.

50 N. W. 2d 516

Filed December 21, 1951. No. 33051.

1. **Indictments and Informations.** An information which apprises the defendant, with reasonable certainty, of the accusation against him so that he may prepare a defense and plead the judgment as a bar to subsequent prosecution for the same offense, meets fundamental purposes of information, as well as constitutional requirements.
2. **Courts: Appeal and Error.** Whenever the facts stated in the record are consistent with the duty of the court, and nothing is shown to establish a contrary theory, it will be assumed that the court acted properly and all things were rightly done.
3. **Larceny.** In a prosecution for larceny, proof of the value of the property stolen must be made by at least one witness affirmatively shown to possess knowledge of the value concerning which he is called upon to give evidence.
4. **Juries: Appeal and Error.** It is not the province of this court to resolve conflicts in the evidence in law actions, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Those matters are for the jury.
5. **Criminal Law: Appeal and Error.** In a criminal case, this court will not interfere with a verdict of guilty based upon the evidence, unless it is so lacking in probative force that we can say, as a matter of law, that it is insufficient to support a finding of guilt beyond a reasonable doubt.
6. **Trial.** The invalidity of a quotient verdict depends not upon the method of arriving at the verdict or the result reached but on a previous agreement by all of the jurors to be bound by the result of the quotient process. The test to be applied in determining the validity of a verdict which is attacked as a quotient verdict is whether the jury agreed beforehand to be bound by the result reached; the existence of such agreement is the test in both criminal prosecutions and civil actions.
7. **Trial: Juries.** No affidavit, deposition, or other sworn statement of a juror will be received to impeach the verdict, to explain it, to show on what grounds it was rendered, or to show a mistake in it; or that they misunderstood the charge of the court; or that they otherwise mistook the law; or the result of their finding.
8. ———: ———. An affidavit of a juror as to what items the jury allowed or disallowed in computing the amount due, or what the jury believed they had a right to do under the in-

structions, is incompetent. Such matters are commonly held to inhere in the verdict.

9. **Trial: Criminal Law.** It is proper to charge, and error to refuse to charge, that a reasonable doubt may arise either from the evidence or from a want of evidence, and that the absence of sufficiently satisfying evidence may be a ground for a reasonable doubt of defendant's guilt.

10. **Trial.** It is elementary that in passing upon the validity of part of an instruction, it must be considered not only in the light of all the language used in the particular instruction of which it is a part, but also all other instructions given by the trial court.

ERROR to the district court for Sarpy County: THOMAS E. DUNBAR, JUDGE. *Affirmed.*

Grenville P. North and *Francis M. Casey,* for plaintiff in error.

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

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

CHAPPELL, J.

A jury found plaintiff in error, hereinafter called defendant, guilty of grand larceny. His motion for new trial was overruled, and the trial court sentenced him to be imprisoned in the Nebraska State Penitentiary for two years. Therefrom he prosecuted error to this court, assigning substantially: (1) That the information did not charge an offense under the statute; (2) that the trial court erred in failing and refusing to give him six peremptory challenges; (3) that the verdict was not sustained by the evidence but was contrary thereto and contrary to law; (4) that the jury was guilty of prejudicial misconduct by the manner in which it arrived at the value of the property allegedly taken; and (5) that the trial court erroneously failed to instruct on the law applicable to the case, and in giving instructions Nos. 1, 4, 5, 6, and 13. We conclude that the assignments have no merit.

The statute involved, section 28-506, R. R. S. 1943, provides: "Whoever steals any money or goods and chattels of any kind whatever, whether the same be wholly money, or wholly in other property, or partly in money and partly in other property, the property of another, of the value of thirty-five dollars or upwards * * * shall be imprisoned in the penitentiary not more than seven years nor less than one year."

In the light thereof, we have examined the information and conclude that it did sufficiently charge the offense of grand larceny. The information, insofar as important here, charged that on September 8, 1950, contrary to the form of the statutes in such cases made and provided, defendant "did unlawfully, wrongfully and feloniously and with the intent to steal, did take and carry away from the premises of the Union Pacific Railroad Company at Higgins Crossing in said County of Sarpy, State of Nebraska, property of value, to-wit: Fourteen (14) unused railroad cross-ties of the value of $35.00 and upwards, and being then and there the property of the said Union Pacific Railroad Company."

In Hans v. State, 147 Neb. 67, 22 N. W. 2d 385, this court held: "In charging the commission of an offense in an information, it is not necessary that the exact words of the statute be used, provided the words employed are the equivalent in meaning of those contained in the statutes.

"The court will give the words used in the information their ordinary and commonly accepted meaning, and when viewed in this light, if the words employed mean the same thing as those found in the language of the statute denouncing the offense, the information will be upheld."

In Pauli v. State, 151 Neb. 385, 37 N. W. 2d 717, it was held: "An information which apprises the defendant, with reasonable certainty, of the accusation against him so that he may prepare a defense and plead the judgment as a bar to subsequent prosecution for the same

offense, meets fundamental purposes of information, as well as constitutional requirements."

Only recently this court reaffirmed the rule that: "A complaint or information is fatally defective only if its allegations can be true and still not charge a crime." Phillips v. State, 154 Neb. 790, 49 N. W. 2d 698.

The foregoing rules have application here, and affirm the sufficiency of the information.

For the first time, and that on motion for new trial, defendant complained that the trial court erroneously failed and refused to allow defendant six peremptory challenges. In that respect the record discloses as follows: "MONDAY, MARCH 19th, 1951, 10:00 A. M.: (Jury names drawn by the Clerk, examination for cause by attorneys for Plaintiff and Defendant.) MONDAY, MARCH 19th, 1951, 1:30 P. M.: (Impanelling of jury continued, and challenges exercised by Plaintiff and Defendant.) * * * Jury empaneled and sworn at 2:24 P. M."

It does not appear any place in the record that the court failed or refused to give defendant six peremptory challenges or that defendant requested the same. Rather, the record discloses that he exercised two such challenges, then waived the third, and, without making any request or taking any exceptions, presumptively waived the other three. If the defendant did not exercise all of them, the court was not at fault. It can only be concluded that defendant was satisfied with the jury until it found him guilty, and then, as an afterthought, raised the question without anything in the record to sustain it.

As stated in Nash v. State, 110 Neb. 712, 194 N. W. 869: "The record shows that the jury were duly impaneled and sworn, and, nothing appearing to the contrary, the presumption is that the jury were properly and lawfully selected. * * * The fact appearing in the record that no exceptions were taken to the jury by the defendants indicates that it was a fair and impartial jury, such as the Constitution guarantees to a party.

The defendants were tried by a jury to which they took no exceptions, and this in itself should constitute a waiver of further peremptory challenges."

Also, as held in Hampton v. State, 148 Neb. 574, 28 N. W. 2d 322: "Whenever the facts stated in the record are consistent with the duty of the court, and nothing is shown to establish a contrary theory, it will be assumed that the court acted properly and all things were rightly done." We conclude that the second assignment of error has no merit.

We turn then to the third assignment, relating to insufficiency of the evidence. In that connection, the record discloses that eye witnesses identified defendant as one of several men who, at the time and place alleged, loaded the 14 new and unused cross ties belonging to the Union Pacific Railroad in a truck identified by description and license number, and hauled them away without the owner's permission. In fact, defendant was identified as the driver of the truck. The ties were soon thereafter located at a feed lot just south of Omaha, on the Fort Crook road, where they were being used by the feeder to build a fence and loading chute. Such feeder, as a witness for the State, admitted that in accord with a prior arrangement, he bought the ties from defendant, paying him therefor the sum of $14. Such witness testified on cross-examination, but over objection by the State, and without any foundation, that on September 8, 1950, he considered that $14 was their fair value. There was competent evidence that defendant admitted to an investigator that, using his own truck, he hauled the ties to the feeder and sold them to him, but claimed that he had overtaken a panel truck driver under a highway overpass and purchased the ties from such truck driver, without knowing who he was or who owned the ties.

The ties were new creosoted railroad cross ties, designed for, purchased by, and belonging to the Union Pacific Railroad Company. They were identified by

such railroad's particular brand or markings on the ties. They were not sold to the public but only to railroads or for the construction of adjoining railroad side tracks. The assistant general purchasing agent of the Union Pacific Railroad, who had served in that capacity for 23 years, and whose duties, among others, was to purchase ties for that railroad, testified that in his opinion the value of the ties when taken was $4 each, which made a total of $56. Contrary to defendant's contention, there was ample and sufficient foundation laid for the admission of such testimony by that witness. Defendant adduced no evidence in his own behalf.

The jury fixed the value of the property as $35. Such value was a question of fact for its determination, and examination of the record discloses that under the evidence it could as well have found that the property was worth more, up to $56.

In Edmonds v. State, 42 Neb. 684, 60 N. W. 957, this court held: "In a prosecution for larceny, proof of the value of the property stolen must be made by at least one witness affirmatively shown to possess knowledge of the value concerning which he is called upon to give evidence. Following Brooks v. State, 28 Neb., 389." That rule was complied with in every respect in the case at bar.

In Clark v. State, 151 Neb. 348, 37 N. W. 2d 601, this court held: "It is not the province of this court to resolve conflicts in the evidence in law actions, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Those matters are for the jury.

"Where there is substantial evidence sustaining the jury's verdict, it will not be set aside."

In Smith v. State, 153 Neb. 308, 44 N. W. 2d 497, it was said: "The credibility of the witnesses and the weight of their testimony was for the jury to determine and the decision of the jury cannot be disturbed unless

it is clearly wrong. Morrow v. State, 146 Neb. 601, 20 N. W. 2d 602."

It was recently reaffirmed in Phillips v. State, *supra,* that: "In a criminal case, this court will not interfere with a verdict of guilty based upon the evidence, unless it is so lacking in probative force that we can say, as a matter of law, that it is insufficient to support a finding of guilt beyond a reasonable doubt."

We conclude that the evidence adduced by the State was amply sufficient to sustain the verdict.

Defendant contended that the jury was guilty of misconduct because it erroneously arrived at the value of the property by adding the evidence given by the two witnesses regarding value, and dividing that sum by two, thereby arriving at a quotient verdict. Upon motion for new trial the affidavits of two jurors so indicating were offered in evidence but refused. We conclude that the trial court properly refused to admit or consider them. Contrary to defendant's contention, there is no showing in this record which would justify any finding that the jury returned a quotient verdict upon the question of value. As stated in 53 Am. Jur., Trial, § 1031, p. 712: "The invalidity of quotient verdicts depends not upon the method of arriving at the verdict, or the result reached, but on the previous agreement to be bound by the result of the quotient process. The test to be applied in determining the validity of a verdict which is attacked as a quotient verdict is whether the jury agreed beforehand to be bound by the result reached; the existence of such agreement is the test in both criminal prosecutions and civil actions."

The applicable rule here is that: " '* * * no affidavit, deposition, or other sworn statement of a juror will be received to impeach the verdict, to explain it, to show on what grounds it was rendered, or to show a mistake in it; or that they misunderstood the charge of the court; or that they otherwise mistook the law, or the result of their finding.' " Hamblin v. State, 81 Neb. 148, 115 N.

W. 850. See, also, Schindler v. Mulhair, 132 Neb. 809, 273 N. W. 217, and Bonacci v. Cerra, 134 Neb. 588, 279 N. W. 314, wherein it was held: " 'An affidavit of a juror as to what items the jury allowed or disallowed in computing the amount due, or what the jury believed they had a right to do under the instructions, is incompetent. Such matters are commonly held to inhere in the verdict.' Palmer v. Parmele, 104 Neb. 30, 175 N. W. 649."

Defendant argued that the trial court erred when it failed to instruct on the law applicable to the case. In that connection, defendant argued that the trial court should have given the jury some measuring stick to use in determining the value of the property allegedly stolen. Instruction No. 12, told the jury: "If you find the defendant guilty beyond a reasonable doubt as charged in the information, it is your province and duty to ascertain and determine the value of the property described in the information and alleged to have been stolen, as shown by the evidence beyond a reasonable doubt to have been taken as charged in the information, and you will state in your verdict such value of the property so taken, although it may not literally be the same value as set forth in the information." In that respect, the court complied with section 29-2026, R. R. S. 1943, which provides: "When the indictment charges an offense against the property of another by larceny * * * the jury, on conviction, shall ascertain and declare in their verdict the value of the property stolen, * * *."

The information submitted by instruction No. 1 alleged that on September 8, 1950, the property had a value of $35 and upwards. That was the only date involved in the case. All of the material evidence related to that date, and its fair value as of that date. The jury could not have been misled if they determined the value of the property from the evidence adduced, as they were required to do, and the mere failure to use the words "fair and reasonable" in instruction No. 12 could not have been error prejudicial to defendant.

Defendant assigned that the trial court erred in giving instructions Nos. 1, 4, 5, 6, and 13. The complaint with reference to instructions Nos. 1, 5, and 6 was predicated upon the contention that the information did not charge a crime, which we have heretofore concluded has no merit. Therefore, from an examination of the instructions and previous discussion it is apparent that such instructions clearly and correctly stated the law in every respect.

Instruction No. 4 told the jury in part: "By the words 'reasonable doubt' as used in these instructions is meant an actual, substantial doubt of guilt arising in your minds from the evidence *or want of evidence in the case.*" (Italics supplied.) Defendant argued that the italicized words were prejudicial to defendant since he did not adduce any evidence in his own behalf. The contention has no merit. In Trimble v. State, 118 Neb. 267, 224 N. W. 274, this court said: " 'It is proper to charge, and error to refuse to charge, that a reasonable doubt may arise either from the evidence or from a want of the evidence, and that the absence of sufficiently satisfying evidence may be a ground for a reasonable doubt of defendant's guilt.' " See, also, McIntosh v. State, 105 Neb. 328, 180 N. W. 573, 12 A. L. R. 798, and Goemann v. State, 100 Neb. 772, 161 N. W. 421, together with cases cited therein, approving the very instruction here involved.

Instruction No. 13 read in part: "In determining the credibility and weight to be given to the testimony of witnesses, you should take into consideration their interest, if any, in the result of this case; their conduct and demeanor while testifying; their opportunities for seeing and knowing the things about which they testify; and the *probability or improbability* of their testimony." (Italics supplied.) Defendant complained that the words "probability or improbability" used therein, permitted the jury to convict on probable cause, instead of permitting it to determine that which was true and that

which was not true. No authority was cited to support such contention. This court has on a number of occasions approved almost identical instructions. They are correlated in I Corcoran, Nebraska Instructions to Juries (2d ed.), sections 1432, 1433, and 1434, pages 369 and 370.

As generally understood, the words "probability or improbability of their testimony" mean whether their testimony has the appearance of truth or falsehood, that is, whether it is credible or incredible, believable or unbelievable.

As stated in Mulder v. State, 152 Neb. 795, 42 N. W. 2d 858: "It is elementary that in passing upon the validity of part of an instruction, it must be considered not only in the light of all the language used in the particular instruction of which it is a part, but also all other instructions given by the trial court." In the light thereof, we have examined all of the instructions given and conclude that they properly and fairly submitted the issues to the jury.

Other matters are discussed in defendant's brief, but they are entirely without merit, and to discuss them would serve no purpose except to unduly prolong this opinion.

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

AFFIRMED.

BANK OF KEYSTONE, A CORPORATION, APPELLANT, V. IVAN L. KAYTON, APPELLEE.

50 N. W. 2d 511

Filed December 21, 1951. No. 33061.

1 **Automobiles.** The Certificate of Title Act was enacted for the protection of owners of motor vehicles, those holding liens thereon, and the public.

2. **Automobiles: Chattel Mortgages.** The Certificate of Title Act

eliminates the practice of filing and recording chattel mortgages on motor vehicles in the chattel mortgage records, and substitutes the recording of such upon the certificate of title itself.

3. **Automobiles: Liens.** One holding a lien upon a motor vehicle must, insofar as he can reasonably do so, protect himself and others thereafter dealing in good faith, by complying and requiring compliance with applicable laws concerning certificates of title to motor vehicles.
4. ———: ———. Under the act relating to certificates of title to motor vehicles, no valid lien can be asserted against a motor vehicle unless it is disclosed by a valid certificate of title regularly issued by the county clerk of the county in which the applicant resides.
5. **Replevin.** The gist of a replevin action is the unlawful detention of the property at the inception of the suit and the rights of the parties with respect to possession of the property at that time.
6. ———. The burden is on the plaintiff in replevin to establish facts necessary for him to recover, and these must be shown to have existed at the time the action was commenced.
7. ———. The law requires that a plaintiff in a replevin case must recover on the strength of his right in or to the property and not upon any weakness of the interest of the defendant therein.

APPEAL from the district court for Deuel County: JOHN H. KUNS, JUDGE. *Affirmed.*

Firmin Q. Feltz and *G. B. Hastings,* for appellant.

Dallas A. Clouse, for appellee.

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

MESSMORE, J.

This is an action in replevin brought by the Bank of Keystone, plaintiff, against Ivan L. Kayton, defendant, in the district court for Deuel County to obtain possession of a certain 1948 Dodge club coupé or the value of the same if not returned, and for damages and costs. This action is based on a chattel mortgage executed and delivered to the plaintiff bank by John A. Harney, a duly licensed automobile dealer.

The action proceeded to trial before a jury. Upon motion made by the defendant to dismiss the plaintiff's petition, based on the plaintiff's failure to produce sufficient evidence to make a case for the jury, the jury was discharged and the defendant's motion to dismiss was sustained.

The trial court, in substance, made the following findings: (1) That the defendant was a creditor of John A. Harney, a duly licensed automobile dealer; (2) that the defendant had been in possession of the 1948 Dodge club coupé at all times until the same was taken from him by virtue of the action in replevin; (3) that the chattel mortgage dated August 30, 1950, executed and delivered to the plaintiff bank by John A. Harney was not endorsed as a lien on the certificate of title covering the vehicle, nor was the same endorsed upon any certificate of title; (4) that under the terms of section 60-105, R. S. Supp., 1949, and section 60-110, R. S. 1943, no lien was created against defendant even though title had passed from the defendant to John A. Harney; and (5) that defendant was entitled to have the right of possession of the vehicle in question at the commencement of the suit, the value of the same being $800, damages sustained by the detention of the automobile being nominal.

The trial court entered judgment on the findings that defendant was entitled to the immediate possession of the Dodge club coupé or the value of the same in the amount of $800, damages in the sum of one cent, and costs of the action.

The plaintiff filed a motion for new trial. From the order overruling the motion, plaintiff appeals.

For convenience we will refer to the plaintiff as the bank, to the defendant, Ivan L. Kayton, as defendant, and to the automobile dealer John A. Harney as Harney.

It appears from the record that Harney was a duly licensed automobile dealer having a Packard agency in the city of Ogallala. He dealt in both new and used

automobiles. On July 25, 1950, by written contract, Harney sold to the defendant, who resides near Chappell, a new 1950 Packard club sedan, the purchase price being $2,915, with a down payment of $100 by check which he cashed. The defendant was given a trade-in allowance for a 1948 Dodge club coupé which amounted to $1,185, making the total down payment $1,285. Upon delivery of the Packard the defendant was to pay $630 in cash and to give Harney a note for $1,000 with interest at 8 percent due in 90 days. On August 3, 1950, the defendant mailed the certificate of title to the Dodge club coupé to Harney. On August 30, 1950, Harney's bookkeeper, making a business transaction for him with the bank, presented the bank with the following instruments: An installment note executed and delivered by Harney to the bank in the amount of $1,005, payable on October 30, 1950; a chattel mortgage which included therein the 1948 Dodge club coupé as security; two certificates of title; and a power of attorney. One of the certificates of title covered the Dodge automobile here involved. On the reverse side of this certificate of title was an assignment of the Dodge club coupé to Harney, bearing date of August 8, 1950. The reassignment appearing on the certificate of title was in blank, not acknowledged, but signed by Harney.

On July 25, 1950, a power of attorney appointing Harney lawful attorney to assign a certificate of title covering the Dodge club coupé or to make application for a certificate of title was signed by the defendant and delivered to Harney.

The power of attorney and certificate above referred to were in the possession of the bank until introduced in evidence in this case, together with the note and mortgage above referred to. At the time of trial there was due on the debt of Harney to the bank $805.

It was represented to the bank at the time the transaction was had with Harney that the Dodge club coupé was in his possession and free of encumbrances. The

bank did not verify this fact for the reason that it had transacted business satisfactorily with Harney for a period of two years.

Harney died on September 3, 1950. He was insolvent at the time. On September 6, 1950, the plaintiff filed its chattel mortgage in Keith County.

The plaintiff first learned of the location of the Dodge club coupé on September 6, 1950, and that it was in the possession of the defendant. The defendant went to the bank looking for his title on or about September 6, 1950, and asked to see the papers with reference to the transaction had between the parties. He was shown the note, the chattel mortgage, the certificate of title, and the power of attorney. He told the bankers that there was no use denying that his signature appeared on some of the papers. Later in his testimony he denied that he had signed the power of attorney or made any assignment of the title to the vehicle to Harney.

The defendant also testified that Harney was not able to furnish him the 1950 Packard for which he had contracted, but orally agreed to furnish him a 1951 Packard of the same model and on the same terms. The defendant was to mail to Harney the certificate of title to the Dodge automobile which he did on or about August 3, 1950. There was nothing said about a power of attorney. When the transaction was had with Harney by the defendant, he drove the Dodge coupé home and retained the possession of it awaiting delivery of the Packard. It was taken from him in this replevin action instituted on October 16, 1950.

The plaintiff's assignments of error may be summarized as follows: (1) The trial court erred in dismissing the plaintiff's petition at the conclusion of the evidence; (2) the trial court erred in finding the defendant was a creditor of Harney; and (3) the judgment entered by the trial court is contrary to the evidence and the law.

A motion for a directed verdict or dismissal must,

for the purpose of a decision thereon, be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed, and 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 facts in evidence. See, Moncrief v. Interstate Transit Lines, 129 Neb. 168, 261 N. W. 163; Robinson v. Central Neb. Public Power & Irrigation Dist., 146 Neb. 534, 20 N. W. 2d 509.

We bear in mind the foregoing rule in analyzing this appeal.

The trial court found, and properly so, under the factual situation presented that the title to the 1948 Dodge club coupé passed from the defendant to Harney, the licensed dealer.

This appeal involves the act relating to title and transfer of motor vehicles, and provides for the recording of liens and encumbrances on motor vehicles on a certificate of title. This act is found in Chapter 60, article 1, R. S. 1943, and amendments thereto. Certain sections of the act were amended by the 1945 and 1949 Legislatures. See Laws 1945, c. 140, p. 442; Laws 1949, c. 93, p. 249; Laws 1949, c. 179, p. 505.

In support of its assignments of error the plaintiff contends that the provisions of the Certificate of Title Act do not apply to motor vehicles acquired by licensed automobile dealers in this state until such time as the dealer sells such motor vehicle, or vehicles, to a general purchaser or user.

In making reference to certain sections of the motor vehicle act we set forth the material parts of such sections as may be necessary.

Section 60-102, R. S. Supp., 1949, provides that the provisions of this act shall apply to motor vehicles required to be registered under the provisions of sections 60-301 to 60-306, then this section makes exceptions which are not applicable here.

Section 60-302, R. S. Supp., 1949, provides: "Every owner of a motor vehicle shall, for each motor vehicle owned, except as otherwise expressly provided, make application for registration * * *."

The language "otherwise expressly provided" appears in section 60-320, R. S. Supp., 1949, which provides in part: "Each * * * licensed dealer in motor vehicles, doing business in this state, may, in lieu of the registering of each motor vehicle which he owns of a type otherwise required to be registered, * * * operate or move the same upon the streets and highways of this state solely for purposes of transporting, testing, demonstrating, or use in the ordinary course * * * of his business as a * * * dealer, * * * or sell the same without registering each such vehicle upon the condition that any such vehicle display thereon, in the manner prescribed in section 60-323, dealer number plates as provided herein."

The plaintiff makes reference to section 60-104, R. S. Supp., 1949, which provides in part: "No person, except as provided in section 60-103, shall sell or otherwise dispose of a motor vehicle, * * * without delivering to the purchaser or transferee thereof a certificate of title with such assignment thereon as may be necessary to show title in the purchaser, * * *."

Reference is made to section 60-106, R. S. 1943. This section provides for certificate of title, application for, form, evidence necessary, and the duties of the county clerks. The part referred to by the plaintiff provides: "* * * Provided, licensed dealers need not apply for certificates of title for motor vehicles in stock or acquired for stock purposes, but upon transfer of the same they shall give the transferee a reassignment of the certificate of title on such motor vehicle, * * *."

Reference is made to section 60-105, R. S. Supp., 1949, which provides in part: "No person, except as provided in section 60-110, acquiring a motor vehicle, * * * from the owner thereof, whether such owner be a * * * dealer * * * shall acquire any right, title, claim, or in-

terest in or to such motor vehicle, * * * until he shall have had issued to him a certificate of title to such motor vehicle, * * * or delivered to him a manufacturer's or importer's certificate for the same; nor shall any waiver or estoppel operate in favor of such person against a person having possession of such certificate of title * * * for a valuable consideration. No court in any case at law or in equity shall recognize the right, title, claim or interest of any person in or to any motor vehicle, * * * sold or disposed of, or mortgaged or encumbered, unless evidenced by a certificate of title or manufacturer's or importer's certificate duly issued, in accordance with the provisions of this act."

The plaintiff asserts, in view of the foregoing-cited sections of the act, that there is no provision in the act requiring a licensed automobile dealer to procure a new title in his name to or for any motor vehicle acquired by him; that section 60-105, R. S. Supp., 1949, applies only to individuals such as purchasers of automobiles from licensed dealers, and not to licensed dealers; and section 60-110, R. S. 1943, is inapplicable because of the distinction in the various parts of the Certificate of Title Act referring to dealers and others as heretofore indicated.

We are in accord with the plaintiff's reasoning that from the time a licensed automobile dealer acquires a used motor vehicle and has the title assigned and delivered to him by the seller, he is not required to obtain a new certificate of title in his name. When he sells such automobile, then a certificate of title is procured for the purchaser. However, we are not in accord with the plaintiff's reasoning that a licensed automobile dealer is exempt from the Certificate of Title Act insofar as mortgages on motor vehicles are concerned. Section 60-105, R. S. Supp., 1949, and section 60-110, R. S. 1943, of the act apply to dealers as well as to general purchasers or others that may be concerned under the provisions of the act.

We make reference to section 60-110, R. S. 1943, which provides in part that sections 36-207, 36-208, 36-301, 36-302, and 36-303 shall never be construed to apply to or to permit or require the deposit, filing, or other record whatsoever of a chattel mortgage, conveyance intended to operate as a mortgage, trust receipt, conditional sales contract or similar instrument, or any copy of the same covering a motor vehicle.

In Securities Credit Corp. v. Pindell, 153 Neb. 298, 44 N. W. 2d 501, this court held: "The Certificate of Title Act eliminates the practice of filing and recording chattel mortgages on motor vehicles in the chattel mortgage records, and substitutes the recording of such upon the certificate of title itself. * * * Under the act relating to certificates of title to motor vehicles, no valid lien can be asserted against a motor vehicle unless it is disclosed by a valid certificate of title regularly issued by the county clerk of the county in which the applicant resides."

The statute relating to certificates of title to motor vehicles was enacted for the protection of owners of such vehicles, those holding liens thereon, and the public, and one holding a lien upon a motor vehicle must, insofar as he can reasonably do so, protect himself and others thereafter dealing in good faith, by complying and requiring compliance with applicable laws concerning certificates of title to motor vehicles. See Nichols v. Bogda Motors, Inc., 118 Ind. App. 156, 77 N. E. 2d 905.

A holder of a mortgage lien on an automobile owes a duty to see that the mortgagor has complied with the Certificate of Title Act in order to protect such lien, as well as innocent purchasers of automobiles. Securities Credit Corp. v. Pindell, *supra.*

The plaintiff was in a position so that it could reasonably protect its lien by complying with the Certificate of Title Act. It had possession of the certificate of title a reasonable length of time to have its lien noted thereon but instead filed it under the chattel mortgage records.

The following language from Loyal's Auto Exchange, Inc. v. Munch, 153 Neb. 628, 45 N. W. 2d 913, is appropriate: "As stated in Crawford Finance Co. v. Derby, 63 Ohio App. 50, 25 N. E. 2d 306: 'On the other hand, from the whole scheme of the Certificate of Title Act, especially the sections quoted above, it is apparent that the Legislature intended to set up one and only one method by which liens on or titles to a motor vehicle could be acquired. * * *' "

While in the cited case reference was made to the sections quoted therein which are sections 60-104 and 60-105, R. S. Supp., 1949, the foregoing language clearly indicates the method by which a lien on a motor vehicle under the act should be asserted, as provided for in section 60-110, R. S. 1943, that is the method prescribed in the act.

In the case of Alliance Loan & Investment Co. v. Morgan, 154 Neb. 745, 49 N. W. 2d 593, this court held: "A chattel mortgage on a motor vehicle is void as to creditors of the mortgagor unless a notation thereof is made on the face of the certificate of title to the vehicle as required by the applicable statute of the state," which is section 60-110, R. S. 1943. The court further said that the plaintiff could recover only upon the strength of its interest in the property involved and not on any weakness in the interest of the defendant in the property, citing Loyal's Auto Exchange, Inc. v. Munch, *supra*. The burden is on the plaintiff in replevin to establish facts necessary for him to recover, and these must be shown to have existed at the time the action was commenced. The gist of a replevin action is the unlawful detention of the property at the inception of the suit and the rights of the parties with respect to possession of the property at that time.

There was a failure of the plaintiff to produce any evidence of any lien or any interest in the Dodge club coupé as against the defendant at the commencement of this action.

We deem other assignments of error unnecessary to discuss.

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

AFFIRMED.

GUY A. HAMILTON, COUNTY JUDGE OF FILLMORE COUNTY, NEBRASKA, APPELLEE, V. WILLARD H. FOSTER, COUNTY CLERK OF FILLMORE COUNTY, NEBRASKA, ET AL., APPELLANTS.

50 N. W. 2d 542

Filed December 21, 1951. No. 33089.

Officers: Constitutional Law. When a statute enacted and in effect prior to the election of a public officer fixes the compensation of such officer upon the basis of population and an increase or decrease in compensation occurs during the officer's term because of a change in population after his election, such increase or decrease in compensation does not violate our constitutional provision that the compensation of a public officer shall not be increased or diminished during his term.

APPEAL from the district court for Fillmore County: STANLEY BARTOS, JUDGE. *Reversed and remanded with directions.*

John C. Gewacke, for appellants.

Guy A. Hamilton, pro se.

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

WENKE, J.

Guy A. Hamilton, as the elected, qualified, and acting county judge of Fillmore County, brought this action in the district court for Fillmore County against the county of Fillmore seeking a declaratory judgment to determine his rights as to salary during his present term of office, particularly since January 1, 1951. The trial court found that when plaintiff took office on January

6, 1949, Fillmore County was classified under section 23-1101, R. S. 1943, as amended by Laws 1947, c. 62, § 4, p. 199, as class (4) for the purpose of fixing the salaries of its county officers; that section 23-1105, R. S. 1943, as amended by Laws 1947, c. 70, § 4, p. 224, then in effect, provided a county judge in a class (4) county should be paid an annual salary of $2,900; that since January 6, 1949, and during plaintiff's present term of office, the population of the county had decreased so as to make it a class (3) county for the purpose of fixing the salaries of county officers; that such change in population did not, because of the provisions of the Nebraska Constitution, affect plaintiff's salary; and that plaintiff is entitled to be paid a salary of $2,900 during all of his present term of office. The court, in view thereof, awarded judgment against the county accordingly. Defendant filed a motion for new trial and, from the overruling thereof, has appealed.

The facts are stipulated and not in dispute. Appellee was elected county judge of Fillmore County for a term of four years at the general election held on November 2, 1948. He qualified for the office and has been acting in that capacity since his present term began on January 6, 1949.

Prior to November 2, 1948, the board of supervisors of Fillmore County had, by resolution adopted July 28, 1948, determined the population of the county to be more than 13,000 or class (4) for the purpose of fixing county officers' salaries under section 23-1101, R. S. 1943, as amended by Laws 1947, c. 62, § 4, p. 199. Under this classification the holder of the office of county judge was entitled to receive an annual salary of $2,900 and appellee was paid that salary for the years of 1949 and 1950. See section 23-1105, R. S. 1943, as amended by Laws 1947, c. 70, § 4, p. 224.

On December 21, 1950, the board of supervisors passed a resolution for the purpose of fixing the salaries of county officers wherein it fixed the population of Fillmore

County at 11,693 or class (3) under section 23-1101, R. S. 1943, as amended by Laws 1947, c. 62, § 4, p. 199. After January 1, 1951, pursuant to this resolution, the county commenced to pay plaintiff $2,100 per annum as provided for by section 23-1104, R. S. 1943, as amended by Laws 1947, c. 70, § 3, p. 223, the salary of a county judge in a class (3) county.

The salary changes effected by the 1949 Legislature (Laws 1949, c. 40, p. 134) and effective August 27, 1949, are not here applicable. Appellee's rights are controlled by the laws in effect at the time he was elected, qualified, and took over the duties of his office. These are sections 23-1101, R. S. 1943, as amended by Laws 1947, c. 62, § 4, p. 199, and 23-1104 and 23-1105, R. S. 1943, as amended by Laws 1947, c. 70, §§ 3 and 4, pp. 223-4. Ramsey v. County of Gage, 153 Neb. 24, 43 N. W. 2d 593. See, County of Yuma v. Sturges, 15 Ariz. 538, 140 P. 504; State ex rel. Moss v. Hamilton, 303 Mo. 302, 260 S. W. 466; State ex rel. Harvey v. Linville, 318 Mo. 698, 300 S. W. 1066.

Therefore the singular question presented by the appeal is, what was the effect, if any, of the reclassification of Fillmore County on December 21, 1950, upon the salary of the county judge during the balance of the term of office he was then serving?

The Constitution provides for the office of county judge and fixes his term of office at four years and provides his "salary shall be fixed by law." Article V, section 15, of the Constitution of Nebraska.

The statute in effect at the time appellee was elected and took office fixed his salary at the sum of $2,900 per annum. Section 23-1105, R. S. 1943, as amended by Laws 1947, c. 70, § 4, p. 224.

Article III, of the Constitution of Nebraska relating to legislative power provides by section 19 thereof, as amended in 1920, that: "The Legislature shall never grant any extra compensation to any public officer, agent or servant after the services have been rendered

nor to any contractor after the contract has been entered into, *nor shall the compensation of any public officer,* including any officer whose compensation is fixed by the Legislature subsequent to the adoption hereof *be increased or diminished during his term of office.*" (Italics ours.)

We said of this section in Ramsey v. County of Gage, *supra*: "It was designed to protect the individual officer against legislative oppression and, further, to curb the activities of public officers in lobbying to induce the Legislature to increase salaries. By the amendment the people simply said that the Legislature shall not increase or diminish the compensation of any public officer during his term of office, and that this inhibition should include any, and therefore all, public officers whose compensation is fixed by the Legislature." See, also, State ex rel. Randall v. Hall, 125 Neb. 236, 249 N. W. 756.

It is appellants' thought that since the classification statute for the purpose of fixing county officers' salaries, being section 23-1101, R. S. 1943, as amended by Laws 1947, c. 62, § 4, p. 199, was in force and effect when appellee was elected and took office that it does not come within the inhibitions of Article III, section 19, of the Constitution of Nebraska, as amended in 1920, and that when the board of supervisors passed the resolution of December 21, 1950, a salary change came into effect by operation of law and that appellee took his office subject thereto. This precise question has apparently never been answered by this court. It was raised in Shambaugh v. Buffalo County, 133 Neb. 46, 274 N. W. 207, and Shambaugh v. Buffalo County, 137 Neb. 434, 289 N. W. 873, but, for reasons therein stated, it was not necessary to determine it.

An annotation of this subject will be found in 139 A. L. R. 737. Therein, at page 742, referring to a "Statute enacted before officer's appointment or election, automatically increasing or decreasing salary upon

change in population or assessed valuation during term," it states: "In a majority of jurisdictions in which the question has been considered, it is held that such an increase or decrease brought about solely because of a change in the population or assessed valuation does not violate the constitutional inhibition."

Basically, "In the absence of any constitutional prohibition, or affirmative provision, fixing the term of office of any officer or his compensation, the legislature may change such term or compensation, and such change of term or compensation will apply as well to the officers then in office as to those to be thereafter elected." County of Douglas v. Timme, 32 Neb. 272, 49 N. W. 266. See, also, County of Yuma v. Sturges, *supra*.

Of the cases examined, which includes all those cited by the parties, we find the courts follow the majority rule when the constitutional provision involved is like our own.

In County of Yuma v. Sturges, *supra*, under a constitutional inhibition upon the Legislature like ours, it was said:

"It is at once seen that the constitutional restriction is an abridgment of the law-making power to either increase or diminish that compensation of the officer during his term, and which was prescribed for and as an incident to the office at the beginning of his term; that during his term of office the public officer enjoys exemption from legislative interference and control over the amount of his compensation, and at the same time has a curb put upon his activity in the direction of an increase of compensation, whether such activity be worthy or pernicious. In fine he may devote his attention to the performance of his official duties, unembarrassed by any feeling that his worth is being niggardly rewarded in money, and the offspring of such a feeling which usually moves in the direction of increased compensation. At the same time there is the counterpart which attends him with a security from the wretched

thought that others may become imbued with the conviction that his stipend is much too large for one of his capacity, and thus move with the pruning-hook by way of economy in the public funds, or that desire which might in time find congenial soil in the breast of a people desiring to get rid of an officer altogether, and to that end take away that compensation which he hath.

"The matter of paramount importance here, then, is to ascertain what compensation was fixed or prescribed by law when the term of office of the appellee commenced."

The court then found: "When his term of office began, his compensation was definitely fixed and prescribed according as the assessed valuation of the county may be ascertained, if less than $9,000,000 a certain sum, and if $9,000,000 and over a certain sum; the fluctuation not being occasioned by any subsequent legislative action, but by operation of the very law in force and effect and controlling the compensation of the office at the beginning of appellee's term of office—by the operation of that law automatically."

It held: "Under the classification in force when appellee went into office, Yuma county was a county of the first class, with an assessed valuation less than $9,000,000; his compensation was therefore fixed at $2,200 per annum. In August, 1913, Yuma county, while still remaining a county of the first class, nevertheless its equalized assessed valuation became more than $9,000,000, and appellee's compensation was therefore fixed at $2,500 per annum. Not by virtue of any subsequent legislative action, but solely by the automatic operation of the very law in effect at the beginning of the term, and which law definitely prescribed and fixed the compensation incident to the office, the amount thereof being graded according to the determination of an extraneous fact, to wit, the fact of the equalized assessed valuation. * * * The constitutional inhibition has no application here, and the judgment of the lower court

awarding appellee compensation for the month of September, 1913, in the sum of $208.33, being at the rate of $2,500 per annum, is correct."

In State ex rel. Mack v. Guckenberger, 139 Ohio St. 273, 39 N. E. 2d 840, 139 A. L. R. 728, under a constitutional provision like ours, the court stated the question involved as follows: "The question presented by the respondent's demurrer is whether a statute, effective before the commencement of the term of a common pleas judge, whereby his compensation is automatically increased during the term by reason of the increase of the population of his county as shown by a federal census effective after the beginning of the term, is in conflict with Section 14, Article IV of the Constitution, * * *." It then states: "The purpose of the constitutional inhibition now under consideration is to make sure that the judge and the electorate are advised before he is appointed or elected what his compensation will be, with the assurance that it cannot be changed by the Legislature during the term; that the judge is precluded from using his personal influence or official action to have the Legislature increase his salary; and that at the same time he is protected against the Legislature and the people from decreasing his compensation after his term begins. These same salutary purposes are fully and effectually preserved by the terms of the present statute, albeit the compensation of the judge is made variable, from and after the last federal census becoming effective during his term." And holds: "The inhibition, according to the language of the Constitution thus directed to the Legislature, is that it shall not by legislative act during his term diminish or increase the compensation of any common pleas judge. Such compensation must be fixed before his term begins, but there is no inhibition against the Legislature fixing such compensation before the term begins on a basis which may vary it in amount as time advances, provided that basis, within the contemplation and understanding of both the

judge and the people who elect him, is fixed, certain and unchangeable during his term. Such action upon the part of the Legislature does not thereby sanction or attempt to legalize an evil or vice which the Constitution prohibits."

Other cases discussing the question and arriving at the same conclusion are Puterbaugh v. Wadham, 162 Cal. 611, 123 P. 804; State v. Hamilton, *supra;* State v. Linville, *supra;* Board of Commissioners v. Crowe, 214 Ind. 437, 14 N. E. 2d 907, on rehearing 214 Ind. 441, 15 N. E. 2d 1016; State ex rel. Jaumotte v. Zimmerman, 105 Mont. 464, 73 P. 2d 548.

We have held:

"* * * the question in respect of the population of the state, or of the population of any of its subdivisions, is purely a question of fact to be determined by the court the same as other fact questions." Gordon v. Lowry, 116 Neb. 359, 217 N. W. 610.

"What the number of inhabitants may be is a question of fact which must be determined by some competent authority. The duty of settling with county officers, auditing their accounts, fixing the salaries of their deputies, as well as the general management of the affairs of the county, rests upon the county board. Before they can perform the duties devolved upon them by law, it becomes necessary that some determination should be made of the number of inhabitants of the county in order to classify the officers. * * * And where the board of county commissioners in good faith ascertain and determine the number of inhabitants of a county for the purpose of classification of the county officers, such determination is not subject to collateral attack, but is conclusive as to those to whom it applies until set aside or vacated by such county board or some other forum of competent jurisdiction in a direct proceeding instituted for that purpose." Buffalo County v. Bowker, 111 Neb. 762, 197 N. W. 620.

"The salary of the county attorney for any year de-

pends upon the number of inhabitants of the county during that year, and that fact is to be determined, as are other facts in litigation, by the best competent evidence that can be adduced under the circumstances." O'Connell v. Sioux County, 94 Neb. 826, 144 N. W. 779.

"By the provisions of the foregoing statute, the plaintiff was entitled to receive an annual salary, the amount of which depended upon the population of defendant county during each year that plaintiff served as county treasurer." Shambaugh v. Buffalo County, 137 Neb. 434, 289 N. W. 873. See, also, Shambaugh v. Buffalo County, 133 Neb. 46, 274 N. W. 207.

We are of the opinion that when a statute enacted and in effect prior to the election of a public officer fixes the compensation of such officer upon the basis of population and an increase or decrease in compensation occurs during the officer's term because of a change in population after his election, such increase or decrease in compensation does not violate our constitutional provision that the compensation of a public officer shall not be increased or diminished during his term. It is a factual and not a legislative change.

When appellee was elected to, qualified for, and took over the duties of the office of county judge, section 23-1101, R. S. 1943, as amended by Laws 1947, c. 62, § 4, p. 199, provided for the classification of counties by population for the purpose of fixing the salaries of county officers. The law in effect at that time fixing the salaries of county officers according to their classification was Chapter 70, Laws 1947, p. 221. Since Fillmore County was at that time a class (4) county the salary of the county judge was fixed by section 4 of Chapter 70, Laws 1947, p. 224, at the sum of $2,900 per annum. Appellee was properly paid this salary for the years of 1949 and 1950. However, on December 21, 1950, the board of supervisors determined the population to be 11,693. The validity of this determination is not questioned. This resulted in Fillmore County becoming a class (3) county

for the purpose of fixing the salaries of its county officers. Consequently, under section 3 of Chapter 70, Laws 1947, p. 223, the salary of the appellee for the remainder of his term, or for the years 1951 and 1952, became $2,100 per annum.

In view of the foregoing we find the judgment of the trial court to be in error and it is reversed and the cause remanded with directions that it enter a judgment in accordance herewith, that is that appellee for the balance of his term, or for the years of 1951 and 1952, is entitled to a salary of $2,100 per annum.

REVERSED AND REMANDED WITH DIRECTIONS.

YEAGER, J., dissenting.

The majority opinion in this case finds support in decisions from some jurisdictions. In other jurisdictions an opposite viewpoint has been expressed. It is but fair to say that in the jurisdictions wherein the question has been considered the majority hold to the view expressed in the majority opinion herein.

With that view I cannot agree and in consequence I respectfully dissent.

Article III, section 19, of the Constitution of Nebraska to the extent that it is important here is the following: "The Legislature shall never grant any extra compensation to any public officer, agent or servant after the services have been rendered nor to any contractor after the contract has been entered into, nor shall the compensation of any public officer * * * be increased or diminished during his term of office."

In the words employed in this provision, taken either in or out of context or in relation to any other constitutional provision, I fail to find any confusion or ambiguity. The language to me is simple, plain, and clear and thus, under rules so well known that citation of authority therefor would be superfluous, it is entitled to be accorded its common and ordinary meaning. It says, and I cannot escape the belief that it means, that *the com-*

pensation of no public officer shall be increased or diminished during his term of office.

As I interpret, this county judge was entitled to receive without increase or decrease the salary which was appropriate under law at the commencement of his term of office.

STATE OF NEBRASKA EX REL. WESLEY BINTZ, APPELLANT, V. NEBRASKA STATE BOARD OF EXAMINERS FOR PROFESSIONAL ENGINEERS AND ARCHITECTS ET AL., APPELLEES.

50 N. W. 2d 784

Filed January 4, 1952. No. 33030.

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

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

Matthews, Kelley, Fitzgerald, Matthews & Delehant, for appellant.

Clarence S. Beck, Attorney General, and *Walter E. Nolte,* for appellees.

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

CHAPPELL, J.

This is a mandamus action wherein plaintiffs sought to require "defendants, and each of them, to execute, issue, and deliver to your relator, Wesley Bintz, a Certificate of Registration to practice professional engineering in the State of Nebraska." Defendants demurred generally to the petition for the reason that it did not state a cause of action upon which the court could issue a writ of mandamus. Their demurrer was overruled and defendants answered, wherein, among other defensive

grounds they renewed their contention that plaintiff's petition did not state a cause of action. Plaintiff's reply was a general denial.

After a lengthy hearing upon the merits, the trial court rendered its decree, denying the relief prayed and dismissing plaintiff's petition. Plaintiff's motion for new trial was overruled, and he appealed, assigning, insofar as important here, that the judgment was contrary to law. We conclude that the assignment should not be sustained.

It appears from the record that on January 16, 1945, plaintiff filed an application for a certificate of registration. However, after full inquiry, and in the exercise of its discretion based upon the facts presented, defendant board of examiners denied plaintiff's application on August 2, 1945. Plaintiff did not prosecute error therefrom, and such denial became final. Whether or not such denial was an abuse of discretion cannot be determined in this mandamus action. Plaintiff alleged that subsequently, on September 7, 1949, defendants refused to accept the filing of another application, but in this action he does not pray that defendants should be required to do so. Rather herein plaintiff asked the district court, and upon appeal asks this court, to require defendants to issue a certificate of registration, thereby controlling defendant board's discretion. In other words, plaintiff has undertaken in this action to require the courts to administer the law and exercise a discretion committed by law to defendant board of examiners. It is well established that such a mandamus action cannot be maintained.

In support of his action, plaintiff relied upon Downs v. Nebraska State Board of Examiners, 139 Neb. 23, 296 N. W. 151. An examination of that opinion discloses that such action was in mandamus to require the Nebraska State Board of Examiners for Professional Engineers and Architects to issue plaintiff Downs a certificate of registration without an examination. In such

case this court affirmed the issuance of a peremptory writ in the light of an applicable "Grandfather Clause" contained in section 71-3309, C. S. Supp., 1939, same being section 9 of Legislative Bill No. 14, enacted by the 1937 session of the Nebraska State Legislature, which specifically provided that in such case "* * * the Board shall issue a certificate of registration, without written or oral examination, in Engineering or Architecture, * * *." It is apparent that such case is not in point here, and has no application under applicable statutes. Plaintiff here makes no claim that he was entitled to a certificate under such a "Grandfather Clause" as a matter of right. Rather, he is prosecuting this mandamus proceeding to control discretion as distinguished from ministerial action.

In State ex rel. Smith v. Nebraska Liquor Control Commission, 152 Neb. 676, 42 N. W. 2d 297, relied upon by plaintiff, we allowed a writ of mandamus because the statute sought to be enforced left "open no area for the exercise of a discretion. It requires the performance of a purely ministerial duty." It was specifically held therein that: "When a specific duty is made plain by statute, and the officer is not given any discretion in the matter, one for whose benefit the duty is to be performed may compel its performance by mandamus." Clearly that case has no application in the case at bar.

In that connection, section 81-839, R. R. S. 1943, provides in part: "In order to safeguard life, health and property, any person practicing or offering to practice the profession of engineering or architecture in this state shall be required to submit evidence that he is qualified so to practice, and shall be registered as provided in section 81-847."

Section 81-841, R. R. S. 1943, provides that a State Board of Examiners for Professional Engineers and Architects should administer the provisions of sections 81-839 to 81-856, R. R. S. 1943. Thereafter, section 81-847, R. R. S. 1943, provides in part: "The Board of

Examiners for Professional Engineers and Architects shall, upon application therefor on a prescribed form and upon the payment of a fee of fifteen dollars to be paid in the manner prescribed below, issue a certificate of registration (1) to any person who submits evidence satisfactory to the board that he is fully qualified to practice professional engineering or architecture; or (2) to any person who holds a like unrevoked certificate of registration issued to him by proper authority of the National Council of State Board of Engineering Examiners, or of the National Bureau of Engineering Registration, or of the National Council of Architectural Registration, or any state or territory of the United States or any country where the requirements for the registration of professional engineers or architects are not lower than the standards specified in this section and section 81-848; Provided, however, that no person shall be eligible for registration who is under twenty-five years of age, or who is not of good character and repute, or who has not been actively engaged for at least eight years in the practice of professional engineering or architecture of character satisfactory to the board."

Clearly, upon the filing of an application for a certificate of registration as an engineer or architect, defendants were required under such statutes to examine evidence and exercise a discretion based thereon.

In that connection, this court held in State ex rel. Herman v. City of Grand Island, 145 Neb. 150, 15 N. W. 2d 341, that: "The discretion of a public officer cannot be controlled by mandamus, but when a specific duty is made plain by statute, and the officer is not given any discretion in the matter, one for whose benefit the duty is to be performed may compel its performance by mandamus.

"Where a specific duty is provided by statute mandamus may be invoked to enforce it, if denied; and the party entitled to such relief will not be forced to

pursue his remedy by a circuitous and dilatory action at law."

In State ex rel. Strange v. School District, 150 Neb. 109, 33 N. W. 2d 358, this court held: "The court has no power by mandamus to control the decision of those matters which are left by statute to the discretion of the governing body of a governmental agency.

"A peremptory writ of mandamus should be issued only where the legal right to it is clearly shown." See, also, State ex rel. Evans v. Brown, 152 Neb. 612, 41 N. W. 2d 862.

The foregoing rules are controlling here. We conclude, therefore, that the trial court should have sustained defendants' demurrer and not heard the case upon its merits, because plaintiff's petition did not state a cause of action upon which the court could grant the relief prayed.

Other matters are assigned and argued in the brief, which, as we view it, require no discussion or decision.

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

AFFIRMED.

EMANUIL WISKOCIL ET AL., APPELLANTS, V. WILLIAM KLIMENT, APPELLEE.

50 N. W. 2d 786

Filed January 4, 1952. No. 33040.

1. **Appeal and Error.** Actions in equity, on appeal to this court, are triable de novo, subject, however, to the rule that when credible evidence on material questions of fact is in irreconcilable conflict, this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying, and must have accepted one version of the facts rather than the opposite.
2. **Trusts.** The foregoing rule is not abrogated by, but must be construed in the light of, the rule that the burden of proof is upon one seeking to establish and enforce a constructive trust

to establish the same by a preponderance of evidence, clear, satisfactory, and convincing in character.

3. ———. Where one employed to act as agent for another in the purchase of real estate becomes the purchaser himself, he will be considered in equity as holding the property for his principal as upon a constructive trust, although he purchased with his own money subject to reimbursement for his proper expenditures in that behalf.

4. **Frauds, Statute of: Trusts.** The statute of frauds, sections 36-103 and 36-104, R. S. 1943, does not apply to a constructive trust growing out of an undertaking by one person to purchase property for another, where in violation of his agreement he has taken and retained the title in his own name or otherwise for himself, and refuses to convey after tender of the agreed purchase price, or the balance thereof remaining unpaid.

APPEAL from the district court for Saunders County: H. EMERSON KOKJER, JUDGE. *Reversed and remanded with directions.*

Phillip A. Tomek and *John G. Tomek,* for appellants.

H. A. Bryant, for appellee.

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

CHAPPELL, J.

Plaintiffs brought this suit in equity to cancel a deed to 240 acres of described farm land, have title quieted thereto as against defendant, and for an accounting. Defendant denied generally plaintiffs' right of recovery, and prayed for dismissal of the action. After a hearing upon the merits, the trial court rendered its decree, finding generally for defendant, substantially upon the ground that defendant's promise to purchase the land for plaintiffs and convey it to them upon repayment of the balance of the purchase price was oral, thus within the statute of frauds, and that in any event the promise had been withdrawn. Nevertheless, the decree permitted plaintiffs to have an accounting, and ordered that each party should pay his own costs. Plaintiffs' motion for new trial was overruled, and they appealed, assigning

that the judgment was not sustained by the evidence but contrary thereto and contrary to law. We sustain the assignments. Hereinafter, plaintiffs, when spoken of separately, will be respectively called Emanuil and Joseph.

In such cases, the general rule is that: "Actions in equity, on appeal to this court, are triable de novo in conformity with section 25-1925, R. R. S. 1943, subject, however, to the rule that when the evidence on material questions of fact is in irreconcilable conflict this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying and must have accepted one version of the facts rather than the opposite." Sopcich v. Tangeman, 153 Neb. 506, 45 N. W. 2d 478. In that regard, however, the version accepted must be supported by credible evidence. In other words, this court is not required by such rule to believe the unbelievable. See, also, Maddox v. Maddox, 151 Neb. 626, 38 N. W. 2d 547, wherein it was held: "The foregoing rule is not abrogated by, but must be construed in the light of the rule that the burden of proof is upon one seeking to establish and enforce a constructive trust to establish the same by a preponderance of evidence, clear, satisfactory, and convincing in character."

Bearing that in mind, we have examined the record. It discloses that plaintiffs are unmarried brothers. They were both born on the land involved, and lived there all their lives working and farming the land. Plaintiffs did not know the date of their birth or the date of the death of their parents, but it appears that Emanuil was about 45 and Joseph was over 60 years of age at the time of trial. They had but little education, and their physician, who had personally known them for four or five years, testified that from his professional examinations, technical mental tests, and observation, Emanuil, born mentally incapacitated and subject to influence, had the mental capacity of a child seven or

eight years old, and that Joseph had the slightly higher mental capacity of a child eight or nine years old. He classified both of them as low morons. An unmarried brother, who lives with plaintiffs, is physically unable to work, and "not right in the head," having lost his mind in 1942.

On December 9, 1936, plaintiffs jointly owned the land involved. However, on that date Emanuil, who was the record title owner, gave the Prudential Insurance Company, hereinafter called the company, a mortgage on all the land to secure a 10-year loan of $11,400, with interest and $500 on the principal, both payable annually. Years of drought, poor crops, and low prices made it impossible for them to make the payments in 1938. Thereupon the company started foreclosure proceedings, and on February 18, 1944, it received a sheriff's deed to the land.

Prior thereto plaintiffs negotiated with the company to repurchase the land. They later made a written offer to purchase the same for $15,600, and paid the company $1,000 as part payment thereof. The offer was approved and accepted by the company in writing on June 7, 1944.

In the meantime, plaintiffs proceeded to secure the money with which to pay the company. They were able to raise but $4,100 in cash. To raise the balance of $11,500 they entered into an oral agreement with a neighbor, one Dolezal, whereby he was to purchase for himself one 80 acres of the land, and loan plaintiffs sufficient additional money to complete their purchase of the other 160 acres. However, Dolezal was to take a deed to all the land as security for his loan to plaintiffs. Plaintiffs desired to keep all the land for themselves, but nevertheless, pursuant thereto, Joseph and Dolezal went to Omaha and separately made written offers to the company, duly accepted, whereby Emanuil was to purchase a described 160 acres of the land, and Dolezal was to purchase a described 80 acres thereof. The lat-

ter's offer, as provided therein, was "made with the understanding that the sale of" the other described 160 acres "to Emanuil Wiskocil is to be completed in conjunction with this sale. In event said sale to the said 160 A. is not consumated (sic) this offer to be cancelled," which statement, together with other evidence adduced, verified plaintiffs' testimony with regard to such transaction.

Shortly thereafter, defendant, an apparently friendly near neighbor, who often came to plaintiffs' farm borrowing tools and visiting with or advising them, went to see plaintiffs. Having heard about their arrangements with Dolezal, defendant then and there told them to cancel the arrangement and not have anything to do with Dolezal, because he would never permit plaintiffs to pay the loan and would never reconvey the land to plaintiffs as promised, but that he, defendant, would advance the money needed and purchase all of the land for plaintiffs. Defendant said he would see Dolezal for them, so plaintiffs went with defendant in his car to see Dolezal and there informed him that the deal with him was cancelled, and to meet them in Omaha at the company's office at an appointed time and cancel their contracts. At such appointed time defendant took Joseph with him in his car to Omaha, where they met Dolezal in the company's office and such contracts were cancelled, upon defendant's promise that he would make an offer and enter into a contract to purchase all of the land from the company for plaintiffs, pay the balance above what plaintiffs could raise, take title as security therefor, turn the land over to plaintiffs as owners, and convey it to them when he was paid, with interest at 4 percent.

In pursuance thereof defendant executed a written offer to purchase the land for $15,600. The offer was on a regular printed form, but therein, with regard to the right to possession by defendant, there had been typed a separate sentence to the effect that it was "subject to

the rights of the parties now in possession." The offer was accepted, whereupon plaintiffs paid $4,100 directly to the company upon the purchase price, and received a receipt therefor from the company. Defendant paid $11,500 and received a warranty deed to all the land on July 25, 1944. He never then or thereafter offered plaintiffs any security for the $4,100 paid by plaintiffs, or offered to pay interest thereon as if it were a loan to him.

The promises heretofore recited as made by defendant were reiterated by him in his car on the road back home. Twice during the trial defendant admitted that he had made the same, and after this suit was started he told plaintiffs he would give them 80 acres if they would drop the case.

There the matter rested for sometime until the spring of 1946. During all of the period here involved, plaintiffs maintained and retained full and complete possession and dominion over all the land as owners. They rented part of the land to defendant, and as directed by defendant, collected and retained pasture rents. Without direction of or at his request, plaintiffs, at their own expense, repaired and made permanent and substantial improvements to the fences, buildings, and land.

During 1945, plaintiffs paid defendant $614.78 in cash to apply on principal, interest, and taxes. Likewise, in April 1946, they paid him $300 in cash. Likewise, on October 16, 1946, they paid him $500 by check, which check appears in the evidence bearing defendant's endorsement. That payment defendant admitted receiving, and the trial court specifically found that all the aforesaid payments had been made by plaintiffs and credited such amounts to them in the accounting.

In the spring of 1946, defendant secured permission from plaintiffs to farm 23 plowed acres of the land which had been previously planted to sweet clover for two years, upon the promise that he would credit two-fifths rent share of crops raised thereon by him upon prin-

cipal, interest, and taxes paid by him. Under that arrangement defendant thereafter continued to rent from plaintiffs and farm such land. In 1946 such two-fifths share received by him amounted to $1,395.34. In 1947 such crop share, plus one-half the hay taken by defendant from 60 acres, as per oral agreement with plaintiffs, amounted to $1,194.75. In 1948 such share amounted to $890, and in 1949 it amounted to $900. The trial court specifically found that such amounts should be credited to plaintiffs in the accounting.

On April 8, 1946, defendant, being in ill health and believing he might die, came to plaintiffs' home and took them in his car to Wahoo, where, in order to do the right thing, as he had agreed, defendant delivered Emanuil a warranty deed to all the land, which deed was duly recorded. The consideration recited therein was "One Dollar and Love and Affection." At the time of its execution, plaintiffs paid defendant in cash the one dollar consideration recited in the deed, and, at his request, gave him all the money they had, $300 in cash, an amount for which the trial court gave them credit in the accounting. Whether plaintiffs were to get a loan and pay defendant the balance then due him as contended by defendant, or could pay him the balance little by little, as contended by plaintiffs, is of little importance in light of the fact that he did give them a deed as he had promised to do.

Thereafter, however, on April 24, 1946, defendant again came to plaintiffs' farm, where by promises, force, and threats, he induced plaintiffs to go with him in his car to Wahoo, where Emanuil deeded the land back to defendant, who told them not to tell anybody about the transaction or worry, because the farm was still theirs, and they thereafter continued in possession as such at all times in the same manner heretofore recited. The consideration recited in that deed was also "One Dollar and Love and Affection" and there was no other consideration recited or given by defendant.

Defendant in one breath contended that the $4,100 paid by plaintiffs directly to the company was a loan to him at 4 percent, although no interest was ever paid thereon by defendant and no security was ever asked, offered, or given therefor, and in the next breath contended that it was by oral agreement with plaintiffs for rent of the land paid in advance, at five dollars per acre. However, in the light of his own testimony, buttressed by unequivocal facts and circumstances, it appears conclusively that it was neither the one nor the other, but rather was in fact money "advanced on purchase price of land" by plaintiffs, as found and credited by the trial court in its decree of accounting. Likewise, defendant's general denial of plaintiffs' testimony and his equivocal contention that he purchased the land solely for himself and not for plaintiffs, and that he had at all times dealt fairly with them upon that basis, lacks any credence, and a court of equity will not permit defendant to so fraudulently enrich himself at plaintiffs' expense.

Plaintiffs were ultimately able to raise sufficient money to pay defendant in full, which he refused to accept. This action was brought and payment thereof was tendered into court for defendant's benefit. Both plaintiffs and defendant offered evidence with regard to an accounting. The lapse of time and failure of both parties to keep adequate and complete records, makes exactness difficult, but plaintiffs admitted that at the time of trial they were indebted to defendant in the sum of $8,843.11, for principal, interest, and taxes, and in the light of the evidence we conclude that such sum was the correct amount then owing defendant.

In the light of such a situation as that heretofore recited, the law is well established.

In Scott v. Swank, 132 Neb. 720, 273 N. W. 25, this court held: " 'Although mental weakness may fall short of entire incompetency to transact business, if it is taken advantage of to procure a conveyance by inequitable

means, the conveyance may be set aside.' Bennett v. Bennett, 65 Neb. 432, 91 N. W. 409.

" 'A court of equity will scrutinize jealously a transaction as to which there is ground for holding that influence has been acquired over a person of weak mind, and has been abused.' " See, also, Bennett v. Bennett, 65 Neb. 432, 91 N. W. 409.

On the other hand, it has long been the rule that: "The statute of frauds can only be invoked to avoid an oral contract in case one is free from deceit and false representations." Griffin v. Bankers Realty Investment Co., 105 Neb. 419, 181 N. W. 169. See, also, Hecht v. Marsh, 105 Neb. 502, 181 N. W. 135, 17 A. L. R. 1, and Dickson v. Stewart, 71 Neb. 424, 98 N. W. 1085, 115 Am. S. R. 596. In such last-cited case it is said: "And he also overlooks another very important proposition: That a court of equity will never permit a party to shield himself behind a statute of frauds in order to perpetrate a fraud." See, also, Koefoed v. Thompson, 73 Neb. 128, 102 N. W. 268.

In any event the statute of frauds has no application here. In Jenkins v. Jenkins, 151 Neb. 113, 36 N. W. 2d 637, this court said: " 'A constructive trust is a relationship with respect to property subjecting the person by whom the title to the property is held to an equitable duty to convey it to another on the ground that his acquisition or retention of the property is wrongful and that he would be unjustly enriched if he were permitted to retain the property.' O'Shea v. O'Shea, 143 Neb. 843, 11 N. W. 2d 540. See, also, Wilcox v. Wilcox, 138 Neb. 510, 293 N. W. 378; Box v. Box, 146 Neb. 826, 21 N. W. 2d 868; Pollard v. McKenney, 69 Neb. 742, 96 N. W. 679, 101 N. W. 9; 1 Restatement, Trusts, p. 5, § 1e.

"The law is well established that each case is to be determined from the facts, circumstances, and conditions as presented therein. See, Damkroeger v. James, 95 Neb. 784, 146 N. W. 936; Lennox v. Anderson, 140

Neb. 748, 1 N. W. 2d 912; Lunkwitz v. Guffey, 150 Neb. 247, 34 N. W. 2d 256.

"Sections 36-103 and 36-104, R. S. 1943, constitute a part of the statute of frauds. The former section recognizes the creation of an interest in land 'by operation of law.' The latter section provides that section 36-103 shall not be construed in any manner to prevent any trust from arising by implication or operation of law. Thus, trusts arising by implication or operation of law are excepted from the operation of the statute of frauds. See, O'Shea v. O'Shea, *supra;* Pollard v. McKenney, *supra.*"

In Lamb v. Sandall, 135 Neb. 300, 281 N. W. 37, following Johnson v. Hayward, 74 Neb. 157, 103 N. W. 1058, 5 L. R. A. N. S. 112, this court held: " 'Where one employed to act as the agent for another in the purchase of real estate becomes the purchaser himself, he will be considered in equity as holding the property in trust for his principal, although he purchased with his own money, subject to reimbursement for his proper expenditures in that behalf.' " See, also, Maddox v. Maddox, *supra.*

In Johnson v. Hayward, *supra,* it was also held: "A contract whereby one person employs an agent to negotiate for the purchase of real estate is not a contract for the creation of an estate or interest in land, or trust or power over or concerning lands, etc., within the meaning of the statute of frauds."

In the light of the foregoing evidence and rules we conclude that plaintiffs have clearly established a constructive trust, and that for the reasons heretofore stated the judgment of the trial court should be and hereby is reversed and the cause is remanded with directions to render a judgment in conformity with this opinion, requiring defendant to convey the land to plaintiffs by a warranty deed, or, upon his failure or refusal to do so, the deed of April 24, 1946, shall be cancelled and title to the land quieted in plaintiffs absolutely

against all claims of defendant, upon condition that plaintiffs shall pay $8,843.11, together with interest thereon at 6 percent from date of judgment on the mandate, into court for defendant's benefit, within 60 days from date of judgment on the mandate. All costs are taxed to defendant, both in this court and in the district court.

REVERSED AND REMANDED WITH DIRECTIONS.

CENTRAL CONSTRUCTION COMPANY, A CORPORATION, APPELLEE, V. GUY E. HIGHSMITH ET AL., APPELLANTS.
50 N. W. 2d 817

Filed January 4, 1952. No. 33046.

1. **Trial.** Where during the trial of a cause both parties treat an affirmative defense as denied, it will be so considered in this court, although the plaintiff filed no reply either before or after judgment.
2. **Estates.** It is a general rule that where two unequal estates vest in the same person at the same time, without an intervening estate, the smaller is thereupon merged in the greater.
3. ———. But merger does not always or necessarily result from such a coinciding of such estates.
4. ———. Whether the two estates will be held to have coalesced will depend upon the facts and circumstances in the particular case, the then intention of the party acquiring the two estates, and the equities of the parties to be affected.
5. **Mechanics' Liens.** Although a mechanic's lien when filed attaches only to an equitable estate, it may be enforced against the fee after the equitable and legal titles have merged.
6. ———. The object of the mechanics' lien law being to secure the claims of those who have contributed to the erection of a building, it should receive the most liberal construction to give full effect to its provisions.
7. ———. Where a claimant, either by gross carelessness or by design, puts upon record a statement which he knows, or which by the exercise of reasonable and proper diligence he might have known, to be erroneous and unjust, either by including items not furnished for the particular building or by failure to give credit for payments made, the law will not aid him in enforcing his lien. On the other hand, if the errors are trifling and immaterial, or if they are readily explainable as the result of

mistake, and no element of willfulness appears, regard will be had for the imperfections of human machinery, and the recovery of a just debt will not be denied where nothing but fair dealing was intended.

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

W. A. Ehlers, for appellants.

Fraser, Connolly, Crofoot & Wenstrand, R. G. Fraser, and *Hird Stryker,* for appellee.

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

SIMMONS, C. J.

This is an action for the foreclosure of a mechanic's lien. The matter was tried upon an amended petition and answer of the defendants Ehlers. From a decree generally favorable to the plaintiff, the defendants Ehlers and Mitchell appeal. We reverse the judgment of the trial court and remand the cause with directions.

The plaintiff is a construction company engaged in the remodeling of houses. The defendants Margaret C. Ehlers and William A. Ehlers are husband and wife. As will be set out later, certain deeds and instruments were made and delivered wherein Mrs. Ehlers was grantee and assignee. The record shows that Mr. Ehlers handled this entire transaction relating to him and his wife. For convenience these defendants will be referred to as the Ehlers, Mr. Ehlers, or Mrs. Ehlers as the fact appears. It further appears that defendants Mitchell are in possession of the property under a contract with the Ehlers. Where necessary the defendants Mitchell will be referred to herein as the Mitchells.

We are first confronted with a question as to issues. Toward the close of the trial a question arose as to whether or not the Mitchells were parties to the action and, if so, in default. Mr. Ehlers contended that he had an-

swered for the Mitchells. The trial court said: "* * * if the pleadings are not in proper form and their names are not in the heading, he may have leave to ammend (sic) his pleadings to conform to the proof." That occurred on November 2, 1950. On November 22, 1950, after the evidence had been all taken and the cause submitted to the court, Mr. Ehlers, as attorney for himself, Mrs. Ehlers, and the Mitchells filed an amended answer in which he made the Mitchells answering defendants. In this amended pleading he changed in several respects his answer as to the defenses of the Ehlers and also alleged that the plaintiff had sold and assigned its interest in the claim prior to the perfecting of the alleged mechanic's lien and that it had no lien. Plaintiff does not appear to have challenged this pleading. The transcript does not show the filing of a reply.

Appellants now contend that there being no reply denying or explaining affirmative allegations of defense, such allegations are admitted as true.

We discuss this contention no further than to point out that the rule is: "Where during the trial of a cause both parties treat an affirmative defense as denied, it will be so considered in this court, although the plaintiff filed no reply either before or after judgment." Crilly v. Ruyle, 87 Neb. 367, 127 N. W. 251. See, also, Hunter v. Weiner, 103 Neb. 538, 172 N. W. 521; In re Estate of Nilson, 126 Neb. 541, 253 N. W. 675.

The next contention is that plaintiff's petition does not state a cause of action against these appellants or any of them and that the trial court should have so found. It does not appear that the sufficiency of the petition was tested by demurrer or otherwise. The propositions advanced in support of this position are also advanced as to the sufficiency of the evidence to sustain a decree for the plaintiff. They will be determined in that connection.

The real property involved in this action is a lot with a house thereon in the city of Omaha. It is agreed that

as of August 1, 1946, the legal title to this property was in Wholesalers Adjustment Company, a corporation. On that date it entered into a contract to sell this property to one Guy E. Highsmith for $1,300, of which $500 was paid down and the balance of $800 with interest was to be paid in monthly installments of $15, beginning on September 1, 1946. Highsmith went into possession. On October 1, 1946, he paid $30; on November 1, 1946, he paid $15; on December 7, 1946, he paid $15; on March 8, 1947, he paid $20; and on April 15, 1947, he paid $30. On October 3, 1946, Highsmith executed a mortgage on this property to secure a promissory note for $280, payable in monthly installments of $20. The mortgagees were John L. and Juanita L. Bilby. This mortgage was recorded October 4, 1946. It does not appear what, if any, payments were made by Highsmith on the debt.

There is evidence that the Wholesalers Adjustment Company dissolved on or about January 18, 1947, and that one Howard became the holder of this property. The evidence is quite inconclusive on the matter. In the evidence plaintiff and defendants both treat the adjustment company as a going concern after that date. In June 1947, the insurance was paid and charged to the Highsmith account. On September 24, 1947, Howard paid the taxes. The trial court found that the adjustment company was a dissolved corporation. No assignments of error are made here as to that matter.

It also appears that in February 1947, the representative of Howard, using the name of Wholesalers Adjustment Company, began to ask, then to urge, then to demand, that the delinquent payments, the insurance, and the taxes be paid. As late as September 9, 1947, Highsmith was notified by letter that if settlement in full of the contract was not made within five days from the date of receipt of the letter the matter would be placed with an attorney to start action.

Mr. Ehlers testified that in November or December 1946, he was approached by a representative of the ad-

justment company with a proposition to buy this contract for Mrs. Ehlers and that "* * * I suggested that I would foreclose the contract for him if he so desired." All the evidence is that Highsmith was not then in default on the contract. He further testified that in December he agreed that "my wife would buy the contract." Mr. Ehlers offered in evidence a resolution of the board of directors of the adjustment company showing that on January 18, 1947, the officers had authorized conveyance of the property to Mrs. Ehlers, "Assignee of Guy E. Highsmith," for the consideration of $1,300. He further testified that on January 18, 1947, an assignment of the Highsmith contract was made to Mrs. Ehlers. This appears in the bill of exceptions as having been acknowledged before Mr. Ehlers as a notary public. It was recorded as of October 11, 1947. He also testified that on January 18, 1947, the Wholesalers Adjustment Company executed a warranty deed conveying this property to Mrs. Ehlers. It is acknowledged and recorded, as was the contract. It further appears by Mr. Ehlers' testimony that the deed was held by the representative of the adjustment company until early October 1947, when Mr. Ehlers paid Howard $769.70, the balance then due on the contract, including insurance and taxes, received the assignment and deed, among other things, and had them recorded. Prior to October 1947, the Ehlers had no interest in the property.

On October 11, 1947, Highsmith executed a quitclaim deed conveying this property to Mrs. Ehlers, the deed reciting that it was given to convey all right, title, and interest which the grantor had by virtue of the land contract. This deed was also recorded October 11, 1947. Mr. Ehlers testified that the consideration for this conveyance was $100, and that he secured this deed in order to avoid the necessity of a foreclosure proceeding.

On October 14, 1947, the Bilbys executed a release of the Highsmith mortgage. The release was recorded January 28, 1948. Mr. Ehlers testified that he paid for

the mortgage release, although the amount paid is not shown.

On January 16, 1947, Highsmith entered into a contract with plaintiff for the construction of a porch to the house for the recited consideration of $1,180, payable in monthly installments of $37.29. The contract provided that "FHA charge per year is to be added to above cost of labor and materials and is included in the monthly payments." Also on January 16, 1947, Highsmith made application to Universal C.I.T. Credit Corporation for a loan, the proceeds to be used for the above improvement.

Plaintiff entered upon the work covered by the contract. On March 28, 1947, Highsmith executed an "FHA Title I Borrower's Completion Certificate," and plaintiff an "FHA Title I Dealer's Completion Certificate." These certificates were on printer's forms directed to the Universal C.I.T. Credit Corporation. The mechanic's lien here involved was executed on April 25, 1947, and recorded May 29, 1947. Attached to the lien form was a copy of the contract with Highsmith. It recited that it was for work done and labor performed under a written contract for Highsmith, Wholesalers Adjustment Company, and the Bilbys; that when the contract was made the adjustment company was the owner, Highsmith was purchaser under contract, and the Bilbys claimed an interest by reason of a mortgage; that the first item was furnished January 16, 1947, and the date of the last item was April 18, 1947; that there was due the amount of $1,180; and that the plaintiff claimed a lien for that amount.

A witness testified that the actual work under the construction contract began on January 23, 1947. He testified from memory that the completion date was February 1 to 5, or February 10, and later checked his office records and said the completion date was March 28, 1947.

The evidence upon which the contention of a sale of the claim is based will be set out later herein.

The trial court found generally for the plaintiff, and held that plaintiff had a valid lien for the amount claimed against the interest of Highsmith in the property, and that it was entitled to a foreclosure of its lien. The court further found that the sum of the interest of defendants Ehlers in the property was $1,049.70. The court decreed that there was due defendants Ehlers the sum of $1,049.70; that there was due the plaintiff the sum of $1,180, together with interest at 6 percent from January 16, 1947; that in default of the payment of said sums with costs within 20 days, the property be sold as upon execution; and that the proceeds be applied: First, to the payment of defendants Ehlers' interest in the amount of $1,049.70; second, to the payment of costs; and, third, to the payment of the sum of $1,180, together with interest, to plaintiff, and the balance to be distributed to defendants as their interests appear.

The defendants here present a series of alleged errors in the findings and decree.

Defendants contend that Highsmith had no title which could become subject to any lien in favor of the plaintiff. This is based on a provision in the Highsmith contract which gave the adjustment company at its option the right to cancel the contract for failure to make monthly payments and the contention that the contract was in fact forfeited on January 1, 1947. There is and could be no contention here that the adjustment company or Howard ever forfeited or undertook to declare a cancellation of the contract. On the contrary, the evidence shows conclusively that they at all times treated the contract as in force, undertook to secure its performance, and accepted payments thereon. Not only that, but Mrs. Ehlers as assignee of Highsmith performed the contract, paid Howard the amount due under the contract, and secured performance of it. The assignment of error as to that question is devoid of merit.

The next assignment relates to the contention of the defendants that the trial court erred in holding that the defendants Ehlers were lienholders of the property and the companion contention of the Ehlers that in fact they were titleholders. With this contention we agree.

In Peterborough Savings Bank v. Pierce, 54 Neb. 712, 75 N. W. 20, we held:

"It is a general rule that where two unequal estates vest in the same person at the same time, without an intervening estate, the smaller is thereupon merged in the greater.

"But merger does not always or necessarily result from such a coinciding of such estates.

"Whether the two estates will be held to have coalesced will depend upon the facts and circumstances in the particular case, the then intention of the party acquiring the two estates, and the equities of the parties to be affected."

In various ways we have restated these rules down to and including Watson v. Dalton, 146 Neb. 86, 20 N. W. 2d 610.

In their answer defendants claimed title both by reason of the assignment of the Highsmith contract and the adjustment company deed, and also by the Highsmith deed. They prayed that the mechanic's lien be found null and void.

Mr. Ehlers testified that he agreed that Mrs. Ehlers would purchase the contract. The board resolution which he offered recited that Mrs. Ehlers was the assignee of Highsmith. Mr. Ehlers testified that he paid the amount due under the contract and obtained the adjustment company deed. By deed from Highsmith, Mrs. Ehlers secured whatever interest he had in this property and performed the Highsmith contract. A clear intention to merge the titles is shown. The equities all require that it be held that a merger of the adjustment company's legal title and Highsmith's equitable title occurred when Mrs. Ehlers acquired both estates. It fol-

lows that the trial court erred in decreeing the payment to the Ehlers of the $1,049.70 out of the proceeds of the sale.

Although a mechanic's lien when filed attaches only to an equitable estate, it may be enforced against the fee after the equitable and legal titles have merged. Harte v. Shukert, 94 Neb. 210, 142 N. W. 517. It further follows that the mechanic's lien, if valid, is a lien on the fee title shown to be held by Mrs. Ehlers.

This brings us to appellants' contention that under section 52-101, R. S. Supp., 1949, there is no lien except by virtue of a contract with the owner and that, they being the owners of the legal title and there being no contract with appellants, there is no liability on their part for the Highsmith debt. The lien claimed here is one based on a contract with Highsmith, the owner of an equitable interest in the property, which attached by merger, if valid, to the fee. The plaintiff here seeks to enforce a lien against the property. The plaintiff does not seek to make defendants liable for the debt. There is no merit in the contention.

This brings us to appellants' contention that the claimed lien is not valid. This is based on four contentions: (1) The statement of the names of the persons for whom the work was done was false in that it included not only Highsmith but also the adjustment company and the Bilbys with whom plaintiff had no contract; (2) the statement that the first item was furnished January 16, 1947, when the evidence shows that it was furnished January 23, 1947; (3) the statement that the date of the last item was that of April 18, 1947, when the initial evidence was some date early in February and finally March 28, 1947; and (4) the statement that there was due at the date of the claimed lien $1,180, when appellants claim the evidence shows that plaintiff had sold its claim, had received its money from the credit corporation, and had nothing due it on April 25,

1947, the date the lien was executed, or on May 29, 1947, the date the lien was recorded.

The rule is that "The object of the mechanics' lien law being to secure the claim of those who have contributed to the erection of a building, it should receive the most liberal construction to give full effect to its provisions." Way v. Cameron, 94 Neb. 708, 144 N. W. 172. See, also, Johnson v. Olson, 132 Neb. 778, 273 N. W. 201.

It is also the rule that "* * * where a claimant, either by gross carelessness or by design, puts upon record a statement which he knows, or which by the exercise of reasonable and proper diligence he might have known, to be erroneous and unjust, either by including items not furnished for the particular building or by failure to give credit for payments made, the law will not aid him in enforcing his lien. On the other hand, if the errors are trifling and immaterial, or if they are readily explainable as the result of mistake, and no element of wilfulness appears, regard will be had for the imperfections of human machinery, and the recovery of a just debt will not be denied where nothing but fair dealing was intended." Consolidated Stone Co. v. Union P. R. R. Co., 96 Neb. 521, 148 N. W. 318. See, also, Rivett Lumber & Coal Co. v. Linder, 113 Neb. 567, 204 N. W. 77.

We consider the first three of these four contentions together. We conclude that they are trifling and immaterial errors within the above rule and do not in anywise affect the validity of the lien.

This brings us to the fourth contention above stated. We direct attention to the provisions above recited from the Highsmith contract with plaintiff with reference to the FHA charges, to the credit application of Highsmith to the credit corporation, and to the completion certificate of Highsmith and the dealer's completion certificate on printed forms directed to the credit corporation. We direct attention also to the fact that there is no contention

here as to the amount originally due plaintiff from Highsmith under the contract, and no contention that Highsmith paid any part of it.

On direct examination, a witness for plaintiff was asked as to payments, if any, made on the Highsmith contract with plaintiff. He replied that "This contract was sold with" the investment trust and they "know more about it than I do." Later, in answer to a question as to the completion of the work, he testified that they received a completion certificate; that the completion certificate was necessary "to obtain money" from the investment trust and "we turn in our note and completion certificate and they pay us," and again "that the completion certificate cannot be sent in for a purchase until the work is completed"; and that "time has to elapse for approval by the finance company." On cross-examination, this witness testified that plaintiff "assigned this claim" and "got our money from the Commercial Credit" on March 28, 1947, and that plaintiff did not own "this property" on April 1, 1947. Later on redirect examination, this witness referred to a promissory note signed by Highsmith. It was marked as an exhibit and offered in evidence, but not received on Mr. Ehlers' objection that there was no connection shown between it and the mechanic's lien. The witness then testified that the note was "discounted." It was again offered in evidence and a ruling reserved. Later on cross-examination of another witness, the defendants developed that the note was for $1,356.75. Thereafter the offer of the note was withdrawn.

There also is evidence of plaintiff that the mechanic's lien was "assigned" to the credit corporation, and that it was "ultimately and eventually abandoned and assigned back." An instrument purporting to be the "assignment back" was offered in evidence. Ruling was reserved on the offer and, as nearly as we can determine, the instrument never was received in evidence. There is evidence that it was dated October 31, 1947. Accord-

ingly, the terms and provisions of the note and "assignment back" are not before us as evidence for consideration here.

It is apparent that this evidence got into the record as the initial result of the effort of the plaintiff to establish the date of the completion of the work and the absence of payments under the contract. Loose language was used. With the exceptions stated, the written evidence that would show the facts was not produced.

It is as a result of this situation that the defendants Ehlers now undertake to defeat the lien on the contention that the plaintiff had sold its claim before the execution and recording of the mechanic's lien. We find no indication in the court's decree or in the motion for a new trial that this particular issue was urged to the trial court. The court did make a finding generally for the plaintiff and specifically found that the affidavit and the account filed as a mechanic's lien were correct and true.

This evidence indicates that the general plan was that Highsmith was to pay this debt through a loan from the credit corporation; that as a part of that plan a note was given; that plaintiff discounted or pledged the note to the credit corporation as a part of the financing of the transaction and received its money thereon; that the plan was not consummated; that plaintiff had not transferred its interest in the claim so as to lose its inchoate lien right but rather retained and exercised that right; and that as a part of that it assigned the perfected lien to the credit corporation and later secured a reassignment of the lien. The evidence offered does not relate to the status of the claim on either the date of the execution or the recording of the mechanic's lien. The best evidence was in part not offered and when offered it was not received, but that which sustains these conclusions rises as high as that upon which the Ehlers rely. It would be a patent injustice to defeat the enforcement of this lien on this evidence and under the

circumstances appearing here. We agree with the conclusion of the trial court as to the validity of the lien.

The judgment of the trial court is reversed and the cause remanded with directions to enter a decree finding that there is due the plaintiff on the lien the sum of $1,180, with interest, and, if not paid, the property be sold as provided by law and the proceeds be applied: First, to the payment of costs; second, to the amount found due the plaintiff; and the balance, if any, to the defendants as their interests appear. All costs in both district court and this court are to be taxed to defendants Ehlers.

REVERSED AND REMANDED WITH DIRECTIONS.

MARK W. STANLEY, APPELLEE, V. FRANCES STANLEY, APPELLANT.

50 N. W. 2d 558

Filed January 4, 1952. No. 33047.

Divorce. In a divorce action wherein a divorce has been granted and the custody of children has been fixed, if the circumstances of the parties shall change, or it shall be to the best interests of the children, the court may afterwards from time to time on its own motion or on the petition of either parent revise or alter, to any extent, the decree as it concerns the care, custody, and maintenance of the children or any of them.

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

Baskins & Baskins, for appellant.

Crosby & Crosby, for appellee.

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

YEAGER, J.

An action was instituted in the district court for Lincoln County, Nebraska, on April 28, 1949, by Mark W.

Stanley, plaintiff, against Frances Stanley, defendant, for divorce. On July 15, 1949, a decree was entered granting the plaintiff a divorce and the custody of a minor child of the parties. The child was born February 6, 1948. Its name is Mark Allen Stanley. On November 8, 1950, the defendant filed a petition in the action wherein she prayed for an order modifying the decree by granting to her the custody and control of the minor child. She also prayed for an order for support and maintenance of the child. By appropriate pleadings issue was joined and a trial was had. By decree all relief prayed for was denied. The original decree was however modified so as to grant to the defendant the right of reasonable visitation. A motion for new trial was filed which was duly overruled. From the decree and the order overruling the motion for new trial the defendant has appealed.

Numerous assignments of error appear as grounds for reversal but the sole proposition requiring consideration is that of whether or not under the facts as disclosed by the record and appropriate principles of law the court erred in allowing the custody and control of the minor child of the parties to remain with the plaintiff.

The propriety of the original award of custody to the plaintiff is not brought into question. The basis upon which the request for change is made is that there have been changed conditions which make desirable the transfer of custody to the defendant. The request is brought under section 42-312, R. S. 1943, which is as follows: "If the circumstances of the parties shall change, or it shall be to the best interests of the children, the court may afterwards from time to time on its own motion or on the petition of either parent revise or alter, to any extent, the decree so far as it concerns the care, custody and maintenance of the children or any of them." See Blue v. Blue, 152 Neb. 82, 40 N. W. 2d 268.

There is no substantial contention that the plaintiff

has not, from the time that he received the custody of this child, within his ability and capacity provided the best possible care. His devotion to the child and its welfare has been complete and to say the least highly commendable. Since then he has remarried and in addition to his own devotion he now has a wife who has and manifests a high devotion to the child's welfare.

It is true that plaintiff and his wife are not people of large means or income but plaintiff does have a net annual income of from $4,000 to $5,000 from an established business which he owns and operates. These people live in modest quarters but there is nothing in the record from which a reasonable inference could be drawn that anything does or could flow therefrom detrimental to them or to the child. They expect, according to the record, as time and circumstances will permit to improve their condition in this respect and to provide opportunity for outdoor play and recreation for the child. The prospect for the future welfare of this child with them is altogether attractive and in keeping with the standards and traditions of people of like circumstances. The child is in good health, is well cared for, and is apparently happy in the hands of its father and his present wife against whom according to the entire record there is no reproach.

Insofar as the plaintiff is concerned there is no changed circumstance which would justify the removal of this child from his custody. If there are changed circumstances or if anything has occurred which in the best interests of the child would justify a change it must be found with relation to the defendant.

In this connection from the record little is to be ascertained as to defendant's conduct following the decree of divorce. Near the time the decree of divorce was entered the defendant spirited the child from the jurisdiction of the court. Plaintiff caused its return. Just how is not made clear. Since defendant's departure on that occasion she never returned to this state nor at-

tempted to see the child until the hearing on the petition herein. It is disclosed that before her own divorce decree became final she married her present husband who was not divorced from a former wife. Later after her divorce became final and he obtained a divorce these parties were legally married. Apparently from the date of the illegal marriage until the date of the valid one they conducted themselves as husband and wife. Finally about nine months before the hearing herein they bought a nice home and some acreage outside of Tyler, Texas. At this place they reside with a son of the husband by a former marriage. The husband testified to a taxable income of about $20,000 a year. He has riding horses for the pleasure of his family. Neighbors from Texas gave testimony as to the qualities they observed in the defendant and her husband. This testimony was favorable but none was an intimate friend or person who had known them except for the time they had lived in the home mentioned, at Tyler, Texas.

Little more can be said in favor of the requested change than that the defendant is the mother of the child; that she desires custody; that her husband is more affluent than the plaintiff; and that the proposed new environment is more physically attractive.

This is not regarded as a sufficient change of circumstances to justify an award of the custody of this child to the defendant.

The decree of the district court is affirmed.

AFFIRMED.

JENNIE R. FOSTER, APPELLANT, V. ATLAS LUMBER COMPANY, A CORPORATION, DOING BUSINESS AS GORDON LUMBER AND COAL COMPANY, ET AL., APPELLEES.

50 N. W. 2d 637

Filed January 4, 1952. No. 33077.

Workmen's Compensation. Mere exertion, which is not greater than that ordinarily incident to the employment, which combined with pre-existing disease produces disability, does not constitute a compensable accidental injury.

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

Lloyd H. Jordan and *Charles A. Fisher,* for appellant.

Joseph H. McGroarty, for appellees.

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

SIMMONS, C. J.

This is an action under the Workmen's Compensation Act brought by the widow of an employee of the defendant. It presents two questions. Did the employee suffer an accident within the meaning of the Workmen's Compensation Act and, if so, did death result from the accident? The matter was heard before a judge of the compensation court and the claim was dismissed. The matter was next heard before the compensation court sitting en banc and the cause was dismissed. It was appealed to the district court and dismissed. It is here on appeal. We affirm the judgment of the trial court.

The defendant offered no evidence.

Plaintiff's evidence was that the deceased was a man 62 years of age and in general good health. He had some hypertension and was 10 percent overweight. In 1917, he had had an operation for appendicitis followed by an incisional hernia.

For many years the deceased had been the manager of defendant's lumber yard at Gordon. His work was

mostly office work. However, he did anything about the yard that was required, including such work as loading of lumber and cement.

On September 20, 1949, he went with a customer in a car to a warehouse some two blocks from the office and there helped sort out, as to color, paint that the customer purchased. The paint was in cans in cartons weighing 50 pounds or more. The customer and the deceased each carried one carton to the customer's car—a distance of 150 feet. They returned and, at the customer's suggestion, deceased held open the warehouse door while the customer carried out three more cartons of paint. The customer said the deceased may have carried out a second carton, but he does not think so. They then got into the car and started back to the office. On the way deceased said, " * * * I've got kind of a pain in my stomach." Shortly thereafter at the office yard he was observed to be in apparently great pain, sweating and vomiting. He told witnesses he had "hurt" himself lifting paint. He was taken home. His wife was absent, was located, and reached home shortly thereafter. Deceased was abed in pain. He told his wife that he had "hurt" and "strained" himself in lifting paint. A doctor was called by deceased's wife. During the course of his treatment deceased told the doctor, "I got sick after lifting a case of paint and I got to vomiting."

The doctor reached a diagnosis of strangulated incisional hernia. The doctor testified that the cause of a piece of bowel being caught in the incisional hernia was some sort of increased pressure in the abdomen and that pain and the other symptoms would follow almost immediately. Deceased did not respond to treatment. He was operated on the next day and the diagnosis was confirmed. Deceased made a normal recovery. He was ambulatory after four days. On October 1, 1949, he was discharged from the hospital. He walked, with assistance, to his car, and from the car into his home. He

collapsed before reaching his bed and died in a few minutes. The doctor gave the cause of death as an embolus —"a blood clot, which apparently struck one of the major arteries in the heart"; that he assumed the clot came from the healing area of surgery; that a definite diagnosis of the cause of death could not be made without an autopsy; and that none was performed.

Plaintiff contends that the deceased suffered an accident within the meaning of subdivision (2) of section 48-151, R. S. Supp., 1949, and argues that the lifting of the paint caused the strangulated hernia; the operation was necessary to relieve that situation; the embolism and the death were the result of the operation; and hence she is entitled to recover.

The statements of the deceased as to having hurt and strained himself lifting the paint were admitted over objection. Defendant contends that they were hearsay and not admissible. Plaintiff contends that they were admissible and to be considered under the res gestae rule. We do not deem it necessary to determine that question. Assuming, but not deciding, that one or more of the statements were admissible, they show only the result of a cause stated by the deceased to have been the lifting of the paint. They point only to that as a cause. No other cause is indicated in the evidence. The lifting of the paint was within the duties ordinarily done by the deceased.

Subdivision (2) of section 48-151, R. S. Supp., 1949, provides: "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."

We have repeatedly held that "Mere exertion, which is not greater than that ordinarily incident to the employment, which combined with pre-existing disease produces disability, does not constitute a compensable acci-

dental injury." Hamilton v. Huebner, 146 Neb. 320, 19 N. W. 2d 552, 163 A. L. R. 1. The rule is applicable here.

The judgment of the trial court is affirmed.

AFFIRMED.

LILLIAN WAGOUN, APPELLANT, V. CHICAGO, BURLINGTON & QUINCY RAILROAD, APPELLEE.
50 N. W. 2d 810

Filed January 4, 1952. No. 33078.

1. **Appeal and Error.** An appeal from an order of the district court granting 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.
2. **Fraud.** A person may not be held responsible for misrepresentations not made, authorized, or participated in by him.
3. **Agency.** The authority of a person to act for and bind another is a question of fact. There is no presumption of its existence.
4. **Fraud: Release.** Misrepresentation of a material fact made by a person representing a releasor and relied and acted upon by him does not constitute a basis for avoidance of the release of a claim for personal injuries unless the misrepresentation was also made on the authority or with the knowledge of the releasee.

APPEAL from the district court for Douglas County: ARTHUR C. THOMSEN, JUDGE. *Affirmed.*

Mecham, Stoehr, Moore, Mecham & Hills, for appellant.

J. W. Weingarten and *W. P. Loomis,* for appellee.

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

BOSLAUGH, J.

Appellant sued appellee for damages on account of personal injuries claimed to have been sustained by her because of negligence of appellee. Appellant was at the time she received the alleged injuries an employee of

appellee, an interstate common carrier, and she based her action on the provisions of the Federal Employers' Liability Act. 45 U. S. C. A., § 51, p. 118.

At the conclusion of all the evidence, appellee requested the court to instruct the jury to return a verdict for it. The motion was denied. The jury returned a verdict for appellant and judgment was rendered and entered for her and against appellee for the amount of the verdict. Appellee moved the court to set aside the verdict, vacate the judgment, and render a judgment of dismissal of the case notwithstanding the verdict, or, in the alternative, to grant the appellee a new trial of the case for the reasons assigned in that part of the motion. The motion for a new trial was denied and the motion for a judgment for appellee was sustained. This appeal challenges the correctness of the judgment of dismissal of the case.

The petition of appellant sufficiently alleged a cause of action against appellee for the recovery of damages because of injuries negligently caused her on April 18, 1946, while she was performing services for appellee within the scope of her employment in cleaning and conditioning equipment used regularly by appellee in its interstate transportation business.

Appellee in bar thereof pleaded that in June 1947, appellant made claim against it for the injuries described in the petition and claimed to have been sustained by her on April 18, 1946, while employed by appellee; that it on August 15, 1947, compromised and settled all claims and demands made by appellant, including the cause of action alleged in her petition; that she released appellee from all liability to her by instrument in writing duly executed and delivered; and that appellee paid to her and she received and accepted at that time and for that purpose, $3,000 as full and sole consideration for the compromise, settlement, and release.

Appellant by reply asserted that the attorneys of Minneapolis, Minnesota, employed by her on account of her

claim against appellee, solicited the employment; that they conspired with appellee to obtain a settlement of her claim; that in furtherance of the conspiracy they willfully and falsely represented to her that they had ascertained that she would be physically able to return to work within a month; that she would be given and have the right to return to the position she had with appellee on April 18, 1946, the date of the accident, with full seniority rights; that she would be paid $3,000; that each of these matters was contained in an instrument presented to her for her signature; that she could not and did not read the instrument; that it was incorrectly read to her by her attorney; that she relied and acted upon the information given her as aforesaid, and because thereof she signed the instrument pleaded and relied upon by appellee as a release herein; that said instrument did not contain any of the terms and provisions stated to her as the basis of the settlement, except the fact that she would be paid $3,000; that appellee refused to restore her to her seniority rights; that appellant has been disabled continuously since April 18, 1946; that when she learned the falsity of the representations made to her as alleged, she tendered return of the money received by her and has continued the tender thereof; and that the release was without consideration, was obtained by fraud, and as the result of a mistake of fact.

It was the province and duty of the district court, in the situation presented by the record after the motion for a judgment notwithstanding the verdict was made, to re-examine the entire material evidence, and if it was found insufficient to support the verdict to sustain the motion, to set aside the verdict, and to render a judgment of dismissal of the case. The appeal requires this court to consider the entire record and determine the correctness or incorrectness of the conclusion of the trial court that the evidence was not sufficient to sustain the verdict returned and the judgment rendered thereon. § 25-1315.02, R. R. S. 1943; Krepcik v. Interstate Transit Lines,

152 Neb. 39, 40 N. W. 2d 252; Hamilton v. Omaha & Council Bluffs St. Ry. Co., 152 Neb. 328, 41 N. W. 2d 139.

Appellant was employed by appellee as a passenger coach and mail car cleaner. She was the victim of an an accident and suffered injuries on the 18th day of April 1946, while cleaning a mail car used by appellee in the conduct of its interstate transportation business. More than a year thereafter she was located and solicited by a representative of the law firm of Davis, Michel, Yaeger and McGinley of Minneapolis, Minnesota, to employ them to represent her in presenting and pressing her claim on account of the accident against appellee, and on the 21st day of June 1947, this firm by instrument in writing was engaged by her to prosecute her claim to settlement or judgment.

These attorneys for more than 20 years before and including 1947 specialized in the procurement, settlement, and trial of personal injury and death claims of railroad employees arising under the Federal Employers' Liability Act. Their clients were confined to claimants or plaintiffs. They were never engaged by, and never represented any railroad company, and in particular they never in any manner represented or acted for the Chicago, Burlington & Quincy Railroad Company. They were regional counsel for the Brotherhood of Railroad Trainmen. Included in its membership were conductors, brakemen, switchmen, switch tenders, flagmen, and trainmasters. The members of the law division, the members of the claim department, and management personnel of railroad companies were not members of the Brotherhood. The contact of the representative of the law firm and appellant resulted from a suggestion of an alleged switchman of appellee who was a member of the Brotherhood to the representative to call appellant and discuss her matter. The alleged switchman was not more definitely identified, his name was unknown, and he could not be located.

C. S. McGinley, a member of the Minneapolis law firm,

handled the claim after the contract of employment was made by appellant. He notified appellee by letter of June 23, 1947, that his firm represented her. The original letter was sent to F. L. Given, assistant general adjuster of appellee at Omaha, and a copy of it was sent to Tom Smiley, general adjuster at Chicago. This is the first communication of any kind or character the firm, McGinley, or any other person connected with that firm had with appellee or any representative of it concerning appellant or any matter in which she was interested. The second communication was about August 1, 1947, when McGinley and Smiley discussed the claim of appellant but reached no conclusion concerning it. Given had charge of the settlement and adjustment of personal injury claims against appellee arising at Omaha and on its lines west of that city, a fact known to the Minneapolis law firm. Sometime after the McGinley and Smiley conversation, McGinley talked with Given by telephone and asked him if he could and would come to Minneapolis on a specified date for a discussion of the claim of appellant looking towards a possible settlement thereof, and in that conversation he was advised that appellant would then be in that city on the date named.

Given went to Minneapolis, and saw and negotiated with McGinley concerning a settlement of the claim. He was there two days. He and McGinley met and negotiated at different times during those days. The result of the negotiations was that Given finally offered $3,000 as a compromise settlement and discharge of all claims of appellant against appellee, and no other thing or consideration. Sometime after the offer was made, McGinley advised him that appellant would accept the offer as made. A release to that effect was prepared by Given and left with McGinley. Appellant executed it and Given delivered to McGinley a check of appellee for $3,000, payable to the order of appellant and her attorneys, and McGinley surrendered the release of appel-

lant to Given. The check was endorsed by the payees and cashed.

Given was the only person who in any way acted for appellee in reference to the claim and settlement thereof after notice from McGinley that his firm had been employed by appellant, except the conversation had by Smiley with McGinley. Given did not meet or communicate with appellant and was not in her presence until long after the settlement of her claim on August 15, 1947. He, or any other person connected in any way with appellee, made no offer or representation to appellant or her attorneys, or any of them, that appellee would employ appellant after the settlement in any capacity or for any purpose, or that her seniority rights as an employee of appellee would be restored and continued. Appellant produced no evidence that anyone other than McGinley made any such offer, statement, or representation. The offer given and made in the settlement of the claim was $3,000 to appellant as the sole and full consideration for the final disposition and release of all her claims against appellee. The release executed by appellant correctly recites and evidences the offer of settlement as made and consummated on the 15th day of August 1947. Any statement or representation contrary to the terms of the release made to appellant was by McGinley outside of the presence and without the knowledge of Given or any other representative of the railroad company. It is not even claimed in this case that the unidentified switchman with whom the solicitor for the Minneapolis attorneys claimed to have talked made any such statements. There is no evidence to support the allegations of the reply that the settlement and release of the claim of appellant was the result of fraud, misrepresentation, or mutual mistake.

A person may not be held liable for fraudulent representations not made, authorized, or participated in by him. Spies v. Stein, 70 Neb. 641, 97 N. W. 752; Atlas Land Co. v. Hendriks, 298 F. 589; Loverin v. Kuhne, 94

Conn. 219, 108 A. 554, 33 A. L. R. 848; Humphrey v. Baron, 223 Iowa 735, 273 N. W. 856; 37 C. J. S., Fraud, § 61, p. 346; 23 Am. Jur., Fraud and Deceit, § 184, p. 1006.

The responsibility of appellee for any misrepresentations made by McGinley to appellant rests on the claim that appellee conspired with the Minneapolis attorneys in general and with McGinley in particular, and that these attorneys were employed to and did represent appellee. The only evidence from which appellant deduces these conclusions is that the representative of the Minneapolis attorneys received a suggestion from an employee of appellee that the representative call appellant and discuss her matter. The employee was identified and characterized only as a switchman and a member of the Brotherhood of Railroad Trainmen. Beyond that there is nothing to show his status, duties, or authority. Without more than appears here it must be concluded that he had the duty and authority to act in the switching of railroad rolling equipment and none whatever to handle claims against or engage lawyers for appellee. The whole theory of the Minneapolis attorneys or any of them representing and conspiring with appellee, as well as the contention that the settlement of the claim by appellee was procured by fraud, is without support except the oft-repeated assertion thereof in the argument of appellant. The authority of one person to speak or act for and bind another is a question of fact. There is no presumption of its existence. Anyone relying on the act of one claimed to be an agent has the burden of proving authority of the agent. In Meier v. Geldis, 148 Neb. 234, 26 N. W. 2d 813, it is said: "The question of agency is one of fact and there is no presumption of its existence. The party alleging the existence of the agency relationship assumes the burden of proving the agent's authority and that the acts of the agent, for which liability against the principal is sought, must be shown to be within the scope of the agent's authority." See, also, Bartholomew v. Skelly Oil Co., 144 Neb. 51, 12 N.

W. 2d 122; Trephagen v. City of South Omaha, 69 Neb. 577, 96 N. W. 248, 111 Am. S. R. 570.

The principle involved in the doctrine that misrepresentations concerning the nature and extent of the injury made by the physician of a releasor do not constitute a basis for avoidance of the release of a claim for personal injuries because the releasee is not responsible for the representations or advice of such physician is applicable to the situation in this case. Colorado Co. v. Huntling, 66 Colo. 515, 181 P. 129, was an action to set aside a release on the grounds of fraud, misconduct, and undue influence, and to recover damage for personal injuries. The court said the allegations of fraud, misconduct, and undue influence: "If intended to apply to Drs. Allen and McKinnie, they are without force until sufficient evidence be adduced to justify the jury in finding that these doctors were in the employ of the company. The proof here not only fails, but conclusively shows the contrary. Plaintiff's first employment of an adviser was that of Judge Orr, her attorney. Through him she employed Dr. Allen. Through Dr. Allen, she employed Dr. McKinnie. * * * If the physician referred to is Dr. Allen, then no advice given by him and no reliance placed upon his representations can form any basis for the recovery, because he was her physician, and for his representations and advice the company is not responsible." Likewise in this case, any reliance of appellant upon representations, statements, and conduct of McGinley affords no basis for impeachment of the settlement and release of the claim of appellant because McGinley was not a representative of appellee and had no authority or right to speak or act for it. As an actor concerning the matters involved in this case, he was attorney for appellant. See, also, Lipscomb v. Houston Electric Co. (Tex. Civ. App.), 149 S. W. 2d 1042; Jordan v. Guerra, 23 Cal. 2d 469, 144 P. 2d 349; Annotation, 48 A. L. R. 1462; 117 A. L. R. 1022.

The appellant failed to impeach the legality and effec-

tiveness of the settlement and discharge of her claim against appellee. The motion of appellee made after the verdict was properly granted.

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

AFFIRMED.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

JANUARY TERM, 1952

CARL E. FAUGHT ET AL., APPELLEES, V. PLATTE VALLEY PUBLIC POWER & IRRIGATION DISTRICT, A PUBLIC CORPORATION, APPELLANT.

51 N. W. 2d 253

Filed January 11, 1952. No. 32987.

1. **Appeal and Error.** To obtain a review of errors of law occurring upon the trial of an equity case, a motion for new trial must be filed assigning the same therein.
2. ———. Likewise, such alleged errors must be assigned and discussed in the brief filed in this court on appeal or they will not ordinarily be considered.
3. **Waters.** The right to use water for irrigation purposes may be acquired by contract with a common carrier irrigation corporation, and such contracts are generally governed by the same rules which pertain to other contracts.
4. **Statutes: Contracts.** Existing statutes and laws with reference to which a contract is made enter into and become part thereof, subject to appropriate legislative limitations subsequently enacted under the police power of the state, and such principle embraces alike those which affect its validity, construction, discharge, and enforcement.
5. ———: ———. Thus when a statute prescribes a duty and a contract is made involving performance of that duty, such statute becomes a part of the contract, or where the law authorizes the regulation of service rendered the public, such law becomes a part of and controls contracts providing for the public service.
6. **Contracts.** Where from the nature of a contract it is evident

that the parties contracted on the basis of the continued existence of a condition or state of things to which it relates, the cessation of existence of the condition will excuse performance, a condition to such effect being implied in spite of the fact that the promise may have been unqualified.

7. **Contracts: Waters.** A construction conferring a right in perpetuity will be avoided unless compelled by unequivocal language of the contract, and a contract will not be construed as imposing a perpetual obligation when to do so would be adverse to public interests.

8. **Waters.** A purchaser of land from one who holds a water right contract thereon with an irrigation company and who takes title thereto by deed containing ordinary covenants of warranty with no reference to the question of water rights and who refuses to accept water from the company is not personally liable for the maintenance fee mentioned in the water right contract between the grantor and the irrigation company, and, for want of privity of estate, an action cannot be maintained against him to recover a personal judgment therefor.

9. ———. An agreement to pay an irrigation corporation maintenance charges as consideration for the right to use irrigation water upon land is not a covenant running with the land in the absence of privity of estate, which can be created only in connection with a grant of the land sought to be charged or an estate therein, or the equivalent thereof, and the grant of a right to use irrigation water belonging to the public to be conveyed to the land by the corporation is not a right in land or the equivalent thereof.

10. ———. An irrigation corporation does not become the owner or proprietor of the water that it conveys as a public commodity. It is only the servant of the public to carry it to the land for which it has been appropriated, and in such respect stands on the same footing as a common carrier.

11. ———. No private estate can be created in property belonging to the public or devoted to a public use, and a consumer of irrigation water who is not a stockholder in the corporation cannot have a water right in the sense that it is a private freehold interest in the real estate of the distributing irrigation corporation because his right is simply a right of service.

12. ———. The exercise or enjoyment of such right of service does not create an easement in the property of the corporation or the consumer but simply is a right of service to be rendered him by a common carrier public utility subject to regulation and control of the state in such manner as may be prescribed by law.

13. ———. A contract with an irrigation corporation for the use of water is executed with reference to the statutes and laws prescribing its authority, which become a part of the contract. The subsequent purchase of such corporation by a public power and irrigation district does not of itself, without appropriate legislative action or consent of the consumer, actual or implied, make the statutes and laws under which it was authorized to organize and operate a part of the original contract made with the irrigation corporation.
14. **Contracts.** Where a contract requires successive steps to be taken by the respective parties, if, when a step becomes due, one party either in words or by their equivalent in acts, declines to take it or is unable to do so while the other is ready and willing to do his part, the latter may rescind the contract.

APPEAL from the district court for Dawson County: JOHN H. KUNS, JUDGE. *Affirmed.*

Crosby & Crosby, and *Beatty, Clarke, Murphy & Morgan,* for appellant.

Smith Brothers, for appellees.

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

CHAPPELL, J.

Plaintiffs brought this suit in equity to cancel and rescind a water right deed and contract and quiet title to described farm land owned by them as against the same because of material changed conditions and abrogation of the deed and contract by defendant. Defendant for answer and cross-petition denied generally and specifically plaintiffs' right to relief prayed and sought a personal judgment against plaintiffs for increased annual water service maintenance charges allegedly due and unpaid by them for the years 1948, 1949, and 1950.

After hearing upon the issues the trial court rendered a decree which cancelled and terminated the contract as of December 3, 1949, the time when notice of rescission was operative, quieted the title to plaintiffs' land against the same, free and clear of any liens for maintenance charges accruing after December 3, 1949, upon

condition, however, that plaintiffs pay into court for the benefit of defendant the sum of $521.91, with interest at 7 percent within 60 days from date of the decree, and in event of default thereof the judgment and decree entered upon plaintiffs' petition should be vacated and set aside. Defendant's cross-petition was dismissed without prejudice to a future action for foreclosure of such unpaid liens arising from the contract.

Defendant's motion for new trial was overruled, and it appealed, assigning substantially that the judgment was not sustained by the evidence but contrary thereto, and contrary to law. We conclude that the assignments should not be sustained. Plaintiffs did not cross-appeal.

At the conclusion of the trial, but after argument and submission, defendant asked leave in open court to amend the prayer of its cross-petition, reducing its interest demand from 9 percent to 7 percent, and praying that any judgment awarded for maintenance service charges should be declared a lien upon plaintiffs' property and a foreclosure thereof should be decreed. The request with regard to interest was granted. The other part of the request was denied without prejudice to future action brought for that purpose. In defendant's brief it was argued that the trial court thus erred. In that regard, however, it appears from the record that defendant did not assign such alleged error either in its motion for new trial or in its brief filed in this court. The applicable rule is that to obtain a review of errors of law occurring upon the trial of an equity case, a motion for new trial must be filed assigning the same therein. Oertle v. Oertle, 146 Neb. 746, 21 N. W. 2d 447. Likewise, such alleged errors must be assigned and discussed in the brief filed in this court on appeal, or they will not ordinarily be considered. Hartman v. Hartmann, 150 Neb. 565, 35 N. W. 2d 482. In any event, however, the form of the judgment was such that in the light of our conclusions herein, defendant could not have been preju-

diced in any manner by the court's refusal to permit the amendment.

The facts are not in dispute. The record discloses that in March 1935, Hastings College owned the farm lands here involved. On and prior to that time, Dawson County Irrigation Company was a privately organized and operated Nebraska common carrier public service utility corporation, with a water appropriation from the state. On March 2, 1935, the College entered into a written contract with such corporation whereby it sold and conveyed to the College and to its heirs and assigns "the right to use water from the canal of the" corporation, including a pro rata share of its available contractual reservoir waters "during the irrigation season of each year, in an amount not exceeding" a designated rate "to be used upon and for the purpose of irrigating" the described lands here involved. The consideration therefor was $750 paid in cash by the College and payment by it "annually in advance, on or before the first day of March in each and every year, the further sum of one and 50/100 ($1.50) Dollars, per acre of the land above described, as an annual maintenance charge" which payments were made a lien upon the land from the date when they became due, plus, as further consideration, a waiver and release of any and all claims then existing in favor of the College for loss or damage by reason of any leakage, seepage, breakage, or overflow from any of the canals, laterals, sub-laterals, or ditches of the corporation to any land owned or controlled by the College, together with a conveyance of a right-of-way through the land for the canal and the laterals of the corporation as then constructed upon the land.

The contract contains no date of termination except as hereinafter recited, and it was agreed therein that "this contract shall have the force and effect of a covenant running to and with the said land * * * for above described, and the canal * * *." It provided that "The

water to be furnished under this agreement is intended to form a part of the appurtenances to the said land above described, and the right thereto shall be transferable only with and run with said land" and that the corporation should be "bound by this instrument to all present and subsequent owners of said land, but to no other person." (Italics supplied.)

The agreement was made upon the express condition that if the College, its heirs, or assigns, at any time failed, neglected, or refused to make any of the annual maintenance charge payments at the time the same became due and payable, the corporation should have the election, without notice, to furnish the supply of water and sue for the annual payment in law or equity at its election or upon such default to shut off such supply and cease to furnish water under its provisions until payment was made of all such defaulted payments to the corporation with interest thereon at 9 percent from date of default until date of payment, and that upon full payment of such defaulted payments with interest, the College should be reinvested with all rights and privileges theretofore conferred, provided, however, that if any annual payment to be made should remain unpaid and in default for a period of three years, the corporation at its option and upon 60 days' notice in writing to the College, could declare the contract and deed forfeited for failure to pay such maintenance charge, whereupon the deed and contract should terminate and the rights granted therein should revert to the corporation. The contract was appropriately recorded.

The land involved is located four and one-half miles from the main canal on the end of a lateral serving several other consumers.

In 1941 defendant, a public power and irrigation district organized under the provisions of sections 70-601 to 70-671, R. R. S. 1943, purchased all the property and assets and expressly assumed and succeeded to all the

rights, liabilities, and obligations of the Dawson County Irrigation Company, a corporation.

In February 1947, plaintiffs purchased the farm land here involved, and received an ordinary warranty deed to the same, which did not refer in any manner to the water right here involved. They took possession and used no irrigation water in 1947 but paid defendant the annual maintenance charge of $1.50 an acre for that year as specifically provided in the water right deed and contract. In that connection, the fact is that the land was planted to alfalfa, and since it was underlaid with a body of underground water at a depth of about 10 feet at the highest point, no irrigation water was necessary, and they used none during 1947, 1948, 1949, or 1950, although the district was ready and willing during 1948, 1949, and 1950, upon sufficient notice, to deliver such water to them upon request if they would pay an increased maintenance rate hereinafter discussed, which plaintiffs refused to do.

On December 5, 1947, the district, without reference to any regulatory authority except by resolution of its own board of directors and without permission or consent of plaintiffs, as allegedly authorized by section 70-655, R. R. S. 1943, increased the annual maintenance charge for irrigation water service to its users from the contract rate of $1.50 an acre to $2.25 an acre, thus increasing the annual maintenance charge to plaintiffs, who used no water and needed no water, past or future, from $150 a year to $225 a year. It appears from the record that the increased maintenance charge was put into effect by defendant not only to cover increased maintenance costs but also for the purpose of amortizing its original purchase price of the Dawson County Irrigation Company canal and works, the repayment of sums borrowed to meet deficits previously incurred in the operation thereof, and for financing capital improvements and replacements.

Plaintiffs refused to recognize the district's authority

to so increase the rate, refused to enter into a new agreement providing therefor as proposed by defendant, and so advised the district. However, plaintiffs offered at all times to perform the contract as originally executed, and tendered full payment of the maintenance charges at the regular original contract rate with interest, which defendant refused to accept because it was allegedly insufficient to discharge their duty under the increased maintenance rate. Thereafter, on December 3, 1949, plaintiffs filed this action, wherein decree was rendered on December 11, 1950.

In the district court, and again in this court, plaintiffs contended that, because of materially changed conditions and abrogation of the contract by defendant, together with its refusal to perform the same in the light of the provisions of statutes applicable thereto and a part thereof as originally executed, they were entitled, upon reasonable notice, to rescind the contract and have the same cancelled and the title to their land quieted against the same. Such alleged material conditions were their lack of use or need for irrigation water past or future, and defendant's attempt under the provisions of statutes authorizing it to organize and operate, which were never a part of the contract as originally executed, to force plaintiffs to pay alleged increased maintenance rates for amortization of the original purchase price of the Dawson County Irrigation Company canal and works, for repayment of sums borrowed to meet deficits previously incurred in the operation thereof, and for financing capital improvements and replacements. We sustain plaintiffs' contentions.

On the other hand, defendant contended and here contends that the contract contained covenants running with the land imposing an easement on plaintiffs' land and defendant's canal; that the contract as originally executed was made with reference to the subject and existing law under which defendant district was organized and authorized to operate, thus giving it the

right to increase maintenance rates in the manner and for the purpose for which it was done; and that the contract, having no termination date, was perpetual without right of cancellation by plaintiffs or defendant. We conclude that the contention has no merit.

Fundamental rules of law governing the construction and application of such contracts should first be discussed.

In 3 Farnham, Waters and Water Rights, § 614, p. 1935, it is said: "A relation between a consumer and a carrier may be established in either one of three different ways, or by a combination of two or more of them: (1) It may depend upon the consumer taking advantage of the statutory duty of the carrier to supply water at fixed rates; (2) it may depend upon the consumer's relation to the carrier as one of its stockholders; or (3) it may be formed by a simple contract between the carrier and consumer. The rights and duties of the parties under these several modes of establishing relations may differ, and the rights claimed under either may, as has already been suggested, be modified by the existence of one of the other factors. So far as the right depends upon a simple contract relation it is similar to any other contract for a water supply, * * *." As stated in 30 Am. Jur., Irrigation, § 40, p. 624: "The right to use water for irrigation purposes may be acquired by contract. Such agreements, generally speaking, are governed by the same rules that pertain to other contracts * * *." See, also, 56 Am. Jur., Waters, § 256, p. 712; 67 C. J., Waters, § 1076, p. 1404, § 1077, p. 1406, § 1078, p. 1407.

In Watkins & Co. v. Kobiela, 84 Neb. 422, 121 N. W. 448, this court held: "Statutes, with reference to which contracts are made, enter into and become part of the contract. Sessions v. Irwin, 8 Neb. 5." See, also, 3 Williston on Contracts, Revised Edition, § 615, p. 1767.

In Vonburg v. Farmers Irrigation District, 132 Neb. 12, 270 N. W. 835, it was held: "The law in existence at the time a contract is made measures its legality,

subject to any limitations subsequently made under the police power of the state."

In McWilliams v. Griffin, 132 Neb. 753, 273 N. W. 209, 110 A. L. R. 1039, it is said: "This principle embraces alike those which affect its validity, construction, discharge, and enforcement."

As stated in 17 C. J. S., Contracts, § 330, p. 784: "So, when a statute prescribes a duty and a contract is made involving performance of that duty, such statute becomes a part of the contract; or, where the law authorizes the regulation of service rendered the public, such law becomes a part of and controls contracts providing for the public service."

As stated in 17 C. J. S., Contracts, § 464, p. 956: "Where from the nature of the contract it is evident that the parties contracted on the basis of the continued existence of the person or thing, condition or state of things, to which it relates, the subsequent perishing of the person or thing, or cessation of existence of the condition, will excuse the performance, a condition to such effect being implied, in spite of the fact that the promise may have been unqualified."

As stated in 17 C. J. S., Contracts, § 398, p. 887: "However, a construction conferring a right in perpetuity will be avoided unless compelled by the unequivocal language of the contract, and a contract will not be construed as imposing a perpetual obligation when to do so would be adverse to public interests."

It is contrary to public policy in this state to continue to furnish irrigation water to lands when no further beneficial use can be made of such waters thereon. Farmers' Canal Co. v. Frank, 72 Neb. 136, 100 N. W. 286; State v. Birdwood Irrigation District, 154 Neb. 52, 46 N. W. 2d 884.

It will be noted that neither plaintiffs nor their predecessors were ever stockholders in or owned any interest in property of the Dawson County Irrigation Company, a public service utility corporation, which never owned

or conveyed any land or the equivalent thereof to plaintiffs, but, having organized and obtained an appropriation of irrigation water belonging to the public, was contractually engaged as a common carrier by means of its canals and ditches in rendering a service for compensation and its own profit, by conveying that public commodity to lands for which it had been appropriated.

In the contract here involved, the corporation did not agree to do or refrain from doing anything on its own lands or property except to maintain and keep in good repair its own canals and laterals, a duty otherwise at all times imposed by section 46-274, R. S. 1943. The corporation by this contract conveyed nothing, but simply agreed, for a consideration, to deliver irrigation water during the irrigation season of each year to the boundary of plaintiffs' land into a sub-lateral ditch or canal, to be made and provided at plaintiffs' expense. Otherwise it did not agree to do or refrain from doing anything on plaintiffs' land. In that connection, plaintiffs' grantor conveyed to the corporation a right-of way through its land for the canal and laterals of the corporation, as then constructed thereon, and released any and all claims then existing for loss or damage by reason of any leakage, seepage, breakage, or overflow from any canal, lateral, sub-lateral, or ditches of the corporation to any land owned or controlled by the College.

At the time of the execution of the contract, it was made with reference, among others, to the following applicable and controlling statutes then existing, which became a part thereof.

Section 46-268, R. S. 1943, provided in part: "Whenever any person owning any irrigation ditch or canal, shall convey by deed or contract the right to use the water from such ditch or canal for any tract of land for irrigation purposes, such deed or contract shall be recorded in the county where such land is situated, in the same manner and under the same conditions as

deeds for real estate. Such deed or contract, from the date of the recording thereof, shall be binding upon the *grantor, his, their or its successors or assigns, and all persons claiming any interest in such ditch or canal.*" (Italics supplied.)

Section 46-270, R. S. 1943, provided: "Any corporation or association organized under the law of this state for the purpose of constructing and operating canals, reservoirs, and other works for irrigation and water power purposes, shall have power to borrow money, to issue bonds, and to mortgage its property and franchises in the same manner as railroad corporations; * * *."

Section 46-271, R. S. 1943, provided in part: "Any corporation or association organized under the laws of this state for the purpose of constructing or operating canals, reservoirs or other works for irrigation purposes may, through its board of directors or trustees, assess the shares, stock or interest of the stockholders thereof for the purpose of obtaining funds to defray the necessary running expenses."

Section 46-274, R. S. 1943, provided: "Every person managing, owning or controlling any irrigation works for the storage, carriage or diversion of water, except irrigation districts, shall keep its headgates, diversion dams, canals, and laterals in reasonable and proper repair for the delivery and diversion of water to the appropriators under its canal, and the regulation thereof shall be under the control and direction of the State Railway Commission."

Section 46-275, R. S. 1943, provided: "Irrigation works constructed under the laws of this state are hereby declared to be common carriers. The owner or operator of any works for the storage, carriage or diversion of water, except irrigation districts, shall deliver all water legally appropriated to the parties entitled thereto at a reasonable rate, to be fixed by the State Railway Commission."

It will be noted that by virtue of section 46-268, R.

S. 1943, the right to use the water during the irrigation season of each year was binding on the grantor, its successors, or assigns and all persons claiming any interest in such ditch or canal. However, neither plaintiffs nor their predecessors claimed any interest in the ditch or canal as such. The water to be furnished, which the corporation did not own, was simply contractually appurtenant to their land.

In that connection, it was held in Farmers & Merchants Irrigation Co. v. Hill, 90 Neb. 847, 134 N. W. 929, 39 L. R. A. N. S. 798, Ann. Cas. 1913B 524, that: "A purchaser of land from one who holds a water-right contract thereon with an irrigation company, and who takes title thereto by a deed containing the ordinary covenants of warranty, with no reference to the question of water rights, and who refuses to accept water from the company, is not personally liable for the maintenance fee mentioned in the water-right contract between his grantor and the irrigation company, and an action cannot be maintained against him to recover a personal judgment therefor."

In the opinion it was said: "From the statutes and decisions referred to it would seem that the waters in the running streams of the state are public property, subject to be diverted and applied for beneficial uses. That ditches may be constructed to carry the water to agricultural lands for a reasonable compensation would seem proper, and the owner of the land may undoubtedly obligate himself to assist in the construction and maintenance of the ditch. If the owner of the land after incurring an obligation of this kind sells and conveys it, is there any obligation upon the part of his grantee to keep up a maintenance fee, although he has not undertaken to do so by any personal promise?

"We think that the following authorities tend to show that the defendant is not personally liable, and some of these decisions perhaps tend to show that he is not liable as grantee for any burden unless he and the

plaintiff in the case are privies in estate: 17 Viner, Abridgment of Law and Equity (Privity), p. 534; 2 Bouvier, Law Dictionary; Hurd v. Curtis, 19 Pick. (Mass.) 459; Educational Society v. Varney, 54 N. H. 376; 2 Washburn, Real Property (6th ed.) secs. 1203-1205; Cole v. Hughes, 54 N. Y. 444; Scott v. McMillan, 76 N. Y. 141; Nesbit v. Nesbit, 1 Taylor (N. Car.) 403 (318); Webb v. Russell, 3 T. R. (Eng.) 393; Keppell v. Bailey, 2 Myl. & K. (Eng.) 517; 4 Kent, Commentaries, *473; Mygatt v. Coe, 124 N. Y. 212; Pool v. Morris, 29 Ga. 374; Patton v. Pitts, 80 Ala. 373; Kettle River R. Co. v. Eastern R. Co., 41 Minn. 461; Bloch v. Isham, 28 Ind. 37; Weld v. Nichols, 17 Pick. (Mass.) 538; Bally v. Wells, 3 Wils. (Eng.) 25." However, plaintiffs did not cross-appeal and the personal judgment against them will not be disturbed.

Lingle Water Users' Assn. v. Occidental Building & Loan Assn., 43 Wyo. 41, 297 P. 385, cited and discussed the foregoing Nebraska case with approval for its conclusion that an agreement to pay maintenance charges as a consideration for the right to use irrigation water was, under circumstances comparable with those at bar, not a covenant running with the land for want of privity of estate, which can be created only in connection with a grant of the land sought to be charged or an estate therein or the equivalent thereof, and that a right to the use of irrigation water to be delivered by such a utility was not a right in land or the equivalent thereof. See, also, Cabell v. Federal Land Bank of Spokane, 173 Or. 11, 144 P. 2d 297, which cited such Nebraska case in support of a like conclusion.

In that connection, this court said in Farmers Canal Co. v. Frank, *supra*: "The doctrine of private ownership of water for irrigation purposes, disassociated from the land to which it is designed to be applied, has been proved by long experience to be detrimental to the public welfare. * * * The other doctrine is that the right to the use of water should never be separated from the

land to which it is to be applied. 'Where this doctrine prevails, canals and ditches become like railroads, great semi-public utilities, means of conveyance of a public commodity, their owners entitled to adequate compensation for services rendered, but having no ownership in the property distributed.' * * * The irrigation company does not own the water; it is only the servant of the public to carry it to the land for which it has been appropriated, * * *." See, also, 2 Wiel, Water Rights in the Western States (3d ed.), p. 1241; Farmers & Merchants Irrigation Co. v. Brumbaugh, 81 Neb. 641, 116 N. W. 512.

As stated in Sammons v. Kearney Power & Irrigation Co., 77 Neb. 580, 110 N. W. 308, 8 L. R. A. N. S. 404: "In this respect it stands on the same footing as a railroad company."

In Enterprise Irrigation District v. Tri-State Land Co., 92 Neb. 121, 138 N. W. 171, it is said: "This court has repeatedly said that a canal company is to a certain extent a public service corporation; that it does not own the water that it carries, but acquires by appropriation the right to divert the same and to charge a reasonable fee for the carriage of the same to the lands upon which it was designed to be used. Paxton & Hershey I. C. & L. Co. v. Farmers & Merchants I. & L. Co., 45 Neb. 884; Castle Rock I. C. & W. P. Co. v. Jurisch, 67 Neb. 377; McCook Irrigation & W. P. Co. v. Crews, 70 Neb. 115."

In 3 Farnham, Waters and Water Rights, § 613, p. 1935, it is said: "In Wheeler v. Northern Colorado Irrig. Co. (10 Colo. 582, 3 Am. St. Rep. 603, 17 Pac. 487) it is said that the courts should jealously guard the rights of the carrier, and so deal with it, the Constitution and statutes permitting, as to encourage the investment of capital in the construction of reservoirs and canals for the storage and transportation of water. But the court further said that the question of the rights of water companies in connection with the water diverted will be governed by the user's rights, and not by those of the

water company, for a carrier does not become the proprietor of the water diverted, but merely has a right to compensation for his services in carrying it to the point where it is needed." The same rule was followed in Wyatt v. Larimer & Weld Irrigation Co., 18 Colo. 298, 33 P. 144, 36 Am. S. R. 280, reversing 1 Colo. App. 480, 29 P. 906.

In Miller v. Railroad Commission, 9 Cal. (2d) 190, 70 P. 2d 164, 112 A. L. R. 221, it is said: " 'No private estate can be created in property devoted to a public use, and a consumer of water cannot have a water right in the sense of a freehold interest in the real estate of the distributing company; that his right is simply a right of service.' (Glenn-Colusa Irr. Dist. v. Paulson, 75 Cal. App. 57, 69 [242 Pac. 494]. See, also, Leavitt v. Lassen Irr. Co., 157 Cal. 82 [106 Pac. 404, 29 L. R. A. (N. S.) 213]; Coulter v. Sausalito Bay Water Co., 122 Cal. App. 480, 497 [10 Pac. (2d) 780]; Hildreth v. Montecito Creek Water Co., 139 Cal. 22, 29 [72 Pac. 395].)"

In Glenn-Colusa Irrigation Dist. v. Paulson, 75 Cal. App. 57, 242 P. 494, it is said: "The supreme court of this state in Leavitt v. Lassen Irrigation Co., 157 Cal. 82 [29 L. R. A. (N. S.) 213, 106 Pac. 404], heretofore referred to, holds, in substance, that no private estate can be created in property devoted to a public use, and a consumer of water cannot have a water right in the sense of a private freehold interest in the real estate of the distributing company; that his right is simply a right of service. This, of course, carries with it the right to that service so long as the public utility controls the instrumentality rendering the service. The exercise and enjoyment of such right of service does not create an easement such as is contemplated by section 552 of the Civil Code, but is a service rendered by a public utility subject to the regulation and control of the state in such manner as may be prescribed by law."

It will be noted that plaintiffs' land was never located in, a part of, or included in a contractual self-

governing irrigation district, organized and operated under the authority of Chapter 46, article 1, R. S. 1943, and that plaintiff's right to abandon and have cancelled the right to the use of irrigation water services would not be controlled by those provisions.

Further, the contract here involved was not made with reference to provisions of the statute then existing which permitted the organization and prescribed the authority of a public power and irrigation district such as defendant. The police power of the state neither then nor subsequently made such statutes operative as a part of a contract such as here involved.

In Halligan v. Elander, 147 Neb. 709, 25 N. W. 2d 13, it is said: "However, 'so far as they are applicable' as stated in the opinion, or 'applicable, as nearly as may be,' as stated in section 70-667, R. S. 1943, is always the controlling language which cannot be overlooked to determine the force of the adopted statute in a particular situation.

"It is clearly observable that the circumstances of both the organization and operation of public power and irrigation districts, as well as their uses of water, are entirely different from irrigation districts, * * *." By analogy, the organization and operation of such districts as well as their uses of water are entirely different from irrigation corporations.

We find no provisions in the statutes or other authority, and none in point have been cited, which would permit such a district to purchase an irrigation corporation such as the Dawson County Irrigation Company, and ipso facto make the laws authorizing and prescribing its organization and operation a part of the original contract without plaintiffs' consent, actual or implied, by estoppel or otherwise, which does not appear in this case.

When plaintiffs herein purchased the land, they took whatever rights as were possessed and assumed such obligations as were imposed upon their original predecessors, no more and no less, and stood in their shoes.

Likewise, when defendant purchased the corporation, it stood in the shoes of such corporation. To hold otherwise would permit defendant to legislate and thus make police power operative by mere purchase without proper legislative authority. In that regard, it is sufficient for us to say that plaintiffs' contract did not make them liable as owners or co-owners of defendant's works for an increased maintenance rate with which to amortize defendant's original purchase price of the corporation or to make repayment of sums borrowed to meet deficits previously incurred in the operation thereof or for financing capital improvements and replacements. In that connection, when defendant attempted to force plaintiffs to so perform and it otherwise refused to perform and threatened foreclosure upon plaintiffs' land at the thus increased rate, it abrogated the contract and there were material changed conditions which gave plaintiffs the right to rescind and cancel the contract and quiet the title to their land as against the same.

It is generally the rule that: "* * * where a contract requires successive steps to be taken by the respective parties, if, when a step becomes due, the party either in words or by their equivalent in acts declines to take it, or is unable, while the other is ready and willing to do his part, the latter may rescind the contract." Bishop on Contracts (2d ed.), § 827, p. 341.

On the other hand, in Farmers & Merchants Irrigation Co. v. Hill, *supra,* construing a similar contract, it is said: "The contract sought to be enforced is executory." Upon that premise, we call attention to Hale v. Hess, 30 Neb. 42, 46 N. W. 261, wherein, after quoting from, approving, and relying upon Bishop on Contracts (2d ed.), § 837, p. 347, this court held: "A party to an executory contract has the right to rescind the contract, and terminate it wholly, without the consent of the other party, who is in no fault; the first party becoming liable to the other in any damages he may have sustained, or any compensation he may have earned, by reason of the

rescission." As stated in Bishop on Contracts (2d ed.), § 837, p. 347: "If this were not so, one might be ruined by an undertaking the carrying out of which a change in circumstances rendered highly inexpedient or practically impossible."

As a matter of course, the general rule stated above is subject to the right of specific performance as a partial exception thereto, which defendant has no right to enforce at the increased maintenance rate.

In that connection, a careful analysis of all the authorities cited by defendant does not disclose a single case in which the court said or concluded, under circumstances comparable with those at bar, that a consumer must continue to accept the water services offered and pay for the same at the increased rate. After diligent search, also, we have found none. The authorities hold otherwise.

In Law v. Railroad Commission, 184 Cal. 737, 195 P. 423, 14 A. L. R. 249, wherein the commission had subsequently fixed rates for steam and electricity involved in a comparable contract, the court said: "It follows, of course, in view of the change effected by the order in such an important part of the contract, that petitioner will have the right under the law to rescind the contract, and prevent further use of his property by the former company, except for compensation properly determined." See, also, Annotation 14 A. L. R. 252; McCullough-Dalzell Crucible Co. v. Philadelphia Co., 223 Pa. 336, 72 A. 633.

In Miller v. Railroad Commission, *supra,* it is said: "It is true this water had been dedicated to a public use, but we have been cited to no authority, and we have been unable to discover any through our own efforts, which holds that a water user, having no further use for the waters furnished by a public utility, can be forced either to receive his proportion of those waters or to pay for the same without using it." See, also, 3 Farnham, Waters and Water Rights, § 609, p. 1917; 2 Wiel,

Water Rights in the Western States (3d ed.), § 1328, p. 1234; South Boulder & R. C. Ditch Co. v. Marfell, 15 Colo. 302, 25 P. 504.

In 43 Am. Jur., Public Utilities and Services, § 99, p. 641, it is said: "If a contract for public utility rates in return for a conveyance is modified or abrogated by legislation or a regulatory body, it does not necessarily follow that the grantor is without a remedy. Indeed, the majority of the cases hold that one who has parted with property in return for a rate contract which is subsequently prohibited or modified by public authority may have the contract rescinded or recover damages."

It may be argued that the foregoing reasons, or some of them, for our decision were not those given by the trial court in its decree. Be that as it may, the applicable rule is: "A proper judgment under the pleadings and the evidence will not be reversed on appeal merely because the trial court did not give the right reason for the decision." Sopcich v. Tangeman, 153 Neb. 506, 45 N. W. 2d 478.

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

AFFIRMED.

EDWARD M. CHAMBERS, APPELLEE, V. HELENE M. CHAMBERS, APPELLANT.

51 N. W. 2d 310

Filed January 11, 1952. No. 33044.

1. **Divorce.** A party may not in an action for divorce challenge the right of a plaintiff to maintain an action after having filed cross-petition therein for divorce and having obtained the relief prayed for.
2. **Husband and Wife.** A postnuptial or separation agreement is valid if it is fair and equitable; if there has been conduct of a party justifying legal separation; if the parties immediately separate; and if the provisions of the agreement are observed by the parties.

3. ———. Postnuptial agreements are without validity during the existence of the complete marriage relation.
4. ———. A postnuptial or separation agreement validly entered into at the time is invalidated by a resumption of the complete marriage relation.
5. **Divorce.** In determining the question of alimony or division of property as between the parties the court will consider the respective ages of the parties to the marriage; their earning ability; the duration of the marriage; the conduct of each party during the marriage; their station in life, including the social standing, comforts, and luxuries of life which the wife would probably have enjoyed; the circumstances and necessities of each; their health and physical condition; and their financial circumstances as shown by the property they owned at the time of divorce, its value at that time, its income-producing capacity, if any, whether accumulated or acquired before or after the marriage, the manner in which it was acquired, and the contributions each has made thereto. From these elements and all other relevant facts and circumstances, the court will determine the rights of the parties and make an award that is equitable and just.
6. **Appeal and Error.** It is the duty of this court in determining the issues before it on appeal in an equity action to arrive at a conclusion independent of that reached by the district court, subject however to the rule that where the evidence is in irreconcilable conflict on material matters it may consider the fact that the trial court observed the witnesses and their manner of testifying.

APPEAL from the district court for Scotts Bluff County: CLAIBOURNE G. PERRY, JUDGE. *Affirmed.*

Neighbors & Danielson, and *Charles A. Fisher,* for appellant.

Edwin D. Crites, A. W. Crites, Straight Townsend, and *Neal D. Youmans, Jr.,* for appellee.

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

YEAGER, J.

This is an action for divorce by Edward M. Chambers, plaintiff, against Helene M. Chambers, defendant, in the district court for Scotts Bluff County, Nebraska. In

the action the defendant filed a cross-petition for divorce. The district court granted a divorce to the defendant. The defendant has appealed from a part of the decree. The plaintiff has cross-appealed from a part of the decree. The defendant is the appellant and cross-appellee and the plaintiff is appellee and cross-appellant.

Neither party has appealed from that part of the decree which grants to defendant a divorce from the plaintiff. The substance of defendant's appeal is a contention that the allowances by way of support money pendente lite, alimony, and division of property were insufficient. The substance of plaintiff's cross-appeal is that the allowances made were improper and excessive.

It is true that there are assignments of error in appellant's brief dealing with subjects other than the matter of allowances. They may not however be reviewed here. Three of them relate to matters which have been waived, if they constituted error, by affirmative act of the appellant.

After appellee commenced the action in Scotts Bluff County the appellant challenged his right to maintain the action on the ground that there was another such action pending in Dawes County. The challenge was made successively by special appearance, demurrer, and plea in abatement. These were overruled whereupon appellant filed answer and cross-petition. By the cross-petition she prayed for a divorce. She thereby invoked the jurisdiction of the court. Upon this invocation the decree in her favor was granted.

This court has said: "A party cannot predicate error upon a ruling which he procured to be made." Pahl v. Sprague, 152 Neb. 681, 42 N. W. 2d 367.

The fourth assignment challenges refusal of the court to strike parts of the reply and the answer to the cross-petition. The contention here is that these contained allegations not proper since they amounted to alleged

grounds for divorce not contained in the original cause of action.

Whether or not this was error is not important here as is clear from the fact that the court awarded no relief in favor of appellee thereon.

Before proceeding to a consideration of appellant's assignment of error relating to the matter of allowances it appears necessary to dispose of a contention of the appellee with reference to a certain agreement relating to property and rights which had been entered into between the parties.

The parties were married on May 2, 1940. Trouble between them arose and on December 21, 1948, an action for divorce was instituted. During the pendency of that action and on January 25, 1949, the parties entered into a separation agreement. The parties, after declaration that a separation had taken place which would continue, entered into an agreement wherein upon valid considerations their estates became separate and each was relieved from any further obligation to the other flowing from the marriage relation or from the laws of descent and distribution.

Appellee fully performed under the agreement. After this performance the parties became reconciled and resumed the marriage relationship. The appellant however did not return to appellee any of the considerations which she had received under the agreement.

After this reconciliation took place trouble again arose and the present action was instituted. The appellee contends that the agreement previously entered into, since appellant did not return the considerations, is binding and in full force and effect and that appellant is barred from asserting any right to alimony or division of property in excess of or contrary to provisions of the agreement.

The validity of an agreement such as the one entered into between the parties here is recognized if it is fair and equitable; if there has been conduct of a party jus-

tifying legal separation; if the parties immediately separate; and if the provisions of the agreement are observed by the parties. In re Estate of Lauderback, 106 Neb. 461, 184 N. W. 128; Smith v. Johnson, 144 Neb. 769, 14 N. W. 2d 424; Focht v. Wakefield, 145 Neb. 568, 17 N. W. 2d 627.

It is not urged here that the agreement when entered into was not fair and equitable. The parties themselves considered at the time that there were legal grounds for separation. There was a separation and the considerations for the agreement passed. At the time, under the authorities cited, the agreement was valid and binding upon the parties.

It will be observed from an examination of the authorities cited that the validity of such an agreement depends upon the observance of the terms of the agreement. One of those conditions is that the parties shall be separated. This condition was not observed. The parties became reconciled and re-established the relationship wherein this court has declared no valid postnuptial agreement may be entered into.

In Smith v. Johnson, *supra,* it was said: "The foregoing cases are what are commonly called separation agreement cases. They do not recognize the right of husband and wife to enter into a postnuptial agreement barring their respective rights in the other's real property while the complete marriage relation exists."

Such agreements are held invalid because of common law prohibition and on the grounds of public policy. It appears to be a necessary corollary that when a separation agreement is validly entered into but thereafter the parties restore themselves to the complete marriage relation such an agreement becomes invalid and unenforceable.

It is concluded therefore that the agreement in question may not be regarded as determinative of the rights of the parties in this divorce action.

In determining the question of alimony and division

of property resort must be had to the following rule: "In determining the question of alimony or division of property as between the parties the court will consider the respective ages of the parties to the marriage; their earning ability; the duration of the marriage; the conduct of each party during the marriage; their station in life, including the social standing, comforts, and luxuries of life which the wife would probably have enjoyed; the circumstances and necessities of each; their health and physical condition; and their financial circumstances as shown by the property they owned at the time of divorce, its value at that time, its income-producing capacity, if any, whether accumulated or acquired before or after the marriage, the manner in which it was acquired, and the contributions each has made thereto. From these elements and all other relevant facts and circumstances, the court will determine the rights of the parties and make an award that is equitable and just." Mangiameli v. Mangiameli, 153 Neb. 753, 45 N. W. 2d 910. See, also, Kroger v. Kroger, 153 Neb. 265, 44 N. W. 2d 475; Strasser v. Strasser, 153 Neb. 288, 44 N. W. 2d 508; Zoppelli v. Zoppelli, 153 Neb. 577, 45 N. W. 2d 599; Pasko v. Trela, 153 Neb. 759, 46 N. W. 2d 139.

At the time of the marriage appellant was 34 years of age and appellee was 39. Both had been previously married. No children were born of the marriage. The parties lived together, except for a short period of time, from the time of the marriage until the commencement of this action which was November 25, 1949.

At the time of the marriage the appellee was engaged in the wholesale oil and grease business in Chadron, Nebraska. Appellant was operating her own business at the time. The business was the publication and distribution of a mimeographed advertising sheet known as Ad-Visor. There is no authentic evidence of financial productivity of either of these enterprises. Neither appears to have yielded high profits. The parties pur-

chased a considerable amount of furniture and household goods for the most part if not entirely on credit. The value at the time of purchase appears to have been about $2,000. There is no certainty as to how this indebtedness was liquidated but it appears reasonable to say that contribution was made thereto by both parties. Appellant sold the Ad-Visor for $3,750. After the marriage appellant purchased and for a time operated a newspaper known as the Panhandle Digest. This was later sold for $5,500. Also after the marriage appellant acquired an appliance store. It is known as the Budget Store. She still owned and operated it at the time of trial. The results of these three enterprises have not been shown.

After the marriage the appellee abandoned the oil and grease business and entered into the business of wholesaler of automotive parts, appliances, and supplies under the name of Ed Chambers Company. The Sidles Company purchased a 51 percent interest in this company. The company was incorporated and the name was later changed to the Sidles-Chambers Company. At the time of trial there were 920 shares of stock outstanding of which number appellee held 285 and his daughter 110. The shares held by the daughter according to appellee were a gift and we think the evidence reasonably discloses that they were at least under control of appellee.

The record fairly discloses that at the time of trial appellee had the following property and assets: 395 shares of stock in the Sidles-Chambers Company, a Cadillac automobile of the estimated value of $2,020, and life insurance policies amounting to $25,000.

What the stock was worth is problematical. The appellee estimated its value at not to exceed $125 a share. An officer of the company estimated its value at not to exceed $160 a share. The corporation has never paid any dividends to the stockholders although it showed a net profit for 1947 of $48,212.28, for 1948 of $34,979.71, and for 1949 of $14,647.46. How this profit was distributed

or applied is not clearly shown except as to one item. Appellee received ten percent of it as a bonus in addition to his salary. His salary was $600 a month or $7,200 a year.

In the record are exhibits from which testimony has been given as to the financial condition of the corporation but from this no reasonably accurate analysis can be made of that condition.

As liabilities appellee owed a balance of $7,300 to the First National Bank of Chadron. He owed Sidles-Chambers Company $11,671. He also owed the company on overdrafts approximately $650. This total is $19,621.

The amount of property and estate which the appellant had at the time of trial has not been clearly disclosed. She has not chosen to put this important information in the record. It is clear that she had $1,500 cash in a bank, the Budget Store of the probable value of about $8,000, household goods of the value of $2,000, and a Chevrolet automobile which cost $2,300. During the marriage she received $3,750 from the sale of the Ad-Visor and $5,500 from the sale of the Panhandle Digest. She received from appellee $15,000 under the separation agreement, which as has been pointed out herein was invalidated by resumption of the marital relationship, no part of which was ever returned. Under this same agreement she received a $5,000 insurance policy having a cash value of $2,710 which she surrendered later for its value at the time of surrender. She appropriated a savings account and savings bonds of the value of $4,200. Information as to the status of these items totaling $31,-160, except in very small part, has not been disclosed.

The evidence indicates that neither party contributed substantially to the business enterprises of the other. They operated their respective businesses separately and independently of each other.

The only subjects of substantial joint contribution were the purchase of household goods and equipment, the purchase of the above-mentioned savings bonds and the ac-

cumulation of savings amounting to $4,200, and the maintenance of the household.

Appellee paid nothing to appellant for her support or the maintenance of the home after July 1949.

In the decree herein the property and business of appellant are not mentioned but it is clear that her right to all of it has not been disturbed.

By the decree she was awarded permanent alimony in the amount of $24,000. On this was credited $15,000 and $2,750, this being the cash value of a life insurance policy at the time it was surrendered. These two items had been received by her under the postnuptial agreement and not returned after reconciliation. Also on this was credited $4,200 for war bonds and postal savings appropriated and never returned. This made a total of $21,950. Thus the balance owing was $2,050. In addition she was allowed attorney's fees in the amount of $2,000 and costs of the action.

It is the duty of this court in determining the matters before it on this appeal to arrive at a conclusion independent of that reached by the district court. Where, however, as in this case, the evidence is in conflict and uncertain the rule that where the evidence is in irreconcilable conflict on a material issue the court may consider the fact that the trial court observed the witnesses and their manner of testifying is peculiarly applicable. Fisher v. Standard Investment Co., 145 Neb. 80, 15 N. W. 2d 355; W. L. Phillips Sons v. Northwest Realty Co., 152 Neb. 808, 43 N. W. 2d 6; Strasser v. Strasser, *supra*.

Bearing this rule in mind and applying the general rule to be applied in the matter of division of property and fixing alimony, which rule was set forth earlier herein, we conclude that the award as fixed by the decree was equitable and just.

The decree of the district court is affirmed.

AFFIRMED.

CHARLES DAHLKE, APPELLEE, V. BERTHA DAHLKE, APPELLANT, MINNIE GUTZMER ET AL., APPELLEES.
51 N. W. 2d 266

Filed January 11, 1952. No. 33066.

1. **Vendor and Purchaser.** In the construction of every instrument for the conveyance of real estate or any interest therein, it is the duty of courts to carry into effect the true intent of the parties so far as such intent can be ascertained from the whole instrument and it is consistent with rules of law.
2. Estates. An estate in fee simple subject to a condition subsequent is created by any limitation which, in an otherwise effective conveyance of land, creates an estate in fee simple and provides that upon the occurrence of a stated event, the conveyor or his successor in interest shall have the power to terminate the estate so created.
3. ———. When a transferor, having an estate in fee simple absolute transfers an estate in fee simple subject to a condition subsequent, the transferee is regarded as having received the entire estate of the transferor, who, by virtue of his reserved power of termination has the power to regain his former estate if and when there is a breach of the condition subsequent.
4. ———. The owner of an estate in fee simple defeasible may be restricted in his uses of the affected land by an outstanding easement or profit or restricting covenant; or his estate may be subject to a money charge in favor of a third person which operates as a lien thereon.
5. **Estates: Covenants.** The language of an instrument frequently requires construction to determine whether it creates a condition subsequent, a covenant, or both. When found to create both, the person entitled to enforce the covenant is entitled to all equitable relief normally available with respect to such a covenant, despite the fact that a condition subsequent also exists.
6. **Equity: Trusts.** Ordinarily, where property is transferred to another subject to the payment of a certain sum to a third person, an equitable charge and not a trust is created. On the other hand, ordinarily where property is transferred to another with direction to pay to a third person a certain sum out of the property or its proceeds, a trust and not an equitable charge is created.
7. ———: ———. In the case of an equitable charge, as in that of a trust, the person having title to property holds it subject to an equitable interest in another person. If an equitable charge is created, the equitable encumbrancer has an equitable lien upon

the property, but the person who holds subject to the charge is the owner of the property, subject only to the lien.

8. **Trusts.** If, by the terms of a trust, an interest passes to the beneficiary during the life of the settlor, although the interest does not take effect in enjoyment or possession before the death of the settlor, the trust is not ordinarily a testamentary trust, and the disposition is not testamentary and the intended trust is valid even though the interest of the beneficiary is contingent upon the existence of a certain state of facts at the time of the settlor's death.

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

Lee Kelligar, for appellant.

Henry F. Schepman and *John C. Mullen,* for appellees.

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

CHAPPELL, J.

Plaintiff, in his own behalf and for the benefit of defendant brothers and sisters, brought this suit in equity to recover $6,000 with interest and have the same declared and enforced as a lien upon described farm lands, under the provisions of a warranty deed executed by the father and mother, conveying the same to plaintiff's sister, defendant Bertha Dahlke. Such defendant answered, denying generally, but admitting execution and delivery of the deed on June 21, 1920, and subsequent recording thereof. She also admitted that thereunder she immediately took possession of the land and continuously thereafter retained possession and paid all taxes levied and assessed against it. She alleged that she was the owner in fee simple, free and clear of all liens and encumbrances, since paragraph Fourth of the deed was null and void, thus unenforceable because it was testamentary in character, and the requirements of the statutes relating to wills were not complied with in its execution and because it sought to impose an obligation upon defendant for the payment of money only,

not for the benefit of grantors, but for a stranger to the contract and deed. Two defendants, a brother and sister of plaintiff, filed separate answers admitting the allegations of plaintiff's petition and joining in the relief prayed by him. All other defendants defaulted.

After a hearing upon the merits, the trial court rendered its decree, finding and adjudging the issues generally for plaintiff and other defendants but against defendant Bertha Dahlke. However, it found and adjudged that such defendant, as a sister of William Dahlke, deceased, for whose benefit the charging lien had been imposed, was the owner of an equal one-seventh share of the lien with interest at 6 percent from February 8, 1950, and gave her credit therefor, of which plaintiff makes no complaint.

The decree specifically provided: "6. That the plaintiff Charles Dahlke and the defendants Minnie Gutzmer, Mary Burow, Amanda Munson, Eddie Dahlke and Ernest I. Dahlke, have and recover from the defendant Bertha Dahlke the sum of $5,142.86 with interest at 6% from February 8, 1950 and in default of the defendant Bertha Dahlke within 60 days from date of decree to pay said amount together with costs that an order of sale issue to the Sheriff of Richardson County, Nebraska directing him as Sheriff to sell said real estate as upon execution to satisfy said sum of $5,142.86 with interest at 6% from February 8, 1950.

"7. Costs of this action taxed against the defendant Bertha Dahlke in addition to said sum of $5,142.86 with interest at 6% from February 8, 1950.

"8. That any money in the hands of the Sheriff of Richardson County, Nebraska from the sale of said real estate after paying said $5,142.86 with interest at 6% from February 8, 1950 and costs taxed to said defendant Bertha Dahlke, to the parties entitled to receive the same shall be paid by the Sheriff of Richardson County, Nebraska, to the defendant Bertha Dahlke."

Defendant Bertha Dahlke's motion for new trial was

overruled, and she appealed, assigning substantially that: (1) The trial court erred in entering a personal judgment against her and in granting a lien with foreclosure thereof; and (2) that the decree was contrary to law. We conclude that the assignments should not be sustained.

At the outset it will be noted that the warranty deed specifically provided, among other things, that the charge of $6,000 "upon said premises * * * shall be and is a lien thereon" and that it "shall be paid * * * by said grantee within one year after the death of the last surviving grantor" and "that for the failure of the said grantee herein, in the performance * * * at the time and in the manner provided herein, then" the persons having the "right as provided herein shall proceed at law to enforce the lien herein and recover the charges made in his or their behalf * * *." In the light thereof, it is apparent that unless paragraph Fourth of the deed was null and void, as argued by defendant, the trial court's decree was correct in every respect.

There remains then only the question of whether or not the decree was contrary to law. We conclude that it was not.

The pertinent facts are as follows: August Dahlke and Mena Dahlke, his wife, parents of defendant Bertha Dahlke, were on June 21, 1920, owners of the described land involved. On that date, as grantors, they executed and delivered to said defendant as grantee, a warranty deed to the land. Admittedly she accepted the deed, duly recorded it, and was in possession of the land from that date until the trial, a period of more than 30 years.

Insofar as important here, the deed recited as consideration "the sum of One Dollar, in hand paid, and the consideration of love and affection, together with conditional considerations hereinafter set forth, * * *." Such considerations were, first, that grantee should pay all taxes and assessments upon the property before the same became by law delinquent. That has been com-

plied with. Second, that grantee should not, during the lifetime of grantors or the survivor of them, sell, convey, mortgage, or in any manner encumber the premises. Compliance therewith is not disputed here. Third, the grantors reserved to themselves and the survivor of them for life an annual charge of $400 against and upon the premises, which should be paid by grantee to them or the survivor, on or before December 31st of each and every year, including 1920, during the life of grantors and the survivor of them. Also, compliance therewith is not disputed here.

The fourth is the provision herein directly involved. It provided: "The said grantors hereby place a further charge upon said premises in the sum of six thousand dollars ($6000.00), which shall be and is a lien thereon, subject only, to taxes and the annual charge hereinbefore reserved, and which said charge of $6,000.00 is made in favor of and shall be paid to our son William Dahlke by said grantee within one year after the death of the last surviving grantor herein, provided the said William Dahlke be then living, and if dead then said payment shall be made to his surviving issue, if there be a failure of living issue of his body, then in equal parts to his brothers and sisters, the children of any deceased brother or sister to receive the share of their ancestor: Provided, that for the failure of the grantee herein, in the performance of conditions number one and two hereof, such failure is declared to and shall work a forfeiture of this conveyance, and the said grantors shall declare said forfeiture and re-enter the said premises and this conveyance shall be and become null, void and of no effect: Provided further, that for the failure of the said grantee herein, in the performance of condition number four hereof at the time and in the manner provided herein, then the said William Dahlke or the next in right as provided herein shall proceed at law to enforce the lien herein and recover the

charges made in his or their behalf according to the provisions of said condition number four."

Grantor Mena Dahlke, wife of grantor August Dahlke, died March 21, 1939. August Dahlke died February 8, 1949. They were the mother and father of plaintiff Charles Dahlke, the defendants Minnie Gutzmer, Mary Burow, Amanda Munson, Eddie Dahlke, Ernest I. Dahlke, and grantee, defendant Bertha Dahlke, all of whom survived and were the only brothers and sisters of William Dahlke, also a son of Mena and August Dahlke, who, when 66 years of age, died without issue on December 6, 1948. Other defendants were the respective spouses of defendant brothers and sisters.

Bertha Dahlke has never paid the $6,000 to William Dahlke or any other person, and no other proceedings at law or in equity have been brought to collect the same.

The question of whether or not the fourth provision was null and void as testamentary in character is dependent upon grantor's intent to be gathered from the language of the instrument and applicable rules of law. As held in Carr v. Miller, 105 Neb. 623, 181 N. W. 557: "In the construction of every instrument for the conveyance of real estate or any interest therein, it is the duty of the courts to carry into effect the true intent of the parties, so far as such intent can be ascertained from the whole instrument and is consistent with the rules of law. Rev. St. 1913, sec. 6195; Benedict v. Minton, 83 Neb. 782."

As stated in Blochowitz v. Blochowitz, 130 Neb. 789, 266 N. W. 644: "However, in this state, the statute requires: 'In the construction of every instrument creating or conveying, or authorizing or requiring the creation or conveyance of any real estate, or interest therein, it shall be the duty of the courts of justice to carry into effect the true interest (intent) of the parties, so far as such intent can be collected, from the whole instrument, and so far as such intent is consistent with

the rules of law.' Comp. St. 1929, sec. 76-109. This statute is applicable alike to wills, deeds, and contracts to convey. Heiser v. Brehm, 117 Neb. 472, 221 N. W. 97; Reuter v. Reuter, 116 Neb. 428, 218 N. W. 86."

In Ohm v. Clear Creek Drainage District, 153 Neb. 428, 45 N. W. 2d 117, this court held: "An estate in fee simple subject to a condition subsequent is created by any limitation which, in an otherwise effective conveyance of land, creates an estate in fee simple and provides that upon the occurrence of a stated event the conveyor or his successor in interest shall have the power to terminate the estate so created." As stated in the opinion: "Restatement, Property, § 45, p. 133, comment a, says: '* * * When a transferor, having an estate in fee simple absolute transfers an estate in fee simple subject to a condition subsequent, the transferee is regarded as having received the entire estate of the transferor, who, by virtue of his reserved power of termination has the power to regain his former estate, if and when there is a breach of the condition subsequent.' " Defendant took such a title when she accepted the deed and assumed its obligations.

Also, as stated in Restatement, Property, chapter 4, p. 168: "The owner of an estate in fee simple defeasible may be restricted in his uses of the affected land by an outstanding easement or profit or restricting covenant; or his estate may be subject to a money charge which operates as a lien thereon, * * *." Also, as stated in Restatement, Property, 1948 Supplement, § 24, comment ff, p. 361: "The language of an instrument frequently requires construction to determine whether it creates a condition subsequent, a covenant or both (see § 45, Comments n, o and p). When found to create both, the person entitled to enforce the covenant is entitled to all equitable relief normally available with respect to such a covenant, despite the fact that a condition subsequent also exists."

In Restatement, Trusts, § 10, comment f, p. 34, it is

said: "Whether an equitable charge or a trust is created depends upon the manifestation of intention of the transferor. If the transferor manifests an intention to impose a duty upon the transferee to deal with the property for the benefit of a third person and to give to the third person the beneficial interest therein, a trust is created; if he manifests an intention not to impose such a duty upon the transferee, but to give to the transferee the beneficial interest therein, and to give a security interest to the third person, an equitable charge is created.

"Ordinarily where property is transferred to another 'subject to the payment of' a certain sum to a third person, * * * an equitable charge and not a trust is created, since the transferor does not thereby manifest an intention to impose a duty upon the transferee to deal with the property for the benefit of the third person. On the other hand, where property is transferred to another with a direction to pay to a third person a certain sum out of the property or its proceeds, * * * a trust and not an equitable charge is created, since the transferor thereby manifests an intention to impose a duty upon the transferee to deal with the property in part at least for the benefit of the third person." Also, as stated in the same section, comment a, p. 32: "In the case of an equitable charge, as in that of a trust, the person having title to property holds it subject to an equitable interest in another person. If an equitable charge is created, the equitable encumbrancer has an equitable lien upon the property, but the person who holds subject to the charge is the owner of the property, subject only to the lien; a trustee is not the owner of the trust property although he has title to it (see § 2, Comment d). An equitable interest as well as a legal interest may be subject to an equitable charge, just as an equitable interest as well as a legal interest may be held in trust.

"After the equitable charge is paid, the devisee can hold the property free and clear. On the other hand,

where property is transferred upon a trust which is fully performed, without exhausting the trust estate, the trustee holds the surplus upon a resulting trust for the settlor unless the settlor properly manifested a different intention (see § 430)."

Further, as stated in Restatement, Trusts, § 56, comment f, p. 172: "If by the terms of the trust an interest passes to the beneficiary during the life of the settlor, although the interest does not take effect in enjoyment or possession before the death of the settlor, the trust is not a testamentary trust, except as stated in § 57 (2, 3). The disposition is not testamentary and the intended trust is valid, even though the interest of the beneficiary is contingent upon the existence of a certain state of facts at the time of the settlor's death." Section 57 (2, 3) has no application here.

It will be observed then that whether the $6,000 involved was an equitable charge as argued by plaintiff, or a trust as argued by defendant Bertha Dahlke, it conveyed a present contingent equitable interest to the beneficiary and it would be valid and binding upon defendant, Bertha Dahlke, and not null and void as testamentary in character. We find no provision in the deed which could make paragraph Fourth null and void. Cases cited and relied upon by defendant are distinguishable upon both the facts and the law, and are not in point or controlling here.

As a matter of fact, the obligation as specifically imposed by the instrument itself formed a part of the consideration for the conveyance which grantee accepted, thereby assuming its payment as a part of the consideration therefor. Peterson v. Graves, 134 Kan. 805, 8 P. 2d 308, involved the construction and enforcement of a comparable provision in a deed, wherein the beneficiary was a third person and not a party to the instrument. In that opinion, it is said: "The deed recited a consideration of one dollar and 'other consideration.' Calling a provision in a deed a condition does not make the pro-

vision a condition. In this instance, the provision constituted in effect a covenant to pay Mabel and Edith, which formed the consideration for the conveyance to defendant. The deed became effective the moment defendant accepted it. From that moment he became bound to satisfy the condition, and his breach of the condition created a cause of action in plaintiff's favor." See, also, 14 Am. Jur., Covenants, Conditions and Restrictions, § 4, p. 483, § 196, p. 611.

Wier v. Simmons, 55 Wis. 637, 13 N. W. 873, also involved construction and enforcement of comparable provisions in a deed, wherein the beneficiaries were third persons not parties to the instrument. In that opinion it is said: "Whether a provision in a deed or will, which, as a part of the consideration, requires the payment of money to third persons by the grantee or devisee therein, within a fixed time after the title and right of possession vest in him, will be construed to be a charge upon the land, or whether it will be construed to be a condition subsequent, depends upon the intent of the parties to the conveyance, or of the testator in the case of a devise, and it will always be construed to make a charge upon the premises, unless a different intent is clearly apparent, or in the case of a deed the language is so clear as to leave no room for construction or doubt." The conclusion of the court, citing numerous authorities in support thereof, was: "That they are a lien and charge upon the lands which can be enforced in equity, we think is well settled, both upon principle and authority."

In Krahn v. Goodrich, 164 Wis. 600, 160 N. W. 1072, it is said: "The decision below that the conveyance of land by one person to another by deed, on condition of such other paying to a third person a specified sum of money, and acceptance of such conveyance, creates a lien upon the land in favor of such third person, is correct,—Wier v. Simmons, 55 Wis. 637, 13 N. W. 873; Williams v. Williams, 82 Wis. 393, 52 N. W. 429; Mer-

ton v. O'Brien, 117 Wis. 437, 94 N. W. 340; Powers v. Powers, 28 Wis. 659; Korn v. Friz, 128 Wis. 428, 107 N. W. 659; but where the payment is made contingent upon a condition precedent, the lien is likewise contingent and, if the time limited for such precedent event to occur expires without its happening, the possibility of the lien ripening into an absolute interest no longer exists. That was what happened in this case." In the case at bar, however, the time has expired, the events have occurred, and since all other conditions have been performed by defendant, the lien has ripened into an indefeasible absolute enforceable interest.

Also, in Logan v. Glass, 136 Pa. Sup. 221, 7 A. 2d 116, affirmed 338 Pa. 489, 14 A. 2d 306, wherein it was concluded that the deed was not testamentary in character and that both the promisor personally and the land were bound, it is said: "It is well established in this Commonwealth that the words 'subject to the payment' of money conditioning a devise of real estate ordinarily has the effect of creating a charge upon the land acquired thereby. That the same principle applies where the land is acquired by deed or grant is not disputed. * * * Just as the acceptance of the devisee implies a promise to perform the condition on which the beneficiary may base his actions, so the acceptance of the grantee imposes upon him a contractual obligation for the benefit of another, whose legal position is that of a third party beneficiary to the contract of conveyance. And 'where performance of a promise in a contract will benefit a person other than the promisee that person is . . . . a donee beneficiary if it appears from the terms of the promise in view of the accompanying circumstances that the purpose of the promisee in obtaining the promise of all or part of the performance thereof is to make a gift to the beneficiary or to confer upon him a right against the promisor to some performance neither due nor supposed or asserted to be due from the promisee to the beneficiary.' * * * The view suggested in the

Restatement and prevailing in this country, that a donee beneficiary has an unqualified right of action to enforce the duty of the promisor to perform the promise, is now, and has been for some years, recognized by the appellate courts of this Commonwealth. This right of action in a third person has long been recognized where money or property has been given over for his sole benefit. * * * 'According to this view the donee beneficiary acquires a right at once upon the making of the contract and that right becomes immediately indefeasible.' " See, also, Stewart v. Colvin, 202 Okl. 380, 214 P. 2d 229.

In the light of the foregoing, the deed here involved became effective and its provisions were enforceable when the deed was accepted by defendant, Bertha Dahlke. She thus became bound to carry out its provisions as intended by the grantors, all of which provisions were consistent with rules of law.

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

AFFIRMED.

ALBERT D. BECKER, APPELLEE, V. COUNTY OF PLATTE, NEBRASKA, APPELLANT.
No. 33070.
MARGARET LIPS, APPELLEE, V. COUNTY OF PLATTE, NEBRASKA, APPELLANT.
No. 33071.
DELORES BENNING, APPELLEE, V. COUNTY OF PLATTE, NEBRASKA, APPELLANT.
No. 33072.
50 N. W. 2d 814

Filed January 11, 1952.

Statutes: Counties. Section 23-916, R. S. 1943, does not relate to the condition of the budget at the time a claim is filed or

acted on by the board but to the time the contract is entered into or liability incurred for any of the purposes for which provision is made in the budget.

APPEAL from the district court for Platte County: ROBERT D. FLORY, JUDGE. *Affirmed.*

Byron Reed, and *Beynon, Greenamyre & Hecht,* for appellants.

Walker, Luckey & Hunter, for appellees.

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

WENKE, J.

This is an appeal from the district court for Platte County. It involves three claims filed against Platte County for services rendered in the office of the county assessor. The three claimants, their claims having been disallowed, appealed to the district court for Platte County. There the three claims were consolidated for trial, jury being waived. The trial court found for each of the claimants and entered judgment against the county accordingly. Its motion for new trial in each case having been overruled, the county appealed.

The cases on appeal were consolidated for the purpose of briefing and oral presentation. Since they involve the same or comparable situations we will consolidate them for the purpose of this opinion.

It is either admitted or established by the evidence that the budget of Platte County, for the fiscal year July 1, 1949, to June 30, 1950, fixed the amount available for the county assessor in the sum of $11,475; that claimants Margaret Lips and Delores Benning were appointed full-time assistants and claimant Albert D. Becker was appointed a special assistant to the county assessor, J. R. Brunken, and their salaries fixed, all in accordance with the provisions of section 77-401.01, R. S. Supp., 1949; that during the period from March 10 to April 21, 1950, inclusive, claimant Becker worked 37 days for which

he filed a claim for $296; that claimants Lips and Benning worked regularly during the fiscal year July 1, 1949, to June 30, 1950, and were paid for the first eleven months thereof and filed their claims for June 1950; that the work performed by these claimants was services necessary to enable the assessor to properly perform the duties of his office; that the claim of Margaret Lips for June 1950 was in the sum of $110 and of Delores Benning for the month of June 1950 was in the sum of $100; that all three claims were filed with the county clerk of Platte County on June 10, 1950; and that the board of supervisors of Platte County disallowed these three claims on June 15, 1950, for the reason that the amount allowed in the county budget for the office of county assessor was then exhausted.

It is appellant's thought that since the amount appropriated in the budget to the office of county assessor had been exhausted when these claims came up for consideration that under the provisions of the County Budget Act of 1937, being Chapter 23, article 9, R. S. 1943, as amended, particularly sections 23-916 and 23-917 thereof, that the county was not liable and therefore the board of supervisors properly disallowed the claims. We shall hereinafter refer to the County Budget Act of 1937, as amended, as the Act.

Section 23-917, R. S. 1943, of the Act, insofar as here material, provides: "After the adoption of the county budget, no county shall be liable, * * * on any contract, * * * for any services rendered such county in pursuance of any contract entered into by or on behalf of such county in violation of the provisions of section 23-916."

It will be noted that section 23-917, R. S. 1943, is applicable when the contract is in violation of the provisions of section 23-916, R. S. 1943.

Section 23-916, R. S. 1943, insofar as here material, provides: "After the adoption of the county budget, no officer, department or other expending agency shall ex-

pend or contract to be expended any money, or incur any liability, or enter into any contract which, by its terms, * * * involves the expenditure of any money for any of the purposes for which provision is made in the budget in excess of the amounts provided in said budget for such office, department or other expending agency, or purpose, for such fiscal year. Any contract, verbal or written, made in violation of this section shall be null and void as to the county, and no moneys belonging thereto shall be paid thereon."

Section 23-916, R. S. 1943, does not relate to the condition of the budget at the time a claim is filed or acted on by the board but to the time the contract is entered into or liability incurred for any of the purposes for which provision is made in the budget. That valid claims may be presented, the allowance of which will result in deficits, is contemplated by the Act for section 23-903, R. S. Supp., 1949, provides in part: "The budget of the county shall present a complete financial plan for the period for which said budget is drawn, as hereinafter provided. It shall set forth (1) all proposed expenditures for the administration, operation and maintenance of all offices, departments, activities, funds and institutions of the county, (2) the actual or estimated operating deficits from prior years, * * *."

If such a deficit results because there have been filed, allowed, and paid claims for which the county was not liable under the Act the county is protected by section 23-919, R. S. 1943, which provides in part as follows: "Any member of the county board or any other official whose duty it is to allow claims and issue warrants therefor, or to make purchases, incur indebtedness, enter into contracts for or on behalf of the county, who issues warrants or evidences of indebtedness, or makes any purchase, incurs any indebtedness or enters into any contract for or on behalf of the county contrary to the provisions of said sections, shall be liable to the county for such violations in the full amount of such

expenditures, and for the full amount which the county may be required to pay by reason of any purchase made, indebtedness incurred or contract made contrary to the provisions of said sections, whether the liability of the county to pay for such supplies, materials, merchandise, equipment or services is based upon said contract or upon quasi-contract, or upon an obligation arising by operation of law, and recovery may be had against the bondsman of such official for said amounts."

At the time claimants Lips and Benning were appointed regular full-time assistants by the assessor and their appointments were consented to and their salaries fixed by the board of supervisors the balance available in the budget of the county assessor was sufficient to cover their salaries for the fiscal year from July 1, 1949, to June 30, 1950, which included June of 1950 for which claim is here made. The same appears to be true on March 6, 1950, when claimant Becker and eleven others were appointed special assistants. Eleven of these special assistants filed claims and all but claimant Becker were paid.

We have come to the conclusion that under the Act, particularly section 23-916 thereof, that the contracts of these claimants for services to be rendered in the office of the county assessor were not in violation of that section because of the condition of the assessor's budget at the time they were entered into. We therefore affirm the action of the trial court as to all three claims.

AFFIRMED.

LOUIS MILLER ET AL., APPELLANTS, V. CITY OF SCOTTSBLUFF, A MUNICIPAL CORPORATION, APPELLEE.
50 N. W. 2d 824

Filed January 11, 1952. No. 33080.

1. **Trial.** Action of the district court in making findings of fact not pleaded and basing judgment thereon is prejudicially erroneous.
2. **Eminent Domain.** In an appeal to the district court from the award of appraisers in a proceeding for condemnation of land for the use of a municipal corporation, if the verdict of the jury exceeds the award of the appraisers the verdict bears interest from the date of the appropriation.

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

Mothersead, Wright & Simmons, for appellants.

Jack E. Lyman and *True R. Ferguson,* for appellee.

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

YEAGER, J.

By ordinance passed and approved July 5, 1949, the City of Scottsbluff, Nebraska, a municipal corporation, appropriated for the use of the city certain lands within the city belonging to Louis Miller and Pauline Miller. By the ordinance three freeholders were duly appointed appraisers to assess the damages caused by the appropriation. The appraiser duly made an appraisement and assessed the damages at $2,492.50.

From the award the Millers took an appeal to the district court. No pleadings were filed. A transcript containing a copy of the record of the appropriation or condemnation proceedings was filed as the basis of the appeal. A trial was had to a jury in the district court and the jury fixed the amount of the damages at $12,625. The Millers were given judgment for this amount.

The Millers asked interest on this amount from the

date of the appropriation. This was denied. The basis of the denial according to the journal entry of the court was a set-off for use of the property by the Millers from the date of appropriation until the trial which the court found to exceed the proper rate of interest on the award. In other words, interest was computed as requested by the Millers but the value of use was found to exceed the interest, hence there was no award or judgment for interest.

The appeal here is from the allowance of the set-off and the disallowance of interest on the award. The award itself is not under question on this appeal. For convenience the Millers will be hereinafter referred to as appellants and the city as appellee.

No bill of exceptions has come to this court. Pursuant to section 25-1140.01, R. R. S. 1943, appellants indicated their intention not to present a bill of exceptions and the appellee did not request one. The case therefore comes to this court on the transcript of the proceedings of the district court which includes the transcript which came to the district court, orders of the district court, certain instructions, the verdict of the jury, the judgment, on the award, the further judgment on the matter of interest and set-off, and appellants' motion for new trial and to set aside judgment.

The appellants present certain assignments of error which depend for determination upon the factual situation as it was developed at the trial in the district court. These of course may not be considered here since as has been pointed out there is no bill of exceptions.

One of the grounds on which the appellants seek a reversal is in substance that set-off for use by the appellants after appropriation of their property by condemnation is not an issuable matter in an appeal to the district court from the award of appraisers. Another, again substantially, is, assuming that it may be an issuable matter if properly presented, that no such question was presented by any pleading or anything in the nature

of a pleading, hence the district court was without power to consider it as an issue and to make an adjudication thereon.

We conclude that it is not necessary in this case to pass upon the former of these two questions.

Reference to the record presented conclusively discloses that no such issue was presented to the district court on appeal by any pleading or anything in the nature of a pleading. The only question presented was the amount of appellants' damages.

This court said in National Fire Ins. Co. v. Evertson, 153 Neb. 854, 46 N. W. 2d 489: "The action of a trial court in making findings of fact not pleaded and basing a judgment thereon is prejudicially erroneous." See, also, Luce v. Foster, 42 Neb. 818, 60 N. W. 1027; Kulhanek v. Kulhanek, 106 Neb. 595, 184 N. W. 139; Drieth v. Dormer, 148 Neb. 422, 27 N. W. 2d 843.

The verdict of the jury exceeded the award of the appraisers, hence appellants were entitled to interest on the amount allowed by the jury from the date of the appropriation. Sioux City R. R. Co. v. Brown, 13 Neb. 317, 14 N. W. 389, 14 N. W. 407; Kennedy v. Department of Roads and Irrigation, 150 Neb. 727, 35 N. W. 2d 781.

It therefore became the duty of the court after return of the verdict of the jury fixing the damages to compute the interest thereon from the date of the appropriation and to render judgment accordingly.

The judgment of the district court with respect to interest and set-off is reversed and the cause remanded with directions to compute the interest on the damages fixed by the verdict of the jury and to render judgment therefor in favor of appellants.

REVERSED AND REMANDED WITH DIRECTIONS.

EDWARD F. GARBARK, APPELLEE, V. BEN NEWMAN, DOING BUSINESS AS NEWMAN MOTORS, ET AL., APPELLANTS.
51 N. W. 2d 315

Filed January 18, 1952. No. 33049.

1. **Actions: Courts.** An improper transfer of an action at law from the law docket of a district court to the equity docket thereof does not change the character of the action.
2. **Reformation of Instruments.** It is unnecessary to secure a formal reformation of a written instrument where it differs from the true agreement of the parties in order to enforce it or have the advantage of it as a defense as it should have been expressed in the writing.
3. **Juries: Appeal and Error.** The denial of a jury trial over objection of a party in an action at law is error, but it is not in all cases prejudicial error.
4. **Appeal and Error.** The findings of a court in an action at law have the effect of a verdict of a jury and will not be disturbed unless clearly wrong.
5. **Sales: Fraud.** A positive statement of a seller of the condition of personal property made during negotiations for its sale indicating his intention to be bound for the truth thereof, and which was so understood and relied upon by the other party, is an express warranty.
6. ———: ———. Where a purchaser receives what he purchased, and bases his right to rescind on a false representation of its quality, condition, or matter affecting its value, he must show that the representation was material and that he was misled thereby to his damage.
7. **Fraud.** If a misrepresentation is likely to affect the conduct of a reasonable person with reference to a transaction with another person, it is generally material to the contract, and if it is material to the transaction entered into by a person deceived thereby, it is assumed, in the absence of a showing to the contrary, that the transaction was induced by the misrepresentation.
8. ———. A person is justified in relying upon a representation made to him in all cases if it is a positive statement of fact and if an investigation would be required to discover the truth.
9. **Agency.** An agent who fails to disclose the fact of his agency and represents himself as a principal inducing another to deal with him as such is liable and may be treated as principal for all purposes until the fact of his agency is made known, and a person dealing with the agent of an undisclosed principal may, after disclosure, sue either the principal or agent, or both.
10. **Automobiles.** A certificate of title of a motor vehicle is gen-

erally conclusive evidence in this state of the ownership of the vehicle.

11. **Sales.** Generally a rescission of a contract of a sale of a chattel must be made by the purchaser giving notice to the vendor of his election to rescind and a return of or offer to return the property to him at the place where it was received by the purchaser.

12. **Tender.** The law does not require vain things, and a formal tender of property is not required if it appears that it would have been futile.

13. **Estoppel.** A person who has given a reason for his conduct and decision concerning a matter involved in controversy cannot, after litigation has begun, change his position and place or explain his conduct upon a different consideration.

14. **Sales.** If a buyer of a chattel is entitled to rescind the sale and elects to do so, and if the seller refuses to accept an offer of the buyer to return the goods, the buyer is thereafter presumed to hold the goods as bailee for the seller subject to a lien to secure the repayment of the price paid.

15. **Bailments.** Generally a bailee is charged with the amount and kind of care of the subject of the bailment that would be exercised by an ordinarily prudent person in the same or similar circumstances.

16. **Sales: Automobiles.** Under the Uniform Sales Act, if a purchaser of an automobile for legal cause rescinds the purchase and the seller refuses the offer of return of the vehicle, the purchaser becomes a bailee for hire of the property, subject to a lien to secure repayment of the price paid, and is entitled to reasonable compensation from the seller for its care and protection. The purchaser may in such a situation place the property in storage, and if he does, the seller is liable for and may be required to pay the reasonable storage charges as a prerequisite of his securing possession of the property.

17. **Sales.** The provision of the Uniform Sales Act that the buyer or seller may recover special damages in any case permitted by law authorizes the recovery of special damages without regard to whether the transaction to which they are incidental has been rescinded or affirmed.

18. **Damages.** The recovery of proximate special damages is recognized in this state.

19. **Sales.** Generally if a purchaser sues for general damages for breach of the contract of sale, he affirms the contract and cannot thereafter disaffirm it. An exception to, or a situation without the operation of this rule, may exist if one expends money or furnishes material in the improvement of property before dis-

covering the fraud by which he was induced to purchase it. In such a case the purchaser may rescind the contract of sale and also recover the reasonable cost of improving the property or of the repairs made thereon.

APPEAL from the district court for Lancaster County: RALPH P. WILSON, JUDGE. *Motion to dismiss denied. Judgment affirmed as modified.*

Sterling F. Mutz, for appellants.

Max Kier and *Charles Bocken,* for appellee.

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

BOSLAUGH, J.

This is an action at law based upon rescission by appellee of a contract for the purchase by him from appellants of a used automobile on the ground of breach of express warranty of the condition of the machine, to recover a money judgment for the purchase price paid at the time of the transaction, and for the amount of expenditures made on account of the machine before appellee discovered the falsity of the representations made and that the warranty had been breached.

The district court, on application of appellants and over objection of appellee, transferred the case to the equity docket, denied a demand of appellee for a jury trial of the issues of the case, and heard and decided it without a jury.

The trial court made a general finding for appellee and against appellants, and special findings, in substance: That the claims of appellee as stated in the petition were true; that about August 13, 1949, he purchased from Ben Newman, doing business in Lincoln, Nebraska, as Newman Motors, one of the appellants, who was acting for an undisclosed principal, Roy Kipf, appellant, a 1941 Buick Roadmaster Sport Coupe for $800; that Newman during the negotiations and at the time of the sale at the place of business of Newman

Motors specifically stated and represented to appellee that the cylinder block of the automobile had not been cracked; that appellee believed, relied, and acted upon that statement and would not have made the purchase of the machine if that representation of the condition thereof had not been made to him by the seller; that the statement was false; that Newman knew or should have known it was untrue; that the representation as to the condition of the cylinder block of the car was material to the transaction and to the subject of the sale; that Kipf was the equitable owner of the car and had repaired it shortly before the sale of it to appellee; that Kipf was not a licensed dealer and he put the car in the name of Newman, an authorized used car dealer, for the purpose of having a sale of it made by Newman; that the certificate of title of the car at the time of the sale showed Newman to be the owner thereof; that the purchase price of the car was paid by appellee to Newman, but thereafter the appellants each participated therein and benefited therefrom; that appellee did not discover that the said representation of Newman was untrue until September 29, 1949; that he forthwith rescinded the sale, demanded of Newman the return of the amount appellee had paid for the car, and he offered to return to the situation the parties were in before the sale; that Newman stated he would not accept return of the car, would not return the amount paid by appellee to him, that he had acted only as agent for Kipf, and disclaimed all responsibility in the transaction; and that before appellee discovered that the representations made by Newman to induce the sale were false and untrue, appellee had expended on account of the car in repairs for and improvements thereof the reasonable amount of $127.62, and was entitled to recover from appellants the total sum of $995.62 upon appellee depositing with the clerk of the court a title certificate for the automobile showing title thereto in appellee free from encumbrance except a lien for

storage of the car after return of it was refused by Newman. The certificate of title was deposited as required, and judgment was rendered in accordance with the findings. This is an appeal from that judgment.

The character of this suit, an action at law, was not altered or changed by its transfer from the law docket to the equity docket of the trial court. It did not become an equity case. It was at its inception, continued to be, and is an action at law for the recovery of money. The significance of the transfer of this case to the equity docket of the court was a mere indication of the determination of the trial court to explore the issues of the case and decide them without the presence or assistance of a jury. Foltz v. Brakhage, 151 Neb. 216, 36 N. W. 2d 768.

There was no matter presented by the pleadings requiring or justifying the transfer of the case or any proceedings in it other or different than was appropriate and permissible in an action at law. The claim made in the answer of Roy Kipf that the terms of the guaranty of the automobile made at the time of the sale were only partly put in writing, that a part of the terms and conditions of the guaranty were omitted from the writing and existed only in spoken words, that the writing should be reformed to state all the agreement of guaranty made between the parties, and that this was essential to permit appellant to make his defense in the case, did not make it either mandatory or discretionary for the court to send this case to the equity docket and deny appellee a jury trial.

The modern system of practice does not make it necessary to secure a formal reformation of a written instrument, where it differs from the true agreement entered into between the parties, in order to enforce the instrument as it should have been made. Likewise it is now recognized that a defendant is entitled to avail himself of a defense based on the real contract between the parties, where the written instrument fails

to show the true agreement, without first having the instrument reformed. In Central Granaries Co. v. Nebraska L. M. Ins. Assn., 106 Neb. 80, 182 N. W. 582, the court said: "Without the delay and the expense incident to two actions, equity and justice can be administered in a single suit. Considered as an action at law on the insurance contract actually made, the issue of mutual mistake was correctly determined by the jury in favor of plaintiff. * * * There was therefore no error in the overruling of the motion for a directed verdict in favor of defendant on the issue of a mutual mistake." See, also, Annotation, 66 A. L. R. 763; Phenix Ins. Co. v. Gebhart, 32 Neb. 144, 49 N. W. 333; Omaha Fire Ins. Co. v. Dufek, 44 Neb. 241, 62 N. W. 465.

The order transferring the case and the order denying appellee a jury trial were each contrary to law, but the error was neutralized by the events of the litigation. Appellants cannot complain because the case was transferred from the law docket and tried by the court without a jury, because they requested the procedure adopted by the court. The success of appellee in the trial court prevents any complaint from him that he was denied a jury trial. However, the findings of the court in this case have the effect of a verdict of a jury and will not be disturbed unless they are clearly wrong. It is not the province of this court in reviewing the record in an action at law to resolve conflicts in or weigh the evidence. In testing the sufficiency of the evidence to sustain a verdict, admissible testimony tending to support the case of the successful party should be accepted as the truth. Foltz v. Brakhage, *supra;* James v. Hogan, 154 Neb. 306, 47 N. W. 2d 847.

Appellants contest the finding that Ben Newman stated and represented to appellee, at the time of the purchase by him of the automobile, that the cylinder block thereof had not been cracked; that appellee believed, relied, and acted upon the statement and would

not have bought the vehicle if that representation of its condition had not been made to him by the seller; and that the statement was false and it was material to the transaction and the subject thereof.

The parties to the negotiations for and the sale and purchase of the automobile were the appellee and Ben Newman, appellant. The pleadings of the parties assert that the representations by Newman of the condition and the warranty of the vehicle were partly oral and partly in writing. Appellee produced proof that appellant stated and represented during the negotiations and at the time of the sale that the block of the car had never been cracked; that the car was in perfect condition, except it did not have bumper guards, a speedometer, or windshield wipers; that these would be furnished and put on the car by appellant at his expense; and that he would pay one-half of the cost of repair parts and expense of installation of any required to correct any mechanical trouble or deficiency that occurred or developed in the car during 30 days from the date of the sale of it, and the remaining one-half thereof would be the liability of the appellee. The latter part of this is described in the record and noted on the motor vehicle invoice as "Thirty day guarantee 50/50." The quotation is the only part of the representations or warranty evidenced by writing.

There is evidence that appellee believed, relied, and acted upon the representations of Newman and especially his positive statement that the block of the car had not been cracked; that his statement in that regard was false; and the fact that the cylinder block had been cracked or broken affected and reduced the value of the car, made it unsalable and undesirable as security for loan purposes.

Appellant Newman agrees that he promised to equip the car with bumper guards, speedometer, and windshield wipers at his expense. He denies he made any statement about the condition of the cylinder block of the

car, or any other part of it. He asserts that the "Thirty day guarantee 50/50" was the only representation or warranty made to appellee. He says that the trial court erred in failing to find and determine that it was exclusive and since no defect in the car occurred or was discovered within 30 days of the date of the sale of it, except the battery failed and was replaced and the brakes required adjustment which was made, appellee had no cause of action against appellants. The finding of the district court that the condition of the car was misrepresented and that there had been a breach of warranty is sustained by evidence and is not contrary to law. Section 69-412, R. R. S. 1943, provides in part: "Any affirmation of fact * * * by the seller relating to the goods is an express warranty if the natural tendency of such affirmation * * * is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon." A positive statement or affirmation of a seller as to the condition of personal property made during negotiations for its sale indicating that he intended to be bound for the truth thereof, and which was so understood and relied upon by the other party to the negotiations, is an express warranty. McGuire v. Thompson, 152 Neb. 28, 40 N. W. 2d 237; Long v. Carpenter, 154 Neb. 862, 50 N. W. 2d 67. Appellee inquired of Newman if the block of the motor of the car had been cracked. His answer in the presence of appellee and a third party was a direct positive statement that it had not been cracked. He emphasized this statement with repetitious and extreme profanity apparently as added assurance that any doubt of appellee in that regard would be wholly dissipated.

The evidence was sufficient to support the finding that the representation as to the condition of the block of the car was material to the contract of sale. It was that an automobile after the block has been cracked is not good security for a loan; that this car would not have been available as collateral for a loan if the defect in

the block had been known; and that such a defect greatly reduces the value of a car and, if it is made known, the car is unsalable. Reduction in the value of this car was estimated at $250. In Cooper v. Marr, 149 Neb. 211, 30 N. W. 2d 563, it is said: "Where, * * * a purchaser receives what he actually purchased, and bases his right to rescind on some false representation as to its quality, condition, or matter affecting its value, he must show that such representation was material, and that he was misled thereby to his injury and damage."

If a misrepresentation is likely to affect the conduct of a reasonable person with reference to a transaction with another person, it is generally material to the contract, and if a misrepresentation is material to the transaction entered into by a person deceived thereby, it is assumed, in the absence of facts showing the contrary, that it was induced by the representation. Pasko v. Trela, 153 Neb. 759, 46 N. W. 2d 139.

Appellants contend that the break in the cylinder block was plainly visible and could have been seen by appellee if he had looked at that part of the car; that he could not close his eyes to an obvious condition and have legal relief because of its existence. The defect in the block was not easily found or seen. It was below the exhaust manifold, had existed for a considerable time, and was rusted. To see it, one had to get down and look under the manifold. The car had been badly used, had been in an accident, and could only be moved with great difficulty by its power. One of the appellants repaired it at an expense of about $350. He cleaned the motor and did not discover the crack in the block. A buyer of a vehicle is not required to assume dishonesty of the seller in his statements concerning the subject of the sale, and make an independent investigation. A person is justified in relying upon a representation made to him in all cases if it is a positive statement of fact and if an investigation would be re-

quired to discover the truth. Sic v. Loup River Power District, 136 Neb. 506, 286 N. W. 700; Hamaker v. Middaugh, 134 Neb. 440, 278 N. W. 849.

The postulate of appellants that appellee must be denied any relief in this case because he did not discover the untruthfulness of the representation of Newman as to the condition of the cylinder block and did not offer to rescind the contract within 30 days of the sale is without merit. The warranty resulting from that affirmation of a fact material to the contract was not within the limitation made applicable to the so-called "Thirty day guarantee 50/50." It is required that a purchaser of a chattel who desires to rescind a contract for fraud or breach of warranty must act within a reasonable time considering all the circumstances. The question as to what is a reasonable time in this regard cannot be answered by reference only to a period of time. McGuire v. Thompson, *supra.* In this case appellee expressed his desire and intention to rescind the contract the same day he discovered the breach of the warranty of the condition of the cylinder block. Greater alertness was impossible.

Appellants contend appellee did not effectively rescind the contract of sale or show a sufficient waiver of a formal rescission thereof. Roy Kipf, one of the appellants, says that appellee did not give notice to him that appellee desired or intended to or did rescind the contract of sale, and that he did not tender or offer to return the car to appellant or to put him in the situation he was at the time the contract was made. He also says that he does not know what transpired between appellee and Newman after appellee discovered the breach of warranty, but whatever was done or said is unimportant because Newman was only an agent of Kipf for the sale of the car, and the agency had been wholly completed and terminated before that time. Ben Newman, one of the appellants, denies that there was a rescission of the contract and pleads that he was only an agent of

his co-appellant in making a sale of the car, that he fully performed and completed the agency, and was discharged therefrom on August 13, 1949.

There is substantial proof that Newman did not disclose to appellee that he was claiming to act only as agent for Roy Kipf in the negotiations and sale of the car until after appellee discovered on September 29, 1949, that the representation made by Newman as to its condition was false. The car was at the place of business of Newman during the negotiations and at the time of the sale. He made an offer to sell it and fixed the price. When the parties agreed, Newman signed the invoice as owner of the car. The purchase price was paid to him. The certificate of title to the car was in his name and he furnished to appellee a certificate of title. The fact that Newman was attempting to act for an undisclosed principal is immaterial in this case.

An agent who fails to disclose the fact of his agency and represents himself as principal inducing another to deal with him as such is liable and may be treated as principal for all purposes until the fact of his agency is made known. A person dealing with an agent of an undisclosed principal may, after disclosure, sue either the principal or agent, or both. Lincoln Joint Stock Land Bank v. Bexten, 125 Neb. 310, 250 N. W. 84; Jackson v. McNatt, 4 Neb. Unoff. 55, 93 N. W. 425; Dresher v. Becker, 88 Neb. 619, 130 N. W. 275; Saco Dairy Co. v. Norton, 140 Me. 204, 35 A. 2d 857, 150 A. L. R. 1299; Restatement, Agency, § 186, p. 431, § 322, p. 714.

It was not competent or permissible for either of the appellants to attempt to show that Newman was not the absolute and sole owner of the automobile. The certificate of title of it was in his name and was conclusive of his ownership under the circumstances of this case, and appellee was justified in treating him as the owner thereof. § 60-105, R. S. Supp., 1949. See, also, Loyal's Auto Exchange, Inc. v. Munch, 153 Neb. 628, 45 N. W. 2d 913.

Generally a rescission of a contract of sale of a chattel must be made by the purchaser giving notice to the vendor of his election to rescind and return or offer to return the property to the place where it was received by the purchaser, and an offer to place the parties in the situation they were at the time the contract was made as nearly as the circumstances will permit. Parks State Bank v. Fernholz, 111 Neb. 669, 197 N. W. 387; Sherrill v. Coad, 92 Neb. 406, 138 N. W. 567; Mundt v. Simpkins, 81 Neb. 1, 115 N. W. 325, 129 Am. S. R. 670; Linch v. Nebraska Buick Automobile Co., 120 Neb. 819, 235 N. W. 456; James v. Hogan, *supra.*

However, the law does not require vain things, and a formal tender of property is not required if it appears that if made it would have been futile. Star v. Watkins, 78 Neb. 610, 111 N. W. 363; Lapham v. Bossemeyer Bros., 5 Neb. Unoff. 343, 98 N. W. 699; Bundy v. Wills, 88 Neb. 554, 130 N. W. 273, Ann. Cas. 1912B 900; Phelps v. Shuck, 107 Neb. 490, 186 N. W. 313; Mundt v. Simpkins, *supra;* 52 Am. Jur., Tender, § 4, p. 216. See, also, Ross v. First American Ins. Co., 125 Neb. 329, 250 N. W. 75; Cox v. Cox, 124 Neb. 706, 247 N. W. 898; Nelson v. State, 121 Neb. 658, 238 N. W. 110; Hippodrome Amusement Co. v. Redick, 109 Neb. 390, 191 N. W. 317. After Newman had positively stated he would not accept a return of the car and would not refund the purchase price paid to him, it was evident that any further offer or tender by appellee would not have been accepted. Thereafter appellee was not required to take the car to the place of business of Newman and tender it to him.

The first information and knowledge appellee had that the cylinder block of the car had been broken was on September 29, 1949. His wife obtained the information first and verified the truth of it by conferring with the mechanic who discovered the crack while working on the car. She discussed the situation with appellee and she for and on his behalf and with his approval talked with Newman on the afternoon of that day. She told

him the car had a cracked block, the source of her information, that she wanted to return the car, wanted Newman to take the car back, and return the money paid for it. "I told him that we wanted our money back on it." Newman said he would not take the car back and that he would not refund or return the money. He said he would have to refer her to Kipf; that Kipf would have to take the car back; that it was his and did not belong to Newman; that he, Newman, did not have anything to do with it; that it was not his car; and that he could not do a thing about it. Newman continued this position at all times thereafter until this litigation resulted. A person who has given a reason for his conduct and decision concerning a matter involved in a controversy cannot, after litigation has begun, change his position and place or explain his conduct upon another or different consideration. From v. General American Life Ins. Co., 132 Neb. 731, 273 N. W. 36. The finding that the contract of sale had been regularly and sufficiently rescinded and that appellee was entitled to judgment against the appellants for the amount of the purchase price with interest at legal rate from September 29, 1949, is sustained by the proof and is not inconsistent with applicable law.

The automobile, after Newman refused to accept it back and declared he would not return the purchase price to appellee, was placed and kept in storage in the Hartsough Motor Company garage and was there at the time judgment herein was rendered. The storage charge was $15 a month and was unpaid. This was established as fair and reasonable. The court required appellee to and he did deposit with the clerk of the district court a certificate of title of the car showing title thereto in him free of encumbrance, except the storage lien, for the use and benefit of appellants upon satisfaction of the judgment. The legality of this procedure is challenged by appellants.

The Uniform Sales Act provides: "(5) Where the

buyer is entitled to rescind the sale and elects to do so, if the seller refuses to accept an offer of the buyer to return the goods, the buyer shall thereafter be deemed to hold the goods as bailee for the seller, but subject to a lien to secure the repayment of any portion of the price which has been paid * * *." § 69-469, R. R. S. 1943. In Elco Shoe Manufacturers v. Thatcher, 231 Mich. 138, 203 N. W. 669, it is said: "The defendants (buyers) returned the shipments to the plaintiff, (seller) who refused to receive them. * * * The defendants took them back and stored them. * * * When the plaintiff refused a return of the goods, it was the duty of the defendants to store them and in doing so the law assumes that they were holding them as bailee for the plaintiff. Uniform sales act (3 Comp. Laws 1915, § 11900)." See, also, Ryder & Brown Co. v. E. Lissberger Co., 300 Mass. 438, 15 N. E. 2d 441, 118 A. L. R. 521; Levy v. Chonavitz, 163 N. Y. S. 658.

Generally a bailee is charged with the amount and kind of care of the subject of the bailment that would be exercised by an ordinarily prudent person in the same or similar circumstances. The observance of ordinary care should be the conduct in every case by a bailee. Peet v. Roth Hotel Co., 191 Minn. 151, 253 N. W. 546; Kubli v. First Nat. Bank, 199 Iowa 194, 200 N. W. 434; 8 C. J. S., Bailments, § 26, p. 261.

Appellee was not a voluntary or gratuitous bailee. His status and responsibility as a bailee was placed upon him by the wrongful refusal of Newman to accept return of the automobile and the law. Appellee was then charged with doing the reasonable and prudent thing to preserve and protect the car from loss, damage, or unusual deterioration. Anything less would subject him to a liability. Prudent persons protect their cars by shielding them from the elements and exposure to the depredation of evil disposed persons toward the property of others. Parking this car in the open would not have been justified. Appellee would then have been subject

to the hazard of liability for damage to or loss of the car. The statement of this court in another case is appropriate here. "When Neville found himself involuntarily in possession of these goods, we think he might preserve them; and for the reasonable worth of the care and preservation of the goods until they were removed the owners were liable." Moline, Milburn & Stoddard Co. v. Neville, 52 Neb. 574, 72 N. W. 854. See, also, Crancer Co. v. Combs, 95 Neb. 403, 145 N. W. 863.

Gant v. Cutting-Larson Co., 110 Misc. 484, 181 N. Y. S. 581, makes reference to the Uniform Sales Act and comments: "The plaintiff, having offered to return the automobile and the offer having been refused, became the bailee for hire of the property and is entitled to the usual charges of bailment or storage after notice to the defendant." In that case, the court further said: "The statute therefore seems to be contrary to the principle, if such there be, as claimed by the defendant, that one cannot make himself the creditor of another without the consent of the latter * * * for the relation of bailor and bailee seems to be created by the statute, regardless of the intention of the parties or their consent or want of consent. * * * In the present case the plaintiff tendered the automobile to the defendant, who refused to receive it, and plaintiff thereupon, * * * stored the automobile in a garage and insured it against the perils of theft and fire and notified the defendant of such action and that the defendant would be held liable for the expense incurred. In so doing the plaintiff sought to make the defendant's loss as light as possible, consistent with the exercise of due care and the proper regard for the right of the defendant in the automobile. Under the circumstances it would seem that the defendant is chargeable with the amount expended for storage and insurance." The record justifies the procedure in this case that required appellants to take the car subject to the charge for its storage after the return of it had been refused by Newman.

Appellee improved the car during the period from its purchase to the time of his discovery that its condition had been misrepresented. The amount he expended for parts, installation thereof, and labor occasioned by the improvements, was $114.77. The appropriateness of these or the reasonableness of the charge for them is not contested. In Mundt v. Simpkins, *supra,* it was determined that: "As a general rule a party who counterclaims for damages for breach of a contract will be held to have affirmed it, and cannot be heard to assert its nonexistence because of its recission (rescission) * * *. An exception * * * may exist where one expends money or material in the improvement of property before discovering the fraud by which he was induced to purchase it, or where the purchase is made on a warranty of its fitness for a prescribed use, and repairs are required to be made before the article can be tested and its fitness for the use ascertained. In such cases the purchaser may rescind the contract of sale and recover the reasonable cost of improving the property or of repairs made thereon."

These expenditures constitute special damages within the Uniform Sales Act. Section 69-470, R. R. S. 1943, contains the following: "Nothing in this act shall affect the right of the buyer or the seller to recover * * * special damages in any case where by law * * * special damages may be recoverable, * * *." This is not in conflict and is not limited or affected by subsection (2) of section 69-469, R. R. S. 1943, that: "When the buyer has claimed and been granted a remedy in any one of these ways, no other remedy can thereafter be granted." The immediate preceding quoted provision relates to and recognizes the doctrine of election of remedies that when two contemporary inconsistent remedies exist, the election and pursuit of one prevents subsequent resort to the other. James v. Hogan, *supra.*

It has not been the rule in this state that only general damages may be recovered for breach of warranty,

but recovery of proximate special damages has been recognized. Aultman & Co. v. Stout, 15 Neb. 586, 19 N. W. 464; Burr v. Redhead, Norton, Lathrop Co., 52 Neb. 617, 72 N. W. 1058; Long v. Carpenter, *supra;* Yoder v. Nu-Enamel Corporation, 145 F. 2d 420.

The purpose and effect of the provision of the Uniform Sales Act that the buyer or seller may recover special damages in any case where the law permits the recovery of such damages is to permit the recovery of special damages without regard to whether the transaction to which they are incidental has been rescinded or affirmed. Russo v. Hochschild, Kohn & Co., Inc., 184 Md. 462, 41 A. 2d 600, 157 A. L. R. 1070; Uniform Laws Annotated, 1A, Sales, § 70, p. 406.

The motion of appellants for an order dismissing this case should be, and it is denied.

The district court determined and allowed as expenditures made on the car by appellee the sum of $127.62. This is $12.85 in excess of the amount shown by the proof. The judgment of the district court of $995.62 should be, and it is reduced to $982.77, and, as reduced, the judgment should be, and is in all things affirmed.

MOTION TO DISMISS DENIED.

JUDGMENT AFFIRMED AS MODIFIED.

CHAPPELL, J., not participating.

IDA W. DUMOND, APPELLANT, V. LEWIS W. DUMOND, JR. ET AL., APPELLEES.

51 N. W. 2d 374

Filed January 18, 1952. No. 33057.

1. **Wills.** The court, in construing a will, is required to give effect to the true intent of the testator to the extent it can be ascertained from the whole instrument, if such intent is consistent with applicable rules of law.
2. ———. Extrinsic evidence is not admissible to determine the intent of the testator as expressed in his will unless there is a latent ambiguity.

3. ———. A patent ambiguity in a will is one which appears upon the face of it. Such an ambiguity must be removed by interpretation according to legal principles and not by evidence, and the intention of the testator must be found within the four corners of the will.

4. ———. The intention of the testator by the devise made "to my son Lewis W Dumond Jr. and to my grandson Lewis W Dumond 3d each one undivided half one half interest in my farms located north east of Fairmont" was to vest an undivided one-half interest in the lands described in each of the two specifically named devisees.

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

Keenan & Corbitt, for appellant.

C. Russell Mattson, for appellees.

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

CARTER, J.

This is an action to partition 160 acres of land in Fillmore County. The plaintiff alleged that she was entitled to an undivided one-half interest in the land under the provisions of a will executed by her husband, Lewis W. Dumond, Sr., now deceased. The trial court found for the defendants and plaintiff appeals.

The record shows that plaintiff and Lewis W. Dumond, Sr., were wife and husband, residing in California at the time of the husband's death on December 25, 1948. He left surviving him as heirs at law or devisees under his will, Ida W. Dumond, his wife, the plaintiff herein, and the defendants Lewis W. Dumond, Jr., a son, and Lewis W. Dumond III, a grandson. All are of adult age and competent.

The deceased, Lewis W. Dumond, Sr., left a holographic will which was duly admitted to probate in the State of California. Ancillary proceedings for the probate of the will in this state were had in Fillmore County. The will was admitted to probate on April 29, 1949, and

no appeal was taken. The plaintiff alleges that the will devises an undivided one-half interest in the land to her and an undivided one-fourth interest to each of the defendants, Lewis W. Dumond, Jr., and Lewis W. Dumond III. The defendants assert that the will devises an undivided one-half interest in the land to each of the defendants and that the plaintiff has no interest therein under the terms of the will.

The provision of the will giving rise to the dispute is as follows: "I devise to my son Lewis W Dumond Jr. and to my grandson Lewis W Dumond 3d each one undivided half one half interest in my farms located north east of Fairmont, County of Filmore Nebraska the legal description being East ½ of South East ¼ of section 3 and south ½ of North West ¼ sec. 2." The meaning of the words "each one undivided half one half interest in my farms" controls the result of the case as to the issues presented here.

In construing a will a court is required to give effect to the true intent of the testator insofar as it can be collected from the whole instrument, if such intent is consistent with applicable rules of law. Bodeman v. Cary, 152 Neb. 506, 41 N. W. 2d 797; Dennis v. Omaha National Bank, 153 Neb. 865, 46 N. W. 2d 606. Extrinsic evidence is not admissible to determine the intent of the testator as expressed in his will unless there is a latent ambiguity. Borah v. Lincoln Hospital Assn., 153 Neb. 846, 46 N. W. 2d 166. Such evidence is not admissible to determine the intent of the testator where the ambiguity is patent and not latent. In re Estate of Pfost, 139 Neb. 784, 298 N. W. 739. A patent ambiguity is one which appears upon the face of the instrument. It must be removed by construction according to settled legal principles and not by evidence, and the intention of the testator is to be determined from the four corners of the will itself. The controverted provision of the will in the case here presented is one appearing upon

the face of the instrument and is therefore a patent ambiguity.

The intent of the testator in using the words "each one undivided half one half interest in my farms" must therefore be ascertained within the four corners of the will without the assistance of extrinsic evidence. The will was wholly in the handwriting of the testator. That the testator was a layman unskilled in the drafting of wills is self-evident. No other specific devise appears in the will. The residuary clause makes the plaintiff the residuary devisee and legatee. If, as contended by the plaintiff, the disputed words devise only an individed one-fourth interest to each of the two defendants, the plaintiff takes one-half as the residuary devisee under the will.

In determining the intent of the testator when he used the controverted words, the court should place itself in the shoes of the testator, ascertain his intention, and enforce it. In so doing it is important to remember at all times that the testator was unskilled in the field of will drafting. It seems clear to us that the testator intended to dispose of his farms in Fillmore County by specific devise. In so doing he specifically named only his son, Lewis W. Dumond, Jr., and his grandson, Lewis W. Dumond III. His wife is not mentioned. The disputed words do not mention a one-fourth interest in connection with the devise of the lands in question. If a one-fourth interest had been intended for anyone, it would have been easy and natural for even a layman to have said so in plain and unambiguous language. It seems to us that, when the testator names but two devisees and describes the undivided interests devised in terms of halves and one-halves and not by one-fourths, it indicates an intent to devise an undivided one-half to each of the two named devisees. This result is further supported, we think, by a general tendency on the part of a layman to dispose of the whole of the property

being devised in terms due to the fact that a layman would not ordinarily be familiar with the effect of a residuary clause upon a portion not devised. The plaintiff argues that the disputed words should be read as if the testator had made them read: "each one undivided half of one-half interest." It seems more consistent to us to say that the word "of" was intentionally left out and that the testator intended the words "one half interest" as a tautegorical explanation of the devise of an undivided half to each of the specifically named devisees. Such an intention is consistent with the general pattern of the will, the gift of the farms to the son and grandson of the testator, and all the rest of his property to his wife. We conclude that the testator intended by the language in question to devise an undivided one-half interest in the lands described to each of the two specifically named devisees, Lewis W. Dumond, Jr., and Lewis W. Dumond III, and that any other property, real or personal which he had or subsequently acquired, was to go to the plaintiff under the terms of the residuary clause of the will. The trial court so found and, we think, correctly so.

AFFIRMED.

WENKE, J., dissenting.

I dissent from the majority holding because, in my opinion, it does not give the ordinary and natural meaning to the language used by the testator in the following sentence of his will: "I devise to my son Lewis W Dumond Jr. and to my grandson Lewis W Dumond 3d each one undivided half one half interest in my farms located north east of Fairmont, County of Filmore Nebraska the legal description being East ½ of South East ¼ of section 3 and south ½ of North West ¼ sec 2." (Underscoring mine.)

The majority holding has the effect of eliminating from this sentence either the word "half" or words "one half." From the very beginning in the study of

arithmetic I was taught that half one half equals one fourth.

SIMMONS, C. J., and MESSMORE, J., concur in this dissent.

WILLIAM SEMRAD ET AL., APPELLEES, V. JOSEPH E. SEMRAD ET AL., APPELLEES, IMPLEADED WITH HARRY E. STEVENS, APPELLANT.

51 N. W. 2d 264

Filed January 18, 1952. No. 33068.

1. **Estates.** Where the grantor conveys real estate to a life tenant with remainder to the children of the life tenant, all children of the life tenant whether in being or born thereafter during the continuance of the life estate are included as remaindermen.
2. **Deeds: Estates.** Where the language of a deed conveying a remainder interest to a class does not provide for a defeasance in case of the death of one of the class during the continuance of the life estate the vested interest of such member of the class does not lapse but descends to his heirs.

APPEAL from the district court for Saunders County: HARRY D. LANDIS, JUDGE. *Affirmed.*

Stevens & Powell, for appellant.

Joseph L. Pallat, H. A. Bryant, and *Joe R. Broz,* for appellees.

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

YEAGER, J.

This is an action by William Semrad and Erma Semrad, plaintiffs and appellees, against Harry E. Stevens, one of the defendants and the appellant herein, and others for the partition of 160 acres of land in Saunders County, Nebraska.

The question of the right to partition is not in issue. The only question for determination is that of apportionment of interests on partition. The apportionment

depends upon the meaning of a provision contained in a certain deed executed and delivered by one Josef Janecek and Marie Janecek, his wife, on August 17, 1892. The facts are not in dispute.

By the deed the land was conveyed to Mary Semrad, a daughter. The deed contains the following provision: "Grantors reserve the right that Mary Semrad (their daughter) can not convey or sell the above described land to any person during her natural life, and in case of Mary Semrad death said above described land should be divided among her hown children, and in case there should be no children after Mary Semrad then in that case the above described land should revert back to the Grantors above mentioned."

Nine children were born to Mary Semrad. Mary Semrad died October 19, 1949. Two of her children predeceased her. The two left surviving children. These children were living at the time Mary Semrad died.

Harry E. Stevens at the time of the commencement of the action in the district court and at the time of trial was the owner of the interests of three of the surviving children of Mary Semrad in this real estate.

William Semrad, one of the surviving children, instituted this action for partition wherein he contends that his interest and that of each of the other surviving children is one-ninth and that the children of each of the deceased children of Mary Semrad have a one-ninth interest therein.

The appellant, Harry E. Stevens, contends that under a proper interpretation of the quoted provision of the deed only the children of Mary Semrad who were living at the time of her death have an interest in the land and that he as the owner of the interests of three of these has a three-sevenths interest in the land.

The district court found and decreed that under the deed the interest of each of the seven living children was one-ninth; that the interests of the children of each of the deceased children was one-ninth; and that in consequence

as successor in interest the appellant was the owner of three-ninths instead of three-sevenths. It is from the determination upon this issue that the appeal has been prosecuted.

Unless we are to depart from the clear, positive, and recent pronouncement of this court the action of the district court is to be sustained.

The case of Strawhacker v. Strawhacker, 132 Neb. 614, 272 N. W. 772, in point of ultimate fact upon which the legal determination depended was not different from the case at bar.

In that case John Jury and Mary E. Jury on December 1, 1883, conveyed 80 acres of land to Andrew M. Strawhacker by deed. The habendum clause of the deed contained the following provision: "to Andrew M. Strawhacker for and during his natural life and at his death, to his present wife Genevieve and her children. Now of the town of Minonk, county of Woodford and state of Illinois." The concluding sentence of the quotation had significance in the consideration in that case but it has none herein.

On the date of the execution and delivery of the deed Genevieve Strawhacker had one child. Subsequently seven additional children were born. Andrew M. Strawhacker died October 15, 1922. The child born before the execution and delivery of the deed died December 28, 1918, leaving a widow and one son. One of the seven died April 15, 1891.

After reviewing the authorities which are fully set forth in the opinion in that case this court said: "We are convinced that, at the time of the execution and delivery of the deed, Andrew M. Strawhacker became vested with a life estate and that the remainder interest vested in his wife, Genevieve, and her only son then in being, Orville Strawhacker, subject to the condition that the class will open up and let in other children born during the continuance of the life estate."

It was also said, and this is apropos here since here

there is no provision for defeasance as was also true there: "It will be noted that the clause in the deed does not provide for a defeasance of the vested interest of any child, either by the death of the child or otherwise. In such case the vested interest of a child does not lapse at his death but descends to his heirs. In the instant case, each of the eight children and Genevieve Strawhacker became vested with an undivided interest in the land as they entered the class. At the termination of the life estate by the death of Andrew M. Strawhacker, the grantee of the life estate, the number within the class became fixed and the absolute interest of each at that time would necessarily be an undivided one-ninth interest in the premises."

Nothing has been presented which warrants a departure from the authority of this opinion. The decree of the district court is therefore affirmed.

AFFIRMED.

DAN ALLEN ET AL., APPELLANTS, V. GORDON TOBIN, CITY CLERK OF THE CITY OF SIDNEY, NEBRASKA, ET AL., APPELLEES.
51 N. W. 2d 338

Filed January 18, 1952. No. 33075.

1. **Statutes.** In construing statutes, the legislative intention is to be determined from a general consideration of the whole act with reference to the subject matter to which it applies and the particular topic under which the language in question is found, and the intent so deduced from the whole will prevail over that of a particular part considered separately.
2. ———. The fundamental principle of statutory construction is to ascertain the intent of the Legislature, and to discover that intent from the language of the act itself, and it is not the court's duty nor within its province to read a meaning into a statute that is not warranted by legislative language.
3. **Intoxicating Liquors: Statutes.** Section 53-1,118, R. S. 1943, provides for a liberal construction of the Liquor Control Act.
4. **Elections.** Any election at which there is a general popular

expression of the public will, whether that election be a state, county, or city election, is a general election.

5. ———. Article XVII, section 4, of the Constitution of Nebraska, and section 32-101, R. S. 1943, define a general state election, and are not conclusive to the extent of including a general municipal election.

6. **Intoxicating Liquors: Elections.** The following language appearing in section 53-122, R. S. 1943, "If a sufficient petition shall be signed by the electors of any such city or village of such number as shall equal twenty per cent of the votes cast at the last general election held therein," means a petition signed by the electors of any such city or village of such number as shall equal twenty percent of the votes cast at the last general municipal election held therein.

7. ———: ———. When a petition meets the requirements of section 53-122, R. S. 1943, to submit to the electorate of any city or village the proposition of sale of alcoholic liquors by the drink, except beer, such petition vests jurisdiction in the proper city officials to call an election for such purpose.

8. ———: ———. Under the provisions of the Liquor Control Act, section 53-122, R. S. 1943, liquor may be sold by the drink in any city or village where the people thereof authorize it.

APPEAL from the district court for Cheyenne County: JOHN H. KUNS, JUDGE. *Affirmed.*

Edward E. Carr and *Ivan Van Steenberg,* for appellants.

J. H. McNish and *L. M. Clinton,* for appellees.

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

MESSMORE, J.

This is an action in equity brought by the plaintiffs to enjoin the city clerk of the city of Sidney, a city of the second class, from certifying returns of an election held in the city for the sale of alcoholic liquor by the drink, except beer, to the Nebraska Liquor Control Commission, and to enjoin the city council, named as defendants, from issuing any license or licenses to any applicant or applicants who may apply for the same, on the ground that the election so held was illegal and void.

The trial court entered the following judgment, in substance: This court does not have jurisdiction to enjoin any of the defendants herein from canvassing, publishing, or otherwise recognizing the results of the election held April 4, 1950. The plaintiffs and the persons whom they allege they represent were, on April 18, 1950, entitled, as electors of the city of Sidney, Nebraska, to institute contest proceedings in accordance with the law. Such right constitutes an adequate remedy at law, and by reason thereof said plaintiffs here have not shown themselves to be entitled to the issuance of an injunction. The plaintiffs' cause of action was dismissed with prejudice at plaintiffs' costs.

Plaintiffs filed a motion for new trial which was overruled. From the overruling of the motion for new trial plaintiffs perfected appeal to this court.

The facts are not in dispute and for the most part are stipulated. The record shows that Gordon Tobin was the city clerk of Sidney, Nebraska, on March 3, 1950, was reelected to the same position April 4, 1950, and has been continuously the city clerk at all times mentioned, and also shows the members of the city council serving during the period of this controversy. A petition in five parts was filed with the city clerk on March 3, 1950, containing 203 signatures of persons. Five of the petitioners who signed the petition did not live within the corporate limits of the city of Sidney, leaving 198 signatures of persons living in the city. The poll books show that at the last general state election held in November 1948, prior to April 4, 1950, 1,993 votes were cast in the election districts of which the corporate limits of the city of Sidney are a part, and 565 voters voted in the general municipal election held on April 4, 1949, in the city of Sidney. Notice of such election, based on the petition filed, was published as provided for by statute, and the question was placed on the ballot and voted on. Certain of the plaintiffs and others appeared at the city council meetings after March 3, 1950, and before the

general municipal election on April 4, 1950, to wit, on March 17 and March 24, 1950, and protested against the sufficiency of the petition, its legality, and the right of the city council to place upon the ballot the question of licensing the sale of alcoholic liquors, except beer, by the drink to be submitted to the electors of the city of Sidney at the next general municipal election on April 4, 1950, according to the provisions of Chapter 53, section 53-122, and other applicable sections of the Revised Statutes of Nebraska, 1943. The minutes of the meeting of the city council of March 24, 1950, show that the city attorney ruled that the petitions presented to the city council on March 3, 1950, petitioning for the sale of liquor by the drink in the city of Sidney and requesting that the licensing of the same be submitted to the electors of the city at the next general election were legal and valid. The city clerk was instructed to proceed with the election and the printing of the ballots according to the statutes of Nebraska. A written protest was made to the city clerk and received on April 3, 1950, protesting that the petition submitted to the city council was invalid on the basis that it did not comply with section 53-122, R. S. 1943, the Nebraska Liquor Control Act. This written protest was in support of verbal protests made to the city council on March 17 and March 24, 1950.

For convenience we will refer to the parties as designated in the district court, and the city of Sidney as the city.

The plaintiffs' assignments of error pertinent to a determination of this appeal may be summarized as follows: (1) The trial court erred in finding and decreeing that it had no jurisdiction over the subject matter of the action; (2) the trial court erred in finding that the injunction to prevent an election would have to be for the protection of public funds to prevent waste or expenditure for an illegal purpose; (3) the trial court erred in finding that the matter here involved could

be determined only by an election contest; and (4) the trial court erred in dismissing the plaintiffs' action.

In 1935, the Legislature of this state passed the Liquor Control Act, the purpose of which is to govern and control the manufacture, sale, giving away, barter, carriage, possession, and use of alcoholic liquors in the state. Under the provisions of the act liquor may be sold by the drink in a city or village where the people thereof authorize it. State ex rel. Johnson v. Hash, 144 Neb. 495, 13 N. W. 2d 716. See, Chapter 53, R. S. 1943, and amendments thereto.

The Liquor Control Act is an independent act dealing solely with the control of alcoholic liquors. See State ex rel. Johnson v. Chase, 147 Neb. 758, 25 N. W. 2d 1.

Section 53-122, R. S. 1943, sets forth the entire procedure to be followed in submitting the proposition of selling liquor by the drink in any municipality. The provisions of this section of the statute relative to the calling of a special election are not here involved. The petitioners, under this section of the statute, are required to meet certain technical requirements which are not here involved.

We summarize section 53-122, R. S. 1943, insofar as the same is applicable to the issue presented in this appeal. The commission may issue licenses for the sale of alcoholic liquors, except beer, by the drink, subject to all the terms and conditions of the act, in all cities and villages in this state if a sufficient petition shall be signed by the electors of any such city or village of such number as shall equal 20 percent of the votes cast at the last general election held therein, which shall request that the question of licensing the sale of alcoholic liquors, except beer, therein by the drink be submitted to the electors thereof and shall be presented to the municipal clerk of the governing body thereof. The question of licensing the sale of such alcoholic liquors by the drink may also be submitted at any general municipal election, except as otherwise provided in section

53-121, R. S. 1943, in any city or village in this state upon the filing with the municipal clerk of the governing body of such city or village of a petition signed by electors of such city or village of such number as shall equal 20 percent of the votes cast at the last general election held therein. In speaking of the petition, the statute reads as follows: "At the top of each sheet shall be stated the proposition * * * to be submitted and the date of the general municipal election at which it is proposed to be submitted. * * * Such petition shall be filed thirty days prior to the day of the general municipal election at which the proposition is to be submitted, * * *. Upon the ballot either at the special election hereinbefore provided (which we have purposely eliminated) or at any general municipal election, the proposition * * * shall be stated as follows: * * *." Then the proposition is stated. The provisions of the statutes of this state relating to election officers, voting places, election apparatus and blanks, preparation and form of ballots, information to voters, delivery of ballots, calling of elections, conduct of elections, manner of voting, counting of votes, records and certificates of elections, and recounts of votes, so far as applicable, shall apply to voting on the proposition or propositions under the provisions of this act.

It is the plaintiffs' contention that the signatures upon the petition required by section 53-122, R. S. 1943, must be by electors of such city or village of such number as shall equal 20 percent of the votes cast at the last general election held therein, and this means the last general state election, as distinguished from a general municipal election.

It will be observed that "general election" and "general municipal election" are both used in this section of the statute. It is also apparent that this section of the statute vests the city with local option, that is by vote to either affirmatively endorse the proposition of sale of liquor by the drink, except beer, or to reject it.

Contra, the defendants contend that the language used in the section, "last general election held therein" means the last regular or general municipal election held in the city of Sidney.

There are certain well-established rules with reference to construction of statutes.

The Supreme Court gives a broad and comprehensive meaning to all statutes in order to arrive at legislative intent. Miller v. Schlereth, 151 Neb. 33, 36 N. W. 2d 497.

Section 53-1,118, R. S. 1943, provides for a liberal construction of the Liquor Control Act.

The fundamental principle of statutory construction is to ascertain the intent of the Legislature, and to discover that intent from the language of the act itself, and it is not the court's duty nor within its province to read a meaning into a statute that is not warranted by the legislative language. Knox County v. Perry, 142 Neb. 678, 7 N. W. 2d 475.

In construing statutes, the legislative intention is to be determined from a general consideration of the whole act with reference to the subject matter to which it applies and the particular topic under which the language in question is found, and the intent so deduced from the whole will prevail over that of a particular part considered separately. In re Application of Rozgall, 147 Neb. 260, 23 N. W. 2d 85; In re Application of Silberman, 153 Neb. 338, 44 N. W. 2d 595.

With the foregoing rules in mind we proceed to a determination of this appeal.

Ordinarily, a general election is one provided for by law for the election of officers throughout the state, or certain subdivisions thereof, after the expiration of the full terms of the former officers. See 29 C. J. S., Elections, § 1, p. 12.

A regular or general election is one which recurs at stated intervals as fixed by law; it is one which occurs at stated intervals without any superinducing cause other

than the efflux of time. In the application of the foregoing rules, it is held that the term "general election" embraces a regular annual municipal election. See 18 Am. Jur., Elections, § 5, p. 181.

Any election at which there is a general and popular expression of the public will, whether that election be a state, county, or city election, is a general election. See, Wing v. Ryan, 255 App. Div. 163, 6 N. Y. S. 2d 825; State ex rel. Griffin v. Superior Court, 70 Wash. 545, 127 P. 120.

In the case of State ex rel. Castle v. Schroeder, 79 Neb. 759, 113 N. W. 192, this court in defining the term "general election" said: "One appointed to fill a vacancy in the office of alderman of a city of the first class having more than 40,000 and less than 100,000 inhabitants holds only until the next general election * * * which is the next election at which the vacancy can be filled * * *, to wit, the next regular municipal election." The court went on to say: "The words 'general election' have no uncertain meaning in this state, and, when used with reference to city elections without any qualifying words, must mean the election for municipal officers in general."

Article XVII, section 4, of the Constitution of Nebraska, which defines general state election, states: "The general election of this state shall be held on the Tuesday succeeding the first Monday of November in the year 1914 and every two years thereafter."

Section 32-101, R. S. 1943, provides the general election of this state shall be held on Tuesday succeeding the first Monday in November in each even-numbered year, thus stating the time the general state election is to be held.

Section 32-201, R. S. 1943, provides: "All state, district, county, precinct and township officers, by the constitution and laws made elective by the people, except school district officers and municipal officers in cities and villages, shall be elected at a general election to

be held at the time provided by section 32-101; Provided, that all elective officers of cities of the metropolitan class shall be elected at a regular or general city election which shall be held on the first Tuesday after the second Monday in May, 1945, and each three years thereafter."

Article XVII, section 4, of the Constitution of Nebraska, and section 32-101, R. S. 1943, define only one type of general election, namely the state general election, and it is apparent by section 32-201, R. S. 1943, where the language used is "at a general election to be held at the time provided by section 32-101," indicates that there is more than one type of a general election. We conclude that Article XVII, section 4, of the Constitution of Nebraska, and section 32-101, R. S. 1943, are not conclusive in that there is only one type of general election, and the Legislature did not so intend, as we have previously pointed out.

The plaintiffs contend that in construing a statute, courts will take judicial notice of events which are generally known, and matters of common knowledge within the limits of their jurisdiction. Courts, in construing a statute, may with propriety recur to the history of the times when it was passed, and this is frequently necessary in order to ascertain the reason, as well as the meaning of the particular provisions of it. See Redell v. Moores, 63 Neb. 219, 88 N. W. 243, 93 Am. S. R. 431, 55 L. R. A. 740.

The plaintiffs in this connection assert that the statute now being interpreted by this court was first engrossed in its embryonic form and read, as far as necessary to consider here, as follows: "* * * a sufficient petition shall be signed by the electors of any such city or village of such number as shall equal thirty-five per cent of the votes cast at the last general municipal election held therein * * *." As finally passed and now a part of section 53-122, R. S. 1943, this section reads: "* * * a sufficient petition shall be signed by the elec-

tors of any such city or village of such number as shall equal twenty per cent of the votes cast at the last general election held therein, * * *."

It will be observed that in this part of the section being discussed as it appears now the word "municipal" does not appear before the word "election" as it did in the first instance. The section of the statute in controversy is plain and clear in that it refers to a purely local governmental unit, in this instance the city of Sidney, and requires, in order to present to the electors of the city the proposition of sale of alcoholic liquors by the drink, except beer, that there must be a sufficient petition signed by the electors of the city of such number as shall equal 20 percent of the votes cast at the last general election held therein, meaning, as we interpret the statute, in the city of Sidney.

For the reasons given in this opinion, we conclude that the language used in section 53-122, R. S. 1943, "the last general election held therein" means the last general municipal election held in the city of Sidney. This being true, the petition, by admission, contained 198 signatures, which equals 20 percent of the votes cast at the last general election held in the city of Sidney, and was sufficient to vest jurisdiction in the proper city officials to call the election, which was done and held on April 4, 1950, where the proposition of the sale of alcoholic liquors by the drink, except beer, was submitted to the electorate of the city and carried by an affirmative vote, as admitted in the record.

Other assignments of error need not be determined in view of our holding.

The judgment of the trial court in dismissing the plaintiffs' petition with prejudice at plaintiffs' costs is affirmed.

AFFIRMED.

JOHN P. JOHNSTON, APPELLANT, V. CECIL O. L. JOHNSTON, APPELLEE.

51 N. W. 2d 332

Filed February 1, 1952. No. 33063.

1. **Appeal and Error.** In determining an appeal in equity involving questions of fact, this court is required to reach an independent conclusion without regard to the findings of the district court; yet in determining the weight of the credible evidence, where there is an irreconcilable conflict on a material issue, it will consider the fact that the trial court observed the witnesses and their manner of testifying and must have accepted one version of the facts rather than the opposite.
2. **Fraud: Cancellation of Instruments.** Where it is sought to set aside a written instrument, and more especially one which has been executed with the formality of being signed in the presence of witnesses and acknowledged before a notary public, on account of fraud, the presumptions of validity and regularity attaching to such a document require clear and convincing evidence to preponderate against them. The formal instrument furnishes proof of the most cogent and solemn character, and to outweigh this proof requires a higher quality of evidence than in a case where there are no such presumptions to overcome.
3. **Fraud.** In an action in which relief is sought on account of alleged fraud, the existence of a confidential or fiduciary relationship, or status of unequal footing, when shown, does not shift the position of the burden of proving all elements of the fraud alleged, but nevertheless may be sufficient to allow fraud to be found to have existed when in the absence of such a status it could not be so found, and thus to have the effect of placing the burden of going forward with the evidence upon the party charged with fraud.

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

Jay P. Gibbs and *John A. McKenzie,* for appellant.

Gray & Brumbaugh, for appellee.

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

SIMMONS, C. J.

In this action plaintiff sought to have a deed declared

null and void, to quiet the title in him to two certain pieces of real estate, and to decree that defendant had no right, title, or interest in personal property purportedly conveyed in a bill of sale by plaintiff to defendant. The action is one based on alleged fraud of the defendant. Issues were made and trial was had resulting in a decree dismissing plaintiff's petition and holding that the deed and bill of sale were in all respects valid, subject to the terms of a condition to which reference will hereinafter be made. Plaintiff appeals. We affirm the decree of the trial court.

Plaintiff and defendant are father and son. Reference will be made herein to a lady who at the inception of this controversy was named Dolly Powell and later became the wife of the plaintiff. For convenience she will be referred to herein as Dolly, that being the name often used in the evidence.

Before undertaking to summarize the pleadings as to the issues presented, we state the fact situations about which there appears to be no material dispute in the pleadings and evidence.

Plaintiff was a man 81 years of age at the time of trial. The defendant, his only son, was 55 years of age at the time of trial. Plaintiff and defendant's mother were married in 1893. Plaintiff and defendant are chiropractors by profession. The mother was also a chiropractor. Plaintiff and defendant's mother began the practice of their profession in Omaha some 35 years ago and continued the practice thereafter in Omaha.

In 1916, the first piece of real estate involved in this action was bought, title being taken in the name of the plaintiff. We refer to it as the Locust Street property. In 1941, the title to this property was conveyed to plaintiff and the mother as joint tenants with right of survivorship. It appears that this property later was sold under contract and that that contract was not fully performed when this controversy arose.

The second and more valuable piece of property in-

volved here was purchased in 1925. We refer to it as the Poppleton Avenue property. Title was taken in the names of plaintiff and the mother as joint tenants with right of survivorship. The mother died in May 1948. Upon her death title to both pieces of real estate vested in the plaintiff without probate proceedings. For several years plaintiff and the mother officed and lived in this property.

The defendant practiced his profession at various places. At times he was with plaintiff and the mother. In 1948, he was at St. Louis, Missouri. He came to Omaha and assisted plaintiff and the mother during her last illness. Thereafter plaintiff and defendant went to Europe and on their return defendant entered the practice with plaintiff. There is some contention as to whether or not a partnership existed. It is not material.

The Poppleton Avenue property was remodeled so as to provide basement offices for plaintiff and defendant. There the two parties lived and practiced their profession in a relationship that was close and cordial and one of mutual trust and confidence, both personally and professionally. They do not appear to have made with each other an exact accounting of income or expenses.

Dolly was a woman of mature years, employed in Omaha. For many years she had been a tenant in the Poppleton Avenue property. She continued as a tenant after the mother's death. Her relationship with the plaintiff, the defendant, and their families was cordial and friendly.

An attorney, Oscar Johnson, had his offices in his home, a block from the plaintiff's office and home. For 20 years the attorney had done plaintiff's legal work and advised him professionally. He handled the transfer of title of the Locust Street property from single to joint tenancy ownership. He also handled the sale of the Locust Street property for plaintiff, undertook to make collections due on that property, and after the

dispute here involved became acute he represented plaintiff and defendant in the foreclosure of the contract of sale on that property. The attorney was acquainted with the defendant but had never served him professionally.

In 1949, plaintiff and Dolly became engaged to marry. They made a trip to California. Relatives of Dolly suggested they be married there. Plaintiff expressed a desire to talk with the defendant about it. They returned to Nebraska. Defendant was advised of the proposed marriage. He made no objection. The marriage date was set for October 6, 1949, and the ceremony was performed on that evening.

On October 5, 1949, plaintiff signed and acknowledged a deed for the consideration of $1 and other valuable considerations conveying the two pieces of real estate to the defendant and himself. This deed is on a printed form entitled "Warranty Deed—Vesting Entire Title in Survivor." The defendant is named as the first of the two grantees. The deed contains in black-faced capital letters this language: "It being the intention of all parties hereto, that in the event of the death of either of said grantees, the entire fee simple title to the real estate described herein shall vest in the surviving grantee." In two places the words "joint tenants" appear in black-faced capital letters. The deed contains the usual covenants in the printed form. It was witnessed by and acknowledged before the attorney and recorded that day.

Likewise on the same day the plaintiff sold for the consideration of $1 and other valuable considerations "all goods, chattles (sic) and credits owned by me and in my possession located at 1146 South 32nd Street, and at 3202 Poppleton Avenue, Omaha, Nebraska." This instrument is a printed form entitled "Bill of Sale of Personal Property" and was witnessed by the attorney. It also was recorded.

It is against these two instruments that plaintiff directs this action.

Plaintiff alleged that he was engaged to marry Dolly and that they had agreed that in the event of the marriage he, plaintiff, was to "turn over" to Dolly certain bonds, securities, and other property which she was to accept in lieu of the statutory allowance in the event he predeceased her. Plaintiff alleged that on October 4, 1949, he advised defendant of the approaching marriage and agreement; that defendant advised plaintiff that such an agreement, to be valid, must be in writing; that defendant would have such an agreement prepared accomplishing the purpose of the agreement; and that under such an agreement plaintiff, although married, would be able to sell and dispose of his lands as though he were single.

Plaintiff further alleged that on the same day defendant advised plaintiff that he had had such papers prepared ready to be executed by plaintiff and Dolly; that plaintiff and defendant went to the office of the attorney above named; that certain instruments were presented to him for signature which he was told would accomplish the above purposes; and that plaintiff believed and relied on the statements made to him and signed the papers.

Plaintiff also alleged that the statements and representations were made for the purpose of cheating and defrauding him of his property and that he had a special trust and confidence in the defendant. Plaintiff alleged that he later learned that the instruments signed were the deed and bill of sale above mentioned; that he was paid no consideration therefor; and that when he learned of the fraud and deception that were practiced upon him, he demanded a reconveyance to him which defendant refused.

Plaintiff prayed that the deed be declared void as having been obtained by fraud, deceit, and deception; that the bill of sale be declared to be void; that title to the

real estate be quieted in him; and that defendant be adjudged to have no interest in the personal property.

Defendant filed an answer and cross-petition. During the trial the issues presented by the cross-petition and prayer for money judgment were withdrawn. Accordingly they need not be set out here.

Defendant by answer denied generally and alleged that the property involved herein was accumulated by the joint efforts of plaintiff and defendant's mother with the assistance of defendant and that there was an agreement and understanding that the property was to be defendant's on the death of the plaintiff, and alleged his version of the transaction which will be set out in discussing the evidence.

After trial, defendant, with consent, filed an amendment to his answer pleading waiver, laches, and estoppel. We do not deem it necessary to set out that pleading.

The court found generally in favor of the defendant on plaintiff's petition, made extended findings of fact, and decreed as first above stated.

The trial of this action consumed several days. The evidence is in irreconcilable conflict on certain material questions. There is much in the evidence that it seems to us is not very material to the decision here. There is much confusion in the evidence.

It appears that there was an oral prenuptial agreement between plaintiff and Dolly. The exact terms are not clear and it became confused as the trial progressed. It further appears, as plaintiff pleads, that the agreement was generally that Dolly should not receive any part of plaintiff's real estate in the event of the marriage and in the event of plaintiff's death before Dolly's death. The evidence indicates that they contemplated a reciprocal exchange of personal property, and in part that was done. It is also apparent that defendant knew of the proposed marriage and in general of the agreement.

In substance, plaintiff's testimony is that on the day

the instruments here involved were executed, defendant advised him that a prenuptial agreement, to be valid, must be in writing and duly executed by plaintiff and Dolly. Plaintiff testified that he told defendant to have the prenuptial agreement drawn and that defendant left for that purpose, returned in three-quarters of an hour, and advised plaintiff that attorney Johnson had the papers prepared. Thereafter plaintiff and defendant went to Johnson's office where plaintiff was presented with and signed the papers and was told that they carried out the agreement. Plaintiff testified that relying on defendant he signed without reading; that the deed was folded so only the signature space appeared; that he left and returned to his office immediately, defendant remaining behind, but catching up and returning to the office with him; and that the recited consideration in the instruments was not paid to him.

From defendant's evidence and that of the attorney, when integrated, it appears that defendant was walking past the attorney's home that noon when the attorney asked about the approaching marriage and inquired about the effect it would have on defendant; that defendant replied it would have none because of the prenuptial agreement; that the attorney told defendant such an agreement had to be in writing; that defendant went home and told the plaintiff of the attorney's statement; that the two then went to the attorney's office; that plaintiff there told the attorney of the agreement with Dolly stating that it involved all his property and asked that such an agreement be prepared; that the attorney advised plaintiff it was necessary that such an agreement be carefully prepared; that he did not have the time to prepare it before the wedding; that the attorney suggested the use of a survivorship deed; that the attorney explained the similarities and dissimilarities in the results that would follow; that the plaintiff said he knew of the operation of a survivorship deed and directed that one be drawn; that the attorney got the legal

description of the properties from his files, prepared the deed, and handed it to plaintiff who read it; that the plaintiff wanted the personal property in the deed but the attorney advised it should be in a bill of sale and one was prepared; that plaintiff signed both papers, and acknowledged the deed and directed their delivery and recording; that plaintiff then left; and that defendant remained while the attorney attached his seal and left, overtaking plaintiff on the way home and paying him the money considerations recited. The defendant then went down town and filed the instruments for recording.

It appears further that later the same day the attorney was advised of the possible completion of the sale of the Locust Street property and in order to enable him to close that transaction plaintiff and defendant executed a deed the next day to the proposed purchaser.

It also appears that either the night of the wedding or the next day or so, plaintiff saw the mention of the transfer in the papers. Plaintiff testified that he found it while looking for announcements of the wedding, and that he called it to the attention of defendant and defendant told him there must be a mistake. This latter statement defendant denies.

Some days later Dolly was advised by a third person that she had seen the notice in the papers, and asked plaintiff about it. Plaintiff investigated the records and said that he then discovered the nature of the instruments he had signed.

On November 1 and 3, 1949, plaintiff surrendered his government bonds and in part took cash and in part had new bonds issued payable to himself and Dolly—she being with him when this was done. There is evidence of a reciprocal transfer of insurance and annuities.

After Dolly knew of the deed and bill of sale the matter became the subject of discussion at different times, plaintiff demanding a reconveyance and Dolly offering

to sign any postnuptial agreement if the reconveyance was made.

Also during this period the attorney began a foreclosure action in the name of plaintiff and defendant on the contract of sale of the Locust Street property. This was with plaintiff's knowledge.

Christmas came with members of defendant's family in the home. In January the matter became acute and plaintiff insisted on a conference with the attorney and defendant. Plaintiff then accused them of fraud and deception. Defendant left the home, at the request of Dolly he said, which she denies. Defendant went to Hastings and engaged in the practice of his profession there. This action was filed April 27, 1950.

During this period and concluding in June 1950, plaintiff wrote the defendant friendly letters about patients, family, friends, etc. There is occasional mention in the letters of this controversy and of plaintiff's dissatisfaction as to what had been done. On June 7, 1950, plaintiff requested that no Father's Day greeting be sent and advised that he was sending back a present received earlier from defendant. In this letter he asserted that he had been defrauded and fooled by the attorney and defendant.

This cause is here as an equity case for trial de novo subject to the often-stated rule that in determining an appeal in equity involving questions of fact, this court is required to reach an independent conclusion without regard to the findings of the district court; yet in determining the weight of the credible evidence, where there is an irreconcilable conflict on a material issue, it will consider the fact that the trial court observed the witnesses and their manner of testifying and must have accepted one version of the facts rather than the opposite. Smith v. Black, 143 Neb. 244, 9 N. W. 2d 193; Rettinger v. Pierpont, 145 Neb. 161, 15 N. W. 2d 393; Wiskocil v. Kliment, *ante* p. 103, 50 N. W. 2d 786. We resort to this rule only to reinforce our independent

conclusion that the weight of the credible evidence is with the defendant.

In addition there are circumstances shown in this record which negative plaintiff's contention that he believed he was signing a prenuptial agreement with Dolly. The testimony shows, and he pleads, that Dolly was to sign the agreement. Yet plaintiff signed; he did not require or ask Dolly to sign, nor did he tell her of the papers he signed. He quite clearly considered the matter as a completed transaction. Obviously he would not have done so if he then believed he was signing such an agreement as he now contends.

Also quite clearly plaintiff went to the attorney's office with the intention and purpose of executing an instrument in writing that would deny Dolly an inheritable interest in his property in the event the marriage was consummated and plaintiff predeceased her. The parties agree that the instruments which he executed have that effect. Plaintiff's complaint is as to the result following the deed which deprives him of a sole right to control and dispose of his property. And yet plaintiff knew of the effect of this sort of a deed; he and his first wife had used that sort of a deed; and plaintiff held title to the real estate as a result of the provisions of such deeds. That he had that understanding with reference to this transaction is demonstrated by his actions with regard to the Locust Street property immediately thereafter. Also, something of the pattern of joint tenancy is shown in the disposition of the bonds which plaintiff and Dolly made within a month following the marriage.

The rule also is: " 'Where it is sought to set aside a written instrument, and more especially one which has been executed with the formality of being signed in the presence of witnesses and acknowledged before a notary public, on account of fraud, the presumptions of validity and regularity attaching to such a document require clear and convincing evidence to preponderate against them. The formal instrument furnishes proof of the

most cogent and solemn character, and to outweigh this proof requires a greater quantum of evidence than in a case where there are no such presumptions to overcome. * * * ' " Neihart v. Ingraham, 140 Neb. 818, 2 N. W. 2d 28.

While adhering to this rule, we feel that in the interest of exactness and in accord with the reasoning of our recent decisions, the last clause should be changed to read, "and to outweigh this proof requires a higher quality of evidence than in a case where there are no such presumptions to overcome." In re Estate of Baker, 144 Neb. 797, 14 N. W. 2d 585, 155 A. L. R. 950; Riley v. Riley, 150 Neb. 176, 33 N. W. 2d 525; In re Estate of Drake, 150 Neb. 568, 35 N. W. 2d 417.

We reach the conclusion that plaintiff has not sustained his burden of proof and is not entitled to the relief prayed, and that the decree of the trial court should be affirmed as to the issues presented.

In reaching this conclusion we are not unmindful of the relationship of trust and confidence between the parties here. The rule as to that is: "In an action in which relief is sought on account of alleged fraud, the existence of a confidential or fiduciary relationship, or status of unequal footing, when shown, does not shift the position of the burden of proving all elements of the fraud alleged, but nevertheless may be sufficient to allow fraud to be found to have existed when in the absence of such a status it could not be so found, and thus to have the effect of placing the burden of going forward with the evidence upon the party charged with fraud." Leichner v. First Trust Co., 133 Neb. 170, 274 N. W. 475. The answer is that a finding of fraud is not sustained by this record.

Consistent with his answer, during the course of the trial defendant repeatedly stated that he did not desire the use of the personal or real property here involved or rents derived therefrom during the lifetime of the plaintiff. The trial court included that limitation

in its judgment. Defendant here asks that it be affirmed. On that basis this provision of the decree also is affirmed.

The decree of the trial court is affirmed.

AFFIRMED.

IRA O. PEEK, APPELLANT, V. AYRES AUTO SUPPLY, APPELLEE.
57 N. W. 2d 387

Filed February 1, 1952. No. 33074.

1. **Workmen's Compensation: Appeal and Error.** A workmen's compensation case is a civil action equitable in character and so triable by this court on appeal.
2. **Workmen's Compensation.** All of the provisions of the Civil Code are applicable and controlling in such a case as they are in any other civil action equitable in nature.
3. **Appeal and Error: Workmen's Compensation.** The filing of a motion for new trial is not necessary in order to obtain review of such a case upon the merits in this court.
4. **New Trial: Appeal and Error.** In order to review errors of law which allegedly occurred during the trial of such a case, a motion for new trial must be timely filed assigning such errors therein, and they must also be subsequently assigned and discussed in the brief filed in this court on appeal, or they will not ordinarily be considered.
5. ———: ———. However, a motion for new trial is not a necessary prerequisite in such a case in order for this court to search the record, try the case de novo thereon, and render such judgment as should have been rendered.
6. **Workmen's Compensation.** As provided in section 48-121, R. S. Supp., 1951, subdivision 2, the compensation for disability partial in character shall be sixty-six and two-thirds percent of the difference between the wages received at the time of the injury and the earning power of the employee thereafter, but compensation awarded thereunder shall not exceed the maximum provided therein.
7. ———. Where the evidence discloses that further medical, hospital, and surgical services would not definitely improve the condition of an injured employee, and where such improvement would be conjectural, the employer's liability under section 48-120, R. S. 1943, to furnish reasonable medical and hospital services and medicines, as and when needed, ceases.

8. **Witnesses.** A witness who testifies as an expert on a subject requiring special knowledge and skill is, in the absence of a special contract, entitled only to the statutory fee.

APPEAL from the district court for Richardson County: VIRGIL FALLOON, JUDGE. *Affirmed in part, and in part reversed and remanded with directions.*

Armstrong & McKnight, and *Paul P. Chaney,* for appellant.

Fraser, Connolly, Crofoot & Wenstrand, for appellee.

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

CHAPPELL, J.

In this case plaintiff appealed from a judgment rendered by the district court in the trial de novo of a workmen's compensation case, as directed in a former opinion of this court, reported as Peek v. Ayres Auto Supply, 153 Neb. 239, 44 N. W. 2d 321. The trial court found, and it is conceded that on May 1, 1946, plaintiff, a salesman for defendant, sustained personal injuries arising out of an automobile accident which occurred in the course of his employment by defendant. Concededly, also, plaintiff was employed by defendant from September 10, 1945, to May 1, 1946, and was paid $1,155 salary plus $32.55 commissions, or a total of $1,187.55 during such period. It will be observed, therefore, that during such period of 33.17 weeks plaintiff earned $35.80 a week.

The trial court found and adjudged that plaintiff should recover $18 a week for 105 weeks from and after May 1, 1946, for temporary total disability; that thereafter he should recover $13.50 a week for 175 weeks for 75 percent temporary partial disability; and that thereafter plaintiff should recover $18 a week for 17½ weeks *"for 50% loss of right ear."* (Italics supplied.) In that connection, there is no disagreement with reference to loss of plaintiff's ears, and the aforesaid italicized lan-

guage concededly should be corrected to read: "for 50% loss of his left ear and 20% loss of his right ear," in order to conform with the evidence and applicable statute, section 48-121 (3), R. S. Supp., 1951. Concededly, also, defendant was properly given credit for $1,350 compensation already paid by defendant.

Further, it was ordered and adjudged that plaintiff should recover $350 traveling expenses to and from his home for medical treatment and that he should be reimbursed for certain medical and hospital expenses paid by plaintiff. Also, defendant was given credit for certain medical and hospital expenses already paid by it, and was required to pay certain others.

In this court plaintiff substantially assigned that: (1) The findings of fact are not conclusively supported by the evidence as disclosed by the record; (2) the trial court erred in failing to find that plaintiff was entitled to compensation for total and permanent disability; (3) erred in computing the compensation due plaintiff for 175 weeks for 75 percent temporary partial disability at $13.50 a week in that the findings of fact do not support such an award; and (4) erred in its findings and judgment for medical and travel expenses, and in its failure to find that plaintiff needed further medical services for which defendant should be liable. With regard to such assignments, we conclude that the first should be sustained, and in a trial de novo sustain the third and fourth, but do not sustain the second.

Defendant cross-appealed, assigning that the trial court erred in allowing any temporary partial disability. We conclude that the assignment should not be sustained.

At the outset of this appeal, defendant contended that since plaintiff filed no motion for new trial, this court was limited to an examination of the pleadings to determine whether or not the judgment was responsive thereto. Consequently, defendant argued that the judgment must be affirmed without a trial de novo, on the record. We conclude that such contention has no merit,

A compensation case is a civil action, equitable in character, and so triable by this court on appeal. Lincoln Packing Co. v. Coe, 120 Neb. 299, 232 N. W. 92. We have concluded that such is ordinarily true whether the action was tried in the district court under section 48-181, R. S. 1943, or section 48-182, R. S. 1943. Solheim v. Hastings Housing Co., 151 Neb. 264, 37 N. W. 2d 212.

As stated in Meester v. Schultz, 151 Neb. 614, 38 N. W. 2d 739: "All of the provisions of our Civil Code are applicable and controlling in a workmen's compensation case as they are in any other civil action equitable in nature. See Chilen v. Commercial Casualty Ins. Co., 135 Neb. 619, 283 N. W. 366." See, also, Schmidt v. City of Lincoln, 137 Neb. 546, 290 N. W. 250.

Further, this court has concluded that the filing of a motion for new trial is not necessary in order to obtain review of a workmen's compensation case upon the merits in this court. Hansen v. Paxton & Vierling Iron Works, 135 Neb. 867, 284 N. W. 352.

In the light of the foregoing, the applicable rule, as in equity cases, must be that in order to review errors of law which allegedly occurred during the trial of a workmen's compensation case, a motion for new trial must be timely filed, assigning such errors therein, and they must also be subsequently assigned and discussed in the brief filed in this court on appeal, or they will not ordinarily be considered. Oertle v. Oertle, 146 Neb. 746, 21 N. W. 2d 447; Hartman v. Hartmann, 150 Neb. 565, 35 N. W. 2d 482. However, we are not presented here with any such alleged errors of law.

Rather, plaintiff's assignments depend for solution and decision entirely upon a review of the evidence appearing in the record and statutes applicable thereto. In such a situation a motion for new trial is not a necessary prerequisite in order for this court to search the record, try the case de novo thereon, and render such judgment as should have been rendered. Werner v. Nebraska

Power Co., 149 Neb. 408, 31 N. W. 2d 315; Beam v. Goodyear Tire and Rubber Co., 152 Neb. 663, 42 N. W. 2d 293.

By stipulation, all evidence adduced at the first trial, which began on November 1, 1949, was received in evidence at a further hearing on December 19, 1950, after the judgment had been reversed and the cause had been remanded for trial de novo, whereat, by stipulation, additional evidence was adduced by both parties.

When the accident occurred, plaintiff was driving a Chevrolet two-door sedan furnished by defendant. At the crest of a hill he swerved right to avoid an on-coming car in his lane of travel. His car then went out of control, from one side of the highway to another, and turned over several times, throwing plaintiff's head out through the windshield and back again. Whether or not he was rendered unconscious for any period of time after the accident is conjectural. In any event, when plaintiff was able, he attempted to flag down several cars without success, until eventually two men who knew him stopped and took him to a hospital at Auburn. There two physicians were called, who administered surgical and medical treatment. After the accident, it was found that 50 percent of plaintiff's left ear and 20 percent of his right ear had been completely severed. He had a long deep cut from back of his right ear downward across his jaw, almost half way to the corner of his mouth. His head was swollen and aching. Both sides of his face were numb, some of his teeth were loosened, his jaw ached, and would not open and shut as it should. One knee was slightly cut and bruised, and his lower back ached. He was confined in the hospital 15 days, after which he returned to his home in Auburn. There he remained bedfast for several weeks, and was treated by a local physician for several months. Although plaintiff had an unsightly disfigurement and the foregoing disabilities, it was thought that he was slowly convalescing and would be back at work in a few weeks. However, adhesions closed his ear canals,

causing them to become infected for want of drainage, and almost destroyed his hearing. In addition, his original symptoms were aggravated by fatigue, nervousness, and insomnia, and at time of trial he had not yet attempted to obtain employment, although it appears that prior thereto he was physically able to have been employed part time.

On August 19, 1946, defendant's insurance carrier sent plaintiff to a physician in St. Joseph, Missouri, who found some of such symptoms, and advised plastic surgical restoration of plaintiff's ear canals. Thereafter, in December 1946 and in January and February 1947, three more of defendant carrier's physicians and surgeons from Kansas City and Omaha made like recommendations, but nothing was done about it until between April 4 and April 19, 1947. During that period he was taken to a hospital where a plastic surgeon performed an operation on plaintiff's left ear with favorable results. Thereafter, on April 23, and again on May 17, 1947, physicians employed by defendant's carrier examined plaintiff and re-examined his left ear, whereat they reported that plaintiff should return to work on June 1, 1947. He complained that he was unable to do so, however, and between January 16 and January 24, 1948, plaintiff was again placed in a hospital by defendant's carrier where plastic surgery was performed upon his right ear with favorable results. Two days thereafter his compensation was stopped.

In March 1948 plaintiff employed two physicians of his own, who, after examination and treatment, were of the opinion that plaintiff had suffered a brain injury with resulting traumatic encephalitis and post-traumatic neurosis, which at time of trial they were of the opinion had caused plaintiff to suffer a 60 to 75 percent permanent partial disability. They testified, however, that plaintiff had improved and further medical treatment would not be curative but only palliative, by the administration of heat and prescription of vitamins. There

is no medical evidence which could sustain a finding of total permanent disability.

In that connection, the Mayo Clinic examined plaintiff and on April 12, 1950, among other things, reported that he had: "a traumatic neurosis with a major symptom of mild depression associated with insomnia * * * and suggested psychiatric aid if his nervous symptoms showed no sign of amelioration." It should be noted, however, that they found other disabilities which were not caused or aggravated by the accident.

In the meantime, defendant carrier had plaintiff examined by several physicians and neurologists, one of whom diagnosed plaintiff's disability as "post traumatic neurosis," with possibility of some organic brain damage, despite the fact that recognized medical tests negatived that conclusion. Others reported no objective symptoms of disability by X-ray or otherwise, except plaintiff's ears, and one adhered to his testimony that plaintiff had no disability except his ears, which were recovered by June 1, 1947, when plaintiff was allegedly able to return to work, despite the fact that a plastic operation was performed with his knowledge and upon his recommendations as late as January 1948.

We are not unmindful that the trial court observed plaintiff, as well as some of the physicians and other witnesses who testified during the trial, whose testimony was in irreconcilable conflict on material questions of fact. Therefore, after an examination of all the evidence, including that given by at least 12 physicians and surgeons in addition to a report from the Mayo Clinic, we conclude, as the trial court did, that plaintiff was not totally and permanently disabled, but did sustain a 75 percent temporary partial disability in addition to the 105 weeks of temporary total disability and 17½ weeks for loss of plaintiff's ears.

In that connection the law in force at the time of the accident, section 48-121, R. S. Supp., 1945, as applicable here, provided in part: "For disability partial in

character, except the particular cases mentioned in subdivision (3) of this section (applicable for loss of plaintiff's ears), the compensation shall be sixty-six and two-thirds per cent of the difference between the wages received at the time of the injury and the earning power of the employee thereafter, but such compensation shall not be more than eighteen dollars per week. This compensation shall be paid during the period of such partial disability; not, however, beyond three hundred weeks after the date of the accident causing disability. Should total disability be followed by partial disability, the period of three hundred weeks mentioned in this subdivision shall be reduced by the number of weeks during which compensation was paid for such total disability."

The wages received by plaintiff were $35.80 a week. With a 75 percent temporary partial disability, plaintiff's earning power would be 25 percent of $35.80, or $8.95 a week, which, subtracted from $35.80, leaves a difference of $26.85. As a result, 66⅔ percent of such difference would be $17.90, the proper weekly rate which plaintiff was entitled to receive for a period of 175 weeks for temporary partial disability. In other words, plaintiff was entitled to recover for 105 weeks temporary total disability at $18 a week, plus 175 weeks at $17.90, instead of $13.50 a week, for 75 percent temporary partial disability, plus 17½ weeks at $18 a week for 50 percent loss of his left ear and 20 percent loss of his right ear.

At the hearing on December 19, 1950, the plaintiff was admittedly improved and no necessity for further surgical or psychiatric treatment was shown. In Paulsen v. Martin-Nebraska Co., 147 Neb. 1012, 26 N. W. 2d 11, this court held: "Where the evidence discloses that further medical, hospital, and surgical services would not definitely improve the condition of an injured employee, and where such improvement would be conjectural, the employer's liability under section 48-120,

R. S. 1943, to furnish reasonable medical and hospital services and medicines, as and when needed, ceases." Therefore, in the light of the evidence and such rules, we conclude that defendant should not be required to furnish plaintiff any future medical and hospital services. The trial court correctly refused to enter such an order.

On the other hand, defendant was given credit for payment of certain medical and hospital bills, was required to pay certain of such bills then unpaid, and was required to reimburse plaintiff for certain such bills paid by him. In addition thereto, we conclude that the trial court should also have required defendant to reimburse plaintiff for an additional $278.48, composed of the following items: $43.48 for medicine purchased and paid for at Cline's Drug Store; $18 for medicine purchased and paid for at Witt Drug Store; and $217 paid by plaintiff for medical services at Mayo Clinic, Rochester, Minnesota.

In that connection, plaintiff contended that the trial court erred in directing defendant to pay one of his physicians only $478. Such contention has no merit. An examination of the claim discloses that $200 thereof was for witness fees at $100 a day. In that connection, the rule is: " 'One testifying as an expert on a subject requiring special knowledge and skill, in the absence of a special contract, is entitled only to the statutory fee.' Main v. Sherman County, 74 Neb. 155." Ulaski v. Morris & Co., 106 Neb. 782, 184 N. W. 946.

In its decree the trial court ordered defendant to reimburse plaintiff in the amount of $350 for necessary expenses in traveling to and from his home for medical treatment. We conclude that such amount should have been for a total of $831.85, as contended by plaintiff.

For the reasons heretofore stated, we conclude that the judgment of the trial court should be and hereby is affirmed in part, and reversed in part, and the cause is remanded with directions to enter a judgment for

plaintiff in conformity with this opinion. Costs are taxed to defendant.

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

STATE EX REL. CHARLES E. WEINBERGER, APPELLANT, V. JAMES T. GORMLEY ET AL., APPELLEES.

51 N. W. 2d 343

Filed February 1, 1952. No. 33083.

1. **Mandamus.** A finding of fact in a mandamus proceeding will not be disturbed on appeal unless it is clearly wrong.
2. **Highways.** To establish a highway by prescription there must be a user by the general public under a claim of right, adverse to the occupancy of the owner of the land, of some particular or defined way or track, uninterruptedly, without substantial change, for a period of ten years.
3. **Mandamus: Highways.** The establishment of highways, the building of bridges, or the making of local improvements, is a discretionary power entrusted to public and municipal corporations, and, when the proper authorities have in good faith decided, mandamus will not issue to compel them to a different course.

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

M. J. Buckley, and *Wagner & Wagner,* for appellant.

Lanigan & Ondracek, and *P. J. Barrett,* for appellees.

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

BOSLAUGH, J.

Appellant sought a writ of mandamus to require the county commissioners of Greeley County, appellees, to construct a suitable bridge as a part of an alleged section line public highway of that county at the location where it is intersected by Mud Creek, and to put the highway in an appropriate condition for travel by the general public.

The basis of the relief asked, as stated by appellant, was that: He was the owner of the northwest quarter and the northeast quarter of the northeast quarter of Section 24, Township 20 North, Range 9 West of the 6th P. M., Greeley County. A public highway had been established on and along the section line between Section 24 and Section 13 by proceedings had by the county and by user. A watercourse or draw extended across the highway near the northeast corner of the northwest quarter of Section 24, over which the county constructed and maintained a bridge. About 1941 the bridge was destroyed by floodwaters passing down the watercourse. There has been no bridge there since, but one had been requested by appellant and refused by appellees. There had been considerable travel of the highway before the loss of the bridge, and persons living east and west of the highway between these sections suffered inconvenience and the value of their real estate had been reduced because of their inability to travel the highway. The land of appellant was farmed as a unit. The farmstead was on the northwest quarter of Section 24, west of the watercourse, and near the north line. The 40-acre tract was east thereof. The schoolhouse available to persons living on the land of appellant was near the southeast corner of Section 24. The absence of a bridge across the watercourse prevented direct travel between the two tracts of land of appellant, increased the cost of the farming operations, and lengthened the distance necessarily traveled between the farmstead and the schoolhouse by a distance of one mile.

The answer of appellees to the petition of appellant and the alternative writ of mandamus was an admission that appellant owned the parts of Section 24 as he alleged, and that appellees were the county commissioners of Greeley County; a denial of all other statements therein, and allegations that no highway was ever established by the county between Sections 13 and 24 or by user or prescription; that there were highways estab-

lished and properly maintained along the west, south, and east of the lands of appellant; that there was an adequate way of travel to and from the buildings on the land to the north and south of the section line between the sections in question; that there is neither need nor demand for a road between the sections; that the cost and expense of constructing and maintaining such a road would be disproportionate to any purpose served by it and would be an unwarranted expenditure of public funds; and that the county commissioners were clothed with and were required to exercise discretion in the matter of improving and maintaining a road for the county or building a bridge as a part thereof.

The substance of the reply was a denial of the new matter contained in the answer.

The trial of the case eventuated in a finding generally for appellees and against appellant, and a judgment of dismissal. The motion for a new trial was denied and this appeal resulted.

The trial court resolved the issues of the case and all conflicts in the competent evidence favorable to appellees. This court may not disturb any finding of fact made by the district court that is sustained by evidence. It has long been considered in this jurisdiction that: "Findings of fact in a mandamus proceeding, based on conflicting evidence, will not be disturbed on appeal unless clearly wrong." State ex rel. Heil v. Jakubowski, 151 Neb. 471, 38 N. W. 2d 26.

There is no attempt to prove that the county instituted or conducted any proceedings to establish or open a highway between the sections of land referred to in this case. It is conceded that appellant relies upon the establishment of a highway at the location in question by user. The appellant to maintain the position adopted by him had the burden of showing a continuous adverse user by the public of the location in question for a period equal to that required to bar an action for recovery of title to land, and that the use by the public

was under a claim of right manifested by some appropriate action on the part of the public authorities. In Gehris v. Fuhrman, 68 Neb. 325, 94 N. W. 133, it is said: "To establish a highway by prescription there must be a user by the general public under a claim of right, and which is adverse to the occupancy of the owner of the land. of some particular or defined way or track, uninterruptedly, without substantial change, for a period of time necessary to bar an action for the recovery of the land." See, also, Hill v. McGinnis, 64 Neb. 187, 89 N. W. 783; State ex rel. Draper v. Freese, 147 Neb. 147, 22 N. W. 2d 556.

There is evidence that in 1918 there was a bridge across Mud Creek where it intersected the section line between Sections 13 and 24, Township 20, Range 9, Greeley County; that there were tracks indicating that some travel had passed along the area near the section line but no evidence that any grading or any other thing had been done to designate or improve it as a highway. It was not shown who constructed the bridge. There was no bridge at this location from 1920 for a period of at least ten years, and there was no general use of the area for travel along or near the section line from 1920 to 1944. There was not much travel on or near the section line except during pheasant hunting. In the period from 1930 to 1934, a bridge and a culvert were put in for crossing Mud Creek. They were each washed out by the water passing down the creek. There was no proof that the county authorized the construction of either of them. The last bridge at that location was destroyed by floodwaters in 1935. There was no defined, graded, or improved road on or along the section line except from the west to the driveway into the farmstead on the northwest quarter of Section 24. A road grader of the county was used on or near the section line from Mud Creek east to the northeast corner of the northwest quarter of Section 24 in 1946 at the direction of James T. Gormley. This was done at the request of and as an accommodation for appellant, and not

because there was a county road there. Gormley instructed the operator to make two rounds with the grader. There is no showing that the county knew, authorized, or ratified what Gormley did in this regard. There was no need or general demand for a highway between the sections or for a bridge as a part of the highway. No one was demanding a road or a bridge but appellant. The county board, when request for a bridge across Mud Creek at the section line was received by it, made an inspection and investigation and determined there was no reason for a bridge or road between the sections in question; that to construct a bridge there would be a waste of tax money; and that for a bridge at that location to be useful would require grading, fills, and "culverts would have to be installed" to the east thereof to the northeast corner of Section 24, a distance of about three-quarters of a mile. The county board determined that there was no public need or demand for either a bridge or a road at that location.

The conclusion of the district court was right. There is substantial evidence that there was not a user by the general public under claim of right adverse to the occupancy of the owner of the land of some particular or defined way or track uninterruptedly for a period of ten years, and that the county board properly exercised the discretion vested in it in reference to the matters involved.

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

AFFIRMED.

I. N. MORGAN, APPELLANT, V. STATE OF NEBRASKA ET AL., APPELLEES.

51 N. W. 2d 382

Filed February 1, 1952. No. 33091.

1. **Health: Physicians and Surgeons.** Osteopathy may, in general terms, be defined as the treatment of human ills by means of manipulative therapy as distinguished from the treatment of such ills through the use of drugs and operative surgery by physicians and surgeons.
2. **Constitutional Law: Health.** The practice of osteopathy is recognized by law as a lawful occupation in the public interest. It may not be arbitrarily limited or discriminated against, and its advocates may lawfully operate property and facilities for the treatment, according to its tenets, of patients seeking its aid, subject only to reasonable regulations under the police power relating to the public health and welfare.
3. **Health: Physicians and Surgeons.** A licensed osteopath in this state is authorized to practice osteopathy in all of its branches as taught in osteopathic colleges recognized by the American Osteopathic Association; to perform surgery as it is taught and used as a part of the osteopathic system, but not including operative surgery with surgical instruments; and to practice obstetrics and use anesthetics.
4. **Hospitals: Constitutional Law.** A regulation adopted by the Department of Health that all persons admitted to a licensed hospital must be under the care of a person licensed to practice medicine and surgery in Nebraska has no relation to health or public welfare, is unreasonable, discriminatory and capricious, is an unlawful exercise of the police power, and is invalid.

APPEAL from the district court for Lancaster County: JEFFERSON H. BROADY, JUDGE. *Reversed and remanded with directions.*

Denney & Denney, and *Perry & Perry,* for appellant.

Clarence S. Beck, Attorney General, *Walter E. Nolte,* and *Homer L. Kyle,* for appellees.

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

BOSLAUGH, J.

Appellant, an osteopathic physician and surgeon, made

application for a license to operate a hospital owned by him in Steele City, Nebraska, as an incident to and in connection with his practice of osteopathy. The Director of Health held a hearing and denied the application for the single reason that the hospital of appellant did not satisfy the standard of the Department of Health of the State of Nebraska that any person admitted to a licensed hospital must be under the care of a person licensed to practice medicine and surgery in Nebraska. An appeal was prosecuted by appellant to the district court for Lancaster County, trial was had, a finding made that the hospital of the applicant "does not comply with the state law and the standards and requirements for operation of a hospital," and a judgment was entered dismissing the application.

There is no issue of fact in this case. Appellant is and has been since 1931 a licensed and practicing osteopathic physician and surgeon of Nebraska. He owned, maintained, and operated a hospital in Steele City from 1935 until 1948 as an incident of and in connection with his practice of osteopathy. He applied for a license to operate his hospital for the year 1948, and a license therefor was granted and issued to him. His application for a license to operate the hospital for the year 1951 was denied, but he was granted and issued a license to operate a maternity home or hospital during that year.

Appellant has at all times limited his practice and services to the things he is authorized and licensed to do as an osteopath. The fact he operated a hospital until the license to do so was denied him did not in any way affect the scope or field of his practice. He conducted himself properly and ethically as an osteopath strictly within the authority and limitations of his license. Any person at or who came to the hospital and required or desired the services of a regular physician and surgeon was furnished or permitted to have one. There has never been any person licensed to practice

medicine and surgery in Nebraska interested in or connected with the hospital of appellant or who has had charge of anyone who was admitted to it as a patient of appellant.

The Legislature of 1947 adopted an act relating to licensing, inspecting, and regulating hospitals. Laws 1947, c. 231, p. 727; §§ 71-2017 to 71-2030, R. R. S. 1943. The declared purpose was to establish and enforce basic standards for the care of persons in institutions which rendered nursing care and to provide for and insure safe and adequate care of persons in such institutions. It made it unlawful after January 1, 1948, for anyone to maintain and operate facilities for the care of two or more nonrelated persons suffering from illness, injury, or deformity, or where obstetrical or other care was rendered for a period of more than one day, without obtaining a license to do so as provided by the act.

The Department of Health was required to issue licenses for the operation of institutions subject to the act which were found to comply therewith and with "such regulations as are lawfully promulgated by said department." It was required to deny or revoke any license issued for violation of the act or any rules and regulations lawfully promulgated pursuant to it; for permitting, aiding, or abetting the commission of any unlawful act; or for: "Conduct or practices detrimental to the health or safety of patients and employees of said institution; Provided, that this provision shall not be construed to have any reference to healing practices authorized by law." § 71-2023, R. R. S. 1943.

The Department of Health, with the advice of the Hospital Advisory Council created by the act, was required to adopt, promulgate, and enforce standards for different types of hospitals and related institutions to be licensed, and was empowered to modify, amend, and rescind any standard adopted. The Department of Health acted, and in April 1950, adopted standards. Under the subhead of "Medical Attendance" in section VIII A 1,

of the standards adopted by the department, is the following: "All persons admitted to any institution covered by these standards must be under the care of a person licensed to practice medicine and surgery in Nebraska."

The appellant has not complied with and does not intend to satisfy the requirement of this standard. If it is valid and enforceable as construed by the Department of Health, the denial of the application of appellant was correct. Otherwise, it should have been granted and a license issued to him to operate a hospital as an incident of and in connection with his practice of osteopathy as a place to care for his patients who desired or required hospitalization.

The Department of Health, for administering the act referred to, has classified hospitals as "General Hospital" and "Specialized Hospital (i.e., orthopedic, contagious, etc.)." The standard quoted above is applicable to either class of hospitals recognized by the department. It requires any person admitted to either to be under the care of a person authorized to practice medicine and surgery in Nebraska. A duly licensed osteopath, under the rules promulgated by the Department of Health, cannot have and operate a hospital facility for the care of persons suffering from sickness, injury, or deformity who are legally and properly his patients. He may render osteopathic healing practices and services in his office or in their homes, or at any other place in Nebraska except in a hospital. For an osteopath to have a patient in a hospital in Nebraska, the Department of Health demands that the patient be cared for while there by a regularly licensed physician and surgeon. In fact, the literal terms of the standard are that at the very time a person is admitted to a hospital he must then be under the care of a regular physician and surgeon.

Appellant has been, during the time important to this case, authorized to practice osteopathy in all its branches as taught in recognized osteopathic colleges,

which "consists of a system of manipulation of the limbs and body of the patient * * * by kneading, rubbing or pressing upon the parts of the body without the aid of medicine or operative surgery"; to perform surgery as it is taught and used as a part of the osteopathic system of healing, which in the main is by manipulation and does not enter the general field of operative surgery with surgical instruments; and to practice obstetrics and use anesthetics. State ex rel. Johnson v. Wagner, 139 Neb. 471, 297 N. W. 906. Otherwise stated, the license of appellant as an osteopathic physician and surgeon authorized him to treat human ills by means of manipulative therapy as distinguished from the treatment of such ills through the use of drugs and surgery by regular physicians and surgeons.

Appellant performs professional services for persons who have suffered sprains, fractures, and injuries which do not require operative surgery; for persons afflicted with chronic heart disorders, rheumatism, and maternity cases; and persons with other ills and conditions that can properly be cared for by an osteopath. Many of his patients desire and require hospitalization. He is unable to secure a license to furnish it to them, except maternity cases. His patients cannot enter any other hospital unless they place themselves under the care of a regular physician and surgeon. The realistic view, therefore, is that an osteopath cannot have a patient in a Nebraska hospital unless the patient is a maternity case. He is thereby restricted and deprived of an advantage and right to which he is entitled by and as an incident of the authority granted to him by the state to practice osteopathy. The standard adopted by the Department of Health is unreasonable and capricious, is an unreasonable exercise of the police power, and violates constitutional prohibitions. It has no real and substantial relation to public health or any other subject important to public welfare. The requirement of the standard bears no relation to the sanitary conditions

or the adequacy of the equipment of the hospital; no relation to the training, competence, or qualification of the personnel, or to the manner of the operation of the physical plant of the hospital; and no relation to the public health, morals, welfare, or security. It may not be asserted that the ability of an osteopath is affected by the fact that his patient is or is not admitted to and cared for in a hospital, or that the quality of the care furnished his patient would be improved by interference of a physician and surgeon while the care was being furnished.

Appellees refer to decisions sustaining regulations prohibiting osteopathic physicians and surgeons from practicing in hospitals. Cases of this character, and they are numerous, verify the extent and frequency of the exclusion of osteopaths from the use of hospitals owned and operated by others, including municipalities and public corporations. If the osteopath may be also excluded by rule such as the one here involved, from having and using a hospital owned by him for the care of his patients, the restriction becomes complete prohibition. These cases also indicate the serious character of the lack of harmony and agreement between the regulars and the osteopaths concerning healing practices, and the practical impossibility of any patient of an osteopath being admitted to a hospital if he is required to place himself under the care of a physician and surgeon as a condition of his admittance.

Any standard adopted by the Department of Health must meet constitutional requirements, must not be oppressive, arbitrary, or discriminatory, nor disregard substantial property rights. The practice of osteopathy is recognized and authorized by law. §§ 71-1,137 to 71-1,141, R. R. S. 1943. It is constituted a lawful occupation in the public interest, and as such is entitled to protection against unlawful restrictions and interference. It may not be arbitrarily limited or discriminated against, and its advocates may lawfully erect and operate build-

ings and facilities for the treatment, according to its tenets, of patients seeking its aid, subject to lawful and reasonable limitations and regulations under the police power. The limitations and regulations imposed must bear relation to the public health or welfare. The practice of appellant as an osteopath is his business, it is a property right, and as such entitled to protection against unlawful restrictions and interference. A state, or an agency of it, may not, under the guise of protecting the public, arbitrarily interfere with private business, prohibit lawful occupations, or impose unreasonable or unnecessary restrictions upon them. To grant appellant the authority to practice osteopathy and then deny him the right to have the use of a recognized and useful facility for the care of his patients, except upon condition that he surrender the care of them to a physician and surgeon, is to take away much of the value and importance of the grant made. Spears Hospital v. State Board, 122 Colo. 147, 220 P. 2d 872; Liggett Co. v. Baldridge, 278 U. S. 105, 73 L. Ed. 204, 49 S. Ct. 57; Mugler v. Kansas, 123 U. S. 623, 31 L. Ed. 205, 8 S. Ct. 273; San Diego T. Assn. v. East San Diego, 186 Cal. 252, 200 P. 393, 17 A. L. R. 513; Ex parte Whitwell, 98 Cal. 73, 32 P. 870, 35 Am. S. R. 152, 19 L. R. A. 727. See, also, Blackledge v. Farmers Independent Telephone Co., 105 Neb. 713, 181 N. W. 709, 16 A. L. R. 343.

The solution of the problem of this case suggested by appellees is their claim that the standard provides only that a licenced physician and surgeon "be on the staff of every licensed general hospital" and that the regulation does not prevent any osteopath from practicing in a general licensed hospital. The plain, unmistakable language of the standard is that all persons admitted to any hospital subject to the standard must be under the care of a person licensed to practice medicine and surgery in Nebraska. It contains not a word about anyone being "on the staff" of any hospital. Lan-

guage of such obvious and conclusive meaning needs no argument and will admit of no interpretation. An osteopath may have a patient in a licensed hospital, but if he does, the patient must be under the care, not of an osteopath, but "of a person licensed to practice medicine and surgery in Nebraska." This substantially prohibits an osteopath from having a patient in such a hospital.

Appellees also assert that the object and purpose of the standard is that "every general hospital should be staffed and equipped to meet any and every emergency * * *." If this is the correct appraisal of the standard in question, it could be fairly maintained, especially by the advocates of the merits of osteopathy, that every licensed hospital must have an osteopathic physician and surgeon on its staff. The hospital of appellant complied with every requirement for the license sought. It was refused solely because of the failure of the patients admitted to be cared for by a physician and surgeon. In other words, the application was refused because the patients admitted to the hospital of appellant were his patients and were cared for by him, and he was an osteopath. This standard is completely silent on the subject of how a hospital shall be staffed. It does not require that anyone authorized to practice any system of the healing art shall be on the staff of a hospital licensed by the department. This contention is wholly without substance or merit.

The record wholly fails to show any reason why the application of appellant should not have been granted and a license issued to him to operate his hospital.

The judgment should be, and it is reversed and this cause is remanded to the district court for Lancaster County, with directions to render a judgment directing and requiring the appellees, on application of appellant, to grant and issue to him a license to maintain and operate the hospital owned by him in Steele City, Nebraska, as it was maintained and operated by him at the time

the application for a hospital license was made which is involved in this case, and that all costs herein be taxed to appellees.

REVERSED AND REMANDED WITH DIRECTIONS.

PERCY LUNG ET AL., APPELLEES, V. HARRY FRANDSEN ET AL., APPELLANTS.

51 N. W. 2d 255

Filed February 1, 1952. No. 33109.

1. **Habeas Corpus.** In general, the writ of habeas corpus has been extended to, and may be used in, controversies regarding the custody of infants. Such proceedings are governed by considerations of expediency and equity, and should not be bound by technical rules of practice.
2. **Parent and Child.** Parents have a natural right to the custody of their children unless they are affirmatively shown to be unfit.
3. ———. The courts may not properly deprive the parents of the custody of their children unless it be shown that such parents are unfit to perform the duties imposed by the relation or that they have forfeited that right.

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

William H. Meier, for appellants.

Bracken & Tucker, for appellees.

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

WENKE, J.

This is a habeas corpus action originally commenced in the county court of Kearney County by Percy Lung and Carrie Lung against Harry Frandsen and Grace Frandsen for the purpose of obtaining the custody of Gloria Dee Lung, minor daughter of the Lungs. The county court, after hearing, denied the Lungs custody of their child. The Lungs then appealed to the district court for Kearney County. The district court, after

trial, directed that the custody of the child be delivered to the Lungs. From this decree, their motion for new trial having been overruled, the Frandsens appealed to this court.

Of this class of actions, we have said: "'In general, the writ of habeas corpus has been extended to, and may be used in, controversies regarding the custody of infants. Such proceedings are governed by considerations of expediency and equity, and should not be bound by technical rules of practice.' 39 C. J. S., Habeas Corpus, § 41, p. 568." Hanson v. Hanson, 150 Neb. 337, 34 N. W. 2d 388. See, also, In re Application of Reed, 152 Neb. 819, 43 N. W. 2d 161.

Section 38-107, R. S. 1943, provides, insofar as here material, that: "The father and mother are the natural guardians of their minor children and are equally entitled to their custody, * * * being themselves competent to transact their own business and not otherwise unsuitable."

The principles applicable to the question herein involved, which is one of fact, are as follows:

"Parents have a natural right to the custody of their children unless they are affirmatively shown to be unfit. See Voboril v. Voboril, 115 Neb. 615, 214 N. W. 254." Hanson v. Hanson, *supra.*

"The courts may not properly deprive the parents of the custody of their children unless it be shown that such parents are unfit to perform the duties imposed by the relation or that they have forfeited that right." Boucher v. Dittmer, 151 Neb. 580, 38 N. W. 2d 401.

What this court said in Norval v. Zinsmaster, 57 Neb. 158, 77 N. W. 373, 73 Am. S. R. 500, is as applicable today as it was then. Therein 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."

In Norval v. Zinsmaster, *supra,* the court goes on to say: "The right of the parent is not lightly to be set aside, and it should not be done where unfitness is not affirmatively shown, or a forfeiture clearly established." See, also, Terry v. Johnson, 73 Neb. 653, 103 N. W. 319; State ex rel. Britton v. Bryant, 95 Neb. 129, 145 N. W. 266.

The trial was held on June 12 and 13, 1951, and the data, such as ages of the parties, etc., will be with reference thereto unless otherwise shown in the opinion.

Percy Lung and Carrie Lung are husband and wife, being respectively 63 and 46 years of age. Their family consists of themselves and six children. The children are a daughter Charlotte, age 23 years; a son Percy, Jr., age 19 or 20 years; a son Harry, age 13 years; a son Paul, age 8 years; a son James, age 6 years; and a daughter Gloria Dee, age 2 years. Gloria was born on February 10, 1949.

During the time herein involved the family either lived in a tenant house located on the farm of Fay Rogers near Minden in Kearney County, Nebraska, where Mr. Lung worked as a hired man for Roy Francisco, who operated it, or in the farm home on a farm in Jewell County, Kansas, where he worked as a hired man for W. H. Hutt. The latter farm is located about two miles south and a quarter mile east of Superior, Nebraska. Just when the Lungs moved to the latter farm is not too clearly shown by the record but apparently it was sometime in April 1951.

The tenant house occupied by the Lungs on the farm near Minden is a small one-story building having four rooms, each about 10 ft. by 12 ft. Two of these rooms were used as bedrooms, one as a living room, and the other as a kitchen. It has no closets or storage space. The house is not modern and it was necessary to carry water about a block and a half. It is apparent that the conditions under which they lived in this home presented difficulties not common to a modern home and required a good deal of extra work. Naturally the standards of good housekeeping are affected by the facilities available in the home.

After Gloria was born the Lung family suffered an epidemic of sickness. Just what caused this cannot be positively stated. It may have been due to a poorly ventilated home, poor heating conditions, or many other causes. During this epidemic Gloria had measles and whooping cough, and Mrs. Lung suffered from a severe leg infection and gall bladder trouble. The mother's condition affected her ability to take care of the home and her family and, because thereof, the conditions existing in the home during the year 1949 left much to be desired.

It was finally decided that Mrs. Lung should go to a hospital for surgery to correct her gall bladder condition. It was thought best, by those in charge from the county assistance office, to temporarily take the three youngest children out of the home while the mother would be away. This Mrs. Lung agreed to. As a result, such arrangements were made by the county assistance officer. The two younger boys, James and Paul, were, on January 4, 1950, taken to a children's home in Holdrege, Nebraska, and the baby, Gloria, was on the same day taken to the home of Harry and Grace Frandsen. The Frandsens are a farm couple who live on a farm some six or seven miles from Minden. The older boy was left at home and stayed with the father.

When Gloria was taken to the Frandsen home she

was in very poor physical condition and possibly in poor health. Just what this was due to cannot be positively stated. It may have been due to the sicknesses which she had had, it may have been due to her nursing while her mother was sick, it may have been due to lack of care and food resulting from her mother's inability to properly take care of the family during the time she was sick, or it may have been due to a combination of all three.

The mother went to the hospital and came through the operation successfully. However, the length of time required for her recovery was longer than had been anticipated. At the time Gloria was taken to the Frandsen home it had been arranged to leave her there about two months. However, when the doctor in charge of Mrs. Lung would not let her return home unless it was understood she was not to have the care of the children for six months, this time was extended accordingly. James and Paul returned home either in the latter part of July or forepart of August 1950. When request was made in August 1950 for Gloria's return the Frandsens would not comply therewith and she has never been returned to her parents.

After Mrs. Lung returned from the hospital her condition improved and the general condition of the home improved. This is also true of the house they now occupy in Kansas which is a seven-room home with both water and electricity available.

Mr. Lung, while working in a field of labor that does not pay the highest wages, is a man of good habits and a steady worker fully capable of holding a job in his line of work. He uses his income to support his family. Mrs. Lung is devoted to her family. There is nothing in the record that disqualifies either of them from having and raising their own children, except the fact that they are in a low income bracket and consequently have not always had available all the facilities we commonly associate with a modern home.

We do not, in any way, want to reflect on the Frandsens and their home. They appear to be people of the finest type who have and would give Gloria a good home. The record shows Gloria quickly responded to the treatment she received when she entered their home and she now appears to be happy there. But these facts are not here controlling as to the rights of the Lungs.

Without going into further detail we have come to the conclusion that the record does not show the Lungs to be unfit to perform the duties imposed upon them as parents. In this respect we have not overlooked the difficulties of Charlotte's husband nor the difficulties of Percy, Jr., which ultimately caused him to be sent to the men's reformatory. These are unfortunate incidents in the lives of these two young people. While the record of Percy, Jr., does reflect somewhat on the parents, we do not find it of such character that it should take from the Lungs the right to have and raise their other children, including Gloria.

It is significant to note that at no time did those in charge of the county assistance office of Kearney County take any action to permanently remove any of the four younger Lung children from the custody of their parents. The evidence shows the three boys (Harry, Paul, and James) are and have at all times been well taken care of by their parents, considering all the circumstances affecting the Lung household at the time.

We have come to the conclusion that since the Lungs have done nothing to forfeit their right to their daughter and since the evidence fails to show them unfit to be parents, that the custody of their daughter should be given to them and that Gloria should be returned by the Frandsens to the Lungs. We therefore affirm the decree of the trial court to that effect.

AFFIRMED.

JOHN F. YOUNG, JR., PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.

51 N. W. 2d 326

Filed February 1, 1952. No. 33114.

1. **Indictments and Informations: Criminal Law.** Where an information is filed under section 29-2219, R. R. S. 1943, charging a violation of an order of probation, compliance with the provisions of section 29-1602, R. R. S. 1943, regarding the endorsing of the names of witnesses on an information, is not mandatory and the failure to do so is not error.
2. **Criminal Law.** It is entirely proper for the court, where probation violation is established, to inquire into the matters covered by sections 29-2217 and 29-2218, R. R. S. 1943, in determining whether or not the probation order should be vacated and the penalty of the law imposed.
3. ———. It is not error, in the absence of a showing that defendant was prejudiced thereby, to sentence a defendant after verdict and before a motion for a new trial has been filed.
4. ———. Sections 29-2201 and 29-2202, R. R. S. 1943, do not require that the court defer judgment until the statutory time for filing a motion for a new trial has expired.
5. ———. Where the violation of a probation order is established or admitted, in determining whether or not to set aside the probationary order and to impose the penalty which it might have imposed before placing the defendant on probation, the trial court is not limited to a consideration of probative evidence of matters arising subsequent to the order of probation.
6. ———. Where the punishment of an offense created by statute is left to the discretion of a court, to be exercised within certain prescribed limits, a sentence imposed within such limits will not be disturbed unless there appears to be an abuse of such discretion.

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

Albert Pike II, and *Perry & Perry,* for plaintiff in error.

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

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

SIMMONS, C. J.

This is an appeal from a judgment finding that plaintiff in error had violated the conditions of an order of probation, vacating said order, and sentencing plaintiff in error to imprisonment in the reformatory for a period of not less than 18 months or more than 2 years. We affirm the judgment of the trial court.

Hereinafter the plaintiff in error will be referred to as the defendant.

The following statement is summarized from the transcript. On October 9, 1950, an information was filed in the district court charging the defendant with feloniously breaking and entering a motor vehicle with intent to steal property of value contained therein. On October 19, 1950, defendant appeared with counsel, was arraigned and pleaded guilty, and judgment of guilt was entered. A plea for probation was made and granted. The defendant was placed on probation for a period of two years under the supervision of the sheriff of Thayer County. One of the conditions of the order was that "The defendant shall not violate any federal, state or local laws whatsoever." The court further ordered that the suspension of the proceedings would be terminated by any violation of the terms of probation and that upon termination the court retained power to pronounce sentence. The defendant acknowledged in writing receipt of a copy of the order of probation, stating that he understood and promised to observe the conditions. On June 23, 1951, the county attorney, by information, charged that on June 6, 1951, defendant was found in an unlawful state of intoxication; that on June 7, 1951, in the county court of Thayer County, defendant was charged with unlawful intoxication, pleaded guilty, and was fined in the amount of $20 and costs; that the above described acts were a direct violation of the order of probation; and that the order should be revoked and the defendant sentenced on the charge contained in the original information. On June 25, 1951, a certified copy of the in-

formation was served on the defendant. On July 3, 1951, the defendant appeared with counsel, was arraigned on the information, stood mute, and a plea denying the truth of the charges was entered by the court and the cause was continued to July 12, 1951. On July 12, 1951, the matter came on for hearing, the defendant being represented by counsel. Evidence was taken and the cause submitted. The court found that the defendant had violated the order of probation as charged and that in its opinion the defendant would not refrain from engaging in and committing further criminal acts in the future. The court also found that the order of probation should be set aside and the suspension of proceedings terminated, and that sentence should be passed on the breaking and entering charge. The court vacated the order of probation. The defendant was asked if he had anything to say as to why sentence should not be entered and responded, and the court found that he showed no good cause. The court thereupon entered sentence as above stated and ordered commitment. On July 21, 1951, the defendant filed a motion for a new trial setting up substantially the grounds here assigned as error. On August 10, 1951, the motion was overruled.

Defendant brings the matter here by petition in error.

As to the violation of the order of probation, the State offered evidence at the hearing that complaint was made and that defendant was found in a state of intoxication at Byron just before midnight, June 6, 1951, and that he was arrested, taken to Hebron, and placed in jail. The State offered evidence as to the charge, plea of guilty, judgment, and fine. Defendant testified that he was 20 years of age at the time of the hearing; that he had attended a public dance on the evening in question, had drunk beer and liquor with some others, and, in effect, admitted that he was intoxicated. He further admitted the charge, the plea, the finding of guilt, the fine, and its payment.

The hearing was conducted without objections to wit-

nesses called or to questions asked by the State, the defendant, or the court. The answers given were not challenged.

The assignments here considered were presented to the trial court when the motion for a new trial was filed.

The first assignment of error is that the names of the witnesses for the State were not endorsed upon the information or upon the copy served on the defendant. This is based upon the provisions of section 29-1602, R. R. S. 1943, which provides: "All informations shall be filed in the court having jurisdiction of the offense specified therein, by the prosecuting attorney of the proper county as informant. He shall subscribe his name thereto and endorse thereon the names of the witnesses known to him at the time of filing the same; and at such time thereafter, as the court or a judge thereof in vacation, in its or his discretion, may prescribe, he shall endorse thereon the names of such other witnesses as shall then be known to him."

It does not appear that objection was made to the testimony of any witness for the State on this or any other ground. After the State had rested, the defendant offered in evidence the information charging the probation violation. It was received and then the defendant called the court's attention to the fact that the names of witnesses were not endorsed on the information. The court was not asked to do anything with reference to it. The objection was first raised in the motion for a new trial.

The defendant appears to rest his assignment on the premise that the statute applies to an information of the character here involved. The State resists this assignment on the grounds of waiver and no prejudicial error shown.

In Sellers v. State, 105 Neb. 748, 181 N. W. 862, the violation of a probationary condition was presented by motion to revoke. That procedure was challenged. We

held: "A formal information and an arraignment conforming to criminal procedure were unnecessary. On the motion charging that defendant violated the probationary conditions of his parole, he had timely notice of a hearing, the assistance of counsel, the testimony of witnesses, and a fair and impartial trial. * * * While the proper practice requires a verified information stating specifically the conduct constituting a violation of probationary conditions, the course pursued in this case did not deprive defendant of any right protected by law." See, also, Moore v. State, 125 Neb. 565, 251 N. W. 117; Moyer v. State, 144 Neb. 673, 14 N. W. 2d 220; Carr v. State, 152 Neb. 248, 40 N. W. 2d 677.

Obviously, if a matter of this kind may be raised by motion without depriving a defendant of any rights protected by law, it of necessity follows that compliance with section 29-1602, R. R. S. 1943, is not mandatory as to an information charging a probation violation and the failure to endorse names of witnesses thereon is not error.

The second and third assignments are that the court erred in allowing proof of offenses other than that of the intoxication of June 6, 1951, and in revoking the suspension of sentence for conduct of defendant prior to the time of the suspension of the sentence.

The defendant relies on the provision of section 29-2219, R. R. S. 1943, that "* * * in case of violation of the probationary conditions, the court may impose any penalty which it might have imposed before placing the defendant on probation" and our holding in Moyer v. State, *supra,* that "* * * after the court has, within its discretion, granted probation such probation may not be revoked except upon a proper charge and probative evidence of violation."

These assignments are directed to the fact that the trial court inquired into the matter of three misdemeanors committed by the defendant prior to the offense committed in October 1950. Before the evidence

here involved was received, the State had offered evidence of the probation violation. The record shows that the defendant on cross-examination of the sheriff inquired as to these earlier offenses. The State then on direct examination inquired of the county judge as to these matters. The defendant then inquired on cross-examination as to dates. The court inquired into some of the details of the misdemeanors. All this was done without objection from anyone. The State meets these assignments with the contention that error, if any, was waived.

Section 29-2217, R. R. S. 1943, provides that in cases of criminal prosecution (with exceptions not here involved), where there is a finding or a plea of guilty, it shall be the duty of the court to ascertain if practicable the age of the accused, whether a first offense, the extent of moral turpitude involved, "and such other facts and circumstances relating to the accused as he may desire to know." In Roberts v. State, 110 Neb. 759, 195 N. W. 114, we held that what is now section 29-2217, R. R. S. 1943, made it the duty of the court to inquire into defendant's general conduct.

Section 29-2218, R. R. S. 1943, provides: "In case such judge, considering the age of the accused, his former course of life, disposition, habits and inclinations, or the fact that the offense of which he is found guilty is his first offense, or any other obtainable information, should be of the opinion that the accused would refrain from engaging in, or committing further criminal acts in the future, the court may, in its discretion, enter an order, without pronouncing sentence, suspending further proceedings and placing the accused on probation under the charge and supervision of a probation officer, or other suitable person."

It being the duty of the court to inquire into such matters initially, we hold it is entirely proper for the court, where probation violation is established, to inquire into the matters covered by sections 29-2217 and

29-2218, R. R. S. 1943, in determining whether or not the probation order should be vacated and the penalty of the law imposed.

The next two assignments are that the court erred in pronouncing sentence before defendant's motion for a new trial was filed and determined, and before the statutory time for filing had expired. In Stapleman v. State, 150 Neb. 460, 34 N. W. 2d 907, we held: "It is not reversible error, in the absence of a showing that the defendant was prejudiced thereby, to sentence a defendant after verdict and before the motion for a new trial has been overruled." We see no reason for a different rule where sentence is pronounced before the motion is filed. Prejudice is not shown. In fact, the procedure followed enabled the defendant to present to the trial court the contention that the sentence was excessive. Section 29-2201, R. R. S. 1943, provides: "Before the sentence is pronounced, the defendant must be informed by the court of the verdict of the jury, and asked whether he has anything to say why judgment should not be passed against him." Section 29-2202, R. R. S. 1943, provides: "If the defendant has nothing to say, or if he shows no good and sufficient cause why judgment should not be pronounced, the court shall proceed to pronounce judgment as provided by law." The journal entry here shows that the question was asked, and that defendant responded but showed no good cause. The court proceeded to pronounce judgment as provided by law. The statutes do not require that the court defer judgment until the statutory time for filing a motion for new trial has expired. We find no merit in these assignments.

The defendant's next three assignments of error go to the sufficiency of the evidence to show a violation of the parole and to warrant a revocation of the parole.

The evidence of the State shows, and defendant admits, the one violation of the terms of the probation order. It is contended that that was not willful and not legally sufficient to sustain the trial court's action. It should

also be said that inquiry was made at the hearing as to compliance with the other conditions of the probation order and noncompliance was not shown.

Defendant relies upon the rule first stated in Sellers v. State, *supra,* and quoted with approval in Moyer v. State, *supra,* and Carr v. State, *supra,* that "* * * any probative evidence showing a violation of probationary conditions by conduct sufficient to convince the district court that defendant will not refrain from criminal acts in the future without punishment will sustain the revocation of a parole." The net of defendant's contention is that the court in determining these matters cannot consider "probative evidence" of conduct prior to the entry of the probation order.

In the three cases above cited the evidence had to do with events occurring subsequent to the order of probation. Here the evidence as to intoxication relates to a matter subsequent, the other evidence is to matters prior, to the order of probation.

Rightly construed, the rule requires the trial court to determine two things. First—is there probative evidence "showing a violation of probationary conditions"? If not, then that disposes of the matter as we held in Moyer v. State, *supra.* See Wright v. State, 139 Neb. 684, 298 N. W. 685, where violation of a parole was established and we held: "After a violation of a parole, the defendant may be brought before the court and, after the violation be established, the court may impose any penalty which might have been imposed before placing the defendant on probation."

If there is a finding of a violation of the probationary order, then the second question arises—is there probative evidence "sufficient to convince the district court that defendant will not refrain from criminal acts in the future"? As the opinion in Sellers v. State, *supra,* clearly shows, this language relates to what is now section 29-2218, R. R. S. 1943, which provides that if the judge "should be of the opinion that the accused would

refrain from engaging in, or committing further criminal acts in the future," the court may place the accused on probation. By the statute it is a matter for the trial court's "discretion." In determining it initially, the trial court has broad powers of inquiry as to "facts," "circumstances," and "other obtainable information," as set out in sections 29-2217 and 29-2218, R. R. S. 1943. As to this, the second question, the court is confronted at that stage of the proceedings with the question, shall probation be continued? In determining that question the court has as broad powers as to probative evidence which is to be considered as it has in determining whether or not to exercise the power of probation in the first instance.

Accordingly we hold that where the violation of a probation order is established or admitted, in determining whether or not to set aside the probationary order and to impose the penalty which it might have imposed before placing the defendant on probation, the trial court is not limited to a consideration of probative evidence of matters arising subsequent to the order of probation. An abuse of discretion is not shown. We find no merit in these assignments.

Finally, the defendant contends that the sentence pronounced is excessive. Defendant invokes the provision of section 29-2308, R. R. S. 1943, that "In all criminal cases that now are, or may hereafter be pending in the Supreme Court on error, the court may reduce the sentence rendered by the district court against the accused, when in its opinion the sentence is excessive, and it shall be the duty of the Supreme Court to render such sentence against the accused as in its opinion may be warranted by the evidence."

The rule is: "Where the punishment of an offense created by statute is left to the discretion of a court, to be exercised within certain prescribed limits, a sentence imposed within such limits will not be disturbed unless there appears to be an abuse of such discretion."

Bright v. State, 125 Neb. 817, 252 N. W. 386. See, also, Carr v. State, *supra,* and Kirkendall v. State, 152 Neb. 691, 42 N. W. 2d 374.

There is no showing in this record of any of the facts or circumstances connected with the offense charged in October 1950. Consequently, as we said in Carr v. State, *supra*: "There is an absence of anything in the record of this case to suggest or support a conclusion of abuse of discretion by the court in fixing the punishment of defendant."

The judgment is affirmed.

AFFIRMED.

MARGARET C. SMITH, APPELLEE, V. FRENCHMAN-CAMBRIDGE IRRIGATION DISTRICT, APPELLANT.

51 N. W. 2d 376

Filed February 1, 1952. No. 33119.

1. **Waters: Equity.** An original action in equity is an appropriate and permissible remedy to exclude or detach land unlawfully included in the area of an irrigation district created under the statute described in the opinion.
2. **Waters.** Land, provided with water by pump for its irrigation, may not be included in an irrigation district except upon written application or consent of the owner thereof.
3. ———. Whether or not land is provided with water by pump for its irrigation is a question which may be investigated and determined at any time in a proper case.
4. ———. If land is nonirrigable because of natural causes, it cannot lawfully be included or held in an irrigation district and taxed to support an irrigation system.
5. ———. Whether or not land, from some natural cause, cannot be irrigated is a question which may be put in issue and determined at any time in a proper case.
6. ———. Whether land cannot from any natural cause be irrigated within the meaning of section 46-176, R. S. 1943, must be determined from the facts in each case. No general and invariable rule to determine that fact can be stated.

APPEAL from the district court for Furnas County:

VICTOR WESTERMARK, JUDGE. *Judgment of the district court vacated. Judgment rendered in this court for appellee.*

Frank B. Morrison, for appellant.

Charles E. McCarl, for appellee.

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

BOSLAUGH, J.

This is an action in equity to exclude from appellant, an irrigation district, land owned by appellee, to cancel taxes levied upon it by appellant, and to enjoin it from future levy of taxes on the land. The district court awarded appellee the relief she sought and denied appellant a new trial. This appeal tests the validity of the decree.

Appellee and her husband, Sherman E. Smith, owned in joint tenancy the southwest quarter of Section 35, Township 4 North, Range 25 West of the 6th P. M., Furnas County. The part north of an irrigation lateral existing upon and across the land from about 1,045 feet south and a few feet east of the northwest corner thereof, following an irregular course, to the east line of the land a short distance south of the northeast corner thereof, consisting of about 95 acres, had been since 1938 until the time of the trial irrigated with water produced by a well and pump located on the land of a capacity in excess of 1,000 gallons a minute.

Sherman E. Smith signed a petition for the creation and organization of the Frenchman-Cambridge Irrigation District, and described in connection with his signature the "SW¼, Sec. 35, Twp. 4, Range 25, Acres 162, Excepts 95 acres now under pump irrigation." Appellee did not sign the petition for the organization and creation of appellant, or any request or consent that the land be included in the district. Her husband did not discuss with her his intention or decision to sign the

petition. He died in 1950, and appellee then became the owner in fee simple of the whole of the land involved in this case.

Appellant was established and declared a duly organized and created irrigation district under Chapter 46, R. S. 1943, by the board of county commissioners of Red Willow County on the 8th day of April 1946. The order of the board treated and included all of the land involved herein as a part of the area of appellant, and the district assessed the land of appellee and levied taxes thereon for irrigation purposes for each of the years 1948, 1949, and 1950. Appellee paid no part of the taxes levied by the district.

Appellee contends that authority and jurisdiction were lacking to include the part of her land irrigated by pump consisting of about 95 acres in the district because it was excepted and reserved by the declaration and act of Sherman E. Smith when he signed the petition to establish appellant, and for the reason that the statute under which appellant was created mandatorily exempted it from becoming a part of the district, except upon written application of its owners. Section 46-108, R. S. 1943, contains the provision that: "The person, * * * whose land, within any proposed district, is provided with water by pumping, * * * shall not be included therein except upon written application of the * * * owners of such land; Provided, that one thousand gallons per minute of water shall exempt one hundred and sixty acres, * * *."

The North Platte Irrigation & Land Company constructed a ditch to irrigate certain lands before the passage of the irrigation statute of 1889. Laws 1889, c. 68, p. 503. After the irrigation statute became effective, the company posted and filed the notice of appropriation required by it. Thereafter, when the irrigation law of 1895 (Laws 1895, c. 69, p. 244) took effect, the company filed a claim with the board of irrigation for the appropriation of water to irrigate the land served by the

ditch, and the appropriation of water therefor was allowed. Afterwards the Suburban Irrigation District was formed under the provisions of another act of the Legislature of 1895 (Laws 1895, c. 70, p. 269), and there was included in its boundary the land involved in the case later referred to and quoted herein. The district issued bonds and incurred obligations. It levied taxes on the land in the manner provided by law for the years 1896 to 1904, inclusive. It was practicable to irrigate the land from the ditch of the North Platte Irrigation & Land Company, and it had sufficient water and was willing to furnish it for that purpose at all times.

The act last referred to contained the provision: "* * * that where ditches or canals have been constructed before the passage of this act of sufficient capacity to water the land thereunder for which the water taken in such ditches is appropriated, such ditches and franchises and the land subject to be watered thereby shall be exempt from operations of this law * * * and that this law shall not be construed to in any way affect the rights of ditches already constructed." Laws 1895, c. 70, § 1, p. 269. State v. Several Parcels of Land, 80 Neb. 424, 114 N. W. 283, involved the validity of taxes levied by the Suburban Irrigation District on land under and served by the ditch of the North Platte Irrigation & Land Company. The taxes were held invalid on the basis that the land was exempt and could not be made a part of the Suburban Irrigation District because of the prohibition in the part of the statute last above quoted. Jurisdiction or authority to include it was lacking, and that objection was available at any time in a proper case. It is therein said: "The purpose of the district irrigation law was obviously to provide the means of reclaiming arid land for which up to that time water had not been available. It would have been clearly unjust for the legislature to permit these districts to be organized to include land already reclaimed, except in cases where the purpose of forming the dis-

trict was to purchase or take over an irrigation system already existing; * * *. We are therefore satisfied that his land should not have been included in the boundaries of the Suburban Irrigation District in the first instance. * * * 2. It is, however, contended that the county board had jurisdiction, and that its determination cannot be attacked in this proceeding. * * * A similar question, arising under the same statute, has once been before this court. Sections 47 to 54, inclusive, of the same act provide for proceedings by means of which land may be excluded from an irrigation district; and section 49 contains the proviso that in no case shall any land be held in any district or taxed for irrigation purposes which cannot, from any natural cause, be irrigated thereby. This clause was construed in Andrews v. Lillian Irrigation District, 66 Neb. 461. In this case it was alleged that the plaintiffs were the owners of certain lands lying within the boundaries of the irrigation district, which were low, wet, swampy lands and totally unfit for irrigation, and which needed to be drained before they could be farmed. * * * Considering the proviso in section 49 the court say: '* * * Whether a particular tract of land from some natural cause cannot be irrigated is a question which goes to the jurisdiction of the county board over such tract and may be raised at any time in a proper case, because section 49, supra, expressly denies the jurisdiction of the county board to include such land in an irrigation district, or to tax it for irrigation purposes.' The reasoning of this case applies to the question we are considering. If the provision that land which cannot, from any natural cause, be irrigated by a ditch excludes it from the jurisdiction of the county board, certainly the provision that land subject to be watered by a ditch constructed before the passage of the act and of sufficient capacity to water the same shall be exempt from the operation of the law would prevent the county board from passing upon and determining this question. * * * The exclusion in

section 1 is more radical and fundamental than that in section 49. It is that the lands described shall be exempt from the operation of the law; and it is only by the operation of the law that the county board can claim jurisdiction. Without this statute, from which this land is expressly made exempt, neither the county board which made the order, nor the district court which afterwards examined it, had any jurisdiction whatever. Their jurisdiction arose by operation of this statute. The defendant's land was expressly and by the plain and unequivocal language of the statute exempted from its operation. * * * 3. It is contended on behalf of the irrigation district that, if the lands of the defendant Walsh were wrongfully included in the district, he had a plain statutory remedy under sections 46 to 53, inclusive, of the act. We have already seen that under the rule in Andrews v. Lillian Irrigation District, supra, the express exclusion of authority negatives the jurisdiction of the county board." See, also, Sowerwine v. Central Irrigation District, 85 Neb. 687, 124 N. W. 118. The position of appellee on this phase of the case was properly sustained by the district court.

Appellee asserts that the part of her land south of the irrigation lateral, consisting of about 65 acres, was made a part of the district contrary to the facts and in violation of the law by virtue of which appellant was created and exists. The claim of absence of authority or jurisdiction to attach it to the area of the district is based on the allegation that this part of the land cannot from natural causes be irrigated.

There is no material dispute as to the character and condition of this part of the land of appellee. It is very rough and rolling land. It has innumerable slopes and grades and none that continue much over 150 feet in any direction. There are ditches, depressions, hills, and mounds. The topsoil is from two inches thick on the higher parts to two feet on the better parts of the land. If it were suitable for irrigation, it could be watered

by use of the pump on the farm. The subsoil is fine river sand down to shale. Five or six acres were leveled in 1943. It has been watered from pump, but it has not produced any crop in the years since irrigation thereon commenced.

A witness of 17 years' experience as a soil conservationist stated he had been familiar with the Smith land since 1941; that the area north of the irrigation lateral had been irrigated by pump as long as he had known the land; that the area south of the lateral was "quite hummocky"—that is, it has mounds, knolls, depressions, and undulations without any particular direction of slope extending for any distance—"there is every slope imaginable"; that it could not be irrigated by gravity as the cost would be too much to level it, and to do so would expose too much topsoil, and if leveled the land would be unproductive and impracticable for farm operations—"Yes, and you wouldn't have much left when you got done"; and "It would be cheaper to buy other good land and forget about this, * * *."

The incidence that any part of the land south of the lateral was not irrigated during the period of 1939 through 1951 when there was available water brought to and conducted along its border and the value of the land would have been increased 100 percent by irrigating it, is not wholly without significance and influence when considered with the other facts disclosed by the record in concluding that this land was not susceptible of irrigation. The fact is that the part of the land south of the irrigation lateral is not suitable for irrigation. It is especially not suitable for gravity irrigation, and any attempt to make it so would involve an unreasonable expense and would result in the destruction of what fertility the land now has. The record is convincing that this land cannot from natural causes be irrigated by works of the appellant that are suitable only for gravity irrigation, notwithstanding the incidental recitation in the petition for the organization of the district that "all

of said land being susceptible to one mode of irrigation from a common source and by the same system of works."

Section 46-176, R. S. 1943, contains the mandate that: "* * * in no case shall any land be held by any district or taxed for irrigation purposes which cannot from any natural cause be irrigated thereby."

The order of the county board establishing and defining the boundaries of appellant is not conclusive that land within the boundaries could not, from some natural cause, be irrigated by the district. The fact in that regard may be raised and determined at any time in a proper case, and if land is nonirrigable by reason of natural causes, it cannot be held in an irrigation district and taxed. Andrews v. Lillian Irrigation District, 66 Neb. 461, 97 N. W. 336, first considered the quoted provision and said in reference thereto: "Whether a particular tract of land from some natural cause can not be irrigated, is a question which goes to the jurisdiction of the county board over such tract and may be raised at any time in a proper case, because section 49, supra, expressly denies the jurisdiction of the county board to include such land in an irrigation district, or to tax it for irrigation purposes. Should such land be included within the boundaries of an irrigation district, or taxed for irrigation purposes, it would be in violation of a plain provision of the statute. That being true, whether it should be held in such district, or taxed for irrigation purposes, does not depend on what is for the best interest of the district, nor on the consent of those holding bonds issued by the district, because the statute is mandatory that it should not be thus held and taxed. The statutory proceedings, therefore, to have lands detached, which make the question whether they shall be detached, or not, dependent on what is for the best interest of the district, and upon the consent of the holders of the district bonds, do not apply." See, also, Birdwood Irrigation District v. Brodbeck, 148 Neb. 824, 29 N. W.

2d 621; Sowerwine v. Central Irrigation District, *supra;* Annotation, 100 A. L. R. 1292.

The argument of appellant that the landowner may not resort to equity in an original action for relief from the inclusion of his land in an irrigation district of the class of the one involved herein, in direct violation of the statute upon which the district depends for its creation and existence, but that the landowner must depend upon the statutory procedure for detaching land from the district, is denied by the decisions of this court to which reference has just been made.

This court has discussed the meaning of the language "land * * * which cannot from any natural causes be irrigated thereby" in two cases. In Andrews v. Lillian Irrigation District, *supra,* it is said: "Evidently the legislature meant to exclude from the irrigation district, and from taxation in support thereof, lands that were not susceptible of irrigation. If, because of the natural conformation of the surface, lands within the irrigation district lay so high as to render it impossible to conduct water thereon by means of irrigation ditches for the irrigation of the land, it would hardly be contended that such lands were not, within the meaning of the section of the statute to which attention has been directed, land 'which can not from any natural cause be irrigated thereby,' and therefore could not lawfully be held in such district, and taxed to support the system."

In Wight v. McGuigan, 94 Neb. 358, 143 N. W. 232, it is significantly remarked that: "The owner of a specific tract of land ought not to be compelled to join an irrigation district and pay taxes for the support thereof if his land as a whole is so situated that for natural causes it cannot be irrigated. * * * If a government subdivision of land, or a tract otherwise capable of identification and definite description, is incapable of irrigation, and so situated with reference to the proposed district and other lands therein as to make such a course practicable, such tract might be omitted from the dis-

trict, although it formed a part of a larger tract of the same owner." The 65 acres of the land of appellee south of the irrigation lateral is land which cannot, because of natural causes, be irrigated by appellant within the meaning of the statute as construed by the decisions of this court.

The findings and judgment of the trial court contain errors in the description and the statement of the character of the several parts of the land of appellee and because thereof the judgment should be, and is vacated and set aside, and a judgment should be rendered in this court.

It should be and is adjudged that the southwest quarter of Section 35, Township 4 North, Range 25 West of the 6th P. M., Furnas County, Nebraska, should be, and it is hereby detached and excluded from the Frenchman-Cambridge Irrigation District; that the taxes attempted to be levied upon the land by appellant for the years 1948, 1949, and 1950, should be, and they are adjudged to be null and void and they should be and are canceled, and the title to the land quieted against them; that appellant and all persons acting for it should be, and they are prohibited and enjoined from levying or attempting to levy any tax upon said land; and that appellee recover costs herein.

JUDGMENT OF THE DISTRICT COURT VACATED.
JUDGMENT RENDERED IN THIS COURT FOR APPELLEE.

COTNER COLLEGE, A CORPORATION, APPELLANT, V. THE ESTATE OF ELMER E. HESTER, DECEASED, APPELLEE.
51 N. W. 2d 612

Filed February 8, 1952. No. 33031.

1. **Trial: Appeal and Error.** Findings of court in a law action in which a jury is waived have the effect of the verdict of a jury, and judgment thereon will not be disturbed unless clearly wrong.

2. **Estoppel.** Equitable estoppel is the effect of the voluntary admissions, representations, acts, or conduct of a party whereby he is absolutely precluded, both at law and in equity, from asserting rights which might have otherwise existed, either of property, or contract, or of remedy, as against another person who in good faith relied upon such conduct and has been led thereby to change his position for the worse, and who on his part acquired some corresponding right either of property, or contract, or of remedy.
3. **Bills and Notes: Estoppel.** General principles of estoppel apply in determining whether or not defendant, in an action on a promissory note between the original parties thereof, is estopped to defend upon the ground that there was a failure of consideration.
4. **Bills and Notes.** As between the parties thereto, the consideration for a subscription note is tested by the situation existing at the time it is sought to enforce the subscription.
5. **Charities: Colleges and Universities.** In the absence of any stipulations upon the subject in terms of the subscription, the abandonment of a charitable or public enterprise releases the subscriber to its fund, the law implying that the enterprise must be existing when payment is demanded.
6. **Bills and Notes: Colleges and Universities.** It is an implied condition of a subscription note that the money shall not be diverted from the purpose for which it was subscribed and that the enterprise shall not be abandoned.
7. **Contracts.** The general principles governing the performance of contracts apply to subscriptions. If a material change in the plan or purpose for which a subscription is made is effected without the consent of the subscriber, he is excused from performing his promise unless estopped to deny his consent to the change.
8. ———. Where there is a total failure of consideration and defendant has derived no benefit from the contract, or none beyond the amount of money which he has already advanced, such failure of consideration may be shown in bar of the action.
9. ———. The doctrine of substantial performance has no application where the party obligated to perform deliberately and intentionally departs from the terms of the contract and attempts to substitute another type of performance.
10. ———. It does not follow that because a technical rescission has not been made, and cannot be made, that a defendant cannot avail himself of the defense of want or failure of consideration.

APPEAL from the district court for Dundy County: VICTOR WESTERMARK, JUDGE. *Affirmed.*

Clarence G. Miles and *Frank B. Morrison,* for appellant.

Stevens & Scott, Van Pelt, Marti & O'Gara, and *Hines & Hines,* for appellee.

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

CHAPPELL, J.

This action originated as a claim filed by plaintiff in the county court against the estate of Elmer E. Hester, deceased, to recover upon a subscription endowment note. The claim was disallowed. Upon appeal to the district court a jury was waived and the issues were tried to the court. The defense, insofar as important here, was failure of consideration, to which claimant replied that the estate was estopped to make such defense. In its decree the trial court found and adjudged the issues generally in favor of the estate and disallowed the claim.

A motion for new trial was overruled, and plaintiff appealed to this court, assigning substantially: (1) That the trial court erred in its refusal to admit and consider certain evidence; and (2) that the judgment was not sustained by the evidence but contrary thereto and contrary to law. We conclude that the assignments should not be sustained.

Preliminary to discussion of the primary issues, we dispose of the first assignment. On examination by plaintiff of its secretary-treasurer, it was shown that before a new program of religious education was inaugurated by plaintiff in 1946, its board of trustees canvassed its assets and exhibit 13 was identified as a list of its estate and other notes, of which the note here involved was one. The exhibit itself was never offered or received in evidence. In that situation the witness was asked in effect whether or not the note here involved was considered by the board along with all other notes at the time the matter of continuing the college

program was being considered. Objection thereto, as self-serving and calling for a conclusion of the witness, was sustained. In that connection, plaintiff then offered to "show by the witness that among all of the other assets which the college regarded that it owned, this note was considered by the board in connection with deciding whether or not to continue a future educational program." Thereafter a like objection thereto was made and sustained. The witness was then handed exhibit 13 and asked by plaintiff's counsel whether or not it was "in the same condition it was when it was considered by the board" and was permitted to answer "Yes" without objection. Thereafter, with no new question pending, plaintiff offered "to prove that the list represented by Exhibit No. 13 was considered by the Board of Trustees of Cotner College prior to and at the time of determining whether or not to go forward with a further educational program shortly before September, 1946." The objection thereto was renewed and sustained. Plaintiff argued that the trial court erred in so ruling. We conclude otherwise.

The question and offers clearly called for a conclusion of the witness, and the offers were either broader than the question or not responsive to any question to which an objection had been sustained. However, in any event the ruling if erroneous was not prejudicial to plaintiff, since the offer was merely cumulative, not only of evidence given by the witness then testifying, but also by another member of the board of trustees, who was permitted without objection to answer at length comparable questions.

Plaintiff also argued that the trial court erred in refusing to consider or admit exhibit 22, a mimeographed letter dated "June 6, 1947" addressed "Dear Friend" and signed "Cotner College P. R. Stevens (stenciled) P. R. Stevens, Pres." It extended greetings to an unidentified old friend of Cotner College and simply contained information relating to its new program of re-

ligious education, which required no reply. As a witness for plaintiff, Stevens testified that he personally mimeographed the letter and mailed a copy to Elmer E. Hester at Benkelman, Nebraska. Offer of the exhibit was objected to for want of sufficient foundation, and that it was incompetent and immaterial. The objection was sustained. Plaintiff thereafter called the executrix as its own witness to have her identify the exhibit as one having been received by deceased during his lifetime. In that connection her testimony was that she had lived in the Elmer E. Hester home after 1947 and would have seen such a letter because she looked after all his correspondence, kept by him in voluminous files. However, she testified that she had never seen such a letter and although having made a thorough search of Elmer E. Hester's papers, she could not find such a letter. The exhibit was then re-offered, to which the previous objection was renewed, with the addition "It relates to a transaction of a deceased party. Mr. Hester isn't here to admit whether he received that letter."

Concededly, no demand ever had been made by plaintiff for production of the original, and plaintiff's own evidence affirmatively established that no sufficient foundation had been laid for its admission. In any event, however, its exclusion could not have been prejudicially erroneous in the absence of any evidence, as hereinafter observed, which could make estoppel operative to prevent defendant from relying upon the defense of failure of consideration. Viewed in that light, we are not required to discuss or decide whether or not the letter and such evidence as related thereto was a transaction between deceased and a witness having a direct legal interest in the result of the suit within the purview of section 25-1202, R. R. S. 1943.

It is well at this point also to dispose of the issue of estoppel. The doctrine was applied in Ricketts v. Scothorn, 57 Neb. 51, 77 N. W. 365, 73 Am. S. R. 491, 42 L. R. A. 794, an action to recover on a promissory

note, wherein it is said: "An estoppel in pais is defined to be 'a right arising from acts, admissions, or conduct which have induced a change of position in accordance with the real or apparent intention of the party against whom they are alleged.' Mr. Pomeroy has formulated the following definition: 'Equitable estoppel is the effect of the voluntary conduct of a party whereby he is absolutely precluded, both at law and in equity, from asserting rights which might perhaps have otherwise existed, either of property, or contract, or of remedy, as against another person who in good faith relied upon such conduct, and has been led thereby to change his position for the worse, and who on his part acquires some corresponding right either of property, of contract, or of remedy.' (2 Pomeroy, Equity Jurisprudence 804.)" In the light of such rules the doctrine of estoppel was applied to permit recovery.

As stated in 31 C. J. S., Estoppel, § 59, p. 236: "Equitable estoppel or estoppel by misrepresentation is the effect of the voluntary conduct of a person whereby he is precluded, both at law and in equity, from asserting rights against another person relying on such conduct; and it arises where a person, by his acts, representations, or admissions, or even by his silence when it is his duty to speak, intentionally or through culpable negligence induces another to believe that certain facts exist, and the other person rightfully relies and acts on such belief, and will be prejudiced if the former is permitted to deny the existence of such facts." Also, as stated in 10 C. J. S., Bills and Notes, § 485, p. 1048: "General principles of estoppel or waiver apply in determining whether the defendant, in an action on a negotiable instrument, is estopped, or has waived his right, to set up a defense thereto." See, also, § 485, p. 1057, where it is stated: "In accordance with general rules considered supra § 485 a, in a proper case defendant may be estopped to set up the defense that the

original consideration was illegal, or that there was a want or failure of consideration, * * *."

In Lowe v. Keens, 90 Neb. 565, 133 N. W. 1127, Ann. Cas. 1913B 430, relied upon by plaintiff, the defendant therein was fully cognizant of, participated in, and consented to the change of plans for construction of a church to which he had subscribed. It has no application here.

In that connection, there is no competent evidence in this record that the makers ever performed any act or made any admissions or representations upon which plaintiff could have relied, and under the circumstances they had no duty to speak. There is no competent evidence that the Hesters ever had any knowledge or notice, much less that they acquiesced in what plaintiff did. Further, the obligations or expenditures by plaintiff to establish its new program were not assumed or expended to carry out the purpose for which the subscription was intended. Therefore, the doctrine of estoppel has no application in this case.

We turn then to other contentions. This is a law action. It is well established in this jurisdiction that: "Findings of court in a law action in which a jury is waived have the effect of a verdict of a jury and will not be disturbed unless clearly wrong." Foltz v. Brakhage, 151 Neb. 216, 36 N. W. 2d 768. As stated in such opinion: "The weight of evidence or credibility of witnesses is not a concern of this court in the review of such a case except to determine that the findings and judgment are supported by evidence and are not contrary to law." See, also, In re Estate of Wotke, 133 Neb. 739, 277 N. W. 45.

The note here involved read:

"COTNER COLLEGE ENDOWNMENT NOTE.

"$25,000.00 Benkelman Nebr. Dec 31st 1921.

"In consideration of our interest in Christian Education and for the purpose of producing an Endowment for Cotner College and for value received, we hereby

subscribe and promise to pay to Cotner College, Bethany, Nebraska, the sum of ---------- Twenty five thousand Dollars, due and payable at the death or before at the option of the makers with interest at the rate of one per cent per annum, beginning January 1st 1924.

"This Endowment Note is made subject to the following conditions;

"FIRST, when the principal sum of this note shall have been paid in full or any part the makers, at their option may ask and demand of Cotner College, Annuity Bonds bearing interest at the rate of Five per cent per annum.—

"SECOND, At the option of the makers of this note sufficient of the annuity privilege may be surrendered to constitute two full scholarships in perpetuity to graduates of accredited High Schools who shall live in that part of Nebraska, lying west of the One Hundred first principal Meridian, and the Scholarships shall be known as the, ---------- Elmer E. and Minnie B. Hester Scholarships. The beneficiaries of these scholarships shall be needy students and selected by the President of Cotner College, the Head of Sacred Literature Department and the President of the Volunteer Band.

(Signed) ELMER E. HESTER
MINNIE B. HESTER

Witness
A. D. HARMON
M. F. HIGGINS"

Its execution is admitted. It is conceded also that on January 24, 1925, the makers paid $250 interest thereon, and that Minnie B. Hester died May 18, 1943, and Elmer E. Hester died September 18, 1949.

The trial court specifically found and adjudged in its decree: "Upon consideration of the files, the evidence, and the arguments of counsel, the court, being fully advised in the premises, finds generally in favor of the objectors and against the claimant, Cotner College, and that the allegations of the objections or answer of the

objectors are true. The court further finds that at the time Elmer E. Hester and Minnie B. Hester executed the note involved herein Cotner College, a legal corporation, maintained its educational institution at Bethany, Nebraska; that it offered several courses of study as an Arts and Religious School of Instruction; that it had approximately 350 students; that it maintained a Boys Dormitory and a Girls Dormitory in connection with its college; that during the latter part of the nineteen-twenties Cotner College became involved in indebtedness; that by reason of such indebtedness and of the general financial condition of the country, and of its supporting constituents, it was forced to suspend its educational program and close its college in the spring of 1933; that at said time in 1933 all educational activities of said college ceased at Bethany, Nebraska, and have never been revived; that the attempted renewal of educational facilities in 1946 by Cotner College near the campus of the University of Nebraska and of the College of Agriculture is not a renewal of its former educational program and is not the type of education formerly provided at Bethany. The court further finds that by reason of the failure of the claimant to maintain and continue its educational program and by reason of the suspension and abandonment of its educational facilities of Cotner College at Bethany, Nebraska, the consideration for the note involved herein wholly failed, and the estate of Elmer E. Hester is not liable thereon.

"IT IS THEREFORE CONSIDERED, ORDERED AND ADJUDGED by the court that the claim of Cotner College be and the same hereby is disallowed, and the costs of this action are taxed to the claimant."

In that connection, an examination of the record discloses ample competent evidence supporting such findings and judgment. Therefore, unless the decree was contrary to law, it will be sustained. We conclude that it was not contrary to law.

In that connection, there was concededly a consider-

ation for the note when it was executed. The question here is whether or not the consideration subsequently failed, since consideration for the promise is tested by the situation existing at the time it is sought to enforce the subscription. 50 Am. Jur., Subscriptions, § 9, p. 783. See, also, Continental Co. v. Eilers, 134 Neb. 278, 278 N. W. 497.

"It is an implied condition of a subscription that the money shall not be diverted from the purpose for which it was subscribed and the enterprise shall not be abandoned." 50 Am. Jur., Subscriptions, § 19, p. 791. As stated in § 25, p. 794: "Also, in the absence of any stipulations upon the subject in terms of the subscription, the abandonment of a charitable enterprise releases the subscriber to its fund; the law implies that the enterprise must be existing when payment is demanded." As stated in § 23, p. 793: "The general principles governing the performance of contracts apply to subscriptions. If a material change in the plan or purpose for which a subscription was made is effected without the consent of the subscriber, he is excused from performing his promise, unless there has been a waiver, or unless he has estopped himself to deny his consent to the change."

In 12 Am. Jur., Contracts, § 359, p. 925, it is said: "A fortiori, where there is a total failure of consideration and the defendant has derived no benefit from the contract or none beyond the amount of money which he has already advanced, such total failure of consideration may be shown in bar of the action.

"Where one party has disabled himself from performing, the other party is not obligated to perform." Also, as stated in the same section on p. 926: "It does not follow that because a technical rescission has not been made, and cannot be made, that a defendant cannot avail himself of the defense of failure or want of consideration." As stated in § 360, p. 927: "A failure of consideration of such a degree that the remaining con-

sideration may be deemed to be no substantial consideration is an excuse for nonperformance of a promise." See, also, 7 Am. Jur., Bills and Notes, § 252, p. 949.

The foregoing propositions of law are stated in another manner in 17 C. J. S., Contracts, § 129, p. 476, wherein it is said: "Although, strictly speaking, it has been said there can be no such thing as failure of consideration, many cases have laid down the rule that when the consideration for a promise wholly fails the promise is unenforceable, and it has been stated that the doctrine of failure of consideration is predicated on the happening of events materially changing the rights of the parties, which events were not within their contemplation when the contract was executed." See, also, 10 C. J. S., Bills and Notes, § 518, p. 1142.

In Restatement, Contracts, c. 10, § 274, p. 399, it is said: "(1) In promises for an agreed exchange, any material failure of performance by one party not justified by the conduct of the other discharges the latter's duty to give the agreed exchange even though his promise is not in terms conditional." In the Pocket Supplement of Nebraska Annotations to § 274, it is said: "This statement is in accord with the Nebraska law." Thereafter, Nebraska cases too numerous to cite herein are listed as supporting the statement.

Also, as stated in Restatement, Contracts, § 281, p. 415: "In promises for an agreed exchange, a promisor is discharged from the duty of performing his promise if substantial performance of the return promise is impossible because of the non-existence, destruction or impairment of the requisite subject-matter or means of performance, provided that the promisor has not himself wrongfully caused the impossibility or has not assumed the duty that the subject-matter or means of performance shall exist unimpaired." The afore-cited annotation also cites numerous Nebraska cases supporting that statement.

In In re Estate of Griswold, 113 Neb. 256, 202 N. W.

609, 38 A. L. R. 858, relied upon by plaintiff, the primary question was whether or not a comparable endowment subscription note was based upon a valuable consideration. Therein it was concluded that assumption by the payee of obligations express or implied to carry out the purposes for which the note was given and intended was a sufficient consideration. There was no question of subsequent failure of consideration. In fact, the payee therein fully performed all its obligations at all times. This court so concluded in the opinion, which affirmed a judgment for plaintiff. The case is not controlling here as precedent for plaintiff. Rather, there are statements in such opinion supporting the position of defendant.

Carson Estate, 349 Pa. 529, 37 A. 2d 488, involved a comparable subscription note and subsequent failure of consideration. In that opinion it is said: "It was a contract. There is no question at this time that it was a valid contract, and that it was supported by consideration sufficient to contracts of this sort. Under the contract both decedent and appellee had mutual obligations. Appellee was obliged, by the express terms written in the solicitor's handwriting, to begin the 'construction of the John F. Carson Memorial building.' * * * It is no reflection on appellee's good faith that it was not able to perform the contract according to its terms. No doubt it would have done so if the funds could have been obtained. The hard fact is, however, that it did not fulfill the contract. Nor can it be claimed that, equitably, it is entitled to the benefits of the contract upon the doctrine that it has substantially performed its agreement by converting its available resources to the accomplishment of the purpose for which the proposed Memorial Hall was intended. The doctrine of substantial performance has no application where the party obligated to perform deliberately and intentionally departs from the terms of the contract and attempts to substitute another type of performance." See, also, Turknett v. Western College of New Mexico

Conference of the Methodist Episcopal Church, 19 N. M. 572, 145 P. 138.

In Simpson Centenary College v. Tuttle, 71 Iowa 596, 33 N. W. 74, the defense was failure of consideration. The subscription note was a donation to the endowment fund, the interest of which was to be used to maintain an academic college, then at Indianola, Iowa. However, payee used such funds to establish a law school in Des Moines, Iowa, 20 miles from Indianola. In that opinion it is said: "The note sued upon is still in the hands of the payee; and, notwithstanding the use of the words 'value received,' the question of consideration is still open. * * * The obligations and expenditures on the part of the donee which might prevent the interposition of the defense of want of consideration must be directly in the line of the purpose for which the gift of the note or promise to give was intended. A diversion of the funds to other purposes, contrary to the intent of the donor, would certainly be a good excuse for withholding the consummation of the gift; and, if the plaintiff is diverting the funds created by the donations to purposes not contemplated at the time of the gift, but in violation of the agreement on which the promise was based, in such a manner as to show want of good faith on the part of the donee, the proof of such diversion is a defense to the note in the nature of a failure of consideration." In the case at bar, an academic college conducting a general program of Christian education and fully equipped therefor with lands, buildings, and faculty, was located at Bethany, a suburb of Lincoln, when the note was executed. That property was lost, its faculty discharged, and its program completely abandoned from 1933 to 1946 when a new and completely different program, insignificant in comparison and described as "distinctly a school of religion," was established in minor quarters in a different atmosphere amidst metropolitan surroundings in Lincoln, four miles away. The afore-cited case is singularly comparable with that at bar.

Rutherford College, Inc. v. Payne, 209 N. C. 792, 184 S. E. 827, involved the right to recover upon a subscription note, comparable with that at bar. It was tried to a jury wherein a verdict was directed and judgment entered thereon for plaintiff. Upon appeal, the court reversed the judgment and awarded a new trial substantially upon the premise that defendant would not be liable on the note if the jury found that subsequent to its execution the college became insolvent and unable to use its endowment fund because it had discontinued the same as a school operated by it for the promotion of Christian education. In material respects that case is comparable with the one at bar.

As stated in Commercial Travelers' Home Assn. v. McNamara, 95 App. Div. 1, 88 N. Y. S. 443: "The law is not so absurd as to hold one to his subscription or promise to give to a charitable or public enterprise after the enterprise has been abandoned. If no condition be attached, the law will imply that the enterprise must be existing when payment is demanded." See, also, Indianapolis Bible Institute v. Kiddey, 98 Ind. App. 567, 187 N. E. 846, and the Annotation, Abandonment of Enterprise, 48 L. R. A. N. S. 811, with cases cited.

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

AFFIRMED.

EMMA STOLTING ET AL., APPELLEES, V. ARTHUR EVERETT ET AL., APPELLANTS, IMPLEADED WITH ANTHON F. STOLTING, APPELLEE.

51 N. W. 2d 603

Filed February 8, 1952. No. 33079.

1. **Trial.** In testing the sufficiency of evidence to support a verdict it must be considered in the light most favorable to the successful party, that is, every controverted fact must be re-

solved in his favor and he should have the benefit of every inference that can reasonably be deduced therefrom.

2. **Appeal and Error.** This court will not disturb the findings of a jury unless on an examination of the record it may be said that such findings are not supported by any evidence or are clearly wrong.
3. **Waters.** A riparian owner may not embank against the overflow of running streams when the effect is to cause an increased volume of water on the land of another riparian owner to his injury, and if he does so he is answerable in damages.
4. **Waters: Damages.** In an action for damages to land and growing crops by floodwaters of a stream, subject to overflow from natural causes, and which it is alleged were thrown upon the plaintiffs' land by the negligent and improper construction of jetties and a dike, the burden of proof is on the plaintiffs to show that the construction complained of either caused such overflow or increased the same, or in some manner contributed thereto, together with the nature and extent of the increased overflow, if any, and the amount of damages caused thereby.
5. **Evidence: Trial.** Under ordinary circumstances expert opinion evidence is to be considered and weighed by the triers of fact like any other testimony.

APPEAL from the district court for Jefferson County: CLOYDE B. ELLIS, JUDGE. *Affirmed.*

Albert L. Detmer, Denney & Denney, J. W. Weingarten, and *W. P. Loomis,* for appellants.

Hubka & Hubka and *George A. Skultety,* for appellees.

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

WENKE, J.

This action was commenced in the district court for Jefferson County to recover damages for injury done to the plaintiffs' lands by the floodwaters of the Little Blue River. As a basis for the action the plaintiffs claim that the damage to their lands was caused by the careless, negligent, and wrongful construction, reconstruction, and maintenance of jetties and a dike by the defendants which prevented the floodwaters of the Little Blue River from flowing in its natural flood channel

but caused it to flow over their lands in such manner as to wash away the top soil thereof and cut a new channel across it. The jury found for plaintiffs and assessed the amount of damages in the sum of $6,500 and rendered verdict accordingly. Defendants filed a motion for judgment notwithstanding the verdict or, in the alternative, for a new trial. The court overruled this alternative motion and rendered judgment on the verdict. It is from the overruling of the alternative motion and rendering of the judgment that this appeal was taken.

Appellees, including the defendant Anthon F. Stolting, are the heirs of Henry Stolting, deceased, and the owners of the damaged land. We will refer to this land as the Stolting lands. Appellants are Arthur and Mary Everett and the Chicago, Burlington & Quincy Railroad Company. In this opinion, when it is necessary to refer to the appellants severally, we will refer to them respectively as the Everetts and the Railroad, and to the lands owned by the Everetts as the Everett lands.

It is the appellants' primary contention that the evidence adduced is not sufficient to sustain the jury's finding that what they did caused the damage to the Stolting lands and therefore the trial court erred in not sustaining either their motion for a directed verdict or, after verdict, their motion for judgment notwithstanding the verdict.

The rules applicable are as follows:

"In every case, before the evidence is submitted to the jury, there is a preliminary question for the court to decide, when properly raised, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the burden of proof is imposed." Krichau v. Chicago, B. & Q. R. R. Co., 150 Neb. 498, 34 N. W. 2d 899.

"Where the evidence was insufficient to sustain a judgment in favor of the plaintiff, it was the duty of the trial court to sustain a motion directing a verdict for de-

fendant at the close of plaintiff's evidence." Goodhart v. Chicago, B. & Q. R. R. Co., 146 Neb. 290, 19 N. W. 2d 549.

"If a motion for directed verdict made at the close of the evidence in a case should have been sustained for want of evidence to support a verdict in favor of the party against whom made, it is the duty of the court on motion for judgment notwithstanding the verdict timely made to sustain such motion to set aside the verdict and to render judgment pursuant to the motion for directed verdict." Hamilton v. Omaha & C. B. St. Ry. Co., 152 Neb. 328, 41 N. W. 2d 139.

"In testing the sufficiency of evidence to support a verdict it must be considered in the light most favorable to the successful party, that is, every controverted fact must be resolved in his favor and he should have the benefit of every inference that can reasonably be deduced therefrom." Smith v. Platte Valley Public Power & Irrigation Dist., 151 Neb. 49, 36 N. W. 2d 478.

"This court will not disturb the findings of a jury unless on an examination of the record it may be said that such findings are not supported by any evidence or are clearly wrong." Keyser v. Allen, 149 Neb. 449, 31 N. W. 2d 309.

The lands herein involved lie in the flood plane of the Little Blue River as its winding course passes through the south half of Section 5, Township 1 North, Range 3 East of the 6th P. M., in Jefferson County, Nebraska, which is just west and a little south of Endicott. The flood plane of the Little Blue is generally about a half to three-quarters of a mile wide. The right-of-way, grade, and tracks of the Railroad also pass through the south half of Section 5. The right-of-way is 100 feet wide and runs generally in an east to west direction although slightly to the southwest. When it reaches the northeast corner of the southeast quarter of the southwest quarter of the section the turn to the southwest increases. It passes out of the section at about the southwest corner thereof. It crosses

the Little Blue at more or less of a right angle at a point near the west edge of the southeast quarter of the southwest quarter of the section. The grade of the railroad roadbed is about 10 to 11 feet above the general level of the flood plane. That part of the Everett lands herein involved is their land lying in the flood plane of the Little Blue just north of and adjacent to the right-of-way and immediately east of and adjacent to the Little Blue as it turns south in its course to pass under the main bridge. That part of the Stolting lands herein involved is their land lying just south of the right-of-way and more or less within a horseshoe bend of the Little Blue. It is, for all practical purposes, located in the southeast quarter of Section 5 and consists of 64.46 acres of which 50 acres were subject to cultivation. It is this 50-acre tract that was damaged. The remainder of the tract, or 14.46 acres, is covered with trees and lies adjacent to and immediately south of the right-of-way. The Railroad owns approximately 13 acres in this flood plane besides its right-of-way. This land lies in the north part of the southeast quarter of the southwest quarter of the section. It is north of the Little Blue and adjacent to the Everett lands which lie immediately to the north. It is divided by the right-of-way.

Located in the right-of-way in the area herein involved are three bridges. The first is the main bridge over the Little Blue which, with a trestle adjacent thereto on the east, is 668 feet long. East thereof some 1,600 feet is a 200-foot bridge referred to as the middle bridge. It has an opening under it varying from 4 to 8 feet in depth. East of the middle bridge some 1,300 feet is the Smith bridge. This bridge is 240 feet long and the opening under it varies from 4 to 13 feet in depth. It is over a natural stream called Smith Creek. The middle and Smith bridges are located in the right-of-way in an area where it lies between the Everett and Stolting lands.

Commencing in December 1947 the Railroad, in conjunction with the Everetts, commenced putting jetties

along the east bank of the Little Blue and dikes on the east bank thereof at the furthest east point in the bend of the river where, coming from the west, it turns south to pass under the main bridge. This was done for the purpose of preventing the river from cutting further to the east in the Everett lands and to prevent it from forming a new channel across the Everett lands in a line approximately through the middle bridge and from there across the Stolting lands and terminating in the present main channel of the river at a point about where Smith Creek now enters it. This work was continued until, in June 1950, it included a completed dike some 5 to 6 feet in height and some 1,450 feet in length. This dike extended from the east end of the trestle adjacent to the main bridge north and slightly to the west completely across the flood plane of the Little Blue north of the right-of-way.

During the six-day period extending from July 9 to 14, 1950, inclusive, the river was in flood stage. It did not reach the height of the 1941 flood but did completely cover the river's flood plane. The dike herein referred to as having been completed in June 1950 completely, except for a very small and insignificant trickle around the north end thereof, prevented any of the floodwaters of the river from flowing east across the Everett lands in the river's flood plane lying north of the right-of-way and then through the middle and Smith bridges. It had the effect of forcing all of the waters flowing in the valley of the Little Blue to flow under the main bridge and trestle adjacent thereto, and then into the main channel and that part of its flood plane which is south of the right-of-way and just east of the main bridge. During this flood the waters flowing across the Stolting 50-acre tract cut a new main channel across it and also severely washed and eroded, or covered with gravel and sand, the other parts thereof.

The 50 acres of the Stolting lands so damaged were of a rich sandy loam and in a good state of cultivation. The

evidence fully supports that it was damaged in the amount fixed by the jury.

Appellants' interference with the natural flow of the floodwaters of the river was subject to the following:

"We think our decisions have committed us to the doctrine that a riparian owner may not embank against the overflow of running streams when the effect is to cause an increased volume of water on the land of another riparian owner to his injury, and if he does so he is answerable in damages." Hofeldt v. Elkhorn Valley Drainage Dist., 115 Neb. 539, 213 N. W. 832, 53 A. L. R. 1174.

"A riparian owner may not dam or dike against such flood waters to the injury of adjacent owners of lands or crops growing thereon." Frese v. Michalec, 148 Neb. 567, 28 N. W. 2d 197.

"The owners or proprietors of lands bordering upon either the normal or flood channels of a natural watercourse are entitled to have its water, whether within its banks or in its flood channel, run as it is wont to run according to natural drainage, and no one has the lawful right by diversions or obstructions to interfere with its accustomed flow to the damage of another." Stocker v. Wells, 150 Neb. 51, 33 N. W. 2d 445.

It was, of course, incumbent upon the appellees to sustain the burden of establishing that the dike was the cause of their damage and the extent thereof. As stated in Goodhart v. Chicago, B. & Q. R. R. Co., *supra:* " 'In an action for damages to land and growing crops by floodwaters of a stream, subject to overflow from natural causes, and which it is alleged were thrown upon the plaintiffs' land by the negligent and improper construction of a railroad nearby and adjacent thereto, the burden of proof is on the plaintiffs to show that the construction complained of either caused such overflow or increased the same, or in some manner contributed thereto, together with the nature and extent of the increased overflow, if any, and the amount of damages

caused thereby.' Harris v. Lincoln & N. W. R. Co., 91 Neb. 755, 137 N. W. 865. See, also, Alt v. Chicago, B. & Q. R. Co., 96 Neb. 714, 148 N. W. 900."

From the evidence adduced the jury could have found that the Everett lands north of the right-of-way and east of the river had always been in the river's flood plane; that since 1902 floodwaters of the river had flowed east and a little south across this land to pass under the middle and Smith bridges; that this part of the river's flood plane carried up to 50 percent of the floodwaters of the river not flowing in the main stream; that the dike completely, for all practical purposes, prevented floodwaters from flowing east across the Everett lands north of the right-of-way; that the dike materially increased the amount of water flowing under the main bridge and trestle adjacent thereto; that because of this increased volume the speed of the water flowing under the main bridge was greatly increased giving it a much greater cutting and washing power than it had ever had before as evidenced by its cutting a deeper channel under the main bridge, by its cutting of the high bank and washing out large trees in the south bank of the river as it turned east some 400 feet south of the main bridge, by its cutting away a substantial area of the north point of a peninsula west of where Rose Creek enters the river and its washing away many trees located thereon, and by its cutting the bank and washing out many trees on the Stolting land on the north bank of the river east of the mouth of Rose Creek; that the increased volume of water with its increased flow passed through the very narrow flood channel of the river between the mouth of Rose Creek and the right-of-way as it approached the Stolting land in the horseshoe bend some 40 rods to the east; that this increased volume and speed gave it cutting and washing power greater than it had ever had before; that as it approached and traveled onto and over the Stolting land it was not met by floodwaters coming through the middle bridge,

as had always been the situation before, but flowed on to the east and north without interference; that in fact the floodwaters flowed north through the middle bridge instead of south as it had always been wont to do; and that this increased flow of water hit the west edge of this 50-acre tract of land with a velocity which gave it a much greater cutting and washing power than it had ever had before and, being uninterfered with from floodwaters coming south through the middle bridge, caused all the damage for which recovery is here sought.

In this respect it should be stated that while this 50-acre tract has always been in the flood plane of the river and subject to overflow it had never, prior to the construction of the dike, been seriously damaged thereby, including the flood in 1941 which it appears was the highest flood of which there is a record.

We have not overlooked the fact that appellants offered evidence of witnesses who were of the opinion that numerous other factors, such as the flow of the floodwaters of Rose Creek entering the Little Blue at right angles not too far upstream from this tract, the cleaning out of the underpass and straightening of the river's approach to the Stanley bridge some 50 rods east of the east line of Section 5, the obstructions in the old channel of the horseshoe bend, the damming of a cutoff from Rose Creek to the old river channel in the horseshoe bend, and the low area across the 50-acre tract, caused the damage. This testimony only presented a question of fact for the jury.

In this respect it is appellants' thought that the evidence of their two experts was conclusive on this factual issue as a matter of law. While it was a subject to which expert testimony was relevant it is not a subject which lends itself exclusively to that type of testimony. Lay witnesses could testify to what they observed and from all the testimony it was for the jury to determine the ultimate question.

Under ordinary circumstances expert opinion evidence

is to be considered and weighed by the triers of fact like any other testimony. See, 32 C. J. S., Evidence, § 569, p. 390; Morse v. Chicago, B. & Q. Ry. Co., 81 Neb. 745, 116 N. W. 859.

Appellants contend that the trial court, by refusing to give its instruction No. 1 and by the giving of its instructions Nos. 2 and 9, failed to properly submit to the jury the issue raised by their answer, and supported by evidence, that they had a right to do what they did because what they did was reasonably necessary to prevent the waters of the Little Blue from creating and establishing a new channel across their lands.

"A riparian owner may restore to its former channel a stream which erosion has caused to flow in a new channel upon his land, providing he does so within a reasonable time after the new channel formed and before the interests of lower riparian proprietors along the course of the old channel would be injuriously affected by such action on his part, * * *." Johnk v. Union P. R. R. Co., 99 Neb. 763, 157 N. W. 918, L. R. A. 1916F 403. See, also, Whipple v. Nelson, 143 Neb. 286, 9 N. W. 2d 288.

What is said of restoring a stream to its former channel would likewise be true of keeping the stream in its original channel. But this right is subject to the following: "'The owners or proprietors of lands bordering upon either the normal or flood channels of a natural watercourse are entitled to have its water, whether within its banks or in its flood channel, run as it is wont to run according to natural drainage, and no one has the lawful right by diversions or obstructions to interfere with its accustomed flow to the damage of another.' Beetison v. Ballou, 153 Neb. 360, 44 N. W. 2d 721." McGill v. Card-Adams Co., 154 Neb. 332, 47 N. W. 2d 912.

The following taken from Fremont, E. & M. V. R. R. Co. v. Harlin, 50 Neb. 698, 70 N. W. 263, 61 Am. S. R. 578, 36 L. R. A. 417, is applicable here: "The next argument is that the court refused to instruct the jury, on

behalf of the railroad company, to the effect that if the jury found that the ditches were properly constructed with reference to the use of the same for railway purposes, that they should find for the railroad company. * * * The material issue on trial was not whether the ditches were sufficient and proper for the draining of the railroad company's right of way and road-bed, but the material issue was whether the railroad company had so constructed its ditches as to unnecessarily and negligently injure the property of its neighbor. The instruction under consideration refused by the court, if given, would have made the case turn on an immaterial issue. A railroad company might construct a bridge, an embankment, a culvert, or a ditch sufficient for the maintenance and operation of its road, and one entirely proper for that purpose, and yet the improvement made might be of such a character as to unnecessarily and negligently injure the property of an adjoining proprietor. * * * This is not a suit in which the plaintiff claims damages because the railroad company did not properly construct its ditches for railroad purposes, but the principle upon which this action rests is that the railroad company, in the lawful possession and use of its property, so used and managed it as to unnecessarily and negligently inflict an injury upon its neighbor."

We find that the appellants had a fair trial and since their contentions are without merit we affirm the verdict and judgment of the trial court.

AFFIRMED.

HAROLD O. HAMMER, APPELLANT, V. ESTATE OF CAROLINE HAMMER, APPELLEE.

51 N. W. 2d 609

Filed February 8, 1952. No. 33081.

1. **Pleading.** When a plaintiff pleads a fact which is material to the issue being tried, he thereby assumes the burden of proving the existence of such fact.
2. **Trial.** Where the evidence is insufficient to sustain a verdict in favor of plaintiff, the trial court may give a peremptory instruction in favor of defendant or excuse the jury and enter a nonsuit.

APPEAL from the district court for Douglas County: HENRY J. BEAL, JUDGE. *Affirmed.*

Oscar T. Doerr and *Paul J. Garrotto,* for appellant.

Webb & Kelley and *Joseph H. McGroarty,* for appellee.

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

SIMMONS, C. J.

Plaintiff initiated this action by filing a claim against the estate of Caroline Hammer, deceased, based on an alleged oral contract with deceased. The matter was heard in the county court and the claim disallowed. Plaintiff appealed to the district court where issues were made and trial was had. At the close of plaintiff's case-in-chief, defendant moved for a directed verdict or a dismissal. The trial court sustained the motion and dismissed the action. Plaintiff appeals presenting questions as to the refusal of the trial court to admit offered evidence and contending that the evidence was sufficient to entitle him to have the cause submitted to the jury. We affirm the judgment of the trial court.

There was involved in the pleadings in the county and district courts an added claim that plaintiff should recover $5,000 for services rendered the deceased in her lifetime. There is no contention here that plaintiff pro-

duced sufficient evidence to sustain that claim, hence no further mention will be made of it.

The deceased and her husband lived in Omaha, Nebraska. Plaintiff refers to them as his aunt and uncle. The evidence suggests that the blood relationship was with the uncle.

Plaintiff was born in Sweden in September 1913, his last name then being Pehrsson. Plaintiff came to America in 1926, and made his home with deceased and her husband. The husband died in 1940 and deceased died in 1947. Plaintiff went to school where he was registered under the name of Hammer. His citizenship and Army papers were issued under that name. He was graduated from high school in June 1931. In September 1931, he became steadily employed and continued in that employment until late in 1942, when he entered the United States Army. He was in the service 3 years and 2 months. Upon discharge from the Army he resumed his old employment for a few months. He lived in the home of deceased with her son and grandson, the deceased being then in a hospital. Sometime in 1946, plaintiff removed to the State of California where he has since lived and been employed.

There is some variance in the details of the claim as filed in the county court and as stated in the petition in the district court. In the district court plaintiff alleged that on or about October 1, 1931, decedent stated to plaintiff that "* * * if he would pay to her some money out of his earnings, she would save the money for him and that she would pay him interest on all such payments and that she would repay said money to him and double the amount whenever he married or required the money or upon her death"; that thereafter during the period up to and including November 16, 1942, he paid deceased the total sum of $6,550; that deceased did not perform her part of said agreement; that by her will she directed the disposition of all property in her possession to others; and that by reason

thereof plaintiff had "* * * been deprived of the consideration expressed in said contract and that claimant is entitled to recover from said estate the sum of $13,100.00 and interest at six per cent from the date of the various deposits made by him at double the amount of said deposits." Plaintiff prayed for judgment in the sum of $18,100 with interest at 6 percent "or double the amounts paid by claimant to decedent for safekeeping and investment," together with costs.

Defendant's answer is in effect a general denial and a denial of any indebtedness to the plaintiff. The cause was tried on these issues.

In his summary here of his claim in county court, plaintiff states that he and decedent "* * * had entered into a verbal agreement by virtue of which he was to give her a certain amount of his earnings which she would save for him, which amount she would double and invest and pay it to him at such time as he might marry or after her death."

In his statement of the case here, plaintiff states that the claim is "* * * for the sum of $13,100.00 with interest at 6% from the date of various deposits made with the decedent, pursuant to an agreement with the decedent that if he would deliver to her funds from time to time, she would save the money for him, and return it to him doubled when he would marry, or would require the money * * *."

There is no contention here but that plaintiff's right to testify was limited by the provisions of section 25-1202, R. R. S. 1943.

Plaintiff undertook to establish the claim by the testimony of third parties and by one exhibit, which the trial court refused to admit in evidence.

Plaintiff offered the evidence of five witnesses who testified as to conversations had with deceased at different times beginning in 1931 to a period after plaintiff went into the Army in 1942. The sum of this evidence is that deceased said plaintiff was saving money; that

he was paying money to her; that she was saving it for him so that he would have it when he got married or some other change occurred; that it was in the bank; and that she was adding a little to it. The testimony of one witness which is more specific is set out later herein.

This brings us down to exhibit 1 which plaintiff first offered in its entirety and then offered it for reasons hereafter shown, limited to entries down to and including October 1940. The trial court refused to admit it in evidence.

Exhibit 1 is a small book about 3 x 5 inches in size containing some 60 sheets of ruled paper. Written on the first page are plaintiff's name and address. On the second are names and addresses in Sweden. At the top of the third page is written "Harold Hammer paid to Mrs. Caroline Hammer," below that "1931," and below that, one entry "$125.00," then below that "x1932x" followed by entries on single lines "Jan 2 $20," "Jan 16 $20," and like entries on the 2nd and 16th of each month, totaled to "$480." On another page is "x1933x" followed by like entries for the 2nd and 16th of each month, excepting that the entries for the 2nd of each month are "$20" and those for the 16th are "$30." These entries are totaled to "$600" followed in a column by "$600," "480," "125," totaled to "$1205." Similar entries are made for the years, months, and days from 1934 to and including November 16, 1942, with one exception. The February 2, 1934, entry is "$30.00" and that of the 16th, "$20.00." Following each December 16 entry (in 1942, November 16) is a carrying forward of a balance and a final total of "$6505."

Plaintiff offered this initially as a book of account showing sums paid to deceased and also as a record of a transaction between plaintiff and deceased made in the regular course of business.

Later the fifth witness was asked about this exhibit. He testified that he first saw the exhibit "on the front room table" in deceased's home. He then started to

testify as to what deceased "told me late" in 1940 and apparently as to that date said "she had showed it to me at that one time" and "she told me there late in 1940 that he was saving money—about fifty a month—and that she was also putting fifty a month in there." Later he testified that he first saw the exhibit "the last part of 1939." Deceased then handed it to the witness and told him that plaintiff "was saving fifty a month and that she would put in that much with it, and that he was putting so much—well, each half; of course, each pay day it amounted to fifty a month," and that deceased "showed me the book and it showed the amounts in there of fifty a month." He further testified that when deceased handed him the exhibit she told him "it was a book the amounts was being kept in that (plaintiff) was saving money." He also testified that late in "'40, she told me that he had over five thousand saved then," and that later deceased told him plaintiff was "still saving his money and he was still giving her $50.00 a month yet," the last conversation being in April or May 1942.

Based on this testimony, plaintiff made the offer of that part of the exhibit up to and including October 16, 1940.

Plaintiff then testified that the entries in the exhibit were in his handwriting and made every month at or about the time of the dates contained in the exhibit; that the first entry was made in 1931, and the last in 1942; and that it was a book in which "I kept the records—."

Plaintiff then renewed the offer of the exhibit and it was not received.

We do not deem it necessary to determine the question of the admissibility of exhibit 1. Assuming, but not deciding, that the exhibit was admissible, as well as evidence admitted but later stricken, and assuming, but not deciding, the sufficiency of the evidence to show that plaintiff paid the deceased the money which

he contends was paid to her, the plaintiff has failed to prove the oral contract alleged and upon which he based his claim.

The evidence of payments claimed to have been made is at no point shown related to the contract alleged. There is no evidence that goes to show the existence of the agreement alleged to the effect that deceased agreed to double the amount which plaintiff paid to her, to pay it to him, and to pay interest thereon. Plaintiff has failed to prove essential allegations as to the contract which he alleged.

As we held in Fairchild v. Fairchild Clay Products Co., 141 Neb. 356, 3 N. W. 2d 581, "Under the issues plaintiff was required in the first instance to prove his contract * * *," and restated the rule that "When a party pleads a fact which is material to the issue being tried, he thereby assumes the burden of proving the existence of such fact." See, also, Riley v. Riley, 150 Neb. 176, 33 N. W. 2d 525; Masonic Temple Craft v. Stamm, 152 Neb. 604, 42 N. W. 2d 178.

Plaintiff having failed to prove essential allegations of his cause of action, the applicable rule is: "Where the evidence is insufficient to sustain a verdict in favor of plaintiff, the trial court may give a peremptory instruction in favor of defendant or excuse the jury and enter a nonsuit." Campbell v. Columbia Casualty Co., 125 Neb. 1, 248 N. W. 690. See, also, Rzeszotarski v. American Smelting & Refining Co., 133 Neb. 825, 277 N. W. 334.

It necessarily follows that the judgment of the district court was not erroneous. It is affirmed.

AFFIRMED.

STATE OF NEBRASKA EX REL. ETHEL LARSON ET AL., APPELLANTS, V. JOSEPHINE MORRISON ET AL., APPELLEES.

51 N. W. 2d 626

Filed February 8, 1952. No. 33085.

1. **Quo Warranto.** Quo warranto or a proceeding in the nature thereof lies only against one who is in possession and user of the office or who had been admitted thereto.
2. **Quo Warranto: Schools and School Districts.** When it is claimed that a school district has no existence as such because not created in the manner required by statute, the cause must proceed against the individuals who are usurping its franchises.
3. ———: ———. Quo warranto is a proper remedy whereby to test the legal entity of a school district and the status of its officers.
4. **Schools and School Districts.** The provisions of section 79-402, R. R. S. 1943, are mandatory and jurisdictional.
5. ———. Any signer of a petition to create a new school district from other districts or to change the boundary of any district may withdraw his signature therefrom at any time before the county superintendent has affirmatively acted upon such petition by authoritatively declaring the district created or change made.

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

Roy E. Blixt, for appellants.

Edward E. Carr and *Allen F. Black,* for appellees.

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

CHAPPELL, J.

This is an action in the nature of quo warranto to test the validity of a school district and oust respondents from office as members of the board thereof. After hearing upon the merits, the trial court rendered a judgment finding and adjudging the issues generally in favor of respondents and dismissing relators' action. Motion for new trial was overruled, and relators ap-

pealed, assigning substantially that the judgment was contrary to the evidence and law. We sustain the assignments.

The facts are not in dispute. They were either stipulated or undenied, and pleaded generally in relators' petition, which, contrary to respondents' contentions, stated a cause of action in quo warranto.

The record discloses that relators are residents, taxpayers, legal voters, and members of the school board of district No. 248, which was duly organized and lawfully performing the functions of a school district in Custer County.

Prior to filing the action here involved, and upon the filing thereof as well, relators complied in every respect with section 25-21,122, R. R. S. 1943, but the Attorney General and county attorney neglected and refused to file the proceedings.

The pertinent facts upon which relators claim the right to judgment are as follows: A duly qualified voter of district No. 248 circulated a petition among the legal voters thereof, requesting the county superintendent to divide the district into two separate districts, as provided in section 79-402, R. R. S. 1943. Such petition was signed by 17 persons residing in the district. Among such signers three were not legal voters and ineligible to sign the petition, which left but 14 lawful signatures thereon. The petition was filed in the office of the county superintendent on July 24, 1950, and on August 1, 1950, a sworn list of voters was also filed therein, purportedly to comply with section 79-404, R. R. S. 1943. Such list contained the names of 28 persons, but the 3 ineligibles aforesaid were also listed thereon, which left but 25 legal voters in the district.

On July 26, 1950, a written application signed by 18 legal voters, 7 of whom had signed the original petition, was filed in the office of the county superintendent, requesting that no action should be taken to create a new

district or divide the old until after the 1950-1951 school year.

Thereafter, on August 17, 1950, two legal voters filed a request in the office of the county superintendent to withdraw their signatures from the original petition, and thereby signified reasons for their intention to be considered as non-signers, which would have left but 12 signatures thereon, concededly less than 55 percent of the legal voters required by section 79-402, R. R. S. 1943, before the county superintendent had any jurisdiction, power, or authority to act.

In that connection, it will be noted that the county superintendent took no action whatever on the petition, did not even plan to act, and had made no decision whatever upon the petition until after she had consulted with the county attorney on August 28, 1950, after the aforesaid withdrawal of signatures. Nevertheless, on August 29, 1950, by written order directed to the county treasurer, and without any hearing, the county superintendent divided district No. 248, and reestablished district No. 157, formerly a part thereof, allegedly in conformity with section 79-402, R. R. S. 1943.

Pursuant to such order and notice, as provided by sections 79-410 to 79-413, R. R. S. 1943, inclusive, a meeting of purported school district No. 157 was held on September 11, 1950, whereat respondents were selected by persons attending the meeting to act as members of the school board for such district. This action was subsequently filed.

Whether or not, as argued by relators, the county superintendent was required to fix a time for hearing upon the petition and give relators and other interested parties an opportunity to be heard thereat before any action was taken, we are not required to decide, in view of other decisive reasons for disposition of the case upon the merits. It is sufficient for us to call attention to section 79-402, R. S. Supp., 1951, which now requires such to be done.

As we view it, there are but two questions presented: (1) Is quo warranto the proper remedy, and if so, who should have been made respondent parties; and (2) may a petitioner for the purposes provided in section 79-402, R. R. S. 1943, withdraw his signature after the petition is filed, but before it has been affirmatively acted upon by the county superintendent?

With regard to the first, section 25-21,121, R. R. S. 1943, provides: "An information may be filed against any person unlawfully holding or exercising any public office or franchise within this state, or any office in any corporation created by the laws of this state, or when any public officer has done or suffered any act which works a forfeiture of his office, or when any persons act as a corporation within this state without being authorized by law, or if, being incorporated, they do or omit acts which amount to a surrender or forfeiture of their rights and privileges as a corporation, or when they exercise powers not conferred by law."

Section 25-21,122, R. R. S. 1943, with which relators concededly complied, provides: "Such information may be filed by the Attorney General or by the county attorney of the proper county whenever either of such officers deems it his duty so to do, except that the county attorney shall not have authority to file such information against any state officer or a judge of the district court; Provided, however, that any elector of the proper county may file such information against any person unlawfully holding or exercising the functions of any public office in the state, other than state officers or judges of the district court, whenever the county attorney of the proper county shall refuse so to do within ten days after he shall have been notified in writing by any elector that any such person is disqualified by the Constitution or the laws of the State of Nebraska to hold the office in question or to exercise the functions thereof. Any person other than the county attorney who shall institute such action shall file with such information

in the office of the clerk of the district court a bond signed by a duly authorized surety company or by two resident freeholders of the county in which the action is filed, the amount of which bond shall be not less than five hundred dollars and be fixed by, and the sufficiency of the sureties thereon approved by the clerk. The bond shall be conditioned that the plaintiff shall prosecute the action without delay and that he shall pay the costs of such suit including a reasonable attorney fee to the person against whom such information is filed should the action be unsuccessful. The amount of such attorney fee shall be fixed by the court and taxed as costs in the action."

With regard to parties, this court has held: "Quo warranto, or a proceeding in the nature thereof, lies only against one who is in possession and user of the office, or who has been admitted thereto." State ex rel. Good v. Marsh, 125 Neb. 125, 249 N. W. 295.

As said in State ex rel. Caldwell v. Lincoln Street Ry. Co., 80 Neb. 333, 114 N. W. 422, 14 L. R. A. N. S. 336: "But where, as here, it is claimed that it has no existence as a corporate body because not organized in accordance with our statute, the case must proceed against the individuals who are usurping corporate rights."

Likewise, in State ex rel. Summers v. Uridil, 37 Neb. 371, 55 N. W. 1072, it is said: "Under very similar statutes it has been held in several states, and we think rightly, that in such proceedings against the persons unlawfully exercising the powers of an office the legal existence of that office may be determined. (People v. Carpenter, 24 N. Y., 86; State v. Parker, 25 Minn., 215; State v. Gladwin, 41 Mich., 647; State v. Coffee, 59 Mo., 59.) Indeed it would seem that to institute proceedings against the village itself would be to recognize its existence as a corporation, and that if the incorporation is void the only proceedings must be against the persons undertaking to exercise its franchises." It clearly appears, then, that neither district No. 157 nor

the county superintendent would have been proper or necessary respondent parties.

With regard to the remedy, this court held in State ex rel. Summers v. Uridil, *supra*: "Quo warranto is the proper remedy to oust persons who are exercising the powers of corporate offices when the corporation has no legal existence." As stated in Dappen v. Weber, 106 Neb. 812, 184 N. W. 952: "'* * * It is likewise a well-established doctrine in this country that quo warranto is the proper remedy to inquire whether a municipal corporation was legally created, as well as to oust persons exercising the privileges and powers of corporate officers when the municipal corporation has no legal existence. State v. Uridil, 37 Neb. 371; State v. Dimond, 44 Neb. 154; State v. Mote, 48 Neb. 683; High, Extraordinary Legal Remedies (3d ed.) sec. 684. An information in the nature of a quo warranto, * * * is the appropriate remedy.' * * * This rule is applicable to school districts, as, like municipal corporations, they obtain their franchises from the state and are created for public purposes and to carry out strictly public policies." As stated in School District D v. School District No. 80, 112 Neb. 867, 201 N. W. 964: "It would seem from Dappen v. Weber, 106 Neb. 812, that quo warranto is the proper action whereby to test the legal entity of a school district and the status of its officers." See, also, 47 Am. Jur., Schools, § 24, p. 314, citing Dappen v. Weber, *supra,* and other cases as authority for the statement. Quo warranto was also recognized as a proper remedy in State ex rel. Tanner v. Warrick, 106 Neb. 750, 184 N. W. 896.

It is true, as held in State ex rel. Donavan v. Palmer, 18 Neb. 644, 26 N. W. 469, a mandamus suit, that: "An order of the county superintendent as to the formation, division or change of school districts where he has jurisdiction cannot be attacked in a collateral proceeding." As stated in School District No. 67 v. School District No. 24, 55 Neb. 716, 76 N. W. 420: "An order of the county

superintendent as to the formation or change of boundaries of a school district cannot be collaterally assailed where he acted within his jurisdiction. (State v. Palmer, 18 Neb. 644.) It is conceded by counsel for plaintiff that this action must fail unless the proceedings before the county superintendent consolidating the two districts were not erroneous merely, but were without jurisdiction and absolutely void; but they argue against the validity of the order of consolidation, and their contention is unanswerable." The cause at bar is a direct attack upon the proceedings before an order of the county superintendent as void for want of any jurisdiction and authority to act because of insufficiency of the petition required by section 79-402, R. R. S. 1943, and not because of any mere error or irregularity.

Respondents argued that relators had a remedy at law because they would have had a right to review such proceedings and order by petition in error, as held in Pollock v. School District No. 42, 54 Neb. 171, 74 N. W. 393. Be that as it may, under the circumstances presented here, where the county superintendent was without any jurisdiction and authority to act, relators were not required to pursue such remedy, and could prosecute an action in the nature of quo warranto.

Section 79-402, R. R. S. 1943, as applicable here, provides: "The county superintendent shall create a new district from other districts, or change the boundaries of any district upon petitions signed by fifty-five per cent of the legal voters of each district affected."

As stated in Cowles v. School District No. 6, 23 Neb. 655, 37 N. W. 493, in speaking of comparable provisions: "These provisions are mandatory, and may, I think, be classed as jurisdictional. * * * The laws of this state, as well by policy as by letter, have left the control of the boundaries of school districts, primarily, with the legal voters of each district respectively. * * * After the first or original organization of a new county into one or more school districts, no new district can be formed, old one

altered, or the boundaries of any altered, without the movement therefor originating with the legal voters thereof, and their will to that effect being expressed by petition of the strength prescribed by statute. These are matters with which the school district, as a corporation, or quasi corporation, has been vested with neither power nor duty, nor has any district officer, board, or school meeting; but they rest with the voters in their capacity of petitioners, and with them alone."

In State ex rel. Donavan v. Palmer, *supra*, it is said: "The statute clothes the county superintendent with power, when certain conditions are complied with, to form new districts, and, when necessary, to make changes in those already existing. * * * He is invested with power, upon proper petitions being filed in his office, to create, divide, or change a school district or districts, and if he acts within the scope of his authority his orders are not subject to collateral attack." See, also, State ex rel. Shull v. Clary, 25 Neb. 403, 41 N. W. 256.

The final question then is whether or not the county superintendent here involved had any jurisdiction and authority to act. The answer depends entirely upon whether or not the persons who withdrew their signatures from the petition on August 17, 1950, had a right to do so before the county superintendent acted upon it August 29, 1950. We conclude that they did have such right, and that the county superintendent thus had no jurisdiction or authority to act upon the petition.

In that regard, this court said in Hoffman v. Nelson, 1 Neb. Unoff. 215, 95 N. W. 347: "We do not feel justified, in a purely statutory matter such as this, in placing any restriction upon the free action of a citizen which the law has not placed there and which no consideration of good morals or even propriety seems to require. We do not discover anything improper in a citizen, who thinks he is now better advised, changing his mind a second time as to the expediency of having such an election. * * * It seems to us better to say as defendants

in error do on page 18 of their able brief: 'He (the citizen) has absolute control of the matter as to whether or not his name shall remain upon the petition up to the moment that the board acts upon it.' "

In State ex rel. Tanner v. Warrick, *supra,* it is said: "The main question in the case is whether the evidence shows that the county superintendent had acted upon the petitions and declared the territory to be annexed before the withdrawals were filed. * * * It is conceded that petitioners might withdraw at any time before action was taken by the county superintendent." We concluded, however, from the evidence in that case, that there had been no withdrawals before the county superintendent acted upon the petition by declaring her approval thereof.

In Dappen v. Weber, *supra,* upon rehearing at 106 Neb. 817, 187 N. W. 230, citing State ex rel. Tanner v. Warrick, *supra,* as authority, the court concluded that petitioners might withdraw their names from the petition by written request at any time before action had been taken thereon by the county superintendent. See, also, State ex rel. Morgan v. Nemaha County, 10 Neb. 32, 4 N. W. 373. There are authorities seeming to hold a contrary view, but they are generally distinguishable by virtue of provisions of statute or controlling facts. The majority of cases comparable with that at bar adhere to the foregoing rule for the reason generally that the rule which permits a withdrawal of signatures at any time before final action upon the petition is more likely to result in real and mature judgment of the voters, and is calculated to discourage a hasty presentation of a petition for signature without a full disclosure of the real merits of the question. See, Annotation, 11 L. R. A. N. S. 372, where many cases are cited. See, also, the recent case of Paetzel v. Clift, —— Minn. ——, 48 N. W. 2d 731, which permitted the withdrawal, before any action had been taken thereon, of a school district resolution directed to the county board

requesting a dissolution of a school district and annexation to another. In the opinion it is said: "Without the initiating action of a school district vote, the county board in this case had no jurisdiction to enter its order, and the order is void."

Likewise, we conclude that without a petition signed by 55 percent of the legal voters, as required by section 79-402, R. R. S. 1943, the county superintendent had no jurisidiction or authority to enter the order creating district No. 157 or changing the boundaries of district No. 248, therefore the order was void.

For the reasons heretofore stated, the judgment of the trial court should be and hereby is reversed, and the cause is remanded with directions to enter judgment in conformity with this opinion and the prayer of relators' petition. All costs are taxed to respondents.

REVERSED AND REMANDED WITH DIRECTIONS.

GILMORE MCLEOD, APPELLANT, V. ANDREW MURPHY & SON, INCORPORATED, APPELLEE.

51 N. W. 2d 620

Filed February 8, 1952. No. 33105.

Trial. Where the evidence is insufficient to sustain a verdict in favor of plaintiff, the trial court may give a peremptory instruction in favor of defendant or excuse the jury and enter a nonsuit.

APPEAL from the district court for Douglas County: WILLIAM A. DAY, JUDGE. *Affirmed.*

Mecham, Stoehr, Moore, Mecham & Hills, for appellant.

Fred N. Hellner, for appellee.

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

SIMMONS, C. J.

This is an action for treble damages under the Emer-

gency Price Control Act of 1942. Issues were made and trial was had. At the close of plaintiff's case-in-chief, defendant moved for a directed verdict and an order dismissing the action. The trial court sustained the motion and dismissed the action. Plaintiff appeals. We affirm the judgment of the trial court.

Sometime in November 1944, a car of the plaintiff and a truck belonging to one Dan Thomas collided. The accident occurred near Valentine in Cherry County. Thomas was a contract dealer with defendant. Plaintiff agreed to pay the damages to the truck and told Thomas to take it to defendant at Omaha, have it repaired, and he would pay the bill. On November 23, 1944, defendant agreed to repair the truck, making the agreement with Thomas. Defendant thereafter performed work on the truck, furnished materials, and charged Thomas therefor $428.50 for labor, and $395.40 for parts. Thomas was entitled to a dealer's discount on parts. The discount here was $93.60, so that the net charge to Thomas by defendant was $730.30.

On January 24, 1945, defendant prepared an estimate of damages to this truck. It was directed to Thomas. It shows in considerable detail labor items of $458.15 and parts $720, and a total of $1,178.15.

Plaintiff had a man examine this estimate late in January or early in February 1945. On February 15, 1945, plaintiff and Thomas went to defendant's place of business. Evidently plaintiff examined the estimate for he states it contained items that should not have been there, some of which were taken off, but he does not show what items were taken away. In any event, plaintiff paid defendant $1,150 thereon that day and testified that in making the payment he was "paying for the damage to Thomas' truck." Defendant then paid to or credited Thomas with the sum of $419.70, being the difference between $1,150 and $730.30.

Plaintiff brought this action in January 1946, and in his petition alleged that he brought the action for treble

damages pursuant to the provisions of section 165 (205), Emergency Price Control Act of 1942 (Public Law 421, 77th Congress, 2d Session, p. 34), and as amended by the Stabilization Extension Act of June 30, 1944 (Public Law 383, 78th Congress, 2d Session, p. 640), and maximum price regulations issued pursuant thereto. He alleges that he (plaintiff) contracted with defendant to repair the Thomas truck; that "repair work was performed" for the sum of $1,178.15, in accordance with an estimate made by defendant on January 24, 1945; that the price of repairs set out in the invoice was in excess of the maximum price in the amount of $400; that part of the repairs were not furnished; that he demanded reimbursement for the overcharge; that it was not made; and that he was entitled to and prayed for treble damages or the sum of $1,200.

So far as material here, the answer is a general denial.

The action was not tried until May 1949. The motion for a new trial was overruled in June 1951.

Plaintiff's assignments here go to the proposition that the trial court erred in sustaining defendant's motion and in dismissing the action.

Plaintiff argues at length here that Thomas in taking his (Thomas') truck to the defendant for repairs and in contracting for the repairs acted as agent of the plaintiff. This contention is apparently for the purpose of bringing himself within the provisions of the act as one who bought a commodity. We do not deem it necessary to decide that question for the reason that plaintiff has failed to prove his contention that there was an overcharge under the act.

Plaintiff does not undertake to prove that there was an overcharge on any item or items of parts or labor shown on the estimate which he paid. He introduced no evidence as to applicable maximum prices. Rather he arrives at the overcharge on the basis of contending that the charges made to Thomas were the proper charges under the act and hence he was overcharged in

the amount of the difference between the estimate and the bill.

The initial error in plaintiff's position factually is that he assumes that the parts and labor for which Thomas was charged are the same as the parts and labor in the invoice which he paid, and that the difference of $419.70 between the two totals constitutes an unlawful overcharge.

It is clear from the evidence that Thomas was charged for labor performed and parts used in repairing the truck. There is no showing that all the work so done and the parts so used were in connection with the repair of damages done to the truck in the accident. It also appears that certain items of damage to the truck as a result of the accident were not repaired and were not included in the bill to Thomas. In short, Thomas was charged for parts actually used and to be used on the truck and for labor actually performed.

It appears from the evidence that the estimate which plaintiff had had examined and had himself examined before paying the $1,150 was designed as a basis for determining the amount of damages that Thomas had as a result of the accident. The ninth item listed in the estimate under "Parts" is "Freight charges from Valentine to Omaha," $100. Obviously that was not a repair item that defendant was called upon to furnish or expected to furnish. It appears that it was included in the estimate as part of the damages as compensation to Thomas for bringing the truck to Omaha for repairs. There also was included in the estimate "2 9.00x20 Tires & Tubes," $225, which defendant did not and could not furnish because of rationing restrictions during the war, and which plaintiff admitted Thomas could get elsewhere. Plaintiff testified that there was no damage done to tires, but the fact remains he paid an estimate that included that amount for tires.

There also was included in the estimate under "Parts" an item of $10.25 for repair of a tire and tube. The

evidence shows that this was a charge which defendant incurred with a third party in an effort to have a tire and tube repaired and later offered to reimburse plaintiff if it in turn got reimbursement for that item. It appears also that this $10.25 item was charged to Thomas. There were also included in the estimate under "Parts," one grille $13.50, and two running boards $19, which defendant could not secure and put on the truck at the time the other repairs were made. It appears that these items were charged to Thomas to be installed on the truck at a later date, and that they were among the items on which Thomas was allowed a dealer's discount.

It appears then that there were included in the estimate under "Parts," a total of $335.25 which defendant in no way furnished or was expected to furnish, and a total of $32.50 on items which defendant was to furnish later, or an over-all total of $367.75.

It appears further that there was included in the estimate for "Labor" an item of $45 for "Painting Damaged Parts." That painting was not done and could not be done until the grille and running boards were installed. We do not find a labor item charged to Thomas that is reconcilable with that item and accordingly conclude it is accounted for in the over-all payment of $419.70 to Thomas.

It follows that what plaintiff is trying to do here is to subtract costs actually incurred by Thomas in repairing the truck from the amount paid for damages arising from the collision, and contending that the difference is an illegal overcharge. Obviously an overcharge is not established by that method.

If we accept plaintiff's premise that the charges for parts and labor in the estimate are to be related in gross to the charges for parts and labor made to Thomas, then we would necessarily reach the result that Thomas, and not the plaintiff, was overcharged, or that if Thomas was charged the correct amount, plaintiff was undercharged. The estimate shows $720 for parts. Subtract-

ing from that the "freight" item of $100 and $225 for tires and tubes, the result would be $395 for parts put or to be put on the truck. The Thomas bill shows that he was charged $395.40 for parts before the discount was allowed. The estimate shows $458.15 for labor. Deducting from that the $45 labor item for painting leaves $413.15. The evidence shows that Thomas was charged $428.50 for labor performed. The net estimate in neither instance is as much as the charge to Thomas. Of course, this does not show that Thomas was overcharged or plaintiff undercharged, but rather shows the lack of a reconcilable basis for plaintiff's claim.

Summing up, plaintiff takes the amount which he, in effect, paid to Thomas for damages to his truck, subtracts from that the amount of the actual cost to Thomas of an incomplete repair job, and holds that the difference was an overcharge by defendant. We know of no rule of law or reason that sustains that conclusion.

The rule is: "Where the evidence is insufficient to sustain a verdict in favor of plaintiff, the trial court may give a peremptory instruction in favor of defendant or excuse the jury and enter a nonsuit." Campbell v. Columbia Casualty Co., 125 Neb. 1, 248 N. W. 690. See, also, Rzeszotarski v. American Smelting & Refining Co., 133 Neb. 825, 277 N. W. 334.

The judgment of the district court is affirmed.

AFFIRMED.

EINOT, INC., APPELLEE, V. EINOT SALES CO., INC., APPELLANT.
51 N. W. 2d 791

Filed February 15, 1952. No. 33004.

SUPPLEMENTAL OPINION

APPEAL from the district court for Dodge County: RUSSELL A. ROBINSON, JUDGE. See 154 Neb. 760, 49 N. W. 2d 625, for original opinion. *Rehearing denied and original opinion adhered to.*

Richards, Yost & Shafersman, for appellant.

Sidner, Lee & Gunderson, and *Spear, Lamme & Flory,* for appellee.

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

YEAGER, J.

By motion for rehearing, among other contentions, the appellee contends substantially that this court was in error in that portion of the opinion wherein it is stated: "On January 3, 1951, attorneys for plaintiff received for and on behalf of plaintiff the $1,017.70 which had been paid into court for the benefit of plaintiff."

The basis of the contention is that this information is not legally authentically before the court, it not appearing in the bill of exceptions. The contention is a valid one and will be so recognized and the statement withdrawn. It will be pointed out however that in the original brief of appellant the subject was presented as authentically appearing and the appellee made no resistance thereto on the ground of lack of authenticity. The matter of receipt of the amount by the attorneys was not even responded to by attorneys for appellee.

The deletion of this sentence however does not affect the decision nor the remainder of the opinion. The record, as pointed out in the opinion, discloses that after declaration of and action for forfeiture the appellee accepted or at least retained certified checks for subsequent payments coming due under the contract. As pointed out in the former opinion this amounted to a waiver of the right of appellee to forfeit the contract.

With the deletion mentioned the motion for rehearing is overruled and the original opinion adhered to.

REHEARING DENIED AND ORIGINAL OPINION ADHERED TO.

FERN GARNETT PARKER, APPELLANT, V. IRVEN C. PARKER, APPELLEE.

51 N. W. 2d 753

Filed February 15, 1952. No. 33029.

1. **Divorce.** A decree of divorce may not be granted on the uncorroborated declarations, confessions, or admissions of the parties to the case.
2. ———. A general rule by which to measure the exact amount or degree of corroboration required in a divorce case cannot be formulated, and each case must be determined upon its facts and circumstances.
3. ———. Extreme cruelty may consist of personal injury or physical violence, or it may be acts or omissions of such a character as to destroy the peace of mind or impair the bodily or mental health of the one upon whom they are inflicted or towards whom they are directed, or be such as to destroy the objects of matrimony.
4. ———. The court in deciding the amount of alimony or in making a division of property in a divorce case will consider the ages of the parties, their earning ability, the duration of and the conduct of each during the marriage, their station in life, the circumstances and necessities of each, the physical condition of each, the property owned by them, and whether or not it was acquired by their joint efforts, and any other pertinent facts.

APPEAL from the district court for Lincoln County: JOHN H. KUNS, JUDGE. *Affirmed as modified.*

Crosby & Crosby, for appellant.

Beatty, Clarke, Murphy & Morgan, for appellee.

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

BOSLAUGH, J.

This is an action of divorce instituted by appellant on the ground of extreme cruelty inflicted upon her by appellee. He denied the charges of appellant and by cross-action sought a divorce from her on the claim that she had practiced extreme cruelty on him. The district court granted appellant a divorce, adjusted the

rights of each in the property accumulated by them during the marriage, reserved the matter of the custody of the minor children of the parties, dismissed the cross-petition of appellee, and denied the separate requests of the parties for a new trial.

The appellant complains that the award of money and property to her is legally unfair and inadequate, and that an insufficient amount was allowed by the court as compensation of her counsel. Appellee by cross-appeal presents the contentions that the evidence did not authorize the grant of a decree of divorce to appellant; that the proof entitled appellee to a divorce; and that the amount of property and money decreed to appellant is excessive.

The petition on which this case was heard and decided alleged generally that appellee had been guilty of acts of extreme cruelty toward appellant during much of the married relationship of the parties, and specifically that he had on many occasions urged appellant to remove from their home; that he did not desire to live with her; that he had no affection for her; that he was enamored with another woman; that his conduct had been cruel toward appellant; and that he had subjected her to the ridicule of her friends and neighbors. Appellant also charged that about the first of April 1950, appellee told appellant he would no longer live with her in their home; that he had a woman in North Platte that loved him; and that he then left the home of the parties and has not since offered or desired to return to and resume the marriage status with appellant.

The parties were married August 27, 1928. The age of each was about 20 years. They resided on farms and later on a ranch. They were hard-working, thrifty, and economical. They had very little assistance. Their farming operations were considerable, and grew and enlarged until the farming and ranching done by them was quite extensive. Appellant did the home work, cared for the children, kept a good home, and did many

kinds of work outside the home. She raised chickens, made and cultivated a garden, milked cows, attended the chores, and gave her attention and efforts to whatever there was to do—"Seemed like there was always something for me to do." They accumulated 2,160 acres of land and a herd of cattle appropriate to their ranch operations; and acquired machinery, trucks, automobiles, and equipment. They reconditioned and added to the improvements on the land they acquired. They have three well-trained, affectionate, and obedient sons.

The record indicates the parties from the time of their marriage until about the end of 1949 devoted themselves to hard work in a determined persistent plan to acquire and pay for property, almost to the exclusion of many of the indulgences usual to even rural life; and that they had few diversions and very infrequent recreation. They had many unpleasant and sometimes violent disagreements. It is not necessary to detail or attempt to evaluate the situation during those years closely and deeply enough to fairly ascribe the greater degree of blame to either. The obvious fact is that the relationship of the parties as the time of their marriage lengthened became rapidly and increasingly less desirable than what it should have been.

Appellee entered the employ of Farm Service Company of North Platte commencing with January 1, 1950, and took over the operation of it February 1, 1950. Appellant and the sons of the parties remained on the ranch. Appellee returned to the ranch generally each night and supervised the work there until about April 1, 1950.

After appellee became employed in North Platte he stayed away from home more, and when he did return it was later at night or early in the morning. He neglected and disregarded appellant; he was quarrelsome with and abusive toward her; and he would agree to accompany her to places such as dinner at the home of a friend, would not appear at the agreed time, but would some-

times come hours later, and sometimes would not come at all. His defaults were unexplained. Appellant, at the request of appellee, went to Ogallala and stayed at the home of her sister for several days in the early spring of 1950. When she returned she met appellee in Sutherland and accompanied him from there to their home. He showed no interest in her and exhibited no affection for her. This was about April 1, 1950—the night of Good Friday. He then told her about the other woman; how she liked him; that she was in North Platte while he came after appellant; and that he was supposed to take the other woman home. When they reached their home about 10:30 or 11:00 p. m., appellee left. He did not explain where he was going. They have not associated as husband and wife since.

Appellee told appellant about the other woman, who is identified in the record as Mrs. Olson; and that he took her from her home to the place where she worked, and accompanied her to lunch and from her work to her home at the close of the day. About the first of June 1950, he told appellant he was going to take Mrs. Olson to Colorado, and he later told appellant that he and Mrs. Olson had made that trip. He told appellant that they had been in Lincoln in May of 1950. The appellant and her sister saw Mrs. Olson and appellee traveling together when appellee was returning from a trip to Sterling, Colorado. They also saw appellee and Mrs. Olson come out and leave a cabin of the Highway Motel in North Platte about 8 a. m. on October 22, 1950.

Appellee and a woman occupied a cabin of the Highway Motel the night of July 6, 1950. He signed the guest register at the motel: "Name: Mr. and Mrs. Red Parker; Address: North Platte; License Number: 15-4542; Car Make: Pont." The woman was not appellant. She was never at the motel with appellee. He was sometimes known as Red Parker. His automobile was correctly described on the register. Appellee was at this motel, and rented and occupied a cabin with a

woman on 19 different times during July and August of 1950.

Appellee told a witness that he met this woman at Mac's 30 Club; that she asked him if he would dance with her, and he did; that she said her husband was getting a divorce; and on that occasion they "cried on each other's shoulders." He told the witness about his keeping company with her, the fact that she was 22 years old, and that "sometimes he felt rather foolish with her." Appellee on the trial of the case admitted that he had been keeping company with Mrs. Olson; that he made a trip to Denver with her; and that he told his wife he had not been "chasing with a woman. I had been around with a certain girl." There is additional evidence of the association of appellee with Mrs. Olson that need not be stated.

Appellee contends that the corroborative evidence is not sufficient in this case. A decree of divorce may not be granted on the uncorroborated declarations, confessions, or admissions of the parties to the case. § 42-335, R. S. 1943; Peterson v. Peterson, 153 Neb. 727, 46 N. W. 2d 126. But the doctrine in this jurisdiction is that a general rule by which to measure the exact amount or degree of corroboration required in a divorce case cannot be formulated, and each case must be decided on its facts and circumstances. Strasser v. Strasser, 153 Neb. 288, 44 N. W. 2d 508; Peterson v. Peterson, *supra.* The evidence of the misconduct of appellee constituting extreme cruelty towards appellant is sufficiently corroborated, and the trial court was correct in granting a decree of divorce to appellant and in denying the cross-petition of appellee. In Peterson v. Peterson, *supra,* this court said: "Extreme cruelty may consist of personal injury or physical violence, or it may be acts or omissions of such a character as to destroy the peace of mind or impair the bodily or mental health of the one upon whom they are inflicted or towards whom they

are directed, or be such as to destroy the objects of matrimony."

Appellee claims that the amount of money and property awarded by the district court is excessive. The rule for determining the question of alimony or division of property between the parties to a divorce case is well settled, has been recently restated, and need not be here repeated. Strasser v. Strasser, *supra;* Brudevold v. Brudevold, 153 Neb. 545, 45 N. W. 2d 443; McNamee v. McNamee, 154 Neb. 212, 47 N. W. 2d 383. The parties to this case at the time of their marriage had very little property. Appellant had taught school and had accumulated a small amount of money. Appellee had a few items of personal property and some cash. They put their money in a common account and their other property was considered and treated as joint property. All of the property owned by them when the controversy in this case arose, except the new automobile purchased by appellant with money borrowed from her father, was the result of their joint efforts and accumulations during their marriage. The award made to appellant is not excessive.

The judgment of the district court assigns all the real estate and all the personal property incident thereto and kept thereon, except 50 head of cattle and 2 bulls and the household goods, to appellee. It sets over and assigns the 50 head of cattle and 2 bulls to appellant. She is not under these circumstances equipped to keep, handle, or dispose of the animals given her by the decree reasonably or advantageously.

The conclusion is that all provisions of the decree of the district court should be affirmed except the provision awarding to the appellant the sum of $33,000; that said amount should be and is increased to $44,750, and that it should be and is adjudged to be paid to appellant within 60 days from the date of the mandate issued in this case; that the 50 head of cattle and 2 bulls assigned to appellant by the decree of the district court should be

and they are assigned and set over to the appellee; and that the judgment should be and is accordingly modified, and as modified, it is affirmed.

Appellee should be and he is ordered to pay, as compensation for the counsel of appellant for all services rendered in and concerning the controversy involved in this case in the district court and in this court, the total sum of $3,000, or an amount in addition to that required by the district court of $1,750, and that the costs should be and they are taxed to appellee.

AFFIRMED AS MODIFIED.

PAT ADAMS, THROUGH AND BY HIS FATHER AND NEXT FRIEND, LLOYD ADAMS, APPELLANT, V. VERNON WELLIVER, APPELLEE.
51 N. W. 2d 739

Filed February 15, 1952. No. 33064.

1. **Automobiles.** Our statutes contemplate not only the installation of warning devices on motor-propelled vehicles but that they shall be used opportunely by the drivers of such vehicles to apprise pedestrians and other drivers of the approach of an on-coming car. The duty to sound a signal warning of the approach of a motor vehicle depends largely on the circumstances of the particular case.
2. ———. It is the duty of the driver of an automobile to exercise reasonable care in its operation and, when pedestrians are numerous and traffic is congested, the degree of care required must be commensurate with the danger reasonably to be anticipated.
3. **Automobiles: Infants.** Until the driver of an automobile has notice of the presence or likelihood of children near his line of travel, he is bound only to the exercise of reasonable care, and has the right to assume that others will do likewise; and until he has such notice the rule is the same as respects children and adults.
4. **Infants: Negligence.** The age when an infant during its minority may be capable of understanding and avoiding dangers encountered while traveling upon a public street in a city cannot be fixed by arbitrary rule, and is generally a question of fact for the jury.

5. ———: ———. Whether or not an infant between nine and ten years of age is of sufficient knowledge, discretion, and appreciation of danger that he may be subject to the defense of contributory negligence is generally a question of fact and not of law.
6. ———: ———. What is required of an infant is the exercise of that degree of care which an ordinary prudent child of the same capacity to appreciate and avoid danger would use in the same situation.
7. Trial. The instructions to the jury in this case, when considered and construed together, fairly state the law applicable to the issues raised by the pleadings and proofs.

APPEAL from the district court for Dawson County: JOHN H. KUNS, JUDGE. *Affirmed.*

Dryden, Jensen & Dier, and *Smith Brothers,* for appellant.

Johnson & Stuart, for appellee.

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

MESSMORE, J.

This action for damages was brought in the district court for Dawson County by Lloyd Adams, father and next friend of Pat Adams a minor, against Vernon Welliver, defendant, to recover for personal injuries sustained by the minor when he came in contact with the defendant's automobile at an intersection crossing in the city of Lexington. The cause was tried to a jury, resulting in a verdict for the defendant. The plaintiff filed a motion for new trial which was overruled. Plaintiff appeals.

For convenience we will refer to the minor Pat Adams as Pat, or the plaintiff; to the defendant, Vernon Welliver, as defendant; and to other persons, as occasion requires, by their proper names.

The pleadings of the parties necessary to be considered in this appeal may be summarized as follows. The amended petition of the plaintiff charges negligence on

the part of the defendant in the following respects: In operating his automobile at a high and excessive rate of speed, in excess of 25 miles an hour, and negligently failing to have the same under control; in failing to maintain a proper lookout for other persons on the highway at the time and place in question; in failing to operate his automobile so as to prevent the same from running into, upon, and against the body of the plaintiff; and of negligently failing to sound his horn or warn the plaintiff of his intention to turn west at the intersection of Washington and Fifth Streets which the plaintiff was crossing from the south to the north.

The answer of the defendant was a general denial, and affirmatively alleged that the sole and proximate cause of the injuries sustained by the plaintiff was due to the negligence of the plaintiff in running and placing himself in front of the defendant's moving automobile at a point on Fifth Street 45 feet west of the cross walk of the intersection, where pedestrians are not expected to be crossing.

The plaintiff's reply to the affirmative allegations of the defendant's answer was a general denial.

The record discloses that Pat Adams, a minor 9 years of age, and his brother Darrell Adams, 13 years of age, were given some spending money by their father, Lloyd Adams, on Saturday evening, June 24, 1950, and were granted permission by their parents to go up town in Lexington to spend it. The evening was warm and pleasant. There was a large crowd in the city and the diagonal parking spaces on both the north and south sides of Fifth Street were filled with parked automobiles, as apparently was the case on Washington Street also. In this situation the driveable distance between parked cars north and south on Fifth Street is 28 feet.

The boys decided to visit some friends who lived west on Fifth Street in the city. They visited for a few minutes, then they proceeded east on the sidewalk on the

south side of Fifth Street to the intersection of Washington and Fifth Streets.

Washington Street, referred to as the main street of the city, runs north and south and is paved. Fifth Street runs east and west and consists of bare brick paving. On the southwest corner of the intersection is McKee's Jewelry Store. Directly across the street north is the City Bakery. The distance from curb to curb, north and south on Fifth Street, is 56 feet. The cross walk across the west side of the intersection and the sidewalk on the west side of Washington Street is 11 feet 8 inches wide.

When the boys arrived at the corner near McKee's Jewelry Store they stopped and waited for a car that blocked their way to pull out. This car went east on Fifth Street, then south on Washington Street. The boys then started north across the intersection with Pat a short distance in front of Darrell in the intersection cross walk. Pat saw a car, which later developed to be the defendant's car, which had proceeded south on Washington Street and was turning the corner west onto Fifth Street, going fast. He started to run in a northwesterly direction, saw the lights of the defendant's car coming around the corner, and did not have time to stop and let the defendant's car pass in front of him. His brother Darrell stepped back a step or two and remained on the cross walk. He was uninjured. Pat had run five or six steps when the right front wheel of the defendant's car came into contact with him. He was on the right front side of the defendant's car which knocked him down and ran over his legs.

Pat's testimony, in most respects, is corroborated by Darrell. Darrell testified that he stepped back and defendant's car passed in front of him, that he said nothing to Pat at the time, and neither did Pat say anything to him. Pat then started to run. He did not corroborate Pat's testimony that Pat was not running very fast, but testified that he was running fast.

A witness standing at the northwest corner of the intersection near the City Bakery testified that she was going to cross the intersection to the south but stopped to permit defendant's car to get around the corner from Washington Street to proceed west on Fifth Street. She saw the Adams boys standing in the middle of the street where they had stopped to let a car pass in front of them. This car had pulled out from the parking space on the south side of Fifth Street. After this car had passed the boys, Pat started to run in a northwesterly direction, and Darrell stepped back. The defendant's car was turning the corner of the intersection west on Fifth Street at a speed of 30 miles an hour. Pat was not running too fast. He was "zipping" along, and he was not on the cross walk but had deviated from it. This witness did not see the accident, but testified if Pat had continued straight ahead he would not have been hit by the defendant's car, and that he was a little more than halfway across the intersection when he deviated from the cross walk in a northwesterly direction.

A police officer testified that the accident happened about 9:30 p. m. He arrived at the scene of the accident 10 or 15 minutes thereafter and proceeded to investigate and take certain measurements. By measurement he determined it was 43½ feet from the west curb on Washington Street to where Pat was lying when he arrived. It was 31½ feet from where Pat was lying on the pavement west from the west boundary of the cross walk across Fifth Street. He prepared a sketch which showed that Pat was lying behind the third parked automobile on the north side of Fifth Street west of the intersection. Fifth Street is 57 feet 10 inches wide from curb to curb, north and south. There is a stop sign on Fifth Street, requiring automobiles to stop before entering Washington Street. The overall width of the parking spaces north and south on Fifth Street is 16 feet 10 inches. There were no skid marks or brake

marks, nor any signs that the defendant's automobile had come in contact with any object. When this witness found Pat, the defendant's car was directly parallel with the supporting pole of the stairs that lead to the second floor of the City Bakery, and was directly behind the third parked car on the north side of Fifth Street west of the intersection. Measurements made by Pat's father indicate that the distance from the west side of the cross walk west to the center of the third parked car on the north side of Fifth Street is 27 feet.

The defendant testified that he and his wife were down town on the evening the accident occurred and had attended a moving picture show. Just prior to the accident he was driving his 1938 Ford sedan south on Washington Street, and between Fifth and Sixth Streets he was proceeding at a speed of 10 miles an hour. There were other cars in the same traffic lane and also cars moving in the opposite direction. He stopped in front of Wisda's Hardware Store, the first building north of the City Bakery on Washington Street, for the reason that there was a car stopped across the cross walk. Before he turned west on Fifth Street there was no one on the cross walk and he was not required at that time to stop for pedestrians to pass. After he rounded the corner west on Fifth Street he felt a thump. He did not know what it was, and did not see Pat. The lights were burning on his car, and his brakes were good. He was traveling at a speed of between 5 and 10 miles an hour and had driven 40 to 45 feet west on Fifth Street when he felt the bump. He immediately applied his brakes and stopped his car within a distance of 5 feet. He then got out and investigated the accident to determine what he had struck.

It appears by the evidence that Pat was lying under the right front wheel of the defendant's car. His head, shoulders, and the upper part of his chest were under the running board of the car, and the remainder of his

body and legs were extending from under the car toward the north curb.

The defendant's wife corroborated his testimony with reference to the rate of speed he was traveling. She was unaware that defendant's car had come in contact with an object. She testified that defendant was generally looking for rattles in his car, and when he stopped she thought he was making an investigation of that nature. She did not leave the car.

A man and his wife, residents of Cozad, on the evening in question entered Lexington on Fifth Street and proceeded east thereon to the intersection of Fifth and Washington Streets. There were two cars ahead of them proceeding in an easterly direction. The second car ahead of them stopped at the stop sign. There were two boys standing on the south side of Fifth Street at the intersection. One little boy started out, hesitated, then darted out in front of the second car ahead of their car. There was a car coming from the north on Washington Street, turning the corner west onto Fifth Street, with its lights on, driving between 5 and 10 miles an hour. They saw Pat's head from the lights in front of this car, then the defendant's car stopped instantly. This testimony further disclosed that Pat was struck approximately when he was ahead of and about at the center of the front of the defendant's car. The impact between the defendant's car and Pat seemed to throw him forward, or he fell forward. Defendant's car was slightly east and north of these witnesses' car which was stopped at the time of the accident.

The doctor who examined Pat testified that he had a fracture of the right leg, no internal injuries, and no contusions or abrasions on the left leg or other parts of his body.

The plaintiff assigns as error that the verdict of the jury and the judgment of the court entered thereon is not sustained by the evidence and is contrary to law; that the trial court committed prejudicial error in not

instructing the jury on the provisions of the Nebraska statutes with regard to the duty of an automobile driver to sound the horn on his automobile as a warning to pedestrians as provided by section 39-7,115, R. S. 1943; that the trial court committed prejudicial error in refusing to give instruction No. 2 requested by the plaintiff; and that the trial court prejudicially erred in giving instruction No. 4 on contributory negligence and instruction No. 12 on comparative negligence.

The plaintiff relies on the case of Christoffersen v. Weir, 110 Neb. 390, 193 N. W. 922, as being in point on the duty of the defendant in the instant case to sound his horn. The court there held: "It is the duty of the driver of an automobile to exercise reasonable care in its operation, and where pedestrians are numerous and traffic is congested, the degree of care required must be commensurate with the danger reasonably to be anticipated." The court further held that the statute then in force "contemplates, not only the installation of warning devices on motor-propelled vehicles, but that they shall as well be used opportunely by the drivers of such vehicles to apprise pedestrians and other travelers of the approach of an oncoming car." See, also, Tews v. Bamrick, 148 Neb. 59, 26 N. W. 2d 499, to the same effect.

The duty of a motorist to sound a signal warning of his approach depends largely on the circumstances of the particular case. See, Tews v. Bamrick, *supra;* Kauffman v. Fundaburg, 123 Neb. 340, 242 N. W. 658.

A driver of an automobile should have his car under such reasonable control as will enable him to avoid collision with other vehicles or pedestrians, assuming that the drivers of the other vehicles and pedestrians exercise due care. Reasonable control by drivers of motor vehicles is such as will enable them to avoid collision with other vehicles operated without negligence in the streets or intersections, and with pedestrians in the exercise of due care; but complete control such as will only prevent a collision by anticipation of negligence or

illegal disregard of traffic regulations, in the absence of notice, warning, or knowledge, is not required by the laws of Nebraska. See, Ficke v. Gibson, 153 Neb. 478, 45 N. W. 2d 436; Spomer v. Allied Electric & Fixture Co., 120 Neb. 399, 232 N. W. 767.

We believe that under the evidence no question of negligence can attach to the defendant in failing to sound his horn under the circumstances of this case. He was not bound to anticipate that Pat would suddenly and unexpectedly leave the direct line of travel on the cross walk of the intersection, dart forward, and run diagonally in a northwesterly direction in front of his car after he had turned the corner and was proceeding west on Fifth Street. In such a situation defendant's failure to sound the horn had no relationship to the cause of the accident, and therefore was no part of the proximate cause thereof. There is competent evidence by which a jury could determine the situation came about so suddenly that it was, as a matter of fact, impossible for the defendant to respond. The trial court did not err in failing to instruct the jury with reference to the duty of the defendant to sound his horn, as contended for by the plaintiff.

There is no evidence that the defendant's car was not under control in the sense that the law requires. It was stopped within five feet after Pat was struck, a fact indicating that the driver was alert and acted in a prompt manner. See, De Griselles v. Gans, 116 Neb. 835, 219 N. W. 235; Trumbley v. Moore, 151 Neb. 780, 39 N. W. 2d 613.

This brings us to the proposition as to whether or not the trial court erred in instructing the jury on contributory negligence and on comparative negligence.

In Armer v. Omaha and C. B. St. Ry. Co., 151 Neb. 431, 37 N. W. 2d 607, this court held: "The age when an infant during his minority may be capable of understanding and avoiding dangers encountered while traveling upon a public street in a city cannot be fixed by

arbitrary rule, and generally is a question of fact for the jury. * * * Whether or not an infant between 11 and 12 years of age is of sufficient knowledge, discretion, and appreciation of danger that he may be subject to the defense of contributory negligence is generally a question of fact and not of law." In the body of the opinion the court said: "The appellant was about three months past 11 years of age, and cannot be charged with the degree of caution required of an adult in guarding against possible accidents while traveling upon and crossing a street in a city. There is no arbitrary rule fixing the time at which a child during its minority may be declared wholly capable or incapable of understanding and avoiding dangers to be encountered while engaged in such an activity. It is generally considered that such a question is one of fact to be decided by a jury. Whether or not negligence may be attributed to a child of such tender years is usually a matter for a jury under the circumstances of each case. It is only in an extreme situation where the facts show plainly knowledge and appreciation of the danger to be incurred, if certain action is had, that a court may decide as a matter of law that a child of such an age was guilty of negligence, or that his act or omission was the proximate cause of the happening in question. It was a question for the jury whether or not the appellant, a child slightly more than 11 years of age, was or could be negligent, and whether or not any act or omission on her part was the proximate cause of the collision." See, Tews v. Bamrick, *supra;* Kauffman v. Fundaburg, *supra.*

In Rule v. Claar Transfer & Storage Co., 102 Neb. 4, 165 N. W. 883, this court held: "As a general rule, whether a child of 11 years of age is of sufficient knowledge, discretion and appreciation of danger that it may be held guilty of contributory negligence is a question for the jury to determine." The court, in the opinion, said: "The general rule is that whether contributory negligence may be attributed to a child of such tender

years is a matter for the jury under all the circumstances of each case."

In De Griselles v. Gans, *supra,* it was held: "Until a driver of an automobile has notice of the presence or likelihood of children near his line of travel, he is bound only to the exercise of reasonable care, and has the right to assume that others will do likewise; and until he has such notice the rule is the same as respects children and adults."

In the last cited case this court determined that the action of the 9-year-old child was the proximate cause of his death and no recovery could be had against the defendant in any event. There appears in the opinion the statement "The plaintiff's decedent, on account of his tender age, is not chargeable with contributory negligence, * * *." However, this was not a question in the case.

The cases determined by this court which hold that an infant of tender years is not chargeable with contributory negligence appear to be cases where the infant is shown to be 7 years old or less, and where the evidence discloses the infant did not possess sufficient knowledge, discretion, and appreciation of the danger that he might be subject to the defense of contributory negligence. As stated in Armer v. Omaha & C. B. St. Ry. Co., *supra,* "There is no arbitrary rule fixing the time at which a child during its minority may be declared wholly capable or incapable of understanding and avoiding dangers to be encountered * * *." The court went on to say "What is required of an infant is the exercise of that degree of care which an ordinary prudent child of the same capacity to appreciate and avoid danger would use in the same situation." See cases cited in the opinion. See, also, 38 Am. Jur., Negligence, § 205, p. 888; 65 C. J. S., Negligence, § 146, p. 788.

The evidence discloses that Pat Adams was 9 years and a little more than 3 months of age at the time of the accident. From his testimony it is apparent that he was

an intelligent boy, in the fourth grade at school. He testified that he was "scared" when he started to run, but continued to do so. There is competent evidence from which a jury could determine that Pat possessed sufficient knowledge, discretion, and appreciation of danger to be able to avoid it, as an ordinary prudent child of the same capacity to appreciate danger and seek to avoid it would do in the same situation. Under the authorities heretofore cited, we believe it was a question for the jury to determine whether or not, under the circumstances of the case, Pat Adams was guilty of contributory negligence.

This brings us to the question of whether or not the trial court committed prejudicial error in failing to give instruction No. 2, requested by the plaintiff. This instruction is as follows: "You are instructed that 'the law required of those driving in the presence of children such care as is commensurate with the danger reasonably to be anticipated from possible erratic acts of such children. In this respect defendant was required to exercise ordinary care. The standard of care established by the law is what an ordinarily careful and prudent person would do under existing circumstances. One driving in the presence of children, in order to meet the standard of ordinary care, may be required to put forth a greater degree of effort or precaution than under ordinary conditions. It is for you to determine what the defendant's conduct should have been under the circumstances, as shown by the evidence, and whether he failed to exercise ordinary care.' "

In instruction No. 8, the trial court instructed the jury as follows: "A motorist who observes or should reasonably anticipate the presence of children in the highway is obliged to use reasonable care in view of all the circumstances. Such a motorist should realize that not all children exercise the same prudence and judgment of experienced persons and that some of them might do impetuous or thoughtless acts. He is not re-

quired to insure the safey of a child or to prevent the injury of a child at all costs. It is for the jury to determine the amount of care which a reasonable prudent person should have exercised under the circumstances and in view of the amount of danger which should have then been anticipated. The failure to use such amount of care constitutes negligence."

Instruction No. 8, heretofore set out, embodies in it everything that is contained in the requested instruction of the plaintiff, and is a correct statement of the law. See, Tews v. Bamrick, *supra;* Armer v. Omaha and C. B. St. Ry. Co., *supra.*

The instructions to the jury in this case, when considered and construed together, fairly state the law applicable to the issues raised by the pleadings and proofs. See, Barton v. McKay, 36 Neb. 632, 54 N. W. 968; O'Dell v. Goodsell, 152 Neb. 290, 41 N. W. 2d 123.

We conclude that the verdict of the jury and the judgment entered thereon by the trial court are correct and should be, and are hereby, affirmed.

AFFIRMED.

HENRY E. DINGWERTH, APPELLANT, V. FRANK ASSENDROP, APPELLEE.

51 N. W. 2d 756

Filed February 15, 1952. No. 33065.

1. **Deeds: Mortgages.** A deed, in terms conveying a title in fee simple, is not to be held a mortgage, unless given to secure payment of a debt or loan. If personal liability to pay the debt is extinguished and it is optional with the grantor to rescue the property by payment, or relinquish it by nonpayment, it is an absolute sale with privilege of repurchase and not a mortgage.
2. **Frauds, Statute of.** Oral agreements for the sale of lands are void on their face as within the statute of frauds because not in writing, even though proved by clear and satisfactory evidence, unless there has been part performance by the promisee which is solely referable to the contract sought to be established and not such as might be referable to any other contract or situation.

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

Dobry & Dobry, Thomas W. Lanigan, and *Cunningham, McDermott & Cunningham,* for appellant.

Haggart & Haggart, and *Harold A. Prince,* for appellee.

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

WENKE, J.

This action was brought in the district court for Howard County by Henry E. Dingwerth against Frank Assendrop. The action was brought for the purpose of requiring the defendant to specifically perform an alleged oral promise that he would, upon certain conditions being performed by plaintiff, reconvey to the plaintiff certain real estate located in Howard County. Trial was had and, at the close of plaintiff's testimony, the trial court sustained defendant's motion for judgment and dismissed the action. Plaintiff filed a motion for new trial and, from the overruling thereof, took this appeal.

The lands involved are described as follows: "The east half of the Southwest quarter (E½ SW¼) and West sixty (60) acres of the Southeast quarter (SE¼) of Section seven (7), and also the Northeast quarter (NE¼), except the East half of the East half thereof, of Section eighteen (18), all in Township thirteen (13) North, Range Nine (9), West of the 6th principal meridian, in Howard County, Nebraska, * * *."

This action was commenced on July 14, 1950. It is equitable in its nature. The record discloses that appellant bought the 260-acre farm herein involved in 1926, and he and his family moved onto it in 1927. He bought it for $32,000 and subsequently, while still the owner, put on improvements costing about $2,500.

Appellant borrowed money from appellee and on December 1, 1933, gave appellee a note of $9,000 evi-

dencing the indebtedness and also a first mortgage on the above-described lands as security therefor. The note was due in five years and provided for interest to be paid on the principal at five percent per annum. On April 26, 1938, none of the principal had been paid nor had any interest been paid thereon. At that time the interest on the obligation amounted to over $1,950. In addition the appellant had not paid the taxes on the premises for the last half of 1936 and all of 1937. Just what these amounted to is not definitely shown but apparently it was somewhere between $122.64 and $162.24.

Because of these delinquencies appellee threatened appellant with foreclosure. As a result of negotiations resulting therefrom the appellant and his wife, on April 26, 1938, conveyed the lands to appellee. As consideration for the conveyance the mortgage obligation was canceled and the mortgage released, appellant was given a lease of the premises for the year 1938 free of any charges for rent, and, in addition thereto, appellee paid appellant $200.

During the years following the execution and delivery of the deed appellee paid all taxes assessed and levied on the lands, kept the buildings insured, caused improvements and repairs to be made for which he paid, and, in general, treated the land as his own and the appellant as his tenant. It is significant that during these same years appellant treated the appellee as his landlord and occupied the farm as his tenant paying rent to the appellee for the use thereof in excess of $14,650 during the ten years following 1938 for which he asks no accounting.

In his amended petition appellant sets forth the oral promise upon which he relies, and which he claims was an inducement for the execution of the deed, as follows: "That in pursuance of the discussions had between the plaintiff and defendant aforesaid, a few days before the 26th day of April, 1938, defendant came to plaintiff's home and informed plaintiff that he had a proposition

to make to the plaintiff so that it would not be necessary to foreclose the mortgage and submitted the following offer to the plaintiff, to-wit: * * * that the defendant would deed the farm back to the plaintiff whenever the plaintiff was able to pay the principal, interest and taxes then due, at any time during their lifetime; * * *."

Appellant testified appellee said: "'You deed the farm to me and I'll deed it back to you any time you can pay me, * * *.'"

Appellant's evidence, both offered and received, tends to prove that during the negotiations leading up to the deed of April 26, 1938, that appellee promised that if at any time appellant could pay him what he then owed he would deed the farm back to him. It is this oral promise to let appellant repurchase the lands which appellant here seeks to enforce.

The factual situation is the same as was involved in Winkelmann v. Luebbe, 151 Neb. 543, 38 N. W. 2d 334, and what was therein held is here controlling.

The principles therein announced are as follows:

"If a deed is in fact intended as a mortgage and only given as security for a debt such an agreement is enforcible and may be established by parol evidence but it must be established by evidence that is clear, satisfactory, and convincing.

"A deed, in terms conveying a title in fee simple, is not to be held a mortgage, unless given to secure payment of a debt or loan. If personal liability to pay the debt is extinguished and it is optional with the grantor to rescue the property by payment, or relinquish it by nonpayment, it is an absolute sale with privilege of repurchase and not a mortgage.

"Oral agreements for the sale of lands are void on their face as within the statute of frauds because not in writing, even though proved by clear and satisfactory evidence, unless there has been part performance by the promisee which is solely referable to the contract sought

to be established and not such as might be referable to any other contract or situation."

No such part performance as would take the case out from under the statute of frauds has either been alleged or proved. We therefore come to the conclusion that the judgment of the trial court is correct and it is therefore affirmed.

AFFIRMED.

ESTHER M. DOLEN, APPELLEE, V. HOWARD B. DOLEN, APPELLANT.

51 N. W. 2d 734

Filed February 15, 1952. No. 33094.

1. **Appeal and Error.** Exhibits which are introduced in evidence in the case, or excluded therefrom, must be brought before the reviewing court by being incorporated in the bill of exceptions if the action of the district court is to be reviewed.
2. ———. Where, upon the inspection of a bill of exceptions, palpable omissions appear, as that certain exhibits introduced with reference to the defense of res judicata are not incorporated therein, the reviewing court will not pass upon the sufficiency of this evidence to determine the validity of such a defense.
3. **Divorce.** 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, including the social standing, comforts, and luxuries of life which the wife would probably have enjoyed; the circumstances and necessities of each; their health and physical condition; their financial circumstances as shown by the property they owned at the time of the divorce, its value at that time, its income-producing capacity, if any, whether accumulated or acquired before or after the marriage, the manner in which it was acquired, and the contributions each has made thereto; and, from all the relevant facts and circumstances relating thereto, determine the rights of the parties and make an award that is equitable and just.

APPEAL from the district court for Lancaster County: RALPH P. WILSON, JUDGE. *Affirmed.*

James A. Hayward, for appellant.

John H. Binning, for appellee.

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

MESSMORE, J.

This is a divorce action brought by Esther M. Dolen as plaintiff against Howard B. Dolen as defendant in the district court for Lancaster County. Trial was had to the court. The court entered judgment granting the plaintiff an absolute divorce, and made a division of the personal and real property owned by the parties. The plaintiff, by motion, moved the court for an order setting aside the decree entered by the court on June 16, 1951, and requested the court to enter a decree adjudging the plaintiff to be the equitable owner of the real estate involved in this action. The defendant, by motion, moved the court to set aside the decree and dismiss the action for the reason that all the matters set forth in the pleadings of the plaintiff had been previously adjudicated by a former action. The trial court overruled both motions. The defendant appealed from the overruling of his motion to set aside and vacate the decree entered by the trial court on June 16, 1951.

It appears from the transcript that on August 12, 1949, the plaintiff filed suit for divorce against the defendant in the district court for Lancaster County. In her petition she charged the defendant with nonsupport. She also alleged that since the marriage the parties had accumulated certain personal property, and the plaintiff had accumulated a house and some lots. The plaintiff prayed for a divorce from the defendant, that title to the real estate described in the petition be quieted in her, and that she be given such personal property as to the court seemed just and equitable. The defendant,

by answer, denied the allegations of the plaintiff's petition with reference to nonsupport, and, by cross-petition which is in effect an answer, pleaded certain facts with reference to the real estate owned by the parties, claiming an interest therein. The answer of the plaintiff to the cross-petition and reply to the answer of the defendant is a general denial and prays for the dismissal of the defendant's cross-petition. Trial was had before the court, and after the evidence was adduced the court entered judgment that the evidence was insufficient to establish the fact that defendant willfully, wantonly, or cruelly failed to provide support for the plaintiff, and dismissed the plaintiff's petition at plaintiff's costs. The plaintiff filed a motion for new trial which was overruled. No appeal was taken from this judgment.

On March 11, 1950, the plaintiff filed an action for divorce against the defendant in the district court for Lancaster County, alleging that the defendant, since the date of the marriage and particularly during the last ten years, had treated the plaintiff with extreme cruelty and in such a way as to destroy the legitimate objects of matrimony; that the defendant had openly and notoriously consorted with other women; and failed to provide for or support the plaintiff. Plaintiff prayed for an absolute divorce, title to the real estate owned by the parties, and a division of the personal property as the court would judge just and equitable. The defendant moved to dismiss the action, which was overruled. The defendant filed an answer and cross-petition, which is in effect an answer, denying generally the allegations of the plaintiff's petition charging extreme cruelty and consorting with other women. The following is alleged in the purported cross-petition: This cause was tried before Judge Ankeny in the district court, and the court held that no nonsupport had been proven, also, that from the evidence no extreme cruelty had been proven or admitted and therefore found for the defendant. The defendant prayed dismissal of the plaintiff's

petition for the reason that all matters contained therein were res judicata, having been completely gone over in the former petition filed by the plaintiff, heard in the court, and decided theretofore. On June 24, 1950, the court entered judgment granting the plaintiff an absolute divorce from the defendant on the grounds of extreme cruelty. The court found that the plaintiff and defendant owned jointly Lots 19, 20, and 21, Block 3, S. H. Irvine's Second Addition to Lincoln, Lancaster County, Nebraska, commonly described as 1709 North 29th Street; that liens existed against the real estate resulting from judgments obtained against the defendant; that each party would own an undivided one-half interest in the real estate subject to all liens and encumbrances existing against the property; and gave all of the household goods to the plaintiff, and two horses in the defendant's possession to him, together with a Chrysler automobile of which he had possession. Defendant was to pay plaintiff's attorney's fees and costs of the action. The defendant filed a motion for new trial. The primary reason given therein was that there had been a previous adjudication of the matters alleged in the plaintiff's petition which was tried to the district court in a former trial. The plaintiff filed a motion for new trial on the ground that the judgment was contrary to law concerning the disposition of the property of the parties. The trial court entered an order sustaining both the defendant's and plaintiff's motion for new trial, and vacated the decree entered by it on June 24, 1950.

On June 16, 1951, the trial court entered a decree and judgment in substance as follows: It was determined at the trial that the petition of the plaintiff filed in book 177, page 144, of the records of the district court for Lancaster County should be treated as an amended petition in a case filed in book 175, page 113, both cases being entitled as Esther M. Dolen v. Howard B. Dolen, docket 177, page 134. The court then found generally in favor of the plaintiff and that the defendant was

guilty of extreme cruelty to the plaintiff and of adultery which entitled the plaintiff to an absolute divorce from the defendant. The court further found that the plaintiff and defendant were joint owners of the real estate which has been heretofore described; that there were liens existing against the real estate resulting from judgments obtained against the defendant; and that the real estate should be divided, the plaintiff to own 60 percent of the same and the defendant to own 40 percent of the same as tenants in common, subject to all liens and encumbrances then existing of record against the real estate. The court retained jurisdiction to appoint a referee and order a sale of the property and distribution of the proceeds after payment of the liens thereon. The court made no disposition as to the liability of the parties for taxes which might be due or which might arise, or for the payment of insurance, upkeep, and the like. The court gave the plaintiff all of the household goods, awarded the defendant two horses of which he was then in possession, and ordered the defendant to pay the attorney's fees of the plaintiff and costs of the action. Judgment was entered in accordance with the findings. The plaintiff filed a motion to set aside the decree entered by the trial court on June 16, 1951, as being contrary to law and equity in that plaintiff was the equitable owner of the real estate and was entitled to have the title of the same quieted in her as against the defendant. The defendant filed a motion to set aside the decree and dismiss the action, the principal ground therefore being that there had been a previous adjudication of all the matters raised in the pleadings of the plaintiff at a former trial. Both the motions of the plaintiff and of the defendant were overruled. Defendant perfected appeal to this court.

It appears from the record that the plaintiff and defendant were married at Lincoln, Nebraska, on August 16, 1920. They are the parents of three boys now adults, not dependent upon them for support. The plaintiff

lived in the house which they purchased in 1941 as co-owners with a $300 down payment. The defendant raised $200, and the seller of the property loaned the other $100 to constitute the down payment. The latter $100 has not been repaid, $30 being the amount paid on the principal debt, and $5 interest. The plaintiff has been employed at a local general merchandising store for a period of 17 years. When she started her employment she received the sum of $12 a week. There was an arrangement between herself and the defendant that he was to furnish the family with support and she was to make the payments on the home. It appears that she did so, with the exception that on three or four occasions the defendant made certain payments. The evidence is not clear as to just how many payments or the amount thereof that defendant did make on the home. The plaintiff and defendant have not lived together as husband and wife for a period of at least six years. They each have their own rooms and neither occupies the room of the other on any occasion. The plaintiff prepares her own meals, procures her own essentials, and washes and irons the linens and towels for the defendant's room. The defendant procures his meals outside of the home, and both come and go as they please without consulting or interfering with the other. They have nothing in common.

The plaintiff relates in her testimony certain cruel treatment on the part of the defendant during their married life, and that the defendant had sold intoxicating liquor to certain persons when they lived in apartments and subsequently from the basement of the home which they purchased. This continued during 1942, 1943, and at other times. The defendant was of a nervous temperament and the least agitation caused him to use abusive language toward the plaintiff. During January 1946, the defendant moved certain household goods and furniture into the basement of the home, and certain clothing belonging to another woman which he

hung in the closet in his room. This contributed to the plaintiff's unhappiness and made her nervous.

There is evidence that the plaintiff in no event would effect a reconciliation with the defendant and refused to accept any support that he would offer her. In addition, there is evidence to the effect that the plaintiff had the utility bills for the household placed in her name and a separate telephone installed which she testified was placed in the house at the instigation of one of her sons. The telephone in the home placed there by the defendant was at various times disconnected.

It also appears from the record that the defendant was seen by neighbors on various occasions in and near the premises occupied by a married woman; that certain furnishings in the home were purchased by him, of which he claimed to be the owner; and that he paid household bills and exercised control and dominion over the home. On or about February 5, 1946, police officers, in making an investigation to locate certain stolen intoxicating liquor, proceeded to this house and contacted the defendant who informed them they would be required to obtain a search warrant to search the premises, and questioned their jurisdiction to do so. Subsequently he permitted the search in which intoxicating liquor was found cached in the basement of this home. It is obvious that he was consorting with a married woman and, in addition, was also an occupant of the home. Subsequently this woman left the city and joined her husband and children.

It also appears from the record that on behalf of the defendant there was offered in evidence docket 173, number 167, case entitled Esther M. Dolen v. Howard Ben Dolen, filed August 12, 1949, the first petition in divorce filed in this case. This included the whole record which was determined to be all of the pleadings in the case and the decree entered by Judge Ankeny. There was also a motion, after the same served its purpose, to withdraw it and leave it with the clerk of the

district court. Objection was made on the ground that it was irrelevant and immaterial, which was overruled.

The defendant contends the trial court erred in overruling his motion at the close of the plaintiff's evidence to dismiss the plaintiff's cause of action. This assignment of error is based upon the doctrine of res judicata, that is, that all of the matters pleaded by the plaintiff and testified to in the instant case have been adjudicated by a former action between the same parties involving the same subject matter in the district court for Lancaster County, as heretofore appears.

None of the pleadings in the case of Esther M. Dolen v. Howard Ben Dolen, filed August 12, 1949, are incorporated in the bill of exceptions. However, the petition, answer and cross-petition, answer to cross-petition and reply to answer, order dismissing petition, motion for new trial, hearing thereon, and order overruling motion for new trial appear in the transcript in the instant case. There is nothing in the record, by stipulation or otherwise, that exhibits appearing in the transcript are a part of the bill of exceptions or that reference should be made to them as evidence in the bill of exceptions.

"Where, upon an inspection of a bill of exceptions, palpable omissions appear, as that certain exhibits introduced are not incorporated therein, the reviewing court will not pass upon the sufficiency of the evidence to sustain the finding below." Scott v. Society of Russian Israelites, 59 Neb. 571, 81 N. W. 624. In the body of the opinion the following appears: "It is next insisted that defendant is estopped from claiming the invalidity of these taxes, by reason of an alleged former adjudication in a cause between the parties. The court below made no finding on this issue tendered by the reply, and this court is unable to pass upon the question, for the reason that certain exhibits introduced in evidence on the trial are not incorporated in the bill of exceptions.

In view of this fact, it can not be determined whether a prior adjudication was established or not."

Exhibits which are introduced in evidence in the case, or excluded therefrom, must be brought before the reviewing court in the record if the action of the lower court is to be reviewed. 3 Am. Jur., Appeal and Error, § 591, p. 223, and cases cited under note 15 thereof on page 224.

In 4 C. J. S., Appeal and Error, § 738, p. 1216, it is said: "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." See, also, Darlington v. State, 153 Neb. 274, 44 N. W. 2d 468, and cases cited therein.

In this jurisdiction cases too numerous to cite hold that where an assignment of error relates to purported evidence which does not appear in the bill of exceptions, such assignment of error will not be reviewed or determined in this court. We conclude the issue of res judicata as contended for by the defendant is not before this court to be determined.

We review the sufficiency of the evidence in the instant case to determine whether or not the trial court erred in granting the plaintiff an absolute divorce and making a division of the real and personal property owned by the parties. There was no evidence introduced by the defendant to contradict the evidence introduced by the plaintiff. We deem it sufficient to affirm the trial court's judgment in granting the plaintiff an absolute divorce and making division of the real and personal property of the parties.

The plaintiff cross-appeals, assigning as error that the trial court, in overruling the motion of the plaintiff made after the entry of the decree to set aside the same and failing to enter a decree quieting the title to the real estate in the plaintiff so that she would be the sole owner thereof, committed prejudicial error. We have heretofore reviewed the evidence with reference to the

payments made on the real estate by the plaintiff and defendant, and have also made mention of certain judgment liens which were caused by the defendant without knowledge of the plaintiff against the real property and total $1,733.43, without interest.

We are cognizant of the rule that it is well established in a divorce suit where the court has jurisdiction of the parties, it has the power to adjust all of their respective property interests. See, Sims v. Sims, 148 Neb. 771, 29 N. W. 2d 378; Johnsen v. Johnsen, 144 Neb. 208, 12 N. W. 2d 837.

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, including the social standing, comforts, and luxuries of life which the wife would probably have enjoyed; the circumstances and necessities of each; their health and physical condition; their financial circumstances as shown by the property they owned at the time of the divorce, its value at that time, its income-producing capacity, if any, whether accumulated or acquired before or after the marriage, the manner in which it was acquired, and the contributions each has made thereto; and, from all the relevant facts and circumstances relating thereto, determine the rights of the parties and make an award that is equitable and just. See Brudevold v. Brudevold, 153 Neb. 545, 45 N. W. 2d 443.

We believe that, on a review of the record, the court made a just and equitable division of the property, both real and personal, owned by the parties. We conclude the judgment of the trial court in the division of the real estate is just and equitable.

While there is some indication in the defendant's brief that the plaintiff condoned the acts of extreme cruelty on the part of the defendant, there is no evidence

in the record to support condonation on plaintiff's part.

For the reasons given in this opinion the judgment of the trial court is affirmed.

AFFIRMED.

VAYLE VONNE GERKINS KUHL, APPELLEE, V. SCHOOL DISTRICT NO. 76 OF WAYNE COUNTY, NEBRASKA, APPELLANT.
No. 33099.
RALPH M. FLUENT, APPELLEE, V. SCHOOL DISTRICT NO. 76 OF WAYNE COUNTY, NEBRASKA, APPELLANT.
No. 33100.
ARDITH MOFFETT, APPELLEE, V. SCHOOL DISTRICT NO. 76 OF WAYNE COUNTY, NEBRASKA, APPELLANT.
No. 33101.
51 N. W. 2d 746

Filed February 15, 1952.

1. **Judgments.** A judgment is not res judicata as to any fact at issue in subsequent actions where neither issues nor parties are the same.
2. **Schools and School Districts.** A contract to teach entered into by a school board with a teacher who does not qualify by certificate as required by law to teach in the particular type of district involved is invalid and unenforceable.
3. **Injunctions.** When an injunction is legally granted in a case where the court has jurisdiction of the subject matter and the parties, it must be respected and obeyed until it is set aside by the court allowing it, or it is reversed in the appellate court by some appropriate mode of direct review.
4. **Contracts.** A contractual duty or a duty to make compensation is discharged in the absence of circumstances showing either a contrary intention or contributing fault on the part of the person subject to the duty, where performance is subsequently prevented or prohibited by a judicial order made with due authority by a judge who has jurisdiction of the subject matter and the parties.

APPEAL from the district court for Wayne County: JACKSON B. CHASE, JUDGE. *Reversed and dismissed.*

Budd B. Bornhoft, for appellant.

Mark J. Ryan and *Joseph G. Rogers,* for appellees.

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

CHAPPELL, J.

Plaintiffs filed three separate actions at law to recover upon their respective contracts to teach during the 1948-1949 school year, which contracts were allegedly executed and subsequently breached by the officers of defendant district, who wrongfully failed, neglected, and refused to open or conduct the school at any time during such year. Defense was that the contracts were invalid for failure to comply with certain alleged mandatory requirements contained in statutes then controlling, and that certain injunctive orders in full force and effect from August 30, 1948, until January 27, 1950, prevented defendant from opening and conducting a school during all of the period covered by the alleged contracts, and thus by operation of law excused performance thereof. In their amendments to replies, plaintiffs, among other things, also affirmatively alleged that they were "prevented from fulfilling" such contracts "because of the wrongful injunctive orders, wrongfully and illegally issued * * * copies of which * * * are attached to defendant's answer * * *."

A jury was waived, and the issues were tried to the court, after which it was found that the contracts were all valid, that the performance thereof was not excused by operation of law, and the court rendered separate judgments in favor of each plaintiff respectively, taxing costs to defendant. Motions for new trial were overruled, and defendant appealed each case separately, assigning that the judgments were not sustained by the evidence but contrary thereto and contrary to law. The three cases were consolidated by stipulation in this court for purposes of briefing, argument, and decision.

Thus in one opinion we sustain the assignments, concluding that the judgments were respectively contrary to law and clearly wrong.

The pertinent facts as disclosed by the record are either stipulated or undenied. They are as follows: In April 1948 the schoolhouse belonging to defendant district was destroyed by fire. Two buildings were then leased by unanimous action of the board in which school was held for the rest of that school year. No action was taken at the annual school meeting on June 9, 1948, with reference to leasing school buildings for the next school year, but thereafter, on July 20, 1948, the electors defeated a proposal to construct a new schoolhouse. Some disagreement arose between the board members regarding school facilities for the 1948-1949 school year, whereupon the moderator and director entered into an oral lease for the same buildings as theretofore leased, in which school was to open on September 6, 1948, for the 1948-1949 school year.

On August 12, 1948, the same moderator and director entered into the alleged contract with plaintiff Kuhl to teach elementary grades. She then held a third grade elementary certificate valid for that purpose in article 3 schools, as provided by section 79-1310, R. S. 1943. However, such certificate was not registered in the office of the county superintendent until September 9, 1948, after the alleged contract was executed, after school was supposed to open on September 6, and after the injunctive orders which prevented performance were in full force and effect.

Likewise, on August 13, 1948, such officers entered into the alleged contract with plaintiff Fluent to serve as school superintendent. He then held a certificate valid for that purpose which, however, was not registered in the office of the county superintendent until August 18, 1948, after the alleged contract was executed.

Likewise, on August 25, 1948, they entered into the alleged contract with plaintiff Moffett to teach elemen-

tary grades. She had previously taught in Dixon County schools, but her third grade elementary certificate, valid for teaching elementary grades in article 3 schools, had expired in June 1948 and at time of executing the alleged contract she had no certificate whatever. The blank space in such printed contract into which should have been written the type of certificate then held by her was for that reason left blank and still so appears. However, she attended summer school at Wayne State Teachers College and had earned credits sufficient to entitle her to renewal of her certificate. On August 28, 1948, she applied for such renewal. After some delay occasioned by the Department of Public Instruction such a certificate, antedated September 8, 1948, was received by her about September 22, 1948, and was registered in the office of the county superintendent on October 6, 1948, all of which occurred after the alleged contract was executed, after the time set for opening school, and after the injunctive orders preventing the same were in full force and effect.

Be that as it may, no school whatever was opened or held in defendant district during the 1948-1949 school year and its children attended neighboring districts. As affirmatively pleaded by both plaintiffs and defendant and as stipulated by them, the reason therefor and the reason for failure to perform the alleged contracts as well was "That defendant's school was not operated during the school year of 1948-1949 by reason of the injunctive orders" entered by courts of competent jurisdiction, which continuously enjoined the opening or conducting of any school from August 30, 1948, until final decision by this court in Griggs v. School District, 152 Neb. 282, 40 N. W. 2d 859, on January 27, 1950, which was more than six months after the teaching dates under the alleged contracts had expired.

In that connection, on August 30, 1948, one Ira O. Griggs, a taxpayer and resident elector of the district, filed an action in the district court in his own right

and on behalf of all persons similarly situated, against the district and its officers, to enjoin the expenditure of school district funds, the entering into of agreements in regard to operation of a school, changing the site of the school, and leasing a building for school purposes unless and until approved by the legal voters of the district.

On that date, in the absence of the district judges from Wayne County, the county judge issued a temporary restraining order, conditioned upon the execution of a $250 bond, restraining defendants and each of them from in any manner conducting a school, entering into any teacher contracts, and expending any of the district's money upon any building not belonging to the district. The matter of hearing upon the application for a temporary injunction was duly set and noticed for September 9, 1948, at 10 a. m. In the meantime, a director notified plaintiffs of the proceedings, and that school would not be opened on September 6, 1948, as planned.

Thereafter, on September 9, 1948, after hearing whereat evidence was adduced, and over objections by defendants, the district court granted a temporary injunction conditioned upon the giving of a $1,000 bond, which injunction enjoined defendants from leasing or carrying out the terms of any lease for school buildings or changing the school site until and unless approved by electors of the district. They were also enjoined in any event from maintaining a high school.

Thereafter, on September 24, 1948, the voters of the district unanimously voted against a proposal to lease a described hall for school purposes, whereupon defendant officers answered, denying generally any right to injunctive relief, alleging that the district for many years prior to 1947-1948, had lawfully maintained an eighth grade and a four-year high school and that in attempting to hire teachers and lease buildings for school purposes they were merely carrying out the duties im-

posed by statute upon officers of such a district. They prayed for dissolution of the temporary injunction and dismissal of the petition at plaintiffs' costs.

On November 24, 1948, a trial of the issues was had whereat evidence was adduced and the cause was submitted to the court. Briefs were subsequently filed by counsel for the parties and on April 19, 1949, a memorandum opinion was filed by the trial court and a decree was rendered, finding and adjudging the issues generally in favor of plaintiffs and against defendants, with costs taxed to defendant moderator and director. It concluded substantially that such officers had, without legal authority, attempted to lease buildings, change the schoolhouse site, spend school funds, and conduct a high school in the district, and that the temporary injunction theretofore granted should be made permanent in accord with the prayer of plaintiffs' petition. It then so decreed, permanently enjoining defendants from leasing or attempting to lease a school building for school purposes, changing or attempting to change a school site, and from making any expenditure of district funds without and until so authorized by vote of electors of the district, and enjoined defendants from maintaining a high school in any event.

Therefrom defendants timely appealed to this court whereat in the opinion, Griggs v. School District, *supra,* it was concluded that defendant district was and had been for many years beyond the limitations of section 79-308, R. S. 1943, an article 6 and not an article 3 school, that its officers were governed by the statutes and regulations with reference thereto, and that until the legal voters in the district proceeded by law to effect a change in its organization such powers so remained. Consequently it was concluded that the officers could conduct a grade and high school, employ teachers, enter into contracts necessary to performance of their duties authorized by law, with implied power in an emergency to lease buildings suitable for school purposes, that the

leasing of a building for use as a temporary school was not a change of the school site within the purview of the statute, and that such school board was authorized to draw and deliver warrants in payment of expenses necessary to conduct and maintain the school.

In the light thereof we concluded that the trial court erred in granting plaintiffs any of the relief sought. Thus we reversed the judgment and dismissed the cause. The mandate therein, appearing in the record now before us, dated February 17, 1950, so ordered, taxed costs to plaintiffs as appellees, and awarded execution therefor.

Defendant argued in the present appeals that, in the light of the provisions of then applicable statutes, the alleged contracts involved were invalid.

In that connection, section 79-1310, R. S. 1943, provided in part: "The Nebraska Third Grade Elementary School Certificate shall be valid in kindergarten to eighth grade inclusive for a period of three years in schools organized under sections 79-301 to 79-311." Such schools are generally designated as article 3 schools.

Section 79-1333, R. S. 1943, provided: "No person shall be employed to teach in any public, private, denominational or parochial school in this state who does not hold a valid Nebraska certificate legalizing him to teach the grade or subjects to which elected."

Section 79-1338, R. S. 1943, provided: "Each holder of a teacher's certificate shall, *before contracting to teach, register the same* in the office of the county superintendent of the county in which he is contracting to teach. The superintendent shall endorse upon the certificate that it has been registered and the date thereof. Such registration shall be without fee, and *no certificate to teach nor contract for a school shall be valid until the certificate is so registered.* The school board at the time of contracting with a teacher shall transmit to the county superintendent the name of the teacher to be employed, together with the position to which elected.

The county superintendent at the time of receiving notice shall certify to the school board the name of any teacher who has not met with the requirements of the law as herein provided, and *such contract and certificate shall be invalid* and the teacher *shall* be immediately dismissed by the board." (Italics supplied.)

Section 79-1339, R. S. 1943, provided: "The school board shall be personally liable for all public moneys paid to teachers who are not qualified under the provisions of sections 79-1309 to 79-1339. A teacher violating the provisions of said sections shall not recover any moneys for services while teaching *during the time that such contract and certificate are invalid.*" (Italics supplied.)

Plaintiffs' contention that validity of the contracts here involved was res judicata by reason of the opinion in Griggs v. School District, *supra,* has no merit. The applicable rule is that a judgment is not res judicata as to any fact at issue in subsequent actions where neither issues nor parties are the same. Plattsmouth Bridge Co. v. Turner, 128 Neb. 738, 260 N. W. 562; Gulizia v. Royal Indemnity Co., 139 Neb. 832, 299 N. W. 220.

It will be noted that plaintiffs Kuhl and Moffett not only did not register any certificate in the office of the county superintendent before contracting to teach, but also in fact plaintiff Moffett had no certificate whatever when the contract was executed, and neither of such plaintiffs ever held a certificate authorizing her to teach in an article 6 school such as defendant had been for almost a quarter of a century. See Griggs v. School District, *supra.* Whether or not the county superintendent and others thought that defendant was an article 3 school district is of no consequence. Therefore, under the express provisions of the foregoing statutes such plaintiffs were not qualified to enter into any contract with defendant to teach, nor was defendant through its board authorized to enter into any con-

tract with such plaintiffs for that purpose and, as provided by statute, their contracts were invalid.

Their situation is identical in principle with that of the plaintiff in Zevin v. School District, 144 Neb. 100, 12 N. W. 2d 634, wherein a recovery was denied upon the ground that the contract was void. In doing so, we quoted with approval from 24 R. C. L., § 73, p. 616, where it is said: " 'There are statutes in many jurisdictions providing that persons teaching in the public schools must be holders of teachers' certificates and the question has frequently arisen as to the effect of a contract made by a board with a person not so qualified. Such provisions may be neither waived nor dispensed with and it has been held broadly that the possession of the certificate is a necessary prerequisite to appointment or employment and that any contract made with a teacher not having such certificate is void so as not even to be susceptible of ratification, and that a teacher who lacks the required certificate or license cannot recover on his contract for services rendered thereunder, because the right of a public officer to the compensation of his office is incident to and dependent upon his right and title to the office.' " That rule would prevent plaintiffs Kuhl and Moffett from recovering anything upon their alleged contracts.

On the other hand, plaintiff Fluent did hold a Nebraska Provisional Administrative and Supervisory Certificate at the time the alleged contract was executed on August 13, 1948. It was not registered at that time but that was done on August 18, 1948, before the effective date of the injunctions and before school was supposed to open. However, he never did teach in defendant school, but upon being prevented from doing so by the injunctive orders, he obtained employment elsewhere at a lesser salary and here claims the difference. His case is factually distinguishable from that of plaintiffs Kuhl and Moffett here and the plaintiff in Zevin v. School District, *supra,* but whether or not his contract

was invalid for failure to register the same "before contracting to teach" we are not required to decide. As hereinafter observed, we may assume for purpose of argument only that it was valid and arrive at the same result.

In that connection, there is good reason why none of the plaintiffs could recover in any event. Each of the contracts provided that they could be terminated "by the operation of law" without "penalty." We conclude that they were so terminated by the injunctive orders heretofore discussed. With regard to that conclusion, in Restatement, Contracts, § 458, p. 852, entitled "Supervening Prohibition or Prevention by Law" it is said: "A contractual duty or a duty to make compensation is discharged, in the absence of circumstances showing either a contrary intention or contributing fault on the part of the person subject to the duty, where performance is subsequently prevented or prohibited * * * (b) by a judicial, executive or administrative order made with due authority by a judge or other officer of the United States, or of any one of the United States."

Illustration 3 at p. 854 following such section is identical in all material respects with the case at bar. To paraphrase it would serve no purpose. It is sufficient for us to say that in the absence of circumstances showing a contrary intention or contributing fault by defendant, the rule is controlling here.

As stated in 6 Corbin on Contracts, § 1346, p. 348, citing cases: "Performance of a contract is sometimes prevented by a judicial order or decree forbidding such performance or by a judicial seizure of subject matter or of the means necessary to performance. Some cases have held that this kind of prevention is not a good excuse for non-performance. These holdings can be justified if the judicial action was brought about by reason of the defendant's default in performance of some other legal duty, or if the defendant could have prevented such judicial action by diligent effort. The de-

fendant owed a duty to the plaintiff to perform his contract; and this includes the duty of taking all steps that are necessary to such performance, even including the prevention of interference by third parties so far as is possible by a reasonable degree of effort.

"Prevention of performance by judicial order or decree, at the instigation of third parties, may properly be held to be a valid defense in an action for breach of contract, if it was not caused by the defendant's own negligence or breach of duty to others and if no means of avoiding such interference with performance are reasonably available." The case at bar comes squarely within such statement. See, also, 6 Williston on Contracts (Rev. Ed.), § 1939, p. 5432; 13 C. J., Contracts, § 720, p. 646; 17 C. J. S., Contracts, § 467, p. 964.

As simply stated in Bishop on Contracts (2d Ed.), § 607, p. 256: "Judicial process,—interrupting the doing of the thing, and rendering it impossible, will excuse performance."

In 12 Am. Jur., Contracts, § 379, p. 956, note 1, it is said: "The doctrine that where performance of a contract is prevented by the action of a court of competent jurisdiction nonperformance is excused has been expressly approved as falling within the rule that where a party is prevented from performance of a contract by an event of such a character that it could not reasonably be supposed to have been within the contemplation of the contracting parties when the contract was made, nonperformance is excused. Annotation: L. R. A. 1916F, 75."

In School District v. Howard, 5 Neb. Unoff. 340, 98 N. W. 666, the school was closed by order of the board of health. A teacher sought in that action to recover wages allegedly due under his contract during such period. Defense by the district was that it was prevented from carrying out the contract because it was made impossible by law. In that opinion this court reversed the judgment for plaintiff, saying: "But the

action of the district in closing the school was not voluntary. It was the act of the law which the district and all others were compelled to obey." See, also, 56 C. J., Schools and School Districts, § 373, p. 420, citing the aforesaid Nebraska case and Gregg School Township v. Hinshaw, 76 Ind. App. 503, 132 N. E. 586, 17 A. L. R. 1222, a case almost identical therewith.

In Burkhardt v. Georgia School Township, 9 S. D. 315, 69 N. W. 16, it was held: "An injunction restraining a person from performing a contract with a school board for the removal of a school house will excuse such person from performing his contract, in the absence of a showing that the injunction was dissolved within such time as made it necessary for him to resume work."

In Olyphant Borough School District v. American Surety Co., 322 Pa. 22, 184 A. 758, it is said: "It is a fundamental principle that where the performance of a contract is prevented, without fault on the part of the promisor, by a proper judicial order, the obligation to perform is discharged: Restatement, Contracts, section 458; see Monaca Boro. v. M. & A. St. Ry. Co., 247 Pa. 242; 3 Williston, Contracts, section 1939."

It has long been the rule in this jurisdiction that: "A party is not punishable for contempt of court for disregarding a void order of injunction; but, when an injunction is legally granted in a case where the court has jurisdiction of the subject matter and of the parties, it must be respected until it is set aside by the court allowing it, or is reversed in the appellate court by some appropriate mode of direct review." Miles v. State, 74 Neb. 684, 105 N. W. 301. See, also, 28 Am. Jur., Injunctions, § 330, p. 503. Concededly, the injunctive orders here involved were not void and defendant district and its officers were required to obey them until the granting thereof was reversed by this court upon appeal.

In the case at bar the injunctive orders prevented defendant district from opening or holding school dur-

ing all and more of the period involved in the contracts. Thus the thing contracted to be done was thereby made impossible of performance by law. There is no obligation to do impossible things.

We have been cited no authority by plaintiffs and have found none holding, under circumstances comparable with those at bar, that defendant was required to perform the contracts involved.

For the reasons heretofore stated we conclude that the respective judgments should be and hereby are each reversed and the actions are each dismissed. Costs in each case are taxed to the respective plaintiffs therein.

REVERSED AND DISMISSED.

JULIUS SCHMIDT, PLAINTIFF IN ERROR, V. THE STATE OF NEBRASKA, DEFENDANT IN ERROR.

51 N. W. 2d 759

Filed February 15, 1952. No. 33102.

Criminal Law: Appeal and Error. This court, in a criminal action, will not interfere with a verdict of guilty, based upon 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.

ERROR to the district court for Saline County: STANLEY BARTOS, JUDGE. *Affirmed.*

John E. Mekota, for plaintiff in error.

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

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

WENKE, J.

Julius Schmidt brings this error proceeding from his conviction in the district court for Saline County of the charge of unlawfully operating a motor vehicle

upon the highways in Saline County while under the influence of alcoholic liquor.

In this opinion we will refer to the petitioner in error as the defendant.

Defendant's primary contention is that the evidence adduced is not sufficient to sustain the conviction.

We held in Vaca v. State, 150 Neb. 516, 34 N. W. 2d 873: "This court, in a criminal action, will not interfere with a verdict of guilty, based upon 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."

The State offered the evidence of the arresting officer, State Safety Patrolman Winston L. Flowers. He testified that during the evening of October 2, 1950, at about 9:30 p. m., he observed defendant's car going north on State Highway No. 82 a short distance north of Wilber, Nebraska; that because of the manner in which the car was being driven he followed it for about two miles; that while he followed it the car swerved back and forth; that he stopped the car and defendant was driving it; that he smelled a heavy odor of alcohol about defendant; that he found two pint bottles of liquor in defendant's car with the seals broken, one being whiskey and the other peppermint schnapps; that as defendant walked from his car to the patrol car he staggered and swayed; that he brought defendant to the jail in Wilber; that when defendant got out of the patrol car at the jail he staggered and almost fell; that he gave defendant some tests while at the jail and testified to defendant's reaction thereto; that defendant was quarrelsome; and that based on what he observed he was of the opinion defendant was under the influence of intoxicating liquor.

The State also offered the evidence of Richard Shestak, a deputy sheriff of Saline County, who observed defendant that night at the jail in Wilber when he was brought there by patrolman Flowers. Shestak testified he saw defendant that night and observed his unsteady condi-

tion, his quarrelsome and belligerent attitude, and from what he observed thought defendant was under the influence of liquor.

We think the evidence presented a case for the jury and that the jury's verdict of guilty is sufficiently supported by the evidence adduced.

The defendant further contends that the court erred in admitting, over objection, certain testimony of Charles Mundil, a witness for the State. Mundil testified that on the evening in question while driving a truck south on State Highway No. 82 just north of Wilber he met a car coming toward him that "* * * was too close for comfort and I pulled over." The basis for the objection is insufficient foundation based on the fact that the car was not identified as belonging to defendant.

We think this contention is without merit. The foundation as to the car Mundil referred to being defendant's is fully established by the State's witnesses patrolman Flowers and Richard R. Kacl. Kacl was riding in the cab of the truck with Mundil. Kacl testified it was defendant's car as he had observed the license number. Flowers, who was following defendant's car, also testified to the incident of defendant's car crowding a truck over onto the shoulder of the highway.

But assuming that no sufficient foundation had been laid from which the jury could have found that the car Mundil referred to was defendant's, still we do not think the nature of the evidence is of such a character, in view of the entire record, that it could be said it would have prejudiced defendant's rights.

Finding defendant's contentions to be without merit, and it appearing from the record that defendant had a fair trial, we affirm the verdict and sentence of the trial court.

AFFIRMED.

ANDREW NELSON ET AL., APPELLANTS, V. HELEN GLIDEWELL ET AL., APPELLEES.

51 N. W. 2d 892

Filed February 29, 1952. No. 33076.

1. **Specific Performance: Frauds, Statute of.** Where a party seeks specific performance of an oral contract for the conveyance of land of a deceased person, the burden is on such person to prove an oral contract, the terms of which are clear, satisfactory, and unequivocal and that the acts of part performance in relationship to the subject matter in and of themselves are such as are referable solely to the contract sought to be enforced and cannot be accounted for on any other reasonable hypothesis.
2. **Wills: Attorney and Client.** An attorney may testify to factual matters relating to the execution of a will but anything in the nature of a communication is privileged and inadmissible unless waived.
3. **Witnesses: Evidence.** When two or more persons employ the same attorney in relation to the same business their communications are not privileged between themselves, even though their interests may be diverse, where the disclosures are made in the presence of all parties concerned, or are intended for the information of all parties.

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

Torgeson, Halcomb & O'Brien, for appellants.

Beatty, Clarke, Murphy & Morgan, and *Martin & Davis,* for appellees.

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

YEAGER, J.

This is an action in equity by Andrew Nelson and Anna Nelson, husband and wife, plaintiffs and appellants, against Helen Glidewell, widow of George H. Glidewell; O. A. Olson, administrator of the estate of George H. Glidewell; and the unknown heirs of the said George H. Glidewell, defendants and appellees.

The action is for specific performance of an alleged oral agreement by which George H. Glidewell, in his

lifetime, and Helen Glidewell, whose name was formerly Helen Kennedy, agreed to execute reciprocal and mutual wills each devising to the other his or her property and on death of the surviver to the plaintiffs herein, which wills were to be drawn after the marriage of George H. Glidewell and Helen Kennedy so as to permit bequests totaling $500 to take precedence over the devise to the Nelsons contemplated by the agreement. The alleged agreement was entered into on or about May 8, 1940. The marriage took place thereafter on May 29, 1940.

Among other defenses to the action the defendants denied that any such agreement as was alleged or any enforceable agreement was entered into between the parties.

The cause was tried and at the close of the evidence of plaintiffs the trial court among other findings found that the plaintiffs had failed to prove the existence of a valid and enforceable contract and by decree dismissed plaintiffs' action with prejudice. Motion for new trial was duly filed and overruled. From the decree and the order overruling the motion for new trial the plaintiffs have appealed. There are numerous assignments of error.

The substance of one group of the assigned grounds for reversal is that the court erred in finding and decreeing that plaintiffs had failed to prove the existence of a valid and enforceable contract.

In a case such as this where a party seeks specific performance of an oral contract for the conveyance of land of a deceased person, the burden is on such person to prove an oral contract, the terms of which are clear, satisfactory, and unequivocal and that the acts of part performance in relationship to the subject matter in and of themselves are such as are referable solely to the contract sought to be enforced and cannot be accounted for on another reasonable hypothesis. Crnkovich v. Crnkovich, 144 Neb. 904, 15 N. W. 2d 66; Lintz v. Apking, 145 Neb. 714, 18 N. W. 2d 55; Lunkwitz v. Guffy, 150 Neb.

247, 34 N. W. 2d 256; Casper v. Frey, 152 Neb. 441, 41 N. W. 2d 363; Busteed v. Sheffield, 153 Neb. 253, 44 N. W. 2d 471.

The only evidence of the contract alleged or of any other contract between these parties is the following: "Q Will you please tell the Court what Mrs. Glidewell said to any of you—to you or to Mr. Kepler or to Mr. Glidewell or to Mr. Nelson in this conversation in May, 1940 when Mr. Kepler was out to your house in the presence of these other people and during the afternoon? A Well, Mr. Kepler come out at 2 o'clock in the afternoon, and she said, 'we want Mr. Kepler to come out because George and I have decided to make up some papers', and I said, 'Oh, you have?', and she said 'yes', and so Mr. Kepler came out and we was not quite through eating, and he told us to finish our meals, and after we finished our dinner Mr. Kepler and Mr. and Mrs. Glidewell went into our front room and shut the door. Q Who was that, the Glidewells? A Yes, Mr. and Mrs. Glidewell, and after they had a conversation in the front room they came out in the dining room and sat around the table, and Mrs. Glidewell spoke up and she said, 'Mrs. Nelson, Mr. Kepler is going to make out some papers, and we was wondering if you two folks would be willing to take care of us after a while'—she said, 'when we need help', and I asked her if she would just let me think a little bit and decide with Mr. Nelson, and she said 'yes', and then we decided we would, and then she said 'we will have Mr. Kepler make out a will for you', and so Mr. Kepler spoke up and he said 'I am going to town and make these papers and I will be out to your house with some witnesses, and I will come out there and have them signed by you', and Mr. Kepler asked if we was willing and satisfied to take care of them and I answered, 'yes'. Q Did Mrs. Glidewell speak to Mr. Glidewell while you were there? A She said to Mr. Glidewell, 'Is that all right George' and he said 'yes, it is okay with me'. * * * Q Now, Mrs.

Nelson, when George was talking there, was he talking to anyone other than you, or to whom did he talk to? A To all of us in the room; Mr. Kepler, Mr. Nelson, me and Mrs. Glidewell; we was all around the table. Q What did Mrs. Glidewell say, if anything, about the relatives? A Well, she said 'George and I have decided there is not any of our relatives that is going to inherit after us, because we got a right to give our property and what we got to anybody that we want to'. Q What did George say back to Mrs. Glidewell? A He said the same thing."

The only evidence offered in addition to this was testimony of R. P. Kepler, an attorney. Whether or not this offered testimony had probative value in support of the alleged contract we are not required to decide. It was clearly inadmissible.

The testimony sought to be elicited was clearly communications and information received by Kepler in the role of attorney for the Glidewells and therefore inadmissible. §§ 25-1201 and 25-1206, R. R. S. 1943; In re Estate of Coons, 154 Neb. 690, 48 N. W. 2d 778.

In re Estate of Coons, *supra,* contains the latest expression of this court on this subject. In the opinion it is pointed out that an attorney may testify to factual matters relating to execution of a will but that anything in the nature of a communication is privileged and is inadmissible unless waived.

The appellants assert that Kepler was attorney for both parties in relation to the same business and contend for the rule that when two or more persons employ the same attorney in relation to the same business their communications are not privileged between themselves, even though their interests may be diverse, where the disclosures are made in the presence of all parties concerned, or are intended for the information of all parties. Adler & Sons Clothing Co. v. Hellman, 55 Neb. 266, 75 N. W. 877; Jenkins v. Jenkins, 151 Neb. 113, 36 N. W. 2d 637.

This rule can have no application in this case since under the facts it cannot be said that Kepler was ever attorney for the plaintiffs and the Glidewells. Kepler was called, it is true, by the plaintiffs but at the instance and request of the Glidewells to perform service alone for the Glidewells.

The admissible evidence in the record we conclude is not sufficient within the meaning of the stated legal principles as proof of the contract alleged. It falls short of clear, satisfactory, and unequivocal evidence of the terms of the contract alleged.

The finding of the district court and the decree dismissing the action with prejudice was in all respects proper.

This conclusion renders unnecessary consideration of the other assignments of error.

The decree of the district court is affirmed.

AFFIRMED.

ROBERT R. JOHNSON, AS ADMINISTRATOR OF THE ESTATE OF WILLIAM PARENTI, DECEASED, APPELLEE, V. CECIL A. JASTRAM, APPELLANT.

52 N. W. 2d 245

Filed February 29, 1952. No. 33082.

1. **Negligence.** Gross negligence within the meaning of section 39-740, R. S. 1943, means great or excessive negligence. It indicates the absence of slight care in the performance of a duty.
2. ———. Whether or not one is guilty of gross negligence in a given case depends upon the facts and circumstances of the particular case.
3. ———. 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.

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

George B. Boland and *Clarence E. Haley,* for appellant.

H. D. Addison and *Philip H. Robinson,* for appellee.

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

YEAGER, J.

This is an action by Robert R. Johnson, administrator of the estate of William Parenti, deceased, plaintiff, against Cecil A. Jastram, defendant, for damages for the claimed wrongful death of the said William Parenti.

The action was tried to a jury. At the close of plaintiff's evidence the defendant moved in the alternative for a directed verdict or for dismissal of plaintiff's cause of action on the ground that the evidence did not sustain a right of recovery. This motion was overruled. Again at the close of all of the evidence the defendant made a like motion for the same purpose. This motion was likewise overruled, whereupon the issues were submitted to a jury.

The jury returned a verdict in favor of plaintiff for $7,500. Thereafter timely motions were filed for judgment notwithstanding the verdict and for a new trial. These motions were overruled. From the judgment and the orders overruling the motions for judgment notwithstanding the verdict and for a new trial the defendant has appealed.

There is no materially substantial dispute in the evidence in the case or the legal theory on which it comes to this court.

The theory on which the petition is drawn is that on June 22, 1950, plaintiff's decedent was a guest passenger, within the meaning of section 39-740, R. S. 1943, in an automobile owned and operated by the defendant and that while he was such guest the defendant was guilty of gross negligence in the operation of the said automobile also within the meaning of section 39-740, R. S. 1943, which resulted in the death of plaintiff's decedent.

In the district court the defendant defended the action on the ground that the evidence was insufficient upon which to base a verdict that he was guilty of gross negligence and further that within the meaning of law plaintiff's decedent was not a guest but was engaged upon a joint enterprise with defendant and hence there could be no liability. In his brief he has not presented this latter theory. The case therefore will be determined upon the question of whether or not the evidence was sufficient to sustain the effectual finding of the verdict that the defendant was guilty of gross negligence.

In determining whether or not the evidence was sufficient to present a question of gross negligence to a jury under the statute certain principles are to be borne in mind. These principles are tersely stated in Komma v. Kreifels, 144 Neb. 745, 14 N. W. 2d 591. The statements are in conformity with numerous pronouncements of this court contained in cases cited in the annotations to section 39-740, R. S. 1943. They are:

Gross negligence means great or excessive negligence; that is, negligence in a very high degree. It indicates the absence of even slight care in the performance of a duty.

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

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.

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 it fails to approach

the level of negligence in a very high degree under the circumstances.

The substantial facts to which these principles have application are that plaintiff's decedent and the defendant were, on June 22, 1950, and for some time prior thereto had been, insurance agents or salesmen employed by the same insurance company. As such for a part of the time they combined their efforts and worked together in the solicitation of prospects, the procurement of insurance contracts, and the collection of premiums. The income from this business was equally divided between the two. Each of the two had an automobile both of which were used from time to time. When the automobile of one was used that one would furnish gas and oil and the other would pay for meals and other incidentals while they were working. Plaintiff's decedent had a Packard and defendant a Ford.

On June 22, 1950, near 3 p. m. in pursuance of the described custom the two left Hartington, Nebraska, in the Ford with the defendant driving, to call on a customer. Plaintiff's decedent was sitting to the right of defendant in the front seat. They proceeded southward out of Hartington on a black-top highway which highway was in excellent condition. The speed at the time of the incidents complained of was estimated at from 50 to 55 miles an hour. The day was clear, warm, and windy. About two miles south of Hartington at about 3:10 p. m. the right front of the automobile came into collision with the north end of the west abutment of a bridge. In consequence of this the automobile was thrown about and plaintiff's decedent was killed.

The evidence as to the cause was that plaintiff's decedent remarked to defendant that a wasp or yellow jacket had come into the automobile and stung him, whereupon he slapped it or at it and that it was on the defendant. Thereupon the defendant removed his right hand from the steering wheel and his eyes from the road and slapped at the insect. These happenings it

is clearly inferable were instantaneous. In that instant the right wheels of the automobile left the paving to the right thereof about 50 feet north of the bridge and so continued until the collision took place. The defendant looked up and saw the bridge before the collision but too late either to turn aside or stop before striking the abutment.

This we think is a fair résumé of the evidence upon which the plaintiff bases his claim that the defendant was guilty of gross negligence. There are four specifications of gross negligence in the petition upon which the case was submitted to the jury. One is excessive speed. There is no evidence to sustain it. The speed was well within the maximum provided by statute and there is no evidence of circumstances up to the time defendant's attention was distracted from his driving indicating any unsafety in the rate at which he was driving.

The other three are that he failed to steer and operate the automobile so as to have it under proper control; that he failed to keep a proper lookout; and that he failed to keep his automobile on the hard surface of the highway.

It is true that there was a loss of control, a failure of proper lookout, and a leaving of the hard surface of the highway, and that if there had been no failure in these respects there would have been no accident. These failures however are not sufficient upon which to base a conclusion that there was evidence upon which to submit the issue of gross negligence to a jury.

These failures were set in motion by the distracting remarks and actions of plaintiff's decedent.

This court has repeatedly held that momentary inattention such as is described in the evidence in this case does not amount to gross negligence. This is true even where the inattention is purely voluntary and is in nowise induced or contributed to by a distracting influence.

The case of Black v. Neill, 134 Neb. 764, 279 N. W. 471,

is one where the driver of an automobile turned his head to direct attention to a tree which had been blown down onto a porch after which to avoid striking a preceding automobile he suddenly applied his brakes which caused the plaintiff guest to be thrown into the windshield. This court said as a matter of law that this was not evidence of gross negligence.

Lemon v. Hoffmark, 132 Neb. 421, 272 N. W. 214, is a case where the driver of an automobile was handed something to eat, whereupon she turned her head in consequence of which an accident occurred. This court held as a matter of law that this was not gross negligence.

Gohlinghorst v. Ruess, 146 Neb. 470, 20 N. W. 2d 381, is one where the driver of an automobile took her attention from her driving and was looking over some cookies which had been placed on the front seat. This court said this was not evidence of gross negligence.

Therefore unless this court is prepared to depart from its previous holdings and decisions in cases bearing comparable analogies to the facts in this case it becomes necessary to say as a matter of law that the evidence in this case was not sufficient upon which to submit the question of gross negligence within the meaning of the guest statute to a jury. We are not prepared to so depart.

It follows that the court erred in overruling the motions in the alternative for a directed verdict or for a dismissal of plaintiff's petition and the motion for judgment notwithstanding the verdict.

The judgment of the district court is reversed and the cause remanded with directions to render judgment in favor of the defendant and against the plaintiff notwithstanding the verdict of the jury in favor of the plaintiff.

REVERSED AND REMANDED WITH DIRECTIONS.

PAUL M. WILSON, APPELLANT, V. RAY O. WIGGINS, APPELLEE.

52 N. W. 2d 248

Filed February 29, 1952. No. 33088.

1. **Automobiles: Negligence.** A pedestrian who walks across a street between intersections is required to exercise a greater degree of care than one who walks across a street at a crosswalk where protection is afforded by giving the pedestrian the right-of-way.
2. ———: ———. One who crosses a street between intersections is required to keep a constant lookout for his own safety in all directions from which danger should reasonably be anticipated.
3. ———: ———. It is elementary that one who attempts to cross a street between intersections without looking is guilty of such negligence as would bar a recovery as a matter of law.
4. ———: ———. Unless some reasonable excuse is shown which is consistent with the facts established, one who is obligated to keep a lookout for vehicles or persons favored over him is required to see that which is in plain sight. Where he fails to do so, his negligence is sufficient to defeat a recovery.
5. ———: ———. The above rules apply under a statute which provides that every pedestrian crossing a highway within a business or residence district at any point other than a pedestrian crossing, crosswalk, or intersection shall yield the right-of-way to vehicles upon the highway.

APPEAL from the district court for Dawson County: JOHN H. KUNS, JUDGE. *Affirmed.*

V. H. Halligan and *Baskins & Baskins,* for appellant.

W. A. Stewart, for appellee.

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

SIMMONS, C. J.

This is an action for damages for injuries sustained by plaintiff as a result of being struck by a truck driven by the defendant. Issues were made and trial was had, resulting in a verdict for defendant. Plaintiff appeals, assigning error in the submission of the issue of con-

tributory negligence to the jury. We affirm the judgment of the trial court.

The accident occurred in Gothenburg between intersections on a main traveled street, it being U. S. Highway No. 30, going east and west. The accident happened about 6 p. m., on July 25, 1947. The weather was clear, the pavement was dry, and there was no limitation of visibility. The street at that point is paved and 40 feet in width with two lanes in each direction. Of the two west-bound lanes, the north one is used for parallel parking. Of the two east-bound lanes, the south one is used for what some of the witnesses described as slow traffic. On the south there was a "lip" curb permitting cars to drive over it into a parking area to the south of the pavement.

Plaintiff and two companions had crossed the street from the north and had reached the south edge of the pavement when defendant's truck coming from the west hit plaintiff and caused his personal injuries.

There is ample evidence in the record from which the jury could find the following factual situation.

Defendant's truck was parked east of the intersection off the pavement on the south side of the street. One of plaintiff's companions was the owner of a car also parked off the pavement on the south side and east of the defendant's truck a short distance.

Plaintiff, his two companions, and the defendant had been in a beer parlor on the north side of the street approximately straight across from the parked cars. Defendant, leaving first, went across the street, got in his truck, backed it into the south of the two east-bound lanes, and drove it straight east in the south lane at a speed of one to ten miles an hour. Plaintiff and his two companions also left the beer parlor and started across the street to enter the car. They waited near the north curb for a west-bound car to pass, and then, abreast, plaintiff in the center, the three walked straight across the street to the south. Plaintiff looked

to the west when at the center of the street, or 18 to 20 feet from the south side, and at the north of the two east-bound lanes. He did not look again to the west after he passed the center of the pavement. He did not see defendant's truck until the accident happened. Plaintiff was struck by the right front wheel of defendant's truck while plaintiff was still on the pavement. Defendant's truck was on the pavement. One of plaintiff's companions looked to the west when at the center of the pavement and saw nothing. He looked again to the west when ten feet from the south line of the pavement or at the north line of the south lane for east-bound traffic, and he then saw defendant's truck moving east 35 to 40 feet away. Plaintiff was in the center of the highway when defendant backed out. The plaintiff and his two companions continued on south across the lane of traffic in which defendant was driving and walked in front of and into the path of defendant's truck, with the result above indicated.

The accident concededly did not occur at a regular crosswalk or pedestrian crossing.

Section 39-751, R. S. 1943, provides in part: "The driver of any vehicle upon a highway within a business or residence district shall yield the right of way to a pedestrian crossing such highway within any clearly marked crosswalk or any regular pedestrian crossing included in the prolongation of the lateral boundary line of the adjacent sidewalk at the end of a block, except at intersections where the movement of traffic is being regulated by traffic officers or traffic direction devices. Every pedestrian crossing a highway within a business or residence district at any point other than a pedestrian crossing, crosswalk or intersection shall yield the right of way to vehicles upon the highway."

A pedestrian who walks across a street between intersections is required to exercise a greater degree of care than one who walks across a street at a crosswalk where protection is afforded by giving the pedestrian the right-

of-way. Doan v. Hoppe, 133 Neb. 767, 277 N. W. 64.

One who crosses a street between intersections is required to keep a constant lookout for his own safety in all directions from which danger should reasonably be anticipated. "It is elementary that one who attempts to cross a street between intersections without looking is guilty of such negligence as would bar a recovery as a matter of law." "* * * unless some reasonable excuse is shown which is consistent with the facts established, one who is obligated to keep a lookout for vehicles or persons favored over him is required to see that which is in plain sight. Where he fails to do so, his negligence is sufficient to defeat a recovery." Trumbley v. Moore, 151 Neb. 780, 39 N. W. 2d 613. See, also, Ficke v. Gibson, 153 Neb. 478, 45 N. W. 2d 436.

Plaintiff contends that it is not a violation of law under the above statute to cross a street at any point other than a crosswalk. In a similar case with reference to the violation of an ordinance, we held: "While it is true in the case before us that the applicable city ordinance did not make it a violation of law to cross a street at any point other than a crosswalk, the duty of the pedestrian is the same in any event. * * * Even though the ordinance provides only that a pedestrian crossing the street at any other point other than within a marked or unmarked crosswalk shall yield the right-of-way to vehicles upon the street, the rule announced with reference to the duty of one so doing is as pertinent in the one case as in the other." Kristufek v. Rapp, 154 Neb. 343, 47 N. W. 2d 923. The rules above stated are applicable here under the statute above quoted.

We are here required under the assignment to determine only whether or not there was evidence to take the issue of contributory negligence to the jury. Clearly there was such evidence. The assignment is not sustained.

Plaintiff further contends that it was the duty of the trial court to instruct that he was under no duty to main-

tain a lookout for vehicles approaching from the rear. Plaintiff relies on Brenning v. Remington, 136 Neb. 883, 287 N. W. 776; Johnson v. Anoka-Butte Lumber Co., 141 Neb. 851, 5 N. W. 2d 114; Floyd v. Edwards, 150 Neb. 41, 33 N. W. 2d 555; and Johnson v. Griepenstroh, 150 Neb. 126, 33 N. W. 2d 549.

There is evidence in the record that the line of travel of the plaintiff and his companions across the street was to the southeast. The testimony of the plaintiff and one of his companions is that they went "straight" across the street. The testimony of the witnesses as to the location of the beer parlor and the parked car that plaintiff was going to, the distances given from the intersection at the west to the car, to the point of the accident, and to the beer parlor all indicate that the deviation from a rectangular line to defendant's course of travel at best was slight.

We need not discuss the cases relied upon by the defendant. Clearly they are not factually in point. We need but point out that Trumbley v. Moore, *supra,* involved walking in a "diagonal direction," and in Kristufek v. Rapp, *supra,* plaintiff was "angling back to his car in a southeasterly direction." We find nothing in the evidence that required the court to give an instruction such as plaintiff contends should have been given.

The judgment of the trial court is affirmed.

AFFIRMED.

IN RE APPLICATION OF CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY TO DISCONTINUE AGENCY AT THE STATION OF ELLSWORTH, NEBRASKA, AND TO SUBSTITUTE A CUSTODIAN THEREFOR. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, A CORPORATION, APPELLANT, V. ORDER OF RAILROAD TELEGRAPHERS, APPELLEE.

52 N. W. 2d 238

Filed February 29, 1952. No. 33098.

1. **Railroads: Public Service Commissions.** A final order of the railway commission granting or denying a railroad company permission to discontinue an agency at a particular station is unreasonable and arbitrary unless its findings and conclusions conform to the law and are supported by the evidence.
2. ———: ———. It is arbitrary and unreasonable to require the maintenance of a full-time agency the year around at a station where the principal business is seasonal carload shipments, and the cost of such service is out of proportion to the revenue derived from that portion of the public benefited thereby, especially where full-time agency service is to be provided during such shipping season and a substitute custodial service will afford the same essential although less convenient service during the remainder of the year.

APPEAL from the Nebraska State Railway Commission. *Reversed and remanded with directions.*

J. W. Weingarten and *Walter P. Loomis,* for appellant.

Harry E. Gantz, Donald E. Williams, C. O. Griffith, and *William H. Hein,* for appellee.

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

CHAPPELL, J.

The Chicago, Burlington & Quincy Railroad Company, hereinafter called the carrier, filed an application with the Nebraska State Railway Commission, hereinafter called the commission, requesting authority to discontinue station agency and substitute custodial service therefor except during the cattle shipping months of September and October, at Ellsworth, Nebraska. No

written objections were filed, but interested persons did appear with counsel at the hearing and orally protested. The application was denied, and upon the overruling of its motion for rehearing the carrier appealed to this court, assigning substantially that the order of denial was arbitrary, unreasonable, and contrary to law. We sustain the assignment.

Applicable rules of law are well established in this jurisdiction. They will not be repeated in this opinion. It is sufficient for us to say that they will be found in Thomson v. Nebraska State Railway Commission, 143 Neb. 52, 8 N. W. 2d 552; In re Application of Union P. R. R. Co., 149 Neb. 575, 31 N. W. 2d 552; and In re Application of Chicago, B. & Q. R. R. Co., 152 Neb. 367, 41 N. W. 2d 165.

Such rules have been predicated by this court upon the proposition that although the state has broad powers of regulation, it does not enjoy the freedom of an owner of the carrier, and that unless public necessity requires it, the discretion of the carrier in establishing and maintaining its stations should not be interfered with by the commission.

In the final analysis, when an application is made for additional service or to discontinue an existing service, the question to be determined is the public need or lack of need therefor. In deciding such question the cost of providing the service and revenue derived therefrom are important elements although not controlling. It is contemplated, of course, that the carrier shall provide adequate and comprehensive service to the public in the territory which it serves. In that connection such duties and responsibilities of a carrier are taken into consideration by rate-making bodies in the fixing of rates and charges which limit the revenue, dependent upon public use of the particular services the extent of which use measures the public need.

In the case at bar, a large part of the record, briefs of counsel, and arguments as well have been devoted to

the question of whether or not the carrier's theory of allocation of revenue and cost of operation at the station involved was correct. We do not consider that question of prime importance except insofar as sums involved may measure the public need by indicating the extent of use or lack of use of the services there made available by the carrier. In other words, the carrier is not required to maintain standby station agency service not comprehensively used by the public, or to be used only when other established carriers fail to meet the need.

The pertinent facts are not disputed. Ellsworth is an unincorporated village with a population of about 10 people. Its business district is composed of one general store and carrier's depot, with adjacent stockyards, side track, and industry track. The village is in the Alliance division, on the carrier's Kansas City-Billings line. It is located in the sandhills cattle country, 7.51 miles east of Lakeside and 19 miles west of Ashby, both of which are maintained as open-agency stations. The aforesaid mileage is practically the same by rail as by black-top highway No. 2 which parallels the railroad from Ravenna to Alliance, and goes through both Ellsworth and Lakeside. The people of Ellsworth have access over such public highway by truck, passenger, and other motor vehicles to the state's entire highway system.

No grain is shipped from Ellsworth. The only carloads forwarded therefrom are cattle, most of which are shipped in September and October of each year. A few carloads of feed, coal, and miscellaneous freight and less than carload lot shipments are received during the year, and a considerable portion of that is received freight prepaid. Truck lines also serve the community. For the last three years approximately 90 percent of the total revenue received at the station was from carload shipments. All of the freight shipments in 1950 averaged 17 a month. In 1949 they averaged 21 a month.

In 1948 they averaged 23 a month. There was a small amount of passenger, express, and Western Union business in addition. In that connection, in 1948 and 1950 there were 4 months of each year and in 1949 there were 5 months when no passengers whatever traveled from Ellsworth. It was clearly established that outside of September and October, months during which cattle were generally shipped, the agent had very little work to do, and that the average of all of it would take less than one hour's work during a day. The fact is that there was comparatively little business done at the station during the other 10 months of the year and the cost of maintaining the agency substantially exceeded the revenue for the whole year.

The train service consists of a west-bound passenger train No. 41, due in Ellsworth at 4:09 a. m., at which time there is no one on duty at the station. East-bound passenger train No. 44 is due at 11:42 a. m. Two other passenger trains, one in each direction, Nos. 42 and 43, do not stop at Ellsworth. There is also a west-bound afternoon local freight train on Tuesdays, Thursdays, and Saturdays, with no regular time schedule.

No change in such train service would result from the proposal contained in the application here involved. A centralized traffic control system with which trains are operated by signal devices and without train orders has been installed through Ellsworth, so that no train orders are used or handled by the agent and there is no need for a telegrapher to operate trains.

Nevertheless, until the present time the carrier has maintained an agent at Ellsworth, who is also a telegrapher working five days a week. In addition there is a custodian, the general store owner's son, who works Saturdays, Sundays, and holidays from 11 a. m. to 1 p. m.

The carrier proposed in the application to continue that same service during September and October, but during the rest of the year it was proposed to have a

custodian only who could live in the depot if desired. He will be on duty from 10 a. m. to 12 noon, and from 4 p. m. to 5 p. m. five days a week, and also from 10 a. m. to 12 noon on Saturdays, Sundays, and holidays. He will keep the depot clean, warm, and open from 10 a. m. to 5 p. m. Further, he will receive, care for, and deliver shipments to consignees. Lakeside will be the accounting station but shipments may be billed from Ashby. Of necessity Ellsworth will be a prepaid station except where the shipper has established credit with the carrier, which the merchant at Ellsworth has already done. The custodian will also receive and forward car orders to the accounting station, give instructions for shipping and moving cars or freight, and secure information for patrons about services and trains. He will also handle the express business. Passengers will pay their fares to the conductor without any surcharge and baggage will be checked on the train.

There will be a telephone in the depot waiting room, available to any person who can thereby call the agent at Lakeside or Ashby, send telegrams, give shipping instructions, and obtain any carrier information desired without telephone toll charges. Long distance telephone service is also available at the general store. For cattle shipments the storekeeper at Ellsworth is and has been the health and brand inspector.

The fact is that the carrier proposes to establish a substitute service for 10 months of the year which will afford the same essential service as theretofore, but of course it will be less convenient in some respects. While public convenience is an element to be considered, it is not controlling in the absence of a showing of public necessity, as in the case at bar.

We therefore conclude that the order of the commission denying the application of the carrier was arbitrary, unreasonable, and contrary to law.

Therefore, such order should be and the same hereby

is reversed and the cause is remanded with directions to grant such authority.

REVERSED AND REMANDED WITH DIRECTIONS.

IN RE APPLICATION OF CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY TO DISCONTINUE AGENCY AT THE STATION OF BINGHAM, NEBRASKA, AND TO SUBSTITUTE A CUSTODIAN THEREFOR. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, A CORPORATION, APPELLANT, V. VILLAGE OF BINGHAM ET AL., APPELLEES.

52 N. W. 2d 241

Filed February 29, 1952. No. 33097.

Railroads: Public Service Commissions. The syllabus in In re Application of Chicago, Burlington & Quincy Railroad Company, *ante* p. 387, 52 N. W. 2d 238, is by reference adopted as the syllabus herein.

APPEAL from the Nebraska State Railway Commission. *Reversed and remanded with directions.*

J. W. Weingarten and *Walter P. Loomis,* for appellant.

Harry E. Gantz, Donald E. Williams, C. O. Griffith, and *William H. Hein,* for appellees.

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

YEAGER, J.

This is an appeal by the Chicago, Burlington & Quincy Railroad Company from an order of the Nebraska State Railway Commission denying it the right to discontinue an agency at the station at Bingham, Nebraska, and to substitute instead a custodian and custodial service except during the months of September and October of each year during which two months agency service would be supplied.

No formal objection was filed to the application but a considerable number of citizens living in and in the vicinity of the village of Bingham appeared at the hearing and by the giving of evidence made objection thereto.

By appropriate procedure the order of the commission has been brought to this court for review. The railroad company is appellant, and on the records of this court and in the briefs the village of Bingham is designated as appellee.

The basis of the application is that convenience and necessity do not require the maintenance of agency service except during the months of September and October. The fundamental basis of the appeal is that the findings and adjudication by the commission contrary to the claims of the railroad company in its application for substitution of service are unreasonable, unjust, arbitrary, and clearly wrong.

Bingham is an unincorporated village on the line of the appellant extending from Kansas City, Missouri, to Alliance, Nebraska, and beyond. Its population is about 100. It is about 8½ miles from Ashby, Nebraska, to the east and about 18 miles from Lakeside, Nebraska, to the west. At these two points open stations and agencies are maintained. Nebraska State Highway No. 2, a "blacktop" surfaced highway parallels the railroad from Ravenna, Nebraska, to Alliance, Nebraska. The business establishments in Bingham are two stores; a gasoline and oil station, a soft drink, candy, and tobacco store, which are combined; and a dealer in auto parts.

The appellant bases its test of the propriety of the order of the commission on the history of the business transacted at this station in the years 1948, 1949, and 1950. In 1948 traffic consisted of 118 carloads for the year. This consisted of 104 carloads of cattle forwarded, 4 received, and 10 cars of other freight received. There were 152 less than carload lot shipments commonly referred to as L.C.L. shipments. In 1949 traffic consisted

of 117 carloads for the year. This consisted of 87 carloads of cattle forwarded, 1 received, 2 cars of seed forwarded, and 27 carloads of other freight received. There were 153 L.C.L. shipments. In 1950 traffic consisted of 72 carloads of cattle forwarded, 4 received, and 12 carloads of other freight received. There were 80 L.C.L. shipments.

Most of the forwarded shipments of cattle were made in September and October of each year. Probably a fair example is what happened in 1950. Of the 72 carloads of cattle which were forwarded in that year 65 moved in September and October.

These and the other facts disclosed by the record are so nearly like those in In re Application of Chicago, Burlington & Quincy Railroad Company, *ante* p. 387, 52 N. W. 2d 238, a case which like this was an appeal from the denial of an application to substitute custodial service for agency service at a station on the line of the railroad except during the months of September and October, that no factual or legal conclusion other and different than was arrived at in that case is possible.

The conclusion therein appearing and the principles and reasoning on which they are based as disclosed by the opinion in that case are adopted as determinative of the issues in this case.

As in that case we conclude that the order of the railway commission denying the application of the carrier was arbitrary, unreasonable, and contrary to law.

The order is therefore reversed and the cause remanded with directions to the commission to grant the authority requested in the application.

REVERSED AND REMANDED WITH DIRECTIONS.

BARBARA ZUTAVERN, APPELLANT, V. RICHARD ZUTAVERN, APPELLEE.

52 N. W. 2d 254

Filed February 29, 1952. No. 33111.

1. **Marriage: Fraud.** Marriage is a civil contract which, if procured by fraud, may, under certain conditions, be set aside.
2. ———: ———. Fraud sufficient to vitiate a marriage must go to the essence of the marriage relation.
3. ———: ———. The fraud that vitiates a marriage contract does not lend itself to definitive statement automatically resolving every case.
4. **Equity.** The equitable doctrine of clean hands applies only to bad conduct in the very transaction in litigation. If a party is not guilty of inequitable conduct toward the other person concerned in that transaction, his hands are as clean as a court can require.
5. **Marriage: Fraud.** If a man is induced to marry a woman who he knows or believes to be pregnant, believing and relying upon false statements made to him by her that he is the father of the child with which she is pregnant, when unknown to him her condition was caused by another, the marriage may be annulled for the fraud, if it has not been ratified with knowledge thereof, and the fact that the husband had sustained sexual intercourse with his wife before they were married will not bar the husband from resorting to and having the benefit of the remedy of annulment of the marriage.
6. **Husband and Wife.** In an action in which the legitimacy of a child born in wedlock is in issue, the testimony of the husband and wife is incompetent on the question of access, and neither the husband nor wife should be permitted to testify to collateral facts from which an inference of access or nonaccess might be drawn.
7. **Divorce.** A litigant may not have the benefit of condonation unless it is properly pleaded.
8. ———. In an action by the husband to annul a marriage, the wife is entitled to alimony pendente lite and counsel fees, and the fact that the husband proceeds by cross-petition instead of an original suit does not affect the rule.

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

John S. Samson, for appellant.

James R. Kelly and *Merle M. Runyan,* for appellee.

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

BOSLAUGH, J.

This case was brought by appellant to secure a divorce from appellee. He, by cross-action, asked that the marriage of the parties be annulled.

Appellant alleged residence in Douglas County and marriage with appellee on September 3, 1950; that appellee had been guilty of extreme cruelty towards her; and that she became the mother of a child on January 26, 1951. Appellee admitted the residence of appellant, the marriage of the parties, the birth of the child as alleged by appellant, and that he had sexual intercourse with her commencing in July 1950. Appellee traversed the other claims of appellant and specifically denied that he was the father of the child. He alleged that appellant on about August 25, 1950, falsely informed him that she was pregnant; that he was the cause of her condition; that she implored appellee to marry her; that he believed, relied, and acted upon the information given by her, and solely because thereof consented to and entered into marriage with her; that she was pregnant then and at the time of the marriage as the result of her sexual indulgences with a male other than appellee long prior to his association with her; and that he had not lived or cohabited with her after he obtained knowledge of the fraud by which his consent to the marriage was obtained. Appellee asked that the marriage be adjudged void and that he be declared not to be the father of the child. Appellant replied that appellee was estopped from denying paternity of the child born to her after the marriage of the parties because of his illicit relations with her before the marriage.

The district court found that the consent of appellee to the marriage was obtained by the fraud of appellant as alleged by appellee; denied appellant a divorce; and rendered a decree of annulment of the marriage.

This appeal is a challenge of the correctness of the findings and decree.

This case presents no dispute as to any fact material to its disposition. The record advises that appellant reached the age of 18 years on August 17, 1950, and appellee was 18 years of age September 1, 1950. They attended the fourth grade in public school in Dunning. It is shown that they did not have any association after that until July 23, 1950, or for a period of more than 8 years before that date. They met and were together during the afternoon and evening of July 23, 1950, and on the evening of July 25, 1950. These meetings were uneventful, but commencing with July 26, 1950, according to appellant, or on July 29, 1950, as stated by appellee, and continuing through August 19, 1950, they had frequent and unrestrained acts of incontinence. Their sexual indulgences were nightly on and after July 26 to August 8, 1950. Appellant missed her menstrual period at the end of July. She was going to her home in Alliance on August 8, and shortly before that date she told appellee that she felt that he had got her pregnant. They discussed that possibility and the matter of their getting married. After she arrived home she consulted a doctor. Appellee visited her at Alliance on August 12, she told him that the doctor had said that she was pregnant, and she then advised appellee that he was the cause of her condition. She made this claim to him on several occasions before September 3, 1950. This was the reason he consented to and did marry her on that date.

Appellant, at the suggestion of appellee and his mother, sought and procured the advice of another doctor on September 30, 1950. She told appellee on the evening of that day or the morning of the following day that the physician advised her that she would be delivered of a child in February 1951. Appellee became convinced at that time from the information she furnished him that the condition of appellant was the re-

sult of her improper relations with a person other than appellee, and he so informed her. He asked and demanded that she leave the home where they were living. This she did and they have since been separated. She gave birth to a child of normal full period growth that exhibited no symptoms or evidence of premature delivery on January 26, 1951, exactly six calendar months after she said she first indulged in sexual intimacy with appellee.

Appellant contends that appellee, who married her upon her solicitation after he had sexual acts with her, cannot maintain proceedings for annulment of their marriage, although he was induced to marry her because he was deceived by deliberate false representations, on her part, that she was with child by him and he believed, relied, and acted upon the truth of her statements until he had convincing evidence that her condition was the result of her incontinence long prior to the time she submitted to his embraces.

It is a mandate of the Legislature of this state that marriage be considered a civil contract; that consent thereto by competent parties is essential; and in case consent of one of the parties to the marriage is obtained by fraud, and there has been no voluntary cohabitation of the parties after discovery of the fraud, the marriage shall be voidable at the instance of the one upon whom the fraud was inflicted. §§ 42-101 and 42-118, R. S. 1943. It is obvious that a marriage contract induced by fraud may, under some circumstances, be voidable and annulled at the instance of the victim of the imposition. What amounts to a fraudulent contract, as these terms are used in the statute to express a recognized condition justifying the annulment of a marriage, has not been often considered or extensively discussed in decisions of this court. The fraud that vitiates a marriage contract does not lend itself to definitive statement automatically resolving every case. It is not every kind and degree of fraud that affords cause for setting aside the contract.

The law differentiates between fraud in the essentials of the marriage relation and deceptive arts to which some persons resort with a view to an advantageous marriage by placing their accomplishments, character, and circumstances in a too optimistic view. While these constitute a species of fraud, they do not afford a basis for destruction of the marriage. However, if there is a deception as to some fact whose existence or non-existence may affect in some certain way the very essence of the marriage relation, resulting in a lawful marriage which practically operates as a fraud upon the deceived spouse, and the existence or non-existence of the fact thus concealed or misrepresented must operate as between the parties to the marriage to prevent some essential purpose thereof and result in a practical destruction of that relation, there exists such fraud as the law contemplates and such as renders the marriage contract subject to annulment.

In Hudson v. Hudson, 151 Neb. 210, 36 N. W. 2d 851, this court said: "Marriage is a civil contract which, if procured by fraud, may, under certain conditions, be set aside." Robertson v. Roth, 163 Minn. 501, 204 N. W. 329, 39 A. L. R. 1342, considered this subject and stated the rule as follows: "In order to constitute such fraud there must be something that destroys the consent which blots out all semblance of contract—or it must impose, at the time of the marriage, upon the one wronged, burdens and obstacles wholly unexpected and of such character that they tend to the destruction of domestic happiness and promote humiliation disclosing a situation intolerable to society and detrimental to the marriage relation." See, also, Brown v. Scott, 140 Md. 258, 117 A. 114, 22 A. L. R. 810; Marshall v. Marshall, 212 Cal. 736, 300 P. 816, 75 A. L. R. 661; Hanson v. Hanson, 287 Mass. 154, 191 N. E. 673, 93 A. L. R. 701; Lyman v. Lyman, 90 Conn. 399, 97 A. 312, L. R. A. 1916E 643; 35 Am. Jur., Marriage, § 87, p. 235.

In consonance with the principle stated above, there

is much agreement that antenuptial pregnancy by another man, if concealed by the wife from her husband who was himself innocent of improper relations with her, is a fraud upon him justifying annulment of the marriage. Jackson v. Ruby, 120 Me. 391, 115 A. 90, 19 A. L. R. 77; Annotation, 13 A. L. R. 1435. Appellee cannot claim the advantage of this doctrine because of his participation in and contribution to immoral conduct of appellant before the marriage, and her counsel insists that the existence of that fact creates an obstacle, insurmountable as a matter of law, to the dissolution of the marriage tie on account of the fraud charged.

The position of appellant is not without support of eminent authorities including: Arno v. Arno, 265 Mass. 282, 163 N. E. 861; Brandt v. Brandt, 123 Fla. 680, 167 So. 524; Lindquist v. Lindquist, 130 N. J. Eq. 11, 20 A. 2d 325; Westfall v. Westfall, 100 Or. 224, 197 P. 271, 13 A. L. R. 1428; Annotation, 11 A. L. R. 931; 55 C. J. S., Marriage, § 34, p. 873; 35 Am. Jur., Marriage, § 139, p. 264. A contrary view is strenuously maintained by many other courts. The exact problem presented in this regard by this case has not had consideration or decision by this court.

The cases denying relief to the innocent victim of the fraud in a situation such as is presented by this case may in general be placed in two groups. Those that deny relief on the ground that the husband, legally speaking, does not come into court with clean hands and may not expect equity to aid him. This is neither logical nor convincing. The gravamen of the case of the husband is not unchastity but the fact that his wife, by reason of a too free manner of life with another, has become pregnant and disqualified to properly enter into or perform the marriage relation with him. The parties are in no sense in pari delicto. The matter in litigation is the marriage contract. The antecedent illicit relations form no part of the contract. They were only incidental circumstances which, while possibly in-

fluencing the appellee to enter into it, were not influences brought to bear by him to induce the appellant to do so. They gave appellant no rights which appellee is now trying to avoid, and imposed no obligation which he is trying to evade. His conduct in consenting to marry appellant and in doing so, believing as he did that she was pregnant by him, was not only without fault on his part, but most commendable. It was without advantage to him, if the child was not his, as it was not, but of infinite importance to her as a possible means of protecting her reputation and the name and good standing of her child. His willingness to do all he could to repair the wrong he believed he had done her in being the cause of her condition and to accept the burden which his moral duty, under the circumstances as they were presented to him, called upon him to bear, did not make his hands unclean in the matter of the contract from which he seeks relief, nor for that matter as respects appellant. The equitable doctrine of clean hands extends only to bad conduct in the very transaction in litigation. If a party is not guilty of inequitable conduct toward the other person concerned in that transaction, his hands are as clean as the court can require. Arndt v. Arndt, 336 Ill. App. 65, 82 N. E. 2d 908.

In the second group are those determinations asserting that the husband, knowing of his wife's unchastity and pregnancy, was put upon his inquiry as to her condition and the paternity of the child; that in the pursuit of his inquiry he was, in view of what he knew, put on his guard as to the confidence to be reposed in her word, so that he was not entitled to rely upon it but was bound to pursue searching independent investigations; and that because of his experience with and participation in the incontinence of the woman, he was thereby deprived of any right to complain of having been deceived by her false assurance that he was the only fruitful participant in her illicit intercourse.

The law generally affirms that one who has intention-

ally deceived the other to his prejudice may not be heard to say in defense of the charge of fraud that the innocent party ought not to have trusted him or was guilty of negligence in so doing. This is especially true where there is a relation of trust and confidence between parties contemplating marriage and where knowledge as to the truth or falsity of the alleged misrepresentation is peculiarly within the possession of the defrauding party.

It is difficult to subscribe to the doctrine that it is, in any situation, the duty of a man to subject the woman he intends to marry to the unspeakable inquisition implicit in the view expressed in this line of decisions. The hypothesis that a man is not justified in accepting the statement of a woman, under such circumstances, that he is the father of the child she is bearing, and that he must make searching independent inquiry elsewhere as to her chastity and truthfulness, is an assault on the truthfulness and all decency in every woman that may have been imprudent enough to anticipate with her lover the rights of the marriage relation. The probable futility of the suggested investigation is almost assured because the woman involved would in most cases be the only source of information. Finally, for what purpose should such an investigation be made and extreme care and caution exercised before accepting the representations made by the woman if it would be of no avail and if the law would still impose its forbidding demands because of the single fact that the man had sustained improper relations with her before the marriage.

The rule supported by a preponderance of authority and the weight of reason is that if a man is induced to marry a woman who he knows or believes to be pregnant, believing and relying upon false statements made to him by her that he is the father of the child with which she is pregnant, when unknown to him her condition was caused by another, the marriage may be annulled for the fraud, if it has not been ratified after knowledge of the fraud, and the fact that the husband had

sustained sexual intercourse with his wife before they were married will not bar the husband from resorting to and having the benefit of the remedy of annulment of the marriage. Yager v. Yager, 313 Mich. 300, 21 N. W. 2d 138; Jackson v. Ruby, *supra;* Winner v. Winner, 171 Wis. 413, 177 N. W. 680, 11 A. L. R. 919; Wallace v. Wallace, 137 Iowa 37, 114 N. W. 527, 126 Am. S. R. 253, 14 L. R. A. N. S. 544; Shatford v. Shatford, 214 Ark. 612, 217 S. W. 2d 917; Morris v. Morris, 40 Del. 480, 13 A. 2d 603; Lyman v. Lyman, *supra;* Annotation, 11 A. L. R. 931.

The concealment and untrue statement concerning the father of the child of appellant went directly to the essentials of the marriage contract and constituted a serious fraud on appellee. A woman who is incapable of bearing a child at the time of the marriage by reason of her pregnancy by another man is disqualified to carry out an important part of the contract into which she enters, and any representation which induces a belief that she is in a marriageable condition is a false statement of a fact material to the contract and is sufficient reason to avoid the marriage. The serious consequences of a denial of relief to the defrauded husband in such a situation are many and permanent. There could not be a family which would be advantageous to society or the state after the man discovered he had been victimized to furnish the woman a way out of her difficulties. He could not treat as a wife a woman whom he knew had traded upon his effort to correct a supposed wrong to shield her from the consequences of her unchastity with another man. A just or wise public policy cannot require in the name of a home the maintenance by the husband of an establishment presided over by the one who deceived him as to the paternity of a child, the offspring of another, who daily sits at his table, bears his name, and who, in the absence of a testamentary disposition, would inherit his property. Appellee was entitled under

the facts of this case to be relieved from the contract of marriage and its serious consequences.

Another objection of appellant is that the evidence of nonaccess of appellee to her during the period of gestation of the child born to her on January 26, 1951, consisted of testimony given by the parties to the case; that the presumption of legitimacy of a child born in lawful wedlock may not be rebutted by any information, the source of which is either the husband or the wife; and that all testimony of the husband and wife which has a tendency to prove or disprove legitimacy is incompetent. There is no doubt as to the existence of this rule of law. It was proclaimed more than a century ago in England and has been adopted and applied by many of the courts of this country. It is the rule in Nebraska. Schmidt v. State, 110 Neb. 504, 194 N. W. 679, stated it in this language: "In an action in which the legitimacy of a child born in lawful wedlock is an essential issue of fact, neither the declaration nor the testimony of husband or wife is competent on the question of access, nor should either testify to collateral facts from which an inference of access or nonaccess may be drawn; * * *." See, also, In re Estate of McDermott, 125 Neb. 179, 249 N. W. 555; Morris v. Morris, *supra;* Annotation, 60 A. L. R. 380; Annotation, 89 A. L. R. 911. This rule of law is not of controlling importance in this case because there is much unchallenged proof of nonaccess of appellee until long after the pregnancy of appellant from sources other than the husband or the wife.

There is much said by appellant on the subject of condonation or that the marriage was ratified after knowledge of all of the facts by subsequent voluntary cohabitation of the parties. The pleadings are not sufficient to make this an issue. Eicher v. Eicher, 148 Neb. 173, 26 N. W. 2d 808. The evidence relied upon to establish it is insufficient. § 42-118, R. S. 1943; Sweeney v. Sweeney,

96 Vt. 196, 118 A. 882, 26 A. L. R. 1066; Annotation, 26 A. L. R. 1068.

The district court at the conclusion of the trial required appellee to pay an amount to compensate counsel for appellant for his expenses and services. This is the subject of the cross-appeal. The order complained of was authorized and justified. §§ 42-307 and 42-308, R. S. 1943. In Willits v. Willits, 76 Neb. 228, 107 N. W. 379, 5 L. R. A. N. S. 767, it is said: "* * * it is well settled that in an action by the husband to annul a marriage the wife is entitled to alimony pendente lite and counsel fees, and the fact that the defendant proceeds by cross-petition instead of an original suit does not change the rule." In Nelson v. Robinson, 154 Neb. 64, 46 N. W. 2d 892, this court recently affirmed this pronouncement in this manner: "In Willits v. Willits, 76 Neb. 228, 107 N. W. 379, 5 L. R. A. N. S. 767, the court held that in an action to annul a marriage brought by the husband, the wife is entitled to alimony pendente lite and counsel fees, that the marriage was valid until annulled by the court, and that until such time the husband was liable for the expenses of his family. The court also allowed a reasonable attorney's fee for the services of the defendant's attorneys in the Supreme Court." The cross-appeal should be, and is denied.

The statement in Gard v. Gard, 204 Mich. 255, 169 N. W. 908, 11 A. L. R. 923, is applicable to appellant and this appeal: "The appeal has been prosecuted in the utmost good faith. The question was an open one in this state. Defendant had the right to take the judgment of this court upon it."

The judgment of the district court should be, and it is affirmed. Appellant is entitled to a reasonable allowance for her attorney for services in this court in the sum of $250 to be taxed as costs, and the costs in this case should be, and are taxed to the appellee.

AFFIRMED.

FRANK V. LOVENBURG, APPELLEE, V. LOTTIE JUSTICE ET AL., APPELLEES, IMPLEADED WITH LAWRENCE M. LOVENBURG, APPELLANT.

51 N. W. 2d 895

Filed February 29, 1952. No. 33120.

1. **Reformation of Instruments.** In order to warrant the reformation of a written instrument in any material respect, the evidence must be clear, convincing, and satisfactory, and until overcome by such proof, the terms of the instrument must stand as evidencing the intention of the parties.
2. ———. Reformation of an instrument to correct a mistake will not be accorded unless the intent and agreement which it will express as reformed were concurrent in the minds of the parties to and including the time of its execution.

APPEAL from the district court for Keith County: JOHN H. KUNS, JUDGE. *Affirmed.*

W. I. Tillinghast, for appellant.

George B. Hastings, for appellees.

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

SIMMONS, C. J.

This is an action to partition land. The deed upon which the title rests named L. M. Lovenburg and Chas. Lovenburg as grantees. L. M. Lovenburg, as Lawrence M. Lovenburg, cross-petitioned, seeking a reformation of the deed to remove the name of Chas. Lovenburg as grantee, and to quiet title. The trial court denied and dismissed the cross-petition. The named defendant appeals. We affirm the judgment of the trial court.

The plaintiff herein is one of the heirs at law of Chas. Lovenburg. Chas. Lovenburg will be referred to herein as Charles. L. M. Lovenburg will be referred to herein as Lawrence.

Charles was a bachelor uncle of Lawrence. Their relations were friendly. Charles died in August 1948. Some of the evidence referred to herein was admitted

over objections as to its competency. No assignments of error are made as to that, hence we summarize the evidence received by the trial court as it appears in the bill of exceptions.

The land involved here, 80 acres in Keith County, was owned by a Mr. Campbell of Lincoln. He had a brother at Ogallala. Lawrence contacted the brother with reference to buying the land. Lawrence did not have enough money to buy it. The brother and Lawrence then met and a contract was drawn to purchase the land for $8,000. Neither the contract nor its terms are in evidence. The brother of the owner testified the land was sold to Lawrence and Charles. On May 31, 1946, Lawrence made his check to the owner for $1,000. It does not clearly appear but apparently the contract was sent to Lincoln for Mr. Campbell's approval. In any event the $1,000 check was endorsed by the owner of the land and paid.

Charles had a number of government series E bonds made payable to himself or Lawrence. On June 13, 1946, Charles cashed sufficient of the bonds to secure $3,500 and on that date issued his check to Lawrence for that amount. Lawrence cashed the check. Appearing in the lower left-hand corner are the words "For Land deal."

The deed involved here was prepared in the law office of L. A. DeVoe of Ogallala. Lawrence, the brother of the owner, Mr. DeVoe, and Mr. DeVoe's son were present.

The grantees were named as "L. M. Lovenburg and Chas. Lovenburg." The same names were used in the habendum clause. The deed was made subject to a $2,500 mortgage which the "grantees" assumed and agreed to pay. The deed was sent to Lincoln where it was executed and acknowledged by the owner and his wife. On June 15, 1946, Lawrence issued his checks to L. A. DeVoe for taxes, abstract, etc., in the amount of $569.75, and to the owner for $3,930.25. The $3,500 received from Charles was used to make this payment.

The deed was delivered to Lawrence, who had it recorded on June 20, 1946, and then placed it in his safety deposit box and retained it. Thereafter he took possession of the land, accounted to no one for the proceeds, and paid the taxes as they accrued. On September 4, 1946, Lawrence paid $2,527.50, the principal and interest due on the mortgage.

Lawrence, resisting the partition action, by cross-petition alleged that the name of Charles "was inadvertently and erroneously inserted" in the deed and "without the intent, consent, wish or knowledge" of Charles; that Charles never owned any interest in the land; and that he, Lawrence, was sole owner.

The trial court dismissed the cross-petition. Lawrence assigns that as error here.

Charles appears to have been present when the contract was being negotiated. A witness to the contract testified that Charles told him at that time, " 'I have got a bunch of bonds, * * * as they will never do me any good, * * * I am going to give them up for Lawrence. * * * He needs that place.' " As to a time preliminary to the contract, Lawrence testified that his uncle told him (referring to the bonds), " 'There's $3,500 I will give you if you can handle the deal. * * * I will cash those and give you the money.' " He testified that "they were cashed and given to me to help pay for this land."

Lawrence testified that he knew the contents of the deed before it was sent to Lincoln for execution; that he knew Charles was named as a grantee; that he directed that that be done of "my own free will"; that it was not put there by mistake; and that it was put in "in protection of those bonds," and so that nobody would think he was "doing anything crooked."

The deed was drawn by Mr. DeVoe's son. He testified for plaintiff that the deed was drawn as directed by Lawrence, as did one other witness, but in the light of Lawrence's own testimony that need not be set out here.

On cross-examination, defendant developed evidence

that the scrivener asked Lawrence if he wanted a "joint deed," explaining that with such a deed "title rests in the survivor in the case of the death of either party to the deed," and that Lawrence told him he did not want "a survivorship deed." Lawrence then testified that the scrivener did not tell him what "a joint survivorship deed" was and that he did not tell him he did not want that kind of a deed.

Lawrence now testifies that the deed was not made out the "way it was supposed to be"; that what he wanted was a survivorship deed; and that the grantees should have been named "or" and not "and" just like the bonds were made out.

The applicable rules are:

"In order to warrant the reformation of a written instrument in any material respect, the evidence must be clear, convincing and satisfactory, and until overcome by such proof, the terms of the instrument must stand as evidencing the intention of the parties." Sutherland State Bank v. Dial, 103 Neb. 136, 170 N. W. 666. See, also, Wheeler v. Brady, 126 Neb. 297, 253 N. W. 338; Oft v. Dornacker, 131 Neb. 644, 269 N. W. 418; Otto v. L. L. Coryell & Son, 141 Neb. 498, 3 N. W. 2d 915; Kula v. Kula, 149 Neb. 347, 31 N. W. 2d 96.

"Reformation of an instrument to correct a mistake will not be accorded unless the intent and agreement which it will express as reformed were concurrent in the minds of the parties to and including the time of its execution." Nebraska Loan & Trust Co. v. Ignowski, 54 Neb. 398, 74 N. W. 852.

It is patent that Lawrence has produced no evidence to meet the requirements of these rules. His own evidence shows that the deed fully expressed his intent at the time the deed was drawn. Although not within the scope of his cross-petition, his contention at the trial that he was supposed to have a deed in joint tenancy with right of survivorship is negatived by his own testimony of the directions he gave as to the grantees to be

named in the deed. There is no evidence that he then either intended to secure the benefits or assume the burdens of such a deed. He has produced no evidence as to the intent of the other contracting parties so far as the deed is concerned, save that which is in the deed itself.

The trial court did not err in dismissing the cross-petition. The judgment of the trial court is affirmed.

AFFIRMED.

GROVER STAPLEMAN, APPELLANT, V. HERBERT H. HANN, WARDEN OF NEBRASKA STATE PENITENTIARY, LINCOLN, LANCASTER COUNTY, NEBRASKA, ET AL., APPELLEES.

51 N. W. 2d 891

Filed February 29, 1952. No. 33123.

1. **Habeas Corpus.** A petition for a writ of habeas corpus must state the facts which it is contended constitute the illegal restraint.
2. ———. A petition which states as a conclusion that a petitioner is illegally restrained of his liberty is not sufficient as a basis for the issuance of a writ of habeas corpus.
3. ———. It is the duty of the court on presentation of a petition for a writ of habeas corpus to examine it and if it fails to state a cause of action to enter an order denying a writ.

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

Grover Stapleman, pro se, for appellant.

Clarence S. Beck, Attorney General, and *Homer L. Kyle,* for appellees.

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

YEAGER, J.

Grover Stapleman, petitioner and appellant herein, on August 8, 1951, filed in the office of the clerk of the

district court for Lancaster County, Nebraska, a petition for a writ of habeas corpus directed to Herbert H. Hann, Warden of the penitentiary of the State of Nebraska, respondent, and other named respondents.

At the time the petition was filed the petitioner was serving a sentence of eight years in the state penitentiary for the crime of rape of which he had been duly convicted in the district court for Hall County, Nebraska, which conviction had been affirmed by this court.

On August 14, 1951, one of the judges of the district court examined the petition and entered an order denying the writ and dismissing the petition on the ground that the petition did not state facts sufficient to constitute a cause of action for the allowance of a writ. Notice of appeal was duly filed by the petitioner.

The brief of appellant contains numerous assignments of error but the only question for determination is that of the sufficiency of the petition to state a cause of action, or in other words, did the petition contain sufficient allegations of fact which if taken as true would entitle him to discharge from his imprisonment.

The appropriate rule is that a petition for a writ of habeas corpus must state the facts which it is contended constitute the illegal restraint. It is not sufficient to allege that the petitioner is illegally restrained of his liberty. State ex rel. Distin v. Ensign, 13 Neb. 250, 13 N. W. 216; In re Application of Tail, 145 Neb. 268, 16 N. W. 2d 161.

If on examination it is found that the petition fails to state a cause of action it is the duty of the district court to enter an order denying a writ. In re Application of Tail, 144 Neb. 820, 14 N. W. 2d 840; In re Application of Tail, 145 Neb. 268, 16 N. W. 2d 161; Jackson v. Olson, 146 Neb. 885, 22 N. W. 2d 124, 165 A. L. R. 932; Swanson v. Jones, 151 Neb. 767, 39 N. W. 2d 557; In re Application of Dunn, 150 Neb. 669, 35 N. W. 2d 673; Truman v. Hann, 154 Neb. 501, 48 N. W. 2d 418.

The petition which is much too lengthy to summarize

herein contains no allegations of fact which if true would entitle petitioner to the relief prayed. The district court correctly so held and further correctly dismissed the petition.

The judgment is therefore affirmed.

AFFIRMED.

CHRIS STAHL, APPELLEE, V. CLIFFORD J. ALLCHIN, APPELLANT.
52 N. W. 2d 251

Filed February 29, 1952. No. 33127.

1. **Injunctions.** A litigant cannot successfully invoke the extraordinary remedy of injunction, the effect of which would be to obtain possession of real estate, unless the facts and circumstances in the case are such that his ordinary legal remedies are inadequate.
2. **Judgments: Actions.** An action to secure a declaration of rights under the Uniform Declaratory Judgments Act is designed to terminate a controversy so far as it relates to the parties and facts giving rise thereto, and courts should, under most circumstances, dismiss such an action without prejudice, whenever all parties, whose claims gave rise to the controversy and whose rights upon such claims would be adjudicated by the declaration sought, had they been a party to the action, have not been impleaded.

APPEAL from the district court for Kimball County: JOHN H. KUNS, JUDGE. *Affirmed in part, and in part reversed and remanded with directions.*

Torgeson, Halcomb & O'Brien, for appellant.

Van Steenberg & Myers, for appellee.

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

CHAPPELL, J.

On July 12, 1951, plaintiff filed this action in the district court. His petition purportedly contained two

causes of action. The first sought to enjoin defendant from trespassing upon certain described farm lands, except 60 acres thereof then in wheat to be harvested by defendant during the summer of 1951, and thereafter to perpetually enjoin defendant from also trespassing thereon. It also sought to temporarily enjoin defendant from in any manner molesting plaintiff in his peaceful possession of the premises pending the trial of both causes of action.

The second cause of action, relying substantially upon the same allegations as alleged in the first, sought to have immediately declared and established plaintiff's exclusive right to possession of the premises and to plant and harvest certain crops thereon during the fall of 1951, alleging that unless such determination is so made he will suffer irreparable injury by the continuing trespasses of defendant and that he has no adequate remedy at law since he, the plaintiff, was rightfully in possession of the premises.

In both causes of action plaintiff also prayed for general equitable relief.

His right to the foregoing relief was predicated primarily upon the provisions of a written recorded lease allegedly executed by the owner Alice S. Palmer as lessor, with plaintiff as lessee, on November 27, 1950, for a term from March 1, 1951, to September 1, 1953, of which defendant had notice and knowledge, but for reasons hereinafter discussed refused to recognize as valid and effective.

After a hearing the trial court denied plaintiff's application for a temporary injunction. Defendant demurred to both causes of action for defect of parties plaintiff or defendant, misjoinder of causes of action, and generally for failure to state facts sufficient to constitute a cause of action. His demurrer was subsequently overruled and defendant answered, denying generally plaintiff's right to any relief upon either cause of action and affirmatively alleging that defendant had at all times

involved since August 1950 been in open, peaceful, and lawful possession of the premises upon which plaintiff was and had been a trespasser.

Defendant's alleged possession and right thereto was predicated upon the provisions of a written recorded lease executed on behalf of the owner Alice S. Palmer as lessor, with one Wayne A. Enyeart as lessee, on December 15, 1948, for a term from March 1, 1949, to March 1, 1952. On August 29, 1950, Wayne A. Enyeart allegedly, for valuable consideration recited therein, assigned such lease and certain crops on the premises in writing to defendant, subject to the landlord's approval allegedly obtained, and that defendant then went into possession thereunder prior to the execution of plaintiff's lease on November 27, 1950.

After a hearing upon the merits the trial court rendered a decree finding generally for defendant and against plaintiff on the first cause of action, dismissing the same, and finding generally for plaintiff and against defendant on the second cause of action. In other words, the decree found in effect that defendant was rightfully in possession under a proper assignment approved by the lessor and that under the circumstances plaintiff could not by injunction obtain possession, thereby putting defendant out of possession as prayed in plaintiff's first cause of action. However, the decree undertook to settle the controversy by concluding that plaintiff under provisions of the leases and circumstances involved was entitled to possession of all the land on March 1, 1952, and also had a right to enter and sow fall crops in the summer-fallowed ground in the fall of 1951 to mature after March 1, 1952, all purportedly as prayed in plaintiff's second cause of action.

Defendant's motion for new trial was overruled and he appealed, assigning substantially, insofar as important here, that the judgment on the second cause of action was contrary to law. We sustain the assignment. On the other hand, plaintiff did not file a motion for

new trial but cross-appealed, assigning substantially, insofar as important here, the trial court erred in dismissing plaintiff's first cause of action. We conclude that the assignment has no merit.

The record discloses without dispute that at the commencement of this action and at all times prior thereto, beginning in March 1951, both parties claimed the right to possession of the premises involved. Plaintiff, claiming the right to possession under the written lease executed on November 27, 1950, for a term from March 1, 1951, to September 1, 1953, undertook during the temporary absence of defendant to cultivate portions of the land and plant spring barley on the premises in March 1951. However, defendant, then claiming to have been in peaceful possession under and since his August 29, 1950, assignment of the written lease executed on December 15, 1948, for a term from March 1, 1949, to March 1, 1952, almost immediately notified plaintiff of his possession and rights thereunder, undertook to prevent plaintiff from planting such crops, and went forward with his own cultivation and planting thereon. As a matter of course, in the light thereof plaintiff never was in peaceful possession as alleged in his petition, but under his first cause of action was simply attempting to obtain by injunction such possession and put defendant out of his claimed possession.

It is well established that under such circumstances injunction could not be so invoked by plaintiff. It has long been the rule that: "A litigant cannot successfully invoke the extraordinary remedy of injunction, the effect of which would be to obtain possession of real estate, unless the facts and circumstances in the case are such that his ordinary legal remedies are inadequate." Hollinrake v. Neeland, 94 Neb. 530, 143 N. W. 809; Reed v. Wellman, 104 Neb. 292, 177 N. W. 170; Vance v. Sumner, 119 Neb. 630, 230 N. W. 490. See, also, Mohat v. Hutt, 75 Neb. 732, 106 N. W. 659, and Vance v. Henderson, 141 Neb. 766, 4 N. W. 2d 833, so

holding under circumstances singularly comparable with those at bar.

We therefore conclude as a matter of law that the trial court properly denied plaintiff injunctive relief and correctly dismissed plaintiff's first cause of action. Fenster v. Isley, 143 Neb. 888, 11 N. W. 2d 822, relied upon by plaintiff is clearly distinguishable upon the facts. Therein defendant was truly a trespasser because he "was neither in possession nor did he have a right to possession."

With regard to the second cause of action, plaintiff argued that he sought thereby to have judicially declared his right to possession of the premises and certain crops planted thereon in 1951; had a right to have the controversy between plaintiff and defendant over the question of possession under their respective leases settled; and their rights, status, and duties judicially declared, as provided in the declaratory judgments act. Viewed in such light, we conclude as a matter of law, without deciding questions of fact, that plaintiff was not entitled to the relief demanded and that the granting thereof by the trial court was erroneous for the reason that necessary parties were not impleaded in the action.

In that connection both leases were concededly upon their face executed and delivered at different times to different lessees by or for the same lessor, who was not made a party to this action. Wayne A. Enyeart was lessee in the first lease, and on August 29, 1950, for valuable consideration involving no small amount, assigned said lease and certain crops to defendant upon condition that the lessor approve such assignment, and defendant allegedly went into possession thereunder. Whether or not such assignment was approved by the lessor is in dispute, and the assignor was not made a party to this action. It will be noted that plaintiff was lessee in the other lease executed and delivered after assignment of the first and after possession thereunder had been allegedly taken by defendant. Both leases

were executed on like farm lease forms, but both contained different typewritten provisions which appear to be conflicting and required construction in some material respects. Further, both leases purported thereby to lease the same premises to different lessees for the same period from March 1, 1951, to March 1, 1952. In such a situation, Wayne A. Enyeart, defendant's assignor, and the lessor of both leases as well were necessary parties in order for plaintiff to obtain a declaratory judgment. This is true because the court could not declare the rights of plaintiff and defendant without determining the correlative rights, duties, and obligations of the assignor and lessor, which the court had no jurisdiction to do.

The situation is controlled by the holdings in Redick v. Peony Park, 151 Neb. 442, 37 N. W. 2d 801, which opinion cites and discusses authorities and comparable cases from this and other jurisdictions. Therein this court held that: "Section 25-21,159, R. S. 1943, puts the duty upon the plaintiffs in the first instance of joining as parties all persons who have or claim any interest which would be affected by the declaration. * * *

"An action to secure a declaration of rights is designed to terminate a controversy so far as it relates to the parties and facts giving rise thereto, and courts should, under most circumstances, dismiss such an action without prejudice, whenever all parties, whose claims gave rise to the controversy and whose rights upon such claims would be adjudicated by the declaration sought, had they been a party to the action, have not been impleaded.

"There must be an actual and bona fide controversy as to which the judgment will be res adjudicata. Such a case requires that all the interested parties shall be before the court.

"The Uniform Declaratory Judgments Act does not contemplate the adjudication of interests of a party over which the court has no jurisdiction."

Other matters were presented and argued in the briefs, but in the light of the foregoing conclusions they require no discussion.

It follows for the reasons heretofore stated that the judgment of the district court dismissing plaintiff's first cause of action should be and hereby is affirmed; and that the judgment upon the second cause of action should be and hereby is reversed, and the cause is remanded with directions to dismiss the same without prejudice. All costs in the district court and in this court are taxed to plaintiff.

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

SAFEWAY CABS, INC., A CORPORATION, APPELLANT, CHECKER CAB CO., INC., A CORPORATION, ET AL., INTERVENERS AND APPELLANTS, V. MICHAEL O. HONER, APPELLEE.

52 N. W. 2d 418

Filed March 7, 1952. No. 33000.

1. **Public Service Commissions: Appeal and Error.** On an appeal to the Supreme Court from an order of the Nebraska State Railway Commission administrative or legislative in nature, the only questions to be determined are whether the Nebraska State Railway Commission acted within the scope of its authority and if the order complained of is reasonable and not arbitrarily made.
2. **Motor Carriers: Public Service Commissions.** "Willful failure," as used in section 75-238, R. R. S. 1943, is such behavior through acts of commission or omission which justifies a belief that there was an intent entering into and characterizing the failure complained of. A failure to perform an act for a long period of time, which is required by law to be performed, generally constitutes a willful failure to perform.
3. **Corporations.** A corporation is a complete entity, separate and distinguishable from its stockholders and officers.
4. **Motor Carriers.** Subdivision (8), section 75-223, R. R. S. 1943, defines a motor carrier, as used in the act, to mean "any person owning, controlling, managing, operating, or causing to be op-

erated, any motor-propelled vehicle used in transporting passengers or property for hire over any public highway in this state."

5. ———. The term "motor carrier," as defined in the act, is a term inclusive of both a common carrier and a contract carrier.
6. ———. The term "motor carrier" is intended to include those motor carriers which under the act have or are required to have either a certificate of public convenience and necessity as a common carrier or a permit as a contract carrier.
7. **Statutes.** In construing a statute, effect must be given, if possible, to every word, clause, and sentence, so that no part of its provisions will be inoperative, superfluous, void, or insignificant.
8. ———. When a statute is ambiguous or susceptible of two constructions, one of which creates absurdities, unreasonableness, or unequal operation and the other of which avoids such a result, the latter should be adopted.
9. **Motor Carriers.** A majority stockholder of a corporate motor carrier is not a motor carrier within the definition of motor carrier in subdivision (8), section 75-223, R. R. S. 1943.

APPEAL from the Nebraska State Railway Commission. *Orders appealed from reversed and remanded with directions.*

Kennedy, Holland, DeLacy & Svoboda, Swenson, Viren & Turner, and *Frost, Peasinger & Meyers,* for appellants.

Pilcher & Haney and *Loyal G. Kaplan,* for appellee.

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

SIMMONS, C. J.

We are here presented with appeals from orders of the Nebraska State Railway Commission denying a complaint to terminate a certificate of convenience and necessity and granting in part an application to transfer the certificate. We reverse the orders in both matters.

The Nebraska State Railway Commission will be hereinafter referred to as the commission.

Safeway Cabs, Inc., hereinafter referred to as Safeway, was the complainant in the first matter designated as F. C. 875. In the second matter Safeway protested the granting of the application. This is designated as

B-595. The two matters proceeded concurrently, were heard separately in fact but upon a consolidated record, and were determined by the commission in a joint order.

In F. C. 875, other cab companies joined as interveners, without, however, changing the issues to be determined here. Likewise there were several protestants in B-595. As to the issues presented here, no reference need be made to other parties. Also in F. C. 875, there was an amended complaint seeking to reform the certificate so as to place a further limitation in it. The complaint as to that matter was denied. As we view the issues here, no further reference need be made to that question.

The application for transfer in B-595 was filed January 18, 1949. The formal complaint in F. C. 875 was filed February 1, 1949. Both matters have to do with a certificate of public convenience and necessity issued February 15, 1938, to Michael O. Honer, hereinafter called Honer. Different questions are presented by the two proceedings. They will be determined separately. Both matters are considered subject to the rule that "On an appeal to the Supreme Court from an order of the Nebraska State Railway Commission administrative or legislative in nature, the only questions to be determined are whether the Nebraska State Railway Commission acted within the scope of its authority and if the order complained of is reasonable and not arbitrarily made." In re Application of Neylon, 151 Neb. 587, 38 N. W. 2d 552. See, also, In re Application of Chicago, B. & Q. R. R. Co., 152 Neb. 352, 41 N. W. 2d 157.

On February 15, 1938, the commission issued a certificate of public convenience and necessity to Honer granting "* * * authority to operate motor vehicles for passenger hire in the City of Omaha, Nebraska under the name of Checker Cab Company, subject to and in conformity with Resolution No. 137, Supplemental Order No. 1." Resolution No. 137, supplemental order No. 1, was in part: "It is further ordered that

on and after June 1, 1937, all certificates of public convenience and necessity heretofore granted to and in the name of a service company to operate motor cabs or taxicabs not owned by such service company, shall be null and void and the owners of such motor cabs or taxicabs shall cease to operate unless such owners hold a certificate of public convenience and necessity from this Commission, and in that event such owners shall not operate except through such service company, unless authorized to do so by the Commission." The certificate was for an "owner-driver" operation.

In January 1949, Honer entered into an agreement to sell the certificate and his cab to one Robert S. Gillard, hereinafter referred to as Gillard. The agreed consideration for the certificate was $100, and for the cab $1,000. The application in B-595 was for the purpose of consummating that transaction.

The question presented by F. C. 875 arose in point of time prior to the issues presented by B-595. We first consider F. C. 875.

The complaint charged that Honer, without the authority of the commission, had failed to operate from and after May 4, 1948; that from and after May 8, 1948, he had failed to have proper insurance on file with the commission and had willfully failed to comply with the said certificate and the orders, rules, and regulations of the commission; and that accordingly he had abandoned all operating rights under the certificate. The prayer was that the certificate be terminated, revoked, and canceled.

Honer answered the complaint denying that he had abandoned or intended to abandon the certificate, and denying that he willfully failed to comply with his certificate and the orders, rules, and regulations of the commission. The hearings of the examiner on this matter were held and concluded in April 1949.

The complaint is based on the provisions of section 75-238, R. R. S. 1943, which provides: "Permits and

certificates shall be effective from the dates specified therein, and shall remain in effect until terminated as herein provided. Any such permit or certificate may, upon application of the holder thereof, in the discretion of the State Railway Commission, be revoked or may, upon complaint or on the commission's own initiative, after notice and hearing, be suspended, changed or revoked in whole or in part, for willful failure to comply with any of the provisions of sections 75-222 to 75-250, or with any lawful order, rule or regulation of the commission promulgated thereunder, or with any term, condition or limitation of such permit or certificate."

The complaint is also based on the provisions of section 75-239, R. R. S. 1943, which provides in part: "No certificate or permit shall be issued to a motor carrier or remain in force unless such carrier complies with such reasonable rules and regulations as the State Railway Commission shall prescribe, governing the filing and approval of surety bonds, policies of insurance, qualifications as a self-insurer, or other securities or agreements, in such reasonable amount as the commission may require, conditioned to pay, within the amount of such surety bonds, policies of insurance, qualifications as a self-insurer, or other securities or agreements, any final judgment recovered against such motor carrier for bodily injuries to or the death of any person resulting from the negligent operation, maintenance or use of motor vehicles under such certificate or permit, or for loss or damage to property of others."

Honer's cab was operated as a unit of the Checker Cab Company fleet, hereinafter referred to as Checker, under an arrangement whereby he paid a fee to Checker for operating in its fleet and permitted the use of his cab by it "on the opposite shift." His cab carried the color scheme of Checker and a Checker number. Honer operated only the one cab.

There is no issue in this record as to Honer's operations prior to May 4, 1948. On that day he was involved

in an accident wherein his cab was damaged and he received personal injuries. Following the accident the cab was towed to the Checker lot and there remained except for a short time in December when it was repaired. Honer testified that he had the cab repaired so that he could sell it. He gave the keys to an official of Checker for that purpose. It was agreed its value was $1,000 or more. He agreed to sell the cab to Gillard in January 1949, for $1,000, and signed the papers at that time but did not receive the payment.

Honer was hospitalized for a period of time and up to the time of the hearing testified that he was not able to drive a cab and did not know when he would be able to do so.

The evidence is that Honer carried and paid for the collision, fire, theft, and tornado insurance on the cab. That insurance policy expired December 14, 1948. He did not renew it, testifying that he did not pay the renewal insurance because he was not operating and did not intend to operate the cab "as a cab."

The liability insurance on Honer's cab was carried by Checker and the premiums paid by it. On May 8, 1948, the insurance carrier filed with the commission notice that the Honer cab had been eliminated from coverage. It was not thereafter covered by liability insurance.

Honer testified that during the summer and fall he intended to go back to work but that thereafter he knew he would never be able to go back to work. He fixes the date of this at one place as in September, again on October 8, and again between October 1948, and January 1949. He further testified that he then intended that if he ever was able to drive a cab again, it would be as a driver on a commission basis, and that he knew or "felt" he would never be able to drive again and for that reason he undertook to transfer his certificate to Gillard.

R. C. plates for 1949 were not required at the time

of the agreement with Gillard. Honer testified that he did not apply for 1949 plates "because it was already assigned over before the time to get one."

Honer further testified that he had no intention of giving up or abandoning his right to operate up to the time he "transferred" to Gillard and that he had not abandoned up to that time.

The commission found that Honer "will be unable to resume taxicab operations."

There is evidence also that sometime during the winter of 1948-1949, Checker placed a cab in operation bearing the Honer number 19 and operated it under the Honer R. C. 1948 plates. These facts were discovered by a routine investigation by an employee of the commission. The inference of the evidence is that it was surreptitiously done by Checker. There is no showing that it was done with the knowledge, consent, or approval of Honer, nor is there any showing that it was done for his benefit or as an operation under his certificate, but rather was done as an operation of Checker under its certificate. The examiner stated in his report that under General Order 84 of the commission, Checker was required to furnish insurance coverage whether its " 'motor vehicles are specifically described in the policy or not,' " and that notice to the commission that certain cabs had been removed from coverage was unnecessary for the reason that Checker "has coverage for any and all vehicles operated." He also recited a provision that Checker's policy covered individual owners as additional assureds.

The examiner and the commission disposed of the insurance feature of this complaint by reasoning that Checker used Honer's R. C. plates and that passengers transported by the new cab using those plates had complete insurance coverage. In short, it was held that Checker's operation of its own cab under its insurance coverage, because of the use of Honer's R. C. plates, properly or otherwise, operated to furnish insurance

to Honer on his cab that was not in operation and had been withdrawn from insurance coverage. Obviously such a conclusion does not follow.

We have held that " 'Willful failure,' as used in section 75-238, R. S. 1943, is such behavior through acts of commission or omission which justifies a belief that there was an intent entering into and characterizing the failure complained of. A failure to perform an act for a long period of time, which is required by law to be performed, generally constitutes a willful failure to perform." Union Transfer Co. v. Bee Line Motor Freight, 150 Neb. 280, 34 N. W. 2d 363. See, also, In re Application of Resler, 154 Neb. 624, 48 N. W. 2d 718.

We have then a situation where an "owner-driver" cab was not operated at any time after May 4, 1948. So far as Honer was concerned, the service required of him by his certificate was not performed or tendered to the public. Honer was incapacitated and unable to drive, and made no effort to secure a driver of his cab, assuming that a driver other than Honer was proper. His cab was not in serviceable condition. It was not operated as a cab after May 4, 1948. Honer made no effort to repair it for several months and then repaired it to sell and not to operate. That liability insurance on his cab was required is not disputed. It was not furnished after May 8, 1948. The evidence leads to but one rational conclusion and that is to the fact that Honer had abandoned in fact and intent all operating rights under his certificate and that it was willful under the above definition. True, he testified at one place to a general intent otherwise, but that statement is not consistent with the circumstances and facts shown by the record and the finding of the commission. Rightly construed, it expressed his belief that he still had some right under his certificate that he thought he could transfer for a consideration. He intended only to sell.

The commission by its order dismissing F. C. 875

accordingly permitted Honer to hold a certificate of convenience and necessity for a service which he had not operated for some time, was not then operating, and which he did not thereafter intend to operate and which he was unable to operate. Under the circumstances shown here its order in that respect was unreasonable and arbitrary. See, Publix Cars, Inc., v. Yellow Cab & Baggage Co., 130 Neb. 401, 265 N. W. 234; Publix Cars, Inc., v. Yellow Cab & Baggage Co., 130 Neb. 413, 265 N. W. 240.

We go then to the issues presented by the appeal in B-595.

This is a joint application of Gillard and Honer for the transfer to Gillard of the certificate of Honer. Gillard makes the application as an individual proposing to operate under the trade name of Greyline Taxi. In his application he recites that he then operated motor vehicles under a commission certificate "as stockholder and President of Airline Ground Service."

The various objecting parties presented many issues as to the reasons why the application should not be granted. These we do not deem it necessary to determine here.

Hearings were held by an examiner on the application and concluded in April 1949. It is apparent that the examiner and the applicant proceeded on the theory that the commission had the power to transfer the certificate and that a showing of public convenience and necessity was not required.

On July 7, 1949, our opinion in the case of In re Application of Neylon, *supra,* was filed. On August 9, 1949, Gillard filed his application to reopen the proceedings to take further testimony on the issues of public convenience and necessity. The application to reopen was granted and an extended hearing held.

Gillard testified that it was his intention to operate one cab at the beginning but that if success crowned his venture, he would expand to a maximum of 10 or 15 cabs.

As to public convenience and necessity, the examiner found that "little, if any, proof was shown for additional city-wide service." The commission apparently accepted that finding for it turned for authority to grant the application to section 75-240, R. R. S. 1943. It should be noted that the amendment to that section, now 75-240, R. S. Supp., 1951, was not then effective and is not involved here.

Section 75-240, R. R. S. 1943, is in part: "It shall be lawful, under conditions specified below, but under no other conditions, for two or more motor carriers to consolidate or merge their properties, or any part thereof, into one ownership, management or operation of the properties theretofore in separate ownership, or for any such motor carrier, or two or more such motor carriers jointly, to purchase, lease or contract to operate the properties, or any part thereof, of another such carrier; or for any such motor carrier, or two or more such carriers jointly, to acquire control of another such carrier through purchase of its stock; or for a person to acquire control of two or more motor carriers through ownership of their stock; or for any such person who has control of one or more motor carriers to acquire control of another such carrier through ownership of its stock."

Airline Ground Service, Inc., hereinafter called Airline, is a motor carrier holding a certificate of public convenience and necessity authorizing it to transfer passengers between the Municipal Airport and downtown Omaha. Gillard testified that he was president and general manager, and owned 51 shares of stock in this corporation. We do not find any testimony as to the number of shares of stock outstanding. However, in a "balance sheet" dealing with Airline, there is a recital that there were 91 shares of common stock. The commission found that Gillard owned 51 percent of the outstanding stock of the corporation. For the purposes of this opinion we assume that the record shows Gillard

owned a majority of the outstanding stock. On the basis of that stock ownership, the commission found that Gillard was a motor carrier as contemplated by the act. That finding is the basis for a principal contention of the appellants here. The commission thereupon entered an order approving the Gillard application in part, authorized him to conduct operations under the certificate issued to Honer, and assigned the operating rights and authority to Gillard to be conducted "under the name of Checker Cab Company." Among other things, Checker assigns that as error. We do not reach that question.

The initial and, as we view it, the controlling question here is whether or not Gillard is a "motor carrier" within the meaning of that provision in section 75-240, R. R. S. 1943.

In summary we have this situation. Airline is a motor common carrier holding a certificate of public convenience and necessity. Gillard is an individual holding a majority of the common stock of Airline. Although it does not appear to have entered into the consideration of the commission, Gillard is also shown to be president and general manager of Airline. As we view it, that fact makes no material difference.

We start with a rule that is elementary. "A corporation is a complete entity, separate and distinguishable from its stockholders and officers * * *." Solheim v. Hastings Housing Co., 151 Neb. 264, 37 N. W. 2d 212.

Subdivision (8), section 75-223, R. R. S. 1943, defines a motor carrier, as used in the act, to mean "any person owning, controlling, managing, operating, or causing to be operated, any motor-propelled vehicle used in transporting passengers or property for hire over any public highway in this state." It was on the basis of this definition that the commission held Gillard to be a motor carrier.

Subdivision (1), section 75-223, R. R. S. 1943, states

that "person," as used in the act, "means any individual, * * * corporation * * *."

The term "motor carrier," as defined in the act, obviously was intended to be a term inclusive of both a common carrier and a contract carrier, also defined in the act. It is also patent that the term is intended to include those motor carriers which under the act have or are required to have either a certificate of public convenience and necessity as a common carrier or a permit as a contract carrier.

The definition does not refer to any person owning, controlling, managing, operating, or causing to be operated "a corporation" holding a certificate or permit, but, on the contrary, relates those terms to "any motor-propelled vehicle used." We think it obvious that whatever is done by Gillard with the vehicles of Airline under its certificate is done as an act of the corporation and not as an act of the individual as an officer or stockholder.

The last three clauses of section 75-240, R. R. S. 1943, quoted above, recognize a difference between the control of a motor carrier through stock ownership and the carrier itself. Subject to the powers given the commission, the first of the three clauses authorizes a motor carrier to acquire control of another such carrier through purchase of its stock. The last of the clauses authorizes a person who has control of one or more motor carriers to acquire control of another carrier through ownership of its stock. It appears that if the commission's construction of the definition clause is correct, then the last of the clauses in section 75-240, R. R. S. 1943, becomes largely redundant.

The rule is that in construing a statute, effect must be given, if possible, to every word, clause, and sentence, so that no part of its provisions will be inoperative, superfluous, void, or insignificant. Thomas v. Rasmussen, 106 Neb. 442, 184 N. W. 104.

The statutory definition of motor carrier by the very terms of the first clause of section 75-223, R. R. S. 1943, applies to all provisions of the act. It follows that if the commission's construction of the definition of motor carrier is correct, then, among others, the following statutory provisions would be applicable to every majority stockholder of a corporate motor carrier: The declaration of legislative policy contained in subdivision (3), section 75-222, R. R. S. 1943; the annual fee provision of section 75-226, R. R. S. 1943; the license plate provisions of section 75-227, R. R. S. 1943; and the insurance and classification provisions of section 75-239, R. R. S. 1943. A reading of the sections demonstrates that there was no such legislative intent. To construe those provisions as applying to such a stockholder would be absurd.

Assuming, but not holding, that there is ambiguity in the act or that it is susceptible to two constructions, the rule is: "When a statute is ambiguous or susceptible of two constructions, one of which creates absurdities, unreasonableness or unequal operation and the other of which avoids such a result, the latter should be adopted." Pierson v. Faulkner, 134 Neb. 865, 279 N. W. 813.

It necessarily follows that a majority stockholder of a corporate motor carrier is not a motor carrier within the definition of motor carrier in subdivision (8), section 75-223, R. R. S. 1943; and that section 75-240, R. R. S. 1943, does not authorize the commission to approve the application, and by the provision "but under no other conditions" denied the commission the power that it undertook to exercise. The commission was without authority to approve the application and erred in doing so. This decision makes it unnecessary to state or determine the other matters presented.

The order of the commission in F. C. 875 is reversed and the matter is remanded with directions to sustain the complaint. The order of the commission in B-595 is

reversed and the matter is remanded with directions to dismiss the application.

ORDERS APPEALED FROM REVERSED AND REMANDED WITH DIRECTIONS.

CARTWRIGHT AND WILSON CONSTRUCTION COMPANY, A CO-PARTNERSHIP, APPELLEE, V. W. L. SMITH, APPELLANT.
52 N. W. 2d 274

Filed March 7, 1952. No. 33056.

1. **Juries.** The length of time devoted to meals while the jury is deliberating upon a verdict cannot be shown for the purpose of proving that they did not deliberate for the prescribed length of time provided by law.
2. **Pleading.** Where by statute, as in this state, plaintiff is authorized to plead general performance of all conditions precedent in a contract, defendant must, if he relies upon the fact that any of the conditions precedent have not been performed, set out specifically the condition and the breach.
3. **Trial.** The instructions to the jury in this case, when considered and construed together, fairly state the law applicable to the issues raised by the pleadings and proofs.

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

George B. Dent, Jr., for appellant.

Baskins & Baskins and *E. Leroy Shields,* for appellee.

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

MESSMORE, J.

The plaintiffs, Leon Cartwright and William E. Wilson, a co-partnership engaged in the construction of outdoor drive-in theaters, brought this action at law in the district court for Lincoln County against W. L. Smith, defendant, to recover the balance due it as commission on a written cost-plus contract. The cause was tried to a jury resulting in a verdict in favor of the plaintiff in

the amount of $2,485.71, and a finding against the defendant on his cross-petition. Motion for judgment notwithstanding the verdict and in the alternative for a new trial was filed by the defendant. This motion was argued and overruled. Judgment was entered on the verdict. The defendant appeals.

For convenience we will refer to Cartwright and Wilson Construction Company, a co-partnership, as plaintiff and the partners thereof by their names as occasion requires. The outdoor drive-in theater will be referred to as the theater, and W. L. Smith as the defendant.

There is no dispute that a written contract was entered into by and between the plaintiff and defendant on August 18, 1948, by the terms of which the plaintiff agreed to construct the theater for the defendant. The defendant agreed to pay the costs of the labor and material used in the construction. By the terms of the agreement defendant agreed to pay the plaintiff ten percent of the cost of labor and material used in the construction.

The plaintiff's petition alleged that the theater was completed on or about September 10, 1948; that the plaintiff complied with all the terms of the contract; that the total cost of the labor and material used in the construction of the theater was $52,244.85; and that the defendant paid the plaintiff $2,500 and was given credit for $238.77 which should be deducted from the plaintiff's commission which totaled $5,224.48. The plaintiff prayed for $2,485.71, with interest and costs.

The defendant's amended answer specifically denied all of the allegations of the plaintiff's petition not admitted. It was alleged that plaintiff held itself out to defendant as being expert in the construction of outdoor drive-in theaters and, relying on its representation and promises, oral and written, the defendant entered into the contract refered to in plaintiff's petition; that notwithstanding such representations and warranties on the part of the plaintiff, the plaintiff wholly failed to construct the theater in a workmanlike manner; that it

furnished incompetent help and supervision; that by the failure to construct the theater in a workmanlike manner and carry out the terms of the contract the defendant was damaged; that defendant did not discover that the work was done in an unworkmanlike manner until after he had paid certain sums of money to the plaintiff; and that by virtue of the unworkmanlike manner in which plaintiff constructed the theater, the defendant was put to large expense, and, in order to make temporary repairs to the ground where the theater is located and keep it in operation he was obligated to expend $1,954.75. The items constituting this amount appear in the amended answer and will not be set forth here as they appear in the evidence. The defendant further alleged that the screen was constructed in an unworkmanlike manner and had to be remodeled and reinforced at a cost of $1,000; that the ticket office was located at a place which made it inaccessible and it was necessary to move it at a cost of $192; and that defendant, in order to properly have the ground drain to permit operation of the theater, would be obligated to expend $4,650. These items are also set forth in the amended answer. In addition, the defendant expended $268 for labor at plaintiff's request.

In his cross-petition the defendant incorporated the substance of the foregoing allegations of his amended answer, reiterated the same subject matter therein, and prayed for $8,064.75 and costs.

The plaintiff's reply to the amended answer was a general denial, and plaintiff's answer to the defendant's amended cross-petition was a general denial.

In addition to what has been heretofore set out in reference to the contract it provided, in substance, that plaintiff was to construct the theater upon property designated by the defendant. The theater was to accommodate approximately 500 automobiles. The construction was to be performed upon specifications furnished by the defendant, which would include construction of an

appropriate screen tower, a projection room, confectionary, and ticket office, construction of roads and ramps, all roads and ramps to be graded and packed, plaintiff to do all painting and electrical work, to install adequate water and sewerage system consisting of a septic tank and cesspool, and plumbing facilities required by defendant. Plaintiff was to furnish a competent civil engineer to supervise the laying out of the roads, the grading, and other installations. The engineer was to be paid $150 a week. Services of the engineer were to be computed in the cost of the construction for the purpose of determining the ten percent commission. Defendant was to pay all bills for material and labor necessary in the construction of the theater. The cost of installation of sound and projection equipment and field speakers was to be included in determining the ten percent commission.

It appears from the record that Leon Cartwright and William E. Wilson were a co-partnership engaged in the business of constructing outdoor drive-in theaters since 1946. Leon Cartwright testified that he became acquainted with the defendant, W. L. Smith, who was desirous of having an outdoor drive-in theater constructed in North Platte. Prior to the time he became acquainted with the defendant his firm had constructed 10 or 12 such theaters. The defendant came to Greeley, Colorado, where his firm was constructing a theater. He and the defendant talked about the construction of a theater. As a result a contract was entered into. Leon Cartwright looked over the site which defendant had purchased. The other member of the firm, William E. Wilson, went to North Platte on August 19, 1948, to supervise the construction of the theater, and took some workmen with him, two of whom were Mr. Haynes and an elder Mr. Cartwright. The construction of the theater was practically finished and completed about September 10, 1948, and it was in operation by September 18, 1948. Wilson next saw the defendant in the early part of 1949.

On this occasion he and the defendant went over the bills evidencing the cost of the construction of the theater and certain payments made by the defendant. The items used in the construction and the total cost thereof were detailed by Wilson, the amount of the plaintiff's commission determined, and the payments made by the defendant.

At this point the plaintiff rested its case. The defendant moved for a directed verdict which was overruled, and will be discussed later in the opinion under one of the defendant's assignments of error.

The defendant then adduced evidence of a civil engineer familiar with the theater, who made a survey of the premises on November 17, 1950, in which he mapped the layout, the position of the screen, the ramps and the roads, and took levels to ascertain the slope of the land in order to perfect drainage to keep the theater in operation during the spring season. He detailed in what manner this work should be done, and concluded it would take 3,400 cubic yards of clay to fill the ramps and 1,000 cubic yards of gravel would be necessary to finish off the slope. He was unacquainted with the top soil or the condition of the land prior to the time he made this survey and estimate. The cost of the material and expense involved were testified to by the defendant.

A general contractor, familiar with the theater and the premises, was called out on the ground in June 1949. By an exhibit he identified the screen, testified to its condition, and that he placed it back in the condition in which it was before it was blown over by the wind. In January 1950, he was called again to put the screen in a workable and stationary condition. He explained how he reinforced it to make it substantial for the purpose for which it is used. He testified to the material used, the cost thereof, and gave an estimate of the cost of the labor necessary for the job. He further testified that the screen was not properly constructed. He had

not engaged in the construction of theater screens. It appears that this screen was blown down by the wind on two occasions, and the defendant was reimbursed by an insurance carrier to place the screen back in condition.

The defendant testified that he had operated the theater since it was completed, a period of 59 days in the fall season of 1948. He got the idea of constructing such a theater in the summer of 1948. He looked around at different theaters, looked for a location at North Platte, contacted Leon Cartwright, and later purchased a site in North Platte. Leon Cartwright came to North Platte and they looked over the 12 acres of ground which the defendant had purchased, walking across the entire area. There was one small place where the screen now sits where there was an indication of very little top soil remaining, which does not affect the theater site. They then proceeded to Denver to purchase equipment for the tower, which Leon Cartwright agreed to help him purchase. Subsequently, at Greeley, they entered into the contract. He noticed that part of the contract stated that he should furnish the plans and specifications. He told Leon Cartwright that he knew nothing about that kind of construction and had no plans. He was informed that that would make no difference. He took no part in the construction of the theater. Mr. Haynes came to lay out the ground for the theater. He surveyed the land and set the stakes for grading and for construction of the ramps. Haynes stayed in North Platte approximately two weeks, then informed the defendant that Leon Cartwright was going to send another engineer. The defendant indicated he was not satisfied, but Haynes left, as he was needed on another project. The man to replace him, Cecil Porter, came immediately and started the work where Haynes had left off. He stayed four days after the workmen left. Porter supervised the leveling and grading. The theater opened on September 18, 1948. Porter was there four days after the

opening. There were some finishing touches to be done on the ramps, and Porter was to supervise the spreading of the gravel.

After the theater opened it rained some ten days to two weeks. The ramps did not drain off. Water settled in puddles creating soft spots in the area, and automobiles would get stuck in them. The defendant contacted the plaintiff. He informed plaintiff about water standing in puddles around the ramps. Leon Cartwright called him and said he was so busy he could not make it, but he would send Haynes and a couple of workmen. Haynes and two workmen did come, but several weeks had elapsed and it was about the middle of December. The ground was frozen and they were unable to do any work at that time. The defendant paid $75 to Haynes, $45 to one of the workmen, and $48 to the other workman. In February 1949, Leon Cartwright came from Denver to inspect the theater. They walked over the premises and conferred about the drainage. Leon Cartwright said he would come in June and reconstruct the ramps. Defendant said that would be too late, as he wanted to open the theater and could not operate in a mudhole. Leon Cartwright told him to get the land surveyed, get the dirt haulers, and prepare the theater to open, and it would be deducted from what he owed the plaintiff. Pursuant to that instruction the defendant hired an engineer, the county surveyor, and paid him $58.45 to survey the ground. The defendant negotiated with a sand and gravel company for the use of heavy machinery and the work connected with it, and for hand labor. The amounts paid for this work appear in the record. He further testified that he had never been reimbursed for any of the work that had to be done. In the spring of 1949, Wilson came to see the defendant. They discussed the drainage and defendant informed Wilson it was not complete, that it was temporarily taken care of, and Wilson agreed to talk to Leon Cartwright about it. It rained that spring, cre-

ating puddles of water on the theater site and made it difficult to do the temporary work, and then in June the defendant had trouble with the screen.

The defendant detailed the work necessary to perfect the drainage for the operation of the theater; work done by himself and his son to improve the drainage; the amounts he paid, necessary to temporarily fix the theater site for operation of the theater; the items as set forth in the contract; the amount of the construction of the theater; the commission payable to the plaintiff; and payments made to plaintiff by him.

One witness who lived in close proximity to the theater and sold the land to the defendant testified with reference to the top soil on this 12 acres, the manner in which the ramps were constructed, the leveling of the dirt, what had to be done to place the theater so that it could be operated, and detailed the drainage and expense incident to it. There was also evidence to the same effect by other witnesses who were either on the ground or worked there, and evidence of defendant's wife to the effect that Leon Cartwright told her husband to go ahead and get the ramps fixed up and the drainage corrected.

Leon Cartwright was recalled and testified that the theater was to be constructed similar to the one in Greeley, Colorado. In December 1948, this witness had learned while in Denver that the defendant was not satisfied with plaintiff's work, so he went to North Platte. He contacted the defendant and they looked over the theater property. Defendant told him that he was not satisfied with the ramps. The ground was frozen and no work of any consequence could be done at that time. Leon Cartwright told the defendant he would have Haynes come down. Haynes did come. He looked over the theater property with the defendant who complained because the ramps were not draining the water properly. Haynes checked the grade stakes and there was not over three inches variation from the

grade as fixed originally. There were some chuckholes which caused a "washboard" condition and created a maintenance job. The defendant was so informed.

When Haynes first arrived on the job on August 19, 1948, he went over the ground with the defendant and told the defendant he was not satisfied with the type of soil. The top of the soil was scraped off and there was nothing left but beach sand which is not suitable to build on for theater purposes. He suggested that the defendant acquire other property and he would be glad to assist him. The defendant replied that he had this property. It was apparent that he wanted the theater built on it and to get it done as cheaply as possible. There was also a conversation between Haynes and the defendant about the tower to the effect that Haynes did not believe the ground would hold the tower up. The defendant replied that he had spent the money and was going to build a drive-in theater, and to continue with the construction. When Haynes left the majority of the fill had been completed and the entrance road, the exit road, and the ramps had been completed. The spread for the gravel was also fixed before he left. There was no occasion for him to remain. He was followed by Porter who was more or less a grading foreman and able to operate the machinery incident to that kind of work when occasion required. Also, when Haynes left the theater was 85 or 90 percent completed, just the distribution of the gravel remained to be done.

C. H. Cartwright, an uncle of Leon Cartwright, worked on the project. He arrived in North Platte on August 19, 1948, and was foreman of the screen tower. He had constructed screen towers previously, and had a regular pattern for such construction. He testified to the conversation had between Haynes and the defendant with reference to the suitability of the ground for theater purposes. He was also present with Leon Cartwright and Mr. Knox on December 11, 1948, when they, together with the defendant, went to the theater site. The screen

at that time was in good condition. The tower was "setting good and tight." There was no complaint by the defendant with reference to the top of the ramps. There were some chuckholes where car wheels had sunk into the ground. He had not seen the screen when it was damaged by wind. He noticed that it had been reinforced.

William E. Wilson testified that he arrived in North Platte on August 19, 1948, and superintended the project which included constructing the tower and grading and leveling the land. He testified to the conversation had between the defendant and Haynes with reference to the suitability of the land for theater purposes; and that Haynes seemed to believe it would be quite impossible to build ramps with nothing but sand as a base and to haul dirt to mix with the sand would create a great deal of expense. Defendant, on the other hand, believed that the expense would be less, as he owned the land and to buy another site would incur more expense. Wilson had something to do with the moving of the ticket office, and explained why the defendant wanted it moved. The ticket office was not completed, and the moving was about a two-hour job. The tower was substantially like the one built in Greeley. He attended the opening of the theater and remained three or four days thereafter. He was also in North Platte in the spring of 1949 and interviewed the defendant. They went over the worksheets, the bills, and the payrolls to arrive at the cost of the materials. He made a demand on the defendant to pay the balance due the plaintiff, which defendant refused to pay.

The defendant assigns as error that the verdict of the jury is invalid for the reason it was concurred in by only ten members and was returned into court before the jury had an opportunity to deliberate and consider the case for a period of at least six hours, as required by law.

The record discloses that the case was submitted to the

jury at 4:30 p. m., on March 14, 1951. The jury then deliberated until 6 p. m., when it was taken to dinner at a local cafe by the bailiff. Approximately one hour elapsed from the time the jury left the jury room until it returned to the jury room after dinner. The jury advised the bailiff it was ready to return a verdict at 10:45 p. m., at which time the court and counsel for the respective parties were notified. At the instruction of the court the jury was brought into open court and delivered its verdict at 10:50 p. m.

Article I, section 6, of the state Constitution provides the Legislature may, by general law, authorize a verdict in civil cases in any court by not less than five-sixths of the jury. In accordance with the constitutional authorization the Legislature enacted a law which is now section 25-1125, R. R. S. 1943, providing in substance that where five-sixths of the members of a jury concur in a verdict it will have the same validity as if all members of the jury concurred therein; and that a verdict concurred in by less than all the members of the jury shall not be rendered until the jury shall have an opportunity for deliberation and consideration of the case for a period of not less than six hours after the same is submitted to said jury.

The defendant contends it appears that the jury in the instant case actually deliberated for a period of five hours and twenty minutes, and no more, therefore, the verdict returned by the jury was in violation of the statutory provision cited.

This court has not had occasion to pass directly upon this proposition. We believe the case of Hurlburt v. Leachman, 126 Minn. 180, 148 N. W. 51, is applicable and decisive on this point. The appellant contended the jurors had been removed from the jury room for the purpose of obtaining their meals and also for the purpose of sleeping, and that considering such facts, the jury did not have an opportunity to deliberate on the case the full 12 hours as required by law. The court

reasoned that during retirement the jurors are presumed to be properly performing their duties. Their deliberations are not necessarily confined to discussion or debate with each other. While such are essential to a proper consideration of matters concerning which there is a difference of opinion, a juror may deliberate as wisely and to as good effect when he is considering and weighing the evidence in his own mind as when he is pressing his conclusions upon his fellows. The court assumes that the jurors are deliberating while in retirement for the purpose of determining and arriving at their verdict, and will make no inquiry into the nature or extent of such deliberation. The court held that the length of time devoted to meals and sleep while the jurors are deliberating upon their verdict cannot be shown for the purpose of proving that they did not deliberate for the prescribed length of time.

We conclude that the defendant's assignment of error is without merit.

The defendant contends that the plaintiff failed to sustain the burden of proof for the reason that the defendant's answer denied generally the allegations of plaintiff's petition and, in addition, specifically pleaded certain facts to show wherein the plaintiff breached the contract. The duty then devolved upon the plaintiff to establish by competent evidence substantial performance of the contract, which it failed to do. In proving substantial performance of the contract it was incumbent upon the plaintiff to prove all of the items contained therein which constituted conditions precedent. The proof adduced by the plaintiff before the defendant made his motion for directed verdict was as follows: The plaintiff proved the execution of the contract; that pursuant to the contract the theater was constructed as provided for therein and the contract completed; that the cost of constructing the theater was $52,244.85; that there was due plaintiff $2,485.71 on the contract; and that defendant accepted the theater and proceeded to operate it.

Section 25-836, R. R. S. 1943, provides: "In pleading the performance of conditions precedent in a contract, it shall be sufficient to state that the party duly performed all the conditions on his part; and if such allegation be controverted, the party pleading must establish on the trial the facts showing such performance."

If the defendant relies upon nonperformance of the contract by the plaintiff, he must allege that fact in his answer, and in pleading nonperformance, the facts which constitute the breach must be alleged. Where by statute, as in this state, the plaintiff is authorized to plead general performance of all conditions precedent, the defendant must, if he relies upon the fact that any of the conditions precedent have not been performed, set out specifically the condition and breach. See, Peters v. Wilks, 151 Neb. 861, 39 N. W. 2d 793; Morearty v. City of McCook, 119 Neb. 202, 228 N. W. 367; Davidson v. First American Ins. Co., 129 Neb. 184, 261 N. W. 144; § 25-836, R. R. S. 1943.

As stated in Morearty v. City of McCook, *supra*: " 'In pleading such nonperformance, the facts which constitute the breach must be alleged, and the breach assigned must conform to the terms of the contract. * * * Where by statute plaintiff is authorized to plead a general performance of all conditions precedent, defendant must, if he relies on the fact that any of the conditions precedent have not been performed, set out specially the condition and the breach, thus confining the issue to be tried to such particular condition or conditions precedent as he may indicate as unperformed.' "

Under the cited authorities, a general denial raises no issue as to any of the conditions precedent, and the plaintiff is not required to make affirmative proof on these issues.

Without restating the allegations of the defendant's answer in addition to the general denial contained therein but making reference to it, it is apparent that nonperformance is not pleaded, as required by the cited authori-

ties. In this state of the record it was not incumbent upon the plaintiff to prove all of the separate items constituting conditions precedent to the contract, as contended for by the defendant.

It appears to be the rule where a contract has been substantially performed, as the evidence discloses in this case and the theater accepted, the measure of damages to the accepter would be the cost of remedying the defects. Morearty v. City of McCook, *supra*, wherein it is said: "And we remain satisfied with the further instruction to the district court in connection therewith that the measure of damages would be 'the cost of remedying the defects.'" See, also, Morearty v. City of McCook, 117 Neb. 113, 219 N. W. 839; Library Board v. Ohlsen, 110 Neb. 146, 193 N. W. 110.

In the light of the foregoing authorities, we conclude the trial court did not err in overruling the defendant's motion for a directed verdict.

The defendant requested an instruction to the effect that under the law of this state an engineer, before practicing his profession, must meet certain qualifications and be licensed to practice in this state, and that the fact that the engineer furnished by the plaintiff was not a licensed civil engineer in this state may be taken into consideration in determining whether or not the plaintiff breached the contract and performed the engineering work in a negligent and incompetent manner. The contract provided that the plaintiff was to furnish a competent engineer. The defendant did not specifically plead in his amended answer and cross-petition the failure of the plaintiff to furnish a competent licensed engineer as a condition and breach of the contract. As heretofore pointed out, no breach of the contract became an issue in this case. The evidence shows that the plaintiff substantially performed the contract. The defendant accepted the theater and began to operate it. Whether or not the engineering work was done in an unworkmanlike and negligent manner, as pleaded in the defendant's

amended answer and cross-petition, became a question for the jury to determine under the instruction on the measure of damages as it applies to the defendant. We conclude the trial court did not err in refusing the requested instruction.

The defendant requested an instruction to the effect that plaintiff held itself out as expert in the construction of outdoor drive-in theaters, and it was for the jury to consider whether or not the plaintiff performed its services in a workmanlike manner and as an expert in that field. The defendant pleaded such facts in his amended answer and cross-petition. From an analysis of the evidence, the defendant complained of the construction of the screen and the drainage on the theater site. In any event, evidence was before the jury for its determination as to whether or not the plaintiff performed its services in a workmanlike manner. The items constituting what the jury might take into consideration in such respect appear in another instruction which will be referred to later on. We find no error in the court's refusal to give the requested instruction.

The defendant requested an instruction which comprised certain items of expense to which he was put to place the theater in temporary operation, and also an amount of $100 which was paid to an employee of the plaintiff, for which it was acknowledged he should receive credit. The items constituting the basis of this instruction were before the jury and are related in defendant's amended answer and reiterated in his cross-petition, and the jury had the full benefit of this evidence to determine whether the amount should be credited to the defendant in the event he should recover. We believe, under the circumstances, the trial court did not err in refusing the requested instruction.

The defendant requested an instruction to the effect that evidence had been introduced with reference to the screen not being properly constructed and it was necessary for him to expend money to reinforce the

screen, and the jury, if they found the screen not to be properly constructed could determine from the evidence the fair and reasonable costs of properly reinforcing the screen, and give the defendant credit for such sum. The screen was constructed on a standard pattern as screens of that type. The evidence shows that on two occasions it had been damaged by the wind and reconstructed. In any event, the evidence was before the jury for its consideration, to determine whether or not the defendant should receive credit for the sum so expended. Specifically, in another instruction the court set out the items that the jury might take into consideration in determining if the defendant should recover. The screen was included therein. We find no error in the court's refusal of the tendered instruction.

The defendant predicates error on the giving by the trial court of instruction No. 2. This instruction set out the burden of proof required of the plaintiff before plaintiff would be entitled to recover. The defendant's main contention is with reference to exhibit A attached to the plaintiff's petition, which is a copy of the contract, and exhibit No. 1 introduced in evidence, which is the contract, and to which no objection was made. Defendant contends that there is no showing that exhibit A and exhibit No. 1 are the same instrument, that is, the contract. We find no merit to this part of defendant's contention. The contract is in evidence. No objection was made to its introduction. It was accepted as the only contract between the parties. With reference to the burden of proof on the plaintiff as appears in this instruction, it is the only instruction the court could properly give on the subject on the issues joined herein. The defendant's assignment of error cannot be sustained.

The instruction on the measure of damages given by the trial court was whatever amount of damage the defendant had established by a preponderance of the evi-

dence, after deducting whatever amount is due the plaintiff under its contract, if any. The instruction said: "In considering the amount of damages, you must take into consideration any improper construction in the building of the screen tower, if any, projection room, confectionary and ticket office, roads, ramps, grading and drainage, and other evidence introduced in this case relative to said matters." There is no objection made by the defendant as to the measure of damages, and on the issues as joined the measure of damages was properly instructed upon.

Defendant predicates error on the giving by the trial court of instruction No. 6, which is the instruction on the burden of proof required of the plaintiff before the plaintiff may recover. This instruction is proper in form and in compliance with the burden of proof required of plaintiff in this case on the issues joined.

The defendant predicates error on the giving by the trial court of instructions Nos. 10 and 11. Instruction No. 10 referred to what the jury might consider in determining whether or not the plaintiff should recover, and No. 11 was an instruction on the burden of proof required of the defendant on his affirmative defense based upon his cross-petition, and included what the jury might take into consideration in determining if the defendant be entitled to recover. This consisted of the building of the screen tower, the projection room, confectionary, ticket office, roads, ramps, grading and drainage, and other evidence introduced in this case relative to such matters. In instruction No. 10, the word "preponderance" does not appear before the word "evidence," while in instruction No. 11, the word "preponderance" does appear before the word "evidence." Therefore, the defendant contends that a greater burden is placed upon the defendant in proving his affirmative defense, as pleaded in his cross-petition, than upon the plaintiff. We have heretofore stated that the trial court, in a previous instruction, set forth the burden of proof

required of the plaintiff before it could recover, and made reference that the plaintiff must so prove by a preponderance of the evidence. There is no merit to the defendant's assignment of error.

The instructions to the jury in this case, when considered and construed together, fairly state the law applicable to the issues raised by the pleadings and proofs. See, O'Dell v. Goodsell, 152 Neb. 290, 41 N. W. 2d 123; Barton v. McKay, 36 Neb. 632, 54 N. W. 968.

Other assignments of error need not be discussed.

We conclude that the verdict of the jury and the judgment entered thereon by the trial court is correct and should be, and is hereby, affirmed.

AFFIRMED.

RALPH STRAUEL ET AL., APPELLANTS, V. BERNIE PETERSON, DOING BUSINESS AS OGALLALA LIVESTOCK COMMISSION COMPANY, APPELLEE.

52 N. W. 2d 307

Filed March 7, 1952. No. 33067.

1. **Actions: Animals.** No right of action for damages accrues to an individual injured by a violation of sections 54-766, R. S. Supp., 1949, and 54-1123, R. S. 1943.
2. **Statutes.** Statutes are not to be understood as effecting any change in the common law beyond that which is clearly indicated.

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

Torgeson, Halcomb & O'Brien, for appellants.

George B. Hastings, for appellee.

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

SIMMONS, C. J.

This action was brought by the plaintiffs to recover

damages claimed to have resulted from the purchase of cattle infected with Bang's disease. Issues were made and trial was had resulting in a judgment for defendant. Plaintiffs appeal, assigning error in giving and failing to give instructions and in the admission of evidence. Defendant contends that plaintiffs have neither pleaded nor proved a cause of action and have no right of recovery, and that in any event the record is free of prejudicial error. We sustain the first of the above contentions and affirm the judgment of the trial court dismissing the action.

A demurrer by the defendant does not appear in the transcript. In his answer defendant alleged that the petition did not state facts sufficient to constitute a cause of action. The bill of exceptions shows that at the beginning of the trial this question was presented and the trial court overruled the demurrer. The parties have considered it as sufficient to raise the issue of the right of plaintiffs to recover damages based on an alleged violation of the statute and hence we determine it.

Plaintiffs alleged that defendant is an individual engaged in the operation of a livestock sales ring in Keith County under license from the Department of Agriculture and Inspection; that on February 1, 1950, defendant caused and completed the sale to plaintiffs of 26 Black Angus breeding cattle; that defendant represented that said cattle were brought into Nebraska from Colorado and such was the fact; that the cattle were not accompanied by the required Bang's disease certificate or official health certificate and did not enter under quarantine regulations, nor was there a health certificate of proof of vaccination on file with the department; that the cattle were released from the defendant's sales ring for intrastate shipment before the requirements of the state were complied with; that the cattle were infected with Bang's disease at the time of sale and plaintiffs did not know it; that plaintiffs had been advised before

purchase that the cattle had been imported from Colorado but that they did not know the law with reference to Bang's disease had not been complied with; and that plaintiffs offered to return the cattle and defendant refused to accept them.

Plaintiffs next alleged that the 26 cattle were placed with cattle in their herds. Plaintiffs alleged expenses involved in caring for the cattle and depreciation in their value. Plaintiffs further alleged that if the requirements of the statutes had been complied with, the diseased condition of the cattle would have been known and the cattle could not have been offered for sale as breeding cattle.

Plaintiffs then alleged that they had been damaged (1) as a proximate result of the entry of the cattle into the state without compliance with the law, (2) because the law was not complied with prior to the removal of the cattle from the sales ring, and (3) because the cattle were released from the sales ring for intrastate shipment without compliance with the law. Plaintiffs prayed for damages.

Plaintiffs state here that their case is based on a violation of the statutes and not upon a breach of warranty or fraud, and that, proving a violation of the statutes, the only issue for the jury was one of damages.

Plaintiffs particularly rely upon the alleged violation of sections 54-766, R. S. Supp., 1949, and 54-1123, R. S. 1943.

Section 54-766, R. S. Supp., 1949, provides in substance that dairy and breeding cattle entering the state from a foreign state or country must have come directly from Bang's disease certified herds, or have been tested for Bang's disease with negative results within 30 days prior to shipment into the state and be accompanied by a certificate, or such cattle may enter the state under quartine regulations and be tested within 30 days, or be accompanied by an official health certificate showing vaccination.

Section 54-1123, R. S. 1943, deals with the release of animals from a livestock sales ring after inspection, removal, or quarantine, and "No such livestock for interstate or intrastate shipment shall be released until all the requirements of the state of its destination shall have been complied with."

Plaintiffs rely on the rule stated in Johnson v. Weborg, 142 Neb. 516, 7 N. W. 2d 65, that "* * * a failure to perform a mandatory duty enjoined by statute is negligence per se, and if any person to whom the duty is owed, or for whose protection the statute is enacted, is injured in consequence of such violation a case is made."

Defendant relies on Frontier Steam Laundry Co. v. Connolly, 72 Neb. 767, 101 N. W. 995, 68 L. R. A. 425, wherein we said: "Wherever a statute or ordinance creates a duty or obligation, though it does not in express terms give a remedy, the remedy which is properly applicable to that obligation follows as an incident, but whether a liability arising from the breach of a duty prescribed by a statute or ordinance accrues for the benefit of an individual specially injured thereby, or whether such liability is exclusively of a public character, must depend upon the nature of the duty enjoined and the benefits to be derived from its performance. * * * If the duty imposed by the ordinance is clearly intended for the protection and for the benefit of individuals or of their property, the violation of the rule prescribed tends to show negligence for which a recovery may be had; but where the duty is plainly for the benefit of the public at large, then the individual acquires no new rights by virtue of its enactment, and a violation of the rule is of no evidential value upon the question of negligence. It is not always easy to draw the line between the two classes of enactments. In fact, in some cases their purpose is both for the welfare of the public at large and also for the protection of the personal and property rights of individuals. In such case the individual may adduce the failure to perform the duty en-

joined as evidence of negligence. The rule which is applicable can only be ascertained from a consideration of the object and purpose of the enactment itself in each particular case." See, also, Hanley v. Fireproof Building Co., 107 Neb. 544, 186 N. W. 534, 24 A. L. R. 382; 65 C. J. S., Negligence, § 19, p. 425; 38 Am. Jur., Negligence, § 164, p. 834; 50 Am. Jur., Statutes, § 585, p. 580.

The Bang's Disease Act was first passed by the Legislature in 1939. Laws 1939, c. 68, p. 278. It was amended in 1941 (Laws 1941, c. 114, p. 444); in 1945 (Laws 1945, c. 131, p. 414); and in 1949 (Laws 1949, c. 172, p. 452). The provisions of the act, sections 54-764, 54-764.01, and 54-766, R. S. Supp., 1949, and 54-765, R. S. 1943, must be construed together. We find nothing in the original act or in any of the amending acts which shows a legislative intent to create a civil liability for a violation of the act upon which a right of action for damages to an individual can be based. The act is clearly a health regulation recognizing the economic dangers to the cattle industry from the presence of Bang's disease in the herds of this state and the health dangers to the people of this state from diseases having their source in Bang's disease infected cattle. The act undertakes to secure three results: (1) The eradication of the disease from the herds of this state; (2) compensation in some measure to the owners of condemned diseased animals; and (3) the prevention of dairy and breeding animals afflicted with the disease entering the state. The 1945 Legislature (section 54-764.01, R. S. Supp., 1949) stated the purpose, in part at least, as "For the protection and promotion of the cattle industry in Nebraska" and "the control and eradication of Bang's disease." It undertakes to accomplish these purposes, referred to in the section last above cited as a "program," through the orderly processes of administration of the act by the Department of Agriculture and Inspection.

We find in the act no such provision as was before the court in Schrank v. Philibeck, 251 Wis. 546, 30 N. W.

2d 233, where the statute provided that any person, corporation, or common carrier shall be liable for all damages caused to any livestock for evasion or failure to comply with the requirements of the act. Nor is there in the act such a provision as was before the court in Martin v. Sheely, 144 F. 2d 754, where the statute made it illegal to own, have in possession, sell, transfer, transport, drive, or convey livestock infected with Bang's disease from one section of the Territory of Alaska to another. We do not find in our act any provisions of a similar nature. It is recognized that it is not necessary to the maintenance of an action that the statute so expressly provide. Strahl v. Miller, 97 Neb. 820, 151 N. W. 952, Ann. Cas. 1917A 141. We find nothing in the act upon which a finding of such a legislative intent can be based.

The rule is: " 'Statutes are not to be understood as affecting any change in the common law beyond that which is clearly indicated.' " Nielsen v. Chicago, B. & Q. R. R. Co., 141 Neb. 584, 4 N. W. 2d 569. See Zimmerer v. Prudential Ins. Co., 150 Neb. 351, 34 N. W. 2d 750. Such statutes are to be strictly construed in favor of persons sought to be subjected to their operation. See, also, 59 C. J., Statutes, § 668, p. 1129; 50 Am. Jur., Statutes, § 402, p. 425; Campbell v. Youngson, 80 Neb. 322, 114 N. W. 415; Bank of Commerce & Savings v. Randell, 107 Neb. 332, 186 N. W. 70, 21 A. L. R. 1360; Leon v. Kitchen Bros. Hotel Co., 134 Neb. 137, 277 N. W. 823, 115 A. L. R. 1078.

It necessarily follows that under the statutes involved no right of action accrues to an individual injured by a violation of the act.

Accordingly we affirm the judgment of the trial court dismissing the action.

AFFIRMED.

WENKE, J., dissenting.

I dissent from the rule announced by the majority opinion as applicable to the statutes involved. The

rule which is applicable in each case must be ascertained from a consideration of the objects and purposes of the statute or statutes being considered but when a statute creates a duty, though it does not in express terms give a remedy, the remedy which is properly applicable to that obligation follows as an incident thereto.

To me the nature of the duties here imposed and the benefits to be derived from their performance applies to the herds of individual owners of cattle as well as to the entire cattle industry and the public at large. As stated in Frontier Steam Laundry Co. v. Connolly, 72 Neb. 767, 101 N. W. 995, 68 L. R. A. 425, cited in the majority opinion: "* * * in some cases their purpose is both for the welfare of the public at large and also for the protection of the personal and property rights of individuals. In such case the individual may adduce the failure to perform the duty enjoined as evidence of negligence." For a more extended discussion see Fimple v. Archer Ballroom Co., 150 Neb. 681, 35 N. W. 2d 680.

YEAGER and CHAPPELL, JJ., join in this dissent.

MARY W. PAVLICEK, ADMINISTRATRIX OF THE ESTATE OF JOHN L. PAVLICEK, DECEASED, APPELLEE, V. STANLEY J. CACAK, APPELLANT, JAMES E. HOLMES, APPELLEE.

52 N. W. 2d 310

Filed March 7, 1952. No. 33090.

1. **Trial.** If a motion for directed verdict made at the close of the evidence in a case should have been sustained for want of evidence to support a verdict in favor of the party against whom made, it is the duty of the court on motion for judgment notwithstanding the verdict timely made to sustain such motion to set aside the verdict and to render judgment pursuant to the motion for directed verdict.
2. ———. In testing the sufficiency of evidence to support a verdict it must be considered in the light most favorable to the successful party, that is, every controverted fact must be re-

solved in his favor and he should have the benefit of every inference that can reasonably be deduced therefrom.

3. **Negligence: Automobiles.** Gross negligence, within the meaning of section 39-740, R. S. 1943, means negligence in a very high degree, or the absence of even slight care in the performance of a duty.

4. ———: ———. In an action for gross negligence under the automobile guest statute (section 39-740, R. S. 1943), where there is proof of negligence, a verdict should be directed for defendant only where the court can clearly say that it fails to approach the level 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.

5. **Negligence.** The question of the existence of gross negligence must be determined from the facts and circumstances in each case.

APPEAL from the district court for Scotts Bluff County: CLAIBOURNE G. PERRY, JUDGE. *Reversed and ordered dismissed as to appellant.*

Neighbors & Danielson, for appellant.

Hans J. Holtorf, Kirkpatrick & Dougherty, and *Atkins, Lyman & Ferguson,* for appellees.

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

WENKE, J.

Mary W. Pavlicek, as administratrix of the estate of John L. Pavlicek, deceased, brought this action in the district court for Scotts Bluff County against Stanley J. Cacak and James E. Holmes. The purpose of the action is to recover damages arising from the wrongful death of John L. Pavlicek. The basis for the recovery is that John L. Pavlicek's death was caused by an automobile collision between defendants' cars which collision plaintiff alleges was caused by the concurrent negligent conduct of both. Plaintiff recovered a verdict for $10,353.10 against both defendants. Thereafter defendant Cacak filed a motion for judgment notwithstanding

the verdict or for a new trial. This alternative motion was overruled and judgment was entered on the verdict. Thereupon defendant Cacak appealed.

John L. Pavlicek was at the time of the accident riding as a guest in the car of appellant. In view thereof the burden was on appellee, in order to recover, to establish, by a preponderance of the evidence, that appellant was guilty of gross negligence in the driving of his car. It was not enough for her to establish that appellant, in operating his car, may have been guilty of ordinary negligence. Appellant's liability was submitted to the jury on the basis of whether or not he was guilty of gross negligence. The only question appellant raises by his appeal is, does the evidence adduced at the trial establish a factual situation which will sustain the jury's finding that he was guilty of gross negligence?

It should here be stated that appellant made proper motions for a directed verdict at the close of appellee's evidence and again at the close of all the evidence, which motions the trial court overruled.

The principles here applicable have been stated by this court as follows:

"If a motion for directed verdict made at the close of the evidence in a case should have been sustained for want of evidence to support a verdict in favor of the party against whom made, it is the duty of the court on motion for judgment notwithstanding the verdict timely made to sustain such motion to set aside the verdict and to render judgment pursuant to the motion for directed verdict." Hamilton v. Omaha & C. B. St. Ry. Co., 152 Neb. 328, 41 N. W. 2d 139.

"In testing the sufficiency of evidence to support a verdict it must be considered in the light most favorable to the successful party, that is, every controverted fact must be resolved in his favor and he should have the benefit of every inference that can reasonably be deduced therefrom." Smith v. Platte Valley Public Power and Irrigation Dist., 151 Neb. 49, 36 N. W. 2d 478.

"Gross negligence, within the meaning of section 39-1129, Comp. St. Supp. 1941 (now section 39-740, R. S. 1943), means negligence in a very high degree, or the absence of even slight care in the performance of a duty." Landrum v. Roddy, 143 Neb. 934, 12 N. W. 2d 82, 149 A. L. R. 1041.

"In an action for gross negligence under the automobile guest statute (Comp. St. Supp. 1939, sec. 39-1129), where there is adequate proof of negligence, a verdict should be directed for defendant only where the court can clearly say that it fails to approach the level 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." Thompson v. Edler, 138 Neb. 179, 292 N. W. 236.

"The question of the existence of gross negligence must be determined from the facts and circumstances in each case." Landrum v. Roddy, *supra.*

The accident, as a result of which Pavlicek died on July 23, 1950, happened shortly after 4:25 a. m., on July 19, 1950, at an intersection located three miles north of Minatare, Nebraska. Decedent and his family, consisting of his wife, a son, and a daughter, lived at Fairbury, Nebraska. He and his family had come to Alliance, Nebraska, where appellant lived, on July 18, 1950, to visit appellant, decedent's nephew. That evening decedent and appellant made plans to go fishing the next day in Lake Minatare which is located a few miles north of Minatare. They left Alliance for that purpose the next morning just at daybreak, which was shortly after 3 a. m. They drove to Minatare, some 45 miles distance, and then turned north from Minatare to go to the lake. Appellant was driving his car, a 1937 Pontiac coach, and decedent was riding as his guest. The road they were traveling on north of Minatare was a maintained dirt-gravel road, the improved part of which was about 26 feet in width. The east-

west road at the intersection was of about the same character only the improved part was about 23½ feet in width. There were no stop signs at the intersection. It was daylight at the time of the accident, the weather was clear, and the road surface was dry and fairly smooth. Appellant had only been over this road once before. That was in April 1950 when he was a guest in the car of another.

There is very little dispute in regard to the principal facts herein involved. In its most favorable light for appellee, the evidence can be said to establish: That appellant was driving north on this highway at 50 miles an hour; that his brakes and tires were in good condition; that north of Minatare there had been no traffic on the road; that decedent made no protest as to appellant's driving; that as appellant approached the place of the accident he realized he was coming to an intersection; that somewhere between 300 and 500 feet south thereof he attempted to look to the east to see if any cars were approaching but saw no cars and realized his view in that direction was obstructed by trees and farm buildings located there; that he observed the slow sign located some 225 feet south of the intersection on the right-hand side of the highway but did not slow up; that he did not again look to the east until he was 40 feet south of the intersection where he could see past the trees to the east, which trees came right up to the fence corner; that he then observed a car approaching the intersection from the east at about the same distance therefrom that he was to the south; that he was traveling on the right side of the traveled portion of the road but near the center thereof; that he was unable to apply his brakes after he saw the car; that he attempted to turn to the left; that he entered the intersection at about 50 miles an hour; that the two cars met in the intersection; that the car coming from the east was a 1942 Ford coach owned by defendant James E. Holmes, who was driving it; that the front of appellant's car,

toward the right side thereof, struck the left side of Holmes' car near the front; that both cars turned over and lay on their right sides on the west side of the north-south road; that appellant's car was in the northwest part of the intersection; that the Holmes car lay some 25 to 30 feet north thereof; that both cars were facing mostly to the south but slightly east; and that the appellant's car lay across the lower part of decedent's body.

From these facts the jury could have found appellant guilty of ordinary negligence in several respects, including that of violating certain statutory regulations relating to travel on the public roads. We have held that a series of acts of ordinary negligence may, under certain circumstances, operate to produce gross negligence but not necessarily so.

After a careful study of the facts, we have reached the conclusion that under the guest statute the appellee did not prove facts sufficient to support a finding of gross negligence and that the motion of appellant for a judgment notwithstanding the verdict should have been sustained. It is therefore ordered that the judgment of the district court as to Stanley J. Cacak be reversed and set aside, and the trial court is directed to enter judgment for said appellant, and to dismiss appellee's action as to him.

REVERSED AND ORDERED
DISMISSED AS TO APPELLANT.

ROSEBUD LUMBER AND COAL COMPANY, A CORPORATION, APPELLANT, V. FRANK P. HOLMS ET AL., APPELLEES.
52 N. W. 2d 313

Filed March 7, 1952. No. 33104.

1. **Mechanics' Liens.** Mechanic's lien statutes are cumulative and remedial in nature requiring a liberal construction so as to effectuate their objects and purposes and protect all claimants

within their scope as well as to promote substantial justice.

2. ———. The object of the mechanic's lien law being to secure the claim of those who have contributed to the erection of a building, it should receive the most liberal construction to give full effect to its provisions.
3. ———. A subcontractor who furnishes materials for a building, but whose contract was made with the contractor alone, can acquire a lien under the mechanic's lien law for such materials only as were delivered at the building for use therein, or were actually used in the construction thereof.
4. ———. The lien is given not upon the ground that a contract was made by the owner with such subcontractor, but because the material so furnished was used in the erection of the building.
5. ———. The sworn statement of a subcontractor for a mechanic's lien must contain a description of the premises on which the improvement was erected. Such a description is not insufficient if it renders the location of the property susceptible of ready ascertainment by the aid of extrinsic evidence.
6. ———. As a general rule an overstatement of the amount due and sought to be recovered under a mechanic's lien does not, in the absence of a dishonest intention on the part of the claimant, invalidate the lien.
7. **Trial.** In determining whether or not the defendant's motion to dismiss at the conclusion of the plaintiff's case should be sustained the evidence will be considered by the court in the light most favorable to the plaintiff, controverted facts will be resolved in his favor, and he is entitled to the benefit of every inference that can be reasonably deduced therefrom.
8. **Trial: Equity.** In an equity suit, a motion to dismiss at the conclusion of the plaintiff's evidence affords a proper means of determining the sufficiency of the plaintiff's evidence to make a prima facie case. Where it appears that such dismissal of a plaintiff's cause of action was erroneous, the parties are entitled to be placed in the same position they were in before the error occurred, which requires the cause to be remanded for a new trial.

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

Patrick J. Heaton and *Harold E. Connors*, for appellant.

Kepler & Knicely and *Martin & Davis*, for appellees.

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

MESSMORE, J.

The plaintiff, Rosebud Lumber and Coal Company, a corporation, brought this action against Frank P. Holms and Louise Holms, his wife; Roy Knight and ——— Knight, his wife, first and real name unknown; and Guarantee Mutual Life Company, a corporation, defendants, in the district court for Cheyenne County to foreclose a mechanic's lien. There was no service of process upon the defendants Knight.

At the conclusion of the plaintiff's evidence the defendants moved the court to dismiss the plaintiff's petition. The court sustained this motion and dismissed the plaintiff's petition and the cross-petition of the defendant Guarantee Mutual Life Company. From the overruling of the plaintiff's motion for new trial the plaintiff appeals.

Plaintiff's petition alleged, insofar as necessary to consider here, that plaintiff, between December 12, 1949, and March 8, 1950, sold to the defendants Knight and Frank P. Holms and Louise Holms, husband and wife, certain building materials; that said materials were sold and delivered to be used, and in fact were used, in the construction of a dwelling house on the following described premises: Lot 45, Morrow's Addition to Sidney, Cheyenne County, Nebraska; and, at the times said materials were sold, defendants Holms were, and still are, the owners in fee of the above described premises. The itemized account of the materials furnished, the charges therefor, and the amount paid are set forth. The date of the filing of the mechanic's lien and affidavit are pleaded. In addition, the petition alleges that the defendant Guarantee Mutual Life Company claims a lien on the described premises by virtue of a real estate mortgage, and if such lien is valid, it is junior and inferior to the mechanic's lien of the plaintiff. Plaintiff prayed for foreclosure of its mechanic's lien, and that it be declared to be paramount to the mortgage lien of the Guarantee Mutual Life Company.

The defendant Guarantee Mutual Life Company, by answer denied generally the allegations of the plaintiff's petition not admitted, and affirmatively alleged by cross-petition that the defendants Holms made, executed, and delivered to this defendant their promissory note and mortgage to secure the note; specifically denied the validity and existence of the mechanic's lien which plaintiff seeks to foreclose; affirmatively pleaded that its mortgage be declared a first and paramount lien on the premises of the defendants Holms; and that in the event the court should determine that the mechanic's lien of the plaintiff is paramount to this defendant's mortgage lien, then an accounting be had as to the amount owing this defendant, and the property be sold to pay the liens against it. The prayer is in accordance with the cross-petition and for equitable relief.

The defendants Holms by answer denied generally the allegations of plaintiff's petition and the allegations of the defendant Guarantee Mutual Life Company's cross-petition.

The plaintiff's reply to the answer of defendants Holms is a general denial. The plaintiff's reply to the answer and cross-petition of the Guarantee Mutual Life Company admitted its corporate capacity, that it held a mortgage lien, denied that such lien was prior to plaintiff's lien, and generally denied allegations of the answer and cross-petition not admitted.

By stipulation the record shows that Frank P. Holms and Louise Holms, husband and wife, were the owners of Lot 45, Morrow's Addition to the city of Sidney, Cheyenne County, Nebraska, on or about December 12, 1949, and are still the owners of said real estate; and that plaintiff filed an affidavit and mechanic's lien with an itemized list of materials alleged to have been furnished by it for the erection of a building on the above described lot on April 26, 1950, at 4 p. m. It also was stipulated, on April 3, 1950, the defendants Holms made, executed, and delivered to the Guarantee Mutual Life

Company their promissory note in the amount of $8,700 with interest at the rate of 4½ percent per annum on the unpaid balance until paid, and on the same date, to secure the payment of the note, defendants Holms executed and delivered to the Guarantee Mutual Life Company their mortgage deed filed of record April 12, 1950. There is due the Guarantee Mutual Life Company from defendants Holms $8,383.24.

R. H. Coe testified that he is the president of the Rosebud Lumber and Coal Company, a corporation located at Winner, South Dakota, engaged in the retail sale of lumber and coal. He had business transactions with Roy Knight who posed as a contractor and builder. Roy Knight had practically finished a motel at Winner. contemplated building a mortuary in Winner, and "The man that was there said that he had three units to build at Sidney, Nebraska."

George T. Carter testified that in December 1949, he was a construction foreman for the Roy Knight Construction Company which consisted of Roy Knight and his wife Cecelia. He built a house for Frank Holms which was located at 1145 Sixth Avenue, in Sidney. He was asked: "That is the property that is in controversy here?" He answered: "I think so; yes, sir." He acted as foreman on the job from the time the basement was excavated in November 1949, until the outside work and drives were finished in the latter part of April 1950. He ordered the materials by telephone from Roy Knight who resided in Winner. This was dimensional material. Four truckloads of such material were delivered to the Frank Holms lot, 1145 Sixth Avenue, and unloaded on the lot. This material was used in the construction of the house. Some of the materials which comprised the third load delivered were rejected by him. This consisted of knocked-down windows of the old type which would not fit. On the list he sent to Roy Knight he requested weather-stripped units. The rejected materials were reloaded on

one of Knight's trucks and sent back to Winner. After that, on the fourth load, replacements were delivered by Knight's truck. There was one unit short on this load.

Alfred C. Struss testified that he was employed as a carpenter foreman for the Roy Knight Construction Company located at Winner, South Dakota. He was foreman of the building of the motel, and delivered lumber wherever it was needed on other jobs. He delivered three loads of material which he obtained from the Rosebud Lumber and Coal Company to the Frank Holms house in Sidney. He loaded the truck himself and drove it to Sidney. The deliveries were made in January and February 1950, his last trip being in February. The dimensional lumber was segregated from the other lumber in the Rosebud lumberyard and set apart. The first load delivered by him consisted of dimensional lumber pre-cut by him on one of Roy Knight's jobs. It was loaded on the truck again after being cut, and taken to Sidney to the Frank Holms residence. He did not know the street number or the lot number of the Frank Holms residence. The cement blocks had just been laid in the basement when he delivered the first load. He unloaded this material at the east side of the basement. The second load he handled consisted of shingles, shakes, flooring, and also some sheeting. He had some help in loading this material at Winner, and it was delivered to the Frank Holms residence in Sidney. The third load which he obtained from the Rosebud lumberyard from a list of material given to him by Knight, and which he loaded from this list, was taken to the Frank Holms place in Sidney and unloaded. He was accompanied at that time by George Patterson, an employee of the Knight Construction Company. He also obtained lumber from the Rosebud Lumber and Coal Company to be used in the Mason Funeral Home and the motel located at Winner. This construction work was in progress at the same time deliveries of material were being made to the Holms residence in

Sidney. Certain materials constituting a part of the third load to Sidney were rejected by Carter, the foreman on that job, and were taken back to the Rosebud lumberyard in Winner. He did not remember whether or not he made a report to the Rosebud Lumber and Coal Company with reference to the return of this lumber. He obtained no receipt evidencing return of this lumber. George Patterson made a delivery in February when this witness was in the hospital. He entered the hospital in Winner on February 17, 1950, and was discharged therefrom on February 22, 1950. No deliveries were made to the Holms house after the delivery made by Patterson. This was the fourth load of material.

George Patterson testified that he is engaged in carpenter work and in building, and was employed by the Knight Construction Company of Winner, South Dakota. He brought one load of material to Sidney to the Frank Holms residence which was being constructed at that time. It was a split load part of which came from the Rosebud Lumber and Coal Company, that he loaded. It consisted of miscellaneous finished lumber and millwork. He helped unload this material in Sidney the last Sunday in February 1950. At that time Struss was at home in Minden. He had been released from the hospital and was not working. He saw some building lumber that was sent to Sidney by a common carrier. He did not know the name of the carrier that was employed to haul it. He believed this material consisted of a window and a door that had not arrived at the time he made his delivery to Sidney. He further testified the millwork is all kept separate from the rest of the lumber in the Rosebud lumberyard. The last load he delivered had a different order number that apprised him of the material that had been purchased by the Knight Construction Company. He also testified to the manner in which the fourth load that he delivered to

Sidney was unloaded by the foreman on the job and himself.

Alfred Struss was recalled and testified that he sent some material which he obtained from the Rosebud Lumber and Coal Company to Sidney after Patterson had delivered the fourth load of material. This consisted of a door and window, and was sent after he returned from Minden, which was either the 5th or 6th of March 1950.

R. G. Coe was recalled and testified that the employees of the Knight Construction Company picked up the lumber from the Rosebud lumberyard to be sent to Sidney; that he made an itemized list of the lumber delivered to arrive at a price on it; that exhibit No. 1 is an itemized list of these materials; that the total charge for the same is $2,858; that $800 has been credited to the account; and that $2,058 is still owing, for which the corporation has not been paid. On cross-examination he testified he furnished materials to Mr. Knight for three jobs: One, the finishing of the motel at Winner; another, the construction of a mortuary in Winner; and the third was for what was designated as project No. 1 at Sidney, Nebraska, known as the Holms house. He also testified that at the time he prepared to file his mechanic's lien he had a conversation with Knight's foreman, Carter, with reference to the materials that went into the construction of the Holms house; also, he had no knowledge of any replacements being sent to the Holms residence; that all the millwork which had been ordered was in the Rosebud lumberyard February 25, 1950; and that a small shipment was made later on.

The foreman, George T. Carter, was recalled and testified that after the fourth delivery was made by Mr. Patterson there was one other delivery made to the Holms house by common carrier, which consisted of a single window and a slab door. He was then asked to examine exhibit No. 1, the itemized statement of the

account with the Rosebud Lumber and Coal Company under dates of February 25, 1950, and March 8, 1950, and advise whether or not the window and slab door which were purportedly delivered by the common carrier in Sidney subsequent to the time Patterson delivered the last load were shown on that exhibit. He testified they were not. The material was received and used.

The plaintiff assigns as error (1) the judgment of the trial court is contrary to the evidence and the law, and (2) the trial court prejudicially erred in sustaining defendant's motion to dismiss the plaintiff's petition.

Section 52-102, R. S. 1943, provides in substance that any person or subcontractor who shall furnish any material for any of the purposes mentioned in section 52-101, to the contractor, or any subcontractor who shall desire to secure a lien upon structures mentioned in said section may file a written statement of the amount due him for material, together with a description of the land upon which the same was used, within 60 days from the furnishing of such material, with the register of deeds of the county wherein said land is situated. If the contractor does not pay such person or subcontractor for the same, such subcontractor or person shall have a lien for the amount due for such material on such lot or lots and the improvements thereon from the same time and in the same manner as the original contractor.

"The trend of all recent decisions is to hold that mechanic's lien statutes are cumulative and remedial in nature requiring a liberal construction so as to effectuate their objects and purposes and protect all claimants within their scope as well as to promote substantial justice." Gibson v. Koutsky-Brennan-Vana Co., 143 Neb. 326, 9 N. W. 2d 298. See, also, Way v. Cameron, 94 Neb. 708, 144 N. W. 172; White Lake Lumber Co. v. Russell, 22 Neb. 126, 34 N. W. 104, 3 Am. S. R. 262; Henry & Coatsworth Co. v. Fisherdick, 37 Neb. 207, 55

N. W. 643; Central Const. Co. v. Highsmith, *ante* p. 113, 50 N. W. 2d 817.

"In an equity suit, when the defendant moves for a dismissal of the plaintiff's action at the close of plaintiff's evidence he thereby admits plaintiff's evidence to be true, together with every inference which fairly and reasonably may be drawn therefrom, and where the plaintiff's evidence meets the burden of proof required and plaintiff has made a prima facie case, the motion to dismiss should be overruled." Paul v. McGahan, 152 Neb. 578, 42 N. W. 2d 172.

The trial court found that the evidence was not sufficient to establish and prove a valid contract between the plaintiff, who would be the subcontractor, and the contractor Roy Knight.

In the case of Great Western Manufacturing Co. v. Hunter Bros., 15 Neb. 32, 16 N. W. 759, the court said: "From an examination of this section it must be apparent that it makes no difference what the nature or character of the contract may be, whether special, or parol, verbal, or written, express or implied. If the contract and delivery, or furnishing under it, is sufficient to create an indebtedness or liability, it is sufficient to create a lien under the provisions of this section."

The relationship between a contractor and an owner rests in the contract, express or implied, but there is no privity of contract between the subcontractor and the owner. See Frost v. Falgetter, 52 Neb. 692, 73 N. W. 12.

In Marrener v. Paxton, 17 Neb. 634, 24 N. W. 209, an action to foreclose a subcontractor's lien, the court said: "We have no doubt that in a proper case, one furnishing materials in good faith for the erection of a building under an agreement with a contractor for that purpose, may file a mechanic's lien upon the structure and the lots on which it stands. The lien is given, however, not upon the ground that a contract was made by the owner with such subcontractor, but because the material so

furnished was used in the erection of the building. * * * Where, however, a subcontractor seeks to charge the owner, it devolves on him to show either that the material furnished by him was used in the erection of the building, or at least that he delivered it there under an agreement with the contractor that it would be used in the erection of the building on which the lien is sought." See, also, Way v. Cameron, *supra.*

In the light of the foregoing authorities we conclude the trial court erred, as contended for by the plaintiff.

The plaintiff contends the trial court erred, in dismissing its petition, in finding that the evidence was insufficient to show the plaintiff furnished material that was delivered to property owned by defendants Holms or used in the construction of a house on Holms' property.

The affidavit of the plaintiff states that the itemized statement of account of the materials is a true and correct account of the materials furnished by it for Roy Knight and Frank P. Holms on an oral contract for materials furnished for the erection of a house on Lot 45, Morrow's Addition to Sidney, Nebraska. The plaintiff's petition so pleads. The parties stipulated that Frank P. Holms and Louise Holms, his wife, were the owners of Lot 45, Morrow's Addition to Sidney, on December 12, 1949, and are still the owners of such property. The defendants assert that throughout the remainder of the record the property as above described is never mentioned; that no witness testified that material was ever delivered to, or used in the construction of a building on, that property; the evidence shows only that a house was built for Frank P. Holms at 1145 Sixth Avenue. The foreman for the Knight Construction Company testified that was the property in controversy. The defendants Holms and defendant Guarantee Mutual Life Company were not misled, nor does the evidence show that they were in any manner deceived as to the materials delivered and used in the construction of the

Holms house. The evidence shows that on one occasion the defendants Holms were present and talked to Mr. Patterson who delivered the fourth load of materials to the Holms lot, and wanted to know why Struss, who had made the previous deliveries, had not delivered this load of material.

The statute requires that in the affidavit filed to procure a subcontractor's lien there should be such a description of the real estate as, aided by extrinsic evidence suggested by the description itself, would charge a party dealing with real estate with notice of the lien claimed against it. See Drexel v. Richards, 50 Neb. 509, 70 N. W. 23. See, also, Guiou v. Ryckman, 77 Neb. 833, 110 N. W. 759, 124 Am. S. R. 877; Way v. Cameron, *supra;* Rucker v. Steelman, 73 Ind. 396; Holden v. Mensinger, 175 Cal. 300, 165 P. 950.

Under the evidence the plaintiff has established a prima facie right to enforce the mechanic's lien. The trial court erred as contended for by the plaintiff.

The plaintiff contends the trial court erred, in sustaining the defendants' motion to dismiss its petition, in finding the evidence was not sufficient to prove the fair and reasonable value of the materials furnished by the plaintiff.

The president of the plaintiff corporation testified that exhibit No. 1 was an itemized list of the materials that were sent to Sidney and the charges made thereon in the amount of $2,858, upon which account $800 had been paid and there was owing $2,058. There was no objection to the showing that the prices set forth in the list were not correct, or that the items for profit or the discounts allowed were not reasonable and fair. The evidence shows prima facie what the reasonable cost of the material was and is not controverted.

There is evidence that might disclose excessive charges or overcharges on certain items appearing in the itemized list of materials furnished.

Where the amount indicated was claimed in excess

of that actually due, an overstatement in a claim for a mechanic's lien of the amount due will not, when arising from an honest mistake or an inadvertence free from fraudulent intent, vitiate the lien for the sum actually due. Cases holding to the above rule of law are too numerous to cite. See annotation in 29 L. R. A. N. S. 306. See, also, Kneeland on Mechanic's Liens (2d ed.) § 165, p. 179; Central Const. Co. v. Highsmith, *supra.*

There is no evidence, if the itemized list of material contains an overstatement of the amount due and sought to be recovered by virtue of the mechanic's lien, that such was made intentionally and with a design to defraud. In the state of the record at this time, the defendant's contention as to an overcharge being made by the plaintiff cannot be sustained.

The plaintiff contends that the trial court erred, in dismissing its petition, in finding that the mechanic's lien filed on April 26, 1950, at 4 p. m., was not filed in time as provided for by law. While there is some conflict in the evidence, it does appear that the last delivery made by the witness Patterson, using the Knight Construction Company truck, was on February 26, 1950. There is also evidence that a window and slab door were delivered to the premises by a common carrier either the 5th or 6th of March 1950. The itemized statement of account of materials furnished by plaintiff shows the charges made therefor and the materials furnished at that time, as of March 8, 1950. These last items were not replacement items. It is apparent from this evidence that the mechanic's lien of plaintiff was filed in time as provided for by law.

Other assignments of error need not be discussed.

Being mindful of the rule heretofore set out, when defendant moves to dismiss plaintiff's case at the close of the plaintiff's evidence the defendant thereupon admits the plaintiff's testimony to be true, together with every inference which may fairly and reasonably be

drawn therefrom. We conclude, by the plaintiff's evidence and the authorities cited, the plaintiff has made a prima facie case.

Where it appears that such dismissal of the plaintiff's cause of action was erroneous, the parties are entitled to be placed in the same position they were in before the error occurred, which requires the cause to be remanded for a new trial. Paul v. McGahan, *supra*.

The judgment of the trial court in dismissing the plaintiff's petition and in dismissing the cross-petition of the defendant Guarantee Mutual Life Company, a corporation, is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

THOMAS R. P. STOCKER, APPELLANT, V. FRANK E. WELLS ET AL., APPELLEES.

52 N. W. 2d 284

Filed March 7, 1952. No. 33113.

1. **Appeal and Error.** When a case is sent back by the Supreme Court to the trial court with specific directions, the trial court has no alternative except to follow the directions given in the manner set forth therein.
2. **Costs.** A person who has been brought in as a party to an action between others is ordinarily entitled to recover his costs if no cause of action against him is established and he is not shown to have any interest in the subject matter of the litigation.
3. ———. Unless it appears that depositions were not taken in good faith or were actually unnecessary, costs of taking them are properly taxable although they were not used at the trial.
4. ———. The questions of good faith and reasonable necessity are for a trial court to determine, but the discretion conferred upon it by section 25-1711, R. R. S. 1943, in taxing costs is not arbitrary but a legal one to be exercised within the limitations of legal and equitable principles.

APPEAL from the district court for Nemaha County: THOMAS E. DUNBAR, JUDGE. *Affirmed in part, and in part reversed and remanded with directions.*

T. R. P. Stocker, pro se, for appellant.

Ferneau & Kiechel, and *Lee Kelligar*, for appellees.

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

CHAPPELL, J.

On July 16, 1948, this court decided Stocker v. Wells, 150 Neb. 51, 33 N. W. 2d 445, wherein plaintiff sought and secured a mandatory injunction in the district court requiring defendants Lehr and Wells to remove certain connected dikes constructed by them upon their adjacent premises, and enjoining them from constructing, maintaining, or erecting any dike or dikes that would impede the natural floodwaters of the Nemaha River. In that opinion we reversed the judgment and dismissed the action as to defendants Lehr, and affirmed in part and reversed in part the judgment against defendants Wells, and remanded the action against such defendants in part with directions.

The opinion concluded by saying: "The costs of the defendants Lehr are taxed to the plaintiff; all other costs are taxed to the defendants Wells."

Thereafter on August 4, 1948, plaintiff filed a motion in this court to clarify that portion of the opinion dealing with costs, in order that the method of arriving at the costs might be made definite and equitable in this court and guide the trial court in the taxation of costs in that court. The motion was overruled on September 22, 1948.

On October 5, 1948, the mandate issued from this court. Insofar as important here, it ordered and adjudged that in conformity with the opinion, made a part thereof, defendants Lehr should recover from plaintiff their costs in this court, taxed at $105.95, and also that plaintiff should recover from defendants Wells his costs taxed at $123.75, for which execution was awarded.

Thereafter on November 4, 1948, plaintiff filed in this court a "Motion to correct mistake, omission, and neg-

lect of clerk and to require costs to be taxed in accordance with opinion." The costs in this court taxed against plaintiff in favor of defendants Lehr included one-half cost of transcript from district court, one-half cost of printing brief, and one-half the docket fee. The costs in this court due plaintiff from defendants Wells included one-half the appearance fee and one-half the amount taxable for plaintiff's briefs. Such motion was overruled on November 8, 1948.

Thereafter on March 21, 1951, defendants Lehr filed a motion in the district court to tax the costs in that court. After a hearing thereon, whereat evidence was adduced by the parties, the trial court by written order sustained the motion and purportedly in accordance with the mandate of this court found and adjudged that defendants Lehr should recover from plaintiff $290.16 taxed as costs against plaintiff. It further found and ordered that certain depositions taken by plaintiff at a cost of $39.57 were unnecessary and should be disallowed as costs. Other small items taxed to plaintiff are not involved here. All other costs were taxed to defendants Wells. Therefrom plaintiff appealed to this court, assigning that the findings and order were not sustained by the evidence but contrary thereto and contrary to law and the mandate of this court. We conclude that the assignments should be sustained in part with regard to witness fees and mileage of two witnesses who were called and testified "on behalf of the defendants" and sustained in toto with regard to disallowance of the cost of depositions taken by plaintiff. Otherwise we conclude that the findings and order were correct and that the assignments have no merit.

As a matter of course it was the duty of this court when it disposed of the case as aforesaid to tax costs as in its discretion the equities of the cause required, as provided in section 25-1933, R. R. S. 1943. In that connection, three times this court has concluded that it did so in the case at bar, and in that connection also it was

the duty of the district court to obey the mandate of this court. As held in De Lair v. De Lair, 148 Neb. 393, 27 N. W. 2d 540: "When a case is sent back by the Supreme Court to the trial court with specific directions, the trial court has no alternative except to follow the directions given in the manner set forth therein."

In order to determine whether or not that was done, we have carefully examined every item taxed in favor of defendants Lehr and against plaintiff. In doing so we discover that the trial court obeyed the mandate of this court in every particular and did not abuse its discretion except in the taxation of fees and mileage of two witnesses which, apparently by oversight, were all taxed to plaintiff. In that regard two witnesses, C. A. Shannon and Roy N. Towl, were called by defendants to testify "on behalf of the defendants." The total sum of their witness fees and mileage, $20, was taxed in favor of defendants Lehr and against plaintiff, when only one-half thereof, or $10, should have been so taxed. The other one-half, or $10, should have been taxed in favor of plaintiff and against defendants Wells. Whether or not defendants Lehr or Wells or both of them made certain payments to such witnesses for professional services was beside the point and not controlling because they both testified as expert witnesses called by and on behalf of all defendants.

We turn then to taxation of costs for the bill of exceptions. The record discloses without dispute that defendants Lehr paid $255.50 for one-half the cost of the bill of exceptions, and that defendants Wells paid the other one-half. The trial court, doubtless attempting to follow the mandate of this court and observing that it had taxed plaintiff with one-half the costs of the transcript, brief, and docket fee in this court, taxed one-half the bill of exceptions to plaintiff in favor of defendants Lehr. We sustain the order in such respect.

It is generally the rule that: "A person who has

been brought in as a party to an action between others is entitled to recover his costs if no cause of action against him is established and he is not shown to have any interest in the subject matter of the litigation." 14 Am. Jur., Costs, § 30, p. 20; 15 C. J., Costs, § 200, p. 102; 20 C. J. S., Costs, § 113, p. 354.

The second sentence of the last citation reads: "Where some of the defendants are unsuccessful, however, plaintiff is entitled to recover of them the costs incurred in the joint defense or otherwise, except such as may be separated therefrom as having exclusive reference to the defendant who is discharged."

Plaintiff relying thereon argued that the bill of exceptions was predominantly concerned with evidence relative to the case against defendants Wells instead of defendants Lehr, and that all except a small portion of the cost thereof should be taxed against defendants Wells in favor of plaintiff. In other words, plaintiff contends that he should be taxed for not to exceed 15 pages of the bill of exceptions whereat testimony appeared allegedly having exclusive reference to the Lehr dike. The answer is not that simple.

Plaintiff himself and not defendants Wells brought this action against all defendants, the issues of which presented a complicated over-all drainage problem involving not only the lands of plaintiff and defendants but also adjacent territory as well clear across the entire west valley of the Little Nemaha River. As we view the record, the evidence related itself generally to the whole problem presented. Viewed in such light the judgment against defendants Lehr was reversed. It should be noted also that the judgment against defendants Wells was reversed in part.

Further, in his original petition plaintiff among other things said: "That by reason of the facts herein set forth said dams or dykes constitute a nuisance and unless abated will cause irreparable damage to this plaintiff and other land owners affected thereby. That said

irreparable injuries to the property of this plaintiff, his land and his crops are the result of the acts of each of said defendants, and that said result and injuries have been and will be increased by reason of the concurrent and combined acts of all of said defendants. The plaintiff alleges further that said defendants have agreed and conspired together to do the acts herein complained of in order that by their combined acts and the use of the public highway and the joining of all the dams and dykes constructed, the same constitutes one immense long continuous dam or dyke surrounding the defendant's real estate on all sides and preventing the natural flood water to follow its accustomed course over and upon said defendant's lands, to the great permanent and continuous injury to plaintiff's land." The effect of the trial court's decree was to generally sustain all such allegations except the charge of conspiracy and to tax all costs equally against defendants Lehr and Wells. Defendants each filed separate motions for new trial, and when they were overruled each filed separate notices of appeal. Defendants Lehr, in order to obtain the relief to which they were entitled, were required to perfect an appeal which necessitated the preparation and cost of a bill of exceptions to be presented to this court. They paid one-half the cost and were successful in the appeal. Plaintiff was responsible for its necessity and should be liable to defendants Lehr therefor, as held by the trial court. No other conclusion would be just or equitable.

The sum of $39.57, cost of certain depositions taken by plaintiff but not used at the trial, was disallowed as unnecessary. Plaintiff assigned such disallowance as erroneous. We sustain the assignment.

The applicable rule is stated in Farmers Union Fidelity Insurance Co. v. Farmers Union Co-Operative Insurance Co., 147 Neb. 1093, 26 N. W. 2d 122: "In regard to unused depositions we think the following is the

correct rule: ' * * * unless it appears that the depositions were not taken in good faith or were actually unnecessary, costs of taking them are properly taxable although they were not used at the trial; and * * * that costs are taxable for depositions not used because the witness attends and testifies in person, if the party taking the depositions acted in good faith * * * where its use is rendered unnecessary or impossible by the act of the opposite party; * * * The questions of good faith and reasonable necessity are for the trial court to determine; and in determining them it will bear in mind that a deposition, at the time of the taking thereof may be apparently necessary in the sense that the party cannot safely proceed to trial without it, although afterward the case may take such a course as to make it unnecessary to use the deposition.' 20 C. J. S., Costs, § 194a-1, p. 425." It will be observed also that the discretion conferred on the trial courts by section 25-1711; R. R. S. 1943, in taxing costs is not arbitrary but a legal one to be exercised within the limits of legal and equitable principles. In re Clapham's Estate, 73 Neb. 492, 103 N. W. 61.

In that connection we find nothing in the record before us which in any manner established that the depositions were not taken in good faith or were actually unnecessary. In fact the evidence establishes the contrary without dispute, and we conclude that under the circumstances presented the cost of such depositions should have been taxed in favor of plaintiff and against defendants Wells.

For the reasons heretofore stated we conclude that the order of the trial court taxing costs should be and hereby is affirmed in part and reversed in part, and the cause is remanded with directions to enter an order taxing costs in conformity with this opinion. All costs of this proceeding in both the district court and this court are taxed in favor of plaintiff and against defend-

ants Lehr and Wells, each being required to pay one-half thereof.

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

PLATTE VALLEY PUBLIC POWER AND IRRIGATION DISTRICT, A PUBLIC CORPORATION, APPELLEE, V. NOEL COVER ET AL., APPELLANTS.

52 N. W. 2d 243

Filed March 7, 1952. No. 33116.

Contracts. Courts will not resort to construction where the terms of a contract are clear and plain and the interests of the parties are clearly expressed.

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

Baskins & Baskins, for appellants.

Crosby & Crosby, for appellee.

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

YEAGER, J.

This is an action by Platte Valley Public Power and Irrigation District, a public corporation, plaintiff and appellee, against Noel Cover and Nellie Cover, defendants and appellants, to recover two payments each in the amount of $2,750 with interest at the rate of seven percent per annum which were past due on a written contract of sale of certain land in Dawson County, Nebraska. One payment became due on April 7, 1949, and the other on April 7, 1950.

The contract was entered into on April 7, 1947. It provided for a total consideration of $14,000, $3,000 of which was to be in cash, $2,750 on April 7, 1948, and an equal amount on April 7 of the three succeeding years. The

deferred payments were to draw interest at four percent per annum. The cash payment and payment of the first installment were made. The defendants were in default of payment of the principal of the second and third installments when this action was instituted. They were also in default of interest which accrued after the due dates of the two installments.

These facts are all admitted in the answer of the defendants. There is in the answer of the defendants no denial or traverse of any of the allegations upon which the plaintiff bases a right of recovery. The answer admits that under the terms of the written contract on which the action is predicated they are indebted as claimed by the plaintiff.

In an effort not in defense but in avoidance of this obligation the defendants have filed a cross-petition.

By their cross-petition they allege substantially that by the terms of the contract of purchase they waived damages to the land purchased caused by certain structures maintained thereon by plaintiff, which structures do not require description here, and agreed to continued maintenance thereof by plaintiff. These allegations are factually reflected in the contract.

They further allege that they are owners of land adjoining the land purchased under the contract and that they have learned that the plaintiff construes the contract to mean that the defendants have also waived damages to these other lands and personal property and crops located thereon caused by the structures on the land purchased under the contract. This construction they allege is invalid and was never agreed to by the parties.

By their prayer they asked the district court to interpret the contract and to interpret it in such manner as to declare that the waiver of the contract applies only to damages to the land described in the contract. They seek other relief but in the light of the response to the allegations of the cross-petition and the evidence

as contained in the bill of exceptions this becomes unimportant here.

The reply denies that the plaintiff ever construed the contract as a waiver of damages to lands other than those described in the contract. In addition to this in the only evidence adduced on the trial on the subject, it was unequivocally denied that any such construction had been placed on the contract. On the record which comes here therefore the parties are definitely in accord on the proposition that the contract by its terms does not contain a waiver as to other land and that the plaintiff has not placed and does not place on it any such interpretation.

It is true that the record discloses that in an action by defendants against the plaintiff for damages to and upon the adjoining lands the plaintiff here has pleaded that the defendants here are estopped to assert a claim for such damages because of knowledge which they had of conditions when the contract in question here was entered into. That defense however in nowise depends upon the terms of the contract, any claimed representations as to what the parties considered that it embraced, or any mutually considered inducements to the contract. The validity of the defense is for determination in that action and not in this one.

On the record the district court dismissed the cross-petition and rendered judgment in favor of plaintiff for the two delinquent installments with interest at four percent per annum from date of default until judgment. Interest was allowed on the judgment at the rate of six percent per annum.

The defendants filed a motion for new trial which was overruled. From the order overruling the motion for new trial and the judgment they have appealed.

From the facts as they have already been outlined it is clear that the cross-petition presents nothing for determination. There is nothing in the light of the record for the court to construe.

Courts will not resort to construction where the terms of the contract are clear and plain and the interests of the parties are clearly expressed. In re Ordean's Will, 195 Minn. 120, 261 N. W. 706; 17 C. J. S., Contracts, § 294, p. 683.

The defendants, as pointed out, agree that under the terms of the contract they are indebted to plaintiff as claimed.

The judgment of the district court is therefore affirmed.

AFFIRMED.

MESSMORE, J., participating on briefs.

FRED A. RAHFELDT, APPELLANT, V. ARNOLD W. SWANSON, DOING BUSINESS AS ARNOLD W. SWANSON & COMPANY, ET AL., APPELLEES.

52 N. W. 2d 261

Filed March 7, 1952. No. 33125.

1. **Workmen's Compensation.** The right of recovery in a workmen's compensation case is statutory and the burden is on the claimant to establish the facts essential to an award.
2. **Appeal and Error: Workmen's Compensation.** An appeal in a workmen's compensation case will be by this court considered de novo upon the record.
3. **Workmen's Compensation.** An award of compensation under the Nebraska Workmen's Compensation Act may not be based on possibilities, probabilities, or conjectural or speculative evidence.
4. **Appeal and Error: Workmen's Compensation.** In such a case if the evidence is in irreconcilable conflict the court may upon a trial de novo consider the fact that the district court gave credence to testimony of some witnesses rather than contradictory testimony of other witnesses.
5. **Trial: Courts.** A court is not required to permit a litigant to trifle with the processes of the court by asserting therein under oath at different times the truth of each of two or more contradictory versions of an event or events in controversy according to the necessities of the particular occasion presenting itself.

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

J. E. Willits, for appellant.

Deutsch & Jewell, for appellees.

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

BOSLAUGH, J.

This case involves a claim of appellant against appellees for benefits provided by the Nebraska Workmen's Compensation Act.

The claim of appellant as stated in his petition in district court is that on the 23d day of July 1948, he was employed by Arnold W. Swanson; that New York Casualty Company was his compensation insurance carrier; that appellant on that date suffered personal injuries by an accident arising out of and in the course of his employment consisting of a fracture across the trochanteric area of the right hip, severe bruises and nervous shock, and a right inguinal hernia; that his injuries affected his right foot, arms, back, spine, shoulders, and the use and functions of them; that his injuries and disabilities therefrom are "permanent and practically total"; and that his weekly wage was $106.75. The answer of appellees, insofar as important to this appeal, is a denial of the petition of appellant.

The district court found as follows: That appellant on July 23, 1948, sustained a fracture across the trochanteric area of his right hip; that he had surgical, hospital, and nursing services on account thereof; that he was because of the injury temporarily totally disabled until January 21, 1949, a period of 26 weeks at which time temporary disability terminated; that he had a 10 percent permanent partial disability to his right leg by reason of the injury to it; and that no other injury or disability claimed by appellant was

caused by or was referable to the accident involved in the case.

That the hernia claimed to have been caused by the accident on July 23, 1948, to the right side of appellant existed before it and any disability resulting was not caused by it; and that there was no evidence of increased disability of appellant because of the hernia or any aggravation of it by the accident of July 23, 1948, and he was entitled to no compensation because thereof.

That appellant was entitled to recover for the temporary total disability suffered by him $18 a week for 26 weeks the sum of $468 less the payments made him by appellees amounting to $461.71 or a balance on that account of $6.29, and for 10 percent permanent partial disability to his right leg $18 a week for 21½ weeks the sum of $387 or a total of $393.29 due and unpaid to fully compensate for all disability of appellant resulting from the accident of July 23, 1948; and that appellant should recover the balance of expenses incurred by him for travel to and from doctors and the hospital amounting to $107.44.

The court rendered judgment for appellant and against appellees for $500.73. The court also required appellees to pay, in accordance with the medical and hospital fee schedule promulgated by the Nebraska Workmen's Compensation Court, the fees incurred for an operation for the reduction and repair of the hernia on the right side of appellant, the fees for the operation for the removal of the steel blade plate inserted at the site of the fracture in the right leg of appellant, and the hospital fees while appellant was hospitalized incidental to the operation, provided he elected to and did submit to the operation within 60 days of June 18, 1951.

Appellant contends that the evidence shows and that the district court should have found that he is totally disabled and the court should have awarded him recovery on that basis. The record advises that he was taken to a hospital in Sioux City, Iowa, soon after he

was injured on July 23, 1948, and that he was cared for by Dr. O'Donoghue who had specialized in orthopedic surgery and treatment of fractures for 30 years. The history the appellant gave the doctor was that a few hours previously while he was working with a hammer in his right pocket resting against his right hip he fell and landed on the head of the hammer. He complained of no injury other than to his right hip. The doctor examined him with the assistance of X-ray and found a fracture across the trochanteric area of the right hip. The fracture was on July 26, 1948, after the patient had recovered from shock, openly reduced and held with a stainless steel blade plate. Appellant was confined in the hospital 15 days after the operation and when he was discharged his physical condition was excellent. He could not bear weight on his right leg at that time but moved about with the aid of crutches.

He called on the doctor on October 7, November 4, December 14, 1948, and April 20, 1949. The doctor took X-rays and examined him on each visit. On the first of these dates his hip was "doing very well" but he had a mass in his right groin "which he did not have when we first saw him at the hospital." It was diagnosed as a right inguinal hernia. On November 4 he was allowed to put some weight on the fractured hip. On December 14 "the hip was completely healed. We told him to discard his crutches and do as much work as he wanted to." On that date he wanted to drive a car from the State of Iowa to Phoenix. He was examined the last time on April 20, 1949, and the doctor found that his hip was entirely normal in every way. The X-ray examination showed the hip was perfect. The place where it was broken could not be seen. He then had no permanent disability of any kind, occupational or otherwise, as a result of the fracture of his hip. His hip was as good as it was before the accident. The doctor based his conclusion that appellant had no permanent disability and would not have in the future because of the fracture

on his many years of experience in treating many hundreds of previous injuries, and the fact that even an X-ray did not show the fracture after it healed; that it healed without leaving any residuum; that the angle or inclination of the shaft of the femur was perfectly normal; that the density of the bone on the broken side was normal; that he had full range of passive movement of the hip joint; and that there was no appreciable muscle atrophy.

Appellant was given six months of temporary total disability because the bone was not strong enough to carry weight without support for about four months, and the additional two months were to get the muscles limbered up and strength back in them. The length of his right leg was not affected or changed as a result of the injury. The doctor had no record or recollection of any complaint of the appellant of pain in or between the shoulders. There were no nerves affected by the operation and the doctor did not tell appellant that there were. It is not necessary to remove the plate from the hip of appellant because of the type of fracture that he had. The plate will not change and it will not affect the physical parts or tissues of the body of appellant in any way. Dr. O'Donoghue was the only doctor who was consulted and who did anything for appellant after he arrived at the hospital on the day of the accident until May 4, 1949, a period of about 10 months.

Appellant was examined on August 11, 1949, by Dr. Johnson, a specialist in orthopedic surgery since 1924, and an instructor on the subject of fractures in the Medical College of the University of Nebraska since 1925. He found that the "fracture line through the intertrochanteric region is held in perfect position," there was complete union at the site of the fracture, and the bone and the apposition were in perfect position. The motions of the right hip joint were within normal limits except internal rotation was limited to one-half

normal. There was slight atrophy of the right thigh above the patella. The two hips were identical except there was a little bone atrophy or decalcification. There was no shortening of the right lower limb. There was no condition or disability except as stated above that could be attributed to the fracture of the right leg of appellant. The conclusion of Dr. Johnson was that appellant had "a ten per cent permanent partial impairment of the right lower extremity" and this was based on the objective findings that there was "some limitation of the motion of the hip and some atrophy of the limb." His opinion was that appellant could have on August 12, 1949, resumed his employment as a carpenter and performed all its requirements, and that a 10 percent disability "is a relatively small disability" and was not great enough to keep Mr. Rahfeldt from following his occupation as a carpenter.

Walter E. Dutton, a chiropractor of 2½ years experience in that field of healing art, testified that he was told on May 4, 1949, by appellant that he had an accident and fell off "whatever it was he was on"; that he broke his right leg and sustained "some other spinal injuries" causing pain in his upper back, shoulders, and especially his arms; and that his examination developed the existence of a left rotation of the bodies of the upper dorsal vertebra, a right rotation of the bodies of the lumbar vertebra, and an inferiority of the right ilium. These caused the sacrum to be off balance, and that abnormal rotation of a vertebra may cause pressure on soft tissue structure surrounding the spinal nerves and this may produce pain in the extremities. The right leg of appellant was shorter than the left. A fall from a scaffold could have been the cause of the abnormal rotations of the spine and the shortness of the right leg could have aggravated the condition. Appellant had "a bunching of the muscles" above the third dorsal vertebra. It appeared to be irritating and appellant complained of it and pains in his arms. This condition yielded to chiropractic

treatment. He thought the unsatisfactory conditions of appellant as described by him were of traumatic origin, but he had or gave no estimate or opinion of any degree of disability caused by them or any of them or the probable duration thereof.

Dr. Schroeder examined appellant about the first of July 1949, about a year after the accident. The history given him was that appellant had his hip fractured in a fall; that he sustained a hernia; and that he had "been sore and stiff all over, unable to perform his usual duties; that the joints generally in his body have been sore and achy." The findings of the doctor were "moderate kyphosis and scoliosis to the left in the middorsal region," arthritic changes in the spine, atrophy in the right leg, and right inguinal hernia. His diagnosis was "that much of this arthritis is traumatic or at least seriously aggravated by this fall," and he believed that plaintiff had about 50 percent or more disability. This doctor gave as his qualifications that he was a graduate of the medical school of the University of Iowa and had practiced in Marshalltown, Iowa, 13 years. He made no segregation of the degree of disability he believed resulted from the injury to the leg or the degree of disability in the back or the degree of disability by reason of the hernia. It is speculation whether the hernia and its effect were the principal basis of the opinion of the doctor as to disability or how much or how little importance he placed upon it. The evidence to warrant an award in this kind of a case must be more than conjecture or speculation. The history given the doctor was, with the exception of the hip injury, at variance with what the claimant had said about the accident and the effect upon him on prior occasions.

Examination by Dr. Johnson of appellant was about one month after Dr. Schroeder saw him. Dr. Johnson found that whatever disturbance there was in the bones and joints of the spine was not the result of trauma but was the result of infection or degeneration, a gradual

chronic disease often aggravated by hard work which produces changes in the spine; that it could not be connected up with the accident because there was nothing suggestive of that; that what osteoarthritis he had was of long standing; and that he "probably has had an arthritic spine for a minimum of five years."

Any right of recovery in this case is statutory and the burden is on the claimant to establish the facts essential to an award. An award of compensation may not be based on possibility, probability, or conjectural or speculative evidence. Miller v. Schlereth, 152 Neb. 805, 42 N. W. 2d 865; Hamilton v. Huebner, 146 Neb. 320, 19 N. W. 2d 552, 163 A. L. R. 1. It is the rule that on appeal to this court in a workmen's compensation case it must be determined de novo upon a consideration of the record but in such a case if the evidence is in irreconcilable conflict the court may upon a trial de novo consider the fact that the district court gave credence to testimony of some witnesses rather than contradictory testimony of other witnesses. Tucker v. Paxton & Gallagher Co., 153 Neb. 1, 43 N. W. 2d 522; Meester v. Schultz, 151 Neb. 614, 38 N. W. 2d 739.

The temporary total disability of appellant resulting from the accident of July 23, 1948, did not continue beyond the 21st day of January 1949, and the permanent disability of appellant resulting from the fracture of his right leg in the accident did not exceed 10 percent.

Appellant contests the findings of the district court that he did not sustain a hernia of his right side in the accident of July 23, 1948. He testified at the trial in district court that he had a hernia; that he first noticed it when he got out of bed at the hospital and took a bath; that he called it to the attention of Dr. O'Donoghue and he advised appellant to secure and wear a truss until the hernia was corrected; that it was on his right side; and that he did not have a rupture on that side and never wore a truss before the accident. He denied that he testified before the compensation court in this

case that he wore a truss before the accident; that he had a truss on that had to be and was removed from his body after the accident; or that he had purchased a truss in a drugstore in Hastings.

The trial of the case was adjourned and the testimony of Albert Arms, one of the judges of the compensation court who heard and decided this case therein, was produced. It was that appellant when examined under oath testified he was wearing a truss for a hernia at the time of the accident; that he bought the truss in Hastings; and that he was ruptured about the middle of June 1948. There was evidence that appellant was wearing a truss when he was taken to the office of a doctor the day of the accident and that it was taken off of him when he was undressed in the office. The evidence further was that it was worn for a hernia and that it was "pretty well worn." Dr. Johnson stated that appellant told him that he developed a right inguinal hernia a short time before the injury to his right hip.

Appellant was examined again during the trial after the testimony of Judge Arms had been taken and he then stated that he had an injury to his left side in June of 1948; that he thought his injury was a rupture; that he went to Hastings, bought a truss, put it on, and wore it until it was taken off after the accident on July 23, 1948; and that the hernia he claims compensation for in this case is on the right side.

Appellant within one month testified in the district court to opposite statements concerning the hernia. He gave oath to a third version in the compensation court. An appropriate and sufficient comment here is that courts are not required to permit a litigant to play fast and loose with the processes of the court by insisting at different times under oath on the truth of each of two or more contradictory versions according to the necessities of the particular occasion presenting itself. Gohlinghorst v. Ruess, 146 Neb. 470, 20 N. W. 2d 381; Peterson v. Omaha & C. B. St. Ry. Co., 134 Neb. 322, 278

N. W. 561; Ellis v. Omaha Cold Storage Co., 122 Neb. 567, 240 N. W. 760. Conduct of this kind merits neither toleration nor reward. It is concluded that the evidence fails to show that appellant suffered a hernia or any aggravation thereof as a result of the accident of July 23, 1948.

The cross-appeal contests the order of the district court requiring appellees to furnish and pay the expense of hospitalization and surgery for the repair of the hernia of appellant, for the removal of the steel plate placed in his right leg at the time of the operation for the reduction of the fracture, and to pay appellant compensation during the period of his hospitalization and convalescence incident to the surgery.

What has been said herein about the evidence concerning the hernia by appellant is sufficient for a determination that the appellees are not responsible or liable for any expense required for the repair of the hernia. There is a failure of evidence that it is necessary or desirable to remove the plate from the right leg of appellant. There is convincing evidence that it is not. The suggested evidence to the contrary is exhibit M. The offer of this was objected to and the exhibit should have been refused. It was not identified and no foundation is shown for its admission in evidence. The rule that only competent evidence is admissible over objection applies in a compensation case. Chambers v. Bilhorn, Bower & Peters, Inc., 145 Neb. 277, 16 N. W. 2d 173; Hamilton v. Huebner, *supra*. The cross-appeal should be and it is sustained.

The issue in this case is the nature and extent of the disability of appellant caused by the accident of July 23, 1948, and the amount of unpaid recoverable expenses incurred by him as an incident of his disability. All other essential matters are admitted in the record. Appellant should be awarded $393.29 in addition to the payments of $461.71 made to him by appellees as compensation for his disability and $107.44, the balance of

expenses incurred by him because of the accident, or a total award of $500.73.

The part of the judgment of the district court in favor of the appellant and against the appellees for the amount of $500.73 should be and it is affirmed. The judgment of the district court in all other respects and as to all other matters should be and it is reversed; that all costs accrued in the district court should be and they are taxed to appellees; and that the costs in this court should be and they are taxed to appellant.

AFFIRMED IN PART AND
REVERSED IN PART.

HENRY B. BABSON, APPELLANT, V. VILLAGE OF ULYSSES, A MUNICIPAL CORPORATION, IN BUTLER COUNTY, NEBRASKA, APPELLEE.

52 N. W. 2d 320

Filed March 14, 1952. No. 33112.

1. **Assignments.** Where an executory contract which the parties thereto have the right to rescind or discharge is rescinded by agreement of the parties an assignee of one of the parties of benefits which had not accrued at the time of rescission may not maintain action therefor against the other party in the absence of assumption of liability therefor by such other party.
2. ———. An assignment of a contract or a right flowing therefrom does not create a contractual obligation between the assignee and the other party to the contract in the absence of assumption of the liabilities of the assignor by the assignee.
3. ———. An assignee of the obligation of a contract takes subject to its burdens in the hands of the assignor and in order to recover he must show that the conditions have been performed. He is bound by the terms of the contract to the same extent as the assignor.
4. ———. An assignee of a non-negotiable chose in action ordinarily acquires no greater right than that possessed by his assignor. He stands in the shoes of the assignor and he cannot sue if the assignor could not have maintained the action.

APPEAL from the district court for Butler County: CLOYDE B. ELLIS, JUDGE. *Affirmed.*

J. J. Thomas and *Charles F. Barth,* for appellant.

Flansburg & Flansburg, and *Coufal & Shaw,* for appellee.

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

YEAGER, J.

Here are two actions instituted by Henry B. Babson, plaintiff and appellant, against the Village of Ulysses, a municipal corporation, defendant and appellee. The two were consolidated for the purposes of trial and tried as a single action. They will be regarded and treated as one action here.

By the actions plaintiff claims that there is due him from the defendant $100 a month from December 1930 to and including July 1936 with interest at seven percent per annum. The indebtedness is denied by the defendant.

A trial was had to the court at the conclusion of which it was adjudged and decreed that the defendant was not indebted to plaintiff and plaintiff's actions were dismissed. Motions for new trial were duly filed and overruled. From the judgments and the orders overruling the motions for new trial the plaintiff has appealed.

The basis of the litigation is substantially the following: The village of Ulysses entered into an agreement with the Blue River Power Company to supply the village with electric current for all its needs for a period of 20 years commencing April 1, 1920, which energy was to be delivered at the village substation and by the village distributed to its customers. This contract was not actually entered into until September 20, 1921. As a part of the consideration the village agreed to pay to the company $100 a month for 200

months. This part of the consideration was by the parties denominated a "primary charge." It was a part of the rate structure and it appears that its design was to amortize the cost of a transmission line constructed by the company which was necessary to serve the village. The further consideration of the contract was the payment of a specific rate for each kilowatt hour for all electric current used. This was referred to as a "secondary charge." The validity of this contract was not brought into question on the trial.

There was full and complete performance by both parties under the contract until October 17, 1925. On October 17, 1925, all of the stock of the Blue River Power Company was sold to the United Light and Power Company. The stock had been owned by the plaintiff herein. By the terms of the agreement whereby the United Light and Power Company obtained this stock Babson became entitled by assignment to the payment of the $100 a month or "primary charge" from the defendant herein. He became entitled to other properties and interests theretofore belonging to the Blue River Power Company but we deem it unnecessary to describe these interests here since the village was not a party to the agreement and it is not made to appear that it ever prior to this action became informed as to its contents.

It is to be observed that this assignment represented an obligation of the United Light and Power Company to plaintiff and not one of the village to him, and that this was the method adopted by the power company and plaintiff for its liquidation.

The village was notified of assignment of the "primary charge" of $100 a month provided for in the contract. The body of the notification is the following:

"I have been instructed to inform you that at a recent meeting of the Board of Directors of the Blue River Power Company, resolutions were passed, assigning the $100.00 per month, identified as being a primary charge, in our contract with the Village, to H. B. Babson.

"In the future, commencing with the next payment, you will therefore please remit this $100.00 each month, as provided for in the contract, to H. B. Babson, 19th St. & California Avenue, Chicago, Illinois. Payments due for actual current consumed, and stipulated in the contract as being secondary charge, will be payable to the Blue River Power Company, here at Seward, as in the past.

"I kindly ask that you acknowledge receipt of this letter and make payments as per above instructions."

On May 31, 1926, the Nebraska Gas and Electric Company succeeded the United Light and Power Company and became the assignee of the Blue River Power Company contract, and on August 30, 1927, the Iowa-Nebraska Light and Power Company became the assignee thereof.

The village continued to make the monthly payments of $100 each to the plaintiff until December 1930.

On December 2, 1930, the village sold its distributing system to the Iowa-Nebraska Light and Power Company and granted this company a non-exclusive right and franchise for a term of 25 years to build, operate, and maintain an electric power system in the village. The village at this time ceased to be a distributer of electric current. It ceased also to be a purchaser except for a sufficient amount of current to operate its water system. It became such purchaser under the new contract.

Upon the completion of this arrangement the power company and the village regarded the relationship, which by agreement commenced on April 1, 1920, as ended and in consequence the defendant made no further payments to the plaintiff.

The actions here are by the plaintiff to recover from the defendant the monthly payments remaining after December 1930 under the contract between the Blue River Power Company and the village of Ulysses hereinbefore described which became effective as of April

1, 1920, and entered into on September 20, 1921, except the payments for four months which were not due at the time of the commencement of the second action.

Plaintiff by his actions contends that by virtue of his assignment he became entitled to these amounts as they would have come due had the contract and performance thereof not been abandoned by the parties thereto, and to a judgment therefor against the defendant. The judgment of the trial court was a denial of this contention and a dismissal of the actions.

The briefs of plaintiff contain numerous assignments of error and the assertion of many reasons why the judgment should be reversed. We think however that a proper decision herein depends upon the one question of whether or not the plaintiff was entitled to assert a claim against the village under his assignment after the village and the Iowa-Nebraska Light and Power Company ceased to operate under the Blue River Power Company contract.

In the determination of this question it becomes necessary to examine and apply certain facts as well as certain legal principles.

There is no substantial dispute as to controlling facts. The cases come here on the transcript which contains the pleadings and judgment, a stipulation of facts, and the testimony of a single witness. The testimony of this witness was contained in a deposition which was read at the trial.

It is not disclosed by the record that the village ever was notified or had authentic knowledge of the substance or effect of any of the agreements whereby the agreement of the Blue River Power Company or the obligations thereof were transferred to the United Light and Power Company, then to the Nebraska Gas and Electric Company, and then to the Iowa-Nebraska Light and Power Company. The only thing in that connection which came authentically to its knowledge was the information contained in the notification of assignment

of the "primary charge." This notification has been previously quoted at large herein. It will be observed that by this the village was notified only that the "primary charge" of $100 a month was assigned to plaintiff and the village was directed to make payments as they became due to him.

Further the record does not disclose any contractual relationship or privity with reference to this subject matter between plaintiff and defendant. In this connection the record discloses only that the village became informed that through an undisclosed arrangement between plaintiff and the power company plaintiff became entitled to receive a part of the consideration which flowed to the company under the terms of a contract which it had with the village. Whatever right plaintiff had to receive the payments of $100 each flowed from and was the obligation of the agreement or agreements between him and the power companies successively and not from any agreement with the village.

Under this state of facts the defendant contends that it and the company had the right under law to discontinue operation and performance under the contract or in other words to rescind it without liability thereafter on the part of the defendant to the plaintiff on his assignment. It contends that no obligation to pay remained after the parties by mutual action discontinued operation under and performance of the agreement which became effective April 1, 1920.

The contentions of the defendant in this respect must be sustained.

The assignment here was of payments of money to become due under an executory contract which the parties thereto were privileged to rescind or discharge entirely or to modify by agreement thus relieving each from the further obligations thereof in case of rescission or discharge and substituting the new ones in case of modification. Mather v. Butler County, 28 Iowa 253;

Sawyer v. Hawthorne, 167 Iowa 410, 149 N. W. 512; Smith v. Kelley, Maus & Co., 115 Mich. 411, 73 N. W. 385; Vande Stouwe v. Bankers Life Co., 218 Iowa 1182, 254 N. W. 790; Denler & Denler Land Co. v. Eby, 277 Mich. 360, 269 N. W. 203; Enderlien v. Kulaas, 25 N. D. 385, 141 N. W. 511; 13 C. J., Contracts, § 594, p. 588, § 604, p. 589; 17 C. J. S., Contracts, § 373, p. 857, § 387, p. 879.

An assignment of a contract or a right flowing therefrom does not create a contractual obligation between the assignee and the other party to the contract in the absence of assumption of the liabilities of the assignor by the assignee. 4 Am. Jur., Assignments, § 102, p. 310; Tolerton & Stetson Co. v. Anglo-California Bank, 112 Iowa 706, 84 N. W. 930, 50 L. R. A. 777; Pioneer Loan & Land Co. v. Cowden, 128 Minn. 307, 150 N. W. 903.

In the present instance there was no assumption by the plaintiff of liabilities of the assignor to the village.

An assignee of the obligation of a contract takes subject to its burdens in the hands of the assignor and in order to recover he must show that the conditions have been performed. He is bound by the terms of the contract to the same extent as the assignor. 4 Am. Jur., Assignments, § 104, p. 311; Florida East Coast Ry. Co. v. Eno, 99 Fla. 887, 128 So. 622, 70 A. L. R. 506; Detroit Postage Stamp Service Co. v. Schermack, 179 Mich. 266, 146 N. W. 144, Ann. Cas. 1915D 287; Pioneer Loan & Land Co. v. Cowden, *supra*.

Here there was an absence of performance by the power company covering the entire period contemplated by the actions.

An assignee of a non-negotiable chose in action ordinarily acquires no greater right than that possessed by his assignor. He stands in the shoes of the assignor. He cannot sue if the assignor could not have maintained an action. Henefin v. Live Stock Nat. Bank, 116 Neb. 331, 217 N. W. 91, 58 A. L. R. 758; First Nat.

Bank v. Rogers, 50 Nev. 325, 258 P. 1024, 58 A. L. R. 902; Florida East Coast Ry. Co. v. Eno, *supra;* Steltzer v. Chicago, M. & St. P. Ry. Co., 156 Iowa 1, 134 N. W. 573, L. R. A. 1915E 1017; 4 Am. Jur., Assignments, § 95, p. 304.

After the agreement was mutually rescinded and performance abandoned no burden of payment remained upon the village. The assignor and its successors surrendered their right to receive or recover the monthly amounts. Consequently the right of the assignee to receive them from the village no longer existed.

It must be said therefore that the mutual rescission of the contract which is brought into question here destroyed the right of plaintiff to recover thereafter from the village on his assignment unless, as plaintiff contends, the pretended rescission was void and of no effect.

The basis of this contention is that the village trustees had no authority or power to alter the terms of or abandon the contract of September 20, 1921. The theory is that authority for the proceedings in this connection was not received through a vote of the electors of the village, which plaintiff insists was a condition precedent to the exercise of such power.

Our attention however has not been called to any statutory provision in existence at the time of the rescission imposing any such requirement. Attention is directed to section 70-604, C. S. Supp., 1931, erroneously referred to as section 70-605, which prohibits the sale, lease, or transfer of an electric light or power plant, distribution system, or transmission lines by a village without a vote of the qualified electors. This provision however did not come into being until one day following this rescission.

Reliance is had also on section 17-508, Comp. St. 1929, now sections 17-901 to 17-904, R. S. 1943. This section in nowise relates to existing contractual relationships. It relates to powers and restrictions thereon to enter into contracts.

It is concluded that the claim of the plaintiff as made that the rescission was void and of no effect is without merit.

The judgments of the district court are affirmed.

AFFIRMED.

IN RE ESTATE OF ALICE R. BALE, DECEASED. NEBRASKA METHODIST HOSPITAL, A CORPORATION, APPELLEE, V. JOHN MCCLOUD ET AL., APPELLANTS.

52 N. W. 2d 325

Filed March 14, 1952. No. 33115.

1. **Appeal and Error: New Trial.** Affidavits in support of a motion for new trial which are not embodied in a bill of exceptions will not be considered on appeal.
2. **Wills: Trial.** It is the duty of trial courts to determine the issues upon which there is competent evidence and submit them, and them only, to the jury. In a will contest on the ground of mental incompetency and undue influence, if the evidence is insufficient to sustain a verdict upon either of such issues in favor of the contestants, then the trial court should withdraw both issues from the jury and direct a verdict or discharge the jury and render judgment for proponents.

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

Lightner & Johnson, and *Harlan A. Bryant,* for appellants.

Joseph O. Burger, and *Brower & Brower,* for appellee.

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

CHAPPELL, J.

Nebraska Methodist Hospital, hereinafter called proponent, filed its petition in the county court seeking to probate the alleged last will of Alice R. Bale. There, over objections filed by nephews, nieces, and a sister of

deceased, hereinafter called contestants, the will was admitted to probate. Contestants appealed therefrom to the district court. There a jury was duly empaneled and evidence was adduced by the parties. However, at the close of contestants' evidence the motion of proponent to discharge the jury and enter a judgment or direct a verdict for proponent was sustained, and a judgment was rendered by the trial court ordering the will to be admitted to probate. Contestants' motion and supplemental motion for new trial were overruled and they appealed, assigning substantially that the trial court erred: (1) In withdrawing the cause from the jury and rendering judgment in favor of proponent; and (2) in failing to grant a new trial for newly discovered evidence. We conclude that the assignments should not be sustained.

We turn first to the second assignment which is controlled by State ex rel. Lanham v. Sheets, 119 Neb. 145, 227 N. W. 457, wherein it was specifically held that: "Affidavits in support of a motion for new trial not embodied in a bill of exceptions will not be considered on appeal." In that opinion it was said: "A motion for a new trial was filed by the appellant in the court below, on the ground of newly discovered evidence, and was overruled, upon which ruling the appellant assigns error. We are unable to review the action of the court in that regard because the affidavits upon which such ruling was based have not been preserved by proper bill of exceptions, and we cannot consider them. Omaha Fire Ins. Co. v. Dierks & White, 43 Neb. 473." The situation in the case at bar is identical therewith. Further discussion is not necessary. It is sufficient for us to say that the assignment cannot be reviewed by this court.

The trial court rendered judgment as it did upon the grounds that after proponents had made a prima facie case the contestants adduced no competent evidence which could support a conclusion that there was any failure of lawful execution, testamentary incapacity, or

undue influence. As a matter of fact the record discloses not only that there was no evidence adduced by contestants upon the question of undue influence but also the decree discloses that contestants withdrew that issue in the trial court. It was so conceded in oral argument to this court. That issue therefore requires no further discussion.

We turn then to the questions of: (1) Whether or not proponent made a prima facie case; and (2) whether or not contestants adduced any competent evidence which would make execution and testamentary capacity issues of fact for the jury rather than of law for the court. We conclude that the first should be answered in the affirmative, and the second in the negative.

Without contradiction proponents established execution of the will as provided by law. One subscribing witness was shown to be dead, but the other affirmatively testified at length with regard to its execution, and the signature of deceased on the will was conclusively established not only by such witness but also by another witness and by documentary evidence appearing in the record. Upon such issue contestants adduced no competent evidence whatever.

As a matter of course the rule is that proponent's motion for directed verdict must be treated as an admission of all the competent evidence adduced by contestants, and all proper inferences to be drawn therefrom. In re Estate of Benson, 153 Neb. 824, 46 N. W. 2d 176. In such case, citing other applicable authorities from this jurisdiction, it was held: "It is the duty of trial courts to determine the issues upon which there is competent evidence and submit them, and them only, to the jury. In a will contest on the ground of mental incompetency and undue influence, if the evidence is insufficient to sustain a verdict upon either of such issues in favor of the contestants, then the trial court should withdraw both issues from the jury and direct a verdict."

Other well-established and controlling rules of law

in cases comparable with that at bar will also be found in such case and in In re Estate of Cheney, 78 Neb. 274, 110 N. W. 731; In re Estate of Bose, 136 Neb. 156, 285 N. W. 319; In re Estate of Witte, 145 Neb. 295, 16 N. W. 2d 203; and In re Estate of Wahl, 151 Neb. 812, 39 N. W. 2d 783. To repeat them here would serve no purpose except to unduly prolong this opinion.

In the light of such rules we have examined the record. In doing so, it is clearly apparent that the evidence adduced by proponent was sufficient to make a prima facie case upon the issue of testamentary capacity, and that contestants adduced no competent evidence which could sustain any reasonable inference that testatrix was incompetent to make a will.

The will was executed on June 8, 1927. Its provisions need not be recited here. It is sufficient for us to say that we find nothing in it which appears to be unjust or unreasonable. In the execution thereof testatrix gave all of her property to proponent in trust for the care and welfare of a brother who predeceased but lived with her during his lifetime, and for the promotion of proponent's charitable purposes thereafter. None of the contestants had contributed to her estate or given her any reason, by conduct or otherwise, to expect that testatrix would give her property to any of them. The proponent had cared for another deceased brother of testatrix during his last illness, and she was not unmindful of that fact. Under the contemporaneous circumstances, conditions and history of events leading up to the execution of the will, we find nothing in its provisions inferring any want of testamentary capacity.

Proponents made their prima facie case upon the issue of testamentary capacity by a subscribing witness, and one who had well and personally known testatrix for many years. The subscribing witness testified substantially that he went with others to her home on June 8, 1927, in response to a request that he act as a subscribing witness. He detailed what took place there at that time

with regard to acts and conversations preliminary to signing the will by testatrix and the subscribing witnesses. In other words, he testified that the will was read to testatrix. She then said that she understood its provisions which were as she wanted them, and it was then duly executed. Such witness did not give general answers upon the question of her mental capacity, but answered specific questions which contained the necessary standards as to the quality of mind necessary to constitute testamentary capacity, to wit: That testatrix understood the nature of her acts, the extent of her property and the proposed disposition of it, and knew the natural objects of her bounty.

Another witness, a hardware dealer, testified that he had known testatrix for many years, beginning in 1923. She was a customer in his store from about that time until in 1940 or 1941, and at or about the date of the will and subsequently testatrix made purchases from him, well knowing exactly what she wanted, and giving checks in payment therefor. The checks appear in the record, bearing her unquestioned signatures comparable with that on the will. Such witness likewise testified, as did the subscribing witness, with regard to her testamentary capacity to execute a will.

On the other hand, all four of contestants' witnesses simply testified that in their opinion testatrix was "not of sound mind" or "not really of sound mind" or "I can't say she was slipping but then after she got most of the property to look after— * * * She was not (of sound mind)." It appears, however, that not one question asked, nor any answer of such witnesses, to all of which proponent appropriately objected and moved to strike, even intimated much less stated any standard of mental quality upon which testamentary incapacity could be predicated. In other words, there was no competent evidence adduced by contestants to negative that testatrix: (1) Understood the nature of her acts; or (2) knew the extent of her property; or (3) under-

stood the proposed disposition of it; or (4) knew the natural objects of her bounty. Thus the issue of testamentary capacity became a question of law for the court.

There was some evidence adduced that testatrix was not neat, did not dress in the latest fashion but made her own clothes, was a little eccentric or old-fashioned, and that she was a woman of little education who probably could not read or write except to sign her name. However, as heretofore observed, that was not sufficient to raise any inference that she did not possess testamentary capacity.

There was also some evidence that testatrix possessed quite a large estate in 1927 when the will was executed, but that it had dwindled to considerably less in 1950 when she died. What became of it during the 23 ensuing years was not shown. In that connection there was no evidence that such a situation resulted from mental incompetency. No inference could be drawn therefrom that she lacked testamentary capacity. For aught we know, it was used for her own support and comfort. We conclude that there was no competent evidence adduced by contestants to overcome the prima facie case made by proponent, and that the trial court properly withdrew the cause from the jury and rendered a judgment for proponent.

For the reasons heretofore stated, the judgment should be and hereby is affirmed.

AFFIRMED.

ADOLPH BRCHAN ET AL., APPELLANTS, V. THE CRETE MILLS, A CORPORATION, ET AL., APPELLEES.

52 N. W. 2d 333

Filed March 14, 1952. No. 33121.

1. **Injunctions: Actions.** It is a general rule that several independent tort-feasors may be joined in an action in equity for an

injunction when the petition states but one cause of action against the joint tort-feasors.

2. **Injunctions: Nuisances.** An action for an injunction to restrain or abate a continuing nuisance may be maintained by any person who suffers damage or injury thereby. For such injury injunction is a proper remedy, and an injured party may recover such damages in the same action as he may have sustained by such wrongful act.

3. **Equity.** It is a well-settled principle of equity jurisprudence that, where a court of equity has obtained jurisdiction of a cause for any purpose, it will retain it for all, and will proceed to a final determination of the case, adjudicate all matters in issue, and thus avoid unnecessary litigation.

APPEAL from the district court for Saline County: STANLEY BARTOS, JUDGE. *Reversed and remanded.*

Frederick J. Patz and *Ralph H. Gillan,* for appellants.

Joseph Ach, Dredla & Dredla, Van Pelt, Marti & O'Gara, J. W. Weingarten, Walter P. Loomis, and *John E. Mekota,* for appellees.

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

MESSMORE, J.

This action was brought in the district court for Saline County by Adolph Brchan and Ellis Brchan, plaintiffs, owners of certain real estate and personal property, against The Crete Mills, a corporation, and the Chicago, Burlington and Quincy Railroad Company, a corporation, defendants, to enjoin the defendants from unlawful and negligent interference with the waters of the Big Blue River and Walnut Creek by separate structures maintained by them, to have the same modified or abated, and also for damages sustained by the plaintiffs to their real and personal property. The defendants each, separately and specifically, demurred to the plaintiffs' petition. The trial court sustained the special demurrers of the defendants, holding that The Crete Mills and the Chicago, Burlington and Quincy Railroad Company, corporations, were improperly joined

as parties defendant; and that there was a misjoinder of causes of action, a defect of parties defendant, and a misjoinder of parties defendant, there being no joint or common liability of said two defendants. The plaintiffs elected not to file and docket a separate action against each defendant but to stand on their petition, and the action was accordingly dismissed by the trial court. From this order the plaintiffs appeal.

For convenience Adolph Brchan and Ellis Brchan, husband and wife, will hereafter be referred to as plaintiffs; The Crete Mills, a corporation, defendant, as the Crete Mills; and the Chicago, Burlington and Quincy Railroad Company, a corporation, defendant, as the railroad. In the plaintiffs' petition the Big Blue River is referred to, and for convenience we will refer to it as the river, and Walnut Creek, as described in the plaintiffs' petition, will be referred to as the creek.

In view of the trial court's order in sustaining the separate special demurrers of the Crete Mills and the railroad, we are required to examine and analyze plaintiffs' petition to determine whether or not the trial court erred.

The plaintiffs' petition is rather lengthy. We set forth a resume of it deemed pertinent to a determination of this appeal.

The plaintiffs' petition alleged that the plaintiffs own and reside on real estate situated in Crete, Nebraska, and also own personal property which they use in connection with the real estate. Crete Mills owns a dam. Extending across the river adjacent to the dam and extending several hundred feet in a northwesterly direction from the dam is a system of artificial dikes owned by the Crete Mills, used for the purpose of creating an artificial pond to prevent the river from forming a new channel to the west of the dam. The dikes have been maintained at a height of 9 feet higher than the top of the dam, which height is in excess of that authorized by law. The dikes and the dam obstruct the natural

flow of water in the river, and raise the level of the water above the dam. From time to time, due to melting snow and ice, or heavy rains in the area drained by the Big Blue River, the amount of water carried by the river is greatly increased, creating the danger of the river overflowing its banks and flooding the property of the real estate owners bordered on the river. The dikes and dam increase the danger of flooding said real estate, particularly that owned by the plaintiffs, by impeding, stopping, obstructing, and slowing down the flow of water in the river, all of which is known to the Crete Mills. The Crete Mills carelessly and negligently failed and neglected to guard against the danger, or to provide for the flow of such water over and through said dikes and dam in such a manner as to prevent flooding plaintiffs' property. On the contrary, the Crete Mills built, repaired, maintained, and raised said dikes so as to prevent the flow of any water over or through the dikes.

The petition further alleged that the railroad owns a railroad track and embankment running in a southwesterly direction through the city of Crete, and lying to the south of the real estate owned by plaintiffs; that the embankment has been built up and maintained by the railroad to a height of several feet above the surrounding land and is, in effect, a dike preventing the flow of any water from the land to the north thereof to the land south thereof, except through a small culvert which is inadequate to carry the flood waters from the river that may, from time to time, flow over and upon the land to the north of the railroad tracks; and that the embankment constitutes an obstruction of the flood channel of the river and increases the danger of flooding plaintiffs' real estate. The railroad carelessly and negligently failed and neglected to provide for adequate drainage under and through its embankment. That on or about March 8, 1949, the amount of water in the Big Blue River was greatly increased due

to the melting of ice and snow, and rainfall in the area drained by the river. That said additional water would have been carried within the banks of the river, had the river not been obstructed by the dikes and dam. No flooding of plaintiffs' property would have resulted from the increased flow of water. That because of said obstructions, the level of the water above the dikes and dam was greatly raised, causing the water of the river to flow over and out of its banks; and that because of the railroad embankment the water, after overflowing the banks of the river, could not escape to the south, and the height of the flood was greatly increased. That no flooding of plaintiffs' property would have resulted from the increased flow of water in the river except for the dikes and dam of the Crete Mill. That except for the railroad embankment the flood water would not have raised to a height sufficient to flood plaintiffs' property. That because of the obstructions placed across the river and its flood channel by the Crete Mills and the embankment by the railroad, the real estate of the plaintiffs was flooded to their damage in the sum of $1,130.

Plaintiffs' petition further alleged that north of the plaintiffs' real estate flows Walnut Creek which drains into the river above the dam belonging to the Crete Mills. That due to the maintenance of the dam and its unlawful height, the water level of the river at the mouth of the creek has been raised to such an extent that the flow of the water from the creek into the river has been impeded, and the mouth of the creek is in the backwater of the dam. That as a result, much silt has been deposited in the bed of the creek for a considerable distance back from its mouth. That at times of high water the flow of water from the creek into the river is greatly impeded and obstructed by the silt and the water level of the river at the mouth of the creek thereby causing the water of the creek to flow over and out of its banks and over and upon the real estate

of the plaintiffs. That the natural drainage of flood waters going over the banks of the creek is to the south and over and past the railroad embankment, then to the river. That the railroad embankment obstructs the flood channel of the creek. That the drainage under the embankment is inadequate to provide for the flow of flood waters from the creek which may flow over and upon the land north of the embankment. That the railroad has carelessly and negligently failed and neglected to provide adequate drainage under and through its embankment.

The petition further alleged that on or about May 8, 1950, heavy rains occurred in the area drained by the creek greatly increasing the flow of water therein. That because of matters heretofore alleged, the flow of water so increased went over and out of the banks of the creek. That the railroad embankment obstructed the flow of the flood waters and caused the same to back on and over plaintiffs' real estate. That the flooding of plaintiffs' real estate was the direct result of the obstructions placed in the river by the Crete Mills and in the flood channel of the creek by the railroad, to the plaintiffs' damage in the sum of $1,470.

The petition further alleged that on July 10, 1950, the amount of water in the river was greatly increased due to heavy rainfall in the area drained by the river. That the additional water would have been carried within the banks of the river had the river not been obstructed by said dikes and dam, and no flooding of the plaintiffs' property would have resulted from the increased flow of water. That because of said obstructions the level of the water above the dikes and dam was greatly raised causing the water from the river to flow over and out of its banks. That because of the railroad embankment the water, after overflowing the banks of the river, could not escape to the south, and the height of the flood was greatly increased. That no flooding would have resulted from the increased flow of water in the

river except for the dikes and dam of the Crete Mills. That except for the railroad embankment, the flood waters would not have reached the height sufficient to flood plaintiffs' property. That because of the obstructions placed across the river and its flood channel by the Crete Mills and the railroad, the real estate of plaintiffs was flooded to their damage in the sum of $1,190. That the maintenance of the dam and dikes by the Crete Mills, and of the embankment by the railroad, constitutes a nuisance which will be a continuing nuisance. That plaintiffs' property has been flooded on three occasions since March 8, 1949. That said nuisance and the flooding caused thereby have permanently decreased the value of the plaintiffs' real estate in the amount of $2,000, and also decreased the rental value thereof in the amount of $15 a month since March 8, 1949, or $360 to the date of the filing of this petition.

The petition further alleged that unless restrained by this court the defendants will continue the maintenance of the aforesaid obstructions of the river and the creek and their flood channels, and plaintiffs' real estate will be periodically flooded by reason of the said obstructions. That plaintiffs have been and will be, by reason of the said obstructions, irreparably injured, and have no adequate remedy at law. That plaintiffs are entitled to a permanent injunction requiring defendants to remove said obstructions.

The plaintiffs' prayer is for (1) an order permanently enjoining the Crete Mills from operating and maintaining said dam and dikes in such manner as to obstruct the natural flow of the waters in the river and creek to the extent that the waters from said streams shall, in times of high water, be diverted over and upon plaintiffs' property, and to require the Crete Mills to remove said dam and dikes or lower them to a level to be determined by the court, so that said dam and dikes will not obstruct the natural flow of waters in said streams in such manner as to flood plaintiffs' property; (2) for

an order permanently enjoining the railroad company from maintaining its embankment so as to prevent the flow of water under the same, and to require it to provide drainage sufficient for the uninterrupted flow of waters escaped from the river and creek; and (3) for a judgment against the defendants in the sum of $6,150 and costs of this action, and for such other and further relief as to the court may seem just and equitable in the premises.

The plaintiffs assign as error the judgment of the trial court in sustaining the special demurrer of the Crete Mills, sustaining the special demurrer of the Chicago, Burlington and Quincy Railroad Company, and in dismissing the plaintiffs' petition.

The plaintiffs concede the following: In this case the obstructions maintained by each of the defendants are entirely separate and distinct from each other and there is no concert of action between the two defendants in the maintenance of these obstructions. Under these circumstances there is a great deal of law to the effect that such obstructors are not jointly liable for damages resulting from the maintenance of such obstructions, but that each is liable only for the damages traceable to the obstruction maintained by him. The rule is also quite clear that persons severally, but not jointly liable, may not be joined in a suit at law for damages. Since the plaintiffs have not alleged facts showing joint liability, these defendants could not be joined in an action at law for damages.

This brings us to the question, can both defendants be joined in a suit in equity for an injunction against the maintenance of their separate obstructions?

In Norton v. Colusa Parrot Mining & Smelting Co., 167 F. 202, it is held: "* * * it is an established rule of equity that where several persons are alleged to have contributed, and are continuing to contribute, to the same general nuisance, on account of which complain-

ants suffer, all such contributing persons may be joined as defendants."

In Johnson v. City of Fairmont, 188 Minn. 451, 247 N. W. 572, the court observed that there seemed to be ample authority permitting the prosecution of an action in equity against independent tort-feasors for an injunction restraining them from doing separate and independent acts the consequences of which constitute a nuisance. See, also, 66 C. J. S., Nuisances, § 124, p. 899; 67 C. J. S., Parties, § 39, p. 960; Goldsmith & Powell v. State (Tex. Civ. App.), 159 S. W. 2d 534; Annotation, 91 A. L. R. 765.

In the annotation to 9 A. L. R. 952, appears the following: "It is a general rule that several independent tort-feasors may be joined in an action in equity for an injunction." Cases are cited in support thereof.

We conclude that defendants may be joined in a suit in equity for an injunction against the maintenance of their separate obstructions.

Defendants make reference to § 25-701, R. R. S. 1943, which provides: "The plaintiff may unite several causes of action in the same petition, whether they be such as have heretofore been denominated legal or equitable, or both, when they are included in any of the following classes: * * *." The classes of cases are unnecessary to set forth.

Section 25-702, R. R. S. 1943, provides: "The causes of action so united must affect all the parties to the action, and not require different places of trial."

It is the defendants' contention that plaintiffs' petition states more than one cause of action against each of the defendants for the following reasons: Three separate floods are set forth in the petition and the damage caused by each of the floods is set forth in detail; the unlawful acts of each of the defendants, if any, are separate and distinct; the unlawful act of the defendant Crete Mills is alleged to be the maintaining of a dam and dikes on the Big Blue River, and the petition con-

tains no allegation that the railroad was responsible for the maintaining of the said dam and dikes; the unlawful act charged to the railroad is the maintaining of its embankment, and the petition contains no allegation that Crete Mills is responsible for maintaining the railroad embankment.

In this connection the defendants rely on Sickler v. City of Broken Bow, 143 Neb. 542, 10 N. W. 2d 462. This case holds that causes of action cannot be joined unless each cause affects all the parties. The case involved the attempted joinder of two causes of action which were clearly separate and distinct. One cause of action was against the school district for creating a nuisance in the construction of an athletic field adjoining the plaintiff's property. The city had no interest in this nuisance. In the other cause, the city was charged with the wrongful appropriation of the plaintiff's property. The school district had no part in this appropriation. It is apparent that two causes of action were stated, and they could not be joined.

The defendants assert that the allegations of the petition disclose the essential character of it to be an action in law. This contention is based on the proposition that the petition alleges a specific amount of loss for each of the three floods set forth therein, in addition, alleges a depreciation of the value of the plaintiffs' real estate and loss of rental in a specific amount, and prays for a money judgment of $6,150. The following authority is applicable.

It is held in Mills v. Heckendorn, 135 Neb. 294, 281 N. W. 49: "The essential character of the cause of action and the remedy or relief it seeks, as shown by the allegations of the complaint, determine whether a particular action is one at law or in equity, unaffected by the conclusions of the pleader or what the pleader calls it, or the prayer for relief."

Applying the above rule to the plaintiffs' petition, we believe it contains sufficient allegations to disclose

an action in equity charging the defendants with creating a nuisance, which is a continuing nuisance, and alleging facts upon which the nuisance may be abated if the proof so warrants. The allegations pertaining to damages are incidental to the main relief sought.

In the instant case the structures of the defendants operated at the same time to cause the same damage, the flooding of the plaintiffs' property. During each of the floods complained of, both of the obstructions operated at the same time to hold the waters back upon the plaintiffs' property.

There is no denial but that section 25-702, R. R. S. 1943, also governs equity cases, and that causes of action cannot be joined unless each cause affects all parties. In such event section 25-702, R. R. S. 1943, Sickler v. City of Broken Bow, *supra,* and cases cited by the defendants to the same effect, would be applicable, but not so when plaintiffs' petition states but one cause of action.

This brings us to the question whether, in such suit to enjoin the nuisance, damages suffered by the plaintiff on account of such nuisance may be included in the equitable action. The cases are not unanimous on this point. Norton v. Colusa Parrot Mining & Smelting Co., *supra.* Some cases hold to the position that the collection of damages was not an actionable matter, and that an adequate remedy at law exists for the collection of damages. They further held that the defendant was entitled to a jury trial on the question of damages.

In Weingand v. City of North Platte, 108 Neb. 17, 187 N. W. 90, the court said: "An action for an injunction to restrain or abate a continuing nuisance may be maintained by any person who suffers damage or injury thereby, and he may in the same action be allowed to recover for any past or present damage which he has sustained by reason of the nuisance." See, also, Graham v. Pantel Realty Co., 114 Neb. 397, 207 N. W.

680; Siebold v. Whipple, 143 Neb. 167, 9 N. W. 2d 154; Jack v. Teegarden, 151 Neb. 309, 37 N. W. 2d 387.

In the case of Shepard v. City of Friend, 141 Neb. 866, 5 N. W. 2d 108, in a former action, a suit to obtain an injunction against the continuance of a nuisance, there was no attempt made by the plaintiff to recover damages. The court refused to grant the injunction. The plaintiffs brought this action to recover damages. The court held the matter to be res adjudicata, saying: "On the facts pleaded in the former action the plaintiffs had available two remedies, namely, injunction and damages, provided, of course, that they sustained the allegations of fact. They sought only injunction. They failed to sustain their allegations of fact, hence, there having been no mistake of remedy, under the doctrine of res adjudicata they are estopped to assert the same facts in support of an additional and concurrent remedy which is dependent solely upon those facts."

It appears from the foregoing-cited Nebraska cases that this jurisdiction has given approval to the proposition in a suit to enjoin a nuisance, damages suffered by the plaintiff on account of such nuisance may be included in the equitable action. This being an action in equity, the main relief sought is the abatement of the nuisance. The only damages that could be recovered would be the damages occurring as a result of the nuisance, if such be proven. This is based on the following rule: "It is a well-settled principle of equity jurisprudence that, where a court of equity has obtained jurisdiction of a cause for any purpose, it will retain it for all, and will proceed to a final determination of the case, adjudicate all matters in issue, and thus avoid unnecessary litigation." Schreiner v. Witte, 143 Neb. 109, 8 N. W. 2d 831. See, also, Security Investment Co. v. Golz, 151 Neb. 172, 36 N. W. 2d 862; Herrin v. Johnson Cashway Lbr. Co., 153 Neb. 693, 46 N. W. 2d 111.

Among numerous decisions from foreign jurisdictions that specifically adopt the rule are the following:

In the case of Mitchell Realty Co. v. City of West Allis, 184 Wis. 352, 199 N. W. 390, 35 A. L. R. 396, a suit brought against eight defendants to abate a nuisance caused by the pollution of a stream, and recover damages, upon motion of the defendants, allegations as to damages were stricken. The court said: "Under the doctrine well established by this court, if a court of equity takes jurisdiction of a matter it will retain jurisdiction for the purpose of doing complete justice between the parties, and will, in a proper case, not only extend its equitable remedy but will also permit the recovery of damages." The court overruled the order of the trial court in striking the plaintiff's allegations as to damages, holding: "Had the action proceeded, the plaintiffs could have obtained their equitable remedy for the abatement of the nuisance, and, upon the determination by the court of the proportionate share of the damage caused by each of the defendants, were entitled to judgment for such amounts, thus disposing of the entire litigation in one action. To accomplish such a result is one of the principal functions of a court of equity." See, also, McMechen v. Hitchman-Glendale Consolidated Coal Co., 88 W. Va. 633, 107 S. E. 480; Gilbert v. Boak Fish Co., 86 Minn. 365, 90 N. W. 767, 58 L. R. A. 735; Stoner v. Mau, 11 Wyo. 366, 72 P. 193; Carthew v. City of Platteville, 157 Wis. 322, 147 N. W. 375; Karns v. Allen, 135 Wis. 48, 115 N. W. 357, 15 Ann. Cas. 543.

With reference also to the recovery of damages, damages to personal property located on the real estate may also be recovered in this equity action. See, Graham v. Pantel Realty Co., *supra;* Weingand v. City of North Platte, *supra;* Stoner v. Mau, *supra.*

It is apparent that damages recoverable in an action of this kind are not limited to damages to the real estate alone, but include damages to personal property located thereon.

For the reasons given herein, the special demurrers of the defendants should have been overruled, and the

trial court's judgment in sustaining the special demurrers of the defendants is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

FRANK MEDELMAN AND LEO SOKOL, APPELLANTS, V. STANTON-PILGER DRAINAGE DISTRICT, APPELLEE.
52 N. W. 2d 328

Filed March 14, 1952. No. 33122.

1. **Eminent Domain.** When lands are taken in a condemnation proceeding by reason of the power of eminent domain the owners thereof are entitled to recover full compensation for the lands actually taken and for damages to the remainder thereof such an amount as is equivalent to the diminution of the fair market value thereof resulting therefrom.
2. ———. The market value of property includes its value for any reasonable use to which it may be adaptable.
3. **Evidence.** Generally, either lay or expert witnesses may be used to testify as to the value of a tract of land taken or the value of the remainder thereof immediately before and immediately after the taking if proper foundation is laid showing they have an acquaintance with the property and are informed as to the state of the market, the weight and credibility of their testimony being for the jury.
4. ———. Under ordinary circumstances expert opinion evidence is to be considered and weighed by the triers of fact like any other testimony.

APPEAL from the district court for Stanton County: FAY H. POLLOCK, JUDGE. *Affirmed.*

Deutsch & Jewell, for appellants.

T. L. Grady, for appellee.

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

WENKE, J.

This is a condemnation proceeding instituted in the county court of Stanton County on June 8, 1950, by the

Stanton-Pilger Drainage District to obtain a 200-foot right-of-way across the lands of Frank Medelman and Leo Sokol, doing business as the Elkhorn Construction Company, for the purpose of constructing a new pilot channel to straighten the course of the Elkhorn River. Appeal was taken from the appraiser's award to the district court for Stanton County. In the district court trial was had to a jury. The sole issue tried by the jury was to determine the amount of damages which the landowners had sustained by the taking. The jury returned a verdict for $500 on which the trial court entered judgment. Their motion for new trial having been overruled, the landowners appealed.

Appellants owned approximately 97 acres of land in the south half of Section 3, Township 23 North, Range 3 East of the 6th P. M., in Stanton County, Nebraska, at the time this proceeding was instituted. They acquired this land by warranty deed dated November 8, 1947, and paid for it the sum of $5,000. The appellee's right-of-way passes across the north part of the land.

In this type of action we have held: "As damages the plaintiffs are entitled to recover full compensation for the land actually taken and for such damages to the remainder thereof as are equivalent to the diminution of the fair market value thereof." Langdon v. Loup River Public Power Dist., 144 Neb. 325, 13 N. W. 2d 168.

In this respect we have said: "The market value of property includes its value for any reasonable use to which it may be put. If, by reason of its surroundings, or its natural advantages, or its artificial improvements, or its intrinsic character, it is peculiarly adapted to some particular use, all the circumstances which made up this adaptability may be shown, and the fact of such adaptation may be taken into consideration in estimating compensation. The proper inquiry is, what is its fair market value in view of any reasonable use to which it may be applied and all the reasonable uses to which it is adapted? The correct rule is as stated in Alloway

v. Nashville, 88 Tenn. 510, 13 S. W. 123: '"* * * witnesses should not be allowed to give their opinions as to the value of property for a particular purpose, but should state its market value in view of any purpose to which it is adapted. The condition of the property and all its surroundings may be shown, and its availability for any particular use. If it has a peculiar adaptation for certain uses, this may be shown, and if such peculiar adaptation adds to its value the owner is entitled to the benefit of it. But when all the facts and circumstances have been shown, the question at last is, What is it worth in the market?" Lewis, Eminent Domain, sec. 479.'" Langdon v. Loup River Public Power Dist., *supra.*

As stated in 18 Am. Jur., Eminent Domain, § 242, p. 878: "When the land taken has valuable deposits of minerals, or contains sand, gravel, peat, or other materials of value, or is covered with growing crops, or trees capable of being converted into lumber, these circumstances may be considered so far as they affect the market value of the land; but part of the realty cannot be separately valued for its materials, as an item additional to the value of the land for the purpose of sale." See 29 C. J. S., Eminent Domain, § 174, p. 1043.

Under this principle appellants could introduce evidence to show that the lands involved contained gravel deposits of such character that they were adaptable to commercial development and show the fair market value of the lands in view thereof. This they did.

Appellants complain that the trial court erred by permitting appellee's witnesses to testify as to the fair market value of the lands actually taken for a new pilot channel and the damage resulting therefrom to the remainder because they did not show a knowledge of all the uses and purposes to which the property could be put.

Appellee's witnesses were qualified to and did testify as to the value of the land taken and damages resulting

therefrom based on its use for pasture and agricultural purposes but none were qualified as experts in the field of gravel and the commercial production thereof nor did they testify concerning its value if reasonably adaptable thereto, although they did testify as to observing what had been taken from some of the test holes and also what had been stockpiled in 1948.

"Minerals in place are matters concerning which the ordinary person probably knows little as to their value, and their value is usually a matter for expert testimony to explain to the jury, because not capable of being understood by the average person." Thorn v. Dunn, (Tex. Civ. App.), 94 S. W. 2d 1229.

Whether or not this rule would apply to gravel, which is here involved, we need not decide.

We said in Langdon v. Loup River Public Power Dist., *supra*: "The question of the qualification of witnesses to testify as to the value of the premises in question is raised by the rulings on objections to the testimony of certain witnesses. In Republican V. R. Co. v. Arnold, 13 Neb. 485, 14 N. W. 478, we stated: 'Where persons are shown to be familiar with the value of a particular piece of land, across which a railroad has been built, they may be permitted to testify as to the value of such tract immediately before the location of the road, and to the value thereof immediately afterwards.' And in Wahlgren v. Loup River Public Power District, *supra*, we stated: '* * * where persons are shown to be familiar with the particular land in question, they may be permitted as witnesses to testify as to the value of the tract immediately before and immediately after the appropriation. Republican V. R. Co. v. Arnold, 13 Neb. 485, 14 N. W. 478; Blakeley v. Chicago, K. & N. R. Co., 25 Neb. 207, 40 N. W. 956; Burlington & M. R. R. Co. v. White, 28 Neb. 166, 44 N. W. 95; Chicago, R. I. & P. Ry. Co. v. Buel, 56 Neb. 205, 76 N. W. 571.' And as stated in 20 Am. Jur. 754, sec. 897: 'Ordinarily, property owners who have lived for some time in the vi-

cinity and know the property are qualified to testify to its value.' Either lay or expert witnesses may be used if proper foundation is laid showing they have an acquaintance with the property and are informed as to the state of the market, the weight and credibility being for the jury."

Appellants introduced evidence to the effect that the lands taken contained a gravel bed adaptable to being developed for the profitable production of commercial gravel and the witness considered that fact in placing his value thereon. On the other hand appellee introduced evidence as to the value of the lands based on its use for pasture and agricultural purposes only. It is not necessary that a witness, testifying as to the fair market value of lands, be familiar with, have knowledge of, and take into consideration every possible use to which the owner of the lands being taken may think they are adaptable. What a witness considers in coming to his conclusion as to the value thereof can be brought out in cross-examination. However, the owner may show all of the reasonable uses to which he thinks the lands are adaptable and what the lands are worth in view thereof. If, as a result thereof, there is conflict in whether the lands are adaptable for a certain use it is then up to the jury to determine which of the two views they believe.

That was the situation here. There is much evidence in the record to show that it was not practical to develop these lands for the production of commercial gravel, such as the unprofitable operations of appellants in 1948 when they lost considerable money in trying to do so, the observations made by witnesses of appellee as to the material taken from the test holes and what was in the stockpile, and the removal by appellants in 1949, before this action was started, of most of the equipment which they had placed there in 1948.

Nor is the fact that appellee did not call a witness expert in the field of gravel and its production here con-

trolling. As quoted in Langdon v. Loup River Public Power Dist., *supra*: "As stated in Horst v. Lewis, 71 Neb. 370, 103 N. W. 460: 'Expert evidence is permitted where the facts under investigation are such that the witness is supposed, from his experience, skill and study, to have peculiar knowledge upon the subject of inquiry, which jurors generally do not possess.' However, '* * * the weight to be given to such expert testimony is ordinarily a question for the jury. * * * Jurors are not bound by the testimony of experts; their evidence is to be weighed as that of all other witnesses.' McNaught v. New York Life Ins. Co., 143 Neb. 220, 12 N. W. 2d 108."

"An authoritative text states the rule as follows: 'Expert opinions are not ordinarily conclusive in the sense that they must be accepted as true on the subject of their testimony, but are generally regarded as purely advisory in character; the jury may place whatever weight they choose upon such testimony and may reject it, if they find that it is inconsistent with the facts in the case or otherwise unreasonable. * * * Opinion testimony as to value is not conclusive; when uncontradicted, it may be regarded as sufficient proof, but even in such case the jury may exercise their independent judgment.' 20 Am. Jur., Evidence, § 1208, p. 1060." Trask v. Klein, 150 Neb. 316, 34 N. W. 2d 396.

And as stated in Stolting v. Everett, 155 Neb. 292, 51 N. W. 2d 603:

"In this respect it is appellants' thought that the evidence of their two experts was conclusive on this factual issue as a matter of law. While it was a subject to which expert testimony was relevant it is not a subject which lends itself exclusively to that type of testimony. Lay witnesses could testify to what they observed and from all the testimony it was for the jury to determine the ultimate question.

"Under ordinary circumstances expert opinion evidence is to be considered and weighed by the triers of fact like any other testimony. See 32 C. J. S., Evidence,

§ 569, p. 390; Morse v. Chicago, B. & Q. Ry. Co., 81 Neb. 745, 116 N. W. 859."

Appellants call attention to the fact that appellee failed to call a party by the name of O'Brien who made a test hole on the premises shortly before the trial in the district court. In regard thereto they refer to the following principle: "The unexplained failure of a party to call or examine an available witness who possesses peculiar knowledge may give rise to an inference that the testimony of such witness would not sustain the contention of the party." 31 C. J. S., Evidence, § 156, p. 853.

The failure to call this party, what the party had done in regard to assisting in making a test hole, his qualifications, and all other matters relating thereto were fully presented to the jury.

The extent of a party's right to invoke his opponent's failure to call an available witness is to impair the value of the opponent's proof and to give greater credence to his evidence on any issue on which it is shown that the witness might have had knowledge. However, the probative force of any inference arising therefrom is for the triers of the facts, which in this case was the jury.

Appellants contend the court erred in excluding the evidence of Frank Medelman as to what he would have done as to putting in a full gravel outfit on this land if the drainage district had not gone through it.

"Owner's intended use. In some jurisdictions evidence of what the owner intended to do with the land may be considered as one of the facts in estimating the compensation due him, but it is generally held that the owner is not entitled to enhanced damages because he is prevented from carrying out a particular scheme of improvement." 29 C. J. S., Eminent Domain, § 160, p. 1028.

We think the offered testimony had no relation to the issue before the jury, which was the reasonable

uses to which the land was adaptable. It is also speculative.

Appellants finally contend the verdict of the jury is grossly inadequate and contrary to and not sustained by the evidence. It is true the jury did not exactly follow the evidence of either appellee's or appellants' witnesses in fixing the amount of the recovery. But there is evidence in the record on which they could base their verdict, including their view of the premises.

As early as Northeastern Nebraska R. R. Co. v. Frazier, 25 Neb. 42, 40 N. W. 604, this court made the observation that: "The principal question ordinarily is the amount of damages sustained. This question is to be determined from the testimony of experts, that is, persons familiar with the value of the land, and this may include farmers and others. The observation of this court, from the cases which have been before us, is, that juries ordinarily do not adopt the highest or lowest estimates of witnesses, but seem to have endeavored to bring in just verdicts. Nor did the jury in this case adopt the highest estimates of the witnesses."

Therein the court went on to hold: "The question of the amount of damages sustained by a land owner for a right of way condemned across his land is peculiarly of a local nature, proper to be determined by a jury of the county, and the supreme court ordinarily will not vacate or modify the verdict, if it is based upon the testimony in the case." This holding has often been approved by this court. See, Langdon v. Loup River Public Power Dist., *supra;* Kennedy v. Department of Roads and Irrigation, 150 Neb. 727, 35 N. W. 2d 781.

"It is the province of the jury to harmonize the testimony in so far as that is possible, and in case of conflict to decide as to the weight to be given the testimony of the various witnesses. Wahlgren v. Loup River Public Power District, 139 Neb. 489, 297 N. W. 833." Langdon v. Loup River Public Power Dist., *supra.*

"'* * * when the evidence is conflicting the verdict

of the jury will not be set aside, unless it is shown to be clearly wrong.' Grimm v. Elkhorn Valley Drainage District, 98 Neb. 260, 152 N. W. 374." Langdon v. Loup River Public Power Dist., *supra.*

While in conflict, there is competent evidence in the record to sustain the jury's verdict and we cannot say that it is clearly wrong.

In view of the foregoing, we affirm the judgment of the district court.

AFFIRMED.

FERN GARNETT PARKER, APPELLANT, V. IRVEN C. PARKER, APPELLEE.

51 N. W. 2d 756

Filed March 21, 1952. No. 33029.

SUPPLEMENTAL OPINION

APPEAL from the district court for Lincoln County: JOHN H. KUNS, JUDGE. See 155 Neb. 325, 51 N. W. 2d 753, for original opinion. *Motion for rehearing overruled.*

Crosby & Crosby, for appellant.

Beatty, Clarke, Murphy & Morgan, for appellee.

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

BOSLAUGH, J.

It appearing to the court that some controversy might arise between the parties with reference to interest on the judgment as modified in favor of the appellant, we conclude that the judgment of the appellant shall draw interest at the legal rate 60 days from the date of the issuance of the mandate in this cause. With this clarification, the motion for rehearing is overruled.

MOTION FOR REHEARING OVERRULED.