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REPORTS OF CASES

DECIDED BETWEEN

FEBRUARY 17, 1956 AND JUNE 28, 1956

IN THE

Supreme Court of Nebraska

JANUARY TERM 1956

VOLUME CLXII

WALTER D. JAMES

OFFICIAL REPORTER

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1957

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By WALTER D. JAMES, REPORTER OF THE SUPREME COURT

For the benefit of the State of Nebraska

SUPREME COURT

DURING THE PERIOD OF THESE REPORTS

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JOHN W. YEAGER, Associate Justice
ELLWOOD B. CHAPPELL, Associate Justice
ADOLPH E. WENKE, Associate Justice
PAUL E. BOSLAUGH, Associate Justice

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RICHARD H. WILLIAMS ..... Assistant Attorney General
ROBERT V. HOAGLAND ..... Assistant Attorney General
JOHN H. BINNING ..... Assistant Attorney General

JUDICIAL DISTRICTS AND DISTRICT JUDGES

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

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REVISED RULES

OF THE

Supreme Court

OF THE

State of Nebraska

1956

In force March 1, 1956

Note particularly amendments to Rules 4B; 7C; 10A(1) and (3); 19D and 21B.

MEMBERS

of

SUPREME COURT, 1956

Robert G. Simmons ---------- Lincoln
Chief Justice

Edward F. Carter ---------- Gering

Frederick W. Messmore ---------- Beatrice

John W. Yeager ---------- Omaha

Ellwood B. Chappell ---------- Lincoln

Adolph E. Wenke ---------- Stanton

Paul E. Boslaugh ---------- Hastings
Associate Justices

Clerk of the Supreme Court
George H. Turner
2413 State House
Lincoln, Neb.

REVISED RULES

of the

SUPREME COURT OF NEBRASKA

I Practice in Supreme Court

II Admission of Attorneys

III Disciplinary Proceedings

IV Promulgated by Order Under Constitution

Index

I

PRACTICE IN SUPREME COURT

1. **Procedure on Appeal.**

a. **Perfecting of Appeal.** Every appeal shall be deemed perfected on filing of notice of appeal in the office of the clerk of the district court, accompanied by a docket fee of $20, as required by section 25-1912, R. R. S. 1943.

b. **Docketing of Cause.** Upon forwarding such docket fee and such notice of appeal to the clerk of this court, the clerk of the district court shall accompany the same with a certificate setting forth the names of all of the parties to the cause in the district court and their relation to the case as they appeared in that court. The clerk of this court shall thereupon docket the case designating the party or parties having filed notice of appeal in the court below as appellant or appellants, and all other parties as appellees.

c. **Appeal from Special Tribunals.** In an appeal from an order of the State Railway Commission or other tribunals from which an appeal can be taken direct to this court the procedure shall be similar to that provided for in appeals from the district court.

d. **Cross-appeal.** The filing of an appeal shall vest in an appellee the right to a cross-appeal. The cross-appeal need only be asserted in appellee's brief in the manner provided by Rule 8b 4.

e. **Attorneys of Record.** The attorneys of record and guardians ad litem of the respective parties in the court below shall be deemed the attorneys and guardians ad litem of the same parties in this court, until others are retained or appointed, notice thereof served on the adverse party and proof of such service filed in this court.

2. **Original Actions.**

a. **How Commenced:**

1. **Leave of Court Required.** An original action may not be commenced except by leave of court.

2. **Procedure for Obtaining Leave.** Application for leave to commence an original action shall be made by leaving with the clerk of this court a verified petition setting forth the action. Applicant must also leave with the clerk a statement setting forth the basis of the court's jurisdiction and the reasons which make it necessary to commence the action here. Seven copies of each must accompany the petition and the statement. No oral argument will be permitted except as it may be ordered by the court.

b. **Procedure:**

1. **When Leave Granted to Commence.** The procedure in original actions, when commenced after leave to do so has been granted, shall be the same as in the district court except as otherwise ordered.

3. **Costs and Security for Costs.**

a. **Docketing Fee.** Docket fees shall not be required in cases arising under the Workmen's Compensation or Unemployment Compensation laws. Advance payment of docket fees shall not be required in habeas corpus cases, disciplinary proceedings, or in criminal cases where an affidavit of poverty has been filed under the provisions of section 29-2306, R. S. Supp., 1955. In all other cases, payment of docket fees in advance shall be made as required by section 33-103, R. R. S. 1943.

b. **Security for Costs.** An appeal will be dismissed upon motion and notice for failure to comply with section 25-1914, R. R. S. 1943, unless additional time for compliance be granted for good cause shown.

4. **Transcripts.**

a. **Contents.** The transcript shall contain: (1) The pleadings upon which the case was tried; (2) the judgment, decree or final order sought to be reversed, vacated or modified; (3) the instructions given or refused by the trial court, if the appellant intends to assign error in the giving or refusal thereof; (4) a copy of the supersedeas

bond, if any, given in the district court, or, if none has been given, a recital of the fact that a bond for costs was given and approved in the district court, or a deposit made as required by section 25-1914, R. R. S. 1943; and (5) such other parts of the record as the party appealing may desire to include therein.

b. **Form.** The transcript shall be typed and shall be prepared on bond paper 8½ by 14 inches, of not less than 16 pound substance. Typing shall be on but one side of the paper. The type to be used shall not be smaller than pica. The transcript shall be securely bound at the top and each page thereof shall be consecutively numbered, such number to be placed at the bottom of the page. An index shall be supplied referring to the initial page of each item contained in the transcript. Such index shall constitute the first page of the transcript.

c. **Supplemental Transcript.** After the original transcript is filed in the clerk's office, any party may without leave of court file a supplemental transcript containing any matters omitted from the original transcript. After filing, no change in the original or supplemental transcript shall be made or papers added to or withdrawn therefrom without leave of court. All supplemental transcripts must be filed prior to the day the cause is submitted to the court, unless leave of court be first obtained.

5. **Writ of Error.** Upon filing of petition in error and transcript of record and proceedings in criminal cases, the clerk of this court shall issue and transmit to the district court a writ of error as provided in section 29-2306, R. S. Supp., 1955. If suspension of sentence has been allowed, the writ of error shall so state. The judge of the district court will thereupon admit the defendant to bail in proper cases, requiring him to appear in that court when the case is remanded to that court after affirmance or reversal.

6. **Suspension of Sentence.**

a. **Capital Cases.** In all criminal cases brought on error to this court, where it appears that the court below has passed sentence of death upon the plaintiff in error, it shall be the duty of the clerk to enter the constitutional suspension of sentence upon the journal and he shall immediately transmit to the officer charged with execution of the sentence a certified copy of such suspension.

b. **Criminal Cases Other Than Capital.**

(1) An application for suspension of sentence in other criminal cases made to this court must be in writing and may be included in the petition in error.

(2) If execution of the sentence is suspended by this court, and no application is made in the district court to be admitted to bail, the defendant, if not in the custody of the sheriff, will be taken and remain in his custody until the case in error be disposed of, or he is admitted to bail.

(3) Application to give bail upon written motion and notice as above, must be made to the district court, or a judge thereof, who will fix the amount of bail required and determine as to the sufficiency of sureties. In the absence of all the judges of the district court from the district, such application to admit to bail may be made to this court, or a judge thereof. The bond will require the defendant to prosecute the proceedings in error without delay and to appear in the district court when the cause is remanded and abide, do and perform the final judgment in the case.

(4) Ten days after the receipt of the writ of error, without suspension of sentence, the district court will, in felony cases, cause the sentence to be executed. During the said ten days this court will hear an application for suspension of sentence upon written motion and notice. Good cause must be shown for neglect to make application with the filing in this court of the transcript and petition in error.

(5) In cases of conviction of misdemeanor, an application for suspension of sentence should be made to the district court under the provisions of section 29-2302, R. R. S. 1943.

7. **Bill of Exceptions.**

a. **Index.** The bill of exceptions shall have an index starting on the first page thereof. The index shall show (1) each witness in the order called and the initial page of his or her direct, cross, and further examination, (2) all depositions and exhibits and the initial page where identified, offered, ruled on, and found, (3) stipulations, motions to dismiss or to instruct a verdict, together with the rulings thereon, and page where found, and (4) the history of its settlement, which should always be placed in the first volume.

b. **Body.** The paper used in the bill of exceptions shall be 8½ inches by 11 inches and of suitable weight and quality to make the typing thereon easily legible. The type used shall be either standard or large pica. Each volume shall be bound on the left-hand side with either a wire or plastic spiral. The pages, no matter how many volumes, shall be numbered consecutively and no volume shall contain over 300 pages. If the record is of such size that it requires more than one volume then all volumes shall be as nearly of equal size as possible. Each page of the bill of exceptions shall have line numbers in the left-hand margin from one to twenty-five, inclusive, and the lines of typing shall be placed to correspond therewith. The name of each witness and whether the examination is direct, cross, or further examination shall be stated at the top or in the margin of each page of the witness' testimony. Each volume must have a cover and back, the cover shall be of flexible and the back of rigid material. Ordinarily depositions, exhibits or papers contained in the bill of exceptions should be placed in the record immediately following where they are ruled on by the court. If exhibits are frequently referred to in the testimony they

should be inserted in the record in such a manner as to be easily removed; for instance, by placing them in an attached envelope. If the exhibits are of such character or so numerous that to insert them in any volume containing testimony would make the volume cumbersome and difficult to handle while reading, then such exhibits should be contained in a separate volume. If exhibits are of such character that they cannot be inserted in a bound volume then they should separately accompany the record. Whether in separate volumes or separately accompanying the record all exhibits should be properly identified as part of the record in the reporter's certificate.

c. An application for extension of time within which to procure the allowance and settlement of a bill of exceptions pursuant to Section 25-1140.07, R. R. S. 1943, may not be filed in this court until the judge who tried the cause has exhausted his authority to extend the time under such section.

An application to extend the time to prepare a bill of exceptions may not be filed in this court until 80 days after the date the notice of appeal was filed in the district court, except where the trial court has exhausted its authority to extend the time as otherwise herein provided, and the application must be filed in this court within 30 days after the trial court's authority is exhausted.

An application for an extension of time to serve the bill of exceptions upon the adverse party may be made in this court, where the judge who tried the cause has exhausted his power to do so, within 30 days after the statutory time has expired in which to serve the bill of exceptions on the adverse party.

An application for an extension of time to procure the return of the bill of exceptions from the adverse party may be made in this court, where the judge who tried the cause has exhausted his power to do so,

within 30 days after the statutory time has expired in which to procure the return of the bill of exceptions.

An application for an extension of time to present the bill of exceptions to the judge who heard the cause for allowance and settlement, or to the clerk of the district court as provided in Section 25-1140.06, R. R. S. 1943, may be made in this court, where the judge who tried the cause has exhausted his power to extend the time, within 30 days after the statutory time has expired in which to procure the allowance and settlement of the bill of exceptions. Where the judge who tried the cause has ceased to hold office for any reason, and the bill of exceptions cannot be allowed and settled under Section 25-1140.06, R. R. S. 1943, it will be considered in the application of this rule as if such judge had exhausted his power to grant an extension of time.

When the trial court refuses to grant an extension of time as authorized by Section 25-1140.07, R. R. S. 1943, it will be considered in the application of this rule as if such judge had exhausted his power to grant an extension of time.

Any application made to this court under Section 25-1140.07, R. R. S. 1943, must be supported by detailed and convincing proof of facts showing that the applicant is without fault and has used due diligence, and has been unable to secure an allowance and settlement of a bill of exceptions within the prescribed time by circumstances beyond his control and which he could not have prevented. The showing of good cause for an application for an extension of time under this rule must, if possible, include a statement under oath of the person or persons familiar with the facts as to why it has not been possible to secure an allowance and settlement of the bill of exceptions in the district court in the manner provided by statute. If such statements cannot be procured, the reason for their nonprocurement must be shown by the applicant under oath, and if sufficient

cause for the absence thereof is not shown, the application for an extension of time will be denied. (Promulgated by Neighbors & Danielson v. West Nebraska Methodist Hospital, 162 Neb. 33, — N. W. 2d —.)

d. **Filing**. The bill of exceptions must be filed in the district court and certified by the clerk of such court, and when so filed and certified, may be filed in this court at any time prior to the submission of the case.

e. **Case Stated.** The parties may by agreement state the case to be presented to this court on appeal. The case stated shall briefly recite the facts out of which the questions of law arise and also any substantial conflict in the evidence as to any fact involved. It shall separately identify and quote the rulings of the court complained of with so much of the record as will fully show the law question involved in such ruling and the exceptions and contentions of the parties thereon. The case stated shall constitute the bill of exceptions. It must be allowed and certified by the judge who tried the case, filed with the clerk of the district court, made a part of the record of the district court as in other cases, and included therein when the transcript of the record is filed in this court.

8. **Briefs, Preparation.**

a. **Brief of appellant, plaintiff in error, or plaintiff in an original action.**

1. **Order and Contents of Brief.** The brief shall contain the following matters in the order herein set forth:

(1) Index;
(2) Statement of questions involved;
(3) Statement of the case;
(4) Assignment of errors;
(5) Propositions of law;
(6) Statement of facts; and
(7) Argument.

2. **Preparation.** The matters enumerated above shall be set out in the brief in the manner hereinafter indicated.

(1) **Index.** The index shall consist of (a) a subject index, with page references, including where the separate questions are presented and discussed, and

(b) a case, statute and text index, with page references, with the cases alphabetically arranged.

(2) **Statement of Questions Involved.** The statement of questions involved shall briefly and precisely set forth the principal question or questions to be decided.

(3) **Statement of the Case.** Except in original actions, the statement of the case shall contain in the order indicated:

(a) The kind of action or nature of the case;

(b) The issues actually tried in the court below; and

(c) How the issues were decided and what judgment or decree was entered by the trial court.

In original actions, it shall state the issues before the court. In setting forth this statement, appropriate page citation shall be had to every pleading, judgment or order to which reference is made.

(4) **Assignments of Error.** Assignments of error relied upon for reversal and intended to be urged in the brief shall be separately numbered and paragraphed, bearing in mind that consideration of the cause will be limited to errors assigned and discussed. However, the court may, at its option, notice a plain error not assigned.

(5) **Propositions of Law.** Propositions of law shall be separately numbered and paragraphed, in heavier

type, and shall state concisely and without argument or elaboration the legal propositions intended to be urged. Only those propositions shall be stated which are presented and discussed in the argument. Each proposition of law shall be followed by a list of authorities cited in support thereof. Preference in citation shall be given to those deemed most important and controlling. No authorities shall be cited under any proposition that are not quoted from or otherwise discussed in the argument in connection therewith.

(6) **Statement of Facts.** The statement of facts shall be made in narrative form and shall consist of the substance of so much of the record, with appropriate reference, as is necessary to present the case.

(7) **Argument.** The argument shall present each question separately. In connection with each question discussed, such propositions of law shall be presented as will best set forth the contentions of the party. Authorities relied upon shall be quoted or otherwise discussed. A party may, in connection therewith, make such further statement of facts, or quotation from the record, as he deems necessary properly to present the question, supporting such facts by appropriate reference to the record.

3. **General Rules.** In the preparation of the brief, the following general rules shall be observed:

(1) References to the transcript shall be made by setting forth in parentheses the capital letter T followed by the page of the transcript, as for example, (T26). In original actions, references shall be made to the pleading and page thereof.

(2) References to questions, answers, objections, motions, rulings, or any other matters found in the bill of exceptions shall be made by setting forth in parentheses the numbered line and page in the bill of exceptions where found; for example, (12:156).

The number preceding the colon should represent the line on the page of the bill of exceptions where found and the number following the colon the page.

(3) References to exhibits in the bill of exceptions shall be made by setting forth in parentheses the capital letter E, followed by the number of the exhibit and the page of the bill of exceptions where the exhibit was offered and received or refused, and the page where the exhibit is found, as for example, (E5:92,95).

(4) Every reference to a reported case shall set forth the title thereof, the volume and page where found, and the tribunal deciding the case. If the cited opinion is long, it shall also refer to the page where the pertinent portion of the opinion is found. Nebraska cases shall be cited by the state reports, but may include citation to such other reports as may contain such cases.

(5) If a statute of the state is relied upon, it must be cited from the last published revision or compilation of the statutes, or supplement thereto, if contained therein; if not contained therein, to the session laws wherein contained, or the legislative bill as enacted.

(6) Citations to textbooks, encyclopedias and other works shall give the title, edition, volume number, section and page where found.

b. **Brief of appellee, defendant in error, or defendant in an original action.**

1. **Order and Contents of Brief.** The brief shall contain the following matters in the order herein set forth:

(1) Index;

(2) Statement of questions involved, if appellant's statement thereof is not accepted as correct;

(3) Statement of the case, if appellant's statement thereof is not accepted as correct;

(4) Propositions of law;

(5) Statement of facts, if appellant's statement is not accepted as correct; and

(6) Argument.

2. **Preparation.** The brief shall be prepared under the same rules as the brief of appellant.

3. **Remittitur.** If a party desires to avail himself of the provisions of the statute with reference to remittitur, a special assignment of error thereof may be made in the brief of appellee, or a cross-appeal may be taken.

4. **Cross-Appeal.** Where the brief of appellee presents a cross-appeal, it shall be set forth in a separate division of the brief. This division shall be headed "Brief on Cross-Appeal" and shall be prepared in the same manner and under the same rules as the brief of appellant.

c. **Reply Brief.** The reply brief shall be prepared in the same manner as the brief of appellee. The answer of appellant to any cross-appeal shall be set forth in a separate division of the reply brief, and shall be headed "Answer to Brief on Cross-Appeal."

d. **Brief on Rehearing.**

1. **Order and Contents.** The brief shall contain the following matters in the order herein set forth:

(1) Index;

(2) Motion for rehearing;

(3) Statement of questions involved;

(4) Propositions of law; and

(5) Argument.

2. **Preparation.** The index, statement of questions

involved, propositions of law and argument shall be made in the same manner and under the same rules as the brief of appellant.

3. **Motion for Rehearing.** The motion for rehearing shall set forth in separate paragraphs wherein it is claimed the court erred, pointing out specifically any claimed mistakes or inaccuracies in statements of fact or law in the opinion, and pointing out wherein it is claimed that the court failed to consider any questions involved upon appeal, if such claim is made.

9. **Briefs, Printing and Taxation.**

a. **How Printed.** All briefs shall be either (1) printed, or (2) reproduced by a duplicating process from copy prepared on a proportional-spacing typing machine, the type of which simulates printing. Both processes will be considered printing. Briefs shall be printed on unglazed white book paper on pages 6½ inches wide and 9½ inches long, trimmed size. The printed matter shall be 4 inches wide and 7 inches long. The type used may be 12 point but not smaller than 10 point, except that exhibits may be prepared in smaller sizes when necessary. Italic type or underscoring may be used on citations.

b. **Form of Cover.** The cover and heading of each brief shall show the number and title of the case, the county from which the case was brought, the name of the trial judge, the names of counsel filing the brief, and shall also indicate in whose behalf the brief is filed.

c. **Length of Briefs.** The total content of all briefs filed on behalf of any party to a cause pending in this court on its original submission shall not exceed 150 pages.

d. **Failure to Comply.** The clerk shall refuse to file any brief not prepared in accordance with this rule and shall immediately notify counsel of the objections thereto.

e. **Cost of Printing.** When the parties or their attorneys furnish their printed briefs in conformity to the rules of this court it shall be the duty of the clerk to tax a fee therefor against the unsuccessful party to be collected and paid to the successful party as other costs. Costs shall not be taxed for the printing of a reply brief except such part as is in answer to a cross-appeal, nor for printing briefs unless printed, served, and filed in conformity with the rules of this court. The amount taxed shall not be in excess of $2.40 per page but in no event to exceed the actual cost of printing. Proof of the actual cost of printing shall be submitted to the clerk with the filing of the brief. The total number of pages that may be taxed as costs shall in no event exceed 75.

f. **Costs, When Taxable.** Costs for briefs shall be taxed when served and filed within the time originally fixed as brief day, or, if an extension of brief day has been procured, within the time fixed by such extension.

10. **Briefs, Filing and Service.**

a. **Time of Service.**

(1) **Civil Cases.** In all civil cases, except advanced cases, cases arising under the Workmen's Compensation Act or the Unemployment Compensation Act, appellant shall file his brief within 70 days from the date of the filing of his notice of appeal and shall file proof of service thereof on appellee showing that service was had on or before brief day. In any case where an extension of time with reference to the procurement of the bill of exceptions has been had, and showing is made in this court as to such extension, the brief day of appellant shall be extended to one month from the date thereby fixed for the allowance and settlement of such bill of exceptions.

Within one month after the appellant has served and filed his brief, the appellee shall serve his brief on the appellant and file the same, together with proof of

service thereof, with the clerk of this court.

Within ten days after the appellee has served and filed his brief, the appellant may serve and file a reply brief.

(2) **Workmen's Compensation Cases and Unemployment Compensation Cases.** In workmen's compensation cases and unemployment compensation cases brief day shall be on the twentieth day after the date the transcript is filed. The appellee shall serve and file his brief within twenty days after appellant's brief has been served and filed.

(3) **Criminal Cases.** In criminal cases the plaintiff in error shall file his brief within 70 days from the date the appeal is docketed and shall file proof of service thereof on the Attorney General, showing that service was had on or before brief day. In any case where an extension of time with reference to the procurement of the bill of exceptions has been had, and showing is made to this court as to such extension, brief day of the plaintiff in error shall be extended to one month from the date thereby fixed for the allowance and settlement of such bill of exceptions. The state shall serve and file its brief within one month after the brief of the plaintiff in error has been served and filed. Within ten days after the state has served and filed its brief, the plaintiff in error may serve and file a reply brief.

(4) **Advanced Cases.** In advanced civil cases, brief day for both appellant and appellee shall be the same as in other cases unless a definite time be fixed by the court in its order of advancement.

(5) **Original Actions.** Brief day in original actions shall be fixed by order of court.

b. **Method of Service.** Service may be made either upon the party or an attorney of record. It may be made either by (1) personal service or (2) registered mail. Proof of service may be shown by affidavit of the person making service or by receipt of the party served.

c. **Filing.** Fifteen copies of each brief so prepared by either party, together with proof of service of the same on the opposite party, shall be filed in the clerk's office.

d. **Amicus Curiae.** Briefs of Amicus Curiae may be filed without leave of court in any case before it is placed upon the Call. After the case is on the Call leave of court must be obtained. In all cases such briefs must be served upon all attorneys of record and proof of service thereof submitted before the same may be filed.

e. **On rehearing.** Where a rehearing has been granted or reargument of the case ordered, either pary may file additional briefs. Fifteen copies of each brief so prepared and served, together with proof of service, shall be filed in the clerk's office not less than one week before the case is submitted. Unless the filing of such briefs shall have been ordered by the court, they shall not be taxable as costs.

11. **Motions, Except Motions for Rehearing.**

a. **Form of Motion.** All motions shall be in writing.

b. **Notice of Hearing.** Motions, other than motions for rehearing, shall, except under special circumstances, be noticed for hearing at 9:00 o'clock a. m. on the first day of a regular session. A motion and notice of hearing shall be served on the adverse party, or his attorney of record, at least three days before the hearing. The motion, notice and proof of service shall be filed with the clerk at least two days prior to the hearing.

c. **Form of Notice.** The notice herein provided for shall conform to the provisions of section 25-910, R. R. S. 1943, and shall be accompanied by a copy of the motion with copies of all affidavits which are to be used upon the hearing.

d. **Service of Motion and Notice.** The motion and notice shall be served in the same manner as provided by Rule 10b for the service of briefs.

12. **Sittings of the Court.** The regular sessions of this

court at which oral arguments may be had will begin on the third Monday in September, and the first Monday of October to June, inclusive, at 9:00 o'clock a. m., standard time.

13. **Submission of Cases.** All civil cases shall be regarded as regularly reached for submission ten days after appellee's brief is due. The court will designate by the Call what cases shall be submitted and the time of hearing, having reference to the order in which such cases were docketed. Advanced cases and cases in which rehearings have been granted will have priority.

14. **Notice of Submission of Cases.**

a. **Call.**

(1) The Call is a list of cases to be submitted at each session of the court. A copy will be mailed to the attorneys of record in such cases at least ten days before the date set for submission.

(2) Cases on the Call will not be continued except upon motion and a showing of necessity.

b. **Proposed Call.**

(1) The Proposed Call is a list of cases scheduled to be called for submission at the session next after the Call. A copy will be mailed to the attorneys of record at the same time as the Call.

(2) Cases upon the Proposed Call may be continued only by order of the court. Application therefor may be made by stipulation of the parties, or upon motion and notice, subject to objection.

Oral argument will not be allowed on this motion.

15. **Defaults.** Whenever the brief of appellant is not on file by brief day the judgment will be affirmed or the proceedings dismissed, unless, on sufficient showing, it is otherwise ordered by the court. When default has been made by the appellee and the brief of appellant is on file,

with proof of service thereof within the time provided for by Rule 10, he may proceed ex parte. The hearing of a case will not be delayed by default of either party in serving or filing briefs, unless, for good cause shown, it is otherwise ordered.

16. **Advancement of Cases.** Criminal cases, cases arising under the Workmen's Compensation Act or Unemployment Compensation Act, and cases previously before the court on appeal, will stand advanced for hearing without motion. The court will likewise advance on motion cases within the original concurrent jurisdiction of this court, which have been instituted in the district court and brought to this court by appellate proceedings, and cases in which a case stated has been prepared and filed in accordance with subdivision e of Rule 7. The court may also on motion advance other cases if they involve questions of great public interest, or cases where, if not advanced, the litigation may be moot or fruitless.

Oral argument will not be allowed on this motion.

17. **Cases Involving Constitutional Questions or Appeal from Conviction of Homicide.** A party presenting a case involving the constitutionality of a statute or an appeal from a conviction of homicide must file a written notice thereof with the clerk at the time of filing his brief.

18. **Oral Argument.**

a. **Argument of Cases.** In the oral argument of a case, the time allowed on each side shall not exceed thirty minutes, unless the time be extended by the court for special reasons. The application for allowance of additional time must be made in writing and prior to the issuance of the Call.

b. **Argument of Motions.** Oral arguments when allowed on a motion, other than a motion for rehearing, shall be limited to five minutes on each side.

19. Motions for Rehearing.

a. **Form.** All motions for rehearing in cases brought to this court by appeal or error proceedings must be printed and may be filed at any time within twenty days from the filing of the opinion or rendition of the judgment in the case. Such motion must specify distinctly the grounds upon which it is based and include the brief in support thereof, which shall be prepared as nearly as possible in accordance with Rule 8. In all cases fifteen copies must be filed with the clerk.

b. **Oral Argument.** Oral argument on a motion for rehearing will be allowed on the written request of any party to the appeal. Unless otherwise ordered, oral arguments on motions for a rehearing will be limited to ten minutes for each side. Such oral arguments may be heard by any three or more members of the court to be designated by the Chief Justice. Written requests for oral arguments on motions for a rehearing must be served on opposing attorneys of record at least three days prior to such hearing, unless oral argument is stipulated. Such hearings will be held on the Saturday following each regular sitting of the court, unless otherwise ordered. All oral arguments must be heard on the first hearing date following the filing of the motion for rehearing on which they could properly be heard, except upon stipulation of the parties or special order of court for good cause shown. All motions for rehearing in which requests or stipulations for oral arguments are not filed will be considered submitted as of the next hearing date following their filing.

c. **Original Actions.** Where the error assigned is that the court erred as to the legal principles involved or in its application of the law to the facts, the foregoing provisions shall apply; but as to all other assignments the motion must be made as provided by section 25-1143, R. R. S. 1943, and may be typewritten.

d. **Return of Record.** If the record in a case where

motion for rehearing is filed has been taken from the office of the clerk, such motion for rehearing may not be argued or submitted to the court until the record has been returned.

20. **Unnecessary Costs.** When unnecessary costs have been made by either party, the court will upon application, order the same to be taxed to the party making them, without reference to the disposition of the case.

21. **Mandates.**

a. **Issuance.** No mandate will issue in any case during the time allowed for the filing of a motion for rehearing, or pending the consideration thereof, unless ordered by the court or stipulated by the parties.

b. **Stay Pending Appeal to United States Supreme Court.** Parties desiring to prosecute proceedings to the Supreme Court of the United States, either by appeal or certiorari, may make application within twenty days from the date of the filing of the opinion for an order staying the issuance of the mandate. Such application must be accompanied by a sufficient written showing to indicate that a federal question is involved. If the application is granted, the court may require the giving of bond as a condition therefor.

c. **Motion to Recall Mandate.** A motion to recall mandate must be noticed and served as provided in Rule 11. Such motion must be supported by a showing that no action has been taken upon the mandate by the trial court. Objections may be filed on or before the date of submission of the motion. The motion shall not be subject to oral argument.

II

ADMISSION OF ATTORNEYS

1. **Admission of Attorneys; Time of Examination; Filing of Application.** Examination of applicants for admission to the bar will be held commencing on the third

Monday of February and the third Monday of June of each year; provided, however, that the commission may hold examinations at such other times and places as it shall deem advisable, and may eliminate the February examination in any year. The application of candidates for such examinations shall be filed with the clerk of this court as provided in Rule 2.

2. **Application and Showing; Character Affidavits.** An applicant for admission to the bar must be a citizen of the United States and must show that he is a bona fide resident of the State of Nebraska at the time of filing his application. Each applicant must file with the clerk of this court a written request for admission and his personal affidavit as to his age, residence and time and place of study and degree, or admission and period of practice in courts of record in another state, the District of Columbia, or a territory, together with the certificate or affidavit of at least two citizens of good standing in the community where the applicant resides, or formerly resided, and such other information as the bar commission may require. These certificates or affidavits must show that the parties making them are well acquainted with applicant and that he is of good reputation in that community and that they believe him to be of good moral character. In case the applicant seeks admission on examination he must file such request at least four weeks before the day set for examination, unless otherwise authorized by the commission.

3. **Other Proof of Character; Qualifications of Applicant; Report of Committee of Inquiry.** The qualifications of an applicant for admission are not necessarily established by the foregoing. In addition thereto the applicant shall, in his application, give the names and addresses of at least three persons, other than those whose certificates or affidavits he presents, of whom inquiry can be made in regard to the applicant's character and other qualifications and, in counties where character committees have been appointed by the Supreme Court,

the applicant must obtain the certificate of such committee. The secretary of the commission shall also secure a report on each applicant from the Committee of Inquiry of the Nebraska State Bar Association of the jurisdiction in which such applicant resides. In all cases where an application is made under Rule 5 the commission shall require an investigation by and a report from the National Conference of Bar Examiners with reference thereto.

4. **Admission on Examination; Educational Qualifications.** All applicants for admission except those seeking admission on certificate from another state, the District of Columbia, or a territory, under the provisions of Rule 5, shall be required to pass a satisfactory examination conducted by the Nebraska State Bar Commission. Each such applicant shall make proof that he has received the degree of LLB or JD from a law school approved by the standardization agency of the American Bar Association or will receive such degree prior to the date of the examination; provided, however, that all persons who have registered for the study of law in the office of a practicing attorney prior to June 1, 1949, shall be eligible for examination if application for admission is filed prior to July 1, 1952. The admission of such applicants is to be governed by the terms of Rule 3 of the Rules for Admission of Attorneys in force May 31, 1949.

5. **Admission from Another State, the District of Columbia, or a Territory; Special Admission; General Admission.** Any practicing attorney in the courts of record of another state, the District of Columbia, or a territory, having professional business in the courts of this state, may on motion to such court, be admitted for the purpose of transacting such business. Any such attorney having become a resident of this state, desiring to be admitted to practice generally in the courts of this state, must make his application as required by these rules and present proof by satisfactory certificate that he is a licensed practitioner in another state, the District of

Columbia, or a territory, and had at the time of his admission, qualifications equal to the present requirements in this state as prescribed by these rules, or that he has practiced law five full years under license in any state, the District of Columbia, or a territory, within ten years next preceding the date of his application.

6. **Fees; Payment and Disbursement; Per Diem of Bar Commission.** Each applicant, except applicants seeking admission on a foreign license, shall with his application pay the clerk $25.00. A practicing attorney from another state, the District of Columbia, or a territory, seeking to be admitted generally in this state shall pay a fee of $25.00 plus such amount as is charged by the National Conference of Bar Examiners for investigating and reporting upon the applicant. The clerk shall enter all sums so received in a book of account kept for that purpose, showing date and name of applicant. The same shall be paid out by the clerk on order of the Chief Justice for the per diem and necessary expenses of the bar commission. Each member of the state bar commission conducting a bar examination shall receive his necessary expenses and $50.00 per day while actually engaged in the performance of his duties.

7. **Bar Examination; Subjects.** The Nebraska State Bar Commission shall publish the subjects to which examinations shall conform. The subjects shall be such as the members of the bar commission deem necessary to properly prepare for the practice of law in this state, including the subject of legal ethics.

8. **Bar Commission; Appointment; Duties.** The court will, on or before the opening of the September term in each year, appoint a commission composed of seven persons, learned in law, to conduct examinations for the ensuing year. The Clerk of the Supreme Court shall be ex-officio one of the seven commissioners and secretary of the bar commission, and one commissioner shall be selected from each Supreme Court Judicial District. The commission so appointed shall, prior to

the examinations, examine the proofs of qualifications filed in accordance with the foregoing rules, and may make such further investigation as to the qualifications of any applicant as it shall deem expedient. On the day appointed it shall commence the examination of applicants upon the subjects as published. The method of conducting the examinations shall be left to the discretion of the commission, it being expected that the commission will, in the conduct of such examinations, and in the investigation of the qualifications of applicants, take care that no person shall be recommended for admission who has not in all particulars shown himself to be qualified.

9. **Rejection of Applicant; Further Examination.** If an applicant fail an examination, he will be permitted to take not more than two subsequent examinations. For each of such examinations the applicant shall pay to the Clerk of the Supreme Court a fee of $25.00. A person who fails his third examination shall not be eligible to another examination. No part of the fees required by this rule, or by Rule 6, shall be refunded in case of final rejection of the applicant.

10. **Bar Commission; Reports.** As soon as practicable, after the conclusion of the examination, the commission shall make a written report to the court of its recommendations. All applicants who are recommended for admission by a majority of the commissioners shall, upon approval by the court, be admitted to practice on taking the oath prescribed by law.

11. **Bar Commission; Rules and Regulations.** The bar commission is authorized to make, subject to the approval of this court, such rules and regulations as it shall deem necessary or expedient to carry out the intent and purposes of these rules.

12. **Bar Commission; Administration of Oaths; Power of Subpoena.** Each member of the bar commission is hereby authorized to administer oaths in any proceeding

before the bar commission or matter relative thereto, and shall have power in such matters to subpoena witnesses and take depositions.

State Bar Commission

Harry L. Norval.....Seward
George A. Healey.....Lincoln
O. E. Shelburn.....Alma
Bern R. Coulter.....Bridgeport
Charles F. Bongardt.....Omaha
E. D. Beech.....Pierce
George H. Turner, Secretary.....Lincoln

III

DISCIPLINARY PROCEEDINGS

1. **Nature of Proceedings; Purpose.** Proceedings for discipline of attornys shall be considered civil in their nature, and for the purpose of protecting the public and the good name of the members of the bar of the State of Nebraska. They may be instituted against any person who has been licensed to practice in the courts of the State of Nebraska.

2. **Institution of Proceedings; How Entitled; Who may Bring; Leave of Court Required.** Proceedings for discipline of attorneys may be instituted and prosecuted in the name of the State of Nebraska on the relation of the Nebraska State Bar Association, or on the relation of any other person, if leave of court be first obtained. Leave may be granted to a private person to file proceedings as relator only upon a prima facie showing of probable grounds for disciplinary measures, and only after the matter has been submitted to the appropriate Committee of Inquiry, and reviewed by the Advisory Committee. Proceedings may also be instituted by order of the Supreme Court.

3. **Institution of Proceedings; Complaint; Docketing of Cause.** Proceedings shall be initiated by the relator filing a verified complaint setting forth the grounds thereof with reasonable definiteness. The complaint shall be filed with the Clerk of the Supreme Court, who shall then docket the cause as an original proceeding in the Supreme Court.

4. **Service and Proof of Service; Manner; Registered Mail; Publication of Notice; Contents.** Service upon the respondent may be had by serving upon him a copy of the complaint and notice of the time for answer in the same manner as service of summons is had in civil proceedings in the district courts of the state, in which case it shall be proved by the official return of the officer making such service. Service shall be deemed to have been waived if the respondent shall sign a written receipt for a copy of the complaint and notice. Service may likewise be had by the mailing by the clerk of this court of a certified copy of said complaint and notice by registered mail to the respondent at his last known address; and in that event the official return card of the United States mail, signed by the respondent, acknowledging receipt of the envelope containing the copy of said complaint and notice, shall be deemed sufficient proof of service. In the event that it shall appear by affidavit that personal service cannot be had upon the respondent and that letters to the respondent's last known address are returned unclaimed, service may be had upon the respondent by publication of notice four successive weeks in some legal newspaper published in the county wherein the respondent last resided. Such notice shall state that complaint for disciplinary action has been filed in the Supreme Court of Nebraska against the respondent and shall give the date of filing and the time within which respondent is required to answer.

5. **Answer; Time of Filing; Extension.** The answer of the respondent shall be filed within 20 days after service of notice and a copy of the complaint, or within 20 days

after service by publication, as hereinbefore provided, shall have been completed. For cause shown the court may extend the time to answer.

6. **Default; Answer Tendering No Issue; Disposition of Cause.** If no answer be filed within the time limited therefor, or if the answer tender no issue of fact or of law, the matter may be disposed of by the court on its own motion or on a motion for judgment on the pleadings.

7. **Reference; Taking of Testimony; Report of Referee.** Upon the filing of an answer raising an issue of fact the court shall refer the matter to a member of the bar as referee. It shall be the duty of such referee to fix an early date for hearing, notify the relator and the respondent or their respective attorneys of record, and without delay to hear such testimony as may be introduced under the pleadings. The referee shall have all powers of a referee in civil actions in the courts of Nebraska. The referee shall observe the rules of evidence applicable in civil actions in the district courts of the State of Nebraska. He shall have a competent shorthand reporter present who shall take in shorthand and transcribe in typewriting all oral evidence adduced at the hearing had before the referee. The referee may continue the hearing from time to time as circumstances may require, but shall not delay his proceedings unless justice and equity so require.

The referee shall make a written report stating his findings of fact and recommendations. The typewritten record of the proceedings shall have attached to it all of the exhibits offered at the hearing, and shall be certified by the referee; and the referee shall promptly transmit to this court his report, together with such record so certified.

Upon the filing of an answer raising an issue of law only, the court may in its discretion refer the matter to a member of the bar as referee for such service in relation thereto as the court may by its order of reference direct.

8. **Motion for Final Judgment; Exceptions to Report.** Within 10 days after the filing of such report, either party may file written exceptions to such report. If no exceptions are filed, the court in its discretion may consider the findings final and conclusive, and on motion shall enter such order as the evidence and law require.

9. **Briefs; Time of Filing and Service; Hearing of Case.** If exceptions be filed to the findings or report of the referee, printed briefs and arguments shall be filed and oral arguments made in the Supreme Court as required by the rules of this court in civil cases. The party filing exceptions to the findings and report of the referee shall serve and file his brief within 30 days after the filing of such report and the brief of the adverse party shall be served and filed within 30 days thereafter. The case shall thereupon be placed upon the Call for hearing.

10. **Disposition of Case; Orders.** The court may disbar, suspend, censure or reprimand the respondent and take such other action as shall by the court be deemed appropriate.

11. **Motions for Rehearing; Time of Filing.** Either relator or respondent may file a printed motion for rehearing at any time within twenty days from the filing of the opinion or rendition of the judgment of the court.

12. **Costs; Security; Taxation.** No initial fee shall be required of either party, but upon motion of the respondent the court may require security for costs from any relator other than the Attorney General of the State of Nebraska or the Nebraska State Bar Association. Costs may be taxed by the court as the court shall see fit.

13. **Attorney General; Duties.** The Attorney General shall prosecute in any case which shall be referred to him by the Supreme Court and shall have the right to appear and take such part in the prosecution of any action for disciplinary measures as he may think fit to take, at any stage of the proceedings.

14. **Modification of Sentence; Time of Application; Procedure.** No application for modification of judgment or for reinstatement shall be made prior to the expiration of one year after the final order in such proceedings shall have been entered, except in cases where the only service upon respondent has been by publication, and no appearance has been made by respondent, and except where the application is made under the terms of sections 25-2001 to 25-2009, Reissue Revised Statutes of Nebraska, 1943. Copies of every such application shall be furnished the relator, the Attorney General, the chairman of the district Committee of Inquiry which exercised original jurisdiction and the chairman of the Advisory Committee of the Nebraska State Bar Association, any one or more of whom may appear and resist such application within 20 days thereafter. Any other persons may likewise appear upon obtaining leave of court and make such resistance. The court may overrule such an application without a hearing if justice and equity require it.

If the application or the showing in resistance thereto shall require the taking of evidence, the matter may be referred to a referee and the proceedings shall be the same as in the case of original disciplinary proceedings.

15. **Contempt; Power Over Attorney.** These rules shall not interfere with the power of the courts of the state to punish for contempt, nor shall they deprive the courts of any other powers over attorneys which they now possess.

IV

PROMULGATED BY ORDER UNDER CONSTITUTION

1. **Probate Notices and Forms.** (Adopted February 2, 1946.)

(a) It is hereby ordered that the following be adopted as a rule of practice for county courts in this state pursuant to the authority of section 25 of Article V of the Constitution:

"Whenever the jurisdiction of the County Court is invoked in any of its probate, guardianship or testamentary trust powers, in any proceeding for which notice is not otherwise provided, the County Judge may, in the exercise of sound judicial discretion, require notice of the time, place and purpose of a hearing in such proceeding to be given by such personal service as the Court may direct or by publication of notice in a legal newspaper three successive weeks."

(b) It is hereby ordered that the following probate forms be approved as being sufficient and in compliance with all requirements of the Constitution, statutes and applicable judicial decisions. It is further ordered that the use of such probate forms is not in any sense mandatory, and the use of any other form will not be considered insufficient because it does not follow or comply with the applicable recommended form.

PROBATE NOTICES

(1) **NOTICE OF ADMINISTRATION**

County Court of ———————— County, Nebraska. Estate of ————————, Deceased.

The State of Nebraska, to all concerned: Notice is hereby given that a petition has been filed for the appointment of ———————— as administrat—— of said estate, which will be for hearing in this court on ————, 19——, at —— o'clock, — M.

————————————
County Judge

(2) **NOTICE OF PROBATE**

County Court of ———————— County, Nebraska. Estate of ————————, Deceased.

The State of Nebraska, to all concerned: Notice is hereby given that a petition has been filed for the probate of the will of said deceased, and for the appointment of ———————— as ———————— thereof, which will be for hearing in this court on ————, 19——, at —— o'clock, — M.

————————————
County Judge

(3) NOTICE TO CREDITORS

County Court of ———————— County, Nebraska. Estate of ————————, Deceased.

The State of Nebraska, to all concerned: Notice is hereby given that all claims against said estate must be filed on or before the ———— day of ————, 19——, or be forever barred, and that a hearing on claims will be held in this court on ————, 19——, at ———— o'clock, — M.

————————
County Judge

(4) NOTICE OF FINAL SETTLEMENT

County Court of ———————— County, Nebraska. Estate of ————————, Deceased.

The State of Nebraska, to all concerned: Notice is hereby given that a petition has been filed for final settlement herein, determination of heirship, inheritance taxes, fees and commissions, distribution of estate and approval of final account and discharge, which will be for hearing in this court on ————, 19——, at —— o'clock, — M.

————————
County Judge

(5) ORDER FOR HEARING

In the County Court of ———————— County, Nebraska.

In the Matter of the Estate of)
) ORDER FOR HEARING
———————— Deceased)

————, 19——. It is ordered that the petition of ———— for (here state purpose of hearing substantially as it is stated in the form prescribed for the particular notice, such as "the appointment of ———————— as administrat—— of said estate", or "for the probate of the will of said deceased and for the appointment of ———————— as ———————— thereof", or "for the final settlement herein, determination of heirship, inheritance taxes, fees and commissions, distribution of estate and approval of final account and discharge") be heard in this court on ————, 19——, at ———— o'clock, — M., and that notice thereof be published in the ———— as provided by law.

(Seal)

————————
County Judge

(6) ORDER FOR HEARING OF CLAIMS

In the County Court of ———————— County, Nebraska.

In the Matter of the Estate of)
) ORDER FOR NOTICE TO
) CREDITORS
———————— Deceased)

————————, 19——. It is ordered that all claims against said estate must be filed on or before the ———— day of ————, 19——, or be forever barred; that a hearing on claims will be held in this court on ————, 19—— at —— o'clock, — M., and that notice thereof be published in the ———————— as provided by law.

(Seal) ————————————
County Judge

(7) The following general form of notice is recommended for use in the following proceedings, and for such additional proceedings in which notice may be required or desired, but for which no particular form of notice is prescribed in general use.

1. Settlement of estate as wholly exempt from payment of debts. (Sec. 30-334, R. R. S. 1943).

2. Extension of time for payment of debts. (Sec. 30-612, R. R. S. 1943).

3. Classification of claims and partial distribution to creditors. (Sections 30-615 and 30-616, R. R. S. 1943).

4. Partial distribution.

5. Appointment of administrator de bonis non.

NOTE: The recommendation for the use of the following form of notice in any of the foregoing proceedings is not to be construed as a commitment or indication that the giving of this or any notice is required.

NOTICE

County Court of ———————— County, Nebraska. Estate of ————————, Deceased.

The State of Nebraska, to all concerned: Notice is hereby given that a petition has been filed for (here state purpose of hearing) which will be for hearing in this court on ————, 19——, at ———— o'clock, —. M.

————————————
County Judge

NOTICES IN SHORT FORM PROCEEDINGS

(8) **NOTICE TO CREDITORS AND HEIRS**

County Court of ———————— County, Nebraska. Estate of ————————, Deceased.

The State of Nebraska, to all concerned: Notice is hereby given that ———————— has filed a petition alleging that said deceased died ————————, 19——, a resident of ———————— County, seized of (description of real estate), in which petitioner has derived an interest (here state nature of petitioner's interest), praying for a determination of the time of death, the heirs, degree of kinship and right of descent of real property, of the deceased, which petition will be for hearing in this court on ————————, 19——, at —— o'clock, —. M.

————————————
County Judge

(9) **NOTICE TO CREDITORS, HEIRS, DEVISEES AND LEGATEES**

County Court of ———————— County, Nebraska. Estate of ————————, Deceased.

The State of Nebraska, to all concerned: Notice is hereby given that a petition was filed on ————————, 19——, alleging that the deceased died ————————, 19——, a resident of ———————— County, ————————, and praying for the probate of the will and the descent of the real property of the deceased according to the will and without administration, which petition will be for hearing in this court on ————————, 19——, at —— o'clock, —. M.

————————————
County Judge

2. PRE-TRIAL PROCEDURE: FORMULATING ISSUES.

(a) In any civil action in the district court after issues have been joined the court may in its discretion direct the attorneys for the parties to appear before it for a conference to consider

(1) The simplification of issues;

(2) The necessity or desirability of amendments to the pleadings;

(3) The possibility of obtaining admissions of fact

and of documents which will avoid unnecessary proof;

(4) The limitation of the number of witnesses with a view of avoiding improper cumulative testimony;

(5) The advisability of a preliminary reference of issues to a master for findings to be used as evidence when the trial is to be by jury;

(6) Such other matters as may aid in the disposition of the action.

The court shall at the time of the pre-trial hearing make a record of the proceedings which recites the action taken at the conference, the amendments allowed to the pleadings, and the amendments made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of counsel; that counsel shall forthwith acknowledge their assent thereto, or, in the alternative, state into the record any and all objections they may have thereto; and such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice. The court in its discretion may establish by rule a pre-trial calendar on which actions may be placed for consideration as above provided and may either confine the calendar to jury actions or to non-jury actions or extend it to all actions.

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CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

JANUARY TERM, 1956

JOYCELYN SCHLOTMAN BATY, APPELLEE, V. ERNEST C. WOLFF, APPELLANT.

74 N. W. 2d 913

Filed February 17, 1956. No. 33829.

1. **Livery Stable Keepers.** As a general rule a livery-stable keeper who lets a horse for hire impliedly promises or warrants that the horse is suitable for the purpose for which it is let, and he is liable for injuries resulting from the viciousness or dangerous propensities of the horse if he had knowledge, or, in the exercise of reasonable care, should have had knowledge, of such viciousness or propensities.
2. ———. Where a riding horse bailed for hire has shown unmanageable characteristics, the bailee is not required to dismount merely if he has a reasonable opportunity to do so, but he must do so, a reasonable opportunity being afforded, if a person in the exercise of ordinary care would do so under the circumstances.
3. **Trial.** A jury should be fully and fairly informed as to the various items of damages which it should take into consideration in arriving at its verdict. In this respect it is the duty of the trial court to instruct as to the proper basis upon which damages are to be assessed for each such item.
4. ———. It is the duty of the court to instruct the jury upon the issues presented by the pleadings and evidence, whether requested to do so or not.

APPEAL from the district court for Douglas County: JAMES M. FITZGERALD, JUDGE. *Reversed and remanded for a new trial.*

Schmid, Snow, Ford & Deming and *Donald H. McArthur*, for appellant.

Charles S. Reed and *Franklyn K. Norris*, for appellee.

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

SIMMONS, C. J.

In this action plaintiff sought to recover damages for injuries resulting from being thrown from a riding horse which she rented from defendant, a riding stable operator. Issues were made and trial was had resulting in a substantial verdict for plaintiff.

Defendant moved for judgment notwithstanding the verdict, or in the alternative for a new trial. The motions were overruled. Defendant appeals. We reverse the judgment of the trial court and remand the cause for a new trial.

Plaintiff pleaded that defendant was engaged in the business of renting riding horses to the public; and that she was at the time of the accident of the age of 16 years and known by the defendant to be an inexperienced horseback rider. She pleaded her riding experience with the horses rented from the defendant; that on July 2, 1953, she went to defendant's stable to rent a riding horse; that defendant rented her a recently purchased horse without knowing whether said horse was gentle or safe; that before taking the horse which was furnished to her she advised defendant's employee that she doubted if she could handle the horse and was advised that the horse would handle as easy as the horses she had been accustomed to riding; and that she rode the horse, and without warning or provocation it became unmanageable and ran with her into a public street. She alleged that an automobile was in the street and towing a second car; that the horse ran into the first car; and that plaintiff was thrown into the air and landed on top of the car being towed. She then alleged

that the defendant knew, or in the exercise of reasonable precaution should have known, that the horse was unsafe for riding by the plaintiff, and that it was negligence for defendant to rent the horse to plaintiff. She then alleged her resultant damages and prayed for their recovery.

Defendant for answer denied generally. He admitted that he was engaged in the business of renting riding horses to the public; that he had rented a horse to the plaintiff on July 2, 1953; and that a collision occurred with the automobile while plaintiff was riding.

Defendant denied negligence and alleged that he had no notice or knowledge and in the exercise of reasonable care could not have known of any dangerous propensities of the horse; and that it was carefully selected and tested to assure its suitability for rental purposes.

He alleged that the collision was the direct and proximate result of plaintiff's negligence in that she failed to exercise due and reasonable care to maintain control of the horse; and in that after experiencing difficulty with the horse she had an opportunity to dismount as an ordinary person of her age and experience would or should have done in the exercise of due care.

He further alleged that in renting and riding the horse plaintiff knew, or should have known, that the horse might become frightened and unmanageable, and assumed the risk.

Issues were made on a cross-petition of defendant. That cause was dismissed by the trial court and is not involved in this appeal.

On the second day of the trial and before plaintiff had rested, plaintiff by leave of court, over the objection of defendant, amended her petition so as to allege the correct name of defendant's employee who, she alleged, had given her assurances as to the horse, and so as to further allege that "plaintiff was induced to ride the horse on his assurance that the horse was safe for her to ride."

The above is a summary of the issues upon which the case was tried.

Defendant contends that the trial court should have sustained his motion for a directed verdict because there was no proof of negligence on his part; that plaintiff was guilty of negligence sufficient to bar her recovery; and that she had assumed the risk involved.

It does not appear that we have heretofore stated the rule involving bailment for hire of riding horses under these circumstances.

In 54 Corpus Juris Secundum, Livery-Stable Keepers, section 17, page 645, the rule is stated in this way: "As a general rule a livery-stable keeper who lets a horse for hire impliedly promises or warrants that the horse is suitable for the purpose for which it is let, and he is liable for injuries resulting from the viciousness or dangerous propensities of the horse if he had knowledge, or, in the exercise of reasonable care, should have had knowledge, of such viciousness or propensities."

In 24 American Jurisprudence, Garages, Parking Stations, and Liveries, section 38, page 498, the rule is stated as follows: "A livery-stable keeper who knows of the viciousness of a horse he lets for hire, or, by the exercise of reasonable care, ought to know of its viciousness, is liable for injuries resulting therefrom to the hirer. It is the duty of a livery-stable keeper to inform himself of the habits and disposition of the horses which he keeps in his stable for hire; and if he knows that they are dangerous and unsuitable, or, by the exercise of reasonable care, can ascertain such facts, he is liable for any injuries to his customers resulting from their vicious propensities. A liveryman, however, does not warrant that a horse is free from defects which he does not know of and which he cannot discover by the exercise of due care."

In the annotation to 131 American Law Reports at page 847, the rule is stated as follows: "* * * one who lets a horse for hire, although not an insurer of the

horse's fitness, is under an obligation, sometimes spoken of as an implied warranty, to furnish an animal which is reasonably safe for the purpose known to be intended, and for a failure to use due care to discover dangerous propensities in such animals, or to disclose them to the hirer, he may be held liable for personal injuries or death resulting from such neglect; * * *."

We state the evidence in the light of the established and often repeated rule that in determining such a motion the plaintiff is entitled to have every controverted fact resolved in her favor and to have the benefit of every inference that can be reasonably deduced from the evidence.

Plaintiff offered evidence as follows:

The defendant had two employees who are referred to in the record as "Carl" and "Charlie." We will use those names.

Plaintiff began her riding at the defendant's stables on May 31, 1953. She explained to Carl and Charlie that it was the first time she was to ride and asked for a gentle horse. Thereafter she rode some six or seven times on two different horses without incident.

The afternoon of July 2, 1953, she and five companions went to the defendant's stables to ride. Plaintiff asked Carl for the horse she had ridden the last time. Charlie then came in from the trail riding the horse involved in this accident. The horse was "rearing" and "acting up." Charlie asked plaintiff to ride the new horse. She was "kind of afraid of him." Charlie said he was "okay" and that plaintiff could handle him. While they were debating about it Carl came up and said that plaintiff should not have the new horse and that he (Carl) didn't think plaintiff should handle him. Charlie persisted. Carl said, "Well, be careful then." Charlie persuaded plaintiff to ride the horse around the barn. The third or fourth time around he got "a little high," became unmanageable, and ran. Plaintiff told Charlie she could not take

him and was told that the horse would be all right after he got on the trail.

Charlie then left to go up the trail with another party. Plaintiff rode in that direction. The horse ran and she had a hard time stopping him. Charlie was there where the horse stopped. Plaintiff told him that she could not handle the horse and was going to take it back to the barn. Charlie said: "He is like this when he is alone, but when he is with other horses in a group he will be okay" and "Go on, try him."

Plaintiff then rode back up to the barn, joined with two of her friends, and started back up the trail. The horse "took off" and ran again, left the trail, went over a hill and onto a golf course where plaintiff finally got him stopped. Her companions came up and with one on either side they started back to leave the horse at the barn. The horse "bolted," ran through the park, across the street, and into the car. Plaintiff tried to stop him and could not. At no time did she urge the horse to go faster than at a walk.

Defendant to sustain his defense of due care, offered evidence summarized as follows:

The riding horse involved in this matter was 9 years old. Prior to its ownership by the defendant it had been used by a farmer about his farm, on the highway, and in handling cattle. The farmer was an experienced rider. The horse showed no unsafe characteristics at that time. About 6 months before the accident it was purchased by an Omaha man who used it in connection with other riding horses for private riding and not for hire. It was ridden by adults and a 14-year-old girl who was an experienced rider. The latter testified that usually this riding was done on or about the premises of the owner. There were four children who often rode at the same time, each having his certain horse. "* * * we would always race up and down the lane to see which horse won, and my horse always won." "Every time we went down and up we would run them," and that this

occurred "a good many times." It does not appear defendant knew of this use.

The defendant purchased the horse from the above owner and just before doing so the 14-year-old girl had ridden the horse to defendant's stables. The defendant purchased the horse on June 30, 1953, and it was delivered either that day or the next day. Before buying the horse defendant rode it about the ring and his premises. The defendant was an experienced rider. Other boys and men, all experienced riders, rode the horse under like circumstances. The riding was without incident. The horse was shod on Wednesday, July 1, 1953.

On July 1, 1953, after the horse was shod, Carl rode him twice around the bridle path, a trip of probably an hour and a half. After Carl had ridden the horse, the defendant then rode it through the park for some 4 or 5 miles to get the horse acquainted with the path and find out "if he would be a useful horse for a beginner or an amateur rider." Defendant did not test the horse by having it ridden by an amateur rider, nor did he test it by riding it with other mounted horses on the trails.

The question then is: Is plaintiff's evidence sufficient as a matter of law to take the issue of negligence to the jury under the above rules?

We deem the evidence sufficient as against the test of a motion for a directed verdict. It presents a jury question.

Defendant further contends that when the plaintiff stopped the horse on the golf course, before starting to the barn, and before the horse bolted the last time, she was then in control of the situation; she knew the propensities of the horse; defendant's employees were not there; plaintiff could have then dismounted and walked to the barn; that she elected to continue riding the horse and thereby assumed the risk; and that because of that fact, a directed verdict for the defendant should have been made.

In Landrum v. Roddy, 143 Neb. 934, 12 N. W. 2d 82,

149 A. L. R. 1041, we discussed the conditions under which the doctrine of assumption of risk was applicable in negligence cases. That was an action for personal injuries resulting from an automobile accident. The evidence showed a long-continued period of riding in a car at excessive speeds for a considerable distance and the use of intoxicating liquors. It appeared that near the end of the journey, and before the accident occurred, the plaintiff had an opportunity to get out of the car at a point where other transportation was available. Assumption of the risk was urged. We held that factor entered into and was a part of the question of contributory negligence which should be submitted to the jury.

Applying language quoted with approval in that opinion to the situation here, the rule is that where a riding horse bailed for hire has shown unmanageable characteristics, the bailee is not required to dismount merely if he has a reasonable opportunity to do so, but he must do so, a reasonable opportunity being afforded, if a person in the exercise of ordinary care would do so under the circumstances. That presents a jury question under the evidence here.

The trial court did not err in denying defendant's motion for a directed verdict.

Plaintiff pleaded that "under the attendant circumstances, it was negligence for the defendant to furnish this unsafe horse to the plaintiff when defendant knew, or in the exercise of reasonable precaution, should have known the horse was unsafe for riding by the plaintiff." Defendant joined issue on that matter.

The trial court in its instruction No. 3 told the jury that "before plaintiff can recover * * * the burden is upon her to prove by a preponderance of the evidence that the collision was caused by negligence of the defendant * * * in renting to her the particular horse in question."

Defendant complains of the insufficiency of the instruction. The court did not point out in this nor in any

other instruction the elements of negligence which the plaintiff was required to prove, nor did the court set out the standards or the duty of care owing by the defendant to the plaintiff. The jury was left to be its own judge of issues, what constituted negligence, what were the rights of the plaintiff, and the measure of the liability of the defendant.

Again in instruction No. 4, the court told the jury if it found that the plaintiff "used reasonable care and that the accident was caused by negligence of the defendant, then your verdict will be in favor of the plaintiff."

In instruction No. 5, the court told the jury that it was its duty to determine whether plaintiff's continuing to ride the horse was caused by the assurances of the defendant's employee Charlie "and if plaintiff has made such proof of negligence on the part of defendant by a preponderance of the evidence, then it will be your duty to return a verdict for the plaintiff * * *." Obviously by this instruction the court took from the jury all questions of negligence and contributory negligence. It caused the defendant's liability to be decided on the sole questions: Were the assurances made, and did the plaintiff continue to ride the horse because of the assurances?

By instruction No. 6, the court instructed the jury that defendant alleged that "the accident was caused by negligence of the plaintiff in failing to exercise due care in the handling of the horse. This is called contributory negligence."

Defendant also alleged plaintiff's negligence in failing to dismount as an ordinary prudent person of her age and experience would or should have done. At no place in the instructions was that question submitted to the jury, although it was a proper element under the evidence on the issue of contributory negligence.

The trial court instructed the jury that before the defendant could avail himself of the defense of contributory negligence, he had the burden of establishing by a preponderance of the evidence that the plaintiff was guilty

of negligence. Again there were no standards or statement of issues given to the jury.

The trial court did not advise the jury as to what its finding was to be if contributory negligence was proven. Nor did it instruct as to comparative negligence as it exists in this state. See § 25-1151, R. R. S. 1943.

The errors in the instructions above reviewed are obviously prejudicial to the defendant and require a reversal and remand for a new trial.

Defendant further assigns error as to the instruction on the measure of damages. This subject is extensively discussed in our opinion in Borcherding v. Eklund, 156 Neb. 196, 55 N. W. 2d 643, wherein we stated this concluding rule: "A jury should be fully and fairly informed as to the various items of damages which it should take into consideration in arriving at its verdict. In this respect it is the duty of the trial court to instruct as to the proper basis upon which damages are to be assessed for each such item."

A reversal being required, we do not deem it necessary to discuss this assignment at length. The instruction is confusing at best in that in the concluding sentence it refers to the pain and suffering which plaintiff will endure in the future and then appears to limit the compensation to the pain and suffering "that she has endured." Such an instruction could be prejudicial to the plaintiff, and about it plaintiff makes no complaint. We refer to it here as indicative of the care that should be exercised in the drafting of instructions.

Defendant also complains of the failure of the court to give a large number of tendered instructions. To decide those questions at this point would be to anticipate the requirements of facts and issues at a subsequent trial.

It is the duty of the court to instruct the jury upon the issues presented by the pleadings and supported by the evidence, whether requested to do so or not. Borcherding v. Eklund, *supra*.

The fact that we have not discussed requested instructions or other instructions given is not to be construed as approval or disapproval of them.

Defendant also assigns as error the allowing of the plaintiff to amend her petition during the course of the trial; the striking and excluding of opinion evidence as to the character and suitability of the horse; the failure to grant a motion for a mistrial; and that the verdict is excessive. These are matters which may not arise in a new trial and are not necessary for determination now.

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

REVERSED AND REMANDED FOR A NEW TRIAL.

ROY E. POWELL, DOING BUSINESS AS POWELL IMPLEMENT COMPANY, APPELLANT, V. ALVIN EDWARDS, APPELLEE.

75 N. W. 2d 122

Filed February 17, 1956. No. 33846.

1. **Usury.** Any loan made by a licensee under the installment loan law in excess of $1,000 wherein an interest rate in excess of 9 percent per annum is contracted for is void and the licensee shall have no right to collect or receive any principal or collect any interest on such loan.
2. ———. An installment loan in excess of $1,000 wherein an interest rate in excess of 9 percent per annum is contracted for, which would be void if made by a licensee under the installment loan law, is void and the lender shall have no right to collect or receive any principal or collect any interest on such loan.
3. **Appeal and Error.** A judgment rendered by the district court which is free from error is not rendered invalid by the fact that the court gave an incorrect reason therefor.

APPEAL from the district court for Dundy County: VICTOR WESTERMARK, JUDGE. *Affirmed.*

Daniel E. Owens, for appellant.

Hines & Hines, for appellee.

Gross, Welch, Vinardi & Kauffman, amici curiae.

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

YEAGER, J.

This is a suit on a promissory note by Roy E. Powell, doing business as Powell Implement Company, plaintiff and appellant, against Alvin Edwards, defendant and appellee.

By the petition the plaintiff alleged that on June 12, 1952, the defendant executed and delivered to plaintiff his promissory note for $2,083.76 payable in four equal installments of $520.94 each, payable August 1952, February 1953, August 1953, and February 1954, with interest on unpaid balances after maturity at the highest lawful contract rate; that $520.94 had been paid; and that there was due and owing with interest $1,664.14. The suit was for $1,664.14 with interest from October 18, 1953.

To the petition the defendant filed an answer, an amended answer and cross-petition, and a second amended answer and cross-petition. To the second amended answer and cross-petition the plaintiff filed a reply and answer to the cross-petition. The submission of the case was on the petition, the defendant's second amended answer and cross-petition, and the reply and answer to the cross-petition.

By the answer the defendant generally denied all allegations of the petition except those admitted to be true. He admitted signing the note in question and that he had paid the first installment of $520.94.

As an affirmative defense the defendant pleaded substantially, to the extent necessary to set it forth here, that on May 29, 1952, he purchased a tractor from plaintiff the agreed price of which was $2,700 and that he gave in exchange a tractor of the value of $900; that he signed the note in question and also a chattel mortgage to secure it; that the plaintiff represented that the note was for the difference together with finance charges

and premium for necessary insurance upon the tractor; that plaintiff prepared the note and chattel mortgage upon forms furnished by Securities Acceptance Corporation and that the amount of the note was fixed by plaintiff pursuant to a rate book supplied by the Securities Acceptance Corporation; and that although the note was taken in the name of plaintiff it was in actuality taken by plaintiff as agent for the Securities Acceptance Corporation.

The defendant further pleaded that the note and mortgage were void and that neither principal nor interest was collectible for the reason that the transaction was violative of the provisions of sections 45-114 to 45-162, R. R. S. 1943, as amended; that it was violative of the installment loan law in the following particulars: That plaintiff failed to deliver to defendant a statement in the English language in clear and distinct terms, (a) the amount and date of the loan, (b) a description of the payments required, (c) the type of security of the loan, (d) the names and addresses of the licensee and all persons obligated on the note, and (e) the agreed rate of charge; that the plaintiff failed to deliver to the defendant within 15 days after making the loan an executed copy of the insurance policy; that plaintiff failed to comply with the laws relating to the operations of licensed loan companies; that the plaintiff made exorbitant and confiscatory charges; that the plaintiff deducted and received charges on the loan in advance; that the direct or indirect charge for interest upon the note and mortgage was in excess of the legal limit of 9 percent; that the plaintiff conducted the business of making loans within a place of business in which other business was conducted contrary to the prohibitions of statute; and that at all times mentioned the plaintiff was acting as the agent of the Securities Acceptance Corporation, a licensee under the installment loan law. The statutory provisions above referred to are a part of what is commonly referred to as the installment loan law.

As indicated the defendant filed a cross-petition. It however requires no consideration here. The decision upon it was unfavorable to the defendant but no appeal or cross-appeal has been taken from that decision.

In response to the answer the plaintiff filed a reply and answer to the cross-petition. In it the allegations of both were generally denied.

The action was tried to a jury at the conclusion of which the defendant moved for a directed verdict in his favor. The grounds were that the evidence showed that the grounds of defense set forth in the answer, which have been summarized herein, had been sustained.

Thereupon the plaintiff moved for a directed verdict in his favor. It related in part to the cross-petition and in part to plaintiff's cause of action and the defense thereto.

The motion of the defendant was sustained and plaintiff's cause of action was dismissed.

The motion of plaintiff to the extent that it referred to the cross-petition was sustained and the cross-petition was dismissed. It was otherwise effectually overruled.

The plaintiff filed a motion for new trial which was duly overruled. It is from the judgment dismissing plaintiff's motion and the order overruling the motion for new trial that he has appealed.

Four assignments of error are set forth as grounds for reversal. The first is that the verdict is contrary to the evidence. The second is that the verdict is contrary to law. Obviously the intent was to assert that the judgment is contrary to the evidence and the law since there was no verdict. The third is that the court erred in permitting the defendant to file a second amended answer and cross-petition. And the fourth is that the court erred in overruling plaintiff's motion for a directed verdict and in sustaining defendant's motion for a directed verdict.

It appears that the first point to which attention should be directed is that, assuming that the factual contention

is supported by the evidence, of whether or not the installment loan law is operative against the transaction and against the plaintiff. In other words, does the fact that the plaintiff committed acts violative of conditions for the making of loans under the installment loan law have the effect of defeating plaintiff's right to recover the principal and interest or either provided for in the promissory note in question?

Sections 45-114 to 45-162, R. R. S. 1943, with amendments, have reference particularly to installment loans. Sections 45-123, 45-138, and 45-139, R. R. S. 1943, have been amended in particulars not important here. The amendments could not apply in any event since they came after the consummation of this transaction. Hereinafter, therefore, statutory references will be to R. R. S. 1943. Sections 45-156 to 45-162, R. R. S. 1943, have no bearing on this case.

The design of this law is to license and control the business of making installment loans and to restrict the enforcement of collection of illegal loans once they have been made. Primarily the design, as is apparent, was that the law should have application to the duties and obligations of licensees and the rights and liabilities of those obtaining loans from licensees.

This case does not however present such a situation. It presents, under the facts, a situation where the claim is that one not a licensee has committed acts violative of the prohibitions of the law, thus entitling the defendant to have the apparent obligation of the note in question declared void and unenforceable.

This is true since it is clear that plaintiff was not a licensee under the law, and while it may be true that under the evidence the trial court was justified in finding that the plaintiff acted in the premises as agent of Securities Acceptance Corporation, there is no evidence upon which to base a finding that Securities Acceptance Corporation was a licensee. The question of agency in this respect will be later adverted to herein.

Section 45-138, R. R. S. 1943, provides in part as follows: "No licensee shall directly or indirectly charge, contract for or receive a greater rate of interest than nine per cent per annum upon any loan, or upon any part or all of any aggregate indebtedness of the same person, in excess of one thousand dollars. * * * Any contract of loan made in violation of this paragraph, either knowingly or without the exercise of due care to prevent the same, shall be void, and the licensee shall have no right to collect or receive any principal, interest or charges on such loan."

Section 45-153, R. R. S. 1943, provides: "Any person, firm, partnership, corporation or association, or officer or employee thereof, violating any of the provisions of sections 45-138 to 45-145, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined not less than one hundred dollars nor more than one thousand dollars, or shall be imprisoned in the county jail for not less than thirty days nor more than six months, or both."

This section makes all who violate the inhibitory provisions of the law, whether they be licensees, officers or employees of licensees, or nonlicensees, guilty of a misdemeanor. The language in and of itself is capable of this interpretation and moreover it would be unreasonable to conclude that nonlicensees are free to engage in practices barred to licensees.

Section 45-154, R. R. S. 1943, provides: "Any contract of loan, in the making or collection of which any act is done which constitutes a misdemeanor under section 45-153, shall be void and the lender shall have no right to collect or receive any principal, interest or charges whatsoever."

If therefore the note in question was conclusively violative of section 45-138, R. R. S. 1943, either in the hands of the plaintiff or in the hands of Securities Acceptance Corporation through the agency of plaintiff then the entire indebtedness was void and uncollectible.

The evidence discloses that on or about May 30, 1952, the defendant entered into an arrangement with the plaintiff for the purchase of a new tractor. The plaintiff took in exchange as a part of the purchase price an old tractor. The balance of the purchase price the parties agree was $1,800. The defendant testified that the sale price of the new tractor was $2,700 and the old one was taken in for $900. The plaintiff testified that the price of the new tractor was $2,760 and that the old one was taken in for $960. Thus there was no dispute about the difference to be paid. The defendant did not pay the difference in cash. For what purported to be the balance apparently a promissory note and mortgage to secure it were prepared by an employee of the plaintiff and signed and delivered to plaintiff by the defendant. Just what the contents of the instruments were does not appear. The instruments do not appear in the evidence. However it appears that the instruments were prepared from a formula furnished plaintiff by Securities Acceptance Corporation. The testimony discloses that the defendant was informed that the instruments failed to conform to requirements of the Securities Acceptance Corporation. Thereupon pursuant to instructions received from the Securities Acceptance Corporation new instruments were prepared by an employee of plaintiff which were submitted to and signed by the defendant on June 12, 1952. The new instruments were a promissory note for $2,083.76, payable $520.94 in August 1952, $520.94 in February 1953, $520.94 in August 1953, and $520.94 in February 1954, with interest on the unpaid balance after maturity at the highest lawful contract rate, and a chattel mortgage as security for the payment of the note. The note was made on a form furnished by the Securities Acceptance Corporation and made payable at its office in Omaha, Nebraska. The note was endorsed to Securities Acceptance Corporation by plaintiff first as guarantor and then without recourse and immediately

delivered. Upon delivery the Securities Acceptance Corporation paid to plaintiff $1,800, the exact amount of the balance of the purchase price of the tractor. The defendant testified that the difference between $1,800 and $2,083.76 was represented by interest and insurance. A policy of insurance was issued and the premium on it was $35.36. Thus according to the testimony of the defendant the interest charges on the $1,800 were $248.40.

The plaintiff testified that the difference between the $1,800 and the $2,083.76 represented carrying charges on the contract. Effectually he testified that the charges were figured out by the Securities Acceptance Corporation. This appears from a portion of his testimony, as follows: "Q- Then this difference of, $1,800.00 subtracted from $2,083.76 would be $283.76, and deducting the $35.36 insurance, the rest of it would be finance charges and interest? A- They figure finance charges and interest and trips out to see wherever the party would be, and stuff like that."

On the evidence, the pertinent part of which has been summarized, in the plaintiff's brief and in a brief amici curiae on behalf of the Nebraska Association of Discount Companies it is contended substantially that the transaction involved was an incident of a dealer having one price on an article of merchandise for cash sale and another and higher one for a time sale and that here was a time sale at the higher price. The further contention is made that no violation of law was involved.

It is also contended that insofar as the Securities Acceptance Corporation is concerned plaintiff was in nowise its agent and that all it did was to purchase in good faith the note and mortgage from the plaintiff, which purchase did not constitute the making of a loan, but which transaction was lawful and not condemned by law.

It is of course true, as has been pointed out by the decisions of this court, that an automobile dealer may in good faith sell a car on time for a price in excess of

the cash price without tainting the transaction with usury, though the difference in prices may exceed lawful interest for a loan. See, Grand Island Finance Co. v. Fowler, 124 Neb. 514, 247 N. W. 429; Fidelity Finance Co. v. Westfall, 127 Neb. 56, 254 N. W. 710; American Loan Plan v. Frazell, 135 Neb. 718, 283 N. W. 836; Underwriters Acceptance Corporation v. Dunkin, 152 Neb. 550, 41 N. W. 2d 855. It is also true that a time sale made in good faith at a price in excess of a cash price, even though the difference exceeds lawful interest for a loan, which price is arrived at by schedules furnished by a finance company which solicits contracts so entered into between a purchaser and a dealer, may not be regarded as being tainted with usury. See, Grand Island Finance Co. v. Fowler, *supra;* Fidelity Finance Co. v. Westfall, *supra;* American Loan Plan v. Frazell, *supra;* Underwriters Acceptance Corporation v. Dunkin, *supra.*

These rules however do not apply where it is proved that the transaction was not made in good faith but that it was a scheme and a device pursued to evade the operation against it of the usury statute.

The case of Grand Island Finance Co. v. Fowler, *supra,* sustains the validity of transactions made in good faith. It may well be said also to condemn those wherein it has been proved that it was a scheme and device to evade the usury statutes.

That case in all of its pertinent aspects was like this one, except that the action was in replevin by the finance company, which finance company occupied the same status with regard to the transaction as does the Securities Acceptance Corporation here, to recover the security on account of default of payment. The defense was in its legal aspects the same as the defense here.

With regard to that transaction the court said: "If the transaction was a loan for usury, as asserted by defendant, instead of a sale on time, the contracting parties entered into an unlawful agreement."

Thus this court in that case declared very clearly that a transaction such as the defendant declares this one to be is an *unlawful agreement.* The case was decided in favor of the plaintiff and it was decided solely on failure of proof that the transaction was tainted with usury. The reasonable inference to be drawn from the three accompanying cited cases fully support this view.

The Securities Acceptance Corporation is not a party to this action and no witness who could in any way bind it by his testimony testified in this case. Also there is no testimony which identifies its status legally or otherwise except to the extent of the testimony relating to the negotiation of this transaction and receipt of the paper by it and the payment of money to the plaintiff.

It follows of course that it may not be bound by the testimony given in this case or by any judgment rendered herein. It follows also of course that the plaintiff bound himself by his own acts as proved and his testimony with regard to the transaction as he related it to be with regard to the relation of Securities Acceptance Corporation to the transaction.

By his testimony the plaintiff clearly declared that the note was drafted for the Securities Acceptance Corporation to include his cash price of $1,800 and interest, insurance, and finance charges on that amount, exacted by Securities Acceptance Corporation. His testimony is incapable of any other interpretation, notwithstanding the insistence of the plaintiff and amici curiae.

By computation it becomes readily apparent that the amount charged to the defendant in the note far exceeded the statutory permissible charge of interest on an installment loan in excess of $1,000. Section 45-138, R. R. S. 1943, provides as follows: "No licensee shall directly or indirectly charge, contract for or receive a greater rate of interest than nine per cent per annum upon any loan, or upon any part or all of any aggre-

gate indebtedness of the same person, in excess of one thousand dollars. * * *."

For this reason, in the light of statutes herein referred to, the note was void from its inception, and either in the hands of plaintiff or, in the light of the testimony of plaintiff, in the hands of the Securities Acceptance Corporation, neither the principal nor interest was collectible.

In this case no party questions the validity or constitutionality of the statutory provisions declaring a forfeiture of principal and interest in such situations as are involved here. The terms of the statute as they appear are therefore to be accepted.

The action of the district court in dismissing the petition of plaintiff and rendering judgment in favor of defendant must be said to be correct.

It is true that the finding on which the district court rendered its judgment is not the same as the one which is the basis for the conclusion arrived at here. However the theory on which the determination here is made is presented by the pleadings and the record made on the trial is germane to the theory.

The district court found the note given was one to which the installment loan law was applicable. It further found that section 45-145, R. R. S. 1943, a part thereof, exacted a statement from the plaintiff or Securities Acceptance Corporation to the defendant containing information relating to the transaction which was never given in consequence of which the note was rendered void and uncollectible.

None of the exactions were performed by plaintiff or Securities Acceptance Corporation, but on the record it could not be said that this failure could be the basis for the judgment rendered.

The exactions of the provision are imposed upon licensees but not upon nonlicensees. The plaintiff, it is clear, is not and there is no proof that Securities Acceptance Corporation is a licensee.

A judgment rendered by the district court which is free from error is not rendered invalid by the fact that the court gave an incorrect reason therefor. See, Longnecker v. Longnecker, 90 Neb. 784, 134 N. W. 926; Kanaly v. Bronson, 97 Neb. 322, 149 N. W. 781; Bastian v. Weber, 150 Neb. 709, 35 N. W. 2d 791; Sopcich v. Tangeman, 153 Neb. 506, 45 N. W. 2d 478.

In the light of these observations the conclusion is inevitable that the first, second, and fourth assignments of error are without merit. The third is not supported by legal authority and it has not been presented to this court by argument in the brief. It therefore will not be considered further herein.

The judgment of the district court is affirmed.

AFFIRMED.

IN RE APPLICATION 2312, A PERMIT GRANTED TO THE NORTH LOUP RIVER PUBLIC POWER AND IRRIGATION DISTRICT TO APPROPRIATE WATER FROM THE NORTH LOUP RIVER FOR IRRIGATION PURPOSES.

NORTH LOUP RIVER PUBLIC POWER AND IRRIGATION DISTRICT, APPELLEE, V. LOUP RIVER PUBLIC POWER DISTRICT, APPELLANT.

74 N. W. 2d 863

Filed February 17, 1956. No. 33867.

1. Waters. The Department of Roads and Irrigation has authority, granted by statute, to adjudicate all matters pertaining to the granting and cancellation of water rights and priorities.
2. ———. When an application for the appropriation of public waters has been adjudicated, it becomes a final order unless an appeal is taken to this court.
3. ———. Section 46-229.02, R. R. S. 1943, does not fix the time in which an appropriator must put water to a beneficial use under a new application. Its provisions relate solely to the cancellation of water appropriations for nonuser.
4. ———. The time in which water must be put to a beneficial use by applying it to the lands designated in the application must

be determined from the terms, conditions, and limitations of the adjudicated appropriation.

5. ———. The grant of an appropriation is a conditional right which becomes a perfected appropriation only when the works are completed and the water put to a beneficial use in compliance with the terms, conditions, and limitations of the appropriation as adjudicated by the Department of Roads and Irrigation.

6. ———. The volume of water to be diverted, the rate of its diversion, and its priority as to time, are controlled by the terms, conditions, and limitations of the adjudicated appropriation and, unless appealed from, it becomes final and is not subject to collateral attack.

7. **Administrative Law and Procedure.** The right of the Department of Roads and Irrigation to adopt rules, as provided by section 46-209, R. R. S. 1943, is for the purpose of establishing a procedure to expedite the determination of matters over which it has been given jurisdiction.

8. ———. The right to promulgate rules to expedite the determination of controversial matters within the jurisdiction of the Department of Roads and Irrigation to determine, does not authorize such department to establish rules which purport to expand, amend, or destroy adjudicated rights.

9. ———. A rule promulgated by the Department of Roads and Irrigation which authorizes the department to expand, amend, or limit an adjudicated right is void and of no force and effect.

10. Waters. The Department of Roads and Irrigation has no authority to grant an extension of time to perfect an adjudicated appropriation, except where such authority is expressly granted by statute.

11. ———. Under the public policy of this state an appropriator is not permitted to retain an interest in public waters, to which he has a valid appropriation, which are not put to a beneficial use within a reasonable time.

12. ———. It is the function of the Department of Roads and Irrigation to determine what constitutes a reasonable time at the time the application for an appropriation is adjudicated and, if any interested party is dissatisfied with the findings of the department, the remedy is by appeal to this court.

APPEAL from the Department of Roads and Irrigation. *Reversed.*

Neighbors & Danielson and *Walter, Albert & Leininger,* for appellant.

Munn & Norman, for appellee.

Woods, Aitken & Aitken and *Bert L. Overcash,* amici curiae.

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

CARTER, J.

This is an appeal from an order entered by the Department of Roads and Irrigation granting an extension of time to October 1, 1957, to the North Loup River Public Power and Irrigation District for completing the application of water to beneficial use under water rights obtained by it under Application 2312.

For convenience we shall hereafter refer to the North Loup River Public Power and Irrigation District as the irrigation district, the Loup River Public Power District as the power district, and the Department of Roads and Irrigation as the department.

The record in this case shows that on September 15, 1936, the department granted an appropriation of water for irrigation purposes with a priority date of March 28, 1933, to the irrigation district. The order granting the appropriation provided that the construction work should begin on or before March 15, 1937, and be completed by November 1, 1939. The time fixed for completing the application of water to the beneficial use indicated was October 1, 1944. The grant of the appropriation contained the following specific limitation: "The amount of the appropriation shall not exceed 260.00 cubic feet per second of time; neither shall it exceed the capacity of said ditch or canal, nor the least amount of water that experience may hereafter indicate as necessary for the production of crops in the exercise of good husbandry; and, further, said appropriation, under any circumstances, shall be limited to one-acre foot for each acre of land to which water is actually and usefully applied on or before October 1, 1944."

On September 16, 1944, the irrigation district filed a petition with the department to obtain an extension of time within which to apply water to beneficial use under the appropriation. An order was entered by the State Engineer extending the time to October 1, 1949, without notice or hearing. On September 27, 1949, a second petition was filed by the irrigation district praying for a further extension of time to October 1, 1954, for the application of water to beneficial use under its appropriation granted pursuant to Application 2312. On September 29, 1954, the irrigation district filed a third petition praying for a further extension of time to October 1, 1959, for the application of water to beneficial use under the same appropriation.

The power district filed objections to the petitions for extensions of time filed on September 27, 1949, and September 29, 1954. The objections in each instance alleged in substance that the construction of the irrigation district's irrigation works was completed in 1938 and that owners of land subject to irrigation under the irrigation district's appropriation could have been supplied with water for irrigation purposes had they desired it and, having failed to make use of such water for more than 10 years, they had no right to water under the irrigation district's appropriation; and that the department had no jurisdiction, power, or authority after construction had been completed to extend the time to put appropriated waters to a beneficial use beyond a period of 3 years from the date water became available.

The cause was tried before the department and resulted in an order extending the time to complete the application of water to a beneficial use to October 1, 1957. The sole issue is the validity of the department's order extending the time for compliance with the conditions and limitations contained in the irrigation district's appropriation right as granted by the department.

The disposition of the case depends upon the nature of the irrigation district's appropriation rights. It is

clearly recognized that the department has authority, granted by statute, to adjudicate water rights in this state. It is invested with certain quasi judicial powers which have application only to the granting and cancellation of appropriation rights and priorities. State ex rel. Cary v. Cochran, 138 Neb. 163, 292 N. W. 239; Loup River Public Power Dist. v. North Loup River Public Power & Irr. Dist., 142 Neb. 141, 5 N. W. 2d 240. The approval of an application for an appropriation of public waters under section 46-235, R. R. S. 1943, is an exercise of the quasi judicial powers of the department. It will be noted that under the foregoing section of the statute the department, upon examination of the application, may endorse its approval "for a less period of time for perfecting the proposed appropriation, or for a less amount of water, or for a less amount of land than applied for." An aggrieved applicant is given an opportunity to be heard by the department, and the further right to appeal to this court from an adverse decision. In Loup River Public Power Dist. v. North Loup River Public Power & Irr. Dist., *supra,* we said: "Under the provisions of section 81-6317, Comp. St. 1929, the department may approve the application for an appropriation of public waters in an amount less than that applied for. If the applicant be dissatisfied, the remedy is by appeal to the supreme court, and if he fails to appeal, the appropriation as made is final." Otherwise stated, unless an appeal is taken from the adverse order of the department, the decision of the department is final and the issues finally adjudicated.

It is urged by the power district that the irrigation district is limited to a period of 3 years in applying appropriated waters to a beneficial use on the lands described in the application which received departmental approval. We do not concur in this view. The foregoing contention appears to arise from the language contained in section 46-229.02, R. R. S. 1943, which states: "If it shall appear that any water appropriation has not

been used for some beneficial or useful purpose, or having been so used at one time has ceased to be used for such purpose for more than three years, the department shall appoint a place and time of hearing, * * * to show cause * * * why the water appropriation owned by such person should not be declared forfeited and annulled, * * *." The power district cites the following from Enterprise Irrigation Dist. v. Tri-State Land Co., 92 Neb. 121, 138 N. W. 171, as supporting its position: "This precise question may never arise again in this state, for by an amendment made in 1911 to section 18, ch. 93a, Comp. St., a time is specifically limited for the application of water, and a method of procedure established by which the question of nonuser or lack of diligence is determined."

In a consideration of this contention we take note of the fact that the irrigation law of this state was substantially changed in 1895 in that the department was then charged with the duty of adjudicating the rights of appropriators. Laws 1895, c. 69, § 16, p. 248. It is evident, also, that there were numerous applications not perfected and many appropriations which had been abandoned that required legislative attention. The Legislature in 1911 directed the department to proceed to adjudicate all rights of appropriators which had not been adjudicated, and directed the department to forfeit and annul all appropriation rights where it appeared that any water appropriation had not been used for some beneficial or useful purpose, or having been so used at one time had ceased to be used for such purpose for more than 3 years. Laws 1911, c. 153, § 17, p. 503. We do not construe this to mean that the statute requires that an appropriator is necessarily limited to such period of 3 years in putting appropriated waters to beneficial use under a new application. We think the time in which such waters must be put to a beneficial use must be determined from the terms, conditions, and limitations of the adjudicated appropriation right. The Enterprise

case misconstrues the meaning of the statute, particularly when considered in the light of its legislative history and purpose.

The initial step for procuring an appropriation right for irrigation purposes is the filing of an application for such permit. The granting of the application, in full or in part, is an adjudication which fixes the maximum volume of the appropriation, the rate of diversion, and the priority date. If an applicant is dissatisfied with the terms of the appropriation allowed, he must appeal, or the order becomes a final and binding adjudication. Its grant by the department is notice to senior and junior appropriators, as well as new applicants, of the extent of the appropriation. The grant of the appropriation by the department, however, is a conditional right which becomes a perfected and completed appropriation only when the works are completed and the waters put to a beneficial use in compliance with the conditions and limitations of the grant. It confers upon the applicant the prior right to the water against all subsequent applicants during the progress of the work if, and only if, he finally complies with the conditions and limitations of the appropriation as adjudicated by the department. Commonwealth Power Co. v. State Board of Irrigation, 94 Neb. 613, 143 N. W. 937.

We necessarily conclude that the volume of water to be diverted and the rate of its diversion, as well as the priority date of the appropriation, are controlled in the instant case by the terms, conditions, and limitations of the department's grant made on September 15, 1936. This was an adjudication of the irrigation district's application and, in the absence of an appeal to this court, became final and binding. The date fixed by this final adjudication for applying water to a beneficial use to the lands set out in the application was October 1, 1944, a date 5 years after the time fixed for the construction of the irrigation district's irrigation works. We hold that the department's order granting the appropriation

fixes the time for the applying of water to a beneficial use, and not section 46-229.02, R. R. S. 1943, as claimed by the power district.

The irrigation district contends that the department has the authority to extend the time in which the terms, conditions, and limitations of the grant may be met. In this respect the irrigation district points out that the rules promulgated by the department provide for the filing of petitions for the extension of time in which water may be beneficially applied to the lands described in the application for the appropriation which was granted. It is pointed out, also, that the department has on many occasions issued such orders extending the time in which water may be applied to lands subject to an appropriation.

Under the provisions of section 46-209, R. R. S. 1943, the department is required to adopt rules, the pertinent part being: "The Department of Roads and Irrigation is given jurisdiction over all matters pertaining to water rights for irrigation, power or other useful purposes, highways and drainage, and shall adopt rules governing matters coming before it." There can be no question of the right of the department to adopt procedural rules to expedite the determination of matters over which it has been given jurisdiction. While the rules cited in the present case may be procedural in their nature, they are set up to include and expedite matters which the department is not authorized to determine. The adjudicated appropriation of September 15, 1936, provides that water must be beneficially applied to the described lands by October 1, 1944. If this provision was unsatisfactory the order should have been appealed from. No appeal having been taken, it is a final and binding provision of the appropriation granted, and is a limitation upon the appropriation on which other appropriators or new applicants have a right to rely. If this were not so the public record required to be made in the office of the department would serve no useful purpose as a

public notice of the terms, conditions, and limitations of the appropriator's adjudicated grant. If, after adjudicating an applicant's appropriation right, the department could change the effect of the same in a manner not authorized by statute, the adjudication would be reduced to uncertainty and be devoid of the finality that an adjudication implies. We think that the department has no more authority to extend the time for applying water to beneficial use beyond the time fixed in its adjudicated order than it has to change or amend the provisions of other terms, conditions, or limitations contained in the appropriation which it adjudicated. While the department has authority to promulgate rules by which controversial matters may be heard and determined, it is not granted authority to expand, amend, or destroy adjudicated rights. To provide procedural processes by rules to expedite the determination of matters within its jurisdiction is one thing; to provide rules to limit or expand adjudicated rights is quite another. The one is authorized; the other is not. This conclusion is supported by our statement in Plunkett v. Parsons, 143 Neb. 535, 10 N. W. 2d 469, wherein we said: "The legislative grant of jurisdiction to the department of roads and irrigation does not extend to it power to adjudicate vested rights * * *." We conclude that the department has no authority to extend the time for the application of water to a beneficial use on lands described in the adjudicated appropriation beyond the time therein fixed and, consequently, its promulgated rules providing for such extensions are of no force and effect.

It is pointed out that this court in the case of In re Application of Babson, 105 Neb. 317, 180 N. W. 562, affirmed an order by the department extending the time to commence work on a hydroelectric power plant for the operation of which an appropriation of water for power purposes had been made. The court found that "unavoidable cause" had been shown under the provisions of the statute, which is now section 46-238, R. R.

S. 1943. An examination of this section reveals that within 6 months from the grant of an appropriation right the applicant must commence the excavation or construction of the works in which it is intended to divert the water and that the applicant "shall vigorously, diligently and uninterruptedly prosecute such work to completion unless temporarily interrupted by some unavoidable and natural cause." It is plain therefore that an extension of time for construction of a project could be extended where it was temporarily interrupted by some unavoidable and natural cause. The provision has no application to the applying of water to a beneficial use on the lands described in the approved application. A reading of the opinion in the Babson case will plainly reveal its nonapplicability to the case before us.

We necessarily come to the conclusion that the irrigation district's appropriation of water for irrigation purposes was adjudicated on September 15, 1936, and finally determinable by the provisions of the grant on October 1, 1944. The district's appropriation right was initiated by an application. It was considered and approved by the department. No appeal was taken and the order of the department became a final adjudicated order. It is true that the order was conditional and that the appropriation was perfected only when compliance with the terms, conditions, and limitations of the adjudicated grant had been met. The grant provided that construction should commence on or before March 15, 1937, and should be completed on or before November 1, 1939. A map or plat was required to be filed in accordance with the rules of the department. No complaint is made of any noncompliance with these conditions. The grant provided further that the amount of the appropriation should not exceed 260 cubic feet per second of time and that it should be limited to one-acre foot for each acre of land to which water was actually and usefully applied on or before October 1, 1944. These conditions are limitations upon the extent of the appro-

priation granted and constitute an adjudication of the district's appropriation. The department enlarges the adjudicated right if it is permitted to extend the time water may be put to beneficial use and thereby permit the amount of the appropriation to be increased by one-acre foot for each acre of land to which water is beneficially applied after October 1, 1944. To permit such an extension is necessarily injurious to the adjudicated rights of junior appropriators and the rights of new applicants. We are required to hold that the number of acre feet to which the irrigation district is entitled under its appropriation is fixed by the determination of the number of acres of land described in the application to which water has been beneficially applied on or before October 1, 1944. The attempt of the department to extend the time beyond October 1, 1944, is in violation of law and a deprivation of the vested appropriation rights of subsequent appropriators. It is consistent with the general policy for the appropriation of public waters in this state. In State v. Birdwood Irr. Dist., 154 Neb. 52, 46 N. W. 2d 884, we stated that public policy in part as follows: "An appropriator will not be permitted to retain an interest in public waters, to which he has a valid appropriation, which are not put to a beneficial use. Such a rule would be contrary to the policy of the state that the necessity for water for irrigation is a public want and that the public waters of the state, available for appropriation for irrigation purposes, should be administered to secure the greatest benefit possible therefrom. An appropriator will not be permitted to retain an interest in the use of public waters which he has never put to a beneficial use, or having been once put to a beneficial use has failed for the statutory period to continue such beneficial use. It is the express duty of the department to determine the appropriations, or parts thereof, which are subject to forfeiture for nonuser and make the waters covered thereby available to junior appropriators or new appli-

cants. It is the duty of the department to protect the rights of any and all the appropriators of public waters. It is its duty also to see to it that the maximum amount of water may be subject to appropriation."

The order of the department appealed from is reversed and set aside for the reasons stated.

REVERSED.

NEIGHBORS & DANIELSON, A CO-PARTNERSHIP, APPELLEE, V. WEST NEBRASKA METHODIST HOSPITAL, A CORPORATION, APPELLANT.

74 N. W. 2d 854

Filed February 17, 1956. No. 33880.

1. **Appeal and Error.** Under the provisions of section 25-1140.07, R. R. S. 1943, an extension of time to reduce a bill of exceptions to writing may be secured in the district court only from the judge who tried the cause.
2. ———. The judge who tried the cause is without authority to make any order with reference to the bill of exceptions more than 110 days after the notice of appeal was filed in the district court.
3. ———. Pursuant to Article V, section 25, Constitution of Nebraska, a rule of practice in the Supreme Court is herein promulgated implementing the statutes (§§ 25-1140 to 25-1140.07, R. R. S. 1943) with reference to the procurement of extensions of time in this court (1) to reduce exceptions to writing, (2) to serve the bill on the adverse party, or his attorney of record, (3) to return the bill to the other party, or his attorney of record, and (4) for settling and allowing the bill of exceptions by the judge who heard the cause.

APPEAL from the district court for Scotts Bluff County: FAY H. POLLOCK, JUDGE. *Motion to quash bill of exceptions sustained. Motion to attach order to bill of exceptions denied.*

Mothersead, Wright & Simmons and *Robert M. Harris,* for appellant.

Stubbs & Metz, for appellee.

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

CARTER, J.

The question presently before the court arises on two motions filed by the parties. The appellee, hereafter referred to as the plaintiff, filed a motion to quash the bill of exceptions. The appellant, hereafter referred to as the defendant, filed a motion for an order authorizing the appellant to attach to the bill of exceptions filed in this court an executed copy of the order of the judge who heard the cause, bearing the date of November 21, 1955, granting an extension of time allowing an additional 40 days for the preparation, service, and settlement of the bill of exceptions, such 40 days to run from August 20, 1955.

Defendant filed a notice of appeal on July 12, 1955. The bill of exceptions was reduced to writing and certified to by the court reporter on September 2, 1955, it being the fifty-second day after the filing of the notice of appeal. Defendant's counsel delivered the bill of exceptions to counsel for the plaintiff on September 10, 1955, it being the sixtieth day after the filing of the notice of appeal. On September 19, 1955, plaintiff's attorney returned the bill of exceptions to defendant's counsel with four proposed amendments which were accepted by the attorneys for the defendant on the same day. The trial judge settled and allowed the bill of exceptions on September 22, 1955, the seventy-second day after the notice of appeal was filed.

There appears in the bill of exceptions an order signed by C. G. Perry, District Judge, allowing an additional 40 days, over and above the original 40 days granted by statute, in which to prepare the bill of exceptions. The record shows that the judge who tried the cause was Fay H. Pollock, District Judge for the Ninth Judicial District, and not C. G. Perry, District Judge for the Seventeenth Judicial District, the district in which the

action was filed. It is the contention of the plaintiff that Judge Perry was without authority to extend the time for preparing the bill of exceptions and that his order was without force or effect.

The applicable statute provides: "In cases where a party seeking to obtain the allowance of a bill of exceptions has used due diligence in that behalf, but has failed to secure the settlement and allowance of the same as herein required, it shall be competent for the judge who tried the cause, upon showing of due diligence, and not otherwise, to extend the time herein allowed, but not beyond forty days additional to that herein provided, making such specific directions in that behalf as shall appear to the court to be just to all parties. Thereafter, a further extension of time may be granted by the Supreme Court upon application and showing of good cause therefor." § 25-1140.07, R. R. S. 1943. The foregoing statute is clear that only the judge who tried the cause may extend the time for settling and allowing a bill of exceptions. Consequently, the purported order by Judge Perry is without force and effect. No proper extension of time was obtained and the contention of the plaintiff must be deemed the correct one. This appears to have been the holding of this court since Hanscom v. Lantry, 48 Neb. 665, 67 N. W. 762. In that case this court said: "It follows that appellants' motion for additional time within which to procure the allowance of their exceptions should have been addressed to Judge Ambrose, by whom the order of confirmation was made, and that the orders in that behalf by Judge Scott were ineffective for the purpose intended."

The defendant relies upon the case of State ex rel. Downing v. Gaslin, 32 Neb. 291, 49 N. W. 353. It seems clear that the holding in that case upon the point presently being considered was overruled, although not in terms, in Hanscom v. Lantry, *supra*. It is no longer the law in this state. We hold, therefore, that the order purporting to extend the time for the allowance and

settlement of the bill of exceptions by Judge Perry was not authorized. We conclude that there was no extension of time granted in the present case.

It is the contention of the plaintiff that in the absence of an extension of time to settle and allow the bill of exceptions, the trial court had no power to do so after 70 days from the time of the filing of the notice of appeal. Plaintiff cites and relies on Jones v. City of Chadron, 156 Neb. 150, 55 N. W. 2d 495; Gernandt v. Beckwith, 160 Neb. 719, 71 N. W. 2d 303; Zenker v. Zenker, 161 Neb. 200, 72 N. W. 2d 809; and other earlier cases. The defendant contends that the allowance and settlement of the bill of exceptions was within the time provided by statute under the holdings of this court in In re Estate of Boschulte, 128 Neb. 316, 258 N. W. 530; Scotts Bluff County v. McHenry, 128 Neb. 613, 259 N. W. 754; Markel v. Glassmeyer, 132 Neb. 716, 273 N. W. 33; and other earlier cases. Due to the confusion that appears to exist in the two classes of cases referred to, we shall attempt to clarify the law on the subject as it now exists. This requires a consideration of sections 25-1140 to 25-1140.07, R. R. S. 1943.

Prior to 1877 it was necessary to settle the bill of exceptions within the trial term. In 1877 the applicable statute was amended to provide that the party excepting was required to submit the proposed bill within 15 days, or in such time as the court may direct, not exceeding 40 days from the rising of the court. In 1881 the statute was again amended by adding the provision permitting the judge who tried the cause, upon due showing of diligence and not otherwise, to further extend the time, but not beyond 40 days additional. The statute does not appear to have been materially changed until 1947 when the present sections (25-1140 to 25-1140.07, R. R. S. 1943) were enacted. Under the 1947 statute the time for allowing and settling a bill of exceptions began to run with the filing of the notice of appeal. It seems clear, therefore, that cases arising prior to 1947 are not appli-

cable to cases arising since that time, except as the reasoning of the prior cases may be applied to the interpretation to be placed upon the 1947 amendments.

The right to a bill of exceptions is in all cases the creature of statute and is measured and defined by statute. This appears to have been the rule as early as First National Bank v. Bartlett, 8 Neb. 319, 1 N. W. 199. See Horbach v. City of Omaha, 49 Neb. 851, 69 N. W. 121, and cases cited therein. In Stock v. Luebben, 72 Neb. 254, 100 N. W. 307, this court said: "This evidence shows that it was solely the fault of the court reporter, and the question is whether, under such circumstances, the delay beyond the 80 days in presenting the bill to opposing counsel is fatal to the settlement of the bill. It was held that such delay is not fatal in State v. Gaslin, 32 Neb. 291, and in Richards v. State, 22 Neb. 145, but in Horbach v. City of Omaha, 49 Neb. 851, the case of Richards v. State is reviewed fully and overruled upon this point, and the rule declared to be that the statute is mandatory, and that no bill of exceptions can be settled and allowed by the trial court that has not been presented to the opposing counsel within the 80 days. This ruling is followed in Mathews v. Mulford, 53 Neb. 252, and it is there stated that the remedy, when the delay has been caused by the neglect of the reporter in making the transcript, is by application for a new trial. Following these later cases, which seem to be well reasoned, this motion must be sustained. This places great responsibility upon the official reporters of the trial courts. It will rarely, if ever, happen that 80 days will be too short for the performance of this duty, if the importance of the matter is duly appreciated. Inefficient and negligent reporters should not be tolerated. The delay and expense of another trial, made necessary solely by the inefficiency of a court reporter, are serious matters." We adhere to the language contained in Horbach v. City of Omaha, *supra,* stating: "It cannot be asserted that this court, or the district court, is empowered in exceptional

cases, or for the purpose of maintaining any supposed general principle of abstract ethics, to enlarge the statute or to create a right to a bill where the statute confers none." We conclude, therefore, that the provisions of sections 25-1140 to 25-1140.07, R. R. S. 1943, are mandatory and must be followed in the procurement of a valid bill of exceptions.

The initial period for reducing a bill of exceptions to writing is 40 days from the date the notice of appeal is filed. § 25-1140, R. R. S. 1943. Exceptions are reduced to writing within the meaning of this section of the statute on the day the court reporter certifies the draft as the bill of exceptions in the case. A period of 10 days is allowed to serve the bill on the adverse party, as provided by section 25-1140.03, R. R. S. 1943. The adverse party has 10 days to prepare amendments and return the bill, as provided by section 25-1140.04, R. R. S. 1943. The bill of exceptions must be presented to the trial judge for settlement, or to the clerk of the district court in a proper case, within 10 days thereafter, and after 5 days notice to the adverse party when proposed amendments have been made and not accepted. §§ 25-1140.05 and 25-1140.06, R. R. S. 1943.

It is plain, therefore, that where no extension of time has been granted, as authorized by section 25-1140.07, R. R. S. 1943, the appellant is limited, from the date of filing notice of appeal, to 40 days to reduce the bill of exceptions to writing, to 10 days thereafter to serve the same on the adverse party, to an additional 10 days to procure its return, and 10 days thereafter to procure a settlement and allowance of the bill. In other words, the bill must be prepared within 40 days after the filing of the notice of appeal, it must be served on the adverse party within 50 days thereafter, it must be examined and returned by the adverse party within 60 days, and it must be settled and allowed within 70 days. These limitations as to time are mandatory and they may not be waived. The settlement and allowance of the bill after the 70 days,

as in the present case, is not authorized and will not be considered by this court. Jones v. City of Chadron, *supra.*

We point out, however, that extensions of time to procure an allowance of a bill of exceptions are authorized by section 25-1140.07, R. R. S. 1943. Under this section of the statute the trial judge who tried the cause, upon a showing of due diligence and not otherwise, may extend the time, not more than 40 days, making such specific directions in that regard as shall appear to be just to all parties. The extension is limited by the statute to the terms appearing in such order, and where the extension granted is less than 40 days, or the extension is circumscribed by other conditions or limitations, the limitations of time contained therein and the conditions of the order must be complied with. Where an extension of time has been granted by the trial judge who tried the cause, this court will not review the evidence on which such extension was granted for the purpose of determining whether the showing of due diligence was sufficient. Greenwood v. Cobbey, 24 Neb. 648, 39 N. W. 833. We likewise hold that this court will not review the evidence on which an application for an extension was denied for the purpose of determining whether the showing of due diligence required a different order. We also adhere to the rule announced in In re Estate of Boschulte, *supra,* that an order extending the time for the preparation of a bill of exceptions may be made within the period extended by the trial court, but not exceeding the 40-day limitation.

It will be noted by an examination of section 25-1140.07, R. R. S. 1943, that the trial court may extend the time, upon a showing of due diligence and not otherwise, not only as to the time for preparing the bill of exceptions, but also the time for serving, returning, and settling and allowing the bill of exceptions as long as the extensions granted for any purpose do not exceed 40 days. In other words, after extensions of 40 days have been granted, the trial court has no authority to

further extend the time for any purpose. The assumption that the judge who tried the case may grant an extension of time only for the preparation of the bill is an erroneous one. The statute clearly authorizes such extensions to serve, procure the return, or to present and allow the bill as well, if the maximum extension period of 40 days is not exceeded.

Prior to 1947 the time for procuring the allowance of a bill of exceptions commenced to run from the adjournment sine die of the term of court at which the judgment was rendered or at which the motion for a new trial was ruled on. By the amendments enacted in 1947 (§§ 25-1140 to 25-1140.07, R. R. S. 1943), it was provided that such time should commence to run from the date the notice of appeal was filed with the clerk of the district court. In most cases this had the effect of materially reducing the time in which a bill of exceptions could be settled and allowed. The Legislature evidently intended to make provision for further time where it was not possible to obtain a settlement and allowance of the bill without fault on the part of the appellant in the exercise of due diligence by providing in section 25-1140.07, R. R. S. 1943: "Thereafter, a further extension of time may be granted by the Supreme Court upon application and showing of good cause therefor." The meaning of this provision is that if a bill of exceptions cannot be allowed within the time fixed by sections 25-1140 to 25-1140.07, R. R. S. 1943, after the powers of the district court have been exhausted with reference thereto, without fault and in the exercise of due diligence by the party seeking the bill, an application accompanied by a showing of good cause could be made to this court for a further extension of time to secure the allowance of the bill. We recognize the fact that circumstances can arise wherein the draft of the bill cannot be obtained in 80 days, or, where the right to an extension of time at the hands of the trial judge has been exhausted, the appellant may be unable to

serve the bill upon the appellee because of his absence or other reasons, or that appellant may be unable to secure the return of the bill from the appellee through no fault of his own, or that appellant may be unable because of conditions beyond his control to secure the allowance of the bill by the judge who tried the cause, or by the clerk of the district court in cases where the latter has authority to do so. In order to safeguard the rights of the parties in this respect, and give effect to the legislative intent, we hereby adopt the following rule of court as authorized by Article V, section 25, Constitution of Nebraska:

An application for an extension of time within which to procure an allowance of a bill of exceptions pursuant to section 25-1140.07, R. R. S. 1943, may not be filed in this court until the judge who tried the cause has exhausted his authority to extend the time under such section. An application to extend the time to prepare a bill of exceptions may not be filed in this court until 80 days after the date the notice of appeal was filed in the district court, except where the court has exhausted its authority to extend the time as otherwise herein provided, and the application must be filed in this court within 30 days after the trial court's authority is exhausted. An application in this court for an extension of time to serve the bill of exceptions upon the adverse party may be made in this court, where the judge who tried the cause has exhausted his power to do so, within 30 days after the statutory time has expired in which to serve the bill on the adverse party. An application in this court for an extension of time to procure the return of the bill of exceptions from the adverse party may be made in this court, where the judge who tried the cause has exhausted his power to do so, within 30 days after the statutory time has expired in which to procure the return of the bill. An application in this court for an extension of time to present the bill of exceptions to the judge who heard the cause for settlement

and allowance, or to the clerk of the district court as provided in section 25-1140.06, R. R. S. 1943, may be made in this court, where the judge who tried the cause has exhausted his power to extend the time, within 30 days after the statutory time has expired in which to procure the settlement and allowance of the bill. Where the judge who tried the cause has ceased to hold office for any reason, and the bill cannot be settled and allowed under section 25-1140.06, R. R. S. 1943, it will be considered in the application of this rule as if such judge had exhausted his power to grant an extension of time. When the trial court refuses to grant an extension of time as authorized by section 25-1140.07, R. R. S. 1943, it will be considered in the application of this rule as if such judge had exhausted his power to grant an extension of time. Any application made to this court under section 25-1140.07, R. R. S. 1943, must be supported by detailed and convincing proof of facts showing that the applicant is without fault and has used due diligence, and has been unable to secure an allowance of a bill of exceptions within the prescribed time by circumstances beyond his control and which he could not have prevented. The showing of good cause for an application for an extension of time under this rule must, if possible, include a statement under oath of the person or persons familiar with the facts as to why it has not been possible to secure an allowance of the bill of exceptions in the district court in the manner provided by statute. If such statements cannot be procured, the reason for their nonprocurement must be shown by the applicant under oath, and if sufficient cause for the absence thereof is not shown, the application for an extension of time will be denied.

In the application of the foregoing rule we adhere to our former holding that the aggregate time allowed for the performance of any of the statutory steps in securing an allowance of a bill of exceptions will not be shortened, or advanced, by completing any of the steps

enumerated in advance of the time limited by the statute. Sherwin v. O'Connor, 23 Neb. 221, 36 N. W. 491.

When more than one appeal is taken to this court from the same judgment or other final order, a single bill of exceptions, containing all of the matter designated by the parties, is sufficient.

The rule of court herein adopted contemplates four steps that must be taken within time limits prescribed by the statute, to wit: (1) The reducing of the exceptions to writing, (2) the service of the bill on the adverse party, or his attorney of record, (3) the return of the bill with proposed amendments, if any, to the other party, or his attorney of record, and (4) the settlement and allowance of the bill of exceptions by the judge who heard the cause. Any or all of the periods of time prescribed by the applicable statutes may be extended by the judge who heard the cause for an aggregate period of 40 days. Such extension or extensions may be granted within the period extended. The limit of time to be allowed by the judge who heard the cause for the preparation, serving, return, and allowance of the bill cannot under any circumstances exceed 110 days.

A failure to procure a bill of exceptions because of noncompliance with the foregoing rule will not afford a basis for a new trial. If a bill of exceptions cannot be obtained under such rules because of unavoidable casualty which precludes the obtaining of a bill of exceptions, a petition in equity for a new trial constitutes the remedy. Holland v. Chicago, B. & Q. R. R. Co., 52 Neb. 100, 71 N. W. 989; Langan v. Parkhurst, 1 Neb. (Unoff.) 804, 96 N. W. 63.

The design of the statute is to allow a fixed time within which a bill of exceptions must be reduced to writing, served on the adverse party, returned, and submitted to the trial judge for settlement and allowance. The trial judge is without authority to allow a bill of exceptions not prepared in the manner and within the times fixed. Any attempt to allow a bill of ex-

ceptions not prepared in compliance with statutory authority is of no force and effect, and the lack of authority cannot be waived. The bill of exceptions must be prepared, served, returned, settled, and allowed in accordance with the statute. Its terms are mandatory. Consequently, a bill of exceptions which is not prepared in accordance with the statute will be quashed on motion of the adverse party. This court will also take judicial notice of the fact that a bill of exceptions was not prepared, served, returned, or settled and allowed within the time provided by statute, and therefore cannot be considered on appeal. Gernandt v. Beckwith, *supra*; Zenker v. Zenker, *supra*.

In the case before us no extension of time was granted for the preparation, service, settling, or allowance of a bill of exceptions. Under such circumstances the maximum time in which the judge who heard the cause could lawfully allow a bill of exceptions was 70 days after the filing of the notice of appeal. The order of the trial court purporting to allow the bill on the seventy-second day was therefore unauthorized and of no force and effect. The motion of the plaintiff to quash the bill of exceptions must therefore be sustained. Jones v. City of Chadron, *supra*. The judge who tried the cause was without authority under any circumstances to make an order with respect to the allowance of the bill of exceptions after 110 days from the date of the filing of the notice of appeal. The extension of time of 40 days from August 20, 1955, to prepare, serve, and settle the bill of exceptions purported to have been granted by the judge who tried the cause on the one-hundred-thirty-second day after the notice of appeal was filed, is without authority and of no force and effect. We therefore deny the motion for leave to attach a copy of such order to the bill of exceptions filed in this case.

MOTION TO QUASH BILL OF EXCEPTIONS SUSTAINED.
MOTION TO ATTACH ORDER TO BILL OF EXCEPTIONS DENIED.

WENKE, J., concurring.

I am in full accord with the result arrived at by the court's opinion and with the rules promulgated therein except I cannot agree a strict compliance with the procedural steps leading up to the allowance and settlement of a bill of exceptions cannot, under any circumstances, be waived by the parties. I do not mean to infer by the foregoing that the parties can, by waiver, extend the authority of the district court for allowing and settling a bill of exceptions beyond the maximum time as fixed, in the first instance, by statute or as it may be extended by the district court or this court.

It has always been my thought that the bench and bar of this state were and are in favor of simplifying appeal procedures by, insofar as possible, removing all unnecessary technical requirements which would have a tendency to defeat the hearing of an appeal on its merits. Let us consider two of the steps which the opinion holds must be taken within time limits provided by statute for that purpose or authority obtained for doing so beyond that time. Let us assume counsel for the party appealing obtains a certified bill of exceptions from the official court reporter within the time fixed by statute for that purpose but, because of their absence or for other good and sufficient reason, is unable to serve it on the adverse party or his attorney of record before the 51st day. Opposing counsel, being fully aware why the bill of exceptions has not been served on him or his client on or before the 50th day, makes no objection because of that fact and the bill is settled by the judge who tried the case within the time provided by statute for that purpose. Although no objection is ever made thereto in the trial court or this court we will be required to quash the bill of exceptions for under our holding in Gernandt v. Beckwith, 160 Neb. 719, 71 N. W. 2d 303, we are required to take judicial notice of the above failure to strictly comply with this procedural step. The same would be true if, through

no fault of his own, appellant's counsel was not able to secure a return of the bill of exceptions until the 61st day. To require such strict compliance with these procedural steps will lead to many cases not being heard on their merits. Such a result is very undesirable. I would now hold, as this court has done on many occasions, that the parties may waive a strict compliance with these procedural steps. It seems to me that unless proper and timely objection is made on that ground that a failure to strictly comply with any procedural step should cause it to be considered as waived provided the bill of exceptions can be and is allowed and settled within the time given the trial court for that purpose. If proper and timely objection is made then, of course, counsel should be required to obtain authority for doing so out of time.

There is another reason why I cannot agree with the majority view in this respect. I think the expense of litigation should, insofar as possible, be kept at a minimum. Let us take a situation where the trial court has exhausted its authority to extend the time and counsel for the party appealing obtains the bill of exceptions within the time so provided but, because of good and sufficient reasons beyond his control, is not able to serve it in the manner provided by the statute until the 91st day or, due to no fault of his own, is unable to secure the return of the bill of exceptions before the 101st day. In either or both instances, even though opposing counsel has made no objection to the allowance and settlement of the bill of exceptions and the trial court could do so on or before the 110th day, appealing counsel must first make application to and obtain authority from this court to extend the time to serve and then to extend the time for return. This will result in needless delay and much additional expense which is wholly unjustified and all within our power to prevent.

I trust this concurring opinion serves the purpose of warning each member of the bar of the strictness with

which these procedural steps will hereafter be applied and that he not be entrapped thereby.

BOZELL & JACOBS, INC., A CORPORATION, APPELLANT, V. BLACKSTONE TERMINAL GARAGE, INC., A CORPORATION, APPELLEE.

75 N. W. 2d 366

Filed February 24, 1956. No. 33844.

1. **Insurance: Parties.** An arrangement between an insurer and an insured, whereby the former loaned to the latter the amount of a loss under the terms of a policy of insurance, to be repaid only if the insured made a recovery from a third person, is a lawful agreement and the loan thus made is not such a payment of insurance as to make the insurer the real party in interest.
2. ———: ———. Where insurer has advanced to insured the amount of the insurance under an agreement reciting that the amount was received as a loan to be repaid only from such recovery as might be had from any other party, insured, and not insurer, is the real party in interest.
3. **Bailments.** A special contract of bailment prevails in determining the liabilities of the parties, as against general principles of law applicable in the absence of express agreement.

APPEAL from the district court for Douglas County: WILLIAM A. DAY, JUDGE. *Reversed and remanded for a new trial.*

Matthews, Kelley, Fitzgerald & Delehant and *Martin A. Cannon,* for appellant.

White, Lipp & Simon, for appellee.

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

SIMMONS, C. J.

In this action plaintiff sought a recovery of damages resulting to an automobile that had been placed with defendant. Issues were made and trial was had. At

the close of all the evidence, the cause was dismissed on motion of the defendant. Plaintiff appeals.

We reverse the judgment of the trial court and remand the cause for a new trial.

The plaintiff and the defendant are corporations.

Plaintiff alleged that on or before June 1, 1953, it had entered into an oral contract with the defendant for a valuable consideration whereby plaintiff agreed to surrender its automobile to the defendant; that defendant agreed to care for the car in its garage and to return it unused and undamaged to the plaintiff on demand; that on June 1, 1953, the automobile was delivered to the defendant pursuant to the contract; and that it was later returned severely damaged so as to have a salvage value only.

Defendant by answer denied generally and admitted that it had entered into a "transaction" with plaintiff; that it operated a parking garage; that plaintiff arranged for the parking and removal of the car during the hours the garage was open; and that plaintiff's car was left with it "for parking."

Defendant then pleaded in detail the investigation made and recommendations received before employing a night man in the garage, the instructions given to the employee, and the methods of its operations. Defendant then pleaded that this employee, after working hours and not within the scope of his employment and in violation of his instructions, entered the garage, took plaintiff's car, drove it to Lincoln, and was involved in an accident in which the automobile was injured. In conclusion, defendant pleaded that the damage was not the result of any act of negligence or lack of care on its part and that it had acted with reasonable care, but that the damage was the result of the unauthorized criminal act of the employee.

For reply plaintiff denied allegations of new matter in the answer. It alleged that the defendant's employee was untrustworthy and irresponsible; that defendant

knew or could have discovered that fact; and that the damage was proximately caused by the negligence of the defendant.

The evidence shows without dispute that during the day or evening of May 31, 1953, plaintiff left the car with the defendant in its garage; that at 1 a. m. the following morning the employee closed the garage and went away; that within an hour he returned to and entered the garage, using a key furnished to him by the defendant; and that he took the car and drove it away on a mission of his own. The accident resulted while it was so used by the employee.

Defendant by amended answer alleged that plaintiff had been paid in full the amount of its loss and that it was not the real party in interest. Preliminary to the determination of the substantive questions presented by this appeal, we determine that question.

On cross-examination of plaintiff, it was shown that the plaintiff received a new car of the same model, style, and type that it had before the accident, in exchange for the damaged car, without payment from plaintiff, and that the difference was adjusted by the insurance carrier. It was then developed on redirect examination that there was an agreement between the insurance carrier and the plaintiff that plaintiff would make claim to and prosecute any and all legal proceedings necessary to enforce the claim; and that plaintiff acknowledged receipt of money "as a loan, repayable only in the event and to the extent of recovery that the undersigned may make from any person causing or liable for the loss or damage to the property insured * * *." A similar contention was advanced in Shiman Bros. & Co. v. Nebraska National Hotel Co., 143 Neb. 404, 9 N. W. 2d 807. There the loan to the plaintiff was not the full amount of the loss. However, we there quoted from and relied upon Luckenbach v. McCahan Sugar Refining Co., 248 U. S. 139, 39 S. Ct. 53, 63 L. Ed. 170. In the Luckenbach v. McCahan Sugar Refining

Co. case, the amounts received from the insurance companies aggregated the loss.

In Shiman Bros. & Co. v. Nebraska National Hotel Co., *supra,* we held: "An arrangement between an insurer and an insured, whereby the former loaned to the latter the amount of a loss under the terms of a policy of insurance, to be repaid only if the insured made a recovery from a third person, is a lawful agreement and the loan thus made is not such a payment of insurance as to make the insurer the real party in interest."

In 46 C. J. S., Insurance, § 1209, p. 170, it is stated: "Where insurer has advanced to insured the amount of the insurance under an agreement reciting that the amount was received as a loan to be repaid only from such recovery as might be had from any other party, insured, and not insurer, is the real party in interest."

Here the plaintiff did not assign its cause of action. It retained it and entered into an agreement with its insurer as to the disposition of the proceeds arising from a recovery. It is apparent that a recovery by the plaintiff here would bar a recovery by the insurance carrier in an action against the defendant.

Consistent with these authorities we find no merit in defendant's contention.

Plaintiff, by its president, testified that it made the agreement with the defendant through Mr. Block, defendant's owner and general manager; that the agreed consideration was $20 a month; and that it was understood that the automobile would be returned to the plaintiff in substantially the same condition in which it was received.

Defendant's Mr. Block testified that he had an oral agreement with the plaintiff for the storage of the car; that it was agreed that plaintiff could drive the car into the garage; and that defendant would take care of it and whenever the garage was open, would return it to plaintiff in substantially the same condition in which he re-

ceived it. The above is substantially the evidence as to the contract.

When left with the defendant, the plaintiff's car was an expensive make that had been driven some 800 miles. When returned to plaintiff, it had only a salvage value left. Obviously, it was not returned in substantially the same condition in which it was received by the defendant.

Plaintiff here alleged the contract and its breach. Defendant denied the contract, admitted that the car was left with it for storage, and alleged due care on its part. Plaintiff by reply joined issue on the answer and in defense thereto alleged negligence. In brief, those were the issues pleaded and upon which evidence was offered.

Plaintiff here relies upon the contract and asserts that the issue is one of damages only. Defendant here asserts that because it alleged the exercise of due care on its part, because plaintiff joined issue on that defense, and because evidence as to that question was offered and received, that plaintiff is now shifting its position as to the issue pleaded and tried. We see no merit in that contention. We deem it sufficient to point out that defendant in its motion for dismissal gave as one of the grounds that plaintiff had failed to establish the allegations of its petition and reply.

It appears from the evidence that defendant's normal open-for-business hours were from 7 a. m. to 1 a. m. the next morning. That at all times one or more employees were on duty. The employee involved here normally worked from 4:30 p. m. to 1 a. m. He was furnished a key that gave him entry to the building and, in turn, gave him access to all cars therein.

The patrons of defendant, so far as this class of service is concerned, normally drove their cars into the runway in the garage, leaving them there with the ignition keys in the cars. An employee of defendant then backed the cars into assigned stalls, where they were left with the keys in the cars. The owners then at any-

time the garage was open drove their cars from the stalls into the runway and out of the garage. Substantially all of the cars so left with defendant were owned by residents of a nearby hotel and were expensive models. Plaintiff testified that its car was valued at $5,000 before the accident. After the accident its value was about $1,850. Defendant's evidence as to value before the accident indicated a much smaller amount.

The rule is stated in 8 C. J. S., Bailments, § 22, p. 255, as follows: "The rights, duties, and liabilities of the bailor and the bailee must be determined from the terms of the contract between the parties, whether express or implied. Where there is an express contract, the terms thereof control, since both the bailor and the bailee are entitled to impose on each other any terms they respectively may choose, increasing or diminishing their rights, and their express agreement will prevail against general principles of law applicable in the absence of such an agreement. * * * Thus, the bailee is liable for loss resulting from breach of his contract to keep the property in a particular manner or at a particular place, although circumstances compel him to store it in another place and he was not negligent in doing so, or to use it only for a particular purpose or to a specified extent, or in a particular manner, or to return it at a particular time, or to comply with other special stipulations in regard to the property, irrespective of the question as to whether or not he has been negligent." Also in 8 C. J. S., Bailments, § 26, p. 267, it is stated: "A bailee may enlarge his liability by special contract, provided the contract is not in violation of law or public policy." In 6 Am. Jur., Bailments, § 181, p. 299, the text states: "Subject to the general rules and principles heretofore considered which govern such agreements, a bailee may enlarge his legal responsibility for the subject of the bailment by contract, express or implied, even to the extent of making himself absolutely liable as insurer for the loss or destruction of goods

committed to his care; this is true even of gratuitous bailees, and the contract embracing such liability is controlling and must be enforced according to its terms, irrespective of the fact that a less onerous liability is imposed by law on bailees of the same class generally. For such an undertaking, the bailment itself or the compensation to be paid for it is a sufficient consideration."

Defendant relies on decisions and quotes the rule as stated in 6 Am. Jur., Bailments, § 242, p. 345, which states: "The rule appears well settled that unless made so by statute or express contract, an ordinary bailee, no matter to what class he belongs, is not an insurer of goods delivered into his keeping, although, as respects a few special kinds of bailees, such as common carriers and innkeepers, it seems that public policy makes them such." Defendant appears to overlook the "unless made so by statute or express contract" clause.

The two rules are not in conflict. They apply to different contractual situations. The distinctions run throughout the texts and the decided cases.

The Supreme Court of the United States has aptly stated the rules and the distinctions as follows: "It is elementary that, generally speaking, the hirer in a simple contract of bailment is not responsible for the failure to return the thing hired, when it has been lost or destroyed without his fault. Such is the universal principle. This rule was tersely stated by Mr. Justice Bradley in Clark v. United States, 95 U. S. 539, where it was said (p. 542):

" 'A bailee for hire is only responsible for ordinary diligence and liable for ordinary negligence in the care of the property bailed. This is not only the common law, but the general law on the subject. See Jones, Bailm. p. 88; Story, Bailm. secs. 398, 399; Domat, Lois Civiles, lib. 1, tit. 4, sec. 3, pars. 3, 4; 1 Bell, Com. pp. 481, 483, 7th ed.'

"But it is equally true that where by a contract of bailment the hirer has either expressly or by fair im-

plication assumed the absolute obligation to return, even although the thing hired has been lost or destroyed without his fault, the contract embracing such liability is controlling and must be enforced according to its terms. In Sturm v. Boker, (1893) 150 U. S. 312, both the elementary principles above stated were clearly expressed by the court, through Mr. Justice Jackson. It was said (p. 330):

" 'The complainant's common law responsibility as bailee exempted him from liability for loss of the consigned goods arising from inevitable accident. A bailee may, however, enlarge his legal responsibility by contract, express or fairly implied, and render himself liable for the loss or destruction of the goods committed to his care—the bailment or compensation to be received therefor being a sufficient consideration for such an undertaking.'

"This statement of the binding effect of contracts upon those who enter into them was, in substance, but a reiteration of the principle clearly announced in Dermott v. Jones, (1865) 2 Wall. 1, where it was said:

" 'It is a well-settled rule of law that if a party by his contract charge himself with an obligation possible to be performed, he must make it good, unless its performance is rendered impossible by the act of God, the law or the other party. Unforeseen difficulties, however great, will not excuse him.' " Sun Printing & Publishing Assn. v. Moore, 183 U. S. 642, 22 S. Ct. 240, 46 L. Ed. 366.

In principle this case has been decided by us in Butler v. Greene, 49 Neb. 280, 68 N. W. 496. We there stated the rule as follows: "A special contract of bailment prevails in determining the liabilities of the parties, as against general principles of law applicable in the absence of express agreement." In that case there was a bailment of a watch and chain. The plaintiff alleged that they were lost through negligence of the bailee. The verdict was for the plaintiff. Defendant complained

that the instructions to the jury carried an implication that he, as bailee, was an insurer of the property. The evidence was that the bailee contracted to keep the watch and chain in a vault in the bank, that he did not do so, and that he left it within the reach of thieves.

There the court by two instructions told the jury that if defendant contracted to keep the watch and chain in the bank vault, he was bound by his agreement to do so but that if he did not do so and the watch was stolen by reason of want of care, the jury should find for the plaintiff. We there held: "If the defendant contracted to keep the watch in the vault of the bank, and if it was lost by reason of his failure to do so, he was liable without regard to the general principles of the law of bailment. He had made a contract and he was liable for all damages resulting from his failure to perform it. If he had no right to keep the watch in the vault, that was his affair and not the bailor's. The contract was not to keep the watch in the vault if the bank permitted it, but it was absolute; and it was the pledgee's business to see that he had authority to keep it there. If he had not, he should not have made the contract. But the instructions of the court relieved him from this liability, and, taken together, were to the effect that although he broke his contract in this regard he was still not liable unless he failed to exercise ordinary care. This was more favorable to the defendant than the law warranted."

So here the defendant contracted to return the plaintiff's car to it in substantially the same condition as when it was received. It was not conditioned on the exercise of due care, nor was it on an "if it is not stolen" condition. The promise as testified to by both parties was absolute. The exercise of ordinary care is not a defense under these conditions. The law does not warrant it.

The question here is not that of defendant's exercise of due care, or liability for the tortious acts of its serv-

ants. It is a question of defendant's liability for a breach of its admitted contract.

The defendant now seeks to impose upon the plaintiff an exception to its absolute liability which it did not directly or by implication impose when the contract was made. The defendant's liability here rests on its failure to do that which it agreed to do.

At the close of the evidence the contract to return the car in substantially the same condition as when it was received was established without dispute. The breach of that agreement was either admitted or not disputed. There remained nothing to submit to the jury except the amount of plaintiff's damage. It necessarily follows that the trial court erred in dismissing the cause.

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

REVERSED AND REMANDED FOR A NEW TRIAL.

FRANCES WOLCOTT, ADMINISTRATRIX OF THE ESTATE OF PHINEAS ASA WOLCOTT, DECEASED, APPELLANT, V. ROYAL DRAKE, APPELLEE.

75 N. W. 2d 107

Filed February 24, 1956. No. 33853.

1. **Negligence: Trial.** The burden of proving negligence is on the party alleging it.
2. ———: ———. If defendant pleads that the plaintiff was guilty of contributory negligence, the burden is upon him to prove that defense and this burden does not shift during the trial. However, if the evidence adduced by the plaintiff tends to prove that issue, the defendant is entitled to receive the benefit thereof.
3. **Negligence.** The negligence of a person charged with responsibility for an accident cannot be inferred from a presumption of due care on the part of a person killed in an accident. A presumption of due care in the performance of duty attends a person so charged as well as a person so killed.
4. ———. Negligence is not presumed; the mere happening of an accident does not prove negligence.

5. **Negligence: Trial.** The burden of proving a cause of action is not sustained by evidence from which negligence can only be surmised or conjectured.
6. **Negligence.** It is essential to the existence of negligence that there be some fault on the part of the person sought to be held liable.
7. ———. Negligence is the doing of something which an ordinarily prudent person would not have done under the same or similar circumstances, or the failure to do something which an ordinarily prudent person would have done under the same or similar circumstances.

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

Torgeson, Halcomb & O'Brien and *John D. Knapp,* for appellant.

Van Steenberg & Myers, for appellee.

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

SIMMONS, C. J.

This is an action for damages based on negligence arising from an automobile collision causing the death of Phineas Asa Wolcott. Plaintiff seeks recovery for the exclusive benefit of the widow and next of kin. The collision involved an automobile driven by the deceased and one driven by the defendant. Issues were made and trial was had. At the close of all the evidence the trial court sustained a motion to dismiss, based on the insufficiency of plaintiff's evidence. Plaintiff appeals.

We affirm the judgment of the trial court.

Plaintiff alleged her version of the accident and pleaded that it was caused by defendant's negligence in many particulars. Defendant pleaded his version of the accident, denied negligence, and pleaded contributory negligence in many particulars.

We state the evidence as it relates to the question of defendant's negligence.

U. S. Highway No. 30 is a main-traveled paved two-

lane highway leading west from Kimball, Nebraska. Shortly before 8 o'clock on the morning of July 12, 1952, deceased was driving west along that highway. Defendant was driving east along that highway. About 2 miles west of Kimball there is a graveled road leading south from U. S. Highway No. 30. The collision occurred at that intersection. Plaintiff offered evidence as to the location of the graveled road.

Plaintiff's evidence does not show the actual collision of the cars. It consisted of the evidence of a deputy sheriff, supported by photographs, that immediately after the accident, the two cars were on the east side of the graveled road and south of the paved portion of U. S. Highway No. 30. It showed that defendant's car was damaged as though by a direct head-on collision with some object, with the left front headlight broken and the right front headlight not broken. It showed skid marks leading from the west. These marks were 54 feet in length to a point where they "changed directions," and then skid marks from that point to the two cars. The skid marks angled off the "oil" approximately 20 feet to the point where there was a change of direction. The distance of that point from the pavement is not shown. The evidence showed that there was clear visibility along the highway for three-tenths of a mile west of the point of the accident.

Plaintiff's evidence shows also that the deceased was seriously injured in the accident and died thereafter on July 22, 1952.

Plaintiff then rested her case-in-chief.

Defendant moved for a directed verdict which was overruled. Defendant then took the stand to testify in his own behalf.

He testified to events prior to the accident and that he was involved in an accident on July 12, 1952, 2 miles west of Kimball "on a driveway leading to the south." He then undertook to further testify as to the accident. Objections to his competency were made apparently

under the provisions of section 25-1202, R. R. S. 1943, the so-called "dead man statute." The trial court sustained objections to the testimony and an offer of proof. Defendant having prevailed, that ruling is not here for review.

Defendant then called a witness who was riding with him. He testified that defendant's speed was 45 to 50 miles per hour prior to the accident; that defendant was driving on the right-hand side of the highway going east; that prior to the accident there were several cars visible to the east and going west; that they were passing each other by going into the south lane and then back into the north lane; that cars so traveling passed the deceased's car (although the witness did not then know whose car it was); and that the last one so passing turned back into the west-bound lane some 10 to 15 yards east of the graveled road.

He testified that prior to, but not at the time of, the accident he had been working with some wiring under the dashboard of defendant's car. He testified that he heard defendant yell, heard the screeching of the tires, saw a green object in front of them, and that there then followed a crash. He testified that defendant's car went 15 feet after the impact; and that it hit deceased's car on the rear wheel and turned it around so that it stopped headed north. Deceased was assisted from his car and sat on the running board. Deceased said, "I would have never turned if I had seen you."

After both parties had rested, defendant renewed his motion for a dismissal, which the trial court sustained.

Plaintiff here grants the rule that the burden of proving negligence is on the party alleging it. Ulrich v. Batchelder, 143 Neb. 697, 10 N. W. 2d 637, and cases there cited. Plaintiff contends that she met that burden of proving negligence on the part of the defendant by a presumption of due care on the part of the plaintiff's decedent and by the photographs and testimony of the

deputy sheriff as to appearance, location, direction, measurement, etc., of the skid marks.

Plaintiff relies on the rule as stated in Anderson v. Nincehelser, 152 Neb. 857, 43 N. W. 2d 182, as follows: "Where there is no eyewitness, no direct evidence of the accident causing the injury, the facts and circumstances may be proved by circumstantial evidence, and the presumption is raised by the instinct of self-preservation on behalf of the deceased that he was not guilty of contributory negligence, but was in the exercise of due care and caution for his own safety, unless the contrary is shown."

Plaintiff produced no eyewitness. She contends that defendant's witness who was riding with him was not an eyewitness. Concededly he did not testify with the accuracy as to detail or attention that might have been expected of a witness who realized an impending accident or who was a "right seat" driver. He did, however, testify as above recited. We need not determine that contention.

Plaintiff argues that under the above rule the presumption of due care makes a prima facie case of negligence. She misreads the rule.

Here plaintiff had the burden of proving defendant's negligence. The defendant had the burden of proving his defense of contributory negligence of the plaintiff's decedent under the rule that: "If defendant pleads that the plaintiff was guilty of contributory negligence, the burden is upon him to prove that defense and this burden does not shift during the trial. However, if the evidence adduced by the plaintiff tends to prove that issue, the defendant is entitled to receive the benefit thereof * * *." Griess v. Borchers, 161 Neb. 217, 72 N. W. 2d 820.

Plaintiff in effect argues that a presumption of negligence arises against the defendant because of a presumption of due care on the part of the deceased.

The Supreme Court of the United States in Looney

v. Metropolitan R. R. Co., 200 U. S. 480, 26 S. Ct. 303, 50 L. Ed. 564, has given the obvious answer to this contention: "A plaintiff in the first instance must show negligence on the part of the defendant. Having done this, he need not go farther in those jurisdictions where the burden of proof is on the defendant to show contributory negligence. In other words, if there is no evidence which speaks one way or the other with reference to contributory negligence of the person killed, then it is presumed that there was no such negligence. Thompson on the Law of Negligence, sec. 401; Baltimore & Potomac R. R. Company v. Landrigan, 191 U. S. 461; Texas & Pacific Railway Company v. Gentry, 163 U. S. 353. But the negligence of a defendant cannot be inferred from a presumption of care on the part of the person killed. A presumption in the performance of duty attends the defendant as well as the person killed. It must be overcome by direct evidence. One presumption cannot be built upon another. Douglass v. Mitchell, 35 Pa. St. 440; Philadelphia &c. Railway Company v. Henrice, 92 Pa. St. 431; Yarnell v. Kansas City &c. Railroad Company, 113 Missouri, 570."

The question is: Does the evidence present a jury question as to whether or not defendant was negligent?

Three basic rules are applicable. They are: "Negligence is not presumed; the mere happening of an accident does not prove negligence.

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

"It is essential to the existence of negligence that there be some fault on the part of the person sought to be held liable." Schroeder v. Sharp, 153 Neb. 73, 43 N. W. 2d 572.

We consider the evidence in the light of the established and often repeated rule that in determining a motion for a dismissal of a directed verdict, the party against whom the motion is directed is entitled to have every

controverted fact resolved in his favor and to have the benefit of every inference that can be reasonably deduced from the evidence.

Deceased is shown to have been driving west along the north lane of travel at a reasonable rate of speed. Other cars passed him and there is no claim that any of the west-bound cars that did so were driving at an excessive rate of speed. The last of the cars to pass deceased did so just before he made the left-hand turn to go south across the east-bound lane of travel. Deceased drove his car across the east-bound lane and his car was on the graveled portion of the road leading to the north-and-south road when his car was struck by the car driven by the defendant.

The defendant was driving east prior to the accident on his proper side of the highway at a speed of 45 to 50 miles per hour. Defendant put on his brakes and skidded 54 feet before the impact. At least 54 feet before the impact defendant had turned his car at an angle and had driven slightly to the southeast and was moving in that direction when the cars collided.

Plaintiff contends that the evidence shows "how, where and why" the deceased was killed.

There is ample evidence as to where the impact occurred that caused deceased's injuries and death. Relating the "how" and "why" to the question of negligence, there is, as to that, a complete void in the evidence. Any conclusion as to the defendant's negligence is entirely within the area of surmise and conjecture. All the evidence shows is that an accident happened and where it happened.

Plaintiff alleged that defendant was negligent in failing to stop before the impact; that he failed to have his car under control and to operate it at a reasonable rate of speed; that he failed to observe, consider, and anticipate that others might be using the highway; that he failed to observe automobiles using the highway; that he drove his car off the highway and onto the roadway

where deceased had already driven his car; and that he failed to keep a proper lookout.

We are unable to determine upon which of these alleged acts of negligence plaintiff relies, save as noted at the conclusion of this opinion.

Plaintiff asserts defendant was negligent and that a jury question was presented. The rule is: "Negligence is the doing of something which an ordinarily prudent person would not have done under the same or similar circumstances, or the failure to do something which an ordinarily prudent person would have done under the same or similar circumstances." Shupe v. County of Antelope, 157 Neb. 374, 59 N. W. 2d 710.

We find no evidence in this record from which a jury could apply the tests of the standard rule.

Plaintiff relies here on Bielinski v. Colwell, 242 Minn. 338, 65 N. W. 2d 113. She quotes from that part of the opinion dealing with a question of contributory negligence. That accident happened when plaintiff's decedent was making a left-hand turn on a highway so as to enter an intersecting road. The issue of contributory negligence turned on the question of whether defendant's decedent was so near the intersection as to constitute an "immediate hazard" when plaintiff's decedent made the left-hand turn. The court held that to be a jury question under the facts there. The issue of negligence of defendant's decedent which the court held was for the jury, turned on a question of speed of the car of defendant's decedent.

There the state law fixed a speed limit of 50 miles per hour. Here the "prima facie lawful" speed limit was 60 miles per hour. § 39-7,108, R. R. S. 1943. Here there is no evidence showing that defendant was exceeding this speed. There the defendant's car skidded for 100 feet before the impact. There was evidence that 50 feet before the impact (which was 50 feet after the brakes were applied) defendant's car was traveling "at least 50 miles per hour." There the court cited the distance of

the skidding to fix the rate of speed after the brakes had been applied sufficient to sustain a finding of a greater rate of speed prior thereto. It then referred to a defendant's witness who fixed a speed rate of 40 miles per hour 25 feet from the impact as indicative of a greater speed prior thereto. There is no such evidence in the case before us.

There the court referred to the fact that the car of plaintiff's decedent was pushed back in the direction in which it had traveled 134 feet while the car of defendant's decedent continued 81 feet. The court cited this evidence as lending support "to a finding that defendant's truck must have been traveling at an excessive rate of speed * * *." Here the evidence is that both the car of plaintiff's decedent and defendant's car remained on or just off the highway in the immediate vicinity of the point of impact.

Plaintiff refers to the provision in section 39-7,108, R. R. S. 1943, that "No person shall drive a vehicle on a highway at a speed greater than is reasonable and prudent under the conditions then existing."

It is pointed out in the Bielinski v. Colwell case, *supra,* that Minnesota's statute requires that speed be reduced when special hazards exist with respect to traffic or by reasons of weather or highway conditions. The accident there happened at night when it was raining and misty, and the pavement was wet and slippery. The court there held that the weather conditions created a special hazard that could be sufficient to sustain a finding of negligence for failure to drive at a lesser speed. Those conditions did not exist here. It does appear here that there was other traffic on the highway, that cars were meeting, overtaking, and passing each other. That is a normal condition on our highways. In and of itself it does not establish either a special hazard or require a reduced speed.

Plaintiff in discussing "excessive speed" in her reply brief contends that the above quote from section 39-

7,108, R. R. S. 1943, is the basic speed rule and that the evidence *"indicates* that appellee *either* failed to observe this basic speed rule, failed to keep a proper lookout, failed to keep his automobile under control, *or that his automobile was equipped with faulty brakes or with a faulty steering mechanism."* (Emphasis supplied.)

We have emphasized the last two clauses above because they relate to claimed negligence that has no support whatever in this evidence. It indicates the extent to which surmise and conjecture enters into plaintiff's contentions.

We find nothing in the Minnesota case to sustain plaintiff's contentions.

The judgment of the district court is affirmed.

AFFIRMED.

CARTER, J., participating on briefs.

LORINE DAVIS, APPELLANT, V. LLOYD DENNERT ET AL., APPELLEES.

75 N. W. 2d 112

Filed February 24, 1956. No. 33855.

1. **Trial.** In every case, before the evidence is left to the jury, there is a preliminary question for the judge, 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.
2. **Appeal and Error.** In order that assignments of error as to the admission or rejection of evidence may be considered, the holdings of this court require that appropriate reference be made to the specific evidence against which objection is urged.
3. **Witnesses: Evidence.** As a general rule a party calling a witness vouches for his credibility and is ordinarily bound by any evidence he gives which is not contradicted or shown to be unreliable. In other words, a party who offers the evidence of a witness cannot subsequently object that it should not have been received or that it is insufficient to sustain a judgment based thereon. But a party calling a witness is not necessarily bound by his testimony. This is true where the testimony is

contradicted, either expressly or by inference, by evidence that would justify the trier of facts in arriving at a different conclusion.

4. **Negligence: Evidence.** Negligence is a question of fact and may be proved by circumstantial evidence. All that the law requires is that the facts and circumstances proved, together with the inferences that may be legitimately drawn from them, shall indicate, with reasonable certainty, the negligent act complained of.
5. **Automobiles: Evidence.** A witness may describe the marks that he observed near the place of an accident. The inference to be drawn from the testimony regarding such tire marks or scratches is solely the province of the jury.
6. **Automobiles: Negligence.** The lawfulness of the speed of a motor vehicle within the prima facie limits fixed is determined by the further test of whether the speed was greater than was reasonable and prudent under the conditions then existing.
7. ———: ———. The violation of an ordinance or statute requiring automobiles and other vehicles to drive to the right of the center of the highway does not constitute negligence per se, or as a matter of law; but whether or not such violation constituted negligence is a question for the jury under proper instructions.
8. ———: ———. Where one is confronted suddenly with an emergency and is required to act quickly, he is not necessarily negligent if he pursues a course which mature reflection or deliberate judgment might prove to be wrong.
9. ———: ———. The emergency rule cannot be successfully invoked by either party in a negligence case unless there is competent evidence to support a conclusion that a sudden emergency actually existed, and then it cannot be successfully invoked by one who has brought that emergency upon himself by his own acts or who has not used due care to avoid it.

APPEAL from the district court for Douglas County: WILLIAM A. DAY, JUDGE. *Reversed and remanded with directions.*

Lorna L. Williams and *Wells, Martin, Lane, Baird & Pedersen*, for appellant.

Gross, Welch, Vinardi & Kauffman, for appellees.

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

WENKE, J.

Lorine Davis brought this action in the district court for Douglas County against Lloyd Dennert and Edwin Heidzig. The purpose of the action is to recover damages plaintiff alleged she suffered as a result of an automobile accident in which she was injured and her car damaged. Plaintiff bases her right to recover on the ground that defendant Heidzig negligently operated a car owned by defendant Dennert, which negligence she alleged caused the accident. Dennert filed an answer raising the issue of contributory negligence. He also filed a counterclaim whereby he sought to recover damages for personal injuries and damages to his car arising out of the same accident. Heidzig joined in the answer but filed a separate counterclaim seeking to recover damages for personal injuries he suffered in the same accident. Trial was had. At the conclusion of plaintiff's evidence, and after she had rested, defendants moved for a directed verdict. This motion the trial court sustained. The trial court thereupon dismissed plaintiff's cause of action and also the counterclaims of each of the defendants, the latter without prejudice. On November 3, 1952, plaintiff filed a motion for new trial which the trial court did not overrule until April 27, 1955. This appeal was perfected from that ruling.

The appeal primarily involves two questions. They are: First, did the appellant make a prima facie case? Second, if so, does the evidence she adduced show she was guilty of contributory negligence, as a matter of law, sufficient to defeat her right to recover?

The following principles are applicable in determining these questions:

"The rule is that in every case, before the evidence is left to the jury, there is a preliminary question for the judge, 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." Farr Co.

v. Union P. R. R. Co., 106 F. 2d 437. See, also, Fairmont Creamery Co. v. Thompson, 139 Neb. 677, 298 N. W. 551; Guerin v. Forburger, 161 Neb. 824, 74 N. W. 2d 870.

For the purpose of decision on a motion for directed verdict the motion must be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom it 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." Gable v. Pathfinder Irr. Dist., 159 Neb. 778, 68 N. W. 2d 500. See, also, Behrens v. Gottula, 160 Neb. 103, 69 N. W. 2d 384; Fick v. Herman, 159 Neb. 758, 68 N. W. 2d 622.

" 'In reviewing the action of a trial court in directing a verdict, this court will regard as conclusively established every fact favorable to the unsuccessful party which the evidence proves or tends to establish.' Preston v. Stover, 70 Neb. 632; Kepler v. Chicago, St. P., M. & O. R. Co., 111 Neb. 273. * * * 'Where, from the testimony before the jury, different minds might draw different conclusions, it is error to direct a verdict.' Suiter v. Park Nat. Bank, 35 Neb. 372; Schwerin v. Andersen, 107 Neb. 138." Bainter v. Appel, 124 Neb. 40, 245 N. W. 16.

"In an action where there is any evidence which will support a finding for a party having the burden of proof, the trial court cannot disregard it and direct a verdict against him." Parsons v. Cooperman, 161 Neb. 292, 73 N. W. 2d 235.

"Where different minds may reasonably draw different conclusions or inferences from the adduced evidence, or if there is a conflict in the evidence, as to whether or not the evidence establishes negligence or contributory negligence, and the degree thereof, when one is compared with the other, such issues must be submitted to a jury." Pierson v. Jensen, 150 Neb. 86, 33 N. W. 2d 462.

Dodge Street Highway is a paved four-lane highway running some 16 miles west from Omaha. There it ends in a Y, the north two lanes of the highway curving to the north and the south two lanes thereof curving to the south. Both curved roads then join a paved road running north and south between Waterloo, Nebraska, and Center Street. The accident here involved happened at about the southwest corner of this Y. It occurred approximately where the south curve of the Y, which is a sweeping curve some 3,000 feet in length, joins the north and south highway, which is a paved road 20 feet wide. It happened about 11:30 p. m. on Monday, July 3, 1950. The highway is level where it occurred and the view for drivers coming from any direction is substantially unobstructed. The night was clear and the pavement dry.

The cars involved were a 1939 Chevrolet sedan owned by appellant and, at the time, being driven by her, and a 1950 Ford coach owned by appellee Dennert and, with his consent, being driven by appellee Heidzig. Appellant, with her family, was traveling from Des Moines, Iowa, their home, to David City, Nebraska, to visit appellant's sister and her husband. Appellant, who was familiar with the road, had been driving for about 8 miles immediately preceding the accident. With her in the car at the time were her husband, Lester, who was in the front seat, and her two children, Madelon 16 and Jerry 11, who were in the back seat. Appellees were coming from Denver, Colorado, to Omaha, and had last stopped in Wahoo, Nebraska. With them in the car were Wilber Bohling, Paul Buntrock, and Doris Ails, the latter having joined them at Seward where she was attending school.

The impact was between the left front of the Chevrolet and the front of the Ford. After the accident both cars were on the north-south road facing west and about 4 feet apart. The front of the Chevrolet was off the paved surface and on the shoulder while the Ford

was entirely on the paved surface, the rear being across the center line. Both cars were badly damaged and the passengers therein injured in various degrees.

The foregoing is only a general summary of when, where, and how the accident happened. We shall discuss the evidence more in detail as we deal with the questions raised.

There are several other questions raised besides the two principal issues. We shall discuss and dispose of them first because a determination thereof is, to a certain extent, determinative of the principal issues.

Appellant, in her brief, says: "There were a number of erroneous rulings on evidence. We assume that this Court in determining whether it was proper for the trial court to direct a verdict will only consider such evidence as was properly admitted and will also consider evidence which was wrongfully excluded if proper tender of proof made. Hence, we will not make a separate examination of the Court's rulings * * *."

The rule, in this regard, is as follows:

"In order that assignments of error as to the admission or rejection of evidence may be considered, the rules of court require that appropriate reference be made to the specific evidence against which objection is urged." Joiner v. Pound, 149 Neb. 321, 31 N. W. 2d 100.

"An assignment that evidence was on the trial erroneously admitted or rejected, to be considered on appeal, must specifically point out the evidence." Bolio v. Scholting, 152 Neb. 588, 41 N. W. 2d 913.

Rulings of the court in this regard are therefore not properly here for our consideration. It is true we have held that: "Under the rules of this court the consideration of a cause will be limited to errors assigned and discussed, subject however to the further rule that the court may at its option notice a plain error not assigned." Nowka v. Nowka, 157 Neb. 57, 58 N. W. 2d 600. We find

nothing in this case that would cause us to exercise this option.

Appellant suggests the following principle has application here: "'As a general rule it is negligence as a matter of law for a motorist to drive an automobile so fast on a highway at night that he cannot stop in time to avoid a collision with an object within the area lighted by his lamps.' (Roth v. Blomquist, 117 Neb. 444, 220 N. W. 572.)" Buresh v. George, 149 Neb. 340, 31 N. W. 2d 106.

But, as stated in Bainter v. Appel, *supra*: "This court has properly applied the rule quoted in cases where the collision was between a moving automobile and an object which relative to the automobile was stationary. Roth v. Blomquist, 117 Neb. 444. But to apply it to approaching automobiles colliding with each other would violate the very reason by which the rule is supported."

This principle has no application to automobiles approaching each other. That would be particularly true because: "A user of the highways may assume, unless and until he has warning, notice, or knowledge to the contrary, that other users of the highways will use them in a lawful manner, and until he has such warning, notice, or knowledge, he is entitled to govern his actions in accord with such assumption." Plumb v. Burnham, 151 Neb. 129, 36 N. W. 2d 612.

Appellant called appellee Heidzig as a witness. He placed appellant's automobile astraddle the center line of the curve just before the accident occurred and testified his car was still in the right-hand lane for travel when the impact occurred. Appellees contend appellant is bound by this testimony. The correct rule in this regard is fully discussed in Krull v. Arman, 110 Neb. 70, 192 N. W. 961, as follows: "At the close of the testimony the appellant asked for a peremptory instruction on the claim that, because plaintiff called the defendant as a witness, and elicited testimony from him that deceased gave him the money, plaintiff is abso-

lutely bound by his answers, and is estopped from setting up that they are either untrue or that the witness is not credible. Appellant cites Nathan v. Sands, 52 Neb. 660. This case states the correct rule, and evidence tending only to impeach such witness is not admissible. Contradiction, however, and impeachment are not synonymous. The distinction is pointed out in De Noyelles v. Delaware Ins. Co., 138 N. Y. Supp. 855, quoted in 2 Words and Phrases, Second Series, under 'Impeachment:' 'A party may contradict his own witness, for contradiction is not impeachment, as impeaching evidence is that which is directed solely to the question of the credibility of the witness.' See, also, 40 Cyc. 2561; Dravo v. Fabel, 132 U. S. 487; Thorp v. Leibrecht, 56 N. J. Eq. 499. In this last case Mr. Justice Pitney announces what appears to be a fair and comprehensive rule, as follows: 'While a plaintiff who calls defendants as his witnesses cannot impeach their character for veracity generally, he may show that the whole or any part of what they had sworn to is untrue either by their own examination and the improbability of their own story or by other contradictory evidence material to the case.' "

As stated in Trask v. Klein, 150 Neb. 316, 34 N. W. 2d 396: "As a general rule a party calling a witness vouches for his credibility and is ordinarily bound by any evidence he gives which is not contradicted or shown to be unreliable. In other words, a party who offers the evidence of a witness cannot subsequently object that it should not have been received or that it is insufficient to sustain a judgment based thereon. But a party calling a witness is not necessarily bound by his testimony. This is true where the testimony is contradicted, either expressly or by inference, by evidence that would justify the trier of facts in arriving at a different conclusion."

And in Guyette v. Schmer, 150 Neb. 659, 35 N. W. 2d 689, we said: "But the evidence elicited on cross-

examination does not defeat plaintiff's case on the theory that a party is bound by the testimony of his own witness. It brings into operation the rule announced in Trask v. Klein, ante p. 316, 34 N. W. 2d 396, to the effect that where a plaintiff introduces evidence sufficient to prove all the material facts of his case, and also introduces a witness who contradicts some of the facts, the latter evidence will not sustain the direction of a verdict unless it is the only evidence produced on an issue necessary to the maintenance of the cause of action. See, also, Zimman v. Miller Hotel Co., 95 Neb. 809, 146 N. W. 1030." See, also, Ross v. Carroll, 138 Neb. 1, 291 N. W. 726; Gutoski v. Herman, 147 Neb. 1001, 25 N. W. 2d 902.

We come then to the rule as it relates to circumstantial evidence as appellant's case, to a large extent, depends thereon. We have said in this regard: "All that plaintiff was required to do was to establish, to a reasonable probability, that the accident happened in the manner alleged in his petition, and where facts and circumstances are established from which the way the accident happened could be logically inferred, it was not error to submit that issue to the jury." Markussen v. Mengedoht, 132 Neb. 472, 272 N. W. 241. See, also, Taylor v. J. M. McDonald Co., 156 Neb. 437, 56 N. W. 2d 610.

"Negligence is a question of fact and may be proved by circumstantial evidence and physical facts. All that the law requires is that the facts and circumstances proved, together with the inferences that may be properly drawn therefrom, shall indicate with reasonable certainty the negligent act charged." Shields v. County of Buffalo, 161 Neb. 34, 71 N. W. 2d 701.

However, as early as Blid v. Chicago & N. W. Ry. Co., 89 Neb. 689, 131 N. W. 1027, we held: "Circumstantial evidence may be received to establish a fact in contradiction to the positive testimony of alleged eye-witnesses to the transaction; but circumstantial evidence cannot be said to be sufficient to sustain a verdict 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. Asbach v. Chicago, B. & Q. R. Co., 74 Ia. 248; Lopez v. Campbell, 163 N. Y. 340; American Freehold Land Mortgage Co. v. Whaley, 63 Fed. 743."

In support of this holding we cited Asbach v. Chicago, B. & Q. Ry. Co., 74 Iowa 248, 37 N. W. 182. However, since that time Iowa has materially modified this principle. See Boles v. Hotel Maytag Co., 218 Iowa 306, 253 N. W. 515; Whetstine v. Moravec, 228 Iowa 352, 291 N. W. 425; Hayes v. Stunkard, 233 Iowa 582, 10 N. W. 2d 19. As stated in Boles v. Hotel Maytag Co., *supra*: "A person is not required to prove his theory of negligence by testimony so clear as to exclude every other possible theory."

We have followed the principle announced in Blid v. Chicago & N. W. Ry. Co., *supra*, on numerous occasions, as recently as Shamblen v. Great Lakes Pipe Line Co., 158 Neb. 752, 64 N. W. 2d 728.

On the other hand, in Rocha v. Payne, 108 Neb. 246, 187 N. W. 804, we held: "Negligence is a question of fact and may be proved by circumstantial evidence. All that the law requires is that the facts and circumstances proved, together with the inferences that may be legitimately drawn from them, shall indicate, with reasonable certainty, the negligent act complained of."

Since the announcement thereof we have frequently followed this rule, doing so as recently as Griess v. Borchers, 161 Neb. 217, 72 N. W. 2d 820. That other courts are divided on this question see 20 Am. Jur., Evidence, § 1189, p. 1043, and 32 C. J. S., Evidence, § 1039, p. 1102.

We think the following discussion from Duncan v. Fort Dodge Gas & Electric Co., 193 Iowa 1127, 188 N. W. 865, apropos here: "Appellant makes the point that, to sustain plaintiff's charge of negligence by circumstantial evidence, the circumstances shown must be such as

are wholly inconsistent with any other reasonable theory of the death of the deceased. It may be admitted that cases are to be found, and possibly some of our own, in which the rule is stated as quoted by counsel. It is, nevertheless, a misleading statement, as applied to disputed facts in a civil action. In its broadest sense, it has no proper application except in criminal cases where the evidence relied upon to establish the alleged crime is purely circumstantial."

In Schoepper v. Hancock Chemical Co., 113 Mich. 582, 71 N. W. 1081, the court said: "Defendant's counsel contend that the cause of this explosion is a matter of mere conjecture, and it is said by counsel that it is not enough for plaintiff to prove circumstances consistent with her theory, but that these circumstances, and each of them, must preclude any other rational conclusion. This we take to be but another way of stating the proposition that the proof must exclude all reasonable doubt. It is hardly necessary to say that no such rule obtains in civil cases."

We think the rule as announced in Blid v. Chicago & N. W. Ry. Co., *supra,* should only have application in criminal cases where the proof of guilt must be established beyond a reasonable doubt while the rule announced in Rocha v. Payne, *supra,* has application in civil cases where all that is required of plaintiff is to establish his cause of action by a preponderance of the evidence.

Because of the nature of the evidence adduced, and hereinafter set out, we set forth the following as having application thereto:

"A witness may describe the marks that he observed near the place of an accident. The inference to be drawn from the testimony regarding such tire marks or scratches is solely the province of the jury." Danner v. Walters, 154 Neb. 506, 48 N. W. 2d 635.

"The lawfulness of the speed of a motor vehicle within the prima facie limits fixed is determined by the further

test of whether the speed was greater than was reasonable and prudent under the conditions then existing." Stark v. Turner, 154 Neb. 268, 47 N. W. 2d 569. See, also, Griess v. Borchers, *supra.*

"What is a reasonable speed is necessarily largely dependent on the situation and the surrounding circumstances, it being obvious that a speed which would be safe, reasonable, and proper in some places and under some circumstances might be highly dangerous, unreasonable, and improper in other places and under other circumstances." Tews v. Bamrick, 148 Neb. 59, 26 N. W. 2d 499. See, also, Granger v. Byrne, 160 Neb. 10, 69 N. W. 2d 293.

"The violation of an ordinance or statute requiring automobiles and other vehicles to drive to the right of the center of the highway does not constitute negligence per se, or as a matter of law; but whether or not such violation constituted negligence is a question for the jury under proper instructions." Burkamp v. Roberts Sanitary Dairy, 117 Neb. 60, 219 N. W. 805. See, also, Herman v. Firestine, 146 Neb. 730, 21 N. W. 2d 444.

"Proximate cause, as used in the law of negligence, is that cause which in a natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury, and without which the accident could not have happened." Anderson v. Byrd, 133 Neb. 483, 275 N. W. 825. See, also, Bixby v. Ayers, 139 Neb. 652, 298 N. W. 533.

Appellant testified she entered the curve and, after doing so, dimmed her lights and continued to drive on the right side of the center line. However, she said her memory as to the accident itself was a blank, her first knowledge thereof being after she regained consciousness in the hospital. Appellant then produced several witnesses who testified to debris and a swirl mark on the pavement at a point 5 feet 10 inches to the northwest of the center line for cars traveling from the east and turning on this curve to go south, that is,

5 feet 10 inches over in the normal traveling lane for appellant's car. The debris consisted of dirt, oil, potato salad, etc. The evidence shows that appellant's daughter had prepared and they were carrying a picnic lunch in appellant's car which included potato salad. The swirl mark is referred to as a tire swirl or a mark apparently made by a tire or some substance of the same consistency as a tire. It was also described as dark in color but gradually shading off to a lighter color, as having the appearance of scuffing by a tire on the pavement, and as a black mark that was 4 by 6 inches in size. The evidence shows the left front wheel of the Chevrolet was damaged and the tire thereon as being blown out. In fact it was the only tire on either car that was down. The mark was to the east of where the cars finally came to a stop and on a line about equal distance between them, the cars being 4 feet apart. In fact appellee Heidzig places the point of impact at about the center of the pavement, which was 31 feet wide at this point, and thus only 4 inches from where the other witnesses placed the mark they observed on the pavement.

Appellant called appellee Heidzig to the stand and he testified he had never traveled this road before; that immediately before the accident he had been traveling in excess of 50 miles an hour; that he had noticed a curve sign so had slowed down for it; that there was nothing for some distance to obstruct his view; that he first noticed appellant's car as it was coming around the curve from the east; that he did not pay particular attention to it; that he was driving with his bright lights on; that he did not look to the right or east again but only watched the road ahead; that he next observed appellant's car just seconds before the collision; that when he saw appellant's car it was very close; that when he saw appellant's car he was traveling about 50 miles an hour; that appellant's car was then astraddle the center line, both front and rear left wheels being to the east or in

his lane for travel; that he removed his foot from the accelerator but did not have sufficient time to put it on his brakes; that as he took his foot off his accelerator he also turned his steering wheel to the left and his car swung to the left; that about the same time he turned his car to the west (left) the driver of appellant's car did the same, or to her right; that the impact between the two cars occurred about the center as far as feet from either side of the pavement was concerned; that the left front fender of appellant's car came in contact with the middle of the car he was driving; that his car did not travel forward after the impact; that both cars bounced across the highway to the west; and that after the collision both cars stopped facing west.

It should here be stated that all traveling lanes were 10 feet wide and the shoulder to the right was 8 feet wide, thus giving the appellee Heidzig plenty of room to turn to the right had he observed appellant's car in time to have done so.

From what we have set forth we think the evidence is sufficient to submit to a jury the question of whether or not appellees were guilty of any one or more of the following alleged acts of negligence as claimed by appellant: That appellee Heidzig was driving at a rate of speed greater than was reasonable and prudent under the conditions then existing; that he failed to keep a proper lookout; that, after seeing appellant's car, he failed to turn to the right and keep in his own lane of travel; and that he left his own lane of travel and crossed over into appellant's lane for travel.

We come then to the question, could the facts bring the appellee within the doctrine of a sudden emergency? This doctrine is stated as follows: "* * * where one is confronted suddenly with an emergency and is required to act quickly, he is not necessarily negligent if he pursues a course which mature reflection or deliberate judgment might prove to be wrong. The law does not require under such circumstances that no mistake should

be made. All it requires is that one demean himself as an ordinary, careful and prudent person would have done, under like circumstances, and if he does that, he is not held to be negligent, even though he committed an error in judgment." Belik v. Warsocki, 126 Neb. 560, 253 N. W. 689.

However, as stated in Roby v. Auker, 149 Neb. 734, 32 N. W. 2d 491: "The emergency rule cannot be successfully invoked by either party in a negligence case unless there is competent evidence to support a conclusion that a sudden emergency actually existed, and then it cannot be successfully invoked by one who has brought that emergency upon himself by his own acts or who has not used due care to avoid it."

We think the facts herein set out as testified to by appellee Heidzig clearly brings him within the latter part of this rule. By this we do not mean to say his testimony as to where appellant was driving her car is without effect. If believed by a jury it presented a violation of certain statutes regulating the operation of cars on the public highway and was, therefore, evidence of negligence by appellant to be considered by the jury on the issue of contributory negligence. It would not, however, be such as a matter of law sufficient to defeat any right to recover she might otherwise have.

We have come to the conclusion that the judgment of the trial court denying appellant's motion for a new trial was in error. We therefore reverse its judgment doing so and remand the cause with directions that appellant's motion for a new trial be sustained.

REVERSED AND REMANDED WITH DIRECTIONS.

CARTER, J., participating on briefs.

JOHN H. DIETZE, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.
75 N. W. 2d 95

Filed February 24, 1956. No. 33856.

1. **Automobiles: Evidence.** Evidence of the readings of radar equipment designed to determine the speed of moving vehicles is admissible as evidence of speed if a sufficient foundation is laid as to the accuracy of the equipment in operation.
2. ———: ———. Foundation may be laid for the admission of evidence of the readings of radar equipment by evidence of experience of persons in the handling of such equipment from which it is made to appear that the equipment correctly indicates the speed of moving vehicles.
3. **Trial.** Remarks of a trial judge in an action wherein a jury is waived, duly excepted to at the time, which disclose a lack of ability to consider the evidence of a party fairly and impartially are grounds for a new trial.

ERROR to the district court for Dodge County: RUSSELL A. ROBINSON, JUDGE. *Reversed and remanded.*

Winters & Lawlor, for plaintiff in error.

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

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

YEAGER, J.

This is a criminal action originally instituted by the State of Nebraska in a justice of the peace court of Dodge County, Nebraska, wherein John H. Dietze was charged with the offense of exceeding the speed limit in violation of the statutes in such cases made and provided. In that court Dietze was found guilty. From the adjudication he appealed to the district court. In the district court he was tried to the court, he having waived trial by a jury. In the district court he was convicted, and sentenced to pay a fine of $20 and to pay the costs of the prosecution amounting to $37.50. Thereafter he duly filed a motion for new trial which was

overruled. From the judgment and the order overruling the motion for new trial he brings the case to this court for review by petition in error. He is plaintiff in error but for convenience he will be referred to hereinafter as defendant.

As grounds for reversal of the judgment the defendant asserts substantially that the court erred in finding him guilty since, as he says, there was no competent evidence that he was operating a motor vehicle in excess of the speed limit; that the evidence was not sufficient to prove him guilty beyond a reasonable doubt; that the evidence upon which he was convicted was the reading of a radar machine admitted without sufficient foundation to make it admissible; that the judge erred in not disqualifying himself on account of manifest prejudice; and that the court erred in not granting a new trial.

The first, second, and third assignments of error are related and depend upon what the record discloses as to the facts as they appear in the bill of exceptions. They will therefore not be separately considered.

The record discloses that on March 9, 1955, the defendant was the operator of a Greyhound bus which he was operating westward on U. S. Highway No. 30. Just after 2 p. m. on that date he passed a point about 2 miles east of North Bend, Nebraska. Opposite this point and just off the highway was located a radar speed meter. As he passed the meter which threw a radar beam across the highway the meter registered his speed at 70 miles an hour according to a Nebraska highway patrolman who had charge of the meter. This rate of speed was 10 miles an hour in excess of the maximum permitted under law.

As foundation for the admission of this evidence there was testimony as to tests of the accuracy of the readings of the meter made by checking its readings with the known speed of other motor vehicles operated by other members of the highway patrol on that afternoon near

the time of the occurrence and later. The testimony as to how the meter operated was limited to statements that it threw a beam across the highway and when the beam was broken an indicator would indicate the speed of the object breaking the beam. The testimony as to the mechanics of the meter was that it operated from a battery. If the battery was fully charged the indicator of the meter would show the speed of the object breaking the beam, but if the battery was not fully charged it would register a speed less than the actual speed of the passing object, and that in no event would the instrument indicate a rate of speed in excess of the actual speed of the vehicle.

It is pointed out here that neither the foundational evidence nor the evidence as to speed was at any point objected to during the trial. The first objection came after trial and the judgment of the district court.

The defendant testified that he did not exceed the speed limit. This was not based upon observation at the time but upon assertions made pursuant to tests made by him that, because of governors on the motors, the bus could not have been driven more than 60 to 61 miles an hour. He was corroborated by the testimony of Clarence Crane, the shop foreman of the bus company, that the governor was sealed at 1,900 R.P.M.s, the effect of which would prevent operation in excess of 60 miles an hour.

It becomes apparent that in order to sustain the contention made by the defendant in the first three assignments of error it would be necessary to say that there was no competent evidence of probative value to sustain a finding that the defendant was exceeding the speed limit.

The record under the law will not permit this to be done. The defendant and the State cited in their briefs cases in which it is set forth that radar readings are admissible in proof of the speed of vehicles moving on highways. See, State v. Moffitt, 48 Del. 210, 100 A. 2d 778; State v. Dantonio, 31 N. J. Super. 105, 105 A. 2d

918; State v. Dantonio, 18 N. J. 570, 115 A. 2d 35. None are cited to the contrary. The defendant does not contend for a contrary rule, but only that there must be foundation more than was laid on the trial of this case.

In this view it must be said therefore that the evidence adduced as to speed was competent and it cannot well be said that it did not have probative value. The lack of foundation, if there was a lack, did not destroy the competency of the evidence.

If the defendant was not satisfied with the foundation laid he should have at the time objected on that ground. In a situation wherein the question of lack of foundation for admission of reading of speedometers was being considered the New Jersey Supreme Court in State v. Dantonio, 18 N. J. 570, 115 A. 2d 35, said: "The defendant points out that there was no affirmative evidence introduced by the State to establish that the speedometers in the Troopers' cars had been recently tested. It would, perhaps, have been the better course for the State to have introduced such testimony and presumably it would have done so if the defendant had raised the point in due time before the close of the trial. However, he did not in anywise question the Troopers on the subject and made no mention of it until the testimony had been fully completed and summations were taking place. Under these circumstances the defendant is hardly in any just position to attack the accuracy of the speedometers."

If this pronouncement is to be followed in the case at bar, and we think it should, the defendant may not now be heard to complain of the lack of foundation for the evidence of speed adduced by the State.

As already indicated the contention is only that there was no sufficient foundation. In support of this it is urged that this foundation may be laid only by the testimony of an expert witness regarding the construction, operation, and purpose of the particular machine, its margin of error, and the ways and means of testing its accuracy.

It is of course true that this is a proper method of laying the foundation for the admissibility of the records of speed of moving vehicles as shown by radar devices. See, State v. Moffitt, *supra;* State v. Dantonio, 31 N. J. Super. 105, 105 A. 2d 918; People of City of Rochester v. Torpey, 204 Misc. 1023, 128 N. Y. S. 2d 864; People v. Katz, 205 Misc. 522, 129 N. Y. S. 2d 8. This method however is not and should not be regarded as exclusive.

It is a well-established rule in this state that the foundation may be laid for the introduction by testimony as to the results of experimentation. City of Ord v. Nash, 50 Neb. 335, 69 N. W. 964; Falkinburg v. Prudential Ins. Co., 132 Neb. 831, 273 N. W. 478; Crecelius v. Gamble-Skogmo, Inc., 144 Neb. 394, 13 N. W. 2d 627; Piechota v. Rapp, 148 Neb. 442, 27 N. W. 2d 682. None of these cited cases are like the one at bar in point of fact but they do declare the rule with regard to the admissibility of evidence which depends upon experiments.

The rule is neither new to the law nor to life. It is a rule which has been paramount in all of the steps of the human family in its progress from its most primitive state to its present condition. It is directly sustained by State v. Dantonio, 18 N. J. 570, 115 A. 2d 35. Should it not now be retained as a rule of adjective law and of human direction, provided it is surrounded by proper safeguards?

In the light of common knowledge and the experience of the ages it does not appear that anything is more convincing as to inanimate mechanisms than a course of experiments which discloses the production of unvarying results.

It was evidence of that type of experiment which provided the basis for the evidence of speed at which the defendant was operating the bus. We conclude that the evidence under these circumstances furnished a sufficient foundation for the evidence as to speed. Accordingly, the first three assignments of error are without merit.

The fourth assignment of error however advances a ground which we think requires a reversal of the judgment.

As already pointed out the defense was predicated, not upon direct evidence of what happened at the time, but solely upon circumstances which if believed would render the defendant not guilty of the charge against him. The defendant had the right to have these circumstances considered and weighed fairly and impartially.

The record of remarks of the trial judge seems to indicate that he had at least a fear that he would be incapable of considering such evidence fairly and impartially.

He stated that he had observed and talked with others who had observed Greyhound buses traveling greatly in excess of 60 miles an hour. If he had stopped there it is doubtful that it could be contended that he was incapable of fairly and impartially weighing the circumstances involved herein. He did not however stop there. He clearly indicated a probability that he could not consider fairly, along with other evidence as to speed, the evidence that this particular bus with the governor on it could not travel at a speed in excess of 60 miles an hour. If he could not consider this evidence fairly and impartially it could not be said that the defendant had the fair and impartial trial to which he was entitled.

This court has said: "Unless the record discloses an objection or an exception to remarks of a trial judge a complaint with regard thereto cannot be reviewed on appeal." Morrow v. State, 146 Neb. 601, 20 N. W. 2d 602. In another case it was said: "A prerequisite to review on appeal of alleged improper conduct of and statements by a trial judge, on the trial in the presence of the jury, is an objection and exception thereto." Bolio v. Scholting, 152 Neb. 588, 41 N. W. 2d 913. See, also, Hyslop v. State, 159 Neb. 802, 68 N. W. 2d 698.

These cases indicate that improper remarks of a trial

judge calculated to improperly influence the triers of the facts, if timely objected to, may be considered as ground of reversal on appeal. This is not such a case but is one wherein the judge is himself the trier of the facts. No reason appears why a different rule should apply.

In this case objection was timely made. At the time the remarks were made a request was made that the judge disqualify himself to try the case.

The right to a fair and impartial trial in this respect was a substantial right of the defendant and a failure to accord it to him was such an invasion of that right that he is entitled to have the judgment of the district court reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

CARTER, J., participating on briefs.

LEE DECK, APPELLANT, V. RICHARD SHERLOCK ET AL., APPELLEES.

75 N. W. 2d 99

Filed February 24, 1956. No. 33857.

1. **Automobiles: Negligence.** A motor vehicle is not an inherently dangerous instrumentality and the owner is not generally liable for its negligent use by another to whom its control and operation is entrusted.
2. ———: ———. Liability on the part of the owner of an automobile may arise where he entrusts the control and operation of his motor vehicle to a person so lacking in competency and skill as to convert the vehicle into a dangerous instrumentality.
3. ———: ———. The liability on the part of an owner of an automobile for its negligent operation by another to whom its control and operation is entrusted does not arise out of the relationship of the parties but out of the act of entrustment to one whose incompetency is known or should have been known by the owner.
4. ———: ———. In order to charge the owner of a motor vehicle with liability for negligence in entrusting the vehicle

to an incompetent driver, it must be shown that the owner had knowledge of the driver's incompetence as an operator of a motor vehicle, or that in the exercise of ordinary care he should have known thereof from the facts and circumstances known to him.

5. **Automobiles: Intoxicating Liquors.** Where the owner of a motor vehicle engages with another in the drinking of alcoholic beverages and during the course of which he entrusts the control and operation of his automobile to such other person, it is ordinarily for the jury to determine whether or not the owner exercised due care in so doing.
6. **Trial.** Instructions which properly state the law of the case on the theory shown by the pleadings and evidence are not erroneous.
7. **Evidence.** Where evidence is admitted as an admission against interest against one defendant, it is ordinarily not admissible against his codefendant. In such a case it is not error for the court to limit the purpose of its admission and to refuse its consideration by the jury on an issue as to which it is immaterial or incompetent.

APPEAL from the district court for Keith County: JOHN H. KUNS, JUDGE. *Affirmed in part, and in part reversed and remanded.*

Maupin & Dent, Harold W. Kay, and *Richard W. Satterfield,* for appellant.

Chambers, Holland & Groth, McGinley, Lane, Powers & McGinley, and *Kirkpatrick & Dougherty,* for appellees.

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

CARTER, J.

This is an action brought by Lee Deck to recover a judgment against Richard Sherlock, Robert F. Hull, and William Thomas for personal injuries and property damage resulting from an automobile accident. The trial court directed a verdict in favor of the defendant Sherlock. The jury found in favor of the defendant Thomas. The jury returned a substantial verdict against the defendant Hull. The plaintiff appeals from the judgments entered in favor of Sherlock and Thomas. No appeal was

taken by Hull and the judgment against him has become final, and therefore it is not involved in this appeal.

The plaintiff was a passenger in an automobile operated by his wife, Helen Deck. They were accompanied by the wife's mother and their two minor sons, Lee and Dennis. Plaintiff was a resident of Grand View, Missouri, and was at the time of the accident making a trip to Sheridan, Wyoming. The accident happened about 2 miles north of Ogallala, Nebraska, at the junction of U. S. Highway No. 26 and State Highway No. 61. The collision was between plaintiff's automobile and a car driven by the defendant Hull who was its only occupant. The details of the accident are important only as they incidentally bear upon the issues presented by this appeal in view of the fact that no appeal was taken from the verdict and judgment against Hull.

The defendant Sherlock was the owner of the car driven by Hull, and the defendant Thomas was the owner and operator of a third car which was following the car driven by Hull under the circumstances hereinafter to be related. The evidence is clear that at the time of the accident Hull was under the influence of intoxicating liquor. In fact, Hull admits that he was intoxicated.

The evidence pertinent to this appeal is substantially as follows: On April 22, 1953, Sherlock and Hull were driving around in Ogallala, Sherlock doing all the driving. They were engaged in drinking beer during the afternoon, the evidence being that they drank in excess of six cans of beer during that period. In the early evening they picked up one Harold Duffy and evidently more beer was consumed. The three of them continued to drive around town until about 9:30 p. m., when Sherlock, a disabled veteran, announced that his leg was hurting him and that he desired to go home. At this time Duffy was driving the car, Hull sat in the middle, and Sherlock was on the right. They drove to Sherlock's home and let him out. Sherlock testified that none of

the three was intoxicated at that time. Duffy was not present at the trial and gave no evidence by deposition or otherwise.

Hull testified that when Sherlock got out of the car, Sherlock said: "You can use the car * * * Bring it back." Sherlock testified that he told Duffy he could drive the car down to the Vets Club to get Thomas to pick them up. Sherlock said he did not tell Hull that he could drive the car and that he knew that Hull's license to drive had been revoked for driving while under the influence of intoxicating liquor. Sherlock stated that Hull had not driven the car up to that time and that his conversation relating to the use of the car was directed to Duffy and not to Hull. Hull said that he had not driven the car prior to the time that Sherlock left the automobile. He stated also that Sherlock never gave him any permission to drive the car. After Sherlock got out of the car at his home, Duffy drove it around town for about an hour and then parked it in front of the Vets Club.

Duffy and Hull entered the Vets Club, where they joined Thomas and one Supanchick in drinking alcoholic beverages. They continued to drink until Hull was refused further drinks by the management. During this drinking a discussion arose concerning the relative speeds of Fords and Mercurys. There is some evidence that when the four of them left the Vets Club one of them stated they intended to race the Sherlock Ford and the Thomas Mercury. Thomas and Hull stated that there was considerable discussion of the relative speeds of the two cars, but that it was all talk and that it was never their intention to enter into a race. It is evident from the record that the four were intending to drive out to the junction, where the accident happened, to talk and then proceed to the Thomas home several miles beyond the junction of the two roads. Hull got into the Sherlock car and proceeded north. The other three got in the Thomas car and followed. Thomas said

they were a considerable distance behind the car driven by Hull, that they saw its taillights from time to time, and that they never attempted to pass or even catch up with it. Thomas testified that he came upon the accident shortly after it happened, that he let Duffy out to flag traffic and otherwise assist, and that he and Supanchick went immediately to Ogallala to get an ambulance and to notify the safety patrol.

The plaintiff and his wife testified that as they looked south just prior to the collision it seemed that there were two sets of headlights approaching from the south. Mrs. Deck testified that one set of headlights appeared to be following the first. There is evidence in the record that a third car was parked 6 or 8 feet from the Deck car shortly after the accident. The testimony also shows that some person, unknown to any of the witnesses, assisted in removing Mrs. Deck's mother and Lee Deck, Jr., from the car. It is shown that this same person covered them with blankets, some of which belonged to the defendant Thomas.

The record further shows that State Patrolman Eugene Morrissey arrived at the scene of the accident about 1:10 a. m. The Thomas car was there in addition to the two cars involved in the accident. He testified that Hull and Duffy were very drunk, and that Thomas had been drinking and was very excited.

It is the contention of the appellant that the evidence shows that Sherlock was negligent in entrusting his automobile to Duffy and Hull under the circumstances shown, and that the trial court erred in directing a verdict in favor of Sherlock. Neither the law of master and servant, nor the law of principal and agent, is applicable to the instant case. Walker v. Klopp, 99 Neb. 794, 157 N. W. 962, L. R. A. 1916E 1292. The controlling rule is as follows: The law requires that an owner use care in allowing others to assume control over and operate his automobile, and holds him liable if he entrusts it to, and permits it to be operated by, a person

whom he knows or should know to be an inexperienced, incompetent, or reckless driver, to be intoxicated or addicted to intoxication, or otherwise incapable of properly operating an automobile without endangering others. Williamson v. Eclipse Motor Lines, Inc., 145 Ohio St. 467, 62 N. E. 2d 339, 168 A. L. R. 1356. A motor vehicle is not an inherently dangerous instrumentality and the owner is not generally liable for its negligent use by another to whom it is entrusted to be used. Liability may arise, however, if the owner permits operation of his motor vehicle by one whom he knows or should have known to be so incompetent, inexperienced, or reckless as to render the vehicle a dangerous instrumentality when operated by such person. In order to establish such a liability on the part of an owner it must be shown that he had knowledge of the driver's incompetency, inexperience, or recklessness as an operator of a motor vehicle, or that in the exercise of ordinary care he should have known thereof from facts and circumstances with which he was acquainted. Williamson v. Eclipse Motor Lines, Inc., *supra*. See, also, Annotation, 168 A. L. R. 1364.

The question is, therefore, whether or not Sherlock exercised due care when he entrusted his automobile to Hull and Duffy under the circumstances disclosed by the record. The evidence shows that Sherlock, accompanied by Hull, drove his car around Ogallala most of the afternoon of April 22, 1953. They were engaged in drinking beer while so doing. The evidence shows that they drank at least six cans of beer, and possibly more. They were joined by Duffy in the early evening and all three continued to drink beer. Sherlock testified that none of them was intoxicated when he was let out at his home about 9:30 p. m. Nevertheless, Sherlock knew that both Hull and Duffy had been drinking and that they were going to the Vets Club, where intoxicating liquors were sold, to find the defendant Thomas. Sherlock knew that the driver's license of Hull had been re-

voked for driving while in an intoxicated condition. It is true that Hull had not driven the car and that Sherlock did not give him express permission to drive it, nor did Sherlock direct Hull not to drive the car. The evidence shows that Duffy had been drinking a considerable amount of beer when Sherlock told him he could drive the car to the Vets Club to get Thomas to come and pick them up when he brought the Sherlock car back. Sherlock had known Hull and Duffy for 2 or 3 years. He knew they both were addicted to drink. It seems clear to us that an issue of fact was presented which was for a jury to determine. The tendency of those who engage in drinking to continue to do so and to seek others to join them in their conviviality is well known. A jury might well find that Sherlock was negligent in entrusting his car to Duffy or Hull, or both, in the light of the knowledge he had acquired throughout the afternoon and evening, even though he did not think Hull or Duffy were intoxicated when he permitted them to take the car. Murray v. Pasotex Pipe Line Co., 161 F. 2d 5; F. B. Walker & Sons, Inc. v. Rose, — Miss. —, 78 So. 2d 592; Slaughter v. Holsomback, 166 Miss. 643, 147 So. 318; Pfaehler v. Ten Cent Taxi Co., 198 S. C. 476, 18 S. E. 2d 331; 60 C. J. S., Motor Vehicles, § 431, p. 1062; 2 Berry, Automobiles (6th ed.), § 1327, p. 1083.

The defendant Sherlock asserted, however, that he told Duffy he could use the car, and that he did not authorize Hull to drive it. It is pointed out that after the return of Hull and Duffy to the Vets Club, both continued to drink until they were drunk. When they left the Vets Club, Hull got into the Sherlock car and drove it away without protest by Duffy. Sherlock contends that Hull acted in excess of any permission given to Duffy or Hull and that liability cannot therefore attach to Sherlock. We point out that if Sherlock was negligent in permitting Duffy to use his car because of the latter's intoxication, or the likelihood that he would become intoxicated, Sherlock is liable for every

act of Duffy which contributed to the accident, including the act of Duffy in permitting Hull to drive while he was drunk. Richton Tie & Timber Co. v. Smith, 210 Miss. 148, 48 So. 2d 618; Thixton v. Palmer, 210 Ky. 838, 276 S. W. 971, 44 A. L. R. 1379; Harrison v. Carroll, 139 F. 2d 427.

If Sherlock was negligent in permitting Duffy to use his car under the circumstances shown, as the jury might well find, the negligent act which caused the collision did not begin when the automobiles which collided approached each other on the highway. It had its beginning when Sherlock entrusted his car to a person who was intoxicated, or addicted to intoxication, or otherwise incapable of properly operating an automobile under the circumstances shown. An owner of an automobile is liable for placing an automobile in irresponsible hands and in this way putting a dangerous instrumentality upon a public highway, if damage results therefrom.

Where the owner of an automobile engages with another in the drinking of alcoholic beverages, during the course of which he entrusts the control and operation of his automobile to such other person, it is ordinarily for the jury to determine whether or not such owner exercised due care in so doing. We think the evidence sufficient in the present case to go to the jury on the question of Sherlock's negligence in entrusting the control and operation of his automobile to Hull and Duffy, or either of them, under the circumstances shown. Mitchell v. Churches, 119 Wash. 547, 206 P. 6, 36 A. L. R. 1132.

The appellant contends that the verdict and judgment in favor of the defendant Thomas is erroneous because of errors in the instructions given by the court. The appellant complains of the giving of instructions Nos. 6 and 13.

In instruction No. 6 the court stated in part:

"As to the defendant Thomas, the issues are stated in two propositions: 1. That at the time of or immedi-

ately before the collision, the defendant Thomas was engaged in a race or test of speed with the defendant Hull. 2. That during the course of such race, injury was caused to plaintiff and his property, by the negligence of the defendant Hull."

In instruction No. 13, the court told the jury:

"Evidence has been received relating to conversations between the defendants Hull and Thomas and other persons concerning the comparison of the speed of Ford and Mercury automobiles. You will, if you find such evidence true, give it the weight to which you find it entitled, together with the other facts and circumstances shown by the evidence, in determining whether or not the defendants Hull and Thomas were racing at the time of the collision. An agreement to hold a race does not make one of the participants liable for the negligence of another, unless such race is actually held and the negligence occurred during the course thereof."

It is the contention of the appellant that the court erred in telling the jury that in order to make Thomas liable he had to be racing at the time of the collision. Appellant cites Carney v. DeWees, 136 Conn. 256, 70 A. 2d 142; Saisa v. Lilja, 76 F. 2d 380; Reader v. Ottis, 147 Minn. 335, 180 N. W. 117, 16 A. L. R. 463. While we are in accord with the holdings of these cases to the effect that one may be guilty of negligence contributing to an injury without actual participation at the time the injury was inflicted, we do not think the trial court erred in giving instructions Nos. 6 and 13, in view of the allegations of plaintiff's petition and the evidence adduced in support thereof. The petition alleged in substance that in the furtherance of a common plan to race his automobile with the one driven by Hull, Thomas began pursuing and racing with the said Hull to the point of collision, and while they were so engaged in said plan, the collision occurred. The instructions are limited to the allegations of the petition and the evidence offered in support thereof, and are correct when ap-

plied thereto. A party may not complain of the failure of the trial court to instruct on issues which are outside the scope of the pleadings and evidence. The instructions were in accord with appellant's theory of the case and correctly stated the law in that regard.

The appellant complains of the refusal of the trial court to permit the official court reporter to read the evidence of Hull to the jury after the case had been submitted. The record shows that after the submission of the case the jury requested that the testimony of Mr. and Mrs. Deck and Mr. Hull, tending to prove that a race was in progress just before the accident, be read to the jury. The court permitted the evidence of Mr. and Mrs. Deck to be read to the jury but declined the request as to Hull. We point out that the evidence as to Hull was admitted as an admission against interest against him and its offer was so limited by the court. The evidence was not admissible against Thomas, as the court correctly ruled. Under such a situation the trial court was entirely correct in not permitting such evidence to be read to the jury on an issue as to which it was incompetent and immaterial, and thereby lead the jury to believe that it could be considered in the determination of such issue. The assignment of error on this point has no merit.

The question of negligence on the part of Thomas was correctly submitted to the jury on appellant's theory of the case. The jury returned a verdict for the defendant Thomas. We find no error with respect thereto and the judgment for Thomas is affirmed.

We find that the trial court erred in sustaining defendant Sherlock's motion for a directed verdict. The judgment in favor of Sherlock is therefore reversed and the cause of action as to him is remanded for a new trial.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED.

GERTRUDE POWELL, APPELLEE, V. A. VAN DONSELAAR, APPELLANT.

75 N. W. 2d 105

Filed February 24, 1956. No. 33902.

Judgments. A judgment debtor or debtor under a decree in equity may satisfy the obligations of such judgment or decree by performance of an agreement to satisfy in some manner other than that provided for by the judgment or decree.

APPEAL from the district court for Dakota County: ALFRED D. RAUN, JUDGE. *Reversed and remanded.*

D. Van Donselaar, for appellant.

Leamer & Graham, for appellee.

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

YEAGER, J.

The action here is a supplemental step in an action in equity wherein the plaintiff and appellee claimed that the defendant and appellant committed a trespass upon property of plaintiff and as an act of trespass thereon removed a fence. That action was tried and a decree was rendered favorable to plaintiff. The decree provided that the defendant should replace the fence within 60 days and that for failure so to do the plaintiff should have judgment against the defendant for $75. An appeal was taken therefrom to this court which appeal was dismissed. Powell v. Van Donselaar, 160 Neb. 21, 68 N. W. 2d 894.

After the appeal was dismissed the plaintiff filed a motion in the action in the district court wherein it was alleged that the fence had not been replaced. By the motion a judgment for $75 was prayed.

To the motion the defendant filed an answer and resistance in which he alleged, to the extent necessary to state here, that he entered into an oral agreement with plaintiff to erect a fence other and different from

the kind provided for in the decree, that he performed the agreement, and that the plaintiff accepted that performance in full satisfaction of the decree.

The matter came on for hearing on the motion and answer and resistance on August 17, 1955. The first step taken was an oral motion by plaintiff to strike the defense of the oral agreement and performance thereof in satisfaction of the decree. This motion and a ruling sustaining it appear in the bill of exceptions. A formal order was also entered sustaining it. The formal order discloses that it was sustained on the ground that the oral agreement was not available as a defense since it was violative of Rule U-XVI of the district court, as follows: "All stipulations and private agreements of counsel or of the parties to a suit, unless made in open court during trial, must be reduced to writing and signed by the parties or their attorneys making the same or they will not be recognized."

The plaintiff was called as a witness on her own behalf. She was called upon to and testified only that the defendant had not replaced the fence as called for in the decree.

On cross-examination she testified that there had been a rotten fence built. The defendant made an effort on cross-examination to elicit from this witness information as to the alleged oral agreement and performance thereunder by the defendant but to all of these efforts objections were made, which were sustained by the court.

In his turn, on defense, the defendant called witnesses by whom he attempted, by appropriate questions, to prove the agreement and performance thereunder. All such questions were objected to and the objections sustained. Offers were made to which objections were also sustained.

All of this came about because of the theory that the alleged agreement and performance thereunder was not provable as a defense to the plaintiff's motion for judg-

ment for the reason that the agreement relating to satisfaction of the decree was not in writing.

At the conclusion of the hearing judgment was rendered in favor of the plaintiff and against the defendant for $75 and costs. From this judgment the defendant has appealed.

The assignments of error asserted as grounds for reversal are numerous but in actuality the only question for consideration on this appeal is that of whether or not the defendant had the right to have considered at the hearing on plaintiff's motion for judgment his defense that the original decree was satisfied by the alleged oral agreement and his evidence in support of it.

The defendant had the right to set up the defense which he interposed and to have his evidence in support of it considered. Of this there can be no serious doubt. The general aspect of a decree or judgment represents a right on the one hand and an obligation to respond on the other. Responses may be made agreeable to the terms of the decree or judgment but this is not exclusive. If the holder of the right is willing to and does accept something different he may do so. No contrary rule of law or equity has been cited.

It is well established by reported cases in numerous jurisdictions that a judgment debtor or debtor under a decree in equity may satisfy the obligation of such judgment or decree by performance of an agreement to satisfy in some manner other than that provided for by the judgment or decree. See 49 C. J. S., Judgments, § 565, p. 1040.

The contention that the defendant is barred by the rule of court which has been cited to assert his defense is not supported by any cases. We think there are none. Of course district courts have the right to adopt within proper limits rules affecting procedures but that power may not be exercised in such manner as to arbitrarily, as here, deprive litigants of the right to have judicially determined substantial and substantive rights.

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

REVERSED AND REMANDED.

MICHAEL SALERNO, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.
75 N. W. 2d 362

Filed March 9, 1956. No. 33873.

1. **Trial: Appeal and Error.** The jury is the judge of the credibility of the witnesses and the weight of their testimony, and unless the verdict of the jury is clearly wrong it will not be disturbed on appeal.
2. **Rape.** The degree of force required to sustain a conviction for rape is relative, depending upon the particular circumstances, but it must be sufficient to subject the dissenting woman to the power of the man and thus enable him to have carnal knowledge of her notwithstanding good-faith resistance on her part.
3. ———. The degree of resistance required of the prosecutrix is also relative, depending upon the particular circumstances, but she must in good faith resist to the utmost of her physical ability as long as she has the power to do so until the offense is consummated.
4. ———. In a prosecution for rape it must be shown by competent evidence beyond a reasonable doubt not only that defendant committed the act charged but that he did so under such circumstances that every element of the alleged offense existed.
5. **Criminal Law: Trial.** Where competent evidence is adduced to support every element of the offense charged in a criminal prosecution, it is ordinarily for the jury to determine if the offense has been established by evidence beyond a reasonable doubt.
6. ———: ———. Where the punishment of an offense created by statute is left to the discretion of a court within prescribed limits, a sentence prescribed within such limits will not be disturbed unless there appears to be an abuse of such discretion.

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

Schrempp & Lathrop, for plaintiff in error.

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

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

CARTER, J.

Plaintiff in error, Michael Salerno, 18 years of age, hereafter called the defendant, was charged by indictment with rape. The alleged offense occurred on July 16, 1954. Defendant pleaded not guilty and on a trial to a jury he was found guilty and sentenced to serve 10 years in the penitentiary. He thereupon prosecuted error to this court. The defendant assigned as error that the evidence was insufficient as a matter of law to sustain a conviction for the crime of rape and that the sentence imposed was excessive.

The evidence shows that the defendant on the evening of July 15, 1954, was in the company of Eugene Friis, Bernie Kincaid, Richard Guerrero, Fred Edmunds, and Norman Guerrero. The six of them drove around Omaha in an automobile owned by Friis and finally stopped at a secluded spot near the Missouri River dike in the Carter Lake region where they remained from 7:30 p. m., to 1 a. m. They left this area and started for the city, when they mistakenly turned the wrong way and came to another secluded spot near Nineteenth and Fort Streets. At this point they found a pickup truck parked which was occupied by one Donald Stuhr and the prosecutrix, Vida Buchholz. They parked their automobile across the road in front of the truck. Three of them, including the defendant, engaged in an argument with Stuhr, threatened to beat him up, took his glasses from him, and threw his car keys away. In the meantime the other three young men forced the prosecutrix to get out of the truck. She testified that she resisted and pleaded with them to leave her alone, to no avail. She stated that at one time she was left in the custody of Norman Guerrero and that she was able to break away

from him. She ran and was tripped up by Guerrero from behind, causing her to fall and bruise her arms and hands. She testified that she screamed and cried, and was forced into the automobile. The six men got in the car and drove to another secluded spot about a mile and one-half away. The evidence is that Kincaid, a man weighing 200 pounds, got in the back seat with her, proceeded to strip off her clothes, and commit a rape upon her. The evidence was that after completing the act, Kincaid held her until Norman Guerrero got in the car and the latter proceeded forcibly to have sexual intercourse with the prosecutrix. Norman Guerrero was followed in turn by Richard Guerrero, Edmunds, Friis, Salerno, and Kincaid a second time. The evidence of prosecutrix is that one of her arms was under her in such a way that she could not use it, and that she was wholly unable to cope with these men with the other arm.

The six men took her near her home and let her out at about 5 a. m. Her mother, Mrs. Florence Buchholz, and Mr. and Mrs. Donald Stuhr were present when she arrived home. They testified that her hair was messed up, her clothes disarranged, she was bleeding about the head and arms, there was blood on her blouse, and that she was nervous and hysterical. She was removed to a hospital where pictures were taken of her which showed the outward injuries she had sustained. She was examined by her physician, who stated that there was evidence that she had recently had sexual intercourse and suffered injuries in the vaginal area that were the result of violence.

The defendant testified substantially to the same state of facts to the point where the six men and the prosecutrix arrived at the scene of the alleged rape. He said that all left the automobile except the prosecutrix, Kincaid, and himself. He said he told Kincaid to leave prosecutrix alone, but left the automobile when told to do so by Kincaid. He said he left the group and went north to a pier overlooking the river where he

waited for approximately 2 hours until the others were ready to leave. He said he never at any time had any sexual relations with the prosecutrix and had no actual knowledge of what occurred. His evidence as to what happened at this point in the episode is wholly uncorroborated.

The evidence further shows that one Lesch lived about a block from the point where prosecutrix was taken from the pickup truck. He said he heard loud talk and heard a woman scream as the Friis car drove away. Lesch further testified that Stuhr came to his house and called his wife to bring out another set of car keys. The police were notified of the occurrence at that time. Norman Guerrero, Friis, and Edmunds were apprehended early the next morning. The defendant, Kincaid, and Richard Guerrero heard of the arrest of the other three and they immediately fled the state. They were apprehended at Holton, Kansas, and were returned to Omaha the next day.

The evidence recites the lurid details of the crime. It shows beyond question, if the State's evidence is believed, that every element of the crime of rape was established. The defendant denies that he participated in any manner. The jury evidently believed the evidence of the prosecutrix and her corroborating witnesses, and gave consideration to the fact that defendant participated in the enterprise from its inception and sought to avoid punishment by flight into another state. The jury had a right to consider these matters. The evidence clearly sustains the finding of the jury that defendant raped the prosecutrix at the place and time charged. The jury is the judge of the credibility of the witnesses who testified before it and of the weight to be given to their testimony, and, unless the verdict of the jury is clearly wrong, its verdict will not be disturbed on appeal. Onstott v. State, 156 Neb. 55, 54 N. W. 2d 380; Lovings v. State, 158 Neb. 134, 62 N. W. 2d 672.

The defendant urges that even if the court finds that the evidence was sufficient to support a finding that he had sexual relations with the prosecutrix, it is not sufficient to show that he exercised force or that she resisted to the extent the law requires. We point out that extreme violence was engaged in by Kincaid when he first raped the prosecutrix. It is natural that her physical resistance became less forceful as these six strong men in turn employed their strength in accomplishing the criminal acts. The evidence is that she was reduced to a state of crying and pleading. Under such a situation it is for the jury to determine whether or not the degree of resistance exhibited by the prosecutrix was sufficient to meet the requirements of the law to sustain a conviction. The evidence shows that the defendant and his companions were heedless of the pleas of the prosecutrix. They cursed and swore, and threatened violence if resistance was made. That prosecutrix was forced to yield, not only by threats made but also by the exercise of violence upon her person, is sustained by the record. The rule is stated in Cascio v. State, 147 Neb. 1075, 25 N. W. 2d 897, as follows: "The degree of force required is relative, depending upon the particular circumstances, but in any such case it must be sufficient to subject and put the dissenting woman within the power of the man, and thus enable him to have carnal knowledge of her, notwithstanding good-faith resistance on her part. In that connection, whether carnal knowledge was forcible and against her will or with her consent, is ordinarily indicated by resistance or lack of it by the woman. While the degree of resistance required is also relative, depending upon the particular circumstances, the general rule is that a mentally competent woman must in good faith resist to the utmost with the most vehement exercise of every physical means or faculty naturally within her power to prevent carnal knowledge, and she must persist in such resistance as long as she has the power to do so until the

offense is consummated." Under all the circumstances shown by this record, the jury could properly find that prosecutrix resisted this gang of men in good faith and to the utmost of her ability.

The defendant asserts that the sentence of 10 years in the penitentiary is excessive. The Legislature has fixed the penalty for the crime of rape at imprisonment in the penitentiary for a term of not more than 20 nor less than 3 years. § 28-408, R. R. S. 1943. The sentence was one-half of the maximum penalty. It was assessed by the district judge who saw and heard the witnesses and had full opportunity to make a proper investigation before sentence was imposed. We do not think there is even a semblance of merit to the defendant's contention that the sentence was excessive.

The record shows that the defendant and his companions assaulted the escort of the prosecutrix and forcibly took her in their automobile against her will. The evidence indicates that none of them knew the prosecutrix and that the only possible reason for their conduct was to carnally know her. The crime appears to have been premeditated and joined in voluntarily by each of the six men. The defendant attempts to show that he was an unwilling participant and that extenuating circumstances existed as to him. We find no substantial evidence of such. The crime was a most revolting attack by six lustful men upon one helpless woman. Her pleas and tears were ignored. Her attempt at prayer was ridiculed in vulgar language. Her person was violated seven times in two hours under circumstances that would be abhorrent even to the law of the jungle. The public is entitled to protection from gangs of this kind who respect no law, moral or statutory. Such persons forfeit their right to liberty in order that innocent persons may not be required to suffer because of their lawless conduct. It is a case where the penalty must be fitted to the seriousness of the crime. The trial judge undoubtedly recognized these things in the

performance of his duty as he saw it. Under all the circumstances we cannot say that the trial court did not properly exercise his judicial discretion in imposing the sentence he did. We find no mitigating circumstances that appeal to this court as a basis for reducing the sentence imposed on this defendant.

AFFIRMED.

H. HARLAN WYRICK ET AL., APPELLANTS, V. H. M. WYRICK, EXECUTOR OF THE ESTATE OF GEORGE H. WYRICK, DECEASED, ET AL., APPELLEES.

75 N. W. 2d 376

Filed March 9, 1956. No. 33885.

Frauds, Statute of: Executors and Administrators. When one claims the estate of a deceased person under an alleged oral contract, the evidence of such contract must be clear, satisfactory, and unequivocal.

APPEAL from the district court for Red Willow County: VICTOR WESTERMARK, JUDGE. *Affirmed.*

Van Pelt, Marti & O'Gara and *Emory P. Burnett,* for appellants.

Doyle, Morrison & Doyle, Royce, Hampton, Dunham, Royce & Engelman, and *Lafayette D. Hurley,* for appellees.

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

SIMMONS, C. J.

In this action plaintiffs sought specific performance of an alleged agreement to devise and bequeath property by will; to quiet title thereto in beneficiaries named in a joint will; and to impress a trust on the property involved. Issues were made and trial was had. The trial court dismissed plaintiffs' petition. Plaintiffs appeal.

We affirm the judgment of the trial court.

It appears from the evidence that George H. Wyrick and Maggie G. Wyrick were married in 1916. They had no children.

At the time of the marriage, each had property of the value of about $6,000. Mr. Wyrick was a farmer. Mrs. Wyrick, by the marriage, became a housewife.

The evidence is that on November 26, 1930, Mr. and Mrs. Wyrick called upon their banker. They were at that time respectively about 51 and 54 years of age. They asked the banker to draw a will for them, told him they wanted a joint will, and "how they wanted it drawn." He then drafted the will and it was signed and witnessed. No reference was made to an oral agreement between them but they "evidently had some conversations about it before the Will was drawn." The will, so far as important here, provided as follows:

"It is our will and we do hereby direct that all the property of every description, real, personal or mixed belonging to us jointly or to either of us individually, shall at the death of either one, be and become the property of the one surviving.

"Provided however, that the said survivor shall have only a life estate therein and at the death of the said survivor, it is our will and we hereby direct that all the remaining property belonging to or owned by the survivor under said provisions of this will as above referred to, shall be divided and distributed as follows;

"One-half of all the said property of whatsoever description real, personal or mixed, we hereby will, devise and bequeath as follows; To the heirs, at law of R. W. Wyrick of Spokane, Washington the sum of One Hundred Dollars; to Harlan Wyrick son of Harry M. Wyrick of Ord, Nebraska the remainder of one half of said property, in the event of his death property to go to his father.

"The remaining one-half of said property above mentioned and as aforesaid, to be divided as follows; To the heirs at law, of E. J. Gebhart of Salina, Kansas nine-

tenths, the remaining one-tenth to be divided equally between Leslie Gebhart of Hollywood, California and the heirs at law of Clara Miller of Salina, Kansas; Bessie White of Salina, Kansas and George Gebhart of Forest Grove, Oregon.

"In event of the death of any one of the children of the said E. J. Gebhart, then the remaining children to share equally.

"In the event the one surviving should re-marry, the deceased (sic) interest is due and payable to his or her heirs.

"At the death of either one of the above mentioned testators it is our will and desire and we hereby nominate the surviving testator as the executor of the deceased and at the death of the survivor herein, we hereby nominate as executors, Harlan Wyrick, son of H. M. Wyrick and Edwin Gebhart, son of E. J. Gebhart."

Mrs. Wyrick died in November 1940. The will was probated as her will. Mr. Wyrick, as legatee under the provisions of the will, received the sum of $6,356. Mr. Wyrick remarried in January 1946. He immediately petitioned for further administration of Mrs. Wyrick's estate under the provision of the will that "In the event the one surviving should re-marry, the deceased (sic) interest is due and payable to his or her heirs." In that proceeding the remaindermen, under the terms of the will, were determined and the $6,356, less administration costs, was distributed to them.

On February 7, 1952, Mr. Wyrick made his will providing for a distribution of his estate substantially at variance from the terms of the previous will.

Mr. Wyrick died in June 1953. His will was admitted to probate and his estate was in process of administration when this litigation began.

The plaintiffs are some of the remaindermen named in the will of November 1930. The defendants are others of the remaindermen, the executor of the estate of

Mr. Wyrick, and the beneficiaries under the 1952 will of Mr. Wyrick.

Plaintiffs recognize that their right to recover requires proof of an oral contract between Mr. and Mrs. Wyrick to make a joint testamentary disposition of all their property and that they have no direct proof of such a contract. They contend that Mr. and Mrs. Wyrick must have had such an agreement prior to the making of the 1930 will; that the contents of the will itself and the surrounding circumstances establish the existence of such a contract; that Mrs. Wyrick fully performed, and hence the contract became irrevocable; and that Mrs. Wyrick having fully performed, the statute of frauds does not apply.

Plaintiffs rely by analogy upon our decisions in Brown v. Webster, 90 Neb. 591, 134 N. W. 185, 37 L. R. A. N. S. 1196; Mack v. Swanson, 140 Neb. 295, 299 N. W. 543; Diez v. Rosicky, 145 Neb. 242, 16 N. W. 2d 155; and Eagan v. Hall, 159 Neb. 537, 68 N. W. 2d 147. They also rely on statements in the texts and cases from other jurisdictions.

Assuming, but not deciding, that the circumstances here are sufficient to show that Mr. and Mrs. Wyrick had an agreement of some sort regarding the disposition of their property by will, the question would still remain: What were the terms and conditions of that contract? The only place that an answer to that question can be found, if at all, is in the 1930 will itself. It is not our function here to construe the will save to search it to find if there is sufficient evidence there to sustain plaintiffs' contention.

At the time the 1930 will was made, Mrs. Wyrick had a separate estate. Her separate estate at death was in substantially the same amount. It appears in evidence that Mr. Wyrick, by inheritance and otherwise, had an increase of his separate estate so that at this death it was substantially larger than it was in 1930. There is no contention here that there was jointly-owned property.

The only conclusion that can be drawn from this evidence is that at the time the will was drawn Mr. and Mrs. Wyrick each had a separate estate and thereafter retained separate estates.

The inevitability of death was recognized but nothing appears to indicate that either Mr. or Mrs. Wyrick then contemplated or had cause to contemplate an early death.

Plaintiffs point out that the 1930 will provides for an executor for the estate of the first and last to die. That provision does not establish or tend to establish the terms of a contract.

The will provides that "all the property of every description * * * belonging to * * * either of us individually, shall at the death of either one, be and become the property of the one surviving. * * * the said survivor shall have only a life estate therein and at the death of the said survivor * * * all the remaining property belonging to or owned by the survivor *under said provisions of this will as above referred to* shall be divided and distributed as follows;" Then follow the remaindermen clauses beginning with "One-half of all the *said* property" and "The remaining one-half of *said* property" under which the plaintiffs claim. (Emphasis supplied.)

The will fairly clearly relates the life estate and the remainder estate to the separate estate of the one first to die, being the property which passed to the survivor.

The applicable rule is: "When one claims the estate of a deceased person under an alleged oral contract, the evidence of such contract must be clear, satisfactory, and unequivocal." Eagan v. Hall, *supra.*

Plaintiffs do not here seek the remainder interest in the separate estate of Mrs. Wyrick, but rather they seek the separate estate of Mr. Wyrick, claiming that this will evidences an oral contract that gives them that interest.

Certainly there is nothing in the will or in the cir-

cumstances shown that clearly, satisfactorily, and unequivocally evidences such a contract.

We decided a quite comparable case in Jessop v. Brown, 104 Neb. 770, 178 N. W. 633. The facts and issues are set out in that decision. The contentions of the parties there and here made are there fully answered.

We there held that plaintiff's petition was "without equity."

The same holding is inescapable here.

The judgment of the trial court is affirmed.

AFFIRMED.

ETHEL ANDERSON, APPELLEE AND CROSS-APPELLANT, V. WAYNE M. NIELSEN, APPELLANT AND CROSS-APPELLEE.

75 N. W. 2d 372

Filed March 9, 1956. No. 33886.

1. **Trial.** Where a party has sustained the burden and expense of a trial and has succeeded in securing the judgment of a jury on the facts in issue, he has a right to keep the benefit of that verdict unless there is prejudicial error in the proceedings by which it was secured.
2. **New Trial: Appeal and Error.** Whether the decision was to grant a new trial or deny one, the questions here are, do the alleged error or errors appear in the record, were they called to the attention of the trial court by the motion, and do they constitute prejudicial error to the party complaining.
3. ———: ———. 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.
4. ———: ———. This court is required in reviewing an order granting a new trial to consider all of the grounds contained in the motion for new trial and if it is found that on any of them the grant was proper the action of the district court is to be sustained.
5. **Negligence: Trial.** Where contributory negligence is pleaded as a defense, but there is no competent evidence to support such defense, it is prejudicial error to submit that issue to the jury.

6. **Negligence.** Contributory negligence is conduct for which the 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.

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

Moodie & Burke and *Deutsch & Jewell,* for appellant.

Kennedy, Holland, DeLacy & Svoboda, Fred S. Jack, and *Lawrence J. Tierney,* for appellee.

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

YEAGER, J.

This is an action at law for damages for personal injuries by Ethel Anderson, plaintiff and appellee, against Wayne M. Nielsen, defendant and appellant, growing out of a collision between two automobiles at a highway intersection in Burt County, Nebraska, on November 8, 1953. The action was tried to a jury and a verdict in favor of the plaintiff for $1,689.20 was returned. Judgment was rendered on the verdict. Plaintiff filed a motion for new trial.

The motion was sustained and a new trial was granted. From the order granting the new trial the defendant has appealed. The plaintiff filed a cross-appeal as to the finding of the trial court that the question of contributory negligence had been properly submitted to the jury. What is said hereinafter disposes effectually of both the appeal and cross-appeal with respect to contributory negligence.

By the motion for new trial the plaintiff alleged numerous incidents of prejudicial error in the proceedings on the trial entitling her to a new trial. Two of them only call for consideration herein. By one of these assignments the plaintiff contended that the verdict was

inadequate. By the other it was contended that the court erred in submitting the issue of contributory negligence of the plaintiff which was pleaded as a defense by the defendant. She asserts these incidents of error as reasons why the order granting the new trial was proper.

On the other hand the defendant insists that there was no prejudicial error in the submission of the case to the jury and therefore the trial court erred in sustaining the motion for new trial.

In Greenberg v. Fireman's Fund Ins. Co., 150 Neb. 695, 35 N. W. 2d 772, the court announced certain basic principles to be applied in cases where a motion for new trial has been sustained and an appeal is taken the purpose of which is to reverse an order of the district court setting aside a verdict and granting a new trial as follows:

"Where a party has sustained the burden and expense of a trial and has succeeded in securing the judgment of a jury on the facts in issue, he has a right to keep the benefit of that verdict unless there is prejudicial error in the proceedings by which it was secured."

"Whether the decision was to grant a new trial or deny one, the questions here are, do the alleged error or errors appear in the record, were they called to the attention of the trial court by the motion, and do they constitute prejudicial error to the party complaining."

"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." See, also, Abrams v. Lange, 158 Neb. 512, 63 N. W. 2d 781.

The background of the proceedings here is substantially the following: On Sunday morning November 8, 1953, at about 9 a. m., Roger E. Anderson was operating an automobile which belonged to him eastward on a graveled road. This road was intersected at a point 3 miles east and about 1½ miles north of Lyons, Nebraska, by another graveled road extending north and south. At the same time the defendant was oper-

ating an automobile owned by him in a northerly direction on the north and south road. The traveled portion of the north and south road was about 22 feet in width and the width of the east and west road was about 18 feet. The plaintiff was riding in the front seat with Roger E. Anderson. Anderson drove into the intersection and after he had passed to the east of the center of the north and south road the front end of defendant's automobile collided with the right rear wheel of Anderson's automobile. As a result of the collision Anderson's automobile was caused to turn around so that its front end was headed west. It came to rest on its right side about 15 or 20 feet east of the point of the collision. The plaintiff was thrown out of the automobile into a barbwire fence and injured. The defendant's automobile was headed south after the collision and it came to rest a short distance north of the point of collision.

Thereafter plaintiff instituted this action for damages. She charged that the collision and her damages were caused by the negligence of the defendant. The negligence of which she complained was specified in her petition but necessity does not arise for setting forth the specifications here.

In his answer the defendant pleaded that the collision was proximately caused by the negligence of Anderson and also that the plaintiff was guilty of contributory negligence.

The concern here is not with the allegations of the answer as to Anderson and the evidence in support thereof but with the charge of contributory negligence against the plaintiff, the evidence to support the charge, and the instructions in relation thereto.

It is apparent from the recitals of the order granting a new trial that the new trial was not granted on the ground that it was error to submit the issue of contributory negligence but on the ground that the verdict was inadequate under the proof of damage.

This court however is required in reviewing an order granting a new trial to consider all of the grounds contained in the motion for new trial and if it is found that on any of them the grant was proper then the action of the district court is to be sustained. Greenberg v. Fireman's Fund Ins. Co., *supra.*

It follows that even if it be said that the ground on which a new trial was granted was not valid still if there was a ground properly asserted which was valid the order of the district court will not be reversed.

Under these rules therefore it is proper for this court to consider the contention of the plaintiff that the issue of contributory negligence was improperly submitted to the jury.

It is of course true that if there was no contributory negligence shown on the part of plaintiff it was prejudicial error to submit that issue to the jury. The controlling rule appears in Allen v. Clark, 148 Neb. 627, 28 N. W. 2d 439, as follows: "Where contributory negligence is pleaded as a defense, but there is no evidence to support such defense, it is prejudicial error to submit such issue to the jury." See, also, Driekosen v. Black, Sivalls & Bryson, 158 Neb. 531, 64 N. W. 2d 88; Scott v. Service Pipe Line Co., 159 Neb. 36, 65 N. W. 2d 219; Fick v. Herman, 159 Neb. 758, 68 N. W. 2d 622.

From an examination of the bill of exceptions it appears without question that there was no evidence of probative value that the plaintiff was guilty of any negligence which in any wise contributed to this accident.

The only contention of the defendant in this respect is that he saw the plaintiff wave a gloved hand or hands in a northeasterly direction. From this it is inferred that the attention of Anderson was distracted or his vision was obstructed to the south. The plaintiff had no recollection of waving her hand and Anderson said that his attention had not been distracted and

his vision had not been obscured. He testified that the defendant's automobile was seen constantly by him from the time it was within 100 to 125 feet of the intersection until the collision occurred. This is not proof of contributory negligence.

Contributory negligence has been defined by this court as follows: "'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.'" Eaton v. Merritt, 135 Neb. 363, 281 N. W. 620. See, also, Klement v. Lindell, 139 Neb. 540, 298 N. W. 137; Groat v. Clausen, 139 Neb. 689, 298 N. W. 563; Frazier v. Anderson, 143 Neb. 905, 11 N. W. 2d 764; 65 C. J. S., Negligence, § 116, p. 706.

There is no evidence in the record from which it could be said under this rule that plaintiff was in any wise guilty of contributory negligence. Accordingly on this ground the plaintiff was and is entitled to a new trial.

In the light of these observations it does not become necessary to pass upon the question of whether or not the plaintiff was entitled to a new trial on the ground that the verdict was inadequate.

The order of the district court granting a new trial is affirmed.

AFFIRMED.

ERNEST ROBERT FEAGINS, APPELLEE, V. MELVIN CARVER, APPELLANT.

75 N. W. 2d 379

Filed March 9, 1956. No. 33907.

1. **Workmen's Compensation.** An appeal to this court in a workmen's compensation case is considered and determined de novo upon the record.
2. ———. A compensable injury within the Workmen's Compensation Act is one caused by an accident arising out of and in the course of the employment.
3. ———. An accident within the Workmen's Compensation Act is an unexpected and unforeseen event happening suddenly and violently and producing at the time objective symptoms of injury.
4. ———. In order to recover, the burden of proof is upon the claimant in a compensation case to establish by a preponderance of the evidence that personal injury was sustained by the employee by an accident arising out of and in the course of his employment.
5. ———. Mere exertion, which is no greater than that ordinarily incident to the employment, cannot of itself constitute an accident, and if combined with preexisting disease such exertion produces disability, it does not constitute a compensable accidental injury.
6. ———. An award of compensation under the Workmen's Compensation Act may not be based on possibilities, probabilities, or speculative evidence.
7. ———. The rule of liberal construction of the Workmen's Compensation Act applies to the law, not to the evidence offered to support a claim by virtue of the law. The rule does not dispense with the necessity that claimant shall prove his right to compensation within the rules above set forth nor does it permit a court to award compensation where the requisite proof is lacking.

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

Baskins & Baskins and *Cline, Williams, Wright & Johnson,* for appellant.

Beatty, Clarke, Murphy & Morgan and *Hollman & McCarthy,* for appellee.

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

CHAPPELL, J.

Plaintiff Ernest Robert Feagins originally filed a petition in the Nebraska Workmen's Compensation Court seeking to recover compensation and benefits for injuries resulting in permanent and total disability allegedly caused by an accident arising out of and in the course of his employment by defendant Melvin Carver on June 6, 1953. Defendant filed an answer in that court admitting that plaintiff was employed by defendant on such date but denying that plaintiff's injuries and disability were caused by an accident arising out of and in the course of his employment. Thereafter a hearing was had before one judge of the compensation court who dismissed plaintiff's action upon the ground that he had failed to meet the burden of proof required to establish by a preponderance of the evidence that his disability was caused by an accident as defined by section 48-151, R. R. S. 1943.

Thereafter plaintiff waived rehearing and appealed to the district court. Plaintiff's petition filed in that court substantially reiterated the allegations of his petition filed in the compensation court, except that therein he materially changed the description of the alleged accident and injuries received thereby. Insofar as important here, the allegations of defendant's answer filed in the district court were substantially the same as those contained in his answer filed in the compensation court.

After a hearing upon the merits, the trial court rendered judgment, which so far as important here found and adjudged that on June 6, 1953, plaintiff received injuries resulting in permanent and total disability caused by an accident arising out of and in the course of his employment for which plaintiff was allowed compensation together with allowances for medical and hospital expenses. Thereafter defendant's motion for new trial was overruled and he appealed to this court,

assigning in substance that the judgment of the trial court was not sustained by the evidence but was contrary thereto and contrary to law. We sustain the assignments.

At date of trial plaintiff was concededly totally disabled. Thus the extent of his disability is not involved. As we view it, the sole question presented here is whether or not plaintiff established by a preponderance of the evidence that his injuries and disability were caused by an accident arising out of and in the course of his employment. We conclude that plaintiff did not.

As recently as Jones v. Yankee Hill Brick Manufacturing Co., 161 Neb. 404, 73 N. W. 2d 394, this court, in a comparable case, reaffirmed that: "An appeal to this court in a workmen's compensation case is considered and determined de novo upon the record.

"A compensable injury within the Workmen's Compensation Act is one caused by an accident arising out of and in the course of the employment.

"An accident within the Workmen's Compensation Act is an unexpected and unforeseen event happening suddenly and violently and producing at the time objective symptoms of injury.

"In order to recover, the burden of proof is upon the claimant in a compensation case to establish by a preponderance of the evidence that personal injury was sustained by the employee by an accident arising out of and in the course of his employment.

"Mere exertion, which is no greater than that ordinarily incident to the employment, cannot of itself constitute an accident, and if combined with preexisting disease such exertion produces disability, it does not constitute a compensable accidental injury.

"An award of compensation under the Workmen's Compensation Act may not be based on possibilities, probabilities, or speculative evidence.

"The rule of liberal construction of the Workmen's Compensation Act applies to the law, not to the evidence

offered to support a claim by virtue of the law. The rule does not dispense with the necessity that claimant shall prove his right to compensation within the rules above set forth nor does it permit a court to award compensation where the requisite proof is lacking."

Also, in Pixa v. Grainger Bros. Co., 143 Neb. 922, 12 N. W. 2d 74, reaffirmed in Ruderman v. Forman Bros., 157 Neb. 605, 60 N. W. 2d 658, and Chiles v. Cudahy Packing Co., 158 Neb. 713, 64 N. W. 2d 459, cases comparable in many respects with that at bar, this court concluded that in a workmen's compensation case where the employee fails to establish by a preponderance of the evidence that there was a causal connection between an alleged accident suffered by the employee and his disability, there can be no award of compensation.

In the light of such foregoing applicable and controlling rules, we have examined the record which fairly discloses as follows: On November 18, 1953, plaintiff's counsel served upon defendant a formal written claim for compensation. Therein paragraph II described the nature and extent of his alleged injuries received on June 6, 1953, as follows: "Teh (The) posterior descending spinal artery was occluded as a direct result of traction of the adherent tissues upon the artery by the sudden exertion and flexion at the time of the hereinafter described accident, which resulted in complete paralysis and as a result of said injuries the said Ernest Robert Feagins will be encumbered for life with residual neurologic impairment and will never be self-supporting or able to do any physical work whatsoever."

Paragraph III described the alleged accident, the cause thereof, and the injuries caused thereby, as follows: "On the date aforesaid, claimant was working as your employee in helping collect garbage and rubbish, and prior to noon of that day had gone with you to your home for the purpose of picking up the garbage and refuse at your home. At that time and place the claimant was instructed by you to dump his garbage and rubbish re-

ceptacle on to your truck. That said receptacle was a barrell (barrel) of about 30 gallon capacity and was nearly full of *garbage and refuse*. That claimant leaned over to pick up the barrel and started to lift it and turn with it to dump it on the truck when he was seized with a paralysis and fell to the ground completely paralyzed." (Italics ours.)

Thereafter on January 5, 1954, plaintiff filed his petition in the compensation court. A copy of his claim aforesaid was attached thereto and made a part thereof. Also, paragraphs VII and VIII of plaintiff's petition described the nature and extent of his injuries received on June 6, 1953, and described the alleged accident, the cause thereof, and the injuries caused thereby in almost the exact language as that set forth in paragraphs II and III of plaintiff's claim aforesaid.

Further, a copy of such claim was also attached to and made a part of plaintiff's petition on appeal to the district court. Paragraph VII of such petition described the nature and extent of plaintiff's injuries received substantially in the language of paragraph VIII of his petition filed in the compensation court and that appearing in paragraph II of his claim, except that he added the words "and the spinal cord was injured." Also, paragraph VII of such petition described the alleged accident, the cause thereof, and the injuries sustained thereby in the same language as that appearing in paragraph VII of his petition filed in the compensation court, and paragraph III of his claim, down to the words "garbage and refuse." Thereafter, he alleged: "That at that time and place, plaintiff leaned over to pick up said receptacle for the purpose of dumping and emptying the same into said truck, and started to lift the receptacle and turn, with it to dump it in said truck, and as he was lifting the receptacle and turning with it *his right foot slipped and* he felt a snap in his neck and he was seized with a paralysis and fell to the ground completely paralyzed." (Italics ours.) In that connection, it will be noted that

therein was the first time plaintiff made any allegation that "his right foot slipped."

Plaintiff was 26 years old and lived with his father at North Platte. Ever since he could remember he had an impediment in his speech. He dropped out of school in the 8th grade and since that time had done farm or ranch work and ordinary labor. He was employed by defendant for some time prior to June 6, 1953, to ride on one of defendant's garbage trucks, pick up barrels of garbage, and refuse or trash, and dump them into a truck. On June 6, 1953, plaintiff had completed his round on one of defendant's trucks driven by defendant. At about 10 or 10:30 a. m. they returned to defendant's home where that truck and another owned by defendant arrived at about the same time. Three employees were on the other truck. One such employee left but two others remained standing near the trucks with plaintiff. The trucks, the general area, and the barrel involved were shown by photographs. Defendant told the employees to pick up his barrel containing garbage, tin cans, and trash, and dump it in a truck. Defendant then went into his house, but plaintiff and the two other employees visited a little while, after which plaintiff went over to pick up the barrel which weighed 50 to 60 pounds. He was standing on dry, level ground. There was nothing unusual about the size or weight of the barrel. On that same day and at other times plaintiff had lifted and dumped heavier barrels. Lifting and dumping the barrel into the truck required no exertion greater than that ordinarily incidental to plaintiff's employment. In the ordinary and usual way of doing it, plaintiff leaned over to pick up the barrel, started to lift it, raised it about to his knees, and turned to dump it in the truck, when he felt something snap in his neck. He was seized with paralysis and fell to the ground. In the compensation court plaintiff testified that as he started to raise the barrel, his foot gave out on him, his foot slipped, he was "pretty sure it did," his legs gave way after a snap, he

fell because he did not have control of his legs, his legs gave way and he went down on his face, it all happened suddenly, he didn't know anything was wrong, and the only thing that happened out of the ordinary was he felt something go wrong in his neck and he was paralyzed.

In the district court plaintiff testified that it all happened just like the snap of your finger, he reached over with his left hand, put his right hand underneath the barrel, started to lift it, and when it was about up to his knees his neck snapped, that his right foot slipped, and he heard something snap in his neck. Right after he fell plaintiff told defendant and the other two employees that he did not know what happened or what was wrong with him.

Plaintiff testified that he did not know how far his foot slipped if it did slip; he did not know and had no idea how far it slipped, or which way it slipped. He was turning with his body and did not turn his neck where the claimed injury occurred. He had been working that morning without any trouble and had thrown heavier cans on the truck, so something must have happened when he suddenly had trouble in his neck while he was handling a lighter barrel in the normal manner. He had figured out that the something which must have happened was that his foot slipped, and that was why he was pretty sure his foot slipped. He did not think the trouble could have developed unless it slipped.

The two employees of defendant who were eyewitnesses testified for defendant. One testified that nothing unusual happened except that plaintiff fell over; he did not see any slip by plaintiff; and there was nothing that he could see which indicated that plaintiff slipped. The other employee testified that he saw plaintiff go over to pick up the barrel, saw him bend over, pick it up to about even with his knees, and go to turn or twist with it, and fall. He did not see plaintiff slip or go through any unusual movements, or see anything unusual hap-

pen before plaintiff fell. Plaintiff told him he did not know what happened except that he felt paralyzed.

On June 6, 1953, at 11:30 a. m., plaintiff was admitted to St. Mary Hospital in North Platte. That hospital's "Personal History and Physical Examination" record under the headnote "Chief Complaints" discloses that plaintiff "fell while lifting a bale on farm. Couldn't move left extremities & had headache." The "Physical Findings" show in part that plaintiff had "Partial flaccid paralysis of left leg & left hand." The "Working diagnosis after physical exam." was "Possible cervical disc." The "Final Diagnosis" however was "Bulbo Spinal Poliomyelitis."

At 7:15 p. m., June 6, 1953, plaintiff was removed by ambulance to St. Francis Hospital in Grand Island. He was admitted there at 10:15 p. m., June 6, 1953. That hospital's "History and Physical" record, under the headnote "Present Illness" discloses the following information given by plaintiff: "11:30 a. m. today legs became suddenly weak and pt. limped. No colds, sore throats, headache, nausea, vomiting, stiff neck, stiff back —complains of pain in arms and legs on movement. Left leg now feels normal but troubled him this a. m. Says couldn't move arms or legs this noon but is better now although left hand seems paralyzed. * * * 6-8—Pt. states he was lifting a heavy can of garbage when something snapped in back of neck or shoulders and above story started. 6-9—Pt. reports 1½ years ago similar occurrence c̄ pain around 7th cervical and weakness left leg. Took 3 mo. to recover." The father denied that the last statement was true or that it had ever been made. In that connection, however, the written "Medical report of findings concerning the injury and disability" of plaintiff made by his own physician repeated and verified the information aforesaid as reflected by the hospital record. Such record further discloses that the "Provisional Diagnosis" was "Hysteria"

and the "Final Diagnosis" was "Spinal Cord or Meningeal Tumor."

Plaintiff was thereafter dismissed from that hospital at 1:30 p. m. on June 10, 1953, and at 3:15 p. m. that date he was admitted to the Lincoln General Hospital in Lincoln. The "Personal History" record of that hospital, under the headnote "Chief Complaint" discloses the following information given by plaintiff: "Sudden onset of upper thoracic back pain—loss of motor power in both hands & legs. Past 4-5 years, has had some weakness in (L) leg. 6-6-53. About 11:00 A. M. while lifting a bucket (Garbage hauler) experienced sudden onset of pain over cervico-thoracic spine. Immediate weakness in hands & both legs. Also noted numbness in both hands. Some numbness in legs." The headnote "Past History" discloses the following information: "(Patient said to have been 12th baby. Difficult labor. Considered 'slightly spastic.' Has speech impediment). Denies headaches. No cranial symptoms elicited. History of severe burn (R) arm. Gland trouble (L) cervical $\overline{c}$ incision & drainage at age 2-3." The "Final diagnosis" made by a specialist, his attending neurological physician and surgeon, after physical examination, X-ray, and two exploratory operations, was "Chronic adhesive arachnoiditis." Plaintiff was discharged from that hospital on August 12, 1953, at 7:30 a. m. as improved. The written report of plaintiff's physician and surgeon recited: "According to the history I obtained, Mr. Feagins was in the act of tossing a rather heavy bucket on a truck when he was suddenly seized with some pain in the cervical area and fell to the ground." The record discloses that plaintiff never told such physician and surgeon that he slipped while lifting the barrel and turning to dump it into the truck. That information was subsequently given to him by plaintiff's father.

The record discloses that by examination, X-ray, and two exploratory operations on plaintiff's cervical spine,

his physician and surgeon found no evidence of actual injury, but discovered two things: He discovered that plaintiff had a severe chronic densely adhesive arachnoiditis of unknown origin but long standing with no pulsation of the spinal cord, which indicated a chronic inflammatory process. Briefly, he testified that in such cases the spinal fluid becomes thickened and heavier, and the fine, supporting, elastic, arachnoid filaments become thickened, coarse, and tough. "In other words, the protective character of the arachnoid filaments along with the spinal fluid is lost," thereby permitting any unusual shock or jarring force or stress to be transmitted directly through and into the spinal cord. It was the belief of plaintiff's physician and surgeon that a sudden jarring force, twist, or stress in handling the barrel as he did was what caused plaintiff's paralysis. Nevertheless, his notes made with regard to the first surgical procedure, recited that: " 'It is difficult to explain satisfactorily the suddenness of the onset of this patient's symptoms in the face of the chronic adhesive arachnoiditis encountered on surgical exploration.' "

On the other hand, after the second surgical procedure, the notes of plaintiff's physician and surgeon reported that he found: " 'A comparatively sizeable vessel over the dorsal aspect of the spinal cord appeared occluded. This vessel could well have been the posterior descending spinal artery. This could well explain the patient's neurologic symptoms and findings at this time.' " At the trial he testified that although such apparent occlusion of so small a vessel was purely coincidental, that by the stress and strain of lifting the barrel and turning or twisting to dump it in the truck plaintiff must have suffered a mechanical injury of some kind, either to the spinal cord or the spinal vessel, which caused his paralysis.

A specialist in neurology, psychiatry, and neurological surgery, testified as a witness for defendant. He examined plaintiff on May 5, 1954. Plaintiff told him at

that time that he "was lifting a can of trash to put in a garbage truck when he felt a snap at the base of his neck or in the region of the upper thoracic spine, and immediately fell to the ground paralyzed. His foot slipped at about the time he was lifting the can, and he was not certain whether his foot slipped before or after he felt the snap at the base of his neck." Such surgeon concluded in any event that if plaintiff did slip it had no causal relation to his disability. The effect of his evidence was to say that if plaintiff's foot slipped it was caused by his disability which previously occurred. In other words, it was plaintiff's disability that caused the slip, and not the slip that caused plaintiff's disability.

His opinion was that due to plaintiff's diseased condition, his paralysis was caused either by a hemorrhage of a blood vessel in the substance of plaintiff's spinal cord, or an occlusion or thrombosis of a blood vessel which stopped the flow of blood to a section of plaintiff's spinal cord, and paralysis ultimately occurred when, by stress and strain, plaintiff lifted the barrel and turned to dump it in the truck. He believed that since plaintiff had no previous symptoms of arachnoiditis when turning his neck, or injury to his neck, and could have but did not turn his neck at the time the paralysis occurred, any compression and injury to plaintiff's spinal cord was a mere possibility.

We are convinced that mere exertion no greater than that ordinarily incident to plaintiff's employment, combined with preexisting disease, caused his disability rather than an accident arising out of and in the course of his employment. This record is not convincing that plaintiff's right foot ever slipped, but assuming for purpose of argument only that it did, the evidence fails to establish any causal connection between such slip and plaintiff's claimed disability. To hold otherwise would be purely speculative. An award of compensation cannot be based upon possibility, probability, or speculative evidence such as appears in this case. Plaintiff has whol-

ly failed to establish by a preponderance of the evidence that his injury and disability was caused by an accident arising out of and in the course of his employment, as required by law.

For reasons heretofore stated, we conclude that the judgment of the trial court should be and hereby is reversed and the cause is dismissed. All costs are taxed to plaintiff.

REVERSED AND DISMISSED.

STATE OF NEBRASKA EX REL. FRANK B. HEINTZE, APPELLEE, V. COUNTY OF ADAMS ET AL., APPELLEES, IMPLEADED WITH COUNTY OF DOUGLAS, APPELLANT.

STATE OF NEBRASKA EX REL. FRANK B. HEINTZE, APPELLEE, V. COUNTY OF ADAMS ET AL., APPELLEES, IMPLEADED WITH COUNTY OF SARPY, APPELLANT.

STATE OF NEBRASKA EX REL. FRANK B. HEINTZE, APPELLEE, V. COUNTY OF ADAMS ET AL., APPELLEES, IMPLEADED WITH COUNTY OF BOX BUTTE, APPELLANT.

STATE OF NEBRASKA EX REL. FRANK B. HEINTZE, APPELLEE, V. COUNTY OF ADAMS ET AL., APPELLEES, IMPLEADED WITH COUNTY OF LANCASTER, APPELLANT.

STATE OF NEBRASKA EX REL. FRANK B. HEINTZE, APPELLEE, V. COUNTY OF ADAMS ET AL., APPELLEES, IMPLEADED WITH COUNTY OF STANTON, APPELLANT.

75 N. W. 2d 539

Filed March 9, 1956. Nos. 33947, 33950, 33958, 33965, 33968.

1. **Appeal and Error.** In an action in equity, it is the general rule that an appeal brings up the whole case, and that the appellate court passes upon the record as to the facts as well as to the law.
2. **Officers.** By statute, it shall be the duty of the county attorney to prosecute or defend, on behalf of the state and county, all suits, applications, or motions, civil or criminal, arising under the laws of the state, in which the state or the county is a party or interested.
3. **Appeal and Error.** It is the general rule that one may not voluntarily accept payment of that part of a judgment in his favor and afterwards prosecute an appeal from the part which is against him.

4. **Attorney and Client.** By statute, an attorney is entitled to receive money claimed by his client, in an action or proceeding, during the pendency thereof or afterwards, unless he has been previously discharged by his client. The same rule is applicable to a county attorney representing the county in litigation wherein the state and the county are parties.
5. **Estoppel.** The doctrine of estoppel may be applied in a controversy where the state, county, or city, or any other government agency is involved.

APPEAL from the district court for Lancaster County: HARRY A. SPENCER, JUDGE. *Motions to dismiss appeal sustained.*

Eugene F. Fitzgerald, August Ross, Dixon G. Adams, Robert R. Moran, Elmer Scheele, Dale E. Fahrnbruch, Richard S. Harnsberger, Edward F. Carter, Jr., and *T. L. Grady,* for appellants.

John J. Wilson, Woods, Aitken & Aitken, and *Van Pelt, Marti & O'Gara,* for appellee Heintze.

Chambers, Holland & Groth and *Keith J. Kovanda,* for appellees County of Adams et al.

Swarr, May, Royce, Smith & Story, for appellees Maryland Casualty Co. et al.

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

MESSMORE, J.

This action was brought in the district court for Lancaster County, Nebraska, by the State of Nebraska ex rel. Frank B. Heintze, plaintiff, against the 93 counties of the State of Nebraska as defendants, the purpose of the action being to obtain a declaratory judgment to determine the validity and interpretation of certain statutes relating to what is commonly referred to as the gasoline tax fund, and with reference to the distribution of certain gasoline taxes and equalization fees by the State Treasurer to the various counties. The sum of $2,912,828.56 was deposited with the clerk of the district

court for Lancaster County, which amount constitutes receipts of the gas tax fund held for distribution to be made by the State Treasurer to the 93 counties of the state.

The pleadings, insofar as necessary to disclose the issues presented to the trial court for decision, may be summarized as follows.

The plaintiff's amended petition alleges in substance that the plaintiff is the Treasurer of the State of Nebraska; that the defendants are each a county established in the State of Nebraska according to law; that sections 60-203 and 66-422, R. R. S. 1943, and sections 66-424.01 and 66-604, R. S. Supp., 1953, purport to direct the manner of allocation and distribution of certain funds by the plaintiff to the various counties of the state, the defendants herein; that said funds have been allocated and distributed under the provisions of section 66-422, R. R. S. 1943, prior to October 1953, on the basis of the 1940 federal census and motor vehicle registrations for the previous calendar year, as and when the same became available; that said funds have been allocated and distributed since October 1953 on the basis of the 1950 federal census and motor vehicle registrations for the previous calendar year, as and when the same became available; that a controversy exists as to the validity and interpretation of the statutes heretofore set forth; and that some of the defendants claim to have received less than their lawful distributive share of such funds and the plaintiff claims, if such is the case, that some of the defendants have received distributions in excess of their lawful share of such funds, and that, in all events the total distribution of such funds which may have been received by some of the defendants, in excess of that to which such defendants are lawfully entitled, will equal in amount the total deficiencies in the distribution of such funds which may have been received by other defendants.

The amended petition further alleges that the following matters of interpretation should be determined

and declared: (a) The time at which the United States government census for the year 1950 became effective and operative, within the meaning of the statutes heretofore set forth; (b) The entire non-farm population of the state and the entire non-farm population of each of the respective defendants, as shown by the last United States government census; (c) The entire population outside of cities and incorporated villages of the state and the population outside of cities and incorporated villages of each of the defendants, as shown by the last United States government census; and (d) The total motor vehicle registrations of the state and the total motor vehicle registrations of each of the defendants for the calendar years 1949 to 1953, both inclusive; that in order to resolve the controversy between the parties, it should be determined and declared in what amounts each of the defendants received distributions in excess of, or less than, as the case may be, the amount to which each such defendant was lawfully entitled during the period from January 1, 1950, to date; that the amount of such funds which have been distributed to some defendants, in excess of that to which such defendants are lawfully entitled, should be deducted from future distributions of such funds to such defendants; and that the deficiency of such funds which have been distributed to other defendants, less than that to which such defendants are lawfully entitled, should be added to future distributions of such funds to such defendants.

The amended petition then alleges that Frank B. Heintze is retiring from the office of State Treasurer, and that there is an accumulation of funds involved herein, distribution of which has been withheld pending the final adjudication herein, in the amount of $2,912,828.56 which said sum is herewith deposited with the court, and that the same may there abide and be subject to the final order of this court concerning the distribution thereof. The prayer is for a declaratory

judgment to conform to the issues raised by the amended petition.

The County of Douglas, and certain other counties of the state which would receive a larger proportion of the funds in the hands of the clerk of the district court for Lancaster County if the 1950 federal census were applied than if the 1940 federal census were applied, filed answers, and in some cases cross-petitions, asking, among other things, that the 1950 federal census be applied from and after August 12, 1951. The use of the 1940 federal census for a period of time until the State Treasurer used the 1950 federal census as shown by the decree, would affect the distribution of funds to certain counties.

We believe a summation of the pertinent parts of the cross-petition filed by Douglas County should be set forth for the reason that it raises issues that Douglas County and some other counties deemed pertinent to a decision by the trial court. This cross-petition contained two causes of action, the first, in substance, alleged that Frank B. Heintze, State Treasurer of Nebraska, received money under sections 66-410 and 66-428, R. R. S. 1943; that section 66-422, R. R. S. 1943, provided for the method of allocation and distribution of said funds; that the State Treasurer did not allocate and distribute said funds as provided thereby; that said State Treasurer received funds under section 60-201, R. R. S. 1943, and that said funds were not allocated and distributed by the State Treasurer in the manner provided by law; and that as the result of the neglect and failure of the State Treasurer to properly disburse the funds received by him as the law required, the cross-petitioner sustained a loss of money due it. The prayer was for an accounting to be had of the funds received by the State Treasurer under the sections of the statutes set forth, and that the court find and determine the amount due Douglas County.

The first cause of action also alleged that the Mary-

land Casualty Company was the surety on the bond of the State Treasurer, and prayed for judgment against the defendant Maryland Casualty Company and for such other relief as equity might require.

The second cause of action set forth that the Indemnity Insurance Company of North America, a corporation, was the surety on the State Treasurer's bond; realleged the sections of the statutes set forth in the first cause of action and the improper allocation of the funds made by the State Treasurer which did not conform to the law; and alleged that as a result thereof, the County of Douglas lost a considerable amount of money. The prayer was the same as in the first cause of action and requested judgment to be entered against the Indemnity Insurance Company of North America.

Sixty-three of the counties, appellees, in their answer in the district court alleged that subsequent to the first day of October 1953, these answering defendants have received from said funds sums and amounts less than those provided by law and are entitled to have such deficiency corrected and the amounts thereof added to the amounts received by the said defendants subsequent to the date last mentioned, and that said defendants are entitled to have the fund deposited by the plaintiff in this court in this action so divided that these defendants will receive in full the amounts lawfully due them since the last mentioned date. It was alleged in the motions to dismiss the appeal, as appears later in the opinion, that if it should be determined and adjudged that the 1940 census applied at all times to the distribution of such funds, or if other findings of the district court as to factors lawfully applicable to the distribution of the gas tax funds are modified or reversed, said appellants might be entitled to a lesser amount than that heretofore received and accepted by them; that these moving appellees in their answer in the district court prayed as follows: "2- The Court find and determine that the basis and formula used by plaintiff prior to October 1,

1953 furnishes the correct and lawful method of distributing the fund referred to in plaintiff's amended petition; 3- That the Court order the fund deposited herein divided among the defendants in accordance with the formula and upon the basis used by plaintiff prior to October 1, 1953"; and that if it should be determined and adjudged that said prayers of these moving appellees should be granted, then the appellants have received and accepted benefits of the decree of the district court substantially in excess of the amounts lawfully due them.

The trial court entered its decree finding that certain counties were represented by counsel and appeared in the action upon answers of some of the defendants, and answers and cross-petitions of other defendants; that the defendant counties Cedar, Lincoln, Wayne, Phelps, Colfax, Thurston, Boyd, Dawes, Dakota, Kimball, and Garden, having been served with summons and having failed to plead or otherwise appear were in default, and default was entered against them.

The trial court, in its decree, determined that the words "last United States Government census," as used in setting up the formula for distribution for money deposited with the clerk of the district court for Lancaster County in connection with this action, referred to the current census, which after 1950 would be the 1950 United States government census; further determined that the 1950 United States government census should have been used as of January 1, 1952, for the reason that the 1950 figures were not reasonably available to the State Treasurer until January 1, 1952, when under the law it would be necessary for him to compute the distribution using the motor vehicle figures for the previous year; and that the State Treasurer, in the interpretation and application of the statutes, performed a quasi-judicial function; the court stated in the decree that the investigation and determination of these matters necessarily involved the determination of when, if

at any time, the 1950 census became effective and when the use of the information contained in the 1940 census should be discontinued; that there was also involved in connection with the motor vehicle registration the classes of motor vehicles that should be considered in making the computation and the date when the registration for the previous calendar year should become effective by reason of the fact that the evidence shows that such registration was not available until at least the second month of the following year; and that in addition, there were necessarily involved many subsidiary questions which the State Treasurer needed to determine to make proper distribution of said funds. It was the conclusion of the court that the evidence clearly showed that the State Treasurer was acting in a quasi-judicial capacity, and in the distribution of the said funds, was exercising the judgment and discretion which was vested in him under the law, and his determinations and his actions in distributing such funds were not subject to collateral attack by any of the defendants.

In its preliminary findings during the course of the trial the court determined that the equalization fees, being the funds which were distributed in accordance with Chapter 60, article 2, R. R. S. 1943, should be distributed under the provisions of subdivision (3) of section 66-424.01, R. S. Supp., 1953, as it was in effect when the distributions were made. The court then proceeded to make the findings as follows: With reference to the equalization fees the court held that the distribution method was not changed after 1947 nor at any time during the remainder of the period the statutes remained in effect; that no one sought to alter the distribution while the statutes were in effect and the Legislature was in session during the years 1949, 1951, and 1953, and no change was made by the Legislature in the manner of distribution of the equalization fees; that under the case of Bankers Life Ins. Co. v. Laughlin, 160 Neb. 480, 70 N. W. 2d 474, it is presumed that the Legislature had

knowledge of the interpretation and construction of the statutes pertaining to the equalization fees, and such interpretation constituted an administrative interpretation which should be followed by the courts; that such interpretation and construction of these statutes by the State Treasurer also constituted the exercise of quasi-judicial power and authority and the judgment and discretion vested in him by the statutes was not subject to collateral attack; and that by reason of the quasi-judicial determinations involved in the duties exercised by the State Treasurer with reference to the statutes here involved and distribution to be made as set forth therein, there could be no personal judgment imposed in the action on account of any erroneous distribution of funds by the State Treasurer.

The court further held that the effect of the quasi-judicial character of the acts of the State Treasurer were mutual as to both the treasurer and the various distributees of the funds involved so that there could be no charge on the funds on deposit with the clerk of the court to correct any previous distributions which were erroneously made, and the prayers in the petition or any of the cross-petitions to that effect were denied.

The court further held that the cross-petition of the County of Douglas attempting to join as defendant in this action the Maryland Casualty Company, a corporation, and the Indemnity Insurance Company of North America, a corporation, by reason of said companies having become sureties for the plaintiff, should be dismissed.

The decree specifically set up a table of disbursements of all the funds on deposit with the clerk of the district court for Lancaster County segregating said funds by counties and dividing the payment to each county in accordance with the statutes and the findings of the court.

The trial court in its decree took into consideration Chapter 60, article 2, and Chapter 66, article 4, R. R. S.

1943, and Chapter 66, article 6, R. S. Supp., 1953, and the relevant sections thereunder pertinent to a decision in this appeal.

From the findings and decree so made, and upon the overruling of the motions for new trial, the counties of Douglas, Sarpy, Box Butte, Lancaster, and Stanton have appealed to this court.

Every issue determined by the trial court was challenged in the motions for new trial, and no attempt was made by the appellants to limit the review of this case in this court. The appellants filed a general notice of appeal to this court.

The clerk of the district court for Lancaster County, in compliance with the order of the trial court, issued checks for the amounts payable to each county to the county treasurers thereof for the benefit of the counties. There is no contention made that said checks were not received or deposited.

The plaintiff's motion to dismiss the appeal set forth that the action by the plaintiff was in the nature of an interpleader for a declaratory judgment against all the counties of Nebraska to determine the validity and interpretation of various statutes with reference to the distribution of certain gasoline taxes and equalization fees by the State Treasurer among the various counties; that there was deposited in the district court in connection with this action the sum of $2,912,828.56, covering receipts of the gasoline tax fund held for distribution by the State Treasurer for the months of October, November, and December 1954; that a departure by this court from any finding or conclusion of the district court will necessarily call for a readjustment of the funds distributed; that such readjustments may increase or decrease the fund of any county; that the record demonstrates that if the 1950 census is not substituted for the 1940 census, in the interpretation of the Nebraska statutes, very substantial overpayments will have been made to the appellants by the distribution now made;

that similar overpayments to the appellants may result by reason of any decision that adopts a different construction of classes of motor vehicles comprising the motor vehicle registration of Nebraska, and such overpayments may arise as a result of a decision changing the effective date of the calendar year registration; and that since the entire field of the validity and interpretation of the numerous and complicated statutes pertinent thereto is subject to review and decision herein, the appellants are wholly unable to maintain that they have any certain or absolute rights as to which there is no possibility of adjustment in this appeal.

Sixty-three of the counties, appellees, also filed a motion to dismiss the appeal, alleging that the appellants have accepted all the benefits for them provided in the decree of the district court for Lancaster County, and cashed the checks of the clerk of the district court for the full amount of the decree in their favor; restated the allegations of their answer in the district court heretofore set forth; and then moved that the appeal be dismissed.

With reference to an appeal in an action in equity, this court in McHugh v. Smiley, 17 Neb. 626, 24 N. W. 277, held: "In an action in equity appealed from the district to the supreme court, if the interests of the parties appealing are so united with the others as to require the taking up of the whole record, the entire case will be reviewed."

In equity, it is the general rule that an appeal brings up the whole case, and that the appellate court passes upon the record as to the facts as well as to the law. See 5 C. J. S., Appeal and Error, § 1462, p. 67.

Generally an appeal removes a cause entirely to the appellate court, subjecting the facts as well as the law to a review. See Laflin v. State Board of Equalization & Assessment, 156 Neb. 427, 56 N. W. 2d 469. See, also, Garner v. City of Aurora, 149 Neb. 295, 30 N. W. 2d 917.

In the case at bar every finding and conclusion of the

district court is necessarily subject to review and redetermination in this court if the appeals are to be heard. This includes every question that may adversely affect the interests of the appellants. In other words, the entire case is before this court for review.

Section 23-1201, R. R. S. 1943, relating to the duties of county attorneys, provides in part: "It shall be his duty to prosecute or defend, on behalf of the state and county, all suits, applications or motions, civil or criminal, arising under the laws of the state, in which the state or the county is a party or interested."

Section 7-107, R. R. S. 1943, with reference to powers of attorneys, provides in part: "* * * (3) to receive money claimed by his client, in an action or proceeding, during the pendency thereof or afterwards, unless he has been previously discharged by his client, * * *." See, also, Gordon v. City of Omaha, 77 Neb. 556, 110 N. W. 313.

In the instant case the county attorneys of the respective counties, or counsel employed by some of the counties, represented the counties when the counties were made defendants. Such attorneys would have authority to receipt for the money.

It is well established by the decisions of this court that it is the general rule that one may not voluntarily accept payment of that part of the judgment in his favor and afterwards prosecute an appeal from the part which is against him. See, Harte v. Castetter, 38 Neb. 571, 57 N. W. 381; Weston v. Falk, 66 Neb. 198, 92 N. W. 204; McKee v. Goodrich, 84 Neb. 479, 121 N. W. 577; Thurston v. Travelers Ins. Co., 128 Neb. 141, 258 N. W. 66; Larabee v. Larabee, 128 Neb. 560, 259 N. W. 520; First Trust Co. v. Hammond, 139 Neb. 546, 298 N. W. 144. See, also, Tyler v. Shea, 4 N. D. 377, 61 N. W. 468, 50 Am. S. R. 660; Hamilton County v. Bailey, 12 Neb. 56, 10 N. W. 539; Annotation, 169 A. L. R. 985. The principle has been so generally approved by the highest

courts of the various states of the Union that we abstain from further citation of authority.

The appellants make reference to the exceptions to the rule which may be stated as follows: The rule that a party cannot maintain an appeal or writ of error to reverse a judgment or decree after he has accepted payment of the same in whole or in part has no application, as a rule, where appellant is shown to be so absolutely entitled to the sum collected or accepted that reversal of the judgment or decree will not affect his right to it, as in the case of the collection of an admitted or uncontroverted part of his demand. 4 C. J. S., Appeal and Error, § 216, p. 418.

A well-settled exception to the general rule is stated in Preluzsky v. Pacific Co-operative C. Co., 195 Cal. 290, 232 P. 970, as follows: "It is the general rule that a voluntary satisfaction of a judgment by a party estops him to prosecute an appeal therefrom, but where such satisfaction is involuntary and enforced by process, the mere circumstance that the judgment has been so satisfied does not of itself alone deprive a party aggrieved of his right to appeal therefrom." See cases cited therein.

There is a second exception to the general rule which is recognized, that is, when the appellant is conceded to be entitled to the thing which he has accepted, and where the appeal only relates to an additional claim on his part. See Guho v. City of San Diego, 124 Cal. App. 680, 13 P. 2d 387, and cases cited therein.

The record in the instant case demonstrates that there is no basis in this case for any claim that the distribution made to the appellant counties is conceded to them by the other parties to this action. That being true, there can be no claim that their rights to such funds are absolute and that no possibility of modification or change exists. By the very nature of this case and the numerous questions involved, appellants are in no position to claim an absolute right to the funds recovered by the decree.

We have before this court the question of whether or not appellants come within either one or both of the exceptions to the general rule. It is the appellants' contention that the only issues presented by this appeal are: (a) Whether the district court, in finding that the determination by the State Treasurer of the amount due the respective counties, constitutes a quasi-judicial determination which was not subject to review by the district court; and (b) whether the district court's holding with reference to the distribution of the equalization fee tax was proper.

The appellants argue that no appeal was prosecuted on behalf of any of the counties which contended that the 1940 government census was applicable, consequently, a determination by this court of either of the two questions presented cannot affect the funds which have been paid to the respective parties. In support of this contention, the appellants cite Northwesern Mual Life Ins. Co. v. Mallory, 93 Neb. 579, 141 N. W. 190, to the effect that where a decree in an equity suit disposes of more than one distinct and separate issue litigated in the court below, and an appeal is prosecuted by one of the parties as to one of such issues only, and no cross-appeal is prosecuted by any of the other parties, the only issue which will be considered in this court is the one presented by the appeal.

We have previously stated and cited authority to the effect that the entire case is before this court for review of the facts and law. This being true, Northwestern Mutual Life Ins. Co. v. Mallory, *supra,* is not here applicable. Any reference made to cross-appeal in the brief of the plaintiff and the brief of the 63 appellee counties indicates only a legal right which the plaintiff or the 63 appellee counties may utilize in the event the appeal is heard before this court.

The appellants contend that the acceptance of any benefit under a decree must be voluntary, and that in the instant case the payment was made to the county treas-

urers, public officers by law required to accept payment of taxes, who do not have the discretion to accept or reject the payment of taxes tendered them.

Reference is made to section 66-423, R. R. S. 1943. This statute, as previously stated, has to do with the gasoline tax fund and allocation to be made by county treasurers when the money of the gasoline tax fund is transferred to the various county treasurers. The word "shall" appears in the matter of allocation of such fund to be made by the county treasurers. The contention is that this statute in effect imposes the duty upon the county treasurers to receive these funds, and leaves the treasurers with no discretion with reference to the acceptance and rejection thereof.

The appellants cite Hawkins v. County of Lake, 302 Ill. 213, 134 N. E. 84. The statute involved therein imposed upon the treasurer the duty of collecting the taxes. He derived no authority from the decree, but as soon as the injunction was dissolved it became his duty to enforce the collection of the taxes in the manner directed by law. The treasurer received the taxes, not in compliance with the decree but in the course of his official duty imposed upon him by law. The taxpayer paid taxes after an injunction against the treasurer was dissolved. This was not done in compliance with any order of the court. It is quite apparent that the case has no applicability here as contended for by the appellants.

In Schaeffer v. Ardery, 238 Ill. 557, 87 N. E. 343, the court held: "Where a decree enjoins the collection of the disputed portion of the complainant's taxes but provides that nothing contained therein shall prevent the collection of the portion not in dispute and admitted to be due, the receipt, by the collector, of such undisputed taxes does not operate as a release of errors such as may be pleaded in bar of his assignment of error that the court erred in enjoining the collection of the disputed taxes." The statute made it the duty of the plaintiff in

error to collect the taxes, and if not paid it would have been his duty to enforce collection. When voluntarily tendered to him he had no discretion but was bound to accept payment. The right to the taxes did not arise out of the decree and was not conferred by it. The receipt of the taxes not in dispute but admitted to be due was not the voluntary acceptance of any right conferred by the decree. That is, there was nothing in the decree specifically provided that would prevent the collecting of the undisputed taxes. The case is of no assistance to the appellants.

There is no merit to the appellants' contention that the acceptance of the funds by the respective county treasurers was involuntary. The statute above referred to relates only to the allocation of funds by the respective county treasurers. It contains no provisions that the county treasurers are required to accept such funds from the State Treasurer. In fact, as will appear later in the opinion, there was no obligation on the part of the county treasurers of the respective counties to receive and deposit the checks made payable to them. In other words, said checks could have been left with the clerk of the district court of Lancaster County until the issues involved in this litigation were determined by this court on appeal.

The appellants contend that the funds involved herein constituted an accumulation of some 3 months in taxes, which funds are by law directed to be used for road and bridge purposes; that the various governmental subdivisions are sorely in need of funds for road improvement; that this fund provided by far the largest portion of funds for this purpose; and that courts have recognized that the acceptance of a benefit under a decree, while under financial pressure was not voluntary, citing Greenspot Desert Inns v. Roy, 63 Cal. App. 2d 54, 146 P. 2d 39. The opinion held that because of war conditions and depression, the rule as to accepting benefits would not be enforced. The exceptions to the

general rule have not been extended to such length in this jurisdiction nor by courts of last resort in the majority of the states in the Union. We conclude that the cited case lends no support to appellants' contention under the law of this jurisdiction.

The appellants contend that by Article VIII, section 4, of the Constitution of the State of Nebraska, the Legislature shall have no power to release or discharge any county, city, township, town, or district whatever, or the inhabitants thereof, or any corporation, or the property therein, from their or its proportionate share of taxes to be levied for state purposes, or due any municipal corporation, nor shall commutation for such taxes be authorized in any form whatever.

In addition, the appellants refer to section 77-1737, R. R. S. 1943, which provides in part: "Any taxes so discharged, released, remitted or commuted, may be recovered by civil action from members of any such board, council or trustees, and the sureties on their official bonds at the suit of any citizen of the county, township, city or village, as the case may be, and when collected shall be paid into the proper treasury."

It is the contention of the appellants that the above discloses that the payment of the tax is the duty imposed by law, independent of any decree of the court, and further that it is the duty of the public officer charged with the responsibility of collecting the tax to receive the same when tendered to him, and neither the county treasurer, by any act on his part, nor any other official, by any act on his part, can commute or discharge the obligation of the payment of any tax.

The very nature of the instant suit and the interpretation of the statutes involved and the questions raised as to the manner in which the tax shall be proportioned and distributed, clearly indicates the inapplicability of the above to the instant case.

The appellants contend that the appeal presents an issue independent of the matter of the gasoline tax fund,

namely, the equalization fee tax; that the funds as distributed only pertain to the gasoline tax fund; and that any determination with reference to said fund should not operate as a release of any claims under the equalization fee fund, for the reason that the two are separate and distinct.

In this connection the appellants cite 2 Am. Jur., Appeal and Error, § 215, p. 978, as follows: "Another exception to the general rule has also been applied in the case of a decree consisting of two separate, distinct, and unrelated parts, the disposition of either of which can in no wise affect the decision as to the other."

As previously pointed out, every issue involved in this appeal was determined by the trial court, and the appeal brings the whole case to this court for review. No further citation of authority other than what has been said previously is necessary to disclose that the appellants' contention is without merit.

We deem the following applicable to the instant case. In Harte v. Castetter, *supra,* the court said: "The doctrine that a party who accepts the benefit of a decree in his favor waives the right to prosecute an appeal, is not limited in its application to those alone who have accepted the full amount awarded, but applies as well where there has been part acceptance. A party, by voluntarily accepting under a decree a portion of the amount found due him, thereby as fully and completely recognizes the validity of the decree as if he had drawn the full amount allowed him. If appellant desired to prosecute his appeal he should not have accepted any portion of the fund paid into court, which was adjudged to be his. He was not compelled to accept the money, but could have allowed it to remain with the clerk of the district court until his appeal was decided." See, also, McKee v. Goodrich, *supra;* State ex rel. Tunison v. Millsap, 112 Neb. 722, 201 N. W. 151.

It would be manifestly unjust to permit a party who has accepted the fruits of a decree, by taking all the

money the decree gives him, to prosecute his appeal. A party who is dissatisfied with a decree in his favor should have the same reviewed by proper proceedings. He has the option to do that, or to proceed to enforce the decree and receive the benefits therefrom; but he cannot pursue both, since one course is inconsistent with the other. The acceptance of the money found due by a decree must be deemed an abandonment of an appeal previously taken. See, Harte v. Castetter, *supra;* In re Black's Estate, 32 Mont. 51, 79 P. 554; Webster-Glover Lumber & Mfg. Co. v. St. Croix County, 71 Wis. 317, 36 N. W. 864; and other cases too numerous to cite.

While the general rule is not exclusively predicated on the doctrine of estoppel, this court in City of Grand Island v. Willis, 142 Neb. 686, 7 N. W. 2d 457, held that estoppel applies to controversies between public bodies such as between a city and a school district, or the state. See, also, State ex rel. School Dist. v. Haid, 328 Mo. 739, 41 S. W. 2d 806.

In 31 C. J. S., Estoppel, § 141, p. 416, it is said that estoppel may exist where the controversy is between two or more public agencies, and State ex rel. School Dist. v. Haid, *supra,* is cited. See, also, State ex rel. Caldwell v. Lincoln Street Ry. Co., 80 Neb. 333, 114 N. W. 422, 14 L. R. A. N. S. 336, which held that the state, like individuals, may be estopped by its acts or laches. See, also, State ex rel. Cox v. McIlravy, 105 Neb. 651, 181 N. W. 554.

In applying the doctrine of estoppel, it is quite apparent that it may be applied in a controversy between two or more public agencies. Definitely, it may be applied where the state, county, or city or any other government agency is involved. City of Grand Island v. Willis, *supra.*

For the reasons given herein, we conclude that the motions to dismiss this appeal should be and are sustained.

MOTIONS TO DISMISS APPEAL SUSTAINED.

NOEL COVER, APPELLANT, V. PLATTE VALLEY PUBLIC POWER AND IRRIGATION DISTRICT, A PUBLIC CORPORATION, APPELLEE.
75 N. W. 2d 661

Filed March 16, 1956. No. 33807.

1. **Drains: Waters.** It is the duty of those who build structures across natural drainways to provide for the natural passage through such obstruction of all waters which may be reasonably anticipated to drain there, and this is a continuing duty.
2. **Drains: Easements.** After an easement to drain across the lands of another has been legally acquired it is limited both as to extent and nature to the terms of the original grant.
3. **Easements.** The rule is that if the grant of an easement or reservation is specific in its terms, it is decisive of the limits of the easement.
4. **Judgments.** Where cases are interwoven and interdependent and the controversy involved has already been considered and determined by the court in former proceedings involving one of the parties now before it, the court has the right and should examine its own records and take judicial notice of its own proceedings and judgments in the former action. Such cases are exceptions to the general rule warranted from the necessity of giving effect to former holdings which finally decide questions of fact and law.
5. **Waters.** In order for a flood to come within the term act of God, it must have been so unusual and extraordinary a manifestation of nature as could not under normal conditions have been reasonably anticipated or expected.
6. **Waters: Negligence.** Although a rainfall may be more than ordinary, yet, if it be such as has occasionally occurred at irregular intervals, it is to be presumed that it may occur again, and a party engaged in public work, the construction of which involves change or restraint of the flow of waters in a natural drainway, is negligent if such party fails to make reasonable provision for the consequences that will result from such extraordinary rainfalls as experience shows are likely to occur.
7. ———: ———. An act of God does not necessarily mean an operation of natural forces so violent and unexpected that no human foresight or skill could possibly have prevented its effect. It is enough that the flooding should be such as human foresight could not be reasonably expected to anticipate and whether it comes within this description is ordinarily a question of fact.
8. ———: ———. An act of God must be the sole proximate cause of damages about which plaintiff complained without

concurrent negligent participation of defendant, and in order for defendant to recover a verdict, he has the burden of proving such an alleged defense by a preponderance of the evidence.

9. ———: ———. Where an act of God and the negligence of defendant concur in proximately causing damages, the defendant is liable as though the damages had been caused by his negligence alone.

10. **Trial: Appeal and Error.** Where an instruction assumes to define the whole law of the case but omits a material element therefrom, it is reversible error which may be relied upon although no proper instruction has been requested by the party seeking to take advantage of the defect.

11. **Trial.** An instruction which conflicts with propositions of law properly and correctly stated in another instruction in the same charge on a vital issue of fact, and tends to mislead or confuse the jury in deliberating on conflicting evidence, is erroneous and prejudicial.

12. ———. It is the duty of the trial court, without request, to instruct the jury on each issue presented by the pleadings and supported by evidence. A litigant is entitled to have the jury instructed as to his theory of the case as shown by pleadings and evidence, and a failure to do so is prejudicial.

13. **Opinion Partially Overruled.** Paragraph 3 of the syllabus promulgated in Gable v. Pathfinder Irr. Dist., 159 Neb. 778, 68 N. W. 2d 500, and so much of that opinion as seemingly approved same, is hereby overruled and withdrawn.

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

Baskins & Baskins, for appellant.

Crosby, Crosby & Nielsen and *W. A. Stewart,* for appellee.

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

CHAPPELL, J.

Plaintiff Noel Cover, in his own right and as assignee of Armour and Company, brought this action to recover for flood damages to their described personal property alleged to have been proximately caused by negligence of defendant, Platte Valley Public Power and Irrigation District, in the construction and maintenance of a flood-

water drain under its canal. Defendant's answer denied that it was negligent as claimed by plaintiff and alleged in effect that the sole proximate cause of any damages sustained by plaintiff was an act of God. Further, it alleged that in any event plaintiff was barred and estopped from proving or recovering any damages from defendant in his own right because with full knowledge of its underpass drain plaintiff had entered into a contract to purchase from defendant the south 60 acres located in the northwest quarter and that part of the southwest quarter of Section 9 lying just north of defendant's canal, whereby plaintiff allegedly consented and agreed that the then existing underpass or drain could be maintained by defendant in its then condition and that plaintiff Cover would save defendant harmless from any damages caused thereby. Such lands will be hereinafter designated as the 60-acre tract. Plaintiff's reply was a general denial.

Upon trial to a jury, the trial court held as a matter of law that under the provisions of the contract aforesaid, plaintiff Noel Cover could not recover any damages in his own right. Instruction No. 10 given by the trial court so informed the jury, and only the issue of plaintiff's right as assignee of Armour and Company's alleged damages to its interest in the personal property was submitted to the jury. In that regard, concededly Noel Cover and Armour and Company had been contractually engaged in a large sheep feeding and marketing venture whereby Cover was to receive 30 percent of the profits and be liable for 30 percent of the losses, which in any event should not exceed $25,000 in any one year, while Armour and Company was to receive 70 percent of the profits and be liable for 70 percent of the losses. However, Armour and Company had concededly assigned to plaintiff all of its rights, interests, claims, and demands against defendant which it might have by reason of any damages caused by the alleged flooding on or about June 21 and

22, 1947. Therefore, if plaintiff was entitled to recover in his own right he was also entitled to have submitted and recover in one verdict the total amount of the damages sustained without confusing the jury in any manner by requiring it to ascertain any percentage of the loss individually sustained by either Cover or Armour and Company. As the issues were thus submitted, the jury returned a verdict finding for defendant, and judgment was rendered thereon. Subsequently plaintiff's motion for new trial was overruled and he appealed, assigning some 38 errors. Some of them were not argued and they will not be discussed. Those argued may be summarized as assigning: (1) That the trial court erred in holding as a matter of law that plaintiff Cover could not recover in his own right and in so instructing the jury; (2) that the trial court erred in the admission of certain evidence; and (3) that the trial court erred in the giving and refusal to give certain instructions. We sustain the assignments in the manner hereinafter set forth.

The record is voluminous and contains numerous photographs offered and received for the purpose of identifying the place where the flood occurred and the extent thereof. We need only summarize pertinent parts of the evidence as they relate to the assignments of error. The property alleged to have been damaged was some 26,000 sheep, 60 tons of feed, and 3 electric pump motors, all located on the northeast quarter of Section 8, and 220 tons of alfalfa and 1 electric pump motor, all located on the north 100 acres of the northwest quarter of Section 9. Said lands belonged to plaintiff Cover and none of the personal property claimed to have been damaged was located on the 60-acre tract contractually purchased by plaintiff from defendant. Any question with reference to the amount of the damages is not an issue for determination here. It is sufficient for us to say that the extent thereof was not controverted by defendant. Such damages resulted

from the flooding of plaintiff's lands on June 21 and 22, 1947, when intersecting floodwaters backed up, completely inundating plaintiff's lands except for a few knolls, which waters failed to escape for several days thereafter.

Admittedly defendant, a public corporation, owned and operated an irrigation canal along the south line of the northeast quarter of Section 8 and extending on eastward along the south line of the 60-acre tract contractually purchased by plaintiff from defendant. In other words, the south side of the 60-acre tract is adjacent to defendant's canal and at about the center thereof defendant had constructed and maintained a 42-inch corrugated drain pipe under its canal for the purpose of draining away all intersecting waters flowing down the Stump Ditch and Spring Creek drainage area from the north and west. Spring Creek is a natural drainway about 5 feet deep and 200 feet wide into which overflow waters from Stump Ditch have been diverted. They drain about 30,000 acres of land, extending over an area of some 20 to 30 miles north and west of the point where Spring Creek was intercepted by defendant's canal. The 42-inch drain has a capacity of only 9.62 square feet which was both factually and as a matter of law inadequate to drain all intersecting waters that might be reasonably anticipated to drain through it. In that regard, such drain is now substantially in the identical condition that it was on January 31, 1947, when this court in Faught v. Platte Valley Public Power & Irr. Dist., 147 Neb. 1032, 25 N. W. 2d 889, held that it was not adequate to permit the passage of all waters which defendant should have reasonably anticipated might drain through it, and that defendant was negligent in the construction and maintenance thereof because it violated the rule that: "It is the duty of those who build structures across natural drainways to provide for the natural passage through such obstruction of all waters which may be reasonably

anticipated to drain there. This is a continuing duty."

In such case we specifically held that Faught, plaintiff therein, was entitled to a mandatory injunction requiring defendant to increase the carrying capacity of such 42-inch drain under its canal to an extent sufficient to carry off all waters flowing down Spring Creek on said plaintiff's land. That case involved 70 acres of land immediately north of and adjacent to defendant's canal and drain thereunder. Evidently instead of increasing the carrying capacity of the 42-inch drain as ordered, defendant purchased the south 60 acres of such tract lying immediately north and adjacent to its canal and thereafter contractually sold same to plaintiff Noel Cover. The contract, exhibit No. 30, was offered and received in evidence. It provided in part: "It is further understood and agreed that the presently existing underpass structure as maintained by First Party for the purpose of conveying flood waters from Spring Creek and the drainage area as served thereby underneath its Dawson County Irrigation Canal shall be continued in its operation and maintenance as presently installed, and said Parties of the Second Part, their heirs, personal representatives, grantees or assigns hereby waive all claim or claims for damages to said lands, crops, or other personal property thereon from flood waters flowing upon or across said lands, or accumulated thereon from said drainage area, and agree to save First Party harmless by reason thereof, and said covenant of waiver of damages shall be included in the deed of conveyance from First Party and shall be considered as running with said lands."

In the light thereof, defendant argued, and the trial court sustained its contention, that plaintiff Cover in his own right was thereby precluded from recovering anything as damages to personal property by flood waters not only upon the 60-acre tract so purchased, but also upon all other contiguous and adjoining lands owned by plaintiff. That contention has no merit. Con-

trary to defendant's contention, the 60-acre tract was the servient estate and defendant's canal was the dominant estate. In other words, plaintiff's other lands upon which the personal property here involved was all located were not either the servient or dominant estate.

In that regard, a comparable situation was presented in Webb v. Platte Valley Public Power & Irr. Dist., 146 Neb. 61, 18 N. W. 2d 563, wherein this court held: "After an easement to drain across the lands of another has been legally acquired it is limited both as to extent and nature to the terms of the original grant."

In County of Johnson v. Weber, 160 Neb. 432, 70 N. W. 2d 440, this court said: "The rule is that if the grant of an easement or reservation is specific in its terms, it is decisive of the limits of the easement. 28 C. J. S., Easements, § 75, p. 752; 17 Am. Jur., Easements, § 97, p. 995."

Also, in Mason v. Mason, 156 Neb. 478, 56 N. W. 2d 614, this court reaffirmed that: "A written contract which is couched in clear and unambiguous language is not subject to a construction other and different from that which flows from the language used."

In Stadler v. Missouri River Power Co., 139 F. 305, involving a comparable situation, the court concluded that in the absence of a clearly expressed intention to contract for other right, a reservation from a grant is limited to some part of the estate owned by the grantor and which would otherwise pass by the grant. With regard to a provision comparable with that at bar, the court held that "such provision extended no further than the reservation, and did not release defendant from damages for flooding other lands owned by plaintiffs, not described or mentioned."

In Thomas v. Greenville-Carolina Power Co., 105 S. C. 268, 89 S. E. 552, the court concluded that "where the right granted is specifically defined, and is limited in express terms, as it is in this case, to the flowage of the land described, and immunity from liability for

damage to that land, it cannot be presumed that the parties intended that it should have any greater extent in its operation than that expressed."

We conclude that the language of such contract here involved clearly and unambiguously limited defendant's right to flood only the 60-acre tract, and waived damages therefor to only that tract and personal property located thereon. Therefore, it was proper to receive exhibit No. 30 in evidence exclusively for the consideration of the trial court in order to determine its scope as a matter of law, but it was improper and erroneous to read or submit same as evidence to the jury for any purpose. It follows that the trial court erred prejudicially in holding as a matter of law that plaintiff in his own right was precluded by exhibit No. 30 from claiming any damages to personal property located on his other lands, to wit: The northeast quarter of Section 8 and the north 100 acres of the northwest quarter of Section 9. In that connection also, instruction No. 10 given by the trial court, which informed the jury that "the Court has taken from the jury any consideration of any damages that the plaintiff, Noel Cover, has sustained in his own right because of said flood" was entirely erroneous and prejudicial. Contrary to defendant's contention, it was not, under the circumstances presented here, only an error relating to the measure of recovery which could be error without prejudice. As hereinafter observed, the issue of defendant's negligence and its defense of act of God were not properly submitted to the jury.

In Johnson v. Marsh, 146 Neb. 257, 19 N. W. 2d 366, this court, citing and quoting from other authorities, reaffirmed that: "Where cases are interwoven and interdependent and the controversy involved has already been considered and determined by the court in former proceedings involving one of the parties now before it, the court has the right to examine its own records and take judicial notice of its own proceedings and judg-

ments in the former action." As stated in the opinion: "'* * * These are exceptions to the general rule warranted from the necessity of giving effect to former holdings which finally decide questions of fact and law.'"

In the light of such rule plaintiff argued that the trial court erred prejudicially in refusing to examine its own records and take judicial notice of its own proceedings, and the judgments rendered by that court and this court on appeal in Faught v. Platte Valley Public Power & Irr. Dist., *supra,* an interwoven and interdependent case in which defendant was a party. We sustain that contention. In such case not only the same trial court, but also this court on appeal, held that the very same 42-inch drain here involved was inadequate and that defendant was negligent in constructing and maintaining same. That question has been finally decided and could not properly be again submitted to a jury for it to determine whether or not the trial court and this court were correct in making such a decision. Therefore, the trial court erred prejudicially in failing and refusing to instruct the jury as a matter of law that defendant was negligent as alleged by plaintiff. To hold otherwise would be a travesty upon justice and permit a trifling with judgments duly rendered according to law. On the other hand, as a matter of course, the trial court should have told the jury that the burden was upon plaintiff to prove by a preponderance of the evidence that plaintiff's damages were proximately caused by such negligence of defendant, and the amount of plaintiff's damages.

The defense was primarily predicated upon the contention that the sole proximate cause of plaintiff's damages was an act of God for which it was not liable. This court has decided that in order for a flood to come within the term "act of God" it must have been so unusual and extraordinary a manifestation of nature as could not under normal conditions have been reasonably anticipated or expected. In that connection, we have

concluded that although a rainfall may be more than ordinary, yet, if it be such as has occasionally occurred at irregular intervals, it is to be presumed that it may occur again; and a party engaged in public work the construction of which involves the change or restraint of the flow of surface waters in a natural drainway, is negligent if such party fails to make reasonable provision for the consequences that will result from such extraordinary rainfalls as experience shows are likely to occur. We have also concluded that an act of God does not necessarily mean an operation of natural forces so violent and unexpected that no human foresight or skill could possibly have prevented its effect. It is enough that the flooding should be such as human foresight could not be reasonably expected to anticipate and whether it comes within this description is ordinarily a question of fact. Webb v. Platte Valley Public Power & Irr. Dist., *supra;* Snyder v. Farmers Irr. Dist., 157 Neb. 771, 61 N. W. 2d 557.

Contrary to plaintiff's contention, we conclude that the evidence was generally conflicting and that there was ample competent evidence which required submission of the defense of act of God to the jury. To set forth such evidence here in detail would but unduly prolong this opinion. In that regard, plaintiff argued that the trial court erred in admitting, over objections, the testimony of several of defendant's witnesses with regard to the amount of rainfall and the flood conditions existing on June 21 and 22, 1947, at points allegedly remote and outside the Stump Ditch and Spring Creek drainage area, without laying a foundation sufficient to show that it had any pertinent relation thereto.

In such respect, defendant was permitted to introduce evidence of the amount of rainfall and flood conditions on June 21 and 22, 1947, continuously as far west as Gothenburg, some 11 miles from plaintiff's lands, and continuously from there to Lexington, some 13 miles east of plaintiff's lands, and to show the read-

ings of the river gauges in the north and south channels of the Platte River immediately south of Cozad, which was about 1 mile west of plaintiff's lands. In other words, defendant was permitted to adduce evidence that the amount of rainfall and flood conditions were generally about the same over all such territory. Defendant was also permitted to adduce evidence that such floodwaters were flowing from one drainage area or watershed over into others, including the Stump Ditch and Spring Creek area; that highway bridges, and other irrigation canals as well as that of defendant, were washed out; and that city property and farm lands in the area from Gothenburg to Lexington were generally covered with water. Under the circumstances presented here, such evidence was not too remote as a matter of law, and its admission was largely within the discretion of the trial court. We conclude that it did not abuse its discretion. To have confined such evidence to the amount of rainfall and flood conditions entirely within the Stump Ditch and Spring Creek drainage area would have been too restrictive.

Exhibit No. 55 was an isohyetal map which showed the storm centers and amount of rainfall from June 18 through June 22, 1947, generally throughout adjoining states, including Wyoming, South Dakota, and Nebraska. Such exhibit was erroneously admitted in evidence because too remote, but by order of the trial court it was never exhibited to the jury so its admission as such was not prejudicial to plaintiff. In that regard, such part of exhibit No. 55 as officially and properly disclosed the amount of rainfall in the northwest upper reaches of the Stump Ditch and Spring Creek drainage area was separately admissible and it was properly presented to the jury by oral testimony relating thereto.

Plaintiff argued that the trial court erred in giving instructions Nos. 7 and 11, and erred in failing to give his requested instruction No. 3 or to in any other correctly equivalent manner instruct upon plaintiff's theory

of the case with relation to an act of God. We sustain plaintiff's contentions in the manner hereinafter set forth. Instruction No. 7 given by the trial court first told the jury that defendant in its answer had alleged as an affirmative defense that plaintiff's damages had been caused by an act of God. The instruction then read: "You are instructed that the burden of proof is upon the Defendant to establish that said storm was an 'Act of God', and if you find from a preponderance of all of the evidence in this case that the storm which caused the damages complained of by the Plaintiff was of such proportions that the same was an 'Act of God', then you are instructed that your verdict should be for the Defendant." It will be noted that the court therein not only erroneously assumed as a fact that it was "the storm which caused the damages complained of by the Plaintiff" but it also erroneously omitted a required material element, the absence of which would not entitle the jury to find for defendant. It erroneously failed to instruct the jury that the burden was upon defendant to prove by a preponderance of the evidence not only that the storm alleged by defendant to have caused the damages about which plaintiff complained was an act of God as thereafter defined, but also that such act of God was the sole proximate cause of plaintiff's damages. The rule generally is that the burden is upon defendant to prove by a preponderance of the evidence not only that the storm was of such an unusual and extraordinary manifestation of the forces of nature that it could not under normal conditions have been reasonably anticipated or expected, but also that the flood was of sufficient force to have been the sole proximate cause of the damages about which plaintiff complained without the negligent participation of defendant. In other words, that plaintiff's alleged damages would have resulted to plaintiff even though the drain pipe had been properly constructed and maintained. Snyder v. Farmers Irr. Dist., *supra*.

In Matousek v. Galligan, 104 Neb. 731, 178 N. W. 510, 12 A. L. R. 1270, this court concluded that an act of God must be the sole proximate cause of the damages about which plaintiff complained without the negligent participation of defendant, and in order for defendant to recover a verdict he has the burden of proving such an alleged defense by a preponderance of the evidence.

In City of McCook v. McAdams, on rehearing, 76 Neb. 11, 114 N. W. 596, speaking of the defense of act of God and defendant's burden of proof with relation thereto, this court said: "The burden did not rest upon it to disprove negligence, but upon the plaintiff to prove it, but, negligence being proved against it, it did have the burden of showing an independent cause for the injury, by reason of which it was released from liability."

In Clark v. Cedar County, 118 Neb. 465, 225 N. W. 235, this court said: "Where an instruction assumes to define the whole law of the case, and omits a material element from the definition given, it is reversible error, which may be relied upon, although no proper instruction has been requested by the party seeking to take advantage of the defect. City of South Omaha v. Hagar, 66 Neb. 803."

Instruction No. 11 given by the trial court correctly defined an act of God and properly stated the rule with relation to defendant's burden of proof if it had first told the jury that defendant was guilty of negligence as a matter of law, as heretofore discussed and decided. However, instruction No. 7 was also erroneous as in conflict with instruction No. 11.

As recently as Harsche v. Czyz, 157 Neb. 699, 61 N. W. 2d 265, this court reaffirmed that: "An instruction which conflicts with the propositions of law properly and correctly stated in another instruction in the same charge on a vital issue of fact and tends to mislead or

confuse the jury in deliberating on conflicting evidence is erroneous and prejudicial."

Further, in refusing to give plaintiff's requested instruction No. 3 or a correct equivalent thereof on its own motion, the trial court failed and refused to instruct the jury in any manner with regard to plaintiff's theory of the case with relation to the defense of act of God. In other words, the trial court erroneously failed and refused to instruct the jury in effect that if it found from the evidence that defendant's negligence proximately contributed to cause the damages about which plaintiff complained, even though combined with or in conjunction with an act of God, that its verdict should be for plaintiff for such an amount as they found his damages to be.

In Dunlap v. Welch, 152 Neb. 459, 41 N. W. 2d 384, this court said: "The trial court, even in the absence of a request to do so, is obliged to instruct fully on plaintiff's theory of the case." In that respect, as held in Harsche v. Czyz, *supra,* "It is the duty of the trial court, without request, to instruct the jury on each issue presented by the pleadings and supported by evidence. A litigant is entitled to have the jury instructed as to his theory of the case as shown by pleadings and evidence, and a failure to do so is prejudicial."

Defendant argued that the instructions given aforesaid were favorable to plaintiff and in that regard has called our attention to the opinion of this court in Gable v. Pathfinder Irr. Dist., 159 Neb. 778, 68 N. W. 2d 500, and paragraph 3 of the syllabus in which we held: "In an action for damages for the flooding of lands where it appears that the flooding was caused in part by an act of God and in part by negligence the party guilty of negligence may be held only for that part which resulted from the negligence." Instruction No. 8 given in that case and approved by this court in our opinion complied with the rules heretofore set forth in every respect. In the opinion we said: "The effect of the fifth

assignment of error is to say that the court erred by failure to require plaintiff to allocate the damages sustained by him as a result of the negligence of defendant and those not sustained thereby.

"This contention appears to be without merit." We now conclude that there was no issue presented therein requiring us to formulate a rule such as that stated in paragraph 3 of the syllabus. Its promulgation therein was evidently occasioned by dictum appearing in the opinion as a quotation from defendant's brief, which we seemingly approved but refused to apply. We have now concluded that the rule as stated in paragraph 3 of the syllabus of Gable v. Pathfinder Irr. Dist., *supra,* and so much of that opinion as seemingly approved same, was erroneous and same is hereby overruled and withdrawn.

The following authorities support that conclusion and are controlling in this jurisdiction. In Republican Valley R. R. Co. v. Fink, 18 Neb. 89, 24 N. W. 691, this court, citing authorities, said: "A loss occasioned by the act of God has reference to acts with which the agency of man has nothing to do. * * * If the loss or injury happen in any way through the agency of man, it cannot be considered the act of God."

In Amend v. Lincoln & Northwestern R. R. Co., 91 Neb. 1, 135 N. W. 235, this court said: "As stated by the decisions and authorities, if by any act of man in conjunction with the act of nature an injury is inflicted, he will be held to respond for the injury suffered. In 1 Cyc. 758, it is said that the act of God 'may be defined to be any accident, due directly and exclusively to natural causes without human intervention, which by no amount of foresight, pains or care, reasonably to have been expected, could have been prevented'—citing cases in note. 1 Words and Phrases, 118." Such case was cited with approval by this court as recently as Snyder v. Farmers Irr. Dist., *supra.*

Also, in Davis v. Union P. R. R. Co., 99 Neb. 769,

157 N. W. 964, this court held: "In a suit for damages for personal injuries, an act of God is no defense if defendant's negligence was a concurrent cause of plaintiff's injuries." In the opinion this court said: "The rule is that an act of God is no defense if defendant's negligence was a concurrent cause of the injury. Amend v. Lincoln & N. W. R. Co., 91 Neb. 1. In 1 Shearman and Redfield, Negligence (6th ed.) sec. 39, it is said:

" 'It is universally agreed that, if the damage is caused by the concurring force of the defendant's negligence and some other cause for which he is not responsible, including the "act of God" or superior human force directly intervening, the defendant is nevertheless responsible, if his negligence is one of the proximate causes of the damage, within the definition already given. * * * But if the superior force would have produced the same damage, whether the defendant had been negligent or not, his negligence is not deemed the cause of the injury.' "

Finally, in Inland Power & Light Co. v. Grieger, 91 F. 2d 811, 112 A. L. R. 1075, a leading authority citing many cases designated as "the overwhelming weight of authority" the court concluded that where an act of God and the negligence of defendant concur in proximately causing damages, the defendant is liable as though the damage had been caused by his negligence alone.

For reasons heretofore stated, the judgment of the trial court should be and hereby is reversed and the cause is remanded for new trial in conformity with this opinion. All costs are taxed to defendant.

REVERSED AND REMANDED.

GEORGE E. SCHUTTE, APPELLEE, V. LEO J. SCHMITT ET AL., APPELLANTS.

75 N. W. 2d 656

Filed March 16, 1956. No. 33808.

1. **Officers: Parties.** A public officer who has acted under and pursuant to an unconstitutional statute is not a necessary party to an action brought to enjoin those public officers whose duty it is to carry out such order when no relief of any kind is sought against the former.
2. **Injunctions.** As a general rule, an injunction will not be granted where the remedy at law for the injury complained of is full, adequate, and complete.
3. **Judgments.** A void judgment is in reality no judgment. It is a mere nullity. It is supported by no presumption, and may be impeached in any action, direct or collateral.
4. **Municipal Corporations: Schools and School Districts.** The formation of municipal corporations, such as counties, cities, villages, school districts, or other subdivisions, and the fixing of the boundaries of such municipal corporations are legislative functions.
5. **Constitutional Law.** Due process of law requires notice and an opportunity to be heard, where financial burdens are necessarily imposed on property owners by an exercise of judicial power pursuant to specific terms of a statute.

APPEAL from the district court for Cuming County: FAY H. POLLOCK, JUDGE. *Affirmed.*

Robert D. Moodie, for appellants.

Kerrigan & Flory, for appellee.

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

WENKE, J.

This is an appeal from a decree of the district court for Cuming County holding section 79-420, R. R. S. 1943, as amended by the 1953 Legislature, unconstitutional; holding an order of the State Superintendent of Public Instruction, made pursuant to and under authority thereof, void; and permanently enjoining the school board of school district No. 55 and the officials of Cuming County from performing certain of their official duties

as they relate to assessing and levying taxes on appellee's lands for the support of the public schools in school district No. 55 in Cuming County, Nebraska.

Appellee, George E. Schutte, was a resident and elector of school district No. 12 in Cuming County, Nebraska, owning approximately 266 acres of land located therein. The 1953 Nebraska Legislature, effective as of September 14, 1953, amended section 79-420, R. R. S. 1943. As amended it reads as follows: "When for a period of one school term a district (1) shall have less than three legal voters residing therein, (2) shall fail to maintain a public elementary school within the district, in which are enrolled and in regular attendance for at least one hundred sixty days one or more pupils of school age residing in the district, or (3) does not contract for the tuition and transportation of pupils of such district with another district or districts and have pupils attending school regularly under such contract or contracts, it shall be the duty of the county superintendent of the county in which such district lies to dissolve such district and attach the territory of such district to one or more neighboring school districts. The county superintendent shall distribute the assets of the closed district among the other districts to which the property has been attached in proportion to the assessed valuation of the property attached to each district or districts. If the county superintendent fails to act as directed, then the Superintendent of Public Instruction shall be empowered and it shall be his duty to act." § 79-420, R. S. Supp., 1953.

By letter dated August 16, 1954, the State Superintendent of Public Instruction notified the officers and board members of school district No. 12 that:

"Pursuant to the authority delegated to me by this law (section 79-420, R. S. Supp., 1953), I am dissolving your School District No. 12 and attaching it in its entirety to School District No. 55, Cuming County.

"All of the assets of your school district, including the

school building, its contents, the money on hand in your district treasury, and the money on hand credited to your account in the office of the County Treasurer will automatically become the property of School District No. 55. The last action of the school board members of your district will be for you to write an order on your district treasury for the amount of the money that you have in your district treasury payable to the treasurer of School District No. 55.

"This dissolution is effective as of Saturday, August 14, 1954."

On November 23, 1954, appellee brought this action in the district court for Cuming County against the members of the school board of district No. 55 and the county treasurer, county superintendent, county assessor, and county clerk of Cuming County.

Appellants demurred to appellee's petition on three grounds: (1) A defect in parties defendant; (2) that appellee (plaintiff) had an adequate remedy at law; and (3) because the petition failed to state a cause of action. The trial court overruled this demurrer and, appellants having elected to stand thereon, entered the decree already referred to. Appellants thereupon filed a motion for new trial and this appeal is from the overruling thereof.

Was the State Superintendent of Public Instruction a necessary party? No affirmative relief was sought against him or with reference to any duty or duties of his office. He would undoubtedly have been a proper party if the appellee had desired to make him such. See Alston v. School Board of City of Norfolk, 112 F. 2d 992, 130 A. L. R. 1506. However, a public officer who has acted under and pursuant to an unconstitutional statute is not a necessary party to an action brought to enjoin those public officers whose duty it is to carry out such order when no relief of any kind is sought against the former. As stated in Williams v. Fanning, 332 U. S. 490, 68 S. Ct. 188, 92 L. Ed. 95: "* * * the

superior officer is an indispensable party if the decree granting the relief sought will require him to take action, either by exercising directly a power lodged in him or by having a subordinate exercise it for him."

And in Oliver v. Jersey City, 63 N. J. Law 634, 44 A. 709, 76 Am. S. R. 228, 48 L. R. A. 412, the court said: "* * * where an action is instituted the object of which is only to determine the validity of the act or thing done by an officer, and not involving his personal integrity or want of good faith, the officer himself is not a necessary party."

Did appellee have such an adequate remedy at law that injunction could not be maintained? The order of the State Superintendent of Public Instruction was undoubtedly a final order within the meaning of section 25-1902, R. R. S. 1943, and therefore reviewable by petition in error. § 25-1901, R. R. S. 1943. See, also, Cacek v. Munson, 160 Neb. 187, 69 N. W. 2d 692.

"As a general rule, an injunction will not be granted where the remedy at law for the injury complained of is full, adequate, and complete." 43 C. J. S., Injunctions, § 25, p. 450. See, also, Nickel v. School Board of Axtell, 157 Neb. 813, 61 N. W. 2d 566.

However, as stated in Radil v. Sawyer, 85 Neb. 235, 122 N. W. 980: "A void judgment is in reality no judgment. It is a mere nullity. It is supported by no presumption, and may be impeached in any action, direct or collateral."

And, in Schafersman v. School District, 120 Neb. 673, 234 N. W. 791, we held injunction to be a proper remedy to prevent a school district or its officers from assuming jurisdiction over and taxing land in another school district under an unconstitutional statute. See, also, Nickel v. School Board of Axtell, *supra;* Watkins v. Dodson, 159 Neb. 745, 68 N. W. 2d 508.

We come then to the question, is section 79-420, R. S. Supp., 1953, unconstitutional? The Nebraska Constitution provides: "No bill shall contain more than one subject, and the same shall be clearly expressed in

the title." Art. III, § 14, Constitution of Nebraska. The title to L. B. 455 provides insofar as here material that: "* * * to change the conditions under which a depopulated school district shall be attached to a neighboring district; to provide duties for the county superintendent and the Superintendent of Public Instruction; * * *." Laws 1953, c. 291, p. 988.

L. B. 455 deals with the subject of school laws and the language used, as it relates to section 79-420, R. R. S. 1943, fairly indicates the scope and purpose thereof.

Admittedly the state is supreme in the creation and control of the school districts of the state and may, as it thinks proper, modify or withdraw any of their powers or destroy such school districts without the consent of the residents thereof or even against their protest. Nickel v. School Board of Axtell, *supra;* School District No. 49 v. School District No. 65-R, 159 Neb. 262, 66 N. W. 2d 561.

The Legislature may delegate this authority provided it states the purpose for doing so and sets up reasonable standards to guide the agency which is to administer it. School District No. 39 v. Decker, 159 Neb. 693, 68 N. W. 2d 354; Nickel v. School Board of Axtell, *supra.* Such standards will be found in section 79-420, R. S. Supp., 1953.

The authority so delegated is legislative, not judicial, in character. As stated in Nickel v. School Board of Axtell, *supra*: "The fixing of boundaries of a political subdivision of a state into counties or districts for public purposes is a legislative function." And as stated in Rowe v. Ray, 120 Neb. 118, 231 N. W. 689, 70 A. L. R. 1056: "It is a rule of general recognition that the formation of municipal corporations, such as counties, cities, villages, school districts, or other subdivisions, and the fixing of the boundaries of such municipal corporations are legislative functions."

We said in Nickel v. School Board of Axtell, *supra*:

"Questions of public policy, convenience, and welfare,

as related to the creation of municipal corporations, such as counties, cities, villages, school districts, or other subdivisions, or any change in the boundaries thereof, are, in the first instance, of purely legislative cognizance and, when delegated to any public body having legislative power, any action in regard thereto does not come within the due process clause of either the state or federal Constitutions. See, Searle v. Yensen, 118 Neb. 835, 226 N. W. 464, 69 A. L. R. 257; Ruwe v. School District, supra (120 Neb. 668, 234 N. W. 789); Nebraska Mid-State Reclamation Dist. v. Hall County, supra (152 Neb. 410, 41 N. W. 2d 397); Seward County Rural Fire Protection Dist. v. County of Seward, supra (156 Neb. 516, 56 N. W. 2d 700).

"But when, as a condition to their creation or change, the public body to which such authority is delegated must find certain facts to exist upon which the Legislature has said depends its authority to declare such subdivision, or any change therein, to exist then the questions presented are of a quasi-judicial character. In such cases a hearing must be had to determine if such facts exist and proper notice thereof must be provided for and given to all parties interested therein. See, Searle v. Yensen, supra; Ruwe v. School District, supra."

The act requires that certain facts must exist before either the county superintendent or the State Superintendent of Public Instruction can act. The finding of such facts is of a quasi-judicial character. In such cases a hearing must be had to determine if such facts exist and proper notice thereof must be provided for and given to all parties interested therein. See, Art. XIV, § 1, of the Constitution of the United States; Art. I, § 3, of the Constitution of Nebraska.

As stated in Ruwe v. School District, 120 Neb. 668, 234 N. W. 789: "Due process of law requires notice and an opportunity to be heard, where financial burdens are necessarily imposed on property owners by an exercise of judicial power pursuant to specific terms of a

statute. Whether the county tribunal was required to act judicially in determining the facts and equities essential to an order detaching a quarter section of land from district 43 and annexing it to district 85 depends upon the language of the legislature. While the establishing of boundaries of public school districts for school purposes is a legislative function, the legislature may confer on public boards or courts judicial power to determine the facts and equities under which legislation authorizes changes in such boundaries. City of Wahoo v. Dickinson, 23 Neb. 426; Winkler v. City of Hastings, 85 Neb. 212; Searle v. Yensen, 118 Neb. 835." See, also, Watkins v. Dodson, *supra.*

As stated in Watkins v. Dodson, *supra*: "The indispensable elements of due process are a tribunal with jurisdiction, notice of hearing to the proper party, and an opportunity for a fair hearing according to applicable procedures. * * * The law must require notice and give a right and an opportunity to be heard."

Since section 79-420, R. S. Supp., 1953, contains no provision for notice to those whose financial burdens would necessarily be affected by the exercise of the power granted, or for a hearing, the statute violates the due process clause of both the state and federal Constitutions and is, therefore, unconstitutional and void. The same would be true of any order made by a county superintendent or the State Superintendent of Public Instruction pursuant to the authority therein granted to them.

Having come to the conclusion that the trial court was correct in holding section 79-420, R. S. Supp., 1953, to be unconstitutional because of the reasons hereinbefore set out we affirm its judgment so holding and also the balance of its decree which properly determines the legal effect of the order of the State Superintendent of Public Instruction and which enjoins the school board of school district No. 55 and the county officials of Cuming County from putting it into effect.

AFFIRMED.

TOM JONES, APPELLEE, V. ISABEL RHODES, APPELLANT, IMPLEADED WITH ALBERT JARMAN, APPELLEE.

75 N. W. 2d 616

Filed March 16, 1956. No. 33845.

1. **Subrogation.** No general rule can be laid down which will afford a test in all cases for conventional subrogation. Whether or not the doctrine of conventional subrogation is applicable in any particular case depends upon its particular facts and circumstances, the principle not being enforced as a matter of legal right, but in order to subserve the ends of justice in the particular controversy under consideration.
2. ———. Where one having an interest in property pays off an encumbrance on the property in order to protect his interest he is ordinarily entitled to be subrogated to the rights and remedies of the person paid, provided the debt secured by the encumbrance is not one for which the payor is primarily liable. The granting of such relief is equitable.

APPEAL from the district court for Douglas County: PATRICK W. LYNCH, JUDGE. *Affirmed.*

W. A. Ehlers, for appellant.

J. J. Friedman, 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 Douglas County by Tom Jones against Isabel Rhodes and Albert Jarman. Therein plaintiff sought an accounting on and the strict foreclosure of a contract for the sale of real estate which he had entered into with the defendants. The trial court found there was owing plaintiff $2,400.70 with interest from March 4, 1955, and granted plaintiff the relief he prayed for but gave defendant Isabel Rhodes 20 days to redeem therefrom by depositing said amount with interest and costs in the office of the clerk of the court. Defendant Isabel Rhodes thereupon filed a motion for new trial and, from the overruling thereof, has taken this appeal.

Defendant Albert Jarman defaulted in the district court and is not involved in this appeal as he has made no appearance in this court. We shall not refer to him again.

There is no dispute about the fact that on April 3, 1951, appellee entered into a contract with appellant whereby he sold to her a property he then owned which is located in Shinn's addition to the city of Omaha, Douglas County, Nebraska, and known as 2710 Seward Street, for the sum of $2,500, same to be paid at the rate of $50 per month commencing on May 3, 1951, and the principal to draw interest at the rate of 6 percent. Appellant made payments upon this contract up to and including November 16, 1953. The only real question involved in this appeal is, was the trial court correct when it included in the amount found owing appellee the amount which he had paid the Valley Finance Company of Valley, Nebraska, in satisfaction of a mortgage it held on the premises and which was referred to in the real estate contract as follows: "subject to mortgage in favor of Valley Finance Company of Valley, Nebraska"? Appellant claims this mortgage debt in the sum of $1,000 is not included in or any part of the land contract, there being no covenant or agreement of any kind therein whereby appellant assumed or agreed to pay said mortgage as part of the purchase price.

This is an action in equity. We shall therefore review the record de novo. In evaluating appellee's testimony, which is in some respects inconsistent, we take notice of the fact that he was 63 years of age, had only attended school to the second grade, had been sick for a long period of time, and that his memory is bad at times. We find the evidence adduced establishes that on the same day, but just before the contract of sale was finally entered into, appellant told appellee she had no money and wanted to know if he would sign a note and mortgage on the property so she could get a thousand dollars; that appellee advised her he would and

did so; that appellant took the note and mortgage with her, the mortgage being recorded on the same day; that appellee never received any money from the proceeds thereof; that appellant, when she requested appellee to sign the note and mortgage, agreed to pay the debt created thereby; that the note was made payable to the Valley Finance Company of Valley, Nebraska; that it was payable at the rate of $37.39 per month commencing with May 3, 1951; that appellant paid the Valley Finance Company on this indebtedness the sum of $24.75 on July 10, 1951, $24.30 on August 20, 1951, and $41 on November 19, 1951; that appellant made no further payments to the Valley Finance Company; that the Valley Finance Company then threatened foreclosure; and that when appellee found out the note was not being paid, in order to avoid foreclosure, he paid the Valley Finance Company the balance of $1,062.05. We find, from the foregoing, that the $1,000 debt was the primary obligation of appellant and that appellee merely provided the security which permitted her to obtain the loan. As between the parties this is not a promise on the part of appellant to answer for the debt of appellee but is an original promise on her part to pay this debt and consequently the petition, contrary to what appellant contends, states a good cause of action in this regard. See Melson v. Turner, 125 Neb. 603, 251 N. W. 172.

Was the trial court correct when it included the amount appellee had paid the Valley Finance Company in its decree foreclosing the real estate contract? We think so on the basis of subrogation. The following principles are here applicable:

"No general rule can be laid down which will afford a test in all cases for conventional subrogation. Whether or not the doctrine of conventional subrogation is applicable in any particular case depends upon its particular facts and circumstances, the principle not being enforced as a matter of legal right, but in order to subserve the ends of justice in the particular controversy

under consideration." Hoagland & Co. v. Decker, 118 Neb. 194, 224 N. W. 14.

"* * * where one having an interest in property pays off an encumbrance on the property in order to protect his interest, he is ordinarily entitled to be subrogated to the rights and remedies of the person paid, provided the debt secured by the encumbrance is not one for which the payor is primarily liable, and the grant of such relief is equitable." 83 C. J. S., Subrogation, § 31, p. 630.

"The right of subrogation must depend upon the facts and equities of the particular case in which it is asserted." Frederick v. Gehling, 92 Neb. 204, 137 N. W. 998.

Under the circumstances here established it would certainly be inequitable and unjust not to permit appellee the benefit of the doctrine of conventional subrogation. We therefore affirm the judgment of the trial court.

AFFIRMED.

C. G. WALLACE ET AL., APPELLANTS, V. INSURANCE COMPANY OF NORTH AMERICA, A CORPORATION, ET AL., APPELLEES.
75 N. W. 2d 549

Filed March 16, 1956. No. 33858.

1. **Trial.** The findings of a 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.
2. **Appeal and Error.** In an action at law where a jury has been waived it is not within the province of this court to resolve conflicts or to weigh evidence. If there is a conflict in the evidence this court in reviewing the judgment rendered will presume that controverted facts were decided by the trial court in favor of the successful party and the findings will not be disturbed unless clearly wrong.
3. ———. In the examination of the record on appeal for the purpose of ascertaining whether or not a finding of fact and a judgment thereon may be sustained, a subject for consideration is that

of whether or not the evidence adduced responds to the issues made by the pleadings.

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

Bruckman & Brock, for appellants.

Pilcher, Haney & Howard, for appellees.

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

YEAGER, J.

This is an action at law by C. G. Wallace and Idilla Jeffery Wallace, plaintiffs and appellants, against Insurance Company of North America, a corporation, and Scottish Union and National Insurance Company, a corporation, defendants and appellees, to recover damages to a building belonging to the plaintiffs for which they claim the defendants are liable under three insurance policies issued to them by the defendants.

A jury was waived and the case was tried by the court. At the conclusion of the trial the court found generally in favor of the defendants and a judgment dismissing plaintiffs' action was rendered. Thereafter a motion for new trial was filed. The motion was overruled. From the judgment and the order overruling the motion for new trial the plaintiffs have appealed. As grounds for reversal the plaintiffs have set forth in their brief numerous assignments of error. Attention will be directed to these or such of them as require consideration later herein.

The pertinent facts as shown are that the plaintiffs are the owners of a certain building and an annex thereto in Hastings, Nebraska. The concern here is only with one side of the annex. On the west side of the annex is a wall about 13 inches in thickness. The height of this wall has not been disclosed. During the period covered by this controversy it appears that the area back of the wall was used for the handling of bakery goods

received by truck from Omaha, Nebraska. There are three doors in the wall. The doors are in dimension 8 x 10 feet. The bottoms of the doors are about 4 feet from the ground. A witness said that the bottoms of the doors are about 4 feet from the floor but it is obvious from exhibits and other testimony that he meant to say from the ground. The sill is about 6 inches thick. The width of the sill is about 18 inches. During a period beginning as early as 1950 and extending to about June 1953, bakery goods were delivered by Watson Bros. Transportation Co. by truck to Hastings, Nebraska. The trucks were each composed of a semi-trailer and a tractor. Deliveries were made five times each week. Delivery was made by backing the truck to the middle one of the three doors. The tractor would then be detached and removed. After unloading, usually several hours later, another tractor would be backed into the emptied semi-trailer, coupled onto it, and it would be moved away.

By their petition the plaintiffs alleged that at some time between April 17 and 27, 1953, in the operation of its trucks Watson Bros. Transportation Co. carelessly and negligently backed its trucks against the wall of the annex with such force as to shove the wall inward about 5 inches and that in consequence of which it was damaged to the extent of $1,960.

They further alleged that they were protected against the damage by the three insurance policies.

We are called upon here to determine only the question of whether or not the evidence was sufficient to sustain a finding and judgment that there was damage as charged at some time between April 17 and 27, 1953. There is no contention here that the defendants would not be required by the insurance policies to respond in the event that damage as alleged was proved. In the brief of plaintiffs the following appears: "Is the damage and loss to the building involved covered by the provisions of the insurance policy—is the only question

presented by the record, the transcript, and bill of exceptions, therefore, in the consideration of this case, and in deciding this question, it is only necessary to apply the law to the undisputed facts."

The defendants by stipulation appearing in the bill of exceptions admit that the insurance policies were in full force and effect. In their brief they state that the question for determination is as follows: "The only question involved on appeal, as we view it, is whether the decision and judgment of the trial court is supported by the evidence."

Notwithstanding, therefore, the numerous assignments of error, the only question to be considered is that of whether or not the decision is supported by the evidence, or, as applied to this case, was the court, on the evidence, justified in finding in favor of the defendants?

As has been pointed out this is an action at law and on the trial a jury was waived. In such a case the well-established rule for the consideration of evidence is as follows: "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. See, also, Cotner College v. Estate of Hester, 155 Neb. 279, 51 N. W. 2d 612; Scottsbluff Nat. Bank v. Blue J Feeds, Inc., 156 Neb. 65, 54 N. W. 2d 392; Grant v. Williams, 158 Neb. 107, 62 N. W. 2d 532.

Also in an action at law where a jury has been waived it is not the province of this court to resolve conflicts or to weigh evidence. If there is a conflict in the evidence this court in reviewing the judgment rendered will presume that controverted facts were decided by the trial court in favor of the successful party and the findings will not be disturbed unless clearly wrong. See Grant v. Williams, *supra.*

In the examination of the record on appeal for the purpose of ascertaining whether or not a finding of

fact and a judgment thereon may be sustained a subject for consideration is that of whether or not the evidence adduced responds to the issues made by the pleadings. See, Bauer v. Wood, 144 Neb. 14, 12 N. W. 2d 118; National Fire Ins. Co. v. Evertson, 153 Neb. 854, 46 N. W. 2d 489; Benson v. Walker, 157 Neb. 436, 59 N. W. 2d 739.

In order to make a determination upon the issue presented it becomes necessary to examine the record in the light of these rules.

Testimony to sustain the action of plaintiffs was given by C. G. Wallace, one of the plaintiffs. He testified substantially that on the 27th or 28th of April 1953, he was on an inspection trip of the building in question and while on this trip he observed the operation of a tractor in which an attempt was made to hook on to a semi-trailer which was standing at the location where deliveries of bakery goods were made; that on the first effort the connection was not successful but that on the second or third attempt it was; that in the backward movements to make the connection there was a jam so hard that it attracted his attention; and that he then made an examination which disclosed that the south wall was cracked on the south side, the center of the center door was cracked, the north door with the cement base was cracked, the wall was pushed in near the center about 5 inches which pulled the wall from the main building, the wall above the lintels of the center door was cracked, toward the south end of the west wall the wall was cracked from the south wall down to the lintel, that at the center of the west wall there was a crack from the lintel up to the cap of the wall at the top above the roof, that the wall below the cement lintel of the door was pushed in, and the door was pushed in about 5 inches.

There was other evidence that the condition described by this witness existed after the dates mentioned and none that it did not. There was competent

evidence that the reasonable cost of repair would be $1,960.

C. G. Wallace and no other witness testified that the condition described resulted from the operation which Wallace observed on April 27 or 28, 1953, and which attracted his attention. Furthermore there is no evidence of any particular incident at or about that time or at any time more remote which produced the condition.

It appears that the plaintiffs present two theories. One is that the condition described came about wholly by what occurred on April 27 or 28, 1953. The other is that the condition came about by a series of incidents the last of which occurred on April 27 or 28, 1953.

The substantial contention is that if it came about under the second theory the entire damage would be recoverable in this action since a part of it was embraced within the pleaded cause of action.

In the light of observation appearing later herein we do not deem it necessary to say whether or not this second theory is basically and legally sound. Assuming, but not deciding, that it is sound the determination upon the issue presented is dependent upon the evidence. The determination on the basis of the first theory is likewise dependent upon the evidence.

As pointed out there was no direct evidence as to when or how the condition complained of was produced. C. G. Wallace testified that he had not observed the damaged condition before the date of the incident described. Glenn Wallace testified that over a considerable period of time he had made numerous general inspections and observations of the building and had never discovered the damage.

Carl Hempel, a building contractor, was called as a witness for plaintiffs and testified as to the condition of the building. He examined it with a view as to the cost of repair. He was asked for his opinion as to when the damage occurred. On direct examination he said: "Well, I couldn't say when it happened." On cross-

examination he said: "I couldn't say. It could be once or a dozen of times, but it looked to me like one crack couldn't do that damage that way." He explained that by "crack" he meant backing a truck into the building or coupling a tractor to a standing semi-trailer. There was other testimony elicited from this witness of like character but a review of it would serve no useful purpose.

This we think is a fair summary of the pertinent evidence adduced in support of the theories of plaintiffs.

In the light of the principles of law hereinbefore set forth, in order to determine that the trial court erred in finding and rendering judgment in favor of the defendants it would be necessary to say that the evidence without controversy discloses that the incident described by C. G. Wallace as having occurred on April 27 or 28, 1953, caused the damage, or some part of it, of which complaint is made in this action. This would have to be true under either of the two theories since there is no evidence of any other incident. This we are unable to do.

Assuming that from the evidence a reasonable inference may be drawn that damage flowed from the incident it must be said that a reasonable inference may also be drawn that it did not. This is particularly true in the light of the testimony of the witness Hempel.

In this light the defendants are entitled to the benefit of the rule that in an action at law where a jury is waived this court in reviewing the judgment rendered will presume that controverted facts were decided by the trial court in favor of the successful party and the findings will not be disturbed unless they are clearly wrong.

In this case we are unable to say that the findings were clearly wrong. The judgment is therefore affirmed.

AFFIRMED.

CARLETON P. BARNEY, JR., APPELLEE, V. ORIE CASH ADCOCK ET AL., APPELLANTS.

75 N. W. 2d 683

Filed March 16, 1956. No. 33859.

1. **Highways: Negligence.** The violation of a statute intended to assure the safety of travelers on the public highways is not negligence as a matter of law but may be considered with other evidence in deciding an issue of negligence.
2. ———: ———. A traveler on a highway is required to exercise reasonable care for the safety of others thereon.
3. **Negligence.** What is reasonable care does not permit of definitive statement applicable to all cases but the presence or absence of reasonable care must be determined by the facts and circumstances of each case.
4. **Trial.** If there is evidence adequate to justify a finding for the party who has the burden of proof, in an action triable to a jury, the trial court may not disregard the proof and decide the case as a matter of law.
5. **Automobiles: Negligence.** It is a general rule, subject to exceptions not applicable to this case, that it is negligence as a matter of law for a motorist to drive an automobile on a public highway, at any time, at a speed or in such manner that it cannot be stopped or its course changed in time to avoid a collision with an object or obstruction discernible within his range of vision in the direction he is traveling.
6. **Negligence.** Negligence, to justify the recovery of damages, must have proximately caused or proximately contributed to the injury for which compensation is sought.
7. ———. Proximate cause, as used in the law of negligence, is that cause which in a natural and continuous sequence, unbroken by an efficient intervening cause, produces the injury, and without which it would not have occurred.
8. ———. An efficient intervening cause is a new and independent force which breaks the causal connection between the original wrong and the injury.
9. ———. An alleged cause of an accident may sometimes be merely a condition and not the real cause. The presence or activity of inanimate things is usually a mere condition and not the cause.
10. **Automobiles: Negligence.** The presence of smoke, snow, fog, mist, blinding headlights, or similar elements is not generally recognized as an intervening cause but as a condition which imposes upon the operators of automobiles the duty to assure the

safety of the public by the exercise of a degree of care commensurate with surrounding circumstances.

11. ———: ———. The presence of ice upon a highway is not generally an independent, intervening causal factor that relieves an automobile operator from responsibility for the result of his negligence.

12. ———: ———. In order for an accident to be solely attributable to an icy condition of the highway, it must be made evident that the accident would in some manner have occurred because of the ice, even if the motorist had not been negligent.

13. **Negligence.** If the separate, independent acts of negligence of two or more persons combine to produce a single injury, each of them is liable for resulting damages, though one of them alone might not have caused the injury.

14. **Trial: Appeal and Error.** The charge of a trial court to the jury should be confined to the issues presented by the pleadings and supported by the evidence. It is error to submit to the jury an issue not pleaded in the case.

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

16. **Trial.** The purpose of an instruction is to guide the jury in its deliberations and to aid it in rendering a correct verdict. Hence an instruction should be clear and concise and should not concern a matter foreign to the litigation.

APPEAL from the district court for Douglas County: ARTHUR C. THOMSEN, JUDGE. *Affirmed as to Edward D. Swank, and reversed and remanded as to Orie Cash Adcock.*

Fraser, Connolly, Crofoot & Wenstrand, for appellants.

Burbridge & Burbridge and *Herbert T. White,* for appellee.

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

BOSLAUGH, J.

Appellee claimed damages from appellants on the ground that injuries to the person and property of appellee by the collision of an automobile operated by him and motor vehicles driven by appellants were caused by their negligence.

The circumstances and result of the collision of the vehicles as alleged by appellee are that he was operating his automobile in a westerly direction on U. S. Highway No. 6 near One Hundred Eighth and Dodge Streets in Douglas County in a careful manner at about 11:40 a. m., January 4, 1953. Appellant Adcock, hereafter referred to as Adcock, was then driving his automobile in an easterly direction near that location. He turned to the north, traveled across the highway into the north lane thereof intended and maintained for westbound traffic nearest the center line of the highway, in front of and into the automobile of appellee, and he thereby caused a head-on collision of his car with the car of appellee. Appellant Swank, herein designated Swank, was operating his automobile in a westerly direction near the location described, traveling in the south lane of the highway for westbound traffic, and it collided with the rear of the automobile of appellee at about the time the automobile of Adcock collided with the front of the car of appellee. His car was destroyed. He sustained injuries and was compelled to incur expenses for hospital and medical services. The negligence of Adcock alleged by appellee consisted of his operating his car on the wrong side of the highway, failing to keep a proper lookout, driving his car against the car of appellee, and in failing to see the car of appellee as he should have done in time to have avoided the Adcock car coming in contact with the car of appellee. Swank was charged with negligence in failing to have control of his car, in failing to have maintained a proper lookout, in operating his car too near the car of appellee so that he could not stop within the clear distance between the two cars, in failing to see the car of appellee in time to have avoided the accident, and in failing to stop his car before it collided with the car of appellee. The combined and concurrent negligence of appellants was asserted by appellee to have been the cause of the accident and the losses sustained by him.

The claims of appellee as to the manner and cause of the accident were denied by appellants. Adcock admitted he was traveling eastward on the highway at about the time and place appellee alleged and that there was an accident involving the Adcock car and the car of appellee. The version of the happening pleaded by Adcock was that the car of appellee was moving westward on the south lane of the north half of the 4-lane highway and was in the act of attempting to pass a westbound large semi-trailer truck traveling on the outside lane of the north half of the highway. A short distance ahead of appellee was an automobile operated by Chester Johnson, hereinafter spoken of as Johnson. The highway at that location was downgrade. The Johnson car encountered ice on the road and this caused it to skid, slide, and go out of control of the driver and as a result thereof it traveled from the north half of the highway to and upon the south half thereof and its left rear side and end struck the left front part of the eastbound Adcock car. The collision disabled the steering apparatus of the Adcock car, caused it to move to the left onto the north part of the highway, and collide with the westbound car of appellee. Adcock asserted that the accident was unavoidable on his part. He was traveling on the right or proper side of the highway where his car was struck by the Johnson car. Swank stated he was driving his car westward at the time and place identified by appellee on the north part of the highway a considerable distance to the rear of the car of appellee as it moved toward the west. As Swank reached the crest of a hill he encountered the automobiles of Adcock and Johnson which had been involved in an accident on the slippery portion of the highway and the semi-trailer truck had partly jackknifed and was parked in the outside westbound lane. Swank promptly applied the brakes on his car and attempted to stop it but was unable, without negligence on his part, to fully stop it before it collided with the

rear of the car of appellee. Swank asserted the accident was unavoidable on his part.

Appellants charged that the accident was caused by the negligence of Johnson and the manner in which he operated and lost control of his car, the fact that he traveled on the wrong part of the highway, and ran into the Adcock car; and the negligence of appellee in driving his car at an unlawful speed under the circumstances while attempting to pass the semi-trailer truck, in continuing westward, and not changing his course to the right into the outside north lane when he knew or should have known that the Johnson car was out of control because of the condition of the road and the manner in which it had been operated.

The result of the trial of the case in the district court was a verdict and judgment for appellee. The separate motion of each of the appellants for a judgment without regard to the verdict or, in the alternative, for a new trial, was denied.

Appellants challenge the sufficiency of the evidence to sustain a recovery by appellee against either of them. The jury decided the issues of fact for appellee. He is entitled to have the evidence and the reasonable inferences deducible therefrom considered in this court most favorably to him. Benedict v. Eppley Hotel Co., 161 Neb. 280, 73 N. W. 2d 228.

The happenings important to the case occurred at or near the bridge or overpass at One Hundred Eighth and Dodge Streets on U. S. Highway No. 6 about 9 miles west of the city of Omaha. The highway extended east and west, was about 40 feet wide, and had four lanes. The two on the south were intended for the use of eastbound traffic and the two on the north for the use of travelers moving westward. There were at the scene of the accident yellow lines on either side of the center of the paved portion of the highway and the distance between them was about 20 inches. There was a line in the center of each half of the highway indicating the

inside boundary of the lanes. The highway was slightly downgrade from east of the bridge to it and the downward grade of the highway became more pronounced as it proceeded to the west. There was a deep cut through a hill at and extending in either direction from the location of the bridge. The maximum depth of the cut was about 50 feet. The exact distance of the cut from east to west was not shown but the record indicates that it was several hundred feet. The toe of each side of the cut commenced at the edge of the paved portion of the road and it was flush with the top of the pavement. The sides of the cut receded from the highway as they extended upward. The highway was subject to drainage from the sides of the cut. When it was thawing water would run in the cut and when it became colder it would freeze. The sun did not shine on the road where it passed through the cut. There had been no snowfall recently before the time of the accident but there was snow on the ground surrounding the traveled portion of the highway. The paved part of the highway was in good condition for travel and none of the parties involved in the accident or who appeared as witnesses had known of any ice on the highway or had experienced any difficulty in using it the day of the accident except as related herein. There was ice on the highway from about 200 feet east of the bridge through the cut and west of the bridge for a considerable distance.

The time of the events involved in this case was about noon January 4, 1953. The day was clear and cold. The westbound travelers on the highway in that vicinity immediately prior thereto were John B. Whittle, the operator of a Diesel semi-trailer truck; Chester Johnson, the operator of a 1940 Ford coach; Carleton P. Barney, Jr., the driver of a 1952 Nash Statesman; Edward W. Swank, the driver of a 1952 Oldsmobile sedan; and Don Erixon. They were traveling in the order above listed. Orie Cash Adcock was traveling from the west driving a 1950 Studebaker coach. The truck was in the extreme

north or outer lane of the highway intended for westbound traffic, traveling about 45 miles per hour. Johnson was traveling 50 miles per hour in the south lane for westbound traffic when he overtook the truck east of the bridge a sufficient distance that he was going upgrade. Johnson traveled about 300 feet in passing the truck. He cleared it and attempted to turn north into the outside lane on the highway when his car went into a skid. There was ice on the surface of the road. He was then about 250 feet ahead of the truck and he was partly in both of the north lanes. His car skidded alternately southward and northward and finally the car while on an angle to the highway of about 45 degrees, with its rear to the southeast and the front to the northwest, skidded in a southwest direction. The Adcock car was moving eastward on the highway. The left side and rear of the Johnson car and the left front of the Adcock car collided. Johnson said when his car first slid on the ice he saw the Adcock car 500 or 600 yards to the southwest, that it was traveling with its wheels on either side of the middle line between the south lanes, and that when Johnson saw the Adcock car the second time it was about 300 yards away and it was further north in the center of the eastbound lanes. Johnson did not know how far his car skidded before it struck the Adcock car. The Johnson car skidded across the entire highway toward the southwest and came to rest against a tree off the grade of the highway and to the south of it. It was a very considerable distance west of the bridge over the highway. The Johnson car and the Adcock car collided with considerable force. The rear bumper and door of the baggage compartment of the Johnson car were entirely separated from it. The Adcock car was badly damaged on its left front. The steering apparatus of it was put out of condition by the collision so that Adcock could not control it. He never recovered control of his car. It traveled to the north and east and collided head-on with the car of appellee

as it was traveling westward in the inner lane of the north half of the highway.

Swank was operating his car in the south lane of the north half of the highway moving westward at 45 to 50 miles per hour approaching the place where the bridge was over the highway. He knew there were vehicles traveling ahead of him. The first indication of trouble he observed was the Adcock car about 200 or 250 feet away coming from the left or south "* * * shooting partially across the highway" to the north. He was about 200 feet east of the truck and he saw it was starting to jackknife, with the rear end of the trailer moving south toward the center of the highway. He immediately used the brakes on his car. He "pumped" them, that is, he put them on and off because he supposed the highway was slippery in view of the movement of the truck. He was then about 100 feet behind the car of appellee and he had decreased his speed to 30 to 35 miles per hour. He was unable to stop his car and it collided with the rear of the car of appellee at about the time the Adcock car contacted it on its front end. A member of the safety patrol who investigated the accident testified that he was told by Swank while he was still at the scene of the accident that the speed of his car was 60 miles per hour immediately before he collided with the car of appellee.

The Erixon car was traveling about 100 feet behind the Swank car at a speed of 35 to 40 miles per hour at the time of the collision of the car of appellee and the Swank car. He applied the brakes of his car but they were ineffective because of the icy surface. The car of appellee and the Swank car bumped and then bounced apart and the Erixon car got between them without contact and continued across the highway and came to rest on the south shoulder of it.

Appellee produced evidence that when the Johnson car first went into a skid Adcock was on the south part of the highway 500 or 600 yards west of it. It continued

to skid and to be out of control. Johnson saw Adcock when he was about 300 yards west of the Johnson car and he was then operating his car to the north nearer the center of the highway than when he was first observed by Johnson. There was testimony received without objection substantially in the form of conclusions and, in some respects, speculation, that no part of the Johnson vehicle got south of the center of the highway until after it was struck by the Adcock car. Adcock was driving his car, that had been in use for only about 2 years, on dry pavement. It had good brakes, good tires, and was generally in satisfactory condition. His speed was 40 miles per hour. He saw the Johnson car 200 feet from him and he noticed that it was in trouble. It was then west of the bridge, it was skidding on the inner lane for westbound traffic on ice, and the grade of the highway was downward. There was nothing between Adcock and the Johnson car to obstruct vision. Adcock looked to the right to verify his position on the highway and then looked a second time at the Johnson car. It was then coming broadside across the highway toward the Adcock car. The Johnson car struck the Adcock car. Adcock did not apply the brakes on his car and did not attempt to stop it or avoid the Johnson car except he released the accelerator pedal on his car. The testimony of Adcock was that the Johnson car struck the Adcock car while it was in the outside south lane of the highway.

The driver of a vehicle on a public highway is required to operate it upon the right half of the highway unless it is impracticable to do so. § 39-746, R. R. S. 1943; Callahan v. Prewitt, 141 Neb. 243, 3 N. W. 2d 435; Krepcik v. Interstate Transit Lines, 154 Neb. 671, 48 N. W. 2d 839. The violation of a statute intended to insure the safety of people using the public highways is a fact which may be considered with all the other facts and circumstances shown in evidence in determining whether negligence has been established. Sege-

bart v. Gregory, 156 Neb. 261, 55 N. W. 2d 678; Plumb v. Burnham, 151 Neb. 129, 36 N. W. 2d 612. Negligence, to justify a recovery of damages, must have proximately caused or contributed to the injury for which compensation is sought. Ricker v. Danner, 159 Neb. 675, 68 N. W. 2d 338. A user of a highway is required to exercise reasonable care for the safety of others. What is reasonable care does not lend itself to definitive statement which automatically resolves all cases. The presence or absence of reasonable care must be determined by the facts and circumstances of each case. Haight v. Nelson, 157 Neb. 341, 59 N. W. 2d 576; Fick v. Herman, 159 Neb. 758, 68 N. W. 2d 622. If there is evidence sufficient to sustain a finding for the party who has the burden of proof in an action triable to a jury the trial court may not disregard the proof and decide the case as a matter of law. Haight v. Nelson, *supra;* Shields v. County of Buffalo, 161 Neb. 34, 71 N. W. 2d 701. The proof in this case presented an issue of fact as to whether or not Adcock was guilty of negligence that was the proximate cause or contributed to the injuries for which compensation was sought by appellee.

Swank knew there were vehicles on the highway ahead of him traveling toward the west. The day was clear. The sun was shining. Vision was unobstructed. He was alerted to the fact that there was unusual hazard on the highway 200 or 250 feet in front of him consisting of, as he expressed it, the Adcock car shooting partially across the highway from the south to the north. Swank saw the truck that was ahead of him about 200 feet start to jackknife and the rear end of the trailer moved south toward the center of the highway. The speed of the Swank car was then admittedly 40 to 50 miles per hour. The speed was decreased some but he testified that he was traveling 30 to 35 miles per hour when he was about 100 feet east of the rear end of the car of appellee with which the Swank car collided. The testimony of the safety patrolman was that Swank

told him at the place of the accident that the speed of the Swank car immediately before the collision was 60 miles per hour.

Section 39-749, R. R. S. 1943, provides in part: "The driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent, having due regard to the speed of such vehicles and the traffic upon and condition of the highway." It is firmly established in this jurisdiction, with exceptions not applicable to this case, that it is negligence for a driver to drive an automobile on a highway in such a manner that he cannot stop it and avoid collision with an object within the range of his vision ahead. Nothing will excuse his failure to see what is plainly in sight. If he did not see he was not alert to the situation and if he saw and did not avoid a collision he did not have the required control. Armer v. Omaha & C. B. St. Ry. Co., 151 Neb. 431, 37 N. W. 2d 607.

In Murray v. Pearson Appliance Store, 155 Neb. 860, 54 N. W. 2d 250, the court said: "As a general rule it is negligence as a matter of law for a motorist to drive an automobile on a highway in such a manner that he cannot stop in time to avoid a collision with an object within the range of his vision." See, also, Doleman v. Burandt, 160 Neb. 745, 71 N. W. 2d 521.

In Buresh v. George, 149 Neb. 340, 31 N. W. 2d 106, the reason of this rule is stated: "The basis of this rule is that a driver of an automobile is legally obligated to keep such a lookout that he can see what is plainly visible before him and that he cannot relieve himself of that duty. And, in conjunction therewith, he must so drive his automobile that when he sees the object he can stop his automobile in time to avoid it. * * * There is nothing that will excuse his failure to see what was plainly in sight if he had maintained a proper lookout."

There are exceptions to the general rule stated above. Miers v. McMaken, 147 Neb. 133, 22 N. W. 2d 422. The general rule has no application in any case when reason-

able minds might differ on whether or not the operator of a motor vehicle exercised the care and caution required of a reasonably careful and cautious person under the circumstances of the particular situation. Miers v. McMaken, *supra;* Haight v. Nelson, *supra;* Fulcher v. Ike, 142 Neb. 418, 6 N. W. 2d 610; Fick v. Herman, *supra.*

Appellants argue that a slippery condition of a highway caused by ice thereon may be considered the proximate cause of a motor vehicle becoming unmanageable and colliding with another vehicle. Adcock says that he may not be reasonably charged with the duty of anticipating that Johnson would encounter an icy area of the highway, lose control of his car, and that it would skid into and disable the Adcock car. He thinks that such intervening circumstances were the proximate cause of the resulting damages sought to be recovered in this case.

Swank contends that ice upon a highway may be considered the proximate cause of a vehicle becoming unmanageable and colliding with another vehicle. He says that he may not be reasonably charged with the duty of anticipating that the Adcock car would collide with the Barney car and substantially stop its progress as it was traveling west and that the condition of the road would prevent Swank from stopping his car before it collided with the Barney car. He thinks that such intervening circumstances were the proximate cause of the resulting damages sought to be recovered in this case.

Actionable negligence exists when the injury or the loss is the proximate result thereof. The proximate result must be the natural and probable consequence which ought to have been foreseen or reasonably anticipated in the light of the attendant circumstances. An injury is not actionable if it would not have resulted from the alleged negligence but for the interposition of a new and independent cause. Proximate cause, as used in the law of negligence, is that cause which in the natural and continuous sequence, un-

broken by an efficient intervening cause, produces the injury, and without which the injury would not have occurred. An efficient, intervening cause is a new and independent force which breaks the causal connection between the original wrong and the injury. The cause of an injury is that which actually produces it while the occasion is that which provides an opportunity for the causal agency to act. An alleged cause of an accident may sometimes be merely a condition and not the real cause. The existence or activities of inanimate things are usually mere conditions and not causes. Ricker v. Danner, *supra.*

In Murray v. Pearson Appliance Store, *supra,* this court said: "The existence or presence of smoke, snow, fog, mist, blinding headlights, or other similar elements which materially impair or wholly destroy visibility are not to be deemed intervening causes but rather as conditions which impose upon the drivers of automobiles the duty to assure the safety of the public by the exercise of a degree of care commensurate with such surrounding circumstances."

Ice upon a highway is not generally considered an independent, intervening causal factor that relieves a motor vehicle operator from responsibility for the result of his negligence. In Allen v. Clark, 148 Neb. 627, 28 N. W. 2d 439, the court observed: "Now, in the case at bar, there was ice in the highway, where defendant was driving too fast to avoid the collision, but the existence of this ice might well have been anticipated by an ordinarily careful driver, for in a case in which smoke made it impossible to see another car, this court said: 'In such case, the smoke is a condition which the jury should consider in connection with the other evidence in determining the question of negligence.' Anderson v. Byrd, 133 Neb. 483, 275 N. W. 825."

In King v. Carnahan, 61 Ohio App. 84, 22 N. E. 2d 436, the defendant sought to excuse his liability for the collision of his truck operated by his employee with

an automobile because an area of the highway coated with ice was obscured by a curve in the road until the truck was within about 200 feet of the iced area of the road. Defendant argued that these facts constituted a legal excuse for violation of the provision of the statute which prohibited any person from driving a motor vehicle upon a public highway at a greater speed than would permit him to bring it to a stop within the assured clear distance ahead. The court rejected the argument of defendant by this language: "A consideration of these facts discloses that they all relate to the condition of the surface and other conditions of the highway and are such facts as it is the duty of the driver of a motor vehicle under the statute to take into consideration in operating his motor vehicle, and none of them relates to an independent, intervening causal factor; and such facts, therefore, do not constitute a legal excuse for the violation of the provisions of said section by the operator of defendant's truck."

A condition of ice on a highway being accepted as the proximate cause of an accident thereon is that the proof must be that the accident would in some way have occurred by virtue of the existence of the ice even if the motorist had not been negligent. In Colas v. Grzegorek, 207 F. 2d 705, the United States Court of Appeals said: "In order for accident to be solely attributable to icy condition of highway, it must be evident that accident would in some manner have happened because of ice even if motorist had not been negligent." See, also, Hickey v. Missouri Pacific R. R. Corp., 8 F. 2d 128; McDowell v. Interstate Oil Co., 208 Iowa 641, 224 N. W. 58, corrected on rehearing 225 N. W. 855; Hart v. Wabash R. R. Co., 177 F. 2d 492; Restatement, Torts, § 432, p. 1161.

It was the duty of the state safety patrol to travel the road frequently, watch for any unusual condition of it, and report to the proper official if anything was needed. A member of the patrol had been over the

highway where the accident occurred earlier that day. He did not find it in unsatisfactory condition. There were sand boxes along the highway in the cut but it was not thought necessary to sand the highway at that location and no sand was applied to it. Appellee started to pass the truck but he saw the rear of the trailer moving towards the lane he was in and he decreased the speed of his car and did not pass the truck. He had no difficulty in controlling his car. Motorists who arrived at the scene of the accident by use of the highway experienced no difficulty in traveling on it, stopping their cars at or near the place of the accident, and afterwards proceeding on their respective ways. It was not made evident that the ice on the highway would in some manner have caused the accident if there had been an absence of negligence. Adcock in his argument assumes that he was not in any way negligent; that the Johnson car went out of control of its driver and skidded across the highway to the south; that it collided with the Adcock car while it was prudently being operated in the outside south lane of the highway; and that it was thereby damaged and made unmanageable. If all these things were established the situation and result would be different. The obstacle is that the jury on conflicting evidence as to these things found against Adcock. The slippery condition of the highway may not be considered under the circumstances of this case the proximate cause of the accident and injuries of which appellee complains.

The trial court instructed the jury as to the doctrine of concurrent negligence and upon what findings by the jury it should or should not be applied to the case. The correctness of the substance of the charge in this respect is not challenged. Appellants argue that the claim of appellee against Adcock was based on the contention that he negligently operated his car on the wrong side of the highway and drove it against the front part of the car of appellee when he was properly pro-

ceeding toward the west on his proper side of the road and that the wrong charged by appellee against Swank was that he negligently permitted the car he was driving toward the west to travel into and against the rear of the car of appellee about the same time that the Adcock car collided with the front of his car. Appellants conclude that these acts if conceded and negligently done did not constitute concurrent negligence. There is an absence of any authority cited to support their contentions in this regard. The definition of concurrent negligence formulated many years ago in this jurisdiction and since consistently approved and applied condemns the contentions of appellants. If separate, independent acts of negligence by different persons combine to produce a single injury, each participant is liable for resulting damage, though one of them alone might not have caused injury. Stark v. Turner, 154 Neb. 268, 47 N. W. 2d 569; Wright v. Lincoln City Lines, Inc., 160 Neb. 714, 71 N. W. 2d 182.

The district court advised the jury by instruction No. 1 that the charges made by appellee against Adcock were that he was operating his car towards the east and suddenly turned it to the north across the center of the highway into the south lane intended for westbound traffic directly in front of and into the automobile which appellee was operating towards the west and that the negligence alleged by appellee against Adcock was (a) in operating his automobile to the left of the center of the highway into the lane for westbound traffic; and (b) in driving his automobile into and against the automobile of appellee. The right of the jury to render a verdict against Adcock was conditioned, by the charge of the trial court, upon appellee's establishing by the greater weight of the evidence that Adcock was negligent in one or both of the respects stated above; that his negligence was the proximate cause or was proximately a contributing cause of the accident

involved in the case; and that appellee suffered injury and damages because of it.

Instruction No. 16 given by the court contains the following: "If a preponderance of the evidence fails to establish that defendant Adcock did not use ordinary care in his driving when he saw the Johnson car skidding and fails to establish that immediately before and at the time of the collision with the Johnson car Adcock was north of the yellow line separating the east and west highway lanes, and if you find from the evidence that the left rear of the Johnson car collided with the Adcock car while the latter was in the eastbound highway lanes, and you further find that the control of the Adcock car was lost by this defendant due solely to such collision, and that the defendant Adcock was not negligent in his driving after such collision, then you are warranted in returning a verdict for defendant Adcock." Adcock contends that the instruction was prejudicial. It required the jury to find that "Adcock was not negligent in his driving after such collision" of the Johnson car with the Adcock car before the jury could return a verdict for Adcock. Appellee did not charge by pleading and he did not produce evidence that Adcock was negligent in the operation of his car after it was in collision with the Johnson car. The evidence is that the Adcock car was injured when contact with it was made by the Johnson car so that it was not thereafter manageable; that Adcock attempted unsuccessfully by all means available to him to control it; that he was unable to do so; and that he never had control of the car after its collision with the Johnson car. The court had limited the charges of negligence against Adcock to the two above stated but by instruction No. 16 it introduced a new and additional item of negligence which was unsupported by either pleading or evidence. The trial court made a finding by the jury that Adcock was not negligent in the operation of his car after the collision an indispensable necessity to the exoneration of Adcock

from damages to appellee. The conjunction "and" joined the parts of instruction No. 16. A trial court may not make the success of a party to the case dependent upon a hypothesis foreign to the litigation. Perrine v. Hokser, 158 Neb. 190, 62 N. W. 2d 677; Gable v. Pathfinder Irr. Dist., 159 Neb. 778, 68 N. W. 2d 500; Gain v. Drennen, 160 Neb. 263, 69 N. W. 2d 916.

The charge had in preceding part of it advised the jury substantially that if the appellee had failed to prove by a preponderance of the evidence that Adcock did not operate his automobile to the left of the center of the highway into the lane for westbound travel or did not drive it into or against the car of appellee the verdict should be for Adcock. This part of the charge said nothing about Adcock negligently driving his car after the contact of it and the Johnson car. There is a direct conflict in the part of the charge just referred to and instruction No. 16. Conflicting instructions are erroneous and they are prejudicial unless it is apparent from the record that the jury was not misled thereby because it is impossible to know which of the directions the jury followed. Peterson v. Chicago, M. & St. P. Ry. Co., 101 Neb. 3, 161 N. W. 1043; Bryant v. Modern Woodmen of America, 86 Neb. 372, 125 N. W. 621, 27 L. R. A. N. S. 326, 21 Ann. Cas. 365; Sanderson v. Huffman, 132 Neb. 321, 271 N. W. 870; Hief v. Roberts Dairy Co., 138 Neb. 885, 296 N. W. 331; Harsche v. Czyz, 157 Neb. 699, 61 N. W. 2d 265.

The quoted part of instruction No. 16 requires the jury to find a double negative, a single negative, and three affirmatives before it could properly exonerate Adcock from liability for negligence. The instruction is involved and confusing and is incorrect in the respect above discussed. The inquiry in this regard as shown by the record was properly: Did the evidence fail to show that Adcock operated his car left of the center of the highway in the lane for westbound traffic or did the evidence fail to show that he drove his car into and

against the automobile of appellee? If the finding as to both was in the affirmative Adcock was entitled to a favorable verdict. The purpose of an instruction is to guide the jury in its deliberations and to aid it in rendering a correct verdict. Hence an instruction should be clear and concise and should not go beyond any issue or issues of fact in the case as made by the pleadings of the parties. Platte Valley Public Power & Irr. Dist. v. Armstrong, 159 Neb. 609, 68 N. W. 2d 200. The proof intended to show that Adcock operated his car north of the center of the highway and that the collision between it and the Johnson car took place on the north half of the highway is slight and unsatisfactory. It may not be said, under the circumstances of this case, that instruction No. 16 was error without prejudice to Adcock.

The amount of the verdict and judgment is not claimed to be excessive except the jury found the damage to the automobile of appellee was $1,950 and appellants claim that the proof shows that it was only $1,590 or $360 less than the jury allowed. There was some evidence that an appraisal or estimate of the value of the car of appellee before the accident was $2,150 and that the salvage value of it after the accident was $510, the amount for which it sold. There was proof produced by appellee that the value of his car before the accident was $2,455 and that the value of it after the accident was $500. There was evidence to sustain the verdict. Appellee is entitled to the most favorable view of the evidence and it may not therefore be said to be excessive.

The judgment as to Edward D. Swank should be and it is affirmed.

The judgment as to Orie Cash Adcock should be and it is reversed and the cause is remanded for further proceedings as to him.

AFFIRMED AS TO EDWARD D. SWANK, AND REVERSED AND REMANDED AS TO ORIE CASH ADCOCK.

GLORIA ANN BRAMHALL, APPELLEE, V. ORIE CASH ADCOCK ET AL., APPELLANTS.
75 N. W. 2d 696

Filed March 16, 1956. No. 33860.

1. **Trial: Appeal and Error.** It is prejudicial error for the district court to include in its instructions to the jury allegations of fact made in a pleading in the cause which are without evidence tending to establish them.
2. ———: ———. It is error to charge the jury that allegations of negligence made in a pleading may be considered by it in arriving at a verdict in the cause and also to instruct the jury in effect that such allegations should be disregarded by it.
3. ———: ———. In such a situation as that described above the error is prejudicial, unless it is apparent from the record that the jury was not misled by the charge, because it is impossible to know which of the directions the jury followed.
4. **Automobiles: Negligence.** It is a general rule, subject to exceptions not applicable to this case, that it is negligence as a matter of law for a motorist to drive an automobile on a public highway, at any time, at a speed or in such manner that it cannot be stopped or its course changed in time to avoid a collision with an object or obstruction discernible within his range of vision in the direction he is traveling.
5. ———: ———. The basis of the foregoing general rule is that the driver of an automobile is legally and mandatorily obligated to keep such a lookout that he can see what is plainly visible before him and to operate his automobile in such a manner that he can stop it and avoid collision with any object in front of him.
6. **Negligence.** Proximate cause, as used in the law of negligence, is that cause which in a natural and continuous sequence, unbroken by an efficient intervening cause, produces the injury, and without which it would not have occurred.
7. ———. An efficient intervening cause is a new and independent force which breaks the causal connection between the original wrong and the injury.
8. **Automobiles: Negligence.** The presence of smoke, snow, fog, mist, blinding headlights, or similar elements is not generally recognized as an intervening cause but as a condition which imposes upon the operators of automobiles the duty to assure the safety of the public by the exercise of a degree of care commensurate with surrounding circumstances.
9. ———: ———. The presence of ice upon a highway is not generally an independent, intervening causal factor that relieves

an automobile operator from responsibility for the result of his negligence.

10. ———: ———. In order for an accident to be solely attributable to an icy condition of the highway, it must be made evident that the accident would in some manner have occurred because of the ice, even if the motorist had not been negligent.

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

Fraser, Connolly, Crofoot & Wenstrand, for appellants.

Burbridge & Burbridge and *Herbert T. White,* for appellee.

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

BOSLAUGH, J.

The subject of this litigation is a claim for damages made by appellee against appellants because of injuries she sustained by the collision of an automobile in which she was a passenger and motor vehicles owned and negligently operated by appellants.

The substance of the cause of action alleged by appellee is as follows: She was traveling as a guest of Carleton P. Barney, Jr., hereafter identified as Barney, in an automobile owned and operated by him at about 11:40 a. m., January 4, 1953, towards the west on U. S. Highway No. 6 near One Hundred Eighth and Dodge Streets in Douglas County. Appellant Adcock, called Adcock herein, was then traveling on the highway near that location towards the east in an automobile owned and operated by him. He drove his car north across the highway into the north lane thereof nearest the center of the highway intended for westbound traffic, in front of and into the automobile in which appellee was being transported, and caused a head-on collision of the cars. Appellant Swank, spoken of herein as Swank, was operating his automobile towards the west near the location described on the inner or south lane of the highway

intended for westbound traffic and it collided with the rear of the automobile in which appellee was a passenger at about the identical time the car of Adcock collided with the front of it. The car occupied by appellee was substantially destroyed and she was seriously injured as a result of the collisions which were caused, as she alleged, by the concurrent negligence of appellants. Adcock was charged with operating his car on the wrong side of the highway without keeping a proper lookout, driving it into the car in which appellee was a passenger, and failing to use reasonable care as the operator of a motor vehicle by the exercise of which he could have avoided causing injury to appellee.

Appellee asserted that Swank was negligent in failing to keep a proper lookout for the car in which appellee was traveling and which was directly in front of the Swank car in the inner lane of the north half of the highway, in failing to have his car under control, in operating it at an improper distance behind the car of Barney so that Swank could not stop his car within the distance between the cars, and in failing to stop his car before it collided with the Barney car.

The claims of appellee as to the manner and cause of the accident were denied by appellants. Appellants pleaded that the proximate cause of the accident involved in this case was the negligence of Johnson and Barney.

Adcock admitted that he was driving east on the highway at about the time and place of the accident involving his car and the car of Barney. The version of the happening as pleaded by Adcock is that Chester Johnson, hereafter referred to as Johnson, was going west in his automobile in the inner lane of the highway for westbound traffic a short distance ahead of the Barney car. The highway was in that location downgrade as it extended west. The Johnson car encountered ice on the surface of the highway. This caused it to skid and go out of control of the driver. As a result thereof it trav-

eled from the north half of the highway to and upon the south half thereof and its left rear side and end collided with the left front of the eastbound Adcock car. The steering apparatus of the Adcock car was disabled and the collision caused it to travel to the northeast onto the north part of the highway and it collided with the Barney car. Adcock asserted that he was traveling on the extreme right or the proper side of the highway when his car was struck by the Johnson car and that the accident was unavoidable on his part.

Swank pleaded that he was driving his car towards the west, near the place described by appellee, on the north part of the highway a considerable distance to the rear of the Barney car as it moved towards the west. Swank reached the crest of the hill and encountered the automobiles of Adcock and Johnson which had been involved in an accident on the slippery part of the road and the semi-trailer truck which had partly jackknifed and the rear of the trailer was moving towards the south. Swank applied the brakes on his car, attempted to stop, but was unable, without negligence on his part, to fully stop his car before it collided with the rear of the Barney car. Swank asserted that the accident was unavoidable on his part.

The trial of the case resulted in a verdict for appellants and a judgment dismissing the case. A motion for new trial was sustained and the judgment of dismissal was vacated. This appeal is from the order of the trial court granting a new trial of the case.

The case of Barney v. Adcock, *ante* p. 179, 75 N. W. 2d 683, concerned the identical accident that is the basis of the present case. The plaintiff in the former case was the owner and operator of the automobile in which appellee in this case was a passenger. The evidence in the former case is outlined in the opinion. The proof in each case is in all material respects identical except the part referring to the injuries and losses claimed by the respective plaintiffs. Reference to the

evidence will be made to the extent required in the discussion of matters necessary to a decision in this case. The problem presented by the appeal is whether or not there was a legal reason for awarding appellee a new trial of the case.

The trial court gave no reason for its action in sustaining the motion of appellee and granting her another trial of the case. The duty on this appeal is on the appellee to designate the error she contends exists in the record that justifies the action of the trial court. If there is a legal reason therefor it must exist in the record. Such a record will be scrutinized as closely and critically as an order denying a new trial. Pongruber v. Patrick, 157 Neb. 799, 61 N. W. 2d 578; Vielehr v. Malone, 158 Neb. 436, 63 N. W. 2d 497.

Appellee argues in support of the order of the trial court awarding her new trial of the case that there was prejudicial error at the trial because of the statement in instruction No. 2 that: "This defendant (Adcock) claims that the negligence of Mr. Barney consisted of his driving his automobile in such a manner that he could not stop or slow his automobile or steer the same to his right and avoid an accident; and * * * this defendant asks that the plaintiff's petition be dismissed" and because of the statement in instruction No. 3 that: "This defendant (Swank) further says that the contributing cause to the accident was negligence on the part of plaintiff's driver, Carleton P. Barney, Jr., in driving his car in such a manner that he was unable to slow or stop his automobile or steer same in such a manner as to avoid an accident; and this defendant asks that the plaintiff's petition be dismissed."

It is not claimed that these were not a correct interpretation of allegations of the answers of appellants but total absence of evidence tending to prove any of the matters contained in the quoted statements is the essence of the objection of the appellee. There is no proof in the record tending to show that Barney improperly

or negligently operated his automobile; that he could not slow it, stop it, or steer it to his right or in any manner he desired; that he had opportunity or time to attempt to escape the collision after he was aware or was charged with notice of the impending accident; or that he could have in any manner avoided the collision of the Adcock car and the Swank car with the Barney automobile. The quoted statements are without support in the evidence. It has been many times decided and recently repeated that it is prejudicial error for the trial court to set forth in an instruction to the jury matters of fact stated in a pleading which are without evidence tending to establish them. In Allen v. Clark, 148 Neb. 627, 28 N. W. 2d 439, this court said: "It is reversible error for the court to include, in its instructions to the jury, allegations of fact found in the pleadings but which have not been supported by any evidence." See, also, State v. County of Cheyenne, 157 Neb. 533, 60 N. W. 2d 593; Fuss v. Williamson, 159 Neb. 525, 68 N. W. 2d 139; Fick v. Herman, 159 Neb. 758, 68 N. W. 2d 622; Welstead v. Ryan Construction Co., 160 Neb. 87, 69 N. W. 2d 308; Doleman v. Burandt, 160 Neb. 745, 71 N. W. 2d 521.

The error in this respect was aggravated by instruction No. 9 which stated that appellee was a guest in the Barney car at the time of the accident and "If you find that a proximate cause of the accident was due to negligence on the part of her own driver (Barney), either or (in) whole or in part, any such negligence of the driver is not imputed to her * * *." There is no evidence that Barney was negligent. The possibility suggested by instruction No. 9 that the jury might find that the negligence of Barney was a proximate cause of the accident was not only confusing but may have caused the jury to accept as proof of negligence on the part of Barney the matters quoted from instructions Nos. 2 and 3. There was no other matter presented to the jury concerning negligent conduct of Barney. The statements

quoted from instructions Nos. 2 and 3 were in conflict with the part of instruction No. 9 that advised the jury any negligence of the driver Barney would not be imputed to appellee. The court by instructions Nos. 2 and 3 permitted the jury to consider negligence of Barney in the manner of driving his car and in failing to stop or move to the right in an attempt to avoid an accident. By instruction No. 9 the court told the jury that any negligence of Barney was immaterial and could not affect any right appellee had to recover against appellants. A quite similar situation was considered in Peterson v. Chicago, M. & St. P. Ry. Co., 101 Neb. 3, 161 N. W. 1043, and the conclusion was stated: "It is erroneous to state to the jury by instructions that certain allegations of negligence set forth in the petition are to be considered by it in making up its verdict, and also to tell the jury that such allegations should be disregarded by them. Unless from the whole record it is apparent the jury were not misled thereby, the error must be considered prejudicial, since it is impossible to know which of the directions it followed." See, also, Bryant v. Modern Woodmen of America, 86 Neb. 372, 125 N. W. 621, 27 L. R. A. N. S. 326, 21 Ann. Cas. 365; Sanderson v. Huffman, 132 Neb. 321, 271 N. W. 870; Hief v. Roberts Dairy Co., 138 Neb. 885, 296 N. W. 331; Harsche v. Czyz, 157 Neb. 699, 61 N. W. 2d 265. It is not apparent from the record and it cannot be ascertained that the jury was not misled by the error in and inconsistency of these instructions. It cannot be said that appellee was not prejudiced thereby.

The accident with which this case is concerned happened on U. S. Highway No. 6 about 9 miles west of Omaha near an overpass over the highway. There was a large, deep cut through high ground at that location extending from east to west for several hundred feet. The road was slippery because of ice in that location for a considerable distance. The highway was generally in normal condition for travel. None of the

parties concerned in the happenings resulting in this litigation knew of ice on it and none of them had experienced difficulty in using it the day of the accident except at or near the place where it occurred. The highway was well equipped with lines and signs to guide and warn travelers thereon. The highway was about 40 feet wide and had four lanes, two for westbound travel and two for eastbound travel.

The time of the accident was about noon on January 4, 1953. The day was clear and cold. A large semi-trailer truck was traveling west in the extreme north or outer lane of the highway. It was followed by a car operated by Chester Johnson. Barney was driving his car behind the Johnson car and he was followed by Swank. Johnson passed the truck and when he attempted to return to the outer lane of the highway his car went into a skid, control of it was lost, and because of this it and the Adcock car, proceeding from the west to the east, collided. The Adcock car went out of control, moved northeast to the north side of the road and collided nearly head-on with the Barney car in which appellee was riding as a guest. The Barney car was traveling in the south or inner lane of the highway for westbound traffic. Swank was operating his car in this lane following the Barney car traveling 45 to 50 miles per hour approaching the place where the overpass crossed the highway.

Swank knew there were vehicles traveling ahead of him. The first indication of trouble he observed was the Adcock car about 200 or 250 feet away from him coming from the left or south across the highway to the north. Swank was something like 200 feet east of the truck and he saw it starting to jackknife with the rear end of the trailer moving south toward the center of the highway. He immediately used the brakes on his car. He "pumped" them on and off because he supposed the highway was slippery in view of the movement of the truck. He was then about 100 feet behind the

Barney car and had decreased the speed of his car to 35 to 40 miles per hour. He did not attempt to turn his car to the north into the outside lane of the highway which was clear at that time. He was unable to stop his car and it collided with the rear of the Barney car at about the time the Adcock car collided with its front end. The Barney car was substantially destroyed and appellee sustained serious injuries.

Section 39-749, R. R. S. 1943, provides in part: "The driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent, having due regard to the speed of such vehicles and the traffic upon and condition of the highway." It is firmly established in this jurisdiction as a general rule that it is negligence for a motorist to operate his vehicle on a highway in such a manner that he cannot stop it and avoid a collision with an object within his range of vision in the direction he is traveling. Nothing will excuse his failure to see what is plainly in sight. If he does not see it must be concluded that he is not alert to the situation and if he does see and does not avoid a collision he does not have the required control. Armer v. Omaha & C. B. St. Ry. Co., 151 Neb. 431, 37 N. W. 2d 607.

In Murray v. Pearson Appliance Store, 155 Neb. 860, 54 N. W. 2d 250, the court said: "As a general rule it is negligence as a matter of law for a motorist to drive an automobile on a highway in such a manner that he cannot stop in time to avoid a collision with an object within the range of his vision." See, also, Doleman v. Burandt, *supra.*

In Buresh v. George, 149 Neb. 340, 31 N. W. 2d 106, the reason of this rule is stated: "The basis of this rule is that a driver of an automobile is legally obligated to keep such a lookout that he can see what is plainly visible before him and that he cannot relieve himself of that duty. And, in conjunction therewith, he must so drive his automobile that when he sees the

object he can stop his automobile in time to avoid it. * * * There is nothing that will excuse his failure to see what was plainly in sight if he had maintained a proper lookout."

There are exceptions to the general rule stated above. Miers v. McMaken, 147 Neb. 133, 22 N. W. 2d 422. The general rule has no application in any case when reasonable minds might differ on whether or not the operator of a motor vehicle exercised the care and caution required of a reasonably careful and cautious person under the circumstances of the particular situation. Miers v. McMaken, *supra;* Haight v. Nelson, 157 Neb. 341, 59 N. W. 2d 576; Fulcher v. Ike, 142 Neb. 418, 6 N. W. 2d 610; Fick v. Herman, *supra.*

Swank contends that ice upon a highway may be considered the proximate cause of a vehicle becoming unmanageable and colliding with another vehicle. He says that he may not be reasonably charged with the duty of anticipating that the Adcock car would collide with the Barney car and substantially stop its progress as it was traveling west and that the condition of the road would prevent Swank from stopping his car before it collided with the Barney car. He thinks that such intervening circumstances were the proximate cause of the resulting damages sought to be recovered in this case.

Actionable negligence exists when the injury and loss are the proximate result thereof. The proximate result must be the natural and probable consequence which ought to have been foreseen or reasonably anticipated in the light of the attendant circumstances and an injury is not actionable if it would not have resulted from the alleged negligence but for the interposition of a new and independent cause. Proximate cause, as used in the law of negligence, is that cause which in the natural and continuous sequence, unbroken by an efficient intervening cause, produces the injury, and without which the injury would not have occurred. An

efficient intervening cause is a new and independent force which breaks the causal connection between the original wrong and the injury. The cause of an injury is that which actually produces it while the occasion is that which provides an opportunity for the causal agency to act. An assumed cause of action may sometimes be merely a condition and not the real cause. The existence or activities of inanimate things are usually mere conditions and not causes. In Murray v. Pearson Appliance Store, *supra,* this court said: "The existence or presence of smoke, snow, fog, mist, blinding headlights, or other similar elements which materially impair or wholly destroy visibility are not to be deemed intervening causes but rather as conditions which impose upon the drivers of automobiles the duty to assure the safety of the public by the exercise of a degree of care commensurate with such surrounding circumstances." See, also, Ricker v. Danner, 159 Neb. 675, 68 N. W. 2d 338.

Ice upon a highway is not generally considered an independent, intervening causal factor that relieves a motor vehicle operator from responsibility for the result of his negligence. In Allen v. Clark, *supra,* the court observed: "Now, in the case at bar, there was ice in the highway, where defendant was driving too fast to avoid the collision, but the existence of this ice might well have been anticipated by an ordinarily careful driver, for in a case in which smoke made it impossible to see another car, this court said: 'In such a case, the smoke is a condition which the jury should consider in connection with the other evidence in determining the question of negligence.' Anderson v. Byrd, 133 Neb. 483, 275 N. W. 825."

In King v. Carnahan, 61 Ohio App. 84, 22 N. E. 2d 436, the defendant sought to excuse his liability for the collision of his truck operated by his employee with an automobile because an area of the highway coated with ice was obscured by a curve in the road

until the truck was within about 200 feet of the iced area of the road. Defendant argued that these facts constituted a legal excuse for violation of the provision of the statute which prohibited any person from driving a motor vehicle upon a public highway at a greater speed than would permit him to bring it to a stop within the assured clear distance ahead. The court rejected the argument of defendant by this language: "A consideration of these facts discloses that they all relate to the condition of the surface and other conditions of the highway and are such facts as it is the duty of the driver of a motor vehicle under the statute to take into consideration in operating his motor vehicle, and none of them relates to an independent, intervening causal factor; and such facts, therefore, do not constitute a legal excuse for the violation of the provisions of said section by the operator of defendant's truck."

A condition of ice on a highway being accepted as the proximate cause of an accident thereon is that the proof must be that the accident would in some way have occurred by virtue of the existence of the ice even if the motorist had not been negligent. In Colas v. Grzegorek, 207 F. 2d 705, the United States Court of Appeals said: "In order for accident to be solely attributable to icy condition of highway, it must be evident that accident would in some manner have happened because of ice even if motorist had not been negligent." See, also, Hickey v. Missouri Pacific R. R. Corp., 8 F. 2d 128; McDowell v. Interstate Oil Co., 208 Iowa 641, 224 N. W. 58, corrected on rehearing 225 N. W. 855; Hart v. Wabash R. R. Co., 177 F. 2d 492; Restatement, Torts, § 432, p. 1161.

The record does not make it evident that the accident would in some manner have happened because of the ice even if all the participants had been free from negligence. Swank did not establish any fact exempting him from the operation of the general rules above quoted.

His failure to have his car under proper control was clearly the proximate cause of its collision with the Barney car. The contention of appellee that Swank was guity of negligence as a matter of law is correct.

The order granting a new trial of this cause should be and it is affirmed.

AFFIRMED.

STATE OF NEBRASKA EX REL. WILLIAM G. LINE, COUNTY ATTORNEY IN AND FOR DODGE COUNTY, APPELLEE, V. KENNETH GRANT ET AL., APPELLANTS.

75 N. W. 2d 611

Filed March 16, 1956. No. 33895.

Lotteries. Where a promoter of a business enterprise, with the evident design of advertising his business and thereby increasing his profits, distributes prizes to some of those who call upon him or his agent, or write to him or his agent, or put themselves to trouble or inconvenience, even of slight degree, or perform some service at the request of and for the promoter, the parties receiving the prize to be determined by lot or chance, a sufficient consideration exists to constitute the enterprise a lottery though the promoter does not require the payment of anything to him directly by those who hold chances to draw prizes.

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

Sidner, Lee, Gunderson & Svoboda and *Richards, Yost & Schafersman,* for appellants.

Clarence S. Beck, Attorney General, *Clarence A. H. Meyer,* and *William G. Line,* for appellee.

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

CHAPPELL, J.

This action was brought by the State of Nebraska ex rel. William G. Line, county attorney, as plaintiff, seek-

ing to permanently enjoin defendants Kenneth Grant and Elno Grant, doing business as Grant Chevrolet Company, and their employees, from conducting an alleged lottery upon described premises in Fremont. The trial court forthwith issued a temporary injunction and defendants thereafter answered, denying generally and alleging that their scheme was not a lottery, since the element of consideration was not involved.

After hearing on the merits the trial court rendered judgment which found and adjudged that defendants were conducting a lottery and permanently enjoined the scheme. Defendants' motion for new trial was overruled and they appealed, assigning in effect that the judgment was not sustained by the evidence but was contrary thereto and contrary to law. We conclude that the assignments should not be sustained.

Citing State ex rel. Hunter v. Fox Beatrice Theatre Corp., 133 Neb. 392, 275 N. W. 605, and State ex rel. Hunter v. Omaha Motion Picture Exhibitors Assn., 139 Neb. 312, 297 N. W. 547, defendants conceded that in order for a scheme to be a lottery, it must contain the three elements of prize, chance, and consideration. They also conceded that their scheme contained the elements of prize and chance, but argued that it did not contain the element of consideration. The sole question then is whether or not, in the light of facts and applicable law, defendants' scheme contained the element of consideration in order to make it a lottery. Upon trial de novo we conclude that it did.

The undisputed evidence was substantially as follows: Defendants Kenneth Grant and Elno Grant were a partnership doing business as Grant Chevrolet Company on described premises in Fremont. They were new car dealers for Chevrolet and Cadillac Divisions of General Motors Corporation. They bought and sold new and used automobiles, trucks, and accessories, and operated a general service garage in connection with such business.

On Tuesday, February 15, and Wednesday, February 16, 1955, defendants placed advertisements in the Fremont Guide and Tribune, a legal newspaper in general circulation in Dodge County. Insofar as important here, the advertisements read: "It's Here—Fascinating Chevrolet Exhibits—1955 Chevrolet Featurama—Win a Kiddie Convertible—Free Fun For All.

"Fascinating Exhibits and Fun for the Entire Family. We're inviting everybody in town to come in and see our own personal 1955 auto show, the Chevrolet Featurama. We have gleaming, life-size exhibits of Chevrolet engineering features at work. We have exhibits you can actually operate yourself . . . and have fun operating. Also, we would like to invite you to take this opportunity to drive the 1955 Motoramic Chevrolet and experience its great new features on the road. So, come in soon . . . to the thrilling Chevrolet Featurama for 1955.

"Bring the children. They'll love a ride in the Chevrolet Kiddie Convertible. Here's a special feature to thrill the youngsters! The Chevrolet Kiddie Convertible is a miniature sidewalk-sized version of the 1955 Chevrolet. The car is mounted on a special base that gives an exciting ride effect. It's great fun for the children—they'll love a ride in the Chevrolet Kiddie Convertible.

"Free Drawing! Your child can win a Kiddie Convertible. Some lucky boys and girls are actually going to win Kiddie Convertibles. We're having two grand drawings, one on Thursday, Feb. 17 and another on Saturday, Feb. 19. Get in soon and enter your child's name!

"Come see the 1955 Chevrolet Featurama. Feb. 16, 17, 18 & 19—8:00 A. M. to 9:00 P. M. Daily. Grant Chevrolet Co."

Unless restrained, defendants intended to conduct the chance drawing of names registered at their place of business on typical registration cards. In that connec-

tion, it was necessary for persons registering to fill out a registration card giving their child's name, age, address, telephone number, and the year, make, and model of cars they were driving. The parents were supposed to complete and sign the registration card, but many children filled out such cards all by themselves.

A registration desk was located in about the center of defendants' new car showroom where there were several new Chevrolet cars and trucks, Chevrolet engineering exhibits, and promotional literature. Other products and services, including a Kiddie Convertible ride, and defendants' offices, were located in the immediate vicinity.

Registrants were not required to advance any money or make any purchases in order to register or to be present at the drawing in order to win. It was necessary for persons to enter defendants' new car salesroom and pass by the new Chevrolet automobiles, trucks, and Chevrolet engineering exhibits, in order to register, and the completed registration cards were deposited in a box at the registration desk. Winners were determined by chance drawings made from such registration cards, and prizes for the winners were to be as described in exhibits attached thereto. There were two prizes. Each was a child's Chevrolet Kiddie Convertible worth $60, to be awarded to children under 12 years of age. The purpose of conducting the scheme was to advertise defendants' business, induce people to come into their place of business, look at defendants' exhibits, and buy merchandise, and to generally stimulate defendants' business as a new car dealer.

In 34 Am. Jur., Lotteries, § 2, p. 647, it is said: "Where the term 'lottery' is not defined by a statute directed against it, it has been stated that a definition which includes as an element the evil which the statute was intended to prevent must be adopted."

On the other hand, as this court said in State ex rel. Hunter v. Omaha Motion Picture Exhibitors Assn.,

supra: " 'No sooner is it defined by a court than ingenuity evolves some scheme within the mischief discussed, but not quite within the letter of the definition given.' "

In Lucky Calendar Co. v. Cohen (N. J.), 117 A. 2d 487, a recent exhaustive opinion citing many authorities and involving facts comparable in all material respects with those here involved, the court said: "In deciding whether the facts in the case at bar constitute a lottery, we must resort to the accepted method of determining the meaning of a statute: we must look first to the mischief to be remedied and then to the means taken by the Legislature to achieve that end. * * * Where the Legislature has gone to such lengths as it has here to achieve a desired objective, we are bound in the process of statutory construction to give due weight to every word employed by it in an effort to give effect to the legislative intent."

It is in such manner that we are required to construe and apply our own clear all-inclusive Constitution and related lottery statutes in the light of authorities which involved comparable statutes, facts, and circumstances.

In that connection, Article III, section 24, Constitution of Nebraska, provides in part: "The Legislature shall not authorize any game of chance, lottery or gift enterprise * * *." An apparent exception follows, but it requires no discussion here except to say that such exception did not declare a new policy in this state with reference to lotteries or games of chance. State ex rel. Hunter v. The Araho, 137 Neb. 389, 289 N. W. 545.

Section 28-961, R. R. S. 1943, provides in part: "Whoever opens, sets on foot, carries on, promotes, makes or draws, publicly or privately, any lottery or scheme of chance, of any kind or description, by whatever name, style or title the same may be denominated or known; or by such ways and means exposes or sets to sale any house or houses, lands or real estate, or any goods or chattels, cash or written evidences of debt, or certifi-

cates of claims, or any thing or things of value whatever," shall be punished as provided therein.

Also, section 28-962, R. R. S. 1943, provides in part: "Whoever vends, sells, barters or disposes of any lottery ticket or tickets, order or orders, device or devices of any kind, for or representing any number of shares, or any interest in any lottery, or scheme of chance, or opens or establishes as owner or otherwise any lottery or scheme of chance in this state, or is in any way concerned in any lottery or scheme of chance, by acting as owner or agent in this state for or on behalf of any lottery or scheme of chance to be drawn, paid or carried on, either out of or within this state," shall be punished as provided therein.

Further, section 28-963, R. R. S. 1943, provides in part: "If any person shall by printing, writing, or in any other way, publish an account of any lottery or scheme of chance of any kind or description, to be carried on, held or drawn, either out of or within the State of Nebraska, by whatever name, style or title the same may be denominated or known, stating when or where the same is to be drawn, or the prizes therein or any of them, or any information in relation to such prizes or any of them, or the price of a ticket, show or chance therein, or where any ticket may be obtained, or in any way aiding or assisting in the same, or in any way giving publicity to such lottery or scheme of chance," shall be punished as provided therein.

Such sections of our statutes were originally enacted at the same time in 1873 and then became a part of our criminal code. Since that time they have illustrated the clear and unlimited all-inclusive restrictions which the Legislature, by constitutional mandate, has imposed upon the publication, promotion, and conduct of lotteries or schemes of chance, "of any kind or description, by whatever name, style or title the same may be denominated or known."

In the promotion and conduct of lotteries or schemes

of chance the elements of prize and chance are usually present because attractively desirable, and the only alternative in order to avoid condemnation as a lottery or scheme of chance is to attempt in some manner to eliminate or to attempt by some new artifice to conceal the element of consideration. That situation is presented in the case at bar.

Concededly, there are authorities supporting defendants' contention that the element of consideration is not present and the scheme is not a lottery unless the participants contribute money, property, or substantial time or services in return for the right to participate. Yellow-Stone Kit v. State, 88 Ala. 196, 7 So. 338, 16 Am. S. R. 38, 7 L. R. A. 599; People v. Cardas, 137 Cal. App. 788, 28 P. 2d 99; and State v. Hundling, 220 Iowa 1369, 264 N. W. 608, 103 A. L. R. 861, are examples of such cases. Such two last-cited cases went so far as to hold that a "bank night" scheme was not a lottery. In that regard, such schemes were identical in all material respects with that involved in State ex rel. Hunter v. Fox Beatrice Theatre Corp., *supra,* wherein we held that such a scheme was a lottery. In that opinion this court said with reference to the scheme: "Its tendency is to draw people without tickets in crowds in front of theaters for something they did not buy or earn, a place of idleness. It encourages in men and women the gambling instinct and the propensity to sustain life on the industry and earnings of others. Idleness, pauperism and crime are some of its bitter fruits. It helps to destroy the initiative essential to individual livelihood and good citizenship. It increases the burdens of law enforcement which fall on the people generally throughout the state, as shown by court records. The lottery laws are directed against these and other evils and it is the duty of courts to give effect to the remedies when properly invoked by prosecuting officers."

In order to give force and effect to statutes comparable with our own, the great weight of authority has

adopted the basic contract theory of consideration, holding that the element of consideration is present if there is a benefit to the promisor who is the promoter of the scheme, or if there is a detriment to the promisee who is the contestant or holder of a chance for the prize. Maughs v. Porter, 157 Va. 415, 161 S. E. 242; State v. Greater Huntington Theatre Corporation, 133 W. Va. 252, 55 S. E. 2d 681; State v. Wilson, 109 Vt. 349, 196 A. 757; State v. Jones, 44 N. M. 623, 107 P. 2d 324; State ex rel. Draper v. Lynch, 192 Okl. 497, 137 P. 2d 949; Knox Industries Corp. v. State (Okl.), 258 P. 2d 910; Herald Publishing Co. v. Bill, 142 Conn. 53, 111 A. 2d 4; Lucky Calendar Co. v. Cohen, *supra*; State ex rel. Regez v. Blumer, 236 Wis. 129, 294 N. W. 491; State v. Laven, 270 Wis. 524, 71 N. W. 2d 287.

The foregoing are factually comparable in every material respect with that at bar, and all concluded that the element of consideration was present and the schemes involved were lotteries. Their basic reasoning is illustrated by State ex rel. Regez p. Blumer, *supra,* wherein the court said: "It is manifest that we have here the prize and the chance. The only remaining element of a lottery is a consideration. The trial court was of the opinion that the facts of the registrants' going to the store each day to get the daily coupon, and that the operation of the scheme paid the defendant or he would not operate it, constitute a consideration. Consideration consists in a disadvantage to the one party or an advantage to the other. We here have both." Such case and the reasoning therein was cited and approved by that same court as recently as State v. Laven, *supra.*

In that connection, the only fundamental difference between the case at bar and the scheme presented in State ex rel. Hunter v. Omaha Motion Picture Exhibitors Assn., *supra,* is that in such case two registration cards were required, while the scheme in the case at bar required but one. In that opinion we said: "Its

purpose is not to give away the prize as a gift. It is conceived in the hope of financial gain. It is merely an inducement to try one's luck in a gamble for comparatively large stakes. As a disguised lottery, pretending that it has all the virtues of good advertising, it attracts thousands of persons who would have nothing to do with it as an unmasked lottery."

In 54 C. J. S., Lotteries, § 2, p. 848, it is said: "The consideration required as an essential element of a lottery need not be great, and, in general, may be money or any other thing of value. Some authorities hold that the presence or absence of consideration is measured by the usual tests applicable in the law of contracts, that consideration may consist of a benefit to the person conducting the scheme, or an inconvenience or disadvantage to the promisee, and hence that money or something of actual pecuniary value need not be directly given for the right to compete."

It has long been the rule, as stated in Thomas, Law of Lotteries, Frauds and Obscenity in the Mails, § 16, p. 35, after citing numerous authorities: "Where a promoter of a business enterprise, with the evident design of advertising his business and thereby increasing his profits, distributes prizes to some of those who call upon him or his agent, or write to him or his agent, or put themselves to trouble or inconvenience, even of a slight degree, or perform some service at the request of and for the promoter, the parties receiving the prize to be determined by lot or chance, a sufficient consideration exists to constitute the enterprise a lottery though the promoter does not require the payment of anything to him directly by those who hold chances to draw prizes." Such statement was quoted with approval in State v. Wilson, *supra,* which also quoted with approval a related part of the opinion in Maughs v. Porter, *supra.*

We also approve such statement and the reasoning of related authorities heretofore cited. Therefore, we

conclude that the scheme here involved was a lottery prohibited by our Constitution and statutes. To hold otherwise would give no force or effect to the clear and unmistakable language used therein, and would loose a flood of competitive, fanciful schemes upon all business in general in order to promote their interests and increase their profits at the expense of the public. To hold otherwise would also encourage promotion of the gambling instinct, not only among adults but also among the children of this state, which our Constitution and statutes clearly intended to prevent.

Finally, defendants in argument would have us define "consideration" as "the payment of money for the purchase of merchandise, chance or admission ticket, or as payment on an account, or requires an expenditure of substantial effort or time" as distinguished from mere registration of one's name "at a store in order to be eligible for the prize" in conformity with a ruling made by the Solicitor General who thereby construed a federal lottery statute for the United States Postal Department. Defendants also attempted to support such contention by citing Federal Communications Commission v. American Broadcasting Co., 347 U. S. 284, 74 S. Ct. 593, 98 L. Ed. 699, which sustained that ruling in the light of failure by Congress to enact legislation overriding it. A like claim made by defendant in Lucky Calendar Co. v. Cohen, *supra,* was found to have no merit. In disposing of such contention, that court cited Phalen v. Commonwealth of Virginia, 8 How. 163, 12 L. Ed. 1030, which has never been overruled, and said: "In contrast it must be borne in mind that we are here dealing with the broadest kind of state statute that legislative language could devise to prevent lotteries and one that has been carefully construed by our courts to give effect to the clear legislative intent against lotteries by whatever course of legal reasoning that may have been employed to reach the result of enforcing the statute." The statement is

applicable and controlling here. Defendants' contention should not be sustained.

For reasons heretofore stated, we conclude that the judgment of the trial court should be and hereby is affirmed. All costs are taxed to defendants.

AFFIRMED.

THE FIDELITY AND CASUALTY COMPANY OF NEW YORK ET AL., APPELLANTS, V. RUTH KENNARD, APPELLEE.
75 N. W. 2d 553

Filed March 16, 1956. No. 33914.

1. **Workmen's Compensation.** Under the Workmen's Compensation Act either party at interest may file a petition in the Workmen's Compensation Court.
2. ———. All disputed claims for workmen's compensation shall be submitted to the Workmen's Compensation Court for a finding, award, order, or judgment.
3. ———. The Workmen's Compensation Act creates new remedies and new liabilities. The manner in which it operates is to be found under the legislation itself.
4. **Workmen's Compensation: Appeal and Error.** On any appeal to this court in a workmen's compensation case the cause will be here considered de novo upon the record.
5. **Workmen's Compensation.** Walking to and from the street and a building where one is employed is a necessary incident of the employment, and an injury sustained in so doing is compensable.
6. ———. Where the work, or an incident thereto, exposes the employee to the happening of an event causing an accident, the accident arises out of the employment.
7. **Workmen's Compensation: Attorney and Client.** The right to tax attorney's fees in compensation cases is purely statutory.
8. ———: ———. By statute the right to attorney's fees in a compensation case relates to a specific situation. An employee failing to come within the statute is not entitled to attorney's fees to be allowed and taxed as costs.

APPEAL from the district court for Douglas County: PATRICK W. LYNCH, JUDGE. *Reversed and remanded with directions.*

Brown, Crossman, West, Barton & Quinlan, for appellants.

Schrempp & Lathrop, for appellee.

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

MESSMORE, J.

This action was commenced by the Fidelity and Casualty Company of New York, the insurance carrier for workmen's compensation for the Castle Hotel Company, a limited partnership, and the Boss Hotels Company, a corporation, in the Workmen's Compensation Court, the Castle Hotel Company and the Boss Hotels Company being brought into the action as parties plaintiff, against Ruth Kennard, an employee of the Castle Hotel Company who was injured in an accident claimed by the plaintiffs to have arisen out of and in the course of her employment, as defendant. Hearing was had before a judge of the Workmen's Compensation Court. Thereafter an award was entered in favor of the defendant. From the award and judgment of the said court, the defendant appealed to the district court. Trial was had in the district court. The district court entered judgment finding that the accident to Ruth Kennard concerned therein was not within the provisions of the Nebraska Workmen's Compensation Act. The judgment of the Workmen's Compensation Court was vacated and set aside. The Fidelity and Casualty Company of New York, Boss Hotels Company, a corporation, and the Castle Hotel Company, the employer, filed a motion for new trial. The motion for new trial was overruled. From this ruling said parties appealed to this court.

For convenience we will hereinafter refer to Ruth Kennard as Kennard, or as appellee, and to the other parties as appellants or, with reference to the Castle Hotel Company, as employer.

We believe the first proposition to determine on this

appeal is the contention of the appellee that the Workmen's Compensation Court acquires jurisdiction only by the filing of a valid claim, and that in the instant case no valid claim was filed in the Workmen's Compensation Court for the reason that the appellee did not file a claim therein and claimed no rights under the Workmen's Compensation Act.

In connection with this contention, the appellee filed a motion in this court to dismiss the appeal. Ruling thereon was reserved until this case was heard on its merits. The motion alleged that the appellee had filed a common law action in the district court for Douglas County against the appellants wherein she prayed for damages for personal injuries sustained by her on account of the negligence of the appellants, Boss Hotels Company and the Castle Hotel Company; that the appellants filed an answer to the common law action; that the appellee never had claimed to be under the Nebraska Workmen's Compensation Act; that the appellants had made certain voluntary payments to her by way of drafts which she had not cashed, and also voluntarily paid certain medical bills, which payment could not be prevented by the appellee; that the present action constituted an attempt by appellants to have the validity of a common law defense prejudged by a court of equity; and that if the appellee was under the Workmen's Compensation Act at the time of her injury, the same was a defense to the common law action pending between the parties. Appellee moved to have the appeal dismissed.

The transcript discloses that on September 21, 1954, the Fidelity and Casualty Company of New York, the insurance carrier for the Boss Hotels Company and Castle Hotel Company, the latter being brought into the action as plaintiffs later, filed its petition in the Nebraska Workmen's Compensation Court making Ruth Kennard, an employee of the Castle Hotel the appellee here, defendant. This petition alleged payments of

compensation benefits to the defendant for temporary total disability for 7 weeks, from March 10, 1954, to April 27, 1954, at the rate of $26 per week, or the total sum of $182; that in addition, hospital, medical, and drug bills on behalf of the defendant were paid as follows: To Doctors Hospital, Omaha, $195.05; to Drs. Simonds, Hardy, and McArdle, Omaha, for X-rays, $40; to John O'Brien, druggist, $6.15, a total of $241.20. The petition further alleged that after the payment of the aforesaid compensation benefits and hospital, medical, and drug bills, the defendant, through her attorney asserted a common law action against her employer, the Castle Hotel Company; that no suit had been instituted by any of the parties thereto prior to the filing of this petition; that following the assertion of a common law liability against the employer, the insurance carrier discontinued the payments of weekly compensation for temporary total disability as of April 27, 1954; and that the attending physician stated that the temporary total disability continued until May 17, 1954, when defendant was or should have been able to resume work. The petition prayed that a hearing be had before the Workmen's Compensation Court and that an adjudication be made by said court that this case was one falling within the province and jurisdiction of the Nebraska Workmen's Compensation Court; that the rights and liabilities of the parties be determined; and that plaintiff be awarded such relief as to which it may be entitled under the provisions of the Workmen's Compensation Act.

To the above petition the defendant filed an answer. In the answer she denied that the accident came under the provisions of the Nebraska Workmen's Compensation Act, and alleged affirmatively that because of the negligence of the Boss Hotels and the Castle Hotel, she suffered her injury, and that she had her action at common law against the said hotels.

The case was heard before a judge of the Nebraska

Workmen's Compensation Court on November 22, 1954, and award was entered on January 20, 1955, wherein the court made findings as follows: That the defendant was receiving an average weekly wage in excess of $39 per week which was sufficient to entitle her to the maximum compensation payments of $26 per week; that the defendant had been paid 7 weeks compensation for temporary total disability but was entitled to an additional 3 weeks and 5 days compensation at the rate of $26 a week for temporary total disability; and that an additional amount was due her in the sum of $96.57 and plaintiffs were liable for the bill due Dr. Max Block in the sum of $158. The court also found that the case fell within the purview of the Nebraska Workmen's Compensation Act. Judgment was entered in accordance with the findings.

The defendant appealed directly to the district court, filing her petition on appeal on January 31, 1955. In her petition she prayed the award made in the Nebraska Workmen's Compensation Court be vacated and set aside; that the court find and determine that the accident therein concerned did not fall under the provisions of the Nebraska Workmen's Compensation Act; that if, however, the court should find that said accident did come within the act, the plaintiffs should pay any and all medical and hospital bills and temporary disability compensation, together with permanent partial disability which defendant sustained as a result of said accident.

The appellants filed an answer to the appellee's amended petition in the district court on August 4, 1955. It is apparent that the appellants commenced an action in the Nebraska Workmen's Compensation Court prior to the time that the appellee commenced her common law action in the district court. We find nothing in the record to the contrary.

Section 48-173, R. R. S. 1943, provides in part: "In all cases involving a dispute with reference to work-

men's compensation, either party at interest, without cost, either in person or by attorney, may file with the court a verified petition setting forth the names and places of residence of the parties and the facts relating to the employment at the time of the injury for which compensation is claimed, the injury in its extent and character, the amount of wages being received at the time of the injury, the knowledge of or notice to the employer of the occurrence of such injury and such other facts as may be considered necessary for the information of the court, and also stating the matter or matters in dispute and the contention of the petitioner with reference thereto."

In Krajeski v. Beem, 157 Neb. 586, 60 N. W. 2d 651, this court said: "With reference to the time for filing a petition in the Workmen's Compensation Court in case of a dispute, which section 48-173, R. R. S. 1943, provides may be done by either party, * * *."

Section 48-161, R. R. S. 1943, provides: "All disputed claims for workmen's compensation shall be submitted to the Nebraska Workmen's Compensation Court for a finding, award, order or judgment."

In Miller v. Schlereth, 151 Neb. 33, 36 N. W. 2d 497, this court said, with reference to the Workmen's Compensation Act: "The act creates new remedies and new liabilities. The manner in which it operates is to be found under the legislation itself. See, Perry v. Huffman Automobile Co., 104 Neb. 211, 175 N. W. 1021, 179 N. W. 501; Ashton v. Blue River Power Co., 117 Neb. 661, 222 N. W. 42."

We conclude that appellants had the legal right to commence an action in the Nebraska Workmen's Compensation Court, that the contention of the appellee cannot be sustained, and her motion to dismiss the appeal is overruled.

On any appeal to this court in a workmen's compensation case the cause will be here considered de novo upon the record. See, Myszkowski v. Wilson & Co.,

Inc., 155 Neb. 714, 53 N. W. 2d 203; Jones v. Yankee Hill Brick Mfg. Co., 161 Neb. 404, 73 N. W. 2d 394.

The record discloses that the Castle Hotel is situated on the west side of Sixteenth Street in Omaha. The main entrance is to the east and is about in the center of the building. The entrance is recessed in from the west edge of the sidewalk running along the east front of the hotel building approximately 6 feet. The entrance has double doors which are located 5 feet 7 inches west of the east edge of the terrazzo floor of the entrance. The terrazzo floor of the entrance is 13 feet 5½ inches north and south in length at the east building line of the structure. The words "Hotel Castle" are formed in the terrazzo floor of the entrance. The double doors leading into the lobby of the hotel are of glass and wood and have three chrome handle bars on each door. The recess to the building is contiguous to the Castle Hotel and is covered with terrazzo flooring, which meets the west line of the sidewalk approximately 6 feet from the doors, and the inset of the area is then 6 feet approximately west of the west line of the sidewalk, and inside, or west of the exterior walls of the building on each side of the entrance.

A houseman employed by the Castle Hotel and doing work which included janitor work, testified that on March 3, 1954, he was mopping the lobby of the hotel. He saw Kennard approach from the north and turn toward the front doors of the hotel. He had finished mopping the terrazzo floor and dried it off as best he could. He stood on the inside of the doorway to notify people that the floor was slick. Kennard walked up to the right-hand door and reached for it, to enter the hotel. This was about 8:30 or 8:45 a. m. She slipped and fell. He was in a position to open the door. She was lying entirely in the area of the terrazzo floor. He believed she was lying on her right side. He and a guest of the hotel went to her assistance, opened the door, and took her inside. She had a sack in which there was a

pair of blue shoes. He further testified that there is a powder room, or ladies rest room, to the south of the lobby about 10 or 12 feet from the front door. To go to the coffee shop from the powder room, you go north, then along the cigar counter in the lobby to the coffee shop. After you open the door to the coffee shop, you step down into the coffee shop.

On cross-examination he testified that the terrazzo floor slants down to the sidewalk; that there is a large mat which covers half of the areaway which was not in use because it takes two men to handle it and he was alone; and that the Westward-Ho Bar lies between the coffee shop and the hotel proper. From the inside of the hotel you go into the bar to get from the coffee shop to the lobby. When Kennard fell, her head was far enough from the door so that it could be opened without touching her. Her feet had slipped to the east a little past the letters "L" and "E" in the word "Castle" on the terrazzo floor. When she slipped, she was about an arm's length from the door.

Ruth Kennard testified that she was 59 years old and worked at the hotel coffee shop as a hostess on March 1, 2, and 3, 1954. She was called to work the morning of March 3rd by someone in the coffee shop. She came from her home, got off the bus at Sixteenth Street, and walked south toward the hotel. She frequently used the powder room in the lobby. That morning she had a pair of blue shoes which she had purchased, with the intention of trying them out. She had on the shoes she normally used to work in. In the Workmen's Compensation Court she testified that she had a pair of blue shoes in a sack which were her work shoes, and she was going to the rest room to change into them. She was on her way across the terrazzo area to open the door into the hotel. She was going to the powder room to put on the blue shoes. She had used this room before when going to work. She believed she fell in the terrazzo entrance where the lettering "Hotel Castle" ap-

pears. When she reached for the door she slipped. After she got inside the hotel and went to the powder room, Mrs. Papineau, the wife of George Papineau who manages the hotel, came in. She told Mrs. Papineau she thought she would be all right, not to worry, and that her arm was hurt. Mrs. Papineau called Dr. Block. Kennard was taken to Dr. Simonds' office in the Medical Arts Building to be X-rayed. Later she went home, and then later to the hospital where Dr. Block set her arm. She remained in the hospital for 2 weeks. A Mr. Morgan from the Fidelity and Casualty Company interviewed her in the hospital and took her statement as to how the accident happened. After that she received seven checks, each for $26, as workmen's compensation. She paid no hospital bill, doctor bills, or bills for the X-ray, neither did she receive any statement from the hospital. She went to Dr. Block's office, but did not know how often.

On cross-examination she testified that she worked part time in the Castle Hotel coffee shop; that her work station was in the coffee shop; that is where she reported for work; that she had no duties in the hotel lobby nor the Westward-Ho Bar; that she did not report in the coffee shop for work on the morning of March 3, 1954; and that there is a supervisor in the coffee shop who acts as head hostess who would be in the coffee shop when Kennard reported for work. She further testified that when she was released from the hospital she went to her own physician who treated her, at her own expense, until she was able to go to work on November 28 or 29, 1954. She was unable to work, due to her inability to use her injured arm, for a long period of time after the accident, which prevented her from doing the type of work she ordinarily did. When she went back to work she went to the Regis Hotel coffee shop. She was required to use her arms and hands as a hostess, especially during busy times when she cleared the tables of dishes or carried chairs as a part of her work. When

she did go back to work, as a result of the fall she had pains in her sacroiliac and legs during busy hours, which caused her to have headaches and become upset. She drew no wages from March 3, 1954, until November 29, 1954. During this period of time she stayed at home.

Mrs. Papineau testified that she met Kennard in the hotel lobby at different times when she would come through the door with her hat and coat on; that she would come in and go to the coffee shop; and that the powder room is a facility for use of the hostesses and certain other employees. She defined the duties of a hostess, to receive and greet guests, to wait around with the menus and to take guests from one place to another, and when business was rushing, to clear the tables of dishes and cutlery and place the same in a box which was taken to the kitchen by a bus boy; that the hostesses ordinarily work in conjunction with the cash register with reference to charge accounts which are required to be taken to the office in the lobby where the hostesses would receive the money and go back and put it in the coffee shop cash register. She further testified that coming in the front door and going to the powder room, you turn west. On leaving the powder room, a short distance north you arrive at the cigar stand, then step down to the coffee shop. She testified that she had seen Kennard do that at different times prior to the accident. Kennard was paid 75 cents an hour, and worked by the hour. There is evidence that Kennard also had a meal allowance of $1.40 per day. This witness further testified that the terrazzo entrance is within the property lines of the Castle Hotel; and that the hotel property is leased from the Gifford estate.

On cross-examination she testified that a time book is kept in the coffee shop where the hours of work are entered; that a hostess reporting for work on March 3, 1954, would not necessarily report in the coffee shop; and that ordinarily she would not report there if she was going to come in and wanted to make her first en-

trance into the other room. She would come in, take care of her duty or duties or whatever she wanted to do.

The auditor for the hotel prior to and on March 3, 1954, and who thereafter had full charge of the payroll records, testified that Kennard's name appeared on the payroll for March 1, March 2, and March 3, with 9 hours' pay for March 1, 9 hours' pay for March 2, and 1 hour's pay for March 3, constituting 19 hours at 75 cents an hour, in an amount of $11.74; that a check was issued for this amount on May 10, 1954; and that the hostesses reported to Bonnie Erickson, the supervisor in charge of the coffiee shop at that time. There was a notation in pencil on the time sheet for March 3 showing that Kennard was hurt.

None of the checks received by Kennard as workmen's compensation were cashed by her.

On resuming the stand in her own behalf, Kennard testified that she reported for work in the coffee shop and was not paid until she reported there; that she had a conversation with Dr. Block in which she told him, after he dismissed her, her back was still bothering her down through her side, leg, and ankle; that he told her to get her own doctor; and that it was difficult to tell in just what manner she did fall in the Castle Hotel, but stated that she must have fallen on her right arm.

Dr. Block testified that he saw Kennard professionally on March 3, 1954, at the Castle Hotel. He found her up and around in the coffee shop, and he examined her. She was taken to the offices of Drs. Simonds, Hardy, and McArdle in the Medical Arts Building for the purpose of having X-rays taken of her right shoulder and right arm, including the elbow and the upper forearm. There was no evidence of fracture or dislocation, or any pathology of the right shoulder. On the right elbow there was a longitudinal fracture line through the head of the radius involving the medial third of the head and the fragments were in excellent position. The rest of the elbow was normal in appearance. She was taken to

Doctors Hospital where a cast was applied to her right arm and up to and just below the shoulder, including the upper and lower arm and extending to the wrist. She was hospitalized. He further testified that he took care of her daily at the hospital. She complained of pain in her shoulder, wrist, and hand. On April 12, 1954, an X-ray was taken at his office which showed the fragments of the radius well united and in good position. Later she complained of her shoulder and he told her to go back to Dr. Simonds for a check of her shoulder which was X-rayed by Dr. Simonds on April 6, 1954. There was no evidence of old or recent fractures or other pathology involving the shoulder joint. The X-ray films also included the upper three-fourths of the shaft of the humerus, and there was no evidence of pathology in that area. She entered the hospital on March 3rd and was dismissed on March 17th, 1954, when she returned to her home. He treated her at his office until May 17, 1954. He had no recollection of her complaining about her back and did not treat her for her back, but only for her shoulder and arm. The fracture was about half an inch long at the head of the radius bone, which is not considered a grave fracture. This is the only fracture she had in her arm. The cast was applied on March 3, and removed on April 12. He gave as his opinion that there was no percent of partial permanent disability, and that she had fully recovered from the injury. She was complaining of some soreness and stiffness in the joint. He advised her to use heat and massage. He gave as his opinion that she should have returned to work sooner than November 29, 1954; and that her duties were light enough for her to resume work. The fracture healed satisfactorily. His bill was $158.

Dr. Madsen did not testify in the Workmen's Compensation Court but did testify in the district court that he saw Kennard for the first time after the accident in his office on April 5, 1954. The following history

was related to him: She had fallen and broken her right arm and elbow and was in the hospital for 2 weeks; that she had bruised her left foot; and that she was nervous and shaky. There was limitation of motion of the left knee and left ankle. She claimed to have pain in both shoulders. He found no cause for pain in the shoulders, nor did he believe that pain in her abdomen had anything to do with the accident; and could find no cause for pain in her hip in relation to the accident. He detailed the treatments with reference to her condition on the various times that he saw her after 1947 up to and including the time he saw her with reference to the accident. It is apparent from the record that the conditions for which he had previously treated Kennard had no relation to the accident in question. He gave as his opinion that she was not able to return to work prior to the last part of November. Upon his examination with reference to this accident he found she had muscle pain when she did any moderate or light work. She had tenderness of the ligaments of the left knee, or the left ankle, and tenderness over the sacroiliac. He did not examine the X-rays of her shoulder, and had no knowledge with reference to the fracture found by Dr. Block. He gave as his opinion that she had a 10 percent partial permanent disability in performing her work as a hostess which he considered to be light or moderate work. He was unable to tell how he arrived at the percentage, except to say that it was in connection with the amount of motion that she could go through and had no reference to the fracture, that the 10 percent related more to the damage to the soft tissue, but that nobody could tell about soft tissue unless it was dissected. He further testified that 10 percent is not much, it is mild, and that it would not keep her from being a hostess at any coffee shop; that the condition he treated her for was as a result of the accident; and that in addition she was nervous and anxious about her ability to earn a living which was a contrib-

uting factor to her inability to return to work until the latter part of November 1954.

This brings us to the question as to whether or not the injuries received by Kennard arose out of and in the course of her employment.

Section 48-151, R. R. S. 1943, subdivision (6) thereunder, provides as follows: "(6) Without otherwise affecting either the meaning or the interpretation of the abridged clause, 'personal injuries arising out of and in the course of employment,' it is hereby declared: Not to cover workmen except while engaged in, on or about the premises where their duties are being performed, or where their service requires their presence as a part of such service at the time of the injury, and during the hours of service as such workmen, and not to cover workmen who, on their own initiative, leave their line of duty or hours of employment for purposes of their own."

In McDonald v. Richardson County, 135 Neb. 150, 280 N. W. 456, Byrd McDonald was a clerical assistant to the county engineer. All of her duties were performed in the courthouse. After finishing her work on a snowy and stormy evening, she left the courthouse to go home. While walking down an automobile driveway leading from the courthouse to the street, which was the customary way for pedestrians to leave the grounds, she fell and sustained a double fracture of her left leg. This court said: "In the instant case the employee was not engaged in the business of her employer. She was leaving the place of employment, but she was still upon the premises of the employer. She was on the courthouse grounds in the course of going home. One (sic) the way home she intended to engage in her own personal business. She did not live in the courthouse, and it was necessary for her to go home. She was leaving the premises of her employer by a route commonly used by the employees of the county. She fell and suffered an injury before she had reached the street.

"In Kasari v. Industrial Commission, 125 Ohio St. 410, 181 N. E. 809, it was held: 'Traversing the zone between the entrance of the employer's premises and the plant where an employee is employed is one of the hazards of the employment.' A well-recognized annotator, in considering this case, states: 'By the weight of authority injuries sustained by an employee while going to or from his place of work upon premises owned or controlled by his employer are generally deemed to have arisen out of and in the course of the employment within the workmen's compensation acts, and this rule is supported by the later cases.' 82 A. L. R. 1044. Cases are cited from many jurisdictions to support this statement. * * * An employee leaving the premises of her employer in the usual and customary way after her work is ended is within the course of her employment within the meaning of the workmen's compensation law. Walking to and from the street and a building where one is employed is a necessary incident of the employment, and an injury sustained in so doing is compensable."

In Schank v. Glenn L. Martin-Nebraska Co., 147 Neb. 385, 23 N. W. 2d 557, the court said: "It is a general rule that if an employee is injured while going to or from his work to his home, the injury does not arise out of nor in the course of the employment. Siedlik v. Swift & Co., 122 Neb. 99, 239 N. W. 466; Richtarik v. Bors, 142 Neb. 226, 5 N. W. 2d 199; Lincoln Traction Co. v. Reason, 143 Neb. 512, 10 N. W. 2d 344. In McDonald v. Richardson County, 135 Neb. 150, 280 N. W. 456, this court recognized an exception to this general rule. The exception as stated in that case is to the effect that an employee, leaving the premises of the employer in the usual and customary way after the work period has ended, is within the course of the employment within the meaning of the Workmen's Compensation Act. * * *

"The reason upon which the exception is grounded is that the hazards of entering or leaving the place of employment while on the property of the employer are

hazards of the employment which must be assumed by the employer. The employer is obliged to provide safe ingress and egress to and from the place of employment for employees entering or leaving its property in the performance of the work of the employment. * * * But this is on the theory that the employer has control of the premises and the employee and that the risks of entering or leaving the place of work are incidental to the employment."

The evidence in the instant case discloses that the employee, Kennard, was endeavoring to pass through the entrance door leading to the lobby to go to the powder room to change her shoes and prepare for her work. She had used this room on previous occasions. It was a facility furnished by the hotel for the use of its hostesses working in the coffee shop and for use in their employment. The employee Kennard was "in, on or about the premises" of the Castle Hotel and within the area of the hotel premises when she fell. She was within the area of the hotel premises where, among other activities of the hotel, her employer operated a restaurant business, a part of the hotel operation, and where her duties were to be performed.

We are committed to the view that a disability arising from injuries sustained on the employer's premises must be incidental to the employment to be within the requirement of the compensation law that it "arise out of" and "in the course of" the employment. The use of the employer's premises in the usual and ordinary manner in entering or leaving the place of employment is incidental to the employment.

We believe the exception to the general rule applies under the facts and circumstances of the instant case, and comes within the provisions of section 48-151, R. R. S. 1943.

The appellee, in her brief, makes a request for attorney's fees to be taxed as costs to cover work done in two trials and in this appeal.

The right to tax attorney's fees in compensation cases is purely statutory. Updike Grain Co. v. Swanson, 104 Neb. 661, 178 N. W. 618; Rexroat v. State, 143 Neb. 333, 9 N. W. 2d 305.

Section 48-125, R. R. S. 1943, relates to the allowance of attorney's fees in compensation cases. The pertinent part of the section applicable here is as follows: "In the event the employer appeals to the district court from the award of the compensation court, or any judge thereof, and fails to obtain any reduction in the amount of such award, the district court may allow the employee a reasonable attorney's fee to be taxed as costs against the employer, and the Supreme Court shall in like manner allow the employee a reasonable sum as attorney's fees for the proceedings in that court."

In Sporcic v. Swift & Co., on rehearing, 149 Neb. 489, 31 N. W. 2d 404, we said: "We are of the opinion that the words 'in like manner' limit the power granted and refer to the provision in the same sentence with reference to the granting of fees in the district court; and that this court shall allow fees in like manner as shall the district court."

In the instant case the employee resisted the employer's action in the compensation court on the basis that she did not receive an injury arising out of and in the course of her employment within the contemplation of the Workmen's Compensation Act, and that her action was one based on common law for damages as a result of the negligence of her employer. The Workmen's Compensation Court made an award in her favor. From this award she appealed to the district court, and in that court successfully resisted the judgment of the Workmen's Compensation Court and succeeded in having the action vacated and dismissed. From this judgment an appeal was taken by the employer to this court, the result here being that the employee came within the provisions of the Workmen's Compensation Act and was entitled to an award. The statute limits the right to

an attorney's fee to a specific situation. The appellee has not brought herself within the statute, and her request for attorney's fees to be allowed and taxed as costs is denied.

From the record, and in the light of the authorities heretofore cited, we conclude that the judgment of the district court should be and is hereby reversed. The facts sustain the judgment of the Workmen's Compensation Court. The district court is directed to enter judgment in accordance with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

JOHN J. WILSON ET AL., PLAINTIFFS, V. FRANK MARSH, SECRETARY OF STATE, DEFENDANT, STANLEY BARTOS ET AL., INTERVENERS.

75 N. W. 2d 723

Filed March 17, 1956. No. 33924.

1. **Pleading.** A general demurrer admits the facts properly alleged in the pleading to which it is directed and the reasonable inferences deducible from the facts.
2. **Courts.** The Supreme Court of Nebraska has original jurisdiction of an action relating to the revenue of the state.
3. **Constitutional Law.** The word "revenue" as used in Article V, section 2, of the Constitution of Nebraska is broad and general and includes all public money which the state collects or receives from whatever source and in whatever manner.
4. **Judges.** The compensation of a district judge is fixed by statute. It is defined as an annual salary and it is required to be paid to him in equal monthly installments during the year in which his service is rendered.
5. **Constitutional Law: Judges.** Any arbitrary act of the state by which any part of the salary of a district judge is withheld from him diminishes his salary during his term of office by the amount thereof retained by the state and it is a violation of Article III, section 19, of the Constitution of Nebraska.
6. **Constitutional Law: Officers.** The primary purpose of the constitutional prohibition against diminution of the salary of a public officer during his term of office is not to benefit the official but the public. It may not be construed as a private

grant. It is a limitation imposed in the public interest. All which by their necessary operation and effect withhold or take from the public officer a part of that which has been promised by law for his services is within the inhibition of the Constitution.

7. **Officers.** The benefits of a retirement plan are deferred compensation, presently earned, but payable in the future to the beneficiary upon condition that he possesses the qualifications required by the plan and that he complies with the conditions prescribed by it.
8. ———. The benefits of a retirement system are a form of compensation additional to the regular salary of the beneficiary. The increase in compensation has its inception when the grant is made and when the beneficiary begins his services under the plan and commences to earn the additional remuneration.
9. **Constitutional Law: Officers.** If the Judges Retirement Act of Nebraska is operative during the present term of the district judges it increases their compensation during their term of office in violation of Article III, section 19, of the Constitution of Nebraska.
10. **Officers.** The retirement rights acquired by district judges by virtue of the Judges Retirement Act are vested in any event on the happening of the contingency upon which the retirement pay becomes payable and since it is an integral part of the compensation it cannot be withdrawn after it is vested.
11. **Constitutional Law: Statutes.** If a part of an act is unconstitutional and the remainder is so interrelated with the invalid part that it cannot be sustained without doing violence to the legislative intention as a whole the entire act is invalid.
12. **Statutes.** A statute without an emergency clause may become law 3 months after the adjournment of the session at which it was adopted and the operation of its provisions may be postponed to a much later time designated by specific date or by the happening of an event certain to occur.
13. **Constitutional Law: Statutes.** It is not the province of this court to annul a legislative act unless it clearly contravenes the Constitution and no other resort remains.
14. ———: ———. If the act of the Legislature is capable of more than one interpretation one of which sustains it as valid and another renders it in conflict with the Constitution the court must adopt the former.
15. **Statutes.** A basic rule in the interpretation of a statute is to ascertain the legislative intent and to give effect to it if it is a lawful one.
16. **Constitutional Law: Statutes.** The Legislature when it passes

an act is presumed to know the provisions and limitations of the Constitution of the state, the interpretation that this court has given them, and the construction the court has given similar legislation previously enacted.

17. ———: ———. The presumption is that the Legislature in passing an act intended it to be a valid enactment rather than one in conflict with the Constitution of the state.

Original action. *Demurrer of plaintiffs overruled.*

Van Pelt, Marti & O'Gara, for plaintiffs.

Flansburg & Flansburg, for defendant and interveners.

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

BOSLAUGH, J.

The object of this litigation is to secure an adjudication that seven designated judges of the district court of Nebraska, each of whom are or will be more than 70 years of age on January 3, 1957, are ineligible to be candidates for, to be elected to, or to hold the office of judge of the district court for the term beginning on that date and to enjoin the Secretary of State from certifying the names of said persons to any election official as candidates for the office of district judge.

Plaintiffs allege that: They are residents of the State of Nebraska and are electors and taxpayers in the city and county where they are respectively domiciled. Frank Marsh, the defendant, is Secretary of State of Nebraska and has the legal duty of certifying the names of persons for whom nomination papers have been filed in his office for judge of the district court to the proper election officials of the counties of the state before the official ballots are printed for the primary elections in the state. A state-wide primary election will be held therein on May 15, 1956. Nominations for judge of the district court in each of the judicial districts will be made at the primary election and defendant is obligated to certify to the proper election official of the counties of the state at the time and in the manner required by law

the names of candidates for the office of judge of the district court. Prior to September 18, 1955, Harry D. Landis, Stanley Bartos, Lyle E. Jackson, Herbert Rhoades, Arthur C. Thomsen, James M. Patton, and Isaac Johnson Nisley, judges of the district court, hereafter referred to as the judges, each filed in the manner provided by law as a candidate for election to the office of judge of the district court.

The Legislature of Nebraska at its 1955 regular session enacted Legislative Bill No. 38, known as the Judges Retirement Act, which provides for the retirement of district judges of the state at the age of 70 years and for retirement annuity for each retired judge of the district court to be paid in part from revenue to be provided by taxation and thereby the legislation affects revenue of the state. The Judges Retirement Act became effective on September 18, 1955. Each of the seven persons above named who has filed as a candidate for the office of judge of the district court is ineligible by virtue of the provisions of the retirement act to serve in the office for which he has filed because he is now a judge of the district court and on the date of the commencement of the term, January 3, 1957, each of said persons will be over the age of 70 years and will be subject to retirement with the financial benefits provided by the act. That the Secretary of State will, unless prevented by action of the court, certify to the proper election officials to be placed on the official primary ballots the names of the seven persons who have filed as candidates for the office of judge of the district court in their respective judicial districts.

Plaintiffs seek to have the seven persons who are incumbent judges of the district court adjudged to be ineligible candidates for the office and to have the defendant enjoined from certifying their names as candidates for the office to be voted on at the next primary election.

The answer of the defendant admits that plaintiffs

are residents of Nebraska and are electors and taxpayers in the city and county named for each of them in the petition; that Frank Marsh is Secretary of State of Nebraska; that there will be a general primary election held in Nebraska on May 15, 1956, at which candidates for the office of district judge in each judicial district in the state will be nominated by the electors; and that it is the duty of the Secretary of State to certify at the time and in the manner provided by law to the county clerk or the election commissioner, as the case may be, in each county in which any electors may vote for such office the list of names of each person for whom nomination papers have been filed for the office of district judge in each judicial district.

The answer of defendant also asserts that: Harry D. Landis, Stanley Bartos, Lyle E. Jackson, Herbert Rhoades, Arthur C. Thomsen, James M. Patton, and Isaac Johnson Nisley were elected to the office of district judge at the general election in November 1952, each for a term of 4 years commencing on January 8, 1953, and continuing to January 3, 1957. They qualified, became, and are now district judges serving said term. Each was born on or about the date stated in the petition and each has performed all acts required by statute to be done by him to become a candidate in his respective district for nomination for the office of district judge at the general primary election to be held May 15, 1956.

At the time the district judges named above were elected to office the salary of the judges had been fixed by the Legislature at $7,400 per annum payable in equal monthly installments. They have each served since the commencement of their term as aforesaid, each in his respective district, each has received and accepted the salary aforesaid, and each is entitled to be paid $7,400 per annum, payable monthly, during the term of office, without change, increase, impairment, or reduction by the Legislature. The Judges Retire-

ment Act of Nebraska became effective September 18, 1955, and each of said judges had more than 15 months thereafter to serve of the term for which they had been elected as aforesaid.

At the time of the election of the district judges the Constitution of the State of Nebraska provided that the Legislature shall never grant any compensation to any public officer, agent, or servant after the services have been rendered 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. The Judges Retirement Act has reduced the salary of each of the district judges above named by requiring that the Auditor of Public Accounts deduct each month from the monthly salary owing to each judge 4 percent thereof and place it in the Judges Retirement Fund. This is a reduction of salary of $24.67 and for the 15 months during the balance of the term for which each judge was elected amounts to a total reduction of salary of each judge of $370 during his term of office, in violation of the provisions of the Constitution above stated, and this provision of the Judges Retirement Act is unconstitutional and void. The Judges Retirement Act provides for retirement pay for services to be rendered by each district judge from and after the effective date of the act, September 18, 1955, measured in part by his total years of service both prior to and after the act became effective, by the payment of a life annuity after his services have terminated which constitutes extra and increased compensation to a salary of $7,400 per annum fixed by statute at the time he was elected and it is an increase in his compensation effective during his term of office, in violation of the provisions of the Constitution of the state above stated, and hence this provision of the Judges Retirement Act is unconstitutional and void.

Each of the judges above named is entitled by pro-

visions of the Judges Retirement Act to a life annuity as follows: Harry D. Landis, Herbert Rhoades, Arthur C. Thomsen, and Isaac Johnson Nisley each approximately $400 per month, Stanley Bartos and Lyle E. Jackson each approximately $287 per month, and James M. Patton approximately $123 per month. The retirement annuities provided by the act are proposed to be paid in substantial part from revenue to be raised by taxation. Frank Marsh is a resident and taxpayer of Lincoln, Lancaster County, Nebraska, and his interests as such taxpayer will be adversely affected by the contributions to be made for the payment of the annuities through taxation because such purpose is illegal. Any money raised by taxation by virtue of the act and applied to the payment of annuities will be used for an unlawful and unauthorized purpose and for payments that are illegal and in violation of the provisions of the Constitution of Nebraska above stated. Each of the annuities above described have by provisions of the act become, if valid, a present valuable annuity right to the judges as above set forth. The annuities are a part of the present compensation for the duties to be currently performed by the judges in their official capacity from and after September 18, 1955, although the payment of such compensation by way of annuity is deferred and is to be paid after the services have been rendered and the official position terminated. The Judges Retirement Act because of the reasons alleged and by reason of the changes in the compensation of the seven judges during their term of office as set forth is a violation of the Constitution of Nebraska and the act is in its entirety unconstitutional and invalid.

The defendant as Secretary of State will, unless prevented by action of the court, certify the names of the seven persons herein described as district judges to the proper election official of each county within which electors may vote for the office of district judge for placement on the ballot at the said general primary

election to be held as aforesaid. Defendant asks that the action be dismissed.

Stanley Bartos, Lyle E. Jackson, Arthur C. Thomsen, James M. Patton, and Isaac Johnson Nisley filed a petition in intervention in which they alleged their interest in the subject matter of this action, asserted that all the allegations of fact set forth in the answer of Frank Marsh, Secretary of State, filed herein are true, and that the interveners adopted the same for their answer to the same extent and effect as though said entire answer were incorporated in the petition of intervention.

Plaintiffs have interposed a general demurrer to the answer of the defendant and to the petition of intervention. The facts well pleaded and the inferences therefrom are admitted. The litigation must be resolved as a matter of law. Kinney Loan & Finance Co. v. Sumner, 159 Neb. 57, 65 N. W. 2d 240.

In the following discussion of the case Frank Marsh, Secretary of State, will be designated as defendant. He and the interveners will be generally spoken of as defendants. The seven incumbent judges named in the pleadings will be referred to as the judges.

This action was commenced in this court. The cases of which this court may acquire original jurisdiction are few. They are limited to those of a civil nature in which the state is a party, cases relating to revenue, mandamus, quo warranto, and habeas corpus. Art. V, § 2, Constitution of Nebraska. This provokes inquiry as to what fact exists in this case which solicits and justifies exercise of original jurisdiction by this court. There is a single opportunity for the cause to be within the reach of the original jurisdiction of this court and that is that it is a case relating to the revenue within the meaning of the constitutional provision. The validity of the Judges Retirement Act is the issue in the case. Laws 1955, c. 83, p. 243; §§ 24-701 to 24-714,

R. S. Supp., 1955. This act authorizes and requires a substantial fund for implementing the retirement plan promulgated by it to be furnished by appropriations by the Legislature. The Legislature which passed the act made an appropriation to assist in originating and supplementing the fund. This court has said that the word "revenue" is broad and general and includes all public money which the state collects and receives from whatever source and in whatever manner. City of Omaha v. Hodgskins, 70 Neb. 229, 97 N. W. 346; State v. Stanton County, 100 Neb. 747, 161 N. W. 264. The contesting litigants each aver that the cause relates to the revenue of the state. The conclusion is inescapable that this is correct.

The Judges Retirement Act creates in the state treasury a fund denominated the Nebraska Retirement Fund for Judges to be administered by the Board of Educational Lands and Funds and to which is required to be credited all money appropriated or transferred by law thereto. The act exacts that each judge within its specifications shall contribute monthly 4 percent of his monthly salary to the fund. The method and manner of the contribution is that the Auditor of Public Accounts is by mandate of the act required to make a deduction of 4 percent on the monthly pay roll of each judge, showing the amount to be deducted and its credit to the fund. The additional amounts provided for the retirement fund are a fee of one dollar taxed as costs in each civil cause of action or proceeding filed in the district court and an appropriation biennially in such amount as may be determined by the Legislature to enable the fund to meet anticipated claims. The fund may be used only for the payment of all annuities and other benefits created by the act and shall not be used to pay expenses of the administration thereof. The deductions required by the act as stated above have been and are being made commencing with September 18, 1955. This amounts to about $370 from the salary of

each of the judges of the district court during the unexpired part of the present term.

The retirement pay is determined by the length of the service of the judge and by applying a percentage of the amount of salary he receives at the time of his retirement or at the time he arrives at the compulsory retirement age. The right, if the act is valid, to the provided amounts of retirement pay based upon retirement age, length of service, and amount of present salary ranges as to the several interveners from $123 per month up to $400 per month for their lifetime. These amounts will be in addition to salary.

The State of Nebraska retains 4 percent of the monthly salary of each judge within the act and credits the amount retained to a fund of its designation without participation in any way of the public official. These deductions are the retention of public money. They continue to be public money and the fund is a public one. The amount withheld by the state from the salary of judges never was and never will become their money or property. The annual salary of each fixed by law then earned and required to be paid in equal monthly installments is decreased by the amount deducted during his term of office.

The act has provisions for distribution of the retirement fund and there are instances, if named conditions are satisfied, that an amount equal to the amount which has been withheld by the state will without interest be the distributive share of the fund paid to the judge at some more or less remote future time. The payments are contingent. If a member dies his equivalent of the amount withheld from his salary will never have been received by him. A payment to his estate or to some other person is not a payment to the judge who earned the salary. The payment of the equivalent of the amount withheld from the salary of a judge at a later time does not satisfy the obligation of the state to pay him his salary as earned and as is specified by law. Any

payment from the fund determined by the amount withheld from his salary is not even pretended in the act to be made as a deferred payment of salary but it is a distribution, when it occurs, of the share of deferred compensation from the retirement fund the recipient is entitled to have by virtue of the terms of the act. The benefits to be paid to a judge whose tenure of office has been 10 years or more is not measured by the amount of the deduction from his salary. He is, on the termination of his service or on his retirement, entitled to be paid such annuities as are specified in the act.

The salary of each of the judges affected by the Judges Retirement Act is fixed by statute and it characterizes his compensation as an annual salary and it is thereby made payable and required to be paid in "equal monthly installments." § 24-301.01, R. S. Supp., 1955. A judge has the right by virtue of the law to receive his annual salary during the year in which it is earned in equal monthly installments. There is no lawful right for any part of it to be withheld from him. If any amount is taken from his salary by arbitrary legislative fiat the judge has not received it. He cannot identify any portion of the fund to which the deduction from his salary has been credited as belonging to him. The amount deducted has never become his. It has not been and neither will it ever become his property. It has been withheld from him and his salary has been diminished. This is a violation of the constitutional guaranty that the compensation of a public official shall not be diminished during his term of office. Art. III, § 19, Constitution of Nebraska.

Lickert v. City of Omaha, 144 Neb. 75, 12 N. W. 2d 644, concerned the police pension law applicable to Omaha which created a police relief and pension fund and contained the following: "A sum not to exceed one dollar of the monthly * * * salary * * * of each member of the police department, which sum shall be de-

ducted monthly by the comptroller from the * * * salary * * * of each and every member of the police department, and the comptroller is hereby authorized, empowered and directed to deduct the sum as aforesaid and forthwith to pay the same to the treasurer of the said police relief and pension fund." Plaintiffs were members of the police force of Omaha and they alleged that they became such members with the agreement that the pensions provided by statute were part of the compensation for their services; that they permitted the city to withhold one dollar monthly from their salary to be placed in the relief and pension fund; that thereby there was created a contract between the plaintiffs and the city; that plaintiffs had performed their part of it; and that they had vested rights and interests in the relief and pension fund that could not be disturbed or denied. This court denied the contentions of plaintiffs and determined that the deduction of contributions from the salary of policemen for the benefit of the relief and pension fund was a reduction of their salaries so that their salaries became fixed in the net amount that was paid the policemen and the court also concluded that they had no vested right by virtue of the deductions in the fund created by them. The language of the court follows: "We have heretofore set out that plaintiffs alleged they entered the service with the agreement that the pension as provided at the time was a part of their compensation and that they 'permitted' the defendants to withhold from their salaries the sum of one dollar each month to assist in the creation of the pension fund; and that 'thereby there was created * * * a contract.' There was no evidence of any such agreement having been made. The charter provision as it existed prior to the amendment provided for payment to the treasurer of moneys from various sources 'to constitute a police relief and pension fund, viz.: * * * sixth. A sum not to exceed one dollar of the monthly pay, salary or

compensation of each member of the police department, which sum shall be deducted monthly by the comptroller from the pay, salary or compensation of each and every member of the police department, and the comptroller is hereby authorized, empowered and directed to deduct the sum as aforesaid and forthwith to pay the same to the treasurer of the said police relief and pension fund.' Comp. St. 1929, sec. 14-610. The provisions of this act do not support the construction that the members 'permitted' the deduction of sums from their pay. The deduction, by the clear provisions of the act, is mandatorily made before their salary is paid. * * * such a provision in legal effect says that the officer shall receive each month the net amount payable to him." The reasoning and conclusion of that case are applicable to the present case and make it certain beyond doubt that when the state deducts from the salary an amount to create a pension or retirement fund without the direction or consent of the salaried officer the exaction is a deduction of that amount from the salary and a diminution of compensation to that extent. That decision applied to this case establishes that the judge receives as his compensation not the annual salary the statute designates but only the net amount as reduced by the amount withheld by the state that is credited to the retirement fund. The inescapable effect is that the Judges Retirement Act diminishes the salary of public officers during their term.

Pennie v. Reis, 132 U. S. 464, 10 S. Ct. 149, 33 L. Ed. 426, often characterized as a leading case, considered a statute of California which created a fund identified as the police life and health insurance fund for the benefit of the members of the police force of San Francisco and required the treasurer of the city and county to retain from the pay of each police officer the sum of two dollars per month to be paid into the fund. There was a provision that upon the death of any member of the police force after a specified date there

should be paid from the fund to his legal representative the sum of $1,000. Subsequent legislation repealed the original act and created a new fund called a police relief and pension fund which provided for a transfer to it of the amount in the original fund and made new and different provisions for the distribution of the new fund. The plaintiff was the administrator of a deceased policeman who served the city during the existence of the original legislation and for some time after the new act became effective. The suit was to recover $1,000 from the life and health insurance fund which then amounted to many times the sum sought to be recovered. The opinion in part said: "Notwithstanding, therefore, in this case, the petitioner avers that the deceased police officer contributed out of his salary two dollars a month, pursuant to the law in question, and, in substance, that the fund which was to pay the one thousand dollars claimed was created out of like contributions of the members of the police, the court, looking to the statute, sees that, in point of fact, no money was contributed by the police officer out of his salary, but that the money which went into that fund under the act of April 1, 1878, was money from the State retained in its possession for the creation of this very fund, the balance—one hundred dollars—being the only compensation paid to the police officer. Though called part of the officer's compensation, he never received it or controlled it, nor could he prevent its appropriation to the fund in question. He had no such power of disposition over it as always accompanies ownership of property. * * * If the two dollars a month, retained out of the alleged compensation of the police officer, had been in fact paid to him * * *and after such payment he had been induced to contribute it each month to a fund on condition that, upon his death, a thousand dollars should be paid out of it, to his representative, a different question would have been raised * * *. It is sufficient that the two dollars retained from the police

officer each month, though called in the law a part of his compensation, were, in fact, an appropriation of that amount by the State each month to the creation of a fund for the benefit of the police officers named in that law * * *." See, also, Hughes v. Traeger, 264 Ill. 612, 106 N. E. 431; Helliwell v. Sweitzer, 278 Ill. 248, 115 N. E. 810.

The essence of that decision is that deductions from the salary of the public officer were not voluntary and were not contributions by him; that he never received the amount withheld but it was and remained public money; and that the amount retained was a deduction from his salary and it was decreased to that extent.

The primary purpose of the constitutional prohibition against diminution was not to benefit the public official but the public. Such being its purpose it is to be construed not as a private grant but as a limitation imposed in the public interest; not restrictively but in accord with the spirit and the principle on which it proceeds. Obviously diminution may be effected in many ways. Some may be direct and others indirect or even evasive but the prohibition is inexorable. All which by their necessary operation and effect withhold or take from the public officer a part of that which has been promised by law for his services must be regarded within the inhibition. Nothing short of this gives full effect to its spirit and principle.

The benefit of a retirement system is a form of compensation additional to the regular salary of a member of the system with payment deferred to a later time. The increase in the compensation results when the grant is made and when the recipient of the benefits of the act begins his service and commences to earn the additional remuneration. The benefit of the retirement system awarded to a member thereof who renders services under the act creating the system after its enactment is not a grant of extra compensation after the services are rendered which the Constitution

condemns because the increase in pay is granted immediately and from the date of the grant is being currently earned. It is obviously not compensation granted after service had been rendered. It is the payment thereof alone which is deferred to a later date. If the services are rendered and terminated before the grant is made the benefits awarded are not compensation but are a gratuity.

A decision involving this subject often and favorably referred to is State ex rel. Haberlan v. Love, 89 Neb. 149, 131 N. W. 196, 34 L. R. A. N. S. 607, Ann. Cas. 1912C 542. It concerned the statute of 1895 providing that cities of the first class should pay a benefit to a retired fireman of 25 percent of his salary when he should have retired and should have served 20 years before retirement. Plaintiff was a retired fireman of Lincoln who had served a part only of his 20 years after the enactment of the statute at the time of his retirement on April 1, 1904. He was then receiving a salary of $80 per month and he was entitled to a pension of $20 per month. The statute was amended in 1909 and the benefits of the pension system were increased to $50 per month but the plaintiff had performed no service since the amendment of the statute increasing the amount of the pension. Plaintiff sought to recover the increased amount of $50 per month which the court denied. The court discussed the difference between retirement pay earned as compensation for services rendered under the statute, and therefore valid, and a payment, not a part of compensation and not based upon services rendered, which would be a gratuity and invalid, in this manner: "In considering the right of the state to grant pensions, we enter an unexplored field from a local standpoint. In the constitution of 1866, the constitution adopted by the convention in 1871, but not ratified by the people, and the constitution of 1875, the right of the state to loan its credit to individuals or to grant extra compensation to any officer of or

contractor with the state is definitely and positively forbidden. * * * The constitutional prohibitions just referred to were not formulated and adopted with a view to the eradication of evil practices then prevalent in the commonwealth. The state has generally, to say the least, been frugal in fixing official salaries, and it may have been anticipated that attempts might be made by appropriations or ex post facto laws to favor individuals or to create charges upon the public treasury for services that others would have been willing to render for the compensation provided by law. * * * In applying these limitations to the instant case, it may be conceded that the pension forms an inducement to the individual to enter and remain in the service of the fire department, and that the pension in a sense is part of the compensation paid for those services. 2 Goodnow, Comparative Administrative Law, p. 74; Gray, Limitations of Taxing Power and Public Indebtedness, sec. 336. In this aspect of the case, if no part of the service was rendered subsequent to the enactmnt (enactment) of the law, the compensation would be a gratuity forbidden by the fundamental law of the state. Mead v. Inhabitants of Acton, 139 Mass. 341. But the relator continued in the service nine years after the law was enacted, and thereby earned a right to his pension under that act so long as it shall remain in force. The amendment of 1909 does not repeal the act of 1895 so as to deprive the relator of his right to a pension; but, since he rendered the state no services subsequent to the enactment of that amendment to increase his pension would violate section 16, art. III of the constitution."

It could hardly be made clearer or more positive that retirement benefits are either earned compensation for services rendered after the grant of them and that they are therefore valid or that they are a gratuity and not a part of compensation and therefore invalid.

In Ledwith v. Bankers Life Ins. Co., 156 Neb. 107, 54 N. W. 2d 409, this court said: "The benefits of a retire-

ment plan are contingent deferred compensation, presently earned, but payable in the future to employees upon condition that they possess the qualifications required by the plan and that they comply with the conditions and regulations imposed on receipt by them of the retirement benefits." In the opinion the court remarked: "A pension is a gratuity where it is granted for services previously rendered and which, at the time they were rendered, were fully paid for and gave rise to no legal obligation for further compensation. * * * The retirement plan involved herein does not provide for a gratuity. * * * It does not provide for benefit payments to any persons other than those employed by the company at the time or subsequent to the time it became effective. There is no management discretion in the allotment or measurement of benefits. * * * The benefits are a form of contingent deferred compensation and the plan is uniform in its application to all covered employees."

The opinion in Allen v. City of Omaha, 136 Neb. 620, 286 N. W. 916, asserts: "* * * it is true that a policeman's pension is classified as a part of his compensation and not a gratuity * * *."

In State ex rel. Sena v. Trujillo, 46 N. M. 361, 129 P. 2d 329, 142 A. L. R. 932, it is said: " 'Pensions' for state employees are pay withheld * * * and to be valid the pension must be conferred upon persons who at the time of receiving the right to them are officers or employees of the state and they cannot be conferred upon persons who had previously to the grant retired from the state's service; a pension to such persons being an 'appropriation of public funds' for individuals and a 'gift' or 'gratuity.' "

See, also, Richards v. Wheeler, 10 Cal. App. 2d 108, 51 P. 2d 436; Kern v. City of Long Beach, 29 Cal. 2d 848, 179 P. 2d 799; Rodney v. Firemens Relief Commission (Pa.), 55 Lack. Jur. 105; Salz v. State House Commission, 18 N. J. 106, 112 A. 2d 716; Opinion by the Justices,

249 Ala. 88, 30 So. 2d 14; Mahon v. Board of Education, 171 N. Y. 263, 63 N. E. 1107, 89 Am. S. R. 810; Koehnlein v. Allegheny Co. Emp. Ret. Sys., 373 Pa. 535, 97 A. 2d 88; State ex rel. Smith v. Annuity & Pension Board, 241 Wis. 625, 6 N. W. 2d 676. The Judges Retirement Act increases the compensation of the judges to the extent of the benefits granted.

The benefits of the Judges Retirement Act become vested when the member has reached the required age and completed the required service. It is then an established and vested right which may not be impaired. The interveners and two other district judges have reached the compulsory retirement age stated in the act. They have rendered services under the act and, measured by their total length of service, now have a vested right to retirement pay in addition to their salaries for the remainder of their respective lives if the act is valid and has become operative. The retirement benefits constitute increased compensation not only granted during the present term of the judges but earned during the term for the services they have been and are rendering. They amount to a definite and substantial increase in compensation during the term of office of the beneficiaries.

In Kern v. City of Long Beach, *supra,* it is said: "Pension rights acquired by public employees under statutes providing for pension payments to employees who are eligible for retirement after a period or term of service, become vested as to each employee, at least on the happening of the contingency on which the pension becomes payable. * * * Since a pension right of a public employee is an integral part of the contemplated compensation, it cannot be destroyed, once it has been vested * * *."

In State ex rel. Hanrahan v. Zupnik, 161 Ohio St. 43, 117 N. E. 2d 689, the rule is stated: "In the absence of statutory provisions to the contrary, when any particular installment of a pension, authorized under a

legally established pension system, becomes due, the right of the pensioner thereto immediately becomes vested as a matter of law and such vesting need not be directed or authorized by statute." See, also, State ex rel. Haberlan v. Love, *supra;* Payne v. Board of Trustees, 76 N. D. 278, 35 N. W. 2d 553; McFeely v. Board of Pension Commissioners, 137 N. J. Law 234, 59 A. 2d 412.

Plaintiffs resist the hypothesis that the Judges Retirement Act provides an increased compensation of the judges primarily by saying that this contention has been answered in the decisions of the courts of other states. They cite People v. Wright, 379 Ill. 328, 40 N. E. 2d 719, and quote this statement from it: "Respondent makes the point that provision for a retirement annuity from an economic standpoint amounts to an increase of compensation. This point is not valid, because the constitution only prohibits an increase during the term of office, and the beneficiary does not receive anything during such term." The retirement law considered in that case was a voluntary one by the terms of which a judge could accept or reject the pension provisions. If he accepted he consented to a deduction of a contribution from his salary and his relationship to the plan became contractual. The Nebraska retirement act is not elective; it is mandatory. It may be distinguished from the one considered in the Illinois case by the view of that court that retirement pay is an annuity purchased by voluntary contributions resulting from contractual rights between the employee and employer. Thereby the court substantially removed the Illinois plan from the field of compensation. This view and distinction are emphasized by other decisions of the court of that state.

In Krebs v. Board of Trustees, 410 Ill. 435, 102 N. E. 2d 321, 27 A. L. R. 2d 1434, the court considered an amendment of a statute which provided retirement benefits for teachers. The amendment increased the benefits from $400 to $700 annually and permitted teachers who had retired before the amendment to re-enter the

system on payment of $300 plus interest from a named date. It was argued that this was the granting of compensation after the services were rendered in violation of Article IV, section 19, of the Constitution of Illinois. The court said that the increased amount was not extra compensation but was an annuity purchased for a consideration. The court referred to its prior decisions and said: "* * * this court held that the decisions in the cases cited by appellant did not apply where the fund from which the increased payments were authorized was raised in part by voluntary contributions by the employees, but that in such cases, the voluntary contributions by the employees raised a contractual relation between the employee and the State, and therefore the parties could contract for an increase in the annuity in consideration of further contributions." See, also, Raines v. Board of Trustees, 365 Ill. 610, 7 N. E. 2d 489; Ridgley v. Board of Trustees, 371 Ill. 409, 21 N. E. 2d 286.

The conclusion of the Illinois court in People v. Wright, *supra,* that an increase during the term if the payment thereof is delayed until after the term is not prohibited may not be accepted as sound. The effect thereof would be to destroy the constitutional prohibition that there shall not be an increase in the salary of a public official during the term of office or the grant of a gratuity after the services of the officer have been rendered and terminated.

It was also concluded in that case that the voluntary contribution of a part of the salary for the annuity fund was not a reduction of salary. The Illinois court therein said: "* * * the law does not require them to contribute, but gives them an option or election, and if they do contribute, a contract relation is established, which, after their retirement, entitles them to an annuity. There is no compulsion, but on the contrary it depends upon the voluntary contributions of those affected by the legislation. * * * the effect is the same

as if the full salary were paid to him, and after it became his private means he in turn contributes to the retirement fund."

The Illinois decision is not convincing. It is inconsistent with the prior conclusions of this court. State ex rel. Haberlan v. Love, *supra;* Lickert v. City of Omaha, *supra.*

Plaintiffs cite Aldredge v. Rosser, 210 Ga. 28, 77 S. E. 2d 515, as another case that answers the argument that the Judges Retirement Act of this state provides an increase in the compensation of its members during their term. They quote therefrom the following which may have been adopted from Illinois since it has not been found in any other decision: "The retirement act does not amount to an increase in the compensation of the judge during the term of office in which he was elected for the very good reason that he receives nothing under the provisions of the act until he retires, and when he retires, his term of office, so far as he is concerned, will then be at an end." If the retirement benefits were not an increase in compensation during the term because paid afterwards, the Georgia court makes no attempt to explain why they were not compensation paid after the services were rendered, in violation of the provision of the Constitution of Georgia in that respect. The discussion concerning this rule as announced in People v. Wright, *supra,* is applicable to the Georgia case and will not be repeated.

Plaintiffs argue that if the Judges Retirement Act conflicts with the constitutional limitation that the salary of a public officer shall not be increased or decreased during his term of office the part of the act that was intended to operate before the new term commenced may be disregarded and that the remainder of the act may, in its operation after the new term commences, be considered valid. The fact that a part of a law is invalid does not always require that the entire law be treated as void. If the part that is bad is independent

of and separable from the balance of the law, or if the invalid part was not an inducement to the passage of the act, or if the remainder of the act is not so connected with the invalid portion that it cannot be upheld without doing violence to the legislative intent as a whole or result in putting in effect a law which the Legislature would not have passed had its attention been called to the invalid parts, the portion of the act that is valid may be sustained and given effect. State ex rel. Taylor v. Hall, 129 Neb. 669, 262 N. W. 835; State ex rel. Johnson v. Consumers Public Power Dist., 143 Neb. 753, 10 N. W. 2d 784, 152 A. L. R. 480; Midwest Popcorn Co. v. Johnson, 152 Neb. 867, 43 N. W. 2d 174; Peterson v. Hancock, 155 Neb. 801, 54 N. W. 2d 85.

The provisions of the act intended to operate from September 18, 1955, the date when plaintiffs say it became effective, until January 3, 1957, the beginning of the next term, cannot be deleted from the act and the remainder thereof held to be separable, complete, independent, and unrelated to the part eliminated. The treatment of this act as plaintiffs suggest would be to rewrite it in violation of the obvious intention of the Legislature and to enforce a statute which the Legislature would not have passed.

The act specifically fixes the measure of retirement pay that each judge shall receive under it on reaching the age and rendering the service for the period required and it provides for the accumulation of a fund from which the retirement payments may be made. Plaintiffs say the portions of the act providing for the contributions to the fund from September 18, 1955, to January 3, 1957, may be eliminated from the act, that they are not related to the remainder of it, and that this deletion would not materially affect the entire plan created by it. Likewise they contend the provisions of the act providing retirement pay for incumbent judges who become 70 years of age during the term which they are serving may also be eliminated as un-

essential to the plan the Legislature intended. The provisions for the accumulation of the fund are reciprocal to the payment of the retirement benefits and they are integral parts of the entire system. The two provisions are interrelated. The plan for the accumulation of the fund is not intended to be cut down while the retirement benefits remain untouched and the difference be made up by further increased appropriations of revenue of the state to supply the loss or decrease in the amount of the fund. That was not the intention of the Legislature.

The act has an additional provision for benefits for incumbent judges who are 70 years of age during their present term of office which the plaintiffs would have the court disregard. Such a member with a total service of at least 8 years when his present term expires or at the time of retirement before his term ends may receive retirement annuities as provided by sections 8, 9, and 10 of the act.

The record exhibits the amount of retirement pay each of the judges holding office on September 18, 1955, and who became 70 years of age during his present term of office was entitled to by the provisions of the act. If it became effective on that date and its operation may be suspended until January 3, 1957, plaintiffs contend that these provisions may be eliminated. They believe it is permissible, to save a part of the act, that these judges should be deprived of the opportunity to seek a re-election and that they should also be denied retirement pay. This does not respond to the intention of the Legislature as disclosed by the terms of the act.

The Judges Retirement Act was approved May 29, 1955. Laws 1955, c. 83, p. 243; §§ 24-701 to 24-714, R. S. Supp., 1955. The Constitution provides that no act shall take effect until 3 calendar months after the adjournment of the session in which it was passed except in cases of an emergency the Legislature may by a vote

of two-thirds of all of its members otherwise direct. Art. III, § 27, Constitution of Nebraska. The Judges Retirement Act is silent concerning an emergency and as to the time when it should be in effect. The sixty-seventh session of the Legislature at which the act was passed adjourned on Friday, June 17, 1955. The act would ordinarily have become law September 18, 1955. State ex rel. City Water Co v. City of Kearney, 49 Neb. 325, 68 N. W. 533; Bainter v. Appel, 124 Neb. 40, 245 N. W. 16. The prohibition of the Constitution that no act shall take effect until 3 calendar months after the adjournment of the session at which it was passed unless the emergency provisions thereof are complied with is mandatory. This, however, does not deprive the Legislature of the authority to provide that the operation of an act shall be postponed to a time much beyond 3 calendar months after the adjournment of the session at which the act was passed. The fact that ordinarily legislation cannot become law until 3 months after the end of the session at which it was enacted does not mean that it must in all cases be operative immediately upon the expiration of the 3-month period after adjournment of the session.

It has been recognized in this jurisdiction that an act without an emergency provision may become law 3 calendar months after the end of the session at which it was adopted and that the operation of its provisions may be postponed to a much later time designated by a specific date or by the happening of an event that is certain to occur. A recent instance of this is the act of 1955 increasing the salary of supreme and district judges of the state. Laws 1955, c. 77, § 3, p. 232; § 24-301.04, R. S. Supp., 1955. It postponed operation of the act until such time as the salaries "may become operative under the Constitution of Nebraska."

A much earlier instance in point is the legislation that was involved and considered in Hopkins v. Scott, 38 Neb. 661, 57 N. W. 391, in which it was concluded:

"Chapter 50, Session Laws, 1891, relating to the keeping of state and county funds, is not in conflict with the constitution * * * because of its providing that it shall not apply until the expiration of the terms of office of the state treasurer and of the several county treasurers in office at the time of its passage." In the opinion it is stated: "It is also claimed that the act of 1891 is unconstitutional, because it provides that it shall not take effect until the expiration of the terms of the county treasurers current at the passage of the act. It is said that this is in conflict with the constitutional provision that all acts shall take effect upon the expiration of three calender (calendar) months after the adjournment of the legislature. We think the limitation was one which could be properly made by the legislature. The act, as an act, did go into effect under the constitutional provision referred to. It became the law of the state from that time * * *. After the constitutional period for the act to take effect had expired, it became the law, and has, as fast as the terms of treasurers expired, become operative."

In State ex rel. Wheeler v. Stuht, 52 Neb. 209, 71 N. W. 941, this court said: "A law is not open to the criticism that separate provisions of it take effect at different dates if as an entirety it becomes of effect and operative on a fixed date * * *."

The declaration of the court in Lincoln Telephone & Telegraph Co. v. Albers, 126 Neb. 329, 253 N. W. 429, is: "We are of the opinion that the legislature had power to enact chapter 136, Laws 1933, and that it would become a law, although not operative until there was further legislation. There was then no statute authorizing payment of personal taxes in instalments, but it would become operative and effective when another act was passed providing for the payment of personal taxes in instalments."

The statute considered in Hopkins v. Scott, *supra,* provided that it should not operate until the expiration

of the present term of the State Treasurer and the present terms of the county treasurers. This is referred to in State ex rel. Taylor v. Hall, *supra,* in this manner: "This was an express provision in the statute which this court rightfully held did not render the statute void."

The remarks of the court in Diamond Glue Co. v. United States Glue Co., 187 U. S. 611, 23 S. Ct. 206, 47 L. Ed. 328, are pertinent to the present inquiry: "Statements made with a different intent in some decisions, to the effect that suspended statutes are to be read as if passed on the day when they go into operation, do not apply to a case like this. Such statutes are to be read in that way for the purposes of the operation which is suspended, but not for all."

It is indispensable to a decision of this case to determine when the Legislature intended that the Judges Retirement Act should be operative. If it intended that it should be before the beginning of the next term of district judges, January 3, 1957, the act is, because of the considerations stated above, invalid. If a different interpretation is permissible which honors the intention of the Legislature and sustains the act as a valid one it should and legally must be adopted.

In Abie State Bank v. Weaver, 119 Neb. 153, 227 N. W. 922, the court said: "It is elementary that it is not within the province of the courts to annul a legislative act unless its provisions so clearly contravene a provision of the fundamental law, or it is so clearly against public policy, that no other resort remains." See, also, Weaver v. Koehn, 120 Neb. 114, 231 N. W. 703; Sommerville v. Johnson, 149 Neb. 167, 30 N. W. 2d 577.

In interpreting an act of the Legislature all reasonable doubt must be resolved in favor of its constitutionality. If it is subject to more than one interpretation one of which sustains it as valid and another which renders it in conflict with the Constitution the

court must adopt the former. Hinman v. Temple, 133 Neb. 268, 274 N. W. 605, 111 A. L. R. 1217; Nelsen v. Tilley, 137 Neb. 327, 289 N. W. 388, 126 A. L. R. 729; Beisner v. Cochran, 138 Neb. 445, 293 N. W. 289; Peterson v. Hancock, *supra.*

One of the more significant rules in the interpretation of a statute is to ascertain the legislative intent and give effect to it if it is a lawful one. Hubbell Bank v. Bryan, 124 Neb. 51, 245 N. W. 20; McQuiston v. Griffith, 128 Neb. 260, 258 N. W. 553; Enyeart v. City of Lincoln, 136 Neb. 146, 285 N. W. 314; Howell v. Fletcher, 157 Neb. 196, 59 N. W. 2d 359. In the last case cited it is said that the legislative intent may be gathered from the reason for the enactment of the legislation in question.

The Legislature when it adopted the Judges Retirement Act is presumed to have known the provisions and limitations of the Constitution and the interpretation that the court had placed on them and on similar legislation previously enacted. It may also be assumed that in passing the act the Legislature intended a valid enactment rather than one in conflict with the Constitution. Nebraska District of Evangelical Lutheran Synod v. McKelvie, 104 Neb. 93, 175 N. W. 531, 7 A. L. R. 1688; Burgess-Nash Bldg. Co. v. City of Omaha, 116 Neb. 862, 219 N. W. 394; State ex rel. Johnson v. Goodgame, 91 Fla. 871, 108 So. 836, 47 A. L. R. 118; 11 Am. Jur., Constitutional Law, § 97, p. 725.

If on the basis that it is presumed that the Legislature intended to enact a valid Judges Retirement Act, it is determined that the Legislature intended that the act should be operative as soon as the limitations of the Constitution permit and if that date is accepted as the time when the act will commence to operate, there is no necessity for the elimination of any provision of the act and it will go into operation as to the judges of the district court at the commencement of the next term on January 3, 1957. There is sound

reason for this conclusion. This interpretation has the same effect as if the Legislature had in the act expressly declared that it should not go into operation until the beginning of the new term or as soon as it could constitutionally do so. This interpretation gives application to all the terms and expressions of the act such as "incumbent judge" and "present term." The incumbent judges who will answer to that description at that time will be the district judges elected in 1956 and who will commence their "present" terms on January 3, 1957. The provisions of the act recognize that when it becomes operative there will be district judges who are 70 years of age or more who will be qualified to serve then and for the balance of their terms. It obviously follows that a district judge who is more than 70 years of age would then, by provision of the statute, be qualified to become a candidate for nomination and re-election and if elected to serve as a district judge during the term commencing January 3, 1957.

The basis on which plaintiffs seek an injunction to prevent the names of the district judges being placed on the ballot for re-election is that the act became law and its provisions began to operate September 18, 1955, and that the district judges serving on that date were permitted only to serve out the balance of those terms and were not qualified to serve after those terms expired and when the new term commenced.

It is concluded that the Judges Retirement Act was intended to and will be operative on January 3, 1957, and in this view it does not violate the Constitution of the state for any of the reasons discussed herein.

The demurrer of plaintiffs to the answer of the defendant and to the petition of intervention should be and it is overruled.

DEMURRER OF PLAINTIFFS OVERRULED.

VELMA M. TRUTE, FORMERLY VELMA M. MADISON, ADMINISTRATRIX WITH WILL ANNEXED OF THE ESTATE OF BESS DICKINSON, DECEASED, APPELLANT, V. KATE SKEEDE ET AL., APPELLEES.

75 N. W. 2d 672

Filed March 23, 1956. No. 33792.

1. **Wills.** In searching for the intention of the testator the court must examine the entire will, consider all its provisions, give words their generally accepted literal and grammatical meaning, and indulge the presumption that the testator understood the meaning of the words used.
2. ———. The intention of the testator as determined from the will must be given effect if it is not inconsistent with any rule of law.
3. **Life Estates.** The relation of a life tenant to his remaindermen is that of a quasi trustee. The relation is the same if a power of disposal is annexed to the life estate.
4. **Wills: Life Estates.** Where life tenants under a will accept a conveyance of real estate in lieu of a mortgage, an asset of the estate, such acceptance does not have the effect to enlarge or change the nature of the original bequest and devise given in the will.
5. ———: ———. A change in the form of the estate under the power expressly given in the will does not have the effect to enlarge or change the nature of the original title thereto.
6. ———: ———. When a life estate is expressly created by a will and unlimited power of disposition is given thereunder to the life tenants with the remainder over in whatever part remains undisposed of at the death of the life tenants, the part of the property undisposed of passes to the remaindermen unless otherwise provided.
7. **Life Estates: Remainders.** Where the evidence discloses that life tenants have been reimbursed for advancements made by them to pay debts of the estate, they are not entitled to a lien on the proceeds of a sale of land belonging to the remaindermen.
8. ———: ———. It is the general rule that an increase in the value of real estate in an estate belongs to the remaindermen or corpus rather than to the life tenant or equitable life beneficiary.
9. **Wills.** The words "profit" and "income" as used in the will under consideration in the instant case mean the same thing.
10. **Attorney and Client: Costs.** It is the practice in this state to allow the recovery of attorney's fees and expenses only in

such cases as are provided for by statute, or where the uniform course of procedure has been to allow such recovery.

11. **Appeal and Error.** Under section 25-1919, R. R. S. 1943, and Revised Rules of the Supreme Court, rule 8a 2(4), consideration of the cause on appeal is limited to errors assigned and discussed, except that the court may, at its option, note a plain error not assigned.

APPEAL from the district court for Seward County: HARRY D. LANDIS, JUDGE. *Affirmed.*

Stewart & Stewart, for appellant.

Van Pelt, Marti & O'Gara, for appellees.

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

MESSMORE, J.

This is an action brought by Velma M. Trute, administratrix with the will annexed of the estate of Bess Dickinson, deceased, for a declaratory judgment in the district court for Seward County, Nebraska. The purpose of the action is for a determination of questions which have arisen in the administration of the estate of Bess Dickinson, deceased. Certain defendants defaulted, and their default was entered by the trial court. We are primarily concerned in this appeal with the parties made defendants, interested or claiming to have an interest in the proceeds from the sale by the plaintiff of certain real estate located in Seward County, pursuant to a license to sell real estate granted by the district court for Seward County, Nebraska.

The parties stipulated that these defendants are the heirs and issue of the deceased brothers and sisters of W. Q. Dickinson, deceased. All of such parties appear by name and relationship to W. Q. Dickinson in the pleadings and the decree of the trial court, and will not be repeated here.

The parties will be referred to as designated in the

district court, defendants as defendant cross-petitioners or remaindermen, unless otherwise stated.

The trial court entered its decree finding generally in favor of the defendant cross-petitioners, with certain exceptions.

The decree finds that W. Q. Dickinson died in 1927, and his will was admitted to probate in the State of California and in the State of Nebraska. The decree finds the assets of the estate of W. Q. Dickinson, deceased, including a promissory note and mortgage in the amount of $19,200, which was later assigned to Belle Dickinson and Bess Dickinson; that the Hansens conveyed the land to Belle Dickinson and Bess Dickinson in satisfaction of indebtedness; that Belle Dickinson and Bess Dickinson acquired and held fee simple title to the land subject to their life use; that the land was substituted for the principal and interest and was held in the same proportion, namely ten-elevenths as principal and one-eleventh as interest; that Belle Dickinson died in 1942, and Bess Dickinson died in 1951, holding legal title to the Hansen land (which will be described later in the summary of facts); that on June 20, 1952, the plaintiff properly sold this land pursuant to license granted by the district court for Seward County, Nebraska, for $32,200 which should be distributed under the direction of the county court of Seward County, Nebraska, paying ten-elevenths to the cross-petitioners as heirs of the brothers and sisters of W. Q. Dickinson; and that because of the conflicting claims of the cross-petitioners and remaining defendants to the proceeds of the sale of said real estate, the plaintiff was authorized by the county court to commence this action. The decree also finds that the court does not have authority to allow compensation to plaintiff's attorneys for their services in this action, and that each party should pay his own costs.

Judgment was entered in accordance with the find-

ings in the decree. The plaintiff appeals from the judgment of the trial court.

The assignments of error deemed necessary to a determination of this appeal may be summarized as follows: The trial court erred in finding that the defendant cross-petitioners were entitled to any of the proceeds of the sale of the land hereafter referred to as the Hansen land. The trial court erred in not finding that the defendant cross-petitioners were barred from any interest in the proceeds of the sale of such land because the conveyance of the land by the Hansens to Belle Dickinson and Bess Dickinson was in part payment for advances made by them from their own funds for payment of debts of the estate of W. Q. Dickinson, deceased, and for their support and maintenance. The trial court erred in finding that the deed conveying to Belle Dickinson and Bess Dickinson the fee simple title to the Hansen land gave them only a life estate therein. The trial court erred in not finding that the estate of Bess Dickinson had a lien on said proceeds for the advances made by Belle Dickinson and Bess Dickinson from their own funds for their support and maintenance. The trial court erred in not finding that the estate of Bess Dickinson was entitled to the increase in the value of the Hansen land. And the trial court erred in not finding that the plaintiff was entitled to payment from the funds in her possession of all expenses of administration and of this action.

The record shows that Velma M. Trute, the administratrix with the will annexed of the estate of Bess Dickinson, deceased, testified in substance that W. Q. Dickinson, also known as William Q. Dickinson, died on May 1, 1927; that his will was admitted to probate in California and in the county court of Seward County, Nebraska; that the property passing under the will of W. Q. Dickinson, deceased, included a promissory note for $19,200, executed on March 1, 1918, by Soren M. Hansen and Caroline M. Hansen; that this note was

secured by a mortgage on the northwest quarter of Section 29, Township 10 North, Range 2 East of the 6th P. M., in Seward County, Nebraska; that Belle Dickinson died in Los Angeles, California, on August 30, 1942, and left a will which was admitted to probate in California and also by the county court of Seward County, Nebraska, on October 30, 1942; that on March 26, 1943, a final decree was entered in the county court of Seward County, Nebraska, in said estate; that Bess Dickinson died on June 18, 1951, in Los Angeles, California, and left a will which was admitted to probate in California on July 20, 1951; that Maude M. Robbins was appointed as executrix; that said will was admitted to probate in the county court of Seward County, Nebraska, on September 7, 1951, and this witness was appointed as administratrix with the will annexed of the estate of Bess Dickinson, deceased; that no reference was made to the real estate above described in Bess Dickinson's will; and that Item VII of her will provided that the residue of her estate be devised and bequeathed in trust to the Security First National Bank of Los Angeles as trustee for the parties made defendants in this action whose defaults were entered by the trial court. On June 20, 1952, pursuant to a license of the district court for Seward County, Nebraska, dated May 23, 1952, to sell real estate, the real estate was sold for $32,200. On April 11, 1953, the plaintiff filed a report in the county court of Seward County, Nebraska, showing that she had in her possession $32,758.49 which included the proceeds of the sale, less expenses of sale, and at the time of trial she had on hand $32,211.13.

The record further shows that Maude M. Robbins, executrix of the estate of Bess Dickinson, deceased, in California, had made claims against the plaintiff that the money in her hands, less expenses, should be paid by her to the Bess Dickinson estate in California; that claims have been made that the plaintiff should pay the money in her hands, proceeds from the sale of the real

estate, to the answering defendants in this case; that on September 7, 1951, the county court of Seward County, Nebraska, entered an order fixing the time limit for filing claims against the estate of Bess Dickinson, deceased, which was December 28, 1951; and that thereafter notice to creditors was published and no claims were filed, and they are barred.

On June 30, 1952, the district court for Seward County, Nebraska, entered an order confirming the sale of the real estate heretofore described, and directing the plaintiff to distribute the proceeds of the sale pursuant to the settlement of the estate of Bess Dickinson, deceased, in the county court of Seward County, Nebraska. No appeal was taken from any order or decree above mentioned.

After Belle Dickinson and Bess Dickinson acquired title to the real estate in question in 1933, they retained the title and possession of the Hansen land from that time up to the death of Belle Dickinson in 1943, and thereafter Bess Dickinson continued to retain the title and possession of the land until her death on June 18, 1951.

It was stipulated and agreed that after Belle and Bess Dickinson received the deed to the land above described, they thereafter received the income therefrom and paid the expenses in connection with the same, including taxes, up to the time of the death of Belle Dickinson, and thereafter Bess Dickinson received the income and paid such expenses up to the time of her death on June 18, 1951, including taxes.

The parties stipulated as to who are the brothers and sisters of W. Q. Dickinson, deceased, and stipulated as to who are the heirs and issue of the deceased brothers and sisters of W. Q. Dickinson, deceased, living at the time of the death of Bess Dickinson, who are the remaindermen under the last will of W. Q. Dickinson. We refrain from setting forth the same. They appear in the trial court's decree, and their interests or shares are also set forth therein.

By deposition, the attorney for the estates of W. Q. Dickinson, Belle Dickinson, and Bess Dickinson, testified that all of such estates have been closed and distribution made; that the final account of the Bess Dickinson estate was approved on January 11, 1954, and distribution made a short time thereafter; that after payment of the special bequests, the remainder of the estate was delivered to the Security First National Bank of Los Angeles, as trustee; that no claim was filed against the Bess Dickinson estate by the nieces and nephews of W. Q. Dickinson claiming that any of the assets in the possession of Bess Dickinson at the time of her death belonged to them as heirs of W. Q. Dickinson, deceased; and that an action is now pending in which such a claim is made.

There is also by deposition the testimony of an accountant employed to make an accounting and a report with reference to advances made by Belle Dickinson and Bess Dickinson from their own personal assets to the payment of debts of the W. Q. Dickinson estate, and amounts expended by them for living expenses over and above the income of the W. Q. Dickinson estate, the latter accounting being made on a conservative basis. This accounting took into consideration such amounts with interest from 1927 to June 18, 1951, and total interest to March 18, 1954. We shall make reference to the pertinent parts of this testimony later in the opinion.

Before setting forth the provisions of the will of W. Q. Dickinson, deceased, here involved, we deem the following authorities should be borne in mind to enable us to discern the intention of the testator.

In searching for the intention of the testator the court must examine the entire will, consider all its provisions, give words their generally accepted literal and grammatical meaning, and indulge the presumption that the testator understood the meaning of the words used. See Attebery v. Prentice, 158 Neb. 795, 65 N. W. 2d 138.

The intention of the testator as determined from the will must be given effect if it is not inconsistent with any rule of law. See, Perigo v. Perigo, 158 Neb. 733, 64 N. W. 2d 789; Kramer v. Larson, 158 Neb. 404, 63 N. W. 2d 349; Attebery v. Prentice, *supra;* Hill v. Hill, 90 Neb. 43, 132 N. W. 738, 38 L. R. A. N. S. 198.

Item III of the will of W. Q. Dickinson, deceased, insofar as necessary to consider here, provides in part: "I give, devise and bequeath all of my property of whatsoever character and description and wheresoever situate unto my wife, BELLE DICKINSON, and to my daughter, BESS SKEED DICKINSON, as joint tenants and not as tenants in common, for and during the term of their natural lives and the natural life of the survivor of them or either of them; and considering that the uncertainty of life estates may embarrass the advantageous enjoyment of properties thus situated, * * *. Also I do authorize my said devisees in this ITEM III of my Will, or the survivor of either of them, to sell and convey in fee simple any or all of my estate, and/or to mortgage the same, or otherwise encumber the same, said life tenants, or the survivor of either of them, to have the possession, control, management, use, income and profits of said properties, with the right to receive and apply to their own use, or the survivor of either of them, during the natural lives of said life tenants, the entire income of said property; and should the income from said property be insufficient for the support and maintenance of said life tenants, then they are hereby authorized to consume the principal or so much thereof as may be necessary for their comfort and support."

Item IV of said will provides as follows: "Upon the demise of the survivor of the devisees named in Item III herein of this my last Will and Testament, I then give, devise, and bequeath all of the unconsumed rest, residue and remainder of my estate of whatsoever character and wheresoever situate, to my brothers and sisters and their heirs forever, share and share alike, and/or

if they or any of them have now or should after the date hereof predecease me, or decease before this bequest becomes effective, leaving issue or heirs of his or her body him or her surviving, then to the issue or heirs of their bodies them surviving, the issue or heir to take the share of the deceased parent; and should said deceased brother and/or sister demise without leaving issue or heir of his or her body him or her surviving, then the share of the one so deceased shall go to his or her brothers and/or sisters him or her surviving, and/or the issue or heirs of their bodies, share and share alike, the issue of a deceased taking the share of the deceased parent."

By Item VI of the will, Belle and Bess Dickinson were appointed executrices of the estate, or the survivor of either of them executrix.

The relation of a life tenant to his remaindermen is that of a quasi trustee. The relation is the same if a power of disposal is annexed to the life estate. See Attebery v. Prentice, *supra.*

We believe the first proposition to dispose of is the contention made by the plaintiff that the life tenants became the absolute owners of the Hansen land, and the proceeds of the sale should go to the surviving life tenants' estate, the estate of Bess Dickinson. In this connection, the plaintiff asserts that on February 27, 1931, the Hansen note and mortgage, an asset of the estate of W. Q. Dickinson, was assigned by Belle and Bess Dickinson, executrices of the estate, to them as joint tenants and not as tenants in common, for and during the terms of their natural lives, or the survivor of them or either of them; that on May 6, 1933, the land was conveyed to them in lieu of the mortgage by warranty deed for a consideration of $19,550; that the amount due the life tenants for advances made by them to pay the debts of the estate and for their support was more than the amount due on the Hansen note and mortgage, and the life tenants took the Hansen land as

payment for such advances; that the absolute ownership of this property by Bess Dickinson was recognized and decreed by the county court of Seward County, Nebraska, in its final decree dated March 26, 1943, which is a final judgment adjudicating that Bess Dickinson was the owner of the land heretofore described and that no other person had any interest therein; and that no appeal was taken from said decree, and by reason of said decree cross-petitioners are barred from asserting any right, title, or interest in and to said real estate or the proceeds of the sale thereof.

We deem the following applicable to the plaintiff's contention above stated.

Olson v. Weber, 194 Iowa 512, 187 N. W. 465, 27 A. L. R. 1370, posed the question: Does a life tenant, who sells the devised property or changes its form pursuant to a power to do so, invest himself with a greater title to the newly acquired property than he formerly had to the specific property devised? In answer to this question the court said: "Under our decisions no difficulty arises in making answer on this phase of the case. A change in the form of the estate under the power expressly given in the will does not have the effect to enlarge or change the nature of the original title thereto. In re Estate of Beatty, 172 Iowa 714, 715; Spaan v. Anderson, 115 Iowa 121. See, also Barton v. Barton, 283 Ill. 338. This is the weight of authority rule and is supported on principle and reason. The will of the testator could easily be defeated by the life tenant if by the mere fact of sale such tenant could enlarge a life estate into a fee. A court would necessarily protect the remainderman in order to effectuate the intent of the testator."

In Merrill v. Pardun, 125 Neb. 701, 251 N. W. 834, the plaintiff sought to enforce a trust upon personal property passing by the will of her deceased father. She was the only child, and the issue of his first marriage. After the death of his first wife, he remarried. The

defendants were the residuary legatees and devisees and sisters and children of deceased sisters of the second wife, Margaret L. Brown. Under her husband's will, he bequeathed to her the rest, residue, and remainder of his property wherever situated, to be hers absolutely, and it was his request that any property remaining on the death of his wife should go to his daughter, Mildred I. Merrill, plaintiff, to be hers absolutely, and in case of her prior death, then to her children, share and share alike. The estate was closed in the county court and the personal estate was turned over to the testator's widow. The county court found in its final decree that by the terms of the will all of the property the testator owned at the time of his death went to his widow as sole devisee. The widow died in 1929, leaving a will which was duly probated, by the terms of which she gave her step-daughter, Mildred I. Merrill, $1,000, and the remainder of her estate to other heirs and devisees named therein. The district court dismissed the plaintiff's petition, finding that it did not have jurisdiction by reason of the decree or settlement of final account in the administration proceedings in the estate of the husband by the county court. This court held that the district court was not bound or estopped by the order of the county court entered in the estate of the husband assigning all his property to his widow as sole legatee. This court said that the county court could not determine the rights of the legatees as between themselves, the county court having no authority to bind legatees by construction where the executrix could assign property without construction of a will and did not request construction. The court further found that under the terms of the will of the husband, his widow was entitled to a life estate only in his property, with power to dispose of and use the principal so far as the same might be necessary for her support, comfort, and enjoyment; and that so much of the property remaining at the time of her death should

go to his daughter, Mildred I. Merrill, to be hers absolutely. The court said, with reference to the finding that the court had no jurisdiction by reason of the decree and settlement of the final account in the estate of the father and husband: "It is settled in Nebraska that a district court has jurisdiction of a suit in equity for relief, based upon a breach of a constructive trust, even though the granting of such relief involves the interpretation of a will which has been admitted to probate."

The case is similar to the instant case. In the cited case the opinion does not disclose that the plaintiff filed any claim against the estate of Margaret L. Brown, deceased, as a remainderman under her father's will. This case disposes of the plaintiff's contention that the final decree in the Belle Dickinson estate, entered by the county court of Seward County, Nebraska, to the effect that Belle Dickinson was the owner of an undivided one-half interest in fee simple in the real estate, and that the same descended to Bess Dickinson, and that no other person or persons have any interest therein, is binding on the defendant cross-petitioners in the instant case.

In Edds v. Mitchell, 143 Tex. 307, 184 S. W. 2d 823, we find the following language which is applicable here: "The testator intends that the first taker shall have only a life estate in the property constituting his, the testator's estate, but that the life tenant shall have unlimited power to dispose of the fee; and he intends that so much of the property of his, the testator's, estate as has not been disposed of at the time of the life tenant's death shall pass to the person named in the will as remainderman. * * * If it were held that the exercise of the power of sale by the life tenant operated to divest the remainderman of all title or right to the proceeds of the sale, then the life tenant, merely by selling the property in which he has a life estate, thus changing the form of what came from the testator, could

in effect enlarge his estate into a fee, cut off the remainderman, and defeat the testator's intention. These conclusions are supported by many authorities and we have found none to the contrary. Olson v. Weber, 194 Iowa 512, 187 N. W. 465, 27 A. L. R. 1370; McCormick v. McCormick, (Ky.) 121 S. W. 450; Struck v. Lilly 219 Ky. 604, 293 S. W. 153; Henninger v Henninger, 202 Pa. 207, 51 Atl. 749; Walker v. Pritchard, 121 Ill. 221, 12 N. E. 336; Keniston v. Mayhew, 169 Mass. 166, 47 N. E. 612; Redman v. Barger, 118 Mo. 568, 24 S. W. 177; Smith v. Cain, 187 Ala. 174, 65 So. 367; Note 7 A. & E. Ann. Cas. pp. 953, 956; 3 Page on Wills, pp. 384-385, Sec. 1122." To like effect see Adams v. Prather, 176 Cal. 33, 167 P. 534.

As said in Grace v. Perry, 197 Mo. 550, 95 S. W. 875, 7 Ann. Cas. 948: "It must be remembered that the devise is express for life with power to dispose of the fee, and it is a well-settled principle of law that a power or disposition added to a life estate is not repugnant to the life estate or to the remainder over."

When a life estate is expressly created by will and unlimited power of disposition given to the life tenant, with remainder over in whatever part of the estate remains undisposed of at the time of the death of the life tenant, the proceeds of sale made by the life tenant, undisposed of at the time of his death, pass to the remainderman. By this construction of a will containing such provisions, full effect is given to the testator's intention. See Edds v. Mitchell, *supra*. The plaintiff's contention cannot prevail.

The plaintiff contends that in the event the life tenants did not take the Hansen land for advances made by them to pay debts of the W. Q. Dickinson estate and for their support during their lifetimes, they were entitled to reimbursement from the proceeds of the sale of such land in the hands of plaintiff, and the same should go to the estate of Bess Dickinson, deceased, and be distributed under the terms of her will.

The general rule is stated in 33 Am. Jur., Life Estates, Remainders, Etc., § 461, p. 997, as follows: "The rule is well settled that by paying off a lien, mortgage, charge, or other encumbrance against the property of an estate, a life tenant acquires a lien on the share of the property belonging to the owner or owners of a future interest therein * * *." There are Nebraska authorities to the same effect, and the rule is conceded to be correct by the defendant cross-petitioners.

The plaintiff makes reference to the accountant's evidence and asserts that it discloses that the life tenants received the assets of the W. Q. Dickinson estate subject to their claim for $7,396.05. They later advanced $6,000 to pay mortgages on some properties owned by the testator. Among the assets of the estate was a half section of land in Seward County, Nebraska, subject to a mortgage of $12,000 payable to a bank. It appears that during the course of the mortgage the life tenants paid $6,000 on the principal of the mortgage. The land was sold for $18,000, and the purchaser assumed the $6,000 remaining unpaid on the mortgage. The expenses of sale amounted to $76.80. The net proceeds of the sale was $11,923.20 which was retained by Bess Dickinson when the land was sold in February 1949. So, having advanced $6,000 on the principal of the mortgage for which the life tenants had not been repaid, it is obvious that the net proceeds of the sale which Bess Dickinson received would be $5,923.20. In addition there was a note in the amount of $4,250, an asset of the estate, which was paid, and the life tenants had the benefit of this amount. It is apparent from the plaintiff's figures that the life tenants had advanced $7,396.05 of their own funds to pay debts of the estate. Adding the amounts of $5,923.20 and $4,250, would make a total of $10,173.20, which is more than the $7,396.05 which the plaintiff claims was advanced by Belle Dickinson and Bess Dickinson to the estate of W. Q. Dickinson, deceased.

It is conceded by the plaintiff that the surviving life

tenant received the full amount in cash in payment of the advances made by the life tenants for the benefit of the estate, but plaintiff contends that there is no evidence to show that any such amounts were used for the support of the life tenants.

The accountant's figures show interest at 6 percent from 1927 until March 18, 1954, on the amounts expended by the life tenants over and above the income of the estate for their support and allegedly for other advancements made by them which are not shown with any degree of clarity. Plaintiff contends that the estate of Bess Dickinson, deceased, is entitled to a lien on the proceeds of the sale of the Hansen land in the hands of the plaintiff.

It is apparent that the life tenants received all the income there was from the estate, and repayment of the advances made by them in payment of the debts of the estate. There is nothing in the W. Q. Dickinson will to indicate any charge of interest to be made. It is apparent that the life tenants made no charge of interest during their lifetimes, or claimed interest on any amounts expended by them for the purposes above stated. The charge of interest under the circumstances presented by this record is not a lawful charge and is not allowable.

The plaintiff cites Attebery v. Prentice, *supra,* to the effect that where the life tenant was authorized to sell or convey any part of the real estate or a portion thereof at any time when it might be advantageous or profitable to do so or when it became necessary for her support, it was held that the widow was entitled to support solely from the estate without regard to her own separate means of support. The facts are dissimilar from the instant case. In the instant case the life tenants did not exercise their authority granted by the will to sell the real estate here involved. They might have done so with propriety, if needed for their support. Having not done so, the plaintiff is in no position to claim the assets of the sale of the real estate in behalf of the surviving life

tenant's estate. In other words, the life tenants waived this right and elected to support themselves from the income of the estate and supplement it by their own funds. The plaintiff's contention is not sustainable.

The plaintiff contends that the increase in the value of the property passes to the heirs of the surviving life tenant, the estate of Bess Dickinson, deceased, and said estate is entitled to the profits realized from the sale of the Hansen property under the provisions of Item III of the will of W. Q. Dickinson, deceased. The plaintiff asserts that the Hansen property was acquired in lieu of foreclosure of a mortgage, so it must be assumed that it was worth less than the mortgage which, with interest, amounted to $20,350, therefore the excess realized from the sale of the land above that amount was profit, and under the will belonged to the life tenants.

From a reading of Item III of the will, we believe the words used by the testator, "income and profits," mean one and the same thing, namely, the income. The following is applicable. "It is the general rule that an increase in the value of real estate in an estate belongs to the remainderman or corpus rather than to the life tenant or equitable life beneficiary." 33 Am. Jur., Life Estates, Remainders, Etc., § 340, p. 849. See, also, 33 Am. Jur., Life Estates, Remainders, Etc., § 333, p. 842.

In In re Harned's Estate, 99 N. Y. S. 2d 407, it is said: "It has been repeatedly held that the addition of the word 'profit' to the word 'income' in setting forth the interest of a life beneficiary in a trust does not add to that interest anything beyond the right to the normal yield in the form of earned income." In other words, "profit" and "income" mean the same thing. See, also, In re Vedder's Estate, 17 N. Y. S. 93.

There is no evidence in the instant case that there was any profit from the sale of the land during the lifetime of either of the life tenants. Their interest in the real estate terminated upon their deaths. The plaintiff's contention is without merit.

The plaintiff contends that administraton fees, attorney's fees in the estate proceedings of the Bess Dickinson estate, and the estate costs in the estate proceedings and in this action should be paid from the proceeds of the sale of the real estate in the hands of the plaintiff.

There are two groups of defendants in the instant case. The first group is composed of the residuary devisees and beneficiaries under the will of Bess Dickinson, deceased, and the trustee named in her will. These defendants defaulted and their default was taken and entered. The answering defendants and cross-petitioners were a second set of defendants as previously mentioned, represented by separate counsel than counsel representing the plaintiff and who, for all practical purposes, represents the first group of defendants.

In State ex rel. Ebke v. Board of Educational Lands & Funds, 159 Neb. 79, 65 N. W. 2d 392, this court said: "It is the practice in this state to allow the recovery of attorney's fees and expenses only in such cases as are provided for by statute, or where the uniform course of procedure has been to allow such recovery. See, Blacker v. Kitchen Bros. Hotel Co., 133 Neb. 66, 273 N. W. 836; Higgins v. Case Threshing Machine Co., 95 Neb. 3, 144 N. W. 1037; State ex rel. Charvat v. Sagl, 119 Neb. 374, 229 N. W. 118." See, also, Ehlers v. Campbell, 159 Neb. 328, 66 N. W. 2d 585. We find no statute in this state or uniform course of procedure whereby recovery of attorney's fees and expenses may be allowed in the instant case.

The defendant cross-petitioners cross-appeal, contending that the trial court erred in its decree in finding that the sum of $32,200 received by the plaintiff from the sale of the real estate should be distributed by the plaintiff under the direction of the county court of Seward County, Nebraska, ten-elevenths of said sum to be paid to the defendant cross-petitioners, the remaindermen under the will of W. Q. Dickinson, deceased, and leaving the remaining one-eleventh of said sum to

be retained by the plaintiff for the benefit of the estate of Bess Dickinson, deceased. The cross-petitioners assert that the deed which was taken by Belle Dickinson and Bess Dickinson in satisfaction of the note and mortgage recites a consideration of $19,550; that the amount due on the mortgage was $19,200 principal, and unpaid interest would be $350, which made the consideration as recited in the deed; and that there is no competent evidence to the contrary. In this connection they also contend that under the Uniform Composite Reports as Evidence Act, section 25-12,117, R. S. Supp., 1953, a copy of the report shall be given to the adverse party before trial in order to be admissible in evidence, and that they received no copy at any time prior to trial. The act referred to gives the trial judge discretion to admit such evidence if the trial court finds that no injustice would result from the failure to give such notice. No substantial injustice did result in the instant case from the failure to give such notice. The accountant's report is in conflict with the mortgage and deed. The mortgage was for $19,200 with no prepayment provision, but it was also given to secure a note. The note is not in evidence. The accountant's figures which were accepted by the trial court show that the holders of the note accepted payment which reduced the principal of the debt to $18,500, and by accountant's figures there was $1,850 interest due on the debt, or a total of $20,350. The consideration shown in the Hansen deed is $19,550. There is no evidence that the consideration stated in the deed was the actual amount unpaid on the debt. So, it appears that the consideration named in the deed is less than the amount actually owing on the debt. We believe under the circumstances the trial court was justified in accepting the accountant's figures and holding that the proceeds of the sale in the hands of the plaintiff should be prorated as set forth in the court's decree.

The defendant cross-petitioners make a claim in their brief for interest on the funds in the hands of the plain-

tiff. Their brief does not contain any assignment of error that the trial court failed to require plaintiff to pay interest on the funds in her possession, nor is the question discussed therein.

Under section 25-1919, R. R. S. 1943, and Revised Rules of the Supreme Court, rule 8a 2(4), consideration of the cause on appeal is limited to errors assigned and discussed, except that the court may, at its option, note a plain error not assigned. See Hartman v. Hartmann, 150 Neb. 565, 35 N. W. 2d 482.

The plaintiff has been holding this fund as an officer of the court until the conflicting claims of the parties could be determined. The claim of the defendant cross-petitioners for interest is without merit.

Upon a trial de novo, we arrive at the same conclusion as the trial court, and the judgment of the trial court should be and is affirmed in all particulars, the plaintiff to pay all costs on appeal.

AFFIRMED.

BETTY O'NEIL, ADMINISTRATRIX OF THE ESTATE OF JAMES F. O'NEIL, DECEASED, APPELLANT, V. UNION NATIONAL LIFE INSURANCE COMPANY, A CORPORATION, APPELLEE.

75 N. W. 2d 739

Filed March 23, 1956. No. 33870.

1. **Estoppel.** Where a party gives a reason for his conduct and decision touching anything involved in a controversy, he cannot, after litigation has begun, change his ground, and put his conduct upon another and a different consideration.
2. **Appeal and Error: Pleading.** After appeal and remand a party may not add or substitute a defense substantially different from that relied on at the original trial.
3. ———: ———. On remand, as to matters not inconsistent or in conflict with a position taken at the former trial, the district court is clothed with a discretion to allow amendments in the further disposition of the case.
4. **Appeal and Error: Trial.** Where a case has been remanded with general directions to proceed in accordance with an opinion

which disposes of all issues to be considered on a new trial, a judgment should be entered in favor of the party in whose favor the issues were decided.

5. ———: ———. Where, however, a case has been presented to this court on an issue or issues with other issues remaining for decision on remand, it is the duty of the district court to try the case and make an adjudication upon the remaining issues.

6. **Insurance.** The statutes of this state authorize the inclusion in insurance policies of provisions for contestability on the ground that death came about during military service.

7. ———. An insurance policy which is susceptible of more than one interpretation will be given the one most favorable to the insured.

8. ———. Where there is no ambiguity in an insurance policy, the courts will indulge no forced construction against the insured and the policy will be interpreted according to the intention of the parties as expressed in the instrument.

9. **Evidence.** A death certificate from the War Department is not admissible in evidence in and of itself as proof of cause of death.

10. ———. Where there is uncontradicted and conclusive evidence of the cause of death other than a certificate from the War Department the admission of the certificate in evidence is error without prejudice.

11. ———. Where evidence is offered by deposition and it appears that the form of questions is technically objectionable, but the court on inspection can see that the answers furnish proper evidence, exceptions to the questions will be overruled and the testimony admitted.

12. ———. The diagram of a location made, identified, and described by a witness to illustrate testimony given by the witness is admissible in evidence.

13. **Insurance.** Where a policy of life insurance insures a person against death except in military or naval service in time of war the exception applies only if death is occasioned by actual service or is an incident thereof.

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

Baylor, Evnen & Baylor and *Davis, Healey, Davies & Wilson,* for appellant.

Frank A. Peterson and *F. C. Radke,* for appellee.

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

YEAGER, J.

This is an action at law by Betty O'Neil, administratrix of the estate of James F. O'Neil, deceased, plaintiff and appellant, against the Union National Life Insurance Company, a corporation, defendant and appellee, to recover $2,500, the face amount of a policy of life insurance written on the life of James F. O'Neil, now deceased, interest thereon from the date of his death, and attorney's fees. The case has been previously before this court. An opinion was adopted on the former appearance and it appears as O'Neil v. Union National Life Ins. Co., 148 Neb. 469, 27 N. W. 2d 837. In order that the matters now before the court may be understood it appears necessary to outline herein in considerable detail the proceedings from the commencement of the action in the district court to the present time. For convenience, James F. O'Neil will be referred to as O'Neil.

On August 29, 1944, the plaintiff, as administratrix of the estate of James F. O'Neil, filed a petition in the district court for Lancaster County, Nebraska, in which she alleged that on March 12, 1937, the defendant issued to O'Neil a policy of life insurance by the terms of which the defendant agreed to pay $2,500 to the estate of O'Neil in the event of his death. The policy, by declaration and attachment to the petition as an exhibit, became a part of the petition. In the petition it was alleged that O'Neil died on November 4, 1943. It was further alleged that demand had been made for the $2,500 but that the defendant denied liability for the amount except the sum of $245. The prayer was for $2,500, interest, and attorney's fees.

On April 10, 1945, an amended petition was filed which appears to have been at some time amended by interlineation. It was upon this petition, an answer

thereto, and a reply that the case was tried before it came to this court on the former appeal. To this petition were attached three additional exhibits which were identified as "B," "C," and "D." These were letters from the defendant to the plaintiff.

Two paragraphs of "B" are the following:

"You will notice by the terms of the contract that the death claim under the conditions of your husband's death is the return of the life premiums paid with interest at 5%. In addition to this we will refund the Double Indemnity premiums from the date of enrollment in the armed forces of your husband, on which date the benefits with the Double Indemnity clause are cancelled."

"It appears that the total premiums paid, with interest and the refund of the Double Indemnity premiums will amount to approximately $245.00."

The first paragraph of "C" is the following:

"This file is still pending receipt of your completed claimant statement and your official notification from the War Department of the death of Capt. O'Neill. When these proofs of death are received and approved, your claim will be paid, and we will return the notification of death to you. As we previously stated, the benefits under the policy will be the return of the premiums with interest at 5% per annum."

The body of "D" is as follows:

"Inasmuch as we have not heard from you, we are wondering if there is anything we can do to help you complete your claim as beneficiary under the above policy. We would like to arrange an early payment of the claim and suggest that you let us have the completed from ent (form sent) you in our letter of December 27, 1943, together with such official notices and telegrams as you received notifying you of your husband's death. We will make photostatic copies of these items and they will be returned to you for your further safekeeping."

The answer filed by the defendant contains the following:

"4. Alleges and says that at no time has this defendant denied liability under said policy, but at all times since the delivery thereof to the said James Francis O'Neil, it has recognized same to be in full force and effect."

By the next paragraph of the answer it was asserted that no due proof of death had been supplied as required by the terms of the policy.

As already pointed out there was a reply. In the reply the plaintiff alleged that proofs of loss were furnished and further that the defendant had waived such proof.

In this state from the standpoint of pleadings the case went to trial. A jury was waived.

Upon what issues evidence was presented by the parties on that trial is not known. Whether or not any issue of fact tendered by plaintiff's petition found support in evidence does not appear. The record of that evidence has not been brought here.

The only question which it may be said was presented upon which a determination was made was that of whether or not proof of death had been made within the meaning of the requirements of the policy. The district court adjudged that no such proof had been made and on that ground dismissed the action.

From that adjudication the plaintiff appealed to this court. This court reversed the judgment of the district court on that issue and remanded the cause for further proceedings. In the opinion this court clearly indicated that the only question which was decided was that of whether or not the proof supplied by plaintiff was sufficient as a condition precedent to her right to maintain the action. In the opinion, it was stated: "Consequently, the facts recited in the letter constitute a sufficient proof of death within the provisions of the policy presently before us. This being true, the fur-

nishing of proof of death as a condition precedent to the bringing of suit has been met."

After the determination of this court was made the defendant filed an amended answer to plaintiff's petition in the district court. In this answer, to the extent necessary to set out the allegations thereof, the defendant reiterated its former statements that the policy was in full force and effect. It alleged that the insurance policy contained the following provision: " 'Incontestability. This Policy shall be incontestable after one year from date of issue except for (1) * * * (2) * * * (3) Conditions as to Military Service or Naval Service in time of war. Should the Insured die before attaining the age of thirty-five, from any cause while engaged in Military or Naval Service in time of war or within six months after the termination of such service as a result thereof, the amount payable hereunder shall be limited to the premiums paid together with interest thereon at the rate of five per cent per annum, less any indebtedness thereon to the Company.' " It further alleged that O'Neil was on November 4, 1943, under the age of 35 years; that at that time he was engaged in military service in time of war; and that if he died on November 4, 1943, the beneficiary under the insurance policy was entitled only to the amount of the premiums paid on the policy together with interest at the rate of 5 percent per annum. This amount the defendant offered to pay on proof of death while engaged in military service in time of war.

The plaintiff moved for an order striking the amended answer. This motion was at first sustained, but on reconsideration was overruled.

The plaintiff also moved for judgment on the mandate of this court for $2,500 and interest. This motion was sustained but the order was later vacated and set aside.

After the disposition of numerous incidental and dilatory proceedings not necessary to mention here the plain-

tiff filed a reply to the amended answer. In the reply the plaintiff alleged that the defendant had waived its right to assert the limitation on the amount payable under the policy; that the adjudication of this court was res judicata; that the provision limiting liability, because of the manner of its appearance in the insurance policy, should be disregarded; and that because of lapse of time the incontestability clause could not be made applicable since O'Neil died more than one year after the policy was issued.

Thereafter the case came on for trial to a jury. At the conclusion of the evidence the defendant moved for a directed verdict in its favor. The plaintiff moved for a directed verdict in her favor. The motion of plaintiff was overruled. The motion of defendant was sustained and a verdict, which is the following, was accordingly rendered: "We, the Jury, duly impaneled and sworn in the above entitled cause, do find for the plaintiff and assess the amount of her recovery against defendant in the sum of $445.35." Judgment was rendered on the verdict. An alternative motion for judgment notwithstanding the verdict or for new trial was duly filed by the plaintiff. This motion was overruled. From the order overruling the alternative motion for judgment notwithstanding the verdict or for a new trial and the judgment the plaintiff has appealed.

Six assignments of error appear in plaintiff's brief as grounds for reversal. One of these is separated into three parts. These assignments of error will not be set out here but they will be identified as they are considered later herein.

The first assigned ground for the reversal of the present judgment is that the court erred in failing and refusing to sustain the motion, hereinbefore referred to, to strike the amended answer. The basis of the assignment is that the amended answer asserted a defense entirely different from that relied on by the defendant on the first trial and the former appeal.

It is a well-settled rule in this jurisdiction that where a party gives a reason for his conduct and decision touching anything involved in a controversy, he cannot, after litigation has begun, change his ground, and put his conduct upon another and a different consideration. He is not permitted thus to mend his hold. See, Mitchell v. Brotherhood of Locomotive Firemen & Enginemen, 103 Neb. 791, 174 N. W. 422; McDowell v. Metropolitan Life Ins. Co., 129 Neb. 764, 263 N. W. 145; Serven v. Metropolitan Life Ins Co., 132 Neb. 637, 272 N. W. 922; Farmers Union Fidelity Ins. Co. v. Farmers Union Co-op. Ins. Co., 147 Neb. 1093, 26 N. W. 2d 122; Brown v. Security Mutual Life Ins. Co., 150 Neb. 811, 36 N. W. 2d 251.

On the record before this court however it becomes clear that no basis is found to support and sustain the contention that the defendant at any time changed its defensive position as to liability for a recovery on the insurance policy. As pointed out earlier herein the position of the defendant has been that the policy was in full force and effect; that if the insured lost his life while engaged in military service the liability was for one amount; but if his death came about otherwise the liability was for the face amount of the policy which was $2,500. The amended answer as to this subject did not depart from the contentions made at any time prior thereto.

It must be said therefore that the first assignment of error is without merit.

By the second assignment of error the plaintiff asserts the court erred in refusing to render judgment on the mandate on the former appeal in favor of the plaintiff for the face amount of the policy. The substantial theory of the contention is that all issues upon which a right of recovery depended were tried and a decision rendered thereon in the district court and that the review here was of that decision, and that there was nothing left for the district court to do, since there was a

reversal, but to render judgment in accordance with the prayer of plaintiff's petition.

Neither the record of the proceedings made in the district court nor the opinion of this court sustains this contention.

The judgment of the district court, which appears in the transcript, from which the former appeal was taken discloses unequivocally that the only question decided was that of whether or not the proof of loss which was a condition precedent to the maintenance of action on the policy had been furnished the defendant.

The journal entry so declaring is lengthy and in its entirety will not be repeated here. The final paragraph however is as follows: "The plaintiff's petition is therefore dismissed without prejudice to a new action on compliance with proof of loss requirements."

There is nothing in the former opinion of this court stating directly or inferentially that any other substantial question or issue was being decided. The case was not remanded with any kind or character of direction. This court said only: "The judgment of the district court is reversed and the cause remanded for further proceedings."

The plaintiff has cited no cases the effect of which is to say that a remand under the circumstances which are described herein calls for final judgment in favor of either party on a mandate.

As a proposition of law in support of the contention that she was entitled to judgment on the mandate for $2,500 plaintiff states the following: "After appeal and remand a party may not add or substitute a defense substantially different from those relied on at the original trial." Nebraska cases cited in support are Scott v. Spencer, 44 Neb. 93, 62 N. W. 312; Peterson v. Lincoln County, 92 Neb. 167, 138 N. W. 122, Ann. Cas. 1913E 1309; Gadsden v. Thrush, 72 Neb. 1, 99 N. W. 835.

Only the case of Gadsden v. Thrush, *supra,* has a direct relationship to the subject presented. It holds

that where there is a general remand it is the duty of the district court to exercise its discretion in allowing amendments as to other matters in the further disposition of a case. Other cases which hold to this principle are Sowerwine v. Central Irr. Dist., 91 Neb. 457, 136 N. W. 44; Bohmont v. Moore, 141 Neb. 91, 2 N. W. 2d 599; Piechota v. Rapp, 148 Neb. 442, 27 N. W. 2d 682.

Another stated proposition is: "An insurer raising by its original pleading the defense of failure to furnish due proof of loss may not raise by amended answer a different defense based on grounds of which it had knowledge as being actual or probable." Cited in support are Mitchell v. Brotherhood of Locomotive Firemen & Enginemen, *supra;* Yates v. New England Mutual Life Ins. Co., 117 Neb. 265, 220 N. W. 285; McDowell v. Metropolitan Life Ins. Co., *supra.*

These cases are in point only where a new and different defense is attempted to be asserted. They are not in point in instances where, as here, there has been no change in the defensive position on the merits of the pleaded cause of action.

Another proposition asserted is that where a case has been remanded with general directions to proceed in accordance with an opinion which disposes of all of the issues to be considered on a new trial, a judgment should be entered in favor of the party in whose favor the issues were decided. Cited together with cases from other jurisdictions is Bohmont v. Moore, *supra.*

There can be little doubt that this as an abstract legal principle is sound. However it can have no application here since, as pointed out, the former opinion did not dispose of all of the issues to be considered on a new trial.

The second assignment of error is without merit.

By the third assignment of error the plaintiff effectually contends that she was entitled to a judgment on the evidence before the court on the trial from which this appeal was taken as a matter of law for the reasons

(1) that the incontestability clause which has been quoted herein prohibits a defense under the portion thereof relating to engagement in military service in case of a death occurring more than one year after issuance of the policy, (2) that the position of the caption of the provision relating to death in military service in the policy renders it ineffective, and (3) that the defendant, having the burden of proving that death was occasioned while the insured was engaged in military service, failed to sustain the burden of proof.

Apparently the point of the first proposition is that the policy provision relative to death while engaged in military service, referred to as the war clause, is included as a part of the so-called incontestability provision and is not separately set apart from the one-year provision which applies to other risks.

The cases cited on this proposition do not sustain the contention. The statutes of this state authorize the inclusion in insurance policies of provisions for contestability on the ground that death came about during military service. § 44-502, R. R. S. 1943. This statutory provision was approved in State ex rel. Republic National Life Ins. Co. v. Smrha, 138 Neb. 484, 293 N. W. 372.

The statutory provision relating to death while engaged in military service as a ground of contestability of an insurance policy is combined with the provisions for contestability on other grounds and not separated therefrom in the statute. No reason is apparent why it should be elsewhere than in the incontestability clause of the insurance policy. And if it is clear and unmistakable in its terms, as is true of the one involved here, no reason is apparent why its full content should not be accepted as written.

As to the second point of the third assignment it is true that an insurance policy which is susceptible of more than one interpretation will be given the one most favorable to the insured.

It is also true that where there is no ambiguity in

an insurance policy, the courts will indulge no forced construction against the insured and the policy will be interpreted according to the intention of the parties as expressed in the instrument. Davis v. Aetna Life Ins. Co., 128 Neb. 154, 258 N. W. 58; Shambaugh v. Great Northern Life Ins. Co., 131 Neb. 415, 268 N. W. 288; Parish v. County Fire Ins. Co., 134 Neb. 563, 279 N. W. 170, 126 A. L. R. 703; Pickens v. Maryland Casualty Co., 141 Neb. 105, 2 N. W. 2d 593.

It may not reasonably be said that there was any ambiguity in this war clause or anything which could be misleading as to its content or the placement of the caption of the war clause. The point is without merit.

The third point of the third assignment is directly related to the sixth and last assignment of error. Discussion of it will be deferred until after disposition of the fourth and fifth assignments.

On behalf of the defense a certified copy of the War Department record of the death and cause of death of O'Neil was offered and received in evidence. Objection to it was duly made. By the fifth assignment of error the plaintiff asserts that it was erroneously admitted.

As to this proposition there is a lack of unanimity in the decisions in the various jurisdictions. In Bozicevich v. Kenilworth Mercantile Co., 58 Utah 458, 199 P. 406, 17 A. L. R. 346, the admissibilty of death certificates is upheld. In the opinion cases are cited which contain a like holding. In 5 Wigmore on Evidence (3d ed.), § 1675a, p. 726, the author upholds admissibility. Cases are therein cited which uphold the right.

It appears however that this court has adopted the opposite position. In Omaha & C. B. St. Ry. Co. v. Johnson, 109 Neb. 526, 191 N. W. 691, this court held that the medical certificate required by section 8233, C. S. 1922, was not admissible in evidence as proof of the cause of death. This section has been amended but in particulars not important here. It now appears as

section 71-605, R. S. Supp., 1955. (It was last amended in 1953.) The position taken there was approved in McNaught v. New York Life Ins. Co., 145 Neb. 694, 18 N. W. 2d 56.

It does not appear reasonable to say that a death certificate from the War Department is admissible ab initio in proof of cause of death but that one prepared in conformity with a statute of this state is not.

The conclusion is that it was error to admit the certified copy as evidence of the cause of death, but, as was true in McNaught v. New York Life Ins. Co., *supra,* the error was without prejudice since death and cause of death was otherwise positively and unequivocally proved as will hereinafter appear.

The deposition of Roy A. Murray, Jr., was taken and received in evidence at the trial. The plaintiff filed exceptions to the deposition which were overruled. By the fourth assignment of error the plaintiff challenges the action of the court in overruling the exceptions.

The witness Murray was, at the time O'Neil came to his death, the commanding officer of the Fourth Ranger Battalion in Italy. O'Neil was the commander of a company in the battalion. The purpose of the testimony of this witness was to establish the cause of death of O'Neil.

Certain of the exceptions taken to the deposition were predicated on the proposition that the opinion on the former appeal removed the question of cause of death as an issue on the second trial. In the light of what has been already said herein those exceptions are without merit.

The remainder of the exceptions relate to form of questions, materiality and competency of testimony, admissibility of an exhibit, and foundation for admission of evidence.

It is true that some of the questions propounded may be regarded as somewhat objectionable as to form and foundation or in other words technically objectionable.

It may not be said however that the answers thereto in any instance furnished improper evidence. Applicable to such a situation this court said in the sixth point of the syllabus in Bryant v. Modern Woodmen of America, 86 Neb. 372, 125 N. W. 621, 27 L. R. A. N. S. 326: "In order to avoid needless expense and delay, where evidence is in the form of depositions, and the court upon inspection can see that, while the form of question may be technically objectionable, yet the answer furnishes proper evidence, it would facilitate the administration of justice to heed substance rather than form, overrule the objection, and admit the testimony."

From an examination of the deposition it becomes readily apparent that the answers elicited come within the purview of this rule.

In the light of the conclusion that the issue as to cause of death was triable in the case the objection that evidence appeared in the deposition which was not material or competent was not valid.

The exhibit to which objection was made was a map or drawing made by Murray to illustrate his testimony wherein he described the area in which his command and the enemy forces were operating when O'Neil came to his death. In the light of the fact that his description was complete and the exhibit added nothing but picturization no reason is apparent as to why the exhibit should be regarded as inadmissible. The fourth assignment of error must be said to be without merit.

We return now to the sixth assignment of error and the third point of the third assignment which has not been discussed.

The point of the third assignment challenges the sufficiency of the proof of the defendant to support the contention that O'Neil came to his death while engaged in military service. The effect of the sixth assignment of error is to say that even if there was evidence that O'Neil came to his death while engaged in military service, within the meaning of the policy and

law, the question of the sufficiency of that evidence to sustain the defense was one to be decided by a jury and not one for the court on a motion for directed verdict.

In an approach to this it becomes necessary to ascertain the true meaning of the following from the war clause: "Should the Insured die * * *, from any cause while engaged in Military or Naval Service in time of war * * *."

Pertinent questions in this approach are: Does it mean die in combat? Does it mean die in activity directly related to but not necessarily in combat? Does it include death in actual military or naval service but away from any combatant area? Does it include death while a member of the military or naval forces but not at the time engaged in any character of military or naval service?

This language in the policy, similar language, and these questions have been before the courts of other jurisdictions and of our own on numerous occasions. The interpretations have not been uniform. No useful purpose would be served by directing attention to what has been said in other jurisdictions since this court has declared its own position. This position was declared in 1922 and no departure from that declaration has been discovered.

In Arendt v. North American Life Ins. Co., 107 Neb. 716, 187 N. W. 65, in the second syllabus point, this court said: "Where a policy of life insurance insured a person against death occurring in any part of the world and in any occupation or from any cause, except military or naval service in time of war, the company issuing the same is liable, even though the insured, at his death, was in the military service in time of war, if his death was not incident to or caused by such military service."

Application of this to the present case is to say that if O'Neil came to his death while in action in military

service or as an incident thereof, the face of the policy is not payable and the defendant is required only to make return of premiums with interest.

The facts as disclosed on the trial uncontrovertedly bring the death of O'Neil within the meaning and application of this rule. From the evidence on which plaintiff relied as prima facie proof of death a reasonable inference flows that O'Neil was killed in action. From this evidence the inescapable conclusion is that he died at least as an incident of military service in time of war.

The evidence referred to was that of James J. Altieri given by deposition. Altieri was a fellow officer of O'Neil. The record of his testimony in pertinent part is as follows: "Q- Lieutenant O'Neil was at the time of his death in the military service? A- That is true. * * * Q- You stated that you saw him or his body on November 5, 1943, in or near a town in Italy called Cesto Campano? A- That is right. Q- Was that in the battle area? A- It was slightly behind the battle area at the time. * * * Q- Do you know how he came to his death? A- That I don't know either. Q- Had he been at the front with his troops? A- Well, we took off on an operation the last time I saw Lieutenant O'Neil, and whether or not he actually participated in the battle, I don't know. Q- On what day was the battle fought? A- On the 4th. Q- And you saw him or rather his body on the 5th? A- That is right. I didn't see his body up at the front. I saw it behind the lines."

The testimony of the witness Murray on behalf of the defendant, which is in nowise in conflict with any other evidence in the case, makes it clear that the only reasonable inference of which the record is capable is that O'Neil was killed in action as contended by the defendant. The testimony in this connection summarized is that the witness ordered O'Neil into attack; that he did not actually see O'Neil killed but he did see him immediately thereafter; that at the time he was only

about 200 feet away; and that at the time they were under small arms, heavy mortar, and 88 millimeter fire.

In the light of this evidence and the proper interpretation and meaning of the war clause in the insurance policy there was no issue of fact as to the cause of death to be submitted to a jury. The trial court properly so concluded and likewise properly sustained the motion of the defendant for a directed verdict.

The judgment of the district court is affirmed.

AFFIRMED.

CUSTER PUBLIC POWER DISTRICT, A PUBLIC CORPORATION, ET AL., APPELLEES AND CROSS-APPELLEES, V. LOUP RIVER PUBLIC POWER DISTRICT, A PUBLIC CORPORATION, ET AL., APPELLEES AND CROSS-APPELLANTS, CONSUMERS PUBLIC POWER DISTRICT, A PUBLIC CORPORATION, ET AL., APPELLANTS AND CROSS-APPELLEES, CENTRAL NEBRASKA PUBLIC POWER & IRRIGATION DISTRICT, A PUBLIC CORPORATION, ET AL., APPELLEES AND CROSS-APPELLEES.

75 N. W. 2d 619

Filed March 23, 1956. No. 33920.

1. **Public Utilities: Electricity.** The provision in section 70-602, R. R. S. 1943, that nothing in Chapter 70, article 6, R. R. S. 1943, shall be construed to prevent the organization of a district within, or partly within, the territorial boundaries of another district organized thereunder so long as the plants, systems, and works, the operation of the same, the exercise of powers, and the assumption of duties and responsibilities of or on the part of one district, do not nullify, conflict with, or materially affect those of or on the part of another district organized under the act, relates to the organization of a district.
2. ———: ———. The provision in section 70-602, R. R. S. 1943, above recited relates to a fact condition that may be held to prevent the organization of a district under the provisions of Chapter 70, article 6, R. R. S. 1943. It does not relate to a fact condition subsequently arising so as to prevent or restrict the

operation of an organized district under its charter powers.

3. ———: ———. Under the provisions of Chapter 70, article 6, R. R. S. 1943, the powers and functions of the Department of Roads and Irrigation are to approve or disapprove a petition for the organization of a district. The department can exercise only those powers conferred by express enactment or by necessary implication.

4. ———: ———. Under the provisions of Chapter 70, article 6, R. R. S. 1943, the Department of Roads and Irrigation is without power to approve a petition for the organization of a district subject to conditions and limitations not expressed in the petition.

5. ———: ———. The public policy of this state as to power districts organized under the provisions of Chapter 70, article 6, R. R. S. 1943, is the concept of electrical energy being furnished to the ultimate consumer at the lowest cost consistent with sound business management.

6. **Contracts.** If an agreement binds the parties or either of them to do, or if the consideration is to do, something opposed to the public policy of the state or nation, it is illegal and absolutely void, however solemnly made.

7. ———. The test is the evil tendency of the contract, and not its actual injury to the public in a particular instance.

8. ———. Contracts contrary to public policy, that is those which tend to be injurious to the public or against the public good, are illegal and void, even though actual injury does not result therefrom.

9. **Corporations: Contracts.** A corporation cannot disable itself by contract from performing the public duties which it has undertaken, and by agreement compel itself to make public accommodation or convenience subservient to its private interests.

10. **Declaratory Judgments.** One of the purposes of the Uniform Declaratory Judgments Act is to terminate the controversy that gives rise to the proceedings.

11. ———. Proceedings under the Uniform Declaratory Judgments Act are governed by applicable established rules of pleading.

12. **Pleading.** A cross-petition is not maintainable for purposes of affirmative relief as a cross-suit beyond the requirements of a complete adjudication upon the subject matter of the original suit.

13. **Declaratory Judgments.** Under the Uniform Declaratory Judgments Act courts have a reasonable discretion in determining the controversies to which it applies.

APPEAL from the district court for Platte County:

H. EMERSON KOKJER, JUDGE. *Affirmed in part, and in part reversed and remanded with directions.*

George Healey and *Richard D. Wilson,* for appellants.

Evans & Evans, Kenneth M. Olds, and *Hugh W. Eisenhart,* for appellees Custer Public Power District et al.

Walter, Albert & Leininger, Crosby, Crosby & Nielsen, and *Crosby, Pansing & Guenzel,* for appellees Loup River Public Power District et al.

Beatty, Clarke, Murphy & Morgan and *Charles W. Baskins,* for appellee City of North Platte.

John Riddell, for appellee York County Rural Public Power District.

Ward W. Minor, amicus curiae.

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

SIMMONS, C. J.

This is an action for a declaratory judgment. It involves public power districts organized under the provisions of an act of the 1933 Legislature commonly known as Senate File No. 310, Laws 1933, c. 86, p. 337. As amended the act is now Chapter 70, article 6, R. R. S. 1943.

There were joined, either as parties plaintiff or defendant, all of the power districts organized under the above act, together with other interested defendants and certain interested municipal corporations.

Issues were made and trial was had. There is an appeal and cross-appeal from the decree of the district court. So far as involved here those issues will be stated later in this opinion.

Senate File No. 310 was an act authorizing the creation of public power and irrigation districts, prescribing the manner of their organization and operation, and defining their powers, functions, and franchises. It was

a comprehensive act. As a result of proceedings under it, the privately-owned public power utilities in this state have all passed into some form of public ownership and operation.

Of necessity, preliminary statements of fact must be a general summary.

An early major development under the act was the organization of districts to develop and generate power by water.

The Loup River Public Power District was organized in 1933. It had diversion works at Genoa, 35 miles of canal, and powerhouses near Monroe and Columbus. Its construction was completed in 1937. We will hereinafter refer to this district as Loup.

Platte Valley Public Power and Irrigation District was organized about the same time. It had a diversion dam at Keystone on the North Platte River, with a power plant near the city of North Platte. Its works were completed in 1937 and were put into operation in 1938. We will hereinafter refer to this district as Platte.

The Central Nebraska Public Power and Irrigation District was organized a year or two later than the others with headquarters at Hastings, Nebraska. It produced power from water of the North Platte River. We will hereinafter refer to this district as Central.

When these three hydro power districts were completed, they were in the position of having electric energy to sell, with no firm market to which it could be sold. The privately-owned utilities had their own generating plants and sources of supply.

The hydro districts then considered the purchase of the privately-owned utilities. That was found to be not feasible because of bond obligations and other reasons.

Under the leadership of the officers of Loup, Consumers Public Power District was organized in August 1939. It will hereinafter be referred to as Consumers.

Thereafter, on or before January 1, 1942, Consumers purchased some 14 of the privately-owned public utilities operating in Nebraska. As each utility was purchased, Consumers organized it as an operating division.

In 1940 the Nebraska Public Power System was created by contract by Loup, Platte, and Central. We will hereinafter refer to it as N.P.P.S. This was an operating agreement, "a vehicle," by which the three districts pooled their resources and operating responsibilities, jointly collected and distributed revenue, and bought and sold power. In general Consumers leased its generating facilities to N.P.P.S. and retained the distribution system. Central withdrew from N.P.P.S. in April 1949, and thereafter has sold its power to N.P.P.S.

During this same period of time there was organized under the act a considerable number of rural power districts. These districts will hereinafter be referred to as rurals. Their primary function was to buy power and distribute it to rural patrons. They purchased power from N.P.P.S.

During this period of the growth of public power, there came into existence a series of contracts between Loup, Platte, Central, and Consumers.

In 1946, Consumers, Loup, Central, and Platte entered into an amended and consolidated lease-power agreement. The effective date was March 1, 1946, and it extended to January 2, 1972. This contract, in general, covered the whole field of contract obligations and rates. The specific issue involved in this appeal has its origin in this 1946 agreement.

Thereafter the Loup, Central, and Platte, and after Central's withdrawal, Loup and Platte, were caught in the well-known increase of costs and they had a commodity for sale at a fixed rate.

As of September 1, 1949, Loup, Platte, and Consumers entered into a cost-of-service rate agreement and a supplement to the March 1, 1946, agreement. This agree-

ment, by its terms, becomes involved in the issue here presented.

By 1952 it was recognized by Consumers and N.P.P.S. that the probable future demand for electric power in Nebraska required the securing of an additional and material source of supply. N.P.P.S. proposed to build a generating plant in southeastern Nebraska, contending then and now that the generating of power and the sale of power to Consumers was its contractual right and within the domain of N.P.P.S. as this system of public power had developed in Nebraska.

Consumers contended that it had the right under the terms of its organization powers to build a generating plant to furnish the additional energy, and that it was not under contractual obligation to N.P.P.S. that would prevent it doing so.

The issuance and sale of bonds, to secure the funds to construct a new generating plant, were necessary whether the new facility was to be built by N.P.P.S. or by Consumers. Consumers fortified its position by establishing that its financial structure was such that it could secure the money at a lower rate of interest than could N.P.P.S. Because of that, the saving in interest alone by Consumers' financing would amount to several million dollars.

N.P.P.S. proceeded to issue and was negotiating the sale of bonds when Consumers took the position that it would not buy the additional power if produced by N.P.P.S. Consumers proposed to proceed to build a generating plant to supply itself with additional power for sale to its customers.

This litigation then started, with the purpose of determining the right and power of Consumers in the matter.

As Consumers has developed, it now operates in the western one-third of Nebraska under the designation of its Western System and in the eastern two-thirds of the state under the designation of its Eastern System.

The two systems are not physically connected. This litigation involves the Eastern System.

This brings us to the basic question involved in this appeal.

The March 1, 1946, agreement opened under the title "Witnesseth" with some 20 paragraphs devoted largely to fact recitals followed by "In consideration of the matters hereinbefore recited, and of the mutual covenants and obligations of the parties hereto, it is agreed" etc.

In the nineteenth paragraph of the recitals is this sentence: "It is further recognized that by entering into the contracts hereinafter provided for Consumers District has turned over to Hydro Districts all of its major generating plants and has agreed to buy substantially all of its power requirements from Hydro Districts."

Following the "In consideration" sentence are short provisions that Consumers "shall continue to lease to Hydro Districts" etc.; and that hydro districts "shall continue to furnish electric power and energy to Consumers District" etc. The "Hydro Districts" are shown by the contract to be Loup, Central, and Platte.

In the body of the agreement under Section B, Article IV, under a title "Provisions for Future Facilities" is a provision that hydro districts agree "to have available at all times adequate power to satisfy Consumers District's" requirements, and Consumers "agrees to purchase all of its Eastern System power requirements from Hydro Districts * * *." To each of these covenants are exceptions not material to the solution of the issue here.

Prior to the 1946 agreement, it is patent that Loup, Central, and Platte, in substance, had a monopoly in the generation and sale of power at wholesale to Consumers and the rurals. Consumers had a like monopoly in the distribution and sale of electric power to, or in, over 300 cities and towns in Nebraska. By this

contract the parties undertook to give contractual recognition to the area of each party's monopoly and to extend that recognition for a period of 26 years, or until 1972.

The supplemental agreement of September 1, 1949, was entered into by Consumers, Loup, and Platte, the latter two being designated as "operating districts." The contract opened with "Witnesseth" followed by a series of "Whereas" statements, early in which reference was made to the two covenants quoted immediately above.

Later in the 1949 contract is this provision: "Article IV, Section B of the Lease-Power Contract is hereby amended as follows: Strike all of such Article."

Loup and Platte rely here on the provision in the 1946 agreement which was not stricken in the 1949 supplemental agreement that Consumers "has agreed to buy substantially all of its power requirements from the Hydro Districts."

Loup and Platte contend that provision constitutes a binding, subsisting, present, and continuing obligation of Consumers. Both parties here and in the trial court relied on evidence as to preliminary negotiations leading to both contracts; provisions in both contracts which it is contended lend support to their position; and, in particular, Loup and Platte rely on practical construction by the parties.

The above quotes pinpoint the contractual issue.

The trial court found that Consumers was required to buy substantially all of its power and energy for its Eastern System from N.P.P.S., so long as the latter could furnish it, until the year 1972, with exceptions not material here. The court enjoined Consumers from violating the terms of its contracts as so construed. Preliminary thereto, the court found that "* * * Consumers, may not construct a power plant under the facts and issues as developed in this case * * *."

As appellant here, Consumers contends that the con-

tracts are invalid as against public policy and in any event there is no such contractual obligation.

The procedure for the organization of a district under the provisions of Senate File No. 310, Laws 1933, c. 86, p. 337, was that of the filing of a petition addressed to the Department of Roads and Irrigation, hereinafter referred to as the department. It became the duty of the department to make an investigation of the proposed district and of its proposed plants, systems, and irrigation works, and if deemed by the department feasible and conforming to public convenience and welfare, the petition was to be approved. A certificate in duplicate, setting forth a true copy of the petition and declaring the approval, was then to be filed by the department in the office of the Secretary of State and in the office of the county clerk of the county in which the principal place of business of the district is located. The district then became a body politic and corporate. Under the provisions of this act, the petition, when approved, became in effect the charter of the district. The parties here so treat it.

By amendment in 1937, the Legislature provided: "A district may be organized to engage only in the electric light and power business, or only in the business of owning and operating irrigation works, or to be engaged in both of said businesses." Laws 1937, c. 152, § 3, p. 578 (now section 70-604, R. R. S. 1943).

The Legislature in 1937 referred to the approved petition as a "charter." Laws 1937, c. 152, § 9, p. 589 (now section 70-662, R. R. S. 1943).

The petition for the creation of Consumers proposed the creation of a public power district "to engage in the electric light and power business * * *." The petition recited that the nature of the business in which the district intended to engage was as follows: "The acquiring by purchase or otherwise, the building and construction, the leasing or otherwise holding and op-

erating, of electric facilities, including generating plants, transmission lines, substations, and distribution systems in the manner authorized in said Chapter 86, Laws of Nebraska, 1933, as amended; the purchase, generation, distribution, transmission, and sale of electric energy, either at wholesale or retail, or both, for lighting, power, heating, and every other useful purpose whatsoever; the purchase of electric energy at wholesale from any Public Power or Public Power and Irrigation District and the sale and distribution of the same, either at wholesale or retail, or both; the leasing, purchasing, or otherwise acquiring of the electric facilities of the Northwestern Public Service Company, including generating plant, substations, and distribution systems in the Counties of Platte, Butler, Colfax, and Merrick, used and operated in the City of Columbus, Nebraska, and surrounding territory, commonly referred to as the Columbus Division of said Company, together with franchises, leases, licenses, permits, grants, easements, contracts, customers' accounts receivable, meter deposits, tools, merchandise, machinery, equipment, and miscellaneous other property of said Company used in connection therewith; the leasing, purchasing or otherwise acquiring of such of the electric facilities and appurtenances thereto of such other privately owned electric light and power companies within the State of Nebraska as the District shall deem necessary or expedient in order to fulfill the purpose of its incorporation; the purchasing and selling of appliances, accessories, equipment, and merchandise incident to the operation of an electric light and power business; the leasing, purchasing, or otherwise acquiring of real and personal property needed or useful in connection with any of the above."

There is no contention that Consumers does not have the power, under its charter provision as recited in the petition, to build and operate a generating plant and sell the power therefrom either at wholesale or retail.

The petition for the organization of Consumers recited that the name of the municipality constituting the proposed district shall be the city of Columbus and that the boundaries of the proposed district shall be the same as the boundaries of said city.

Senate File No. 310, Laws 1933, c. 86, § 2, p. 339 (now section 70-602, R. R. S. 1943), provided: "* * * nothing in this act shall be construed to prevent the organization of a district hereunder within, or partly within, the territorial boundaries of another district organized hereunder, so long as the plants, systems and works, the operation of the same, the exercise of powers and the assumption of duties and responsibilities hereunder, of or on the part of one such district, do not nullify, conflict with, or materially affect those of or on the part of another such district."

The Certificate of Approval of the department recited that the city of Columbus was within Loup District; it quoted the statute; and then recited a resolution of the board of directors of Loup containing these two paragraphs: "WHEREAS, the creation of the CONSUMERS PUBLIC POWER DISTRICT, for the purposes in the petition named, and the operation of the plants, systems and works, the exercise of power and the assumption of duties and responsibilities thereunder, of or on the part of such new district, will not nullify, conflict with, or materially affect those of, or on the part of the Loup River Public Power District, * * *.

"BE IT FURTHER RESOLVED, that the Loup River Public Power District cooperate with said proposed new district if and when the same is created, to the end that the purposes enumerated in said petition may be accomplished."

The department then found that the project would be feasible and conform to public convenience and welfare, and approved it subject to three limitations, of which the third is: "That the plants, systems and works, the operation of same, the exercise of powers

and the assumption of duties and responsibilities of the Consumers Public Power District shall not nullify, conflict with, or materially affect those of or on the part of the Loup River Public Power District."

The department by so doing transformed the "do not nullify, conflict with, or materially affect" clause into a prospectively operating "shall not" provision.

The appellees here contend that the statute, and the limiting provision in the approval, bar Consumers from building and operating a power plant and selling electric power so generated, because to do so will conflict with and materially affect their operations.

The statutory provision involved relates to "the organization" of a district within or partly within the territorial boundaries of another district, and permits it so long as it does not nullify, conflict with, or materially affect another district. It is a provision designed to permit the organization of overlapping districts.

We so construed the act in State ex rel. Wright v. Lancaster County Rural P. P. Dist., 130 Neb. 677, 266 N. W. 591. That was an action in quo warranto. The department made no finding that there would be no conflict between two districts operating in the same territory. We held that such a finding was not required. We further held: "The duty of the state department, as imposed by provisions already quoted from the statute, was to make an investigation of the proposed district and of its proposed plants and systems and, if deemed feasible and conforming to public convenience and welfare, to execute, in duplicate, a certificate setting forth a true copy of the petition and declaring it approved. Comp. St. Supp. 1935, sec. 70-703. In this respect the record of organization shows compliance with the statute. The state department made the required investigation and issued certificates declaring that the proposed plants and systems of both districts were 'feasible,' conforming to public convenience and welfare, thus implying and deciding that overlapping will

not create any material conflict within the meaning of the legislative act."

So here it must be held that at the time the department approved Consumers' petition it decided that overlapping would not create any material conflict within the meaning of the act. When the department approved the petition and caused its certificate to be filed, its function in the matter ended.

We further said in State ex rel. Wright v. Lancaster County Rural P. P. Dist., *supra:* "The record fails to show that the powers of the two districts cannot be so exercised as to prevent a material conflict." That statement must be related to the issue involved in the quo warranto proceeding. It relates to the condition of the showing at and prior to the approval of the petition there challenged.

Here the record shows that at the time the department approved the petition of Consumers, there was an affirmative showing before the department, made by Loup, that there was no material conflict.

The statutory provision involved relates to a fact condition that could be held to prevent the organization of a district, and not to a fact condition subsequently arising that could prevent or restrict the operation of an organized district under its charter powers.

We find nothing in the act indicating a legislative intent that the conditions imposed should operate beyond the "organization" of a district. The appellees find comfort in the "so long as" phrase. That phrase is used here in the sense of provided. See Cavanna v. Tri-State Cooperative Assn., 77 Pa. Super. 358.

Is Consumers bound by the prospective condition attached to the approval by the department?

The department's powers and functions are prescribed by the statute. It can exercise only the powers conferred by express enactment or by necessary implication. Scotts Bluff County v. State Board of Equalization & Assessment, 143 Neb. 837, 11 N. W. 2d 453. The ex-

press power conferred is to approve and by implication to disapprove. When it approves, its power ends. Thereafter there remains only the power to certify its approval and file. There is no discretionary power given to the department such as is conferred, for instance, in section 46-235, R. R. S. 1943. It is the petition when approved that becomes the charter of a district. It is the petition when approved that is subject to amendment. § 70-662, R. R. S. 1943.

We find nothing in the act that can be construed to imply a power in the department to condition its approval subject to limitations and conditions running prospectively for the life of the district. It necessarily follows that the restriction imposed by the department on the approval of Consumers' petition was outside its powers and void. It further follows that the organization condition set out in section 70-602, R. R. S. 1943, is of no force and effect subsequent to the approval of Consumers' organization petition.

We come then to the question of whether or not the contract provision in the 1946 agreement of Consumers to buy all of its power from N.P.P.S. is void as against public policy. We are not here dealing with the narrow question of the power of a corporation to contract to buy all of a named commodity from one source of supply. Rather we are here dealing with the power of Consumers, a public corporation, to contract not to exercise for a period of 26 years its charter powers of constructing generating plants, generating electricity, and selling electricity at wholesale or retail.

The public policy of this state as to power districts organized under the provisions of Chapter 70, article 6, R. R. S. 1943, is too well known to require demonstration. It is the concept of electrical energy being furnished to the ultimate consumer at the lowest cost consistent with sound business judgment. It is a matter of public history and common knowledge of which

courts may take judicial notice. There is no contention here to the contrary.

We have here a contract which, if valid, creates a monopoly in N.P.P.S. in the production and furnishing of power. We have a contract which, if valid, requires Consumers to buy substantially all of its electric power from N.P.P.S. If the contract is valid and if N.P.P.S. builds the generating plant to supply Consumers' increased power needs, the cost in interest rates alone to N.P.P.S. and ultimately to the customers of Consumers, will be several million dollars above that which the production of power will cost Consumers and ultimately its customers. There is no adequate showing of material savings that will result from N.P.P.S. production as distinguished from Consumers production sufficient to offset the increased interest rate.

We have here a contract which has implicit in it the evils of a monopoly directly related to a business affected with a public interest. Under the evidence here, to enforce it will not result in the bringing of electrical energy to the ultimate consumer at the lowest possible cost consistent with sound business management.

In State ex rel. Spillman v. First Bank of Nickerson, 114 Neb. 423, 207 N. W. 674, 45 A. L. R. 1418, we applied this rule: " 'If an agreement binds the parties or either of them to do, or if the consideration is to do, something opposed to the public policy of the state or nation, it is illegal and absolutely void, however solemnly made. * * * Where a contract belongs to this class, it will be declared void, although in the particular instance no injury to the public may have resulted. In other words, its validity is determined by its general tendency at the time it is made, and if this is opposed to the interests of the public it will be invalid, even though the intent of the parties was good and no injury to the public would result in the particular case. The test is the evil tendency of the contract, and not its actual injury to the public in a particular instance.' "

The rule is stated in 73 C. J. S., Public Utilities, § 5, p. 996: "As a general rule, public utilities have the right to enter into contracts between themselves or with others, free from the control or supervision of the state, so long as such contracts are not unconscionable or oppressive and do not impair the obligation of the utility to discharge its public duties."

Also, in 17 C. J. S., Contracts, § 211, p. 563, the rule is stated: "Contracts contrary to public policy, that is those which tend to be injurious to the public or against the public good, are illegal and void, even though actual injury does not result therefrom."

Here it is patent that the contract does impair the obligation of Consumers to discharge its public duties.

The Supreme Court of the United States with reference to illuminating gas as distinguished from electricity has held: "The supplying of illuminating gas is a business of a public nature to meet a public necessity. It is not a business like that of an ordinary corporation engaged in the manufacture of articles that may be furnished by individual effort. * * * Hence, while it is justly urged that those rules which say that a given contract is against public policy, should not be arbitrarily extended so as to interfere with the freedom of contract, Printing &c. Registering Co. v. Sampson, L. R. 19 Eq. 462, yet in the instance of business of such character that it presumably cannot be restrained to any extent whatever without prejudice to the public interest, courts decline to enforce or sustain contracts imposing such restraint, however partial, because in contravention of public policy. * * * It is also too well settled to admit of doubt that a corporation cannot disable itself by contract from performing the public duties which it has undertaken, and by agreement compel itself to make public accommodation or convenience subservient to its private interests." Gibbs v. Consolidated Gas Co. of Baltimore, 130 U. S. 396, 9 S. Ct. 553, 32 L. Ed. 979.

The appellees call our attention to our holding in E. K. Buck Retail Stores v. Harkert, 157 Neb. 867, 62 N. W. 2d 288, wherein we held: "The power of courts to invalidate contracts for being in contravention of public policy is a very delicate and undefined power which should be exercised only in cases free from doubt. It is not the province of courts to destroy the right to contract by enabling parties to escape their contractual obligations on the ground of public policy unless the preservation of the public welfare imperatively so demands."

That case had to do with contracts between private parties. Nevertheless we have weighed the problem here in light of the intent of that rule.

We conclude that the contract of Consumers made in 1946 to buy all or substantially all of its electric power from N.P.P.S. was and is contrary to public policy and hence illegal and void. This conclusion renders it unnecessary to determine the impact of the 1949 supplemental agreement.

The trial court erred in holding that Consumers was required to buy substantially all of its electric power from N.P.P.S. and in enjoining Consumers as above stated.

This brings us to the cross-appeal of Loup and Platte.

By cross-petition Loup and Platte prayed for an order terminating the power contracts with the rurals, Consumers, the city of Minden, and the city of North Platte; and directing N.P.P.S. to establish rates for its customers as prescribed by the statutes of Nebraska. Because of admissions made in the pleading, the prayer of the cross-petition of the city of North Platte was granted. That order is not involved in this appeal and is not disturbed by our holding herein.

The trial court denied the cross-petition otherwise. That denial is challenged here, and we are requested to enter a declaratory judgment on the cross-petition.

In 1949 Loup and Platte separately adopted identical

rate resolutions. The purpose of these resolutions was to establish rates for the sale of electrical power. The resolution is lengthy and involved. In form and substance it has the appearance of a legislative act. It created officers of the N.P.P.S., a planning board and a budget board, provided their membership and powers, and set out in detail operations, conditions, and terms.

Based upon these rate resolutions, Consumers, the rurals, and the municipals then entered into cost-of-service contracts with Loup and Platte. An analysis of these resolutions and contracts is not required here. It is sufficient to say that the over-all effect was to guarantee Loup and Platte an income then deemed sufficient to meet their financial needs and to permit the customers of Loup and Platte to have a considerable, if not complete, control over the expenditures of Loup and Platte. It is those contracts which Loup and Platte seek to have terminated by a declaratory judgment on a cross-petition.

One of the purposes of the Uniform Declaratory Judgments Act is to terminate the controversy that gives rise to the proceedings. § 25-21,154, R. R. S. 1943.

The controversy that gave rise to this proceeding was the proposal of Consumers to build and operate a power generating plant. The ultimate question to be determined was whether or not Consumers was contractually bound to buy substantially all of its power from Loup and Platte. That question the trial court determined and on appeal we determine, although with a different result. With that determination the controversy that gave rise to this proceeding has been terminated.

The petition presents basically the construction and validity of one provision of the 1946 contract of Loup, Platte, and Central with Consumers.

The cross-petition presents the construction and validity of provisions in the 1949 rate resolution and cost-of-service contracts of Loup and Platte with the rurals, the municipals, and Consumers.

We have held: "Proceedings under the uniform declaratory judgments act are governed by applicable established rules of pleading." State ex rel. Smrha v. General American Life Ins. Co., 132 Neb. 520, 272 N. W. 555.

In Armstrong v. Mayer, 69 Neb. 187, 95 N. W. 51, we examined at length the question of what matters can be raised by cross-petition in this state. We there held: "But the matters set up in the cross-petition must be germane to the original suit. The cross-petition is not maintainable for purposes of affirmative relief as a cross-suit beyond the requirements of a complete adjudication upon the subject mater (sic) of the original suit."

This decision has since been followed consistently down to and including O'Shea v. O'Shea, 143 Neb. 843, 11 N. W. 2d 540.

Paraphrasing language used in Armstrong v. Mayer, *supra,* in some sense the questions presented by the cross-petition are connected with the subject matter of the petition but the connection is not such a necessary one as to require that a court pass upon them in order to render a complete adjudication of the subject matter of the original controversy.

We have held that under the Uniform Declaratory Judgments Act courts have a reasonable discretion in determining the controversies to which it applies. Phelps County v. City of Holdrege, 133 Neb. 139, 274 N. W. 483.

We have also held: "The use of a declaratory judgment, while discretionary with the court, is nevertheless dependent upon facts and circumstances rendering it useful and necessary. The court's discretion should be exercised with caution. Jurisdiction should be assumed only where the court is satisfied that an actual controversy exists between competent parties who are before the court, and that the declaration sought will be a practical help in ending the controversy or in stabilizing disputed legal relations under the facts al-

leged and proved." Graham v. Beauchamp, 154 Neb. 889, 50 N. W. 2d 104.

Consistent with these authorities, the trial court declined to render a declaratory judgment on the questions presented by the cross-petition. In that it did not err.

The judgment of the trial court is affirmed in part, and in part reversed and remanded with directions to enter judgment in accord with this opinion.

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

DONALD E. KELLEY ET AL., APPELLANTS, V. ARTHUR JOHN, AS MAYOR AND MEMBER OF THE CITY COUNCIL OF THE CITY OF MCCOOK, NEBRASKA, ET AL., APPELLEES, J. HAROLD DONALDSON, JR., ET AL., INTERVENERS-APPELLEES.

75 N. W. 2d 713

Filed March 24, 1956. No. 33971.

1. **Municipal Corporations.** The referendum provisions of our statutes as they relate to municipal corporations apply to legislative acts, but not to administrative or executive matters.
2. ———. If an ordinance of a city serves merely to put into execution a previously enacted law, it is clearly executive or administrative in character.
3. ———. The test for determining that which is legislative from that which is administrative or executive is whether the ordinance was one making a law, or administering or executing a law already in existence.
4. ———. An ordinance changing the classification of property from residential to business use after the adoption of a comprehensive zoning plan is an administrative or executive matter, and not subject to referendum laws applicable to municipalities.

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

Morrison, Lyons & Starrett and *Kennedy, Holland, DeLacy & Svoboda,* for appellants.

Stanley R. Scott, for appellees.

Russell & Colfer and *J. D. Wood, Jr.*, for interveners-appellees.

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

CARTER, J.

This is an appeal by plaintiffs from an order and judgment of the district court for Red Willow County, sustaining defendants' demurrer to plaintiffs' petition and dismissing the action.

The plaintiffs, Donald E. Kelley and Georgia E. Kelley, are the owners of Lots 10 through 19, Block 3, Kelley's Hilltop Addition to the City of McCook, Nebraska. The plaintiff, F. E. Dillman, is the representative of the Berean Fundamental Church Council, Inc., a religious organization which owns Lot 9 in Block 3, the remainder of the property involved in this suit. The plaintiff, Safeway Stores, Incorporated, is the holder of an option agreement to purchase all of the described property, which option has been exercised conditional upon the rezoning of the property for business use. The plaintiffs, Solomon W. Stilgebouer and John Lenhart are citizens, residents, voters, and taxpayers in the city of McCook.

The defendant, City of McCook, a municipal corporation, is a city of the first class operating under the city manager plan. The other defendants are the mayor, city clerk, city treasurer, and the members of the city council of the city of McCook.

On November 27, 1952, the city of McCook established by ordinance a comprehensive zoning plan regulating and restricting the construction and use of buildings within zoning districts, and creating a board of adjustment and fixing its powers and time and place of meeting. Under this ordinance, the validity of which is not questioned, the property here involved was zoned as residential property.

On May 31, 1955, certain owners of property adjoin-

ing Block 3 petitioned the city council to rezone the use of the property from residential to business use. Other parties joined in the proceedings. Notice was given of a public hearing on the matter, as required by the original zoning ordinance. After a hearing, the city council adopted Ordinance No. 795 rezoning Block 3 as "Neighborhood Business District Zone 4-A." Such classification permits the operation of retail stores within the prescribed zone. No appeal was taken to the board of adjustment or to the courts in the manner authorized by statute. Instead, petitions were filed, containing a sufficient number of signers, to obtain a referendum on Ordinance No. 795. The city council found the petitions sufficient and designated December 7, 1955, as a special election day for the referendum. This suit was then commenced, praying that the defendants be enjoined from calling or holding the referendum election. Due to the pendency of the present suit the election was not held on December 7, 1955. Such referendum election is now called for the general municipal election to be held on April 3, 1956.

The applicable portion of the controlling referendum statute provides as follows: "The referendum may be ordered upon any ordinance or measure except ordinances making the annual tax levy, appropriating money to pay the salaries of officers and employees, or relating to local improvements and assessments therefor, * * *." § 19-640, R. R. S. 1943. It is the rule in this state that the referendum provisions of our statutes apply to legislative acts, but not to administrative or executive matters. If an ordinance serves merely to put into execution a previously enacted law, it is clearly administrative or executive in character. The crucial test for determining that which is legislative from that which is administrative or executive is whether the action taken was one making a law, or executing or administering a law already in existence. State ex rel. Ballantyne v. Leeman, 149 Neb. 847, 32 N. W. 2d 918;

State ex rel. Nelson v. Butler, 145 Neb. 638, 17 N. W. 2d 683; Read v. City of Scottsbluff, 139 Neb. 418, 297 N. W. 669. It seems clear to us that an ordinance adopting a comprehensive plan for zoning a city is a legislative matter. It is a determination that the mayor and council of a city, acting legislatively, have concluded that zoning is beneficial to the best interests of the city. Since it is legislative in character, it may be submitted to the qualified electors of the city in the form of a referendum to determine if the ordinance shall or shall not be approved. In the present case no such action was taken and the validity of the ordinance of November 27, 1952, is not questioned.

The ordinance of November 27, 1952, provides for the creation of a board of adjustment to whom appeals may be taken from ordinances purporting to make changes and amendments. Appeals to the district court may be taken from a decision of the board of adjustment as provided by section 19-912, R. R. S. 1943. It is the contention of the appellants that this constitutes the exclusive remedy in the present case. Whether or not this is true is dependent on whether the ordinance changing the classification of the lands in question to "Neighborhood Business District Zone 4-A" is an administrative or legislative act. We conclude that the passage of Ordinance No. 795 is an administrative act. It is the carrying out of the purposes of the comprehensive zoning ordinance and, in so doing, the procedures provided in section 19-912, R. R. S. 1943, are exclusive. We point out that section 19-904, R. R. S. 1943, provides that the city council is to provide the manner in which regulations and restrictions, and the boundaries of the districts are to be determined, established, and enforced, and from time to time amended, supplemented, or changed. It provides for public notice and a public hearing. Under section 19-912, R. R. S. 1943, an appeal to the courts to finally determine the issues raised is provided.

It seems clear to us that the ordinance in question purports to carry out the purposes of the comprehensive zoning ordinance which latter ordinance was a valid exercise of legislative power. In putting this ordinance into effect, the city council acts administratively. In State ex rel. Ballantyne v. Leeman, *supra,* we said: "It was set out generally that when an ordinance enacts a law, or lays down a rule of conduct or course of policy to guide the citizens, there can be no question but that it is legislative in character and referable; but, on the other hand, if it serves simply to put into execution previously enacted laws it is clearly executive or administrative in character." See, also, Monahan v. Funk, 137 Or. 580, 3 P. 2d 778; Burdick v. City of San Diego, 29 Cal. App. 2d 565, 84 P. 2d 1064.

It is fundamental also that to permit a referendum to be invoked to annul or delay executive action would be to destroy the efficiency necessary to successful administration of the business affairs of a municipality. Read v. City of Scottsbluff, *supra.* The policy of the municipality was determined by the adoption of the comprehensive zoning ordinance. The administration of the ordinance, including the changes in classification of particular pieces of property, very rarely affects all the electors of a municipality. To say that administrative determinations are subject to referendum could defeat the very purposes of zoning. The uniformity required in the proper administration of a zoning ordinance could be wholly destroyed by referendum. A single decision by the electors by referendum could well destroy the very purpose of zoning where such decision was in conflict with the general scheme fixing the uses of property in designated areas. This alone is sufficient to sustain the holding that an ordinance, administrative in character, is not subject to referendum. It would permit the electors by referendum to change, delay, and defeat the real purposes of the comprehensive zoning ordinance by creating the chaotic situation

such ordinance was designed to prevent. The determination as to whether or not a city desires to embark upon a policy of zoning for the purpose of regulating and restricting the construction and use of buildings within fixed areas is a legislative matter subject to referendum. But when such policy has been determined, the changing of such areas, or the granting of exceptions, are committed to the mayor and council as administrative matters in order to secure the uniformity necessary to the accomplishment of the purposes of the comprehensive zoning ordinance. In the case at bar the city council has sought to fit the property here involved into a master plan which it believes properly should be classified as business property. If its action may be nullified by a referendum, then the comprehensive master plan becomes a nullity and every change of classification of property made by the city council will be subject to the whims of the electors without regard to the master plan. No such result was intended by the Legislature which lends support to the reasoning of our holdings that administrative acts carrying out the purposes of a valid ordinance are not referable to the electors. The following cases support the principle, although they are dissimilar on their facts. Simpson v. Hite, 36 Cal. 2d 125, 222 P. 2d 225; Whitbeck v. Funk, 140 Or. 70, 12 P. 2d 1019; Hurst v. City of Burlingame, 207 Cal. 134, 277 P. 308.

For the reasons herein stated, the ordinance changing the classification of the property here involved from a residence classification to a business classification is administrative in character and therefore not a matter that could be referred to the electors under the referendum provisions of our statutes. The procedures provided in the comprehensive zoning ordinance, described as Ordinance No. 699, provide the exclusive method for determining the correctness of the action of the city council and the board of adjustment. A party aggrieved by findings and orders of the board of adjustment has a remedy

by appeal to the district court. The action of the city council in referring Ordinance No. 795 was therefore without legal authority. The judgment of the district court in sustaining the action of the city council in directing that Ordinance No. 795 be referred to the electors of the city under the referendum act is therefore in error. The judgment of the district court is reversed and the cause remanded with directions to the trial court to overrule the demurrer to plaintiffs' petition.

REVERSED AND REMANDED WITH DIRECTIONS.

MERLIN OLSON, BY HIS MOTHER AND NEXT FRIEND, MARTHA OLSON, APPELLEE AND CROSS-APPELLANT, V. THOMAS SHELLINGTON, APPELLANT AND CROSS-APPELLEE.

75 N. W. 2d 709

Filed March 30, 1956. No. 33841.

1. **New Trial.** The purpose of a new trial is to enable the court to correct errors that have occurred in the conduct of the trial.
2. ———. The inherent power of the court to grant a new trial is limited to those situations where prejudicial error appears in the record of the proceedings.
3. **Trial: New Trial.** The alleged errors that may be considered in the district court are those which appear in the record of the proceedings which resulted in the verdict and judgment about which complaint is made and which are called to the attention of the trial court by motion or appropriate pleading.
4. ———: ———. 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.
5. **New Trial.** A new trial is to be granted for a legal cause and where it appears that a legal right has been invaded or denied.
6. ———. A new trial may be ordered because of the jury's neglect to follow the court's instructions as to the law governing the case.
7. **Trial.** It is the duty of a jury to find its verdict in accordance with the law as given in the instructions of the court. When it clearly violates this duty, the court should set aside its verdict.

APPEAL from the district court for Dixon County: SIDNEY T. FRUM, JUDGE. *Affirmed.*

Budd B. Bornhoft, Davis, Healey, Davies & Wilson, and *Robert A. Barlow,* for appellant.

Harry N. Larson and *Wear, Boland & Mullin,* for appellee.

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

MESSMORE, J.

This is an action brought by Martha Olson, mother and next friend in behalf of Merlin Olson, a minor, plaintiff, in the district court for Dixon County against Thomas Shellington, defendant, for damages for injuries sustained by Merlin Olson while riding as a guest in a car driven by Thomas Shellington.

The case was tried to a jury. The jury returned a verdict as follows: "We, the Jury duly impanelled and sworn in the above entitled cause do find for the plaintiff, Merlin Olson, by his mother and next friend, Martha Olson, and against the defendant, Thomas Shellington, and do fix the amount of plaintiff's recovery at the sum of $24,000.00. We find slight negligence on the part of the defendant." The statement "We find slight negligence on the part of the defendant" following the typewritten portion of the verdict was in the handwriting of one of the jurors.

The jury was polled and each juror answered in the affirmative that that was his verdict. The jury was discharged. The trial court thereafter entered an order for the jury to return on the date fixed in the order, to determine the intention of the jury in the statement which followed the typewritten portion of the verdict returned by the jury on March 18, 1955.

The defendant filed a motion to set aside the trial court's order recalling the jury, and motion for judgment for the defendant on the verdict. The plaintiff filed a motion for judgment for the plaintiff on the verdict. The jury was not recalled by the trial court,

but was released on the trial court's own motion. Thereafter the defendant filed his motion for judgment notwithstanding the verdict and the plaintiff filed an alternative motion for new trial and a supplemental motion for judgment for the plaintiff on the verdict. All of such motions were presented to the court, and the court found generally that the motions of the plaintiff, with the exception of his alternative motion for new trial, should be overruled; that the motions of the defendant above set forth should be overruled; that the court should, on its own motion, set aside the verdict as being a contradictory verdict; and that a new trial should be granted. All of the above proceedings were had during the same term of court. Pursuant to the findings of the trial court, a new trial was ordered and the defendant appealed.

Among the errors assigned by the defendant was that the trial court erred in overruling the defendant's motion for judgment on the verdict.

On cross-appeal to this court the plaintiff assigned as error that the trial court erred in overruling the plaintiff's motion for judgment on the verdict, and that the trial court erred in overruling the plaintiff's supplemental motion for judgment on the verdict.

This case was tried under the guest statute, section 39-740, R. R. S. 1943, which provides in part: "The owner or operator of a motor vehicle shall not be liable for any damages to any passenger or person riding in such motor vehicle as a guest or by invitation and not for hire, unless such damage is caused by the driver of such motor vehicle being under the influence of intoxicating liquor or because of the gross negligence of the owner or operator in the operation of such motor vehicle. For the purpose of this section, the term 'guest' is hereby defined as being a person who accepts a ride in any motor vehicle without giving compensation therefor, * * *."

No question arises in this case but that under the

circumstances presented by the record the plaintiff was a guest in the defendant's automobile. In fact the plaintiff's petition charges the defendant with gross negligence in several respects.

The trial court, in its instructions, instructed the jury with reference to gross negligence and contributory negligence, and defined gross negligence, contributory negligence, slight negligence, ordinary care, proximate cause, and preponderance of the evidence, and further instructed fully on the issues involved in this case and the law applicable thereto.

The jury was furnished two forms of verdict, one as indicated above, finding for the plaintiff and assessing the amount of his recovery, the second form whereby the jury could return a verdict for the defendant. The jury returned the verdict as heretofore set out.

While contention is made by the defendant that the words "We find slight negligence on the part of the defendant" appended to the typewritten form of the verdict constitutes a special verdict and governs the general verdict, the plaintiff in his cross-appeal contends that the verdict is a general verdict and not a special verdict for the reason that a special verdict is by direction of the court or in answer to certain interrogatories given by the court to the jury to answer with respect to the verdict to be returned by it.

We deem the contentions raised by the parties as above stated are not necessary for determination of this appeal. The important question to determine here is whether or not the trial court, in considering the procedural matters presented to it and considering the verdict returned by the jury, properly and legally granted a new trial on its own motion.

The purpose of a new trial is to enable the court to correct errors that have occurred in the conduct of the trial. The district court has an inherent power as a matter of judicial discretion to consider assignments of error and to grant a new trial even though the motion

was not made within the time required by statute. In this case the alternative motion for a new trial on the part of the plaintiff was made within the same term that the case was tried. The inherent power of the court to grant a new trial is limited to those situations where prejudicial error appears in the record of the proceedings. It expires with the term of court at which the judgment was rendered. 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. A new trial is to be granted for a legal cause and where it appears that a legal right has been invaded or denied. The alleged errors that may be considered in the district court are those which appear in the record of the proceedings which resulted in the verdict and judgment about which complaint is made and which are called to the attention of the trial court by motion or appropriate pleading. See Greenberg v. Fireman's Fund Ins. Co., 150 Neb. 695, 35 N. W. 2d 772. See, also, Tomer v. Densmore, 8 Neb. 384, 1 N. W. 315; Tingley v. Dolby, 13 Neb. 371, 14 N. W. 146; Bush v. Bank of Commerce, 38 Neb. 403, 56 N. W. 989; Bee Building Co. v. Dalton, 68 Neb. 38, 93 N. W. 930; Kleutsch v. Security Mutual Life Ins. Co., 72 Neb. 75, 100 N. W. 139; Trute v. Holden, 118 Neb. 449, 225 N. W. 238; all of which are cited in Greenberg v. Fireman's Fund Ins. Co., *supra,* on this point.

In the instant case the trial court had a legal reason for finding the verdict to be a contradictory verdict and, in the exercise of its sound judicial discretion, in granting a new trial. It is obvious that the verdict is contradictory and ambiguous when considered in connection with the issues contained in the pleadings and in the instructions given by the trial court, and is in violation of the instructions given by the trial court. The following is applicable.

Modern practice recognizes that a new trial may be ordered because of the jury's neglect to follow the

court's instructions as to the law governing the case. The court charges the jury as to the law by which it is to be governed, and if it fails to comply with the instructions, the verdict will be set aside. See 39 Am. Jur., New Trial, § 126, p. 135.

It is the duty of a jury to find its verdict in accordance with the law as given in the instructions of the court. When it clearly violates this duty, the court should set aside the verdict. See Omaha & R. V. Ry. Co. v. Hall, 33 Neb. 229, 50 N. W. 10. See, also, Aultman v. Reams, 9 Neb. 487, 4 N. W. 81.

For the reasons given herein the order of the trial court in granting a new trial is sustained, and the judgment of the trial court in so doing is affirmed.

AFFIRMED.

JOHN H. JOHNSON ET AL., APPELLANTS, V. HERBERT E. RUHL ET AL., APPELLEES.

75 N. W. 2d 717

Filed March 30, 1956. No. 33905.

1. **Pleading.** A general demurrer tests the substantive legal rights of the parties upon admitted facts including proper and reasonable inferences of law and fact which may be drawn from the facts which are pleaded.
2. ———. The rules of pleading require plaintiff in a civil suit to insert in the petition a statement of the facts constituting the cause of action in ordinary and concise language.
3. ———. The word "facts" as used in the code of civil procedure means a narrative of the events, acts, and things done or omitted which show a legal liability of defendant to plaintiff.
4. ———. A petition is sufficient if from the statement of facts set forth therein the law entitles plaintiff to recover.
5. ———. A petition which fails to plead actionable facts is vulnerable to a general demurrer.
6. ———. The purpose of pleadings is to frame the issues upon which the case is to be tried and to advise the adversary what he is called upon to meet.
7. **Vendor and Purchaser.** If a contract for the sale of real estate

provides that time and punctuality are material and essential ingredients in the contract, that nonpayment of an installment of the purchase price shall forfeit the right of the purchaser therein, and that the vendor shall thereupon have the right to take possession of the property, such default of itself generally operates as a forfeiture, unless the contract requires notice or demand as a condition precedent to a forfeiture.

8. ———. A stipulation in a contract for the sale of land that, in the event of default in payment of the purchase price as provided therein, the vendor shall be entitled to the possession of the premises, is valid and enforceable.

9. ———. If a contract of that character contains a stipulation for the investiture of the vendor with the right of possession of the premises and he peaceably obtains possession thereof he may, after default of the vendee, maintain it until the purchase price is fully satisfied.

10. **Restitution.** Restitution is not a mere right. It is ex gracia, resting in the exercise of a sound discretion, and the court will not order it where the justice of the case does not call for it.

11. **Vendor and Purchaser: Damages.** If a litigant seeks to recover damages for the unlawful detention of property he must establish his right to the possession thereof during the period for which he seeks to recover and that the party against whom he seeks relief unlawfully withheld possession thereof.

APPEAL from the district court for Lancaster County: HARRY R. ANKENY and HARRY A. SPENCER, JUDGES. *Affirmed.*

Richard O. Johnson and *H. B. Muffly,* for appellants.

Cline, Williams, Wright & Johnson, for appellees.

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

BOSLAUGH, J.

A general demurrer of appellees to the petition of appellants was sustained. They elected not to plead further. A judgment of dismissal of the case was rendered by the district court. This appeal is from that judgment.

A general demurrer tests the substantive legal rights of the parties upon admitted facts including proper and

reasonable inferences of law and fact which may be drawn from the facts which are pleaded. Central Neb. Public Power & Irr. Dist. v. Walston, 140 Neb. 190, 299 N. W. 609; Kinney Loan & Finance Co. v. Sumner, 159 Neb. 57, 65 N. W. 2d 240.

The following is the substance of the petition:

The parties made a contract in writing on October 10, 1947, by the terms of which appellees, the owners of the premises and the appurtenances described, sold and appellants bought the property therein designated for the sum of $38,000. The purchase price was required to be paid by appellants to appellees $12,000 when the contract was executed and $26,000 with interest at 5 percent per annum in 132 installments of $256.46 each, payable on the 10th day of October 1947, and on the 10th day of each month thereafter until and including October 10, 1958. A copy of the contract was attached to and made a part of the petition. The total principal and interest paid by appellants because of the contract to June 10, 1949, was $17,385.46. The contract was performed by appellants to that date.

The facts concerning the commencement, pleadings, proceedings, findings, and judgment in an ejectment action brought by appellees against appellants in the district court on September 2, 1949, were stated. The court found in that case that appellants had paid $12,000 and the monthly installments required to and including the one due June 10, 1949, on the purchase price of the property; that appellants were entitled to a credit on the purchase price of $989 damages because of misrepresentations made by appellees as to the condition of the property at the time it was sold and bought as alleged in the cross-petition of appellants; that there was due and unpaid to June 1950 on the purchase price and $105.89 for insurance a total of $2,194.41. The court ordered that if appellants failed to pay for 60 days the amount found due appellees or failed to pay delinquent taxes on the property appellees would be entitled to

immediate possession of it. The findings and decree were rendered by the district court on June 1, 1950. Appellees made application to the district court for a writ of assistance to put them in possession of the property. Appellants on November 7, 1950, surrendered the premises to appellees and they have since had the possession and use of them to the exclusion of appellants who have since received nothing from the property.

Appellants appealed from the findings and judgment of the district court of June 1, 1950. It was found by this court that this allowance to the appellants on the purchase price of the property by the trial court was not contested by appellees and that the effect of the credit was that at the time appellees sought to terminate the contract and brought the ejectment action on September 2, 1949, appellants were entitled to a credit on the purchase price in excess of the delinquencies pleaded. The judgment of the district court was reversed and the cause was remanded for further proceedings consistent with the opinion. Ruhl v. Johnson, 154 Neb. 810, 49 N. W. 2d 687.

The district court thereafter upon consideration of the opinion of this court and the mandate found that at the time the ejectment case was brought on September 2, 1949, appellants were not in default in their performance of the contract because of the credit of $989 due them from appellees; and that appellees were not then entitled to cancel the contract and because thereof the petition of appellees in the ejectment case should be dismissed. The district court then adjudged that the $989 should be and that it was credited on the purchase price of the property as stated in the contract of October 10, 1947, and that the petition and cause of action of appellees should be and they were dismissed and the costs were taxed to appellees.

The prayer of the petition is: That an account be taken of the receipts and profits of the premises received by appellees during the time they have been in

the possession of the premises and that appellants have judgment therefor; that an account be taken of the personal property on the premises from the time appellants vacated and surrendered them and that they have judgment for all personal property sold, disposed of, or destroyed since appellees took possession of the property; and that judgment be rendered against appellees for $5,000 as damages sustained by appellants because of the wrongful withholding of the premises by appellees from appellants and for costs of suit and general equitable relief.

The correctness of the action of the trial court in sustaining the demurrer of appellees to the petition of appellants is challenged by them on the basis that the phrase "cause of action" does not mean the formal statement of facts set forth in the petition but the subject matter upon which the appellants ground their right to relief against appellees. The doctrine to which appellants refer is correctly stated by them. Myers v. Moore, 78 Neb. 448, 110 N. W. 989; Zelen v. Domestic Industries, 131 Neb. 123, 267 N. W. 352. However, it is not significant or helpful in deciding the matter at issue in this case. A cause of action and the pleading of a cause of action are separable and distinguishable. Appellants are required by the code of civil procedure to make in their petition a statement of facts constituting the cause of action upon which they seek relief in ordinary and concise language. § 25-804, R. R. S. 1943.

In Ferson v. Armour & Co., 109 Neb. 648, 192 N. W. 125, this court declared: "The rules of pleading require a plaintiff in a civil suit to insert in the petition 'a statement of the facts constituting the cause of action in ordinary and concise language and without repetition.' "

The word "facts" as used in the code means a narrative of the events, acts, and things done or omitted which show a legal liability of the defendant to the

plaintiff. A petition is sufficient if from the statement of facts the law entitles plaintiff to recover thereon. Rhoads v. Columbia Fire Underwriters Agency, 128 Neb. 710, 260 N. W. 174. It is unimportant how meritorious a cause of action a litigant may have. It cannot avail him anything if he fails to properly state in his petition concerning it sufficient actionable facts. A petition which fails to plead actionable facts is vulnerable to a general demurrer. § 25-806, R. R. S. 1943; First State Bank v. Kastle, 118 Neb. 630, 225 N. W. 776.

Pleadings in a civil action are indispensable. Their purpose is to frame the issues upon which the cause is to be tried and to advise the adversary what he is called upon to meet. Appellants cannot prevail on this appeal unless they have pleaded in their petition sufficient actionable facts to entitle them to legal relief against appellees.

The allegations of the petition are that appellants performed the exactions of the contract obligatory upon them to and including June 10, 1949. They do not assert any payment by them on the purchase price or the interest thereon after that date. They were given a credit thereon of $989 by the findings and adjudication of the district court. The credit allowed them was sufficient, disregarding any accrued interest, to satisfy the installments due including the one which matured on September 10, 1949, and a part but not all of the installment due October 10, 1949. The petition sets forth no fact tending to show that appellants have not been in default of all the amounts required to be paid by the contract since November 1949. The amount past due and unpaid on the contract on November 7, 1950, when possession of the property, the subject of the contract, was surrendered by appellants to appellees, was in excess of $2,500. The record compels acceptance of this conclusion. So far as the petition discloses there has not been paid or offered to be paid by appellants any

part of this or any part of the amounts which have since that date become due on the contract.

The contract contains these provisions: "First parties (appellees) agree to give second parties (appellants) immediate possession of * * * said premises * * *. It is agreed that time is of the essence in this contract and that in event second parties shall default in making any of the payments provided herein * * * that first parties may at their option terminate this contract * * * and in such event all sums which have been paid by second parties shall be considered to have been paid by second parties as rent for the use and occupancy of the above described premises. * * * Second parties further agree that if they should default in making the payments required hereunder or in carrying out any of the obligations provided by the terms of this agreement, they will place the first parties in peaceable possession of said premises * * *."

The quoted provisions of the contract are valid and enforceable. It is stated in Gilbert v. Union Pacific R. R. Co., 79 Neb. 160, 112 N. W. 359: "Where a contract for the sale of real estate provides that time and punctuality are material and essential ingredients in the contract, and that non-payment of an instalment of the purchase price shall forfeit the purchaser's rights therein, and that the vendor shall thereupon have the right to take possession of the property, such default of itself operates as a forfeiture * * *." See, also, Dodge v. Galusha, 151 Neb. 753, 39 N. W. 2d 539; Abbas v. Demont, 152 Neb. 77, 40 N. W. 2d 265; Kear v. Hausmann, 152 Neb. 512, 41 N. W. 2d 850; Johnson v. Norton, 152 Neb. 714, 42 N. W. 2d 622.

Appellees were entitled to the possession of the property, the subject of the contract, on November 7, 1950, and appellants were obligated by the terms of the contract to place appellees in the peaceable possession thereof as appellants did on that date.

It is competent for an executory contract for the sale

and purchase of real estate to stipulate for the investiture of the vendor with the right of possession of the premises which includes the right to the rents and profits thereof in the event of default by the vendee. If the vendor peaceably obtains possession of the premises after default of the vendee he may hold such possession as against him until the purchase price of the premises is fully satisfied. Generally a vendor in possession by virtue of a stipulation therefor in the event of default is required to account for the rents and profits received or for the reasonable rental value of the premises but such an accounting should be had in a suit to foreclose the contract as a mortgage or in an action to redeem. See, Felino v. Newcomb Lumber Co., 64 Neb. 335, 89 N. W. 755, 97 Am. S. R. 646; Pettit v. Louis, 88 Neb. 496, 129 N. W. 1005, 34 L. R. A. N. S. 356; Penn Mutual Life Ins. Co. v. Katz, 139 Neb. 501, 297 N. W. 899; Hanks v. Northwestern State Bank, 143 Neb. 204, 9 N. W. 2d 175; Annotation, 115 A. L. R. 339. The decisions just referred to involved real estate mortgages containing provisions for possession of the property affected by the mortgagee in the event of default by the mortgagor but the principles applied therein are equally applicable to an executory land contract containing similar provisions for right of possession by the vendor upon default of the vendee. Appellants do not seek to redeem the property from their defaults. They express no such desire or ability. They have not alleged facts sufficient to constitute a cause of action or any legal basis for an accounting for rents and profits of the property involved herein while it has been in the possession of appellees.

It is an unusual coincidence that the petition makes no allegations concerning personal property but the prayer of the petition asks for an accounting of the personal property on the premises from the time possession thereof was surrendered to appellees and "a judgment for all such personal property sold, disposed of or de-

stroyed." It is not charged in the petition that there was any property sold, disposed of, or destroyed or any other facts that would permit or justify the relief sought in this regard.

Appellants ask for a judgment for $5,000 for damages sustained by them because of wrongful withholding of the premises from them by appellees. It is said by appellants that this court determined that they were not in default of performing their contract on September 2, 1949, and that it follows that they were not in default on November 7, 1950, when they upon demand of appellees surrendered possession of the premises to appellees and hence appellants brought this action for restitution of the premises to them. They were not legally entitled to possession of the property, the subject of the contract, at the time this case was instituted because of any facts averred in the petition. It is deducible from the petition that appellees then had and were entitled to continue to have possession of the property because of the defaults of appellants above referred to and discussed. In State ex rel. Hayden v. Horton, 70 Neb. 334, 97 N. W. 434, on rehearing, 70 Neb. 343, 99 N. W. 501, the court stated: "In Gould v. McFall, 118 Pa. St. 455, 12 Atl. 336, it was said: 'Restitution is not a mere right. It is ex gracia, resting in the exercise of a sound discretion, and the court will not order it where the justice of the case does not call for it * * *.'" See, also, Atlantic Coast Line R. R. Co. v. Florida, 295 U. S. 301, 55 S. Ct. 713, 79 L. Ed. 1451.

Appellants could not therefore in any event recover damages because appellees have since November 1950 detained the premises from appellants. The right of recovery of damages for unlawful detention of property depends upon the right of possession thereof in the plaintiff during the period for which the recovery is asked and that his adversary has illegally withheld the possession thereof. Hanks v. Northwestern State Bank, *supra,* is conclusive of this: "When a party seeks to

recover damages for the unlawful detention of property he must establish his right to the possession thereof during the period for which he seeks to recover and that the party against whom he seeks to recover unlawfully withheld such possession."

The petition of appellants does not state facts sufficient to entitle them to any relief in this case. The demurrer of appellees to the petition was properly sustained.

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

AFFIRMED.

EDDIE NUMON ET AL., APPELLEES, V. PLUMB R. STEVENS ET AL., APPELLEES, IMPLEADED WITH GRIFFITH H. DAVIES, JR., ET AL., APPELLANTS.

76 N. W. 2d 232

Filed March 30, 1956. No. 33908.

1. **Contracts: Work and Labor.** One who undertakes for a consideration to do work requiring special skill, impliedly represents that he possesses, and will exercise, such reasonable degree of skill as the nature of the service may require; and if he is to furnish his own tools, implements, or machinery, there is an implied representation as to their fitness for the use to which they are to be put.
2. **Contracts: Damages.** The measure of damages in the case of a breach of contract is the amount which will compensate the injured person for the loss which a fulfillment of the contract would have prevented or the breach of it has entailed.

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

Curtis O. Lyda and *Willard F. McGriff,* for appellants.

Atkins & Ferguson and *Holtorf & Hansen,* for appellees.

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

WENKE, J.

Eddie Numon and Wreatha L. Numon, husband and wife, brought this action in the district court for Scotts Bluff County. The primary purpose of the action is to recover damages from defendants Griffith H. Davies, Jr., and Griffith H. Davies, Sr., members of a copartnership doing business as Davies and Son, arising out of injury done to a house owned by plaintiffs while it was being moved for them by these defendants. The basis for the recovery is that the moving "was not done in a good and workmanlike manner and by reason of the negligence and unskilled manner in which said house was moved, it was damaged by said Davies." Issues were joined and trial had to the court. The court found that the house was in good condition but during the process of moving "said house suffered extensive damage generally and that said damage was caused by the defendants Griffith H. Davies, Jr. and Griffith H. Davies, Sr., d/b/a Davies and Son, in failing to move said house in a workmanlike manner and exercising reasonable and necessary precautions for the prevention of the damage caused and that the fair and reasonable value of the cost of repairs in placing this house in the same condition as it was prior to its being moved was $1705.99."

There were other defendants to the action. The trial court granted relief to them but no appeal was taken therefrom; therefore no reference will be made thereto in this opinion.

The court decreed there was owing to the defendants Davies the sum of $822.36 on a mechanic's lien they had filed for services rendered under and pursuant to the contract hereinafter referred to. It then set off that amount against the sum of $1,705.99 it had found was owing the plaintiffs because of the damages their property had suffered and rendered a judgment for plaintiffs for the difference or the sum of $883.63 together with interest thereon. It is from the rendition

of this judgment that the defendants Davies perfected their appeal.

Appellees had bought a house located at Seventeenth and Second Avenue in Scottsbluff, Nebraska. They had also purchased Lot 15, Andrews addition to the city of Scottsbluff, referred to as 2809 Avenue H. Shortly after purchasing the foregoing house and lot in the early part of May 1953, they entered into an oral contract with appellants, general contractors engaged in moving buildings, to jack up and move this house from where it was located to the lot they had purchased and there move it onto a foundation which would be constructed for that purpose. This action arises out of what happened to the house while it was being moved.

"Generally an agreement to exercise proper skill is implied in a contract to perform work." 17 C. J. S., Contracts, § 329, p. 781.

"One who undertakes for a consideration to do work requiring special skill, impliedly represents that he possesses, and will exercise, such reasonable degree of skill as the nature of the service may require; and if he is to furnish his own tools, implements or machinery, there is an implied representation as to their fitness for the use to which they are to be put." Van Nortwick v. Holbine, 62 Neb. 147, 86 N. W. 1057.

Without setting forth in detail the evidence, which is quite voluminous, we find it establishes that appellees' house suffered extensive damage while being moved and that such damage was caused by appellants failing to perform the work in connection with moving the house in a workmanlike manner and in failing to exercise reasonable and necessary care for the prevention of damage thereto. In fact, the evidence establishes the work was performed in a careless manner.

" 'The measure of damages in the case of a breach of contract is the amount which will compensate the injured person for the loss which a fulfilment of the contract would have prevented or the breach of it has en-

tailed.' 17 C. J. 847 - citing Schrandt v. Young, 2 Neb. (Unof.) 546, 89 N. W. 607." Elvidge v. Brant, 131 Neb. 1, 267 N. W. 169. See, also, Koyen v. Citizens Nat. Bank, 107 Neb. 274, 185 N. W. 413; Wendt v. Yant Construction Co., 125 Neb. 277, 249 N. W. 599; Williams v. Beckmark, 150 Neb. 100, 33 N. W. 2d 352; Gallagher v. Vogel, 157 Neb. 670, 61 N. W. 2d 245.

As stated in Wendt v. Yant Construction Co., *supra:* "The measure of damages for injuring a building * * * is the cost of restoring it to its former condition."

The house had a dining room, living room, bathroom, three bedrooms, and a kitchen. It was an old house but before being moved was in good condition, both inside and out, and liveable. After it was moved and set on the foundation at 2809 Avenue H the opposite was true. Apparently the whole building was twisted and wrenched during the process of moving. This resulted in the plaster being cracked and loosened from the walls and ceiling, causing much of it to fall on the floors; the doors and frames were twisted and sprung so the doors would not open and close; the windows were twisted and some of the glass therein cracked; a floor joist was broken; the floors, which were mostly oak, were buckled and the finish bady scratched and marred; and the electric wiring was damaged.

In order to restore it to its former condition and make it liveable the appellees had to employ labor and purchase materials, the fair and reasonable value of which the evidence establishes was in excess of $1,705.99. Naturally the materials used, which were new, replaced materials that were old. Appellants suggest depreciation should be taken on the cost of the new material used to restore the building as it is more valuable than that replaced. In other words, appellants contend, "depreciation must be made from the cost of restoring the house with new material more valuable than that which was repaired and replaced," stating, "it stands to reason it (the house) was a more valuable property (after the

repairs were made) than at the time it was purchased." This court has held to the contrary.

In Koyen v. Citizens Nat. Bank, *supra,* we quoted, with approval, the following from Paxson Co. v. Board of Chosen Freeholders, 201 F. 656: "Where a bridge owned by a county was so injured by the wrongful act of defendant that a portion had to be rebuilt, the county is not to be denied recovery of damages in substantially the amount expended, because the rebuilt structure may be of greater value than the old and it is impossible to make a nice estimate of the difference in value."

We said of the old boiler involved in Koyen v. Citizens Nat. Bank, *supra:* "And, what is more, it served the purpose as well as a new one." We think that is true of the old material here replaced by new through the fault of appellants. The house was liveable and, except for damage caused thereto by appellants, would not have needed the repairs made.

In view of the foregoing we affirm the action of the trial court.

AFFIRMED.

FIRST NATIONAL BANK OF WAYNE, APPELLANT, V. GROSS REAL ESTATE COMPANY, A CORPORATION, ET AL., APPELLEES.
75 N. W. 2d 704

Filed March 30, 1956. No. 33915.

1. **Judgments.** The summary judgment act authorizes summary judgment where the moving party is entitled to judgment as a matter of law, where the truth is clear, and where no genuine issue remains for trial.
2. **Trusts.** Ordinarily the violation by a trustee of a duty laid upon it by law, whether willful or fraudulent, or done through negligence or arising through oversight or forgetfulness, is a breach of trust which forms the basis of an action in damages.
3. **Assignments.** Under the common law an assignee of a part of a demand cannot enforce an assignment in an action at law

unless there has been an acceptance on the part of the debtor.

4. ———. An order drawn upon a particular fund creates an equitable assignment thereof, although not accepted by the drawee.
5. ———. As a general rule where there is an assignment of a fractional part of an entire right the assignee must resort to equity to enforce that right and in doing so bring before the court all parties in interest.
6. Actions. The statute which abolished the distinction between actions at law and suits in equity did not abolish the distinction between legal and equitable rights or the methods necessary to assert or defend respectively those rights.

APPEAL from the district court for Douglas County: L. ROSS NEWKIRK, JUDGE. *Affirmed.*

Collins & Collins and *Burr R. Davis,* for appellant.

Schrout & Brown, for appellees.

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

YEAGER, J.

This is an action at law for damages by the First National Bank of Wayne, Nebraska, plaintiff and appellant, against Gross Real Estate Company, a corporation, Victor L. Gross, and Frank Gross, defendants and appellees.

The action was presented to the court on a second amended petition filed by the plaintiff and a motion of the defendants for a summary judgment. The motion for summary judgment was sustained and accordingly judgment was rendered in favor of the defendants. A motion for new trial was filed by plaintiff which motion was overruled. From the judgment and the order overruling the motion for new trial the plaintiff has appealed.

The plaintiff asserts as grounds for reversal that the judgment is contrary to law; that it is not sustained by sufficient evidence; and that it is contrary to the evidence.

As pointed out the action is at law for damages. By the petition upon which the action was presented to the

court, to the extent necessary to set it forth here, the plaintiff alleged that prior to March 6, 1954, William P. Sindelar and Adela Sindelar, husband and wife, who will hereinafter be referred to as the Sindelars, were the owners of certain lands in Wayne County, Nebraska, which were encumbered by a mortgage in the amount of $16,800; that they were indebted to the plaintiff in the aggregate amount of $4,039.89 on six promissory notes one of which notes was for $2,500; and that the note for $2,500 was secured by a chattel mortgage on 35 head of cattle, 66 hogs, 1,500 bushels of corn, 1,200 bushels of oats, 30 tons of hay, and certain farm machinery and equipment.

It is further alleged that on March 6, 1954, all of the real estate was sold at public auction and the proceeds thereof in the amount of $30,240 were delivered to Gross Real Estate Company and Victor L. Gross, the president of Gross Real Estate Company.

It was further alleged that on March 6, 1954, the plaintiff delivered to Victor L. Gross, president of the Gross Real Estate Company, an assignment from the Sindelars directing the Gross Real Estate Company to pay to plaintiff $4,039.89, thus conveying to plaintiff the proceeds of the sale of the land in that amount, subject to the mortgage indebtedness against the land, which assignment was given in consideration of plaintiff releasing chattel mortgage liens held by it upon the chattels of the Sindelars. The assignment in its entirety is attached to the petition as an exhibit. The pertinent parts are the following:

"We hereby authorize and direct you to pay to the First National Bank of Wayne, Nebraska, the sum of four thousand thirty nine dollars and eighty nine cents ($4,039.89).

"This money is to be paid to said bank from the proceeds of the sale of our Wayne County, Nebraska, farm described as follows: * * *

"As agents and brokers for the sale of the farm de-

scribed above, purchase money will come into your custody, and it is our direction that such sum be paid to the First National Bank before any other distribution of the funds is made, other than that necessary to retire the first mortgage indebtedness."

This assignment is not dated but it appears that it was received and receipted for by the defendant Victor Gross on March 6, 1954.

It is to be noted that it is not alleged that Gross said or did anything the effect of which was to affirmatively bind him or the other defendants to perform in accordance with the terms of the assignment.

It is further alleged that the defendants instead of responding to the terms of the assignment followed other directions of the Sindelars and failed to pay any amount to the plaintiff. Some details in this respect are pleaded but it does not appear necessary to set them forth here.

After the petition was filed an affidavit of William P. Sindelar was filed on behalf of the defendants. A similar affidavit of Adela Sindelar was filed. In the title to these and in the body, the two affiants are described as defendants in the action. They however do not appear from the transcript to be parties to the action as presented by the second amended petition. They may not therefore, for the purposes of this case, be treated as parties.

After these affidavits were filed the defendants filed a motion for summary judgment.

After the motion for summary judgment was filed an affidavit of Adon Jeffrey was filed on behalf of the plaintiff. An affidavit of L. B. McClure was filed also on behalf of the plaintiff.

Prior to the filing of the various affidavits and the motion for summary judgment, the defendants took the deposition of Adon Jeffrey, the vice president of the plaintiff.

After all of these steps had been taken the hearing

was had on the motion for summary judgment. There is no bill of exceptions but in lieu thereof there is a case stated. From the case stated it appears that the motion was submitted upon the petition, which is summarized in the case stated; the affidavits; and the deposition of Adon Jeffrey.

In the case stated appears also what is referred to as an answer to an earlier amended petition in this case. It is not in the transcript and there is nothing to indicate that the parties or any of them have treated it as a response to the petition which is before this court. It must therefore be disregarded as a responsive pleading.

In this light it becomes necessary to examine the petition, the affidavits, and the deposition referred to and from them determine whether or not there is an absence of issue as to any material fact the effect of which entitled the defendants herein to judgment in their favor as a matter of law.

In Illian v. McManaman, 156 Neb. 12, 54 N. W. 2d 244, it was said: "The summary judgment act, sections 25-1330 to 25-1336, R. S. Supp., 1951, authorizes summary judgment only where the moving party is entitled to judgment as a matter of law, where it is quite clear what the truth is, and that no genuine issue remains for trial. * * *." See, also, Mecham v. Colby, 156 Neb. 386, 56 N. W. 2d 299; Kennedy v. Chicago, R. I. & P. R. R. Co., 156 Neb. 345, 56 N. W. 2d 446; Palmer v. Capitol Life Ins. Co., 157 Neb. 760, 61 N. W. 2d 396.

There is no real controversy as to the facts. It must be accepted that the Sindelars gave to the plaintiff the assignment in question. It must also be accepted that the plaintiff delivered it to an officer of the defendant corporation. It is also true that the defendants disregarded the terms of the assignment and failed to deliver any of the proceeds of the sale of the real estate to the plaintiff.

The proposition for consideration therefore is that of whether or not on these facts the defendants were as a matter of law entitled to a judgment in their favor. The determination depends upon the rights which were secured by the plaintiff under the assignment, the obligation of the defendants, if any, after it was served, and the method adopted by plaintiff to enforce its rights against the defendants, if any existed. We do not have any question in this case of validity as between the assignor and assignee.

As pointed out this is an action at law for damages. Presumably, although this does not appear clearly from the briefs, the theory of the plaintiff is that after receipt of notice the defendants became trustees of the fund represented by the assignment, and that as such trustees they breached the trust which breach gave plaintiff a right of action in damages.

It is true generally that the violation by a trustee of a duty laid upon it by law, whether willful and fraudulent, or done through negligence or arising through oversight or forgetfulness, is a breach of trust which forms the basis of an action in damages. Masonic Bldg. Corporation v. Carlsen, 128 Neb. 108, 258 N. W. 44; Wells v. Carlsen, 130 Neb. 773, 266 N. W. 618.

No cases have been cited however and we have found none the effect of which is to say that an action in damages may be maintained against a debtor who has received notice of assignment of funds in his hands but has not accepted the assignment. By accepted as used here is meant accepted as binding upon him to respond in accordance with the tenor and effect of the assignment. We think there are none.

This is not to say that an assignee has no right of action against the debtor.

As pointed out the assignment here was of a part of a fund in the possession of the Gross Real Estate Company or to come into its possession. The common-law rule is that a creditor may not without the consent of

a debtor split up the debt by assignment. The debtor is entitled to pay the debt in solido. Notice of the assignment does not destroy the right. 4 Am. Jur., Assignments, § 65, p. 279.

In consequence of this rule, under the common law, an assignee of a part of a demand cannot enforce an assignment in an action at law unless there has been an acceptance on the part of the debtor. Chase Nat. Bank v. Sayles, 11 F. 2d 948, 48 A. L. R. 207, writ of certiorari denied in 273 U. S. 708, 47 S. Ct. 99, 71 L. Ed. 851; Graham v. Southern Ry. Co., 173 Ga. 573, 161 S. E. 125, 80 A. L. R. 407; Morris v. Nelson, 124 Kan. 127, 257 P. 729; Wallins Creek Collieries Co. v. Saylor, 214 Ky. 206, 282 S. W. 1095; National Exchange Bank v. McLoon, 73 Me. 498, 40 Am. R. 388; James v. City of Newton, 142 Mass. 366, 8 N. E. 122, 56 Am. R. 692; Continental Ins. Co. v. H. M. Loud & Sons Lumber Co., 93 Mich. 139, 53 N. W. 394, 32 Am. S. R. 494; La Bonte v. Mutual Fire & Lightning Ins. Co., 75 Mont. 1, 241 P. 631; Security Trust Co. v. Anderson, 110 N. J. Law 503, 166 A. 303; Field v. Mayor of New York, 6 N. Y. 179, 57 Am. Dec. 435; 4 Am. Jur., Assignments, § 65, p. 279.

We have not found that this court has passed directly upon the question of whether or not an action at law may be maintained upon such an assignment as this. It has held however that an order drawn upon a particular fund creates an equitable assignment thereof, although not accepted by the drawee. Slobodisky v. Curtis, 58 Neb. 211, 78 N. W. 522. See, also, Nebraska Moline Plow Co. v. Fuehring, 60 Neb. 316, 83 N. W. 69; Yeiser v. Broadwell, 83 Neb. 302, 119 N. W. 473.

The general rule is that where there is an assignment of a fractional part of an entire right the assignee must resort to equity to enforce that right and in doing so bring before the court all parties in interest. Chase Nat. Bank v. Sayles, *supra;* Graham v. Southern Ry. Co., *supra;* National Exchange Bank v. McLoon, *supra;* James v. City of Newton, *supra;* Warren v. First Nat.

Bank, 149 Ill. 9, 38 N. E. 122, 25 L. R. A. 746; Holbrook v. Payne, 151 Mass. 383, 24 N. E. 210, 21 Am. S. R. 456; Schwartz v. Tuchman, 232 Mich. 345, 205 N. W. 140; Bush, Redwood & Co. v. Foote, 58 Miss. 5, 38 Am. R. 310; Cogan v. Conover Mfg. Co., 69 N. J. Eq. 809, 64 A. 973, 115 Am. S. R. 629; Stewart v. Heywood, 62 Utah 466, 220 P. 717; Annotation, 80 A. L. R. 414.

The requirement for enforcement of such a right as is involved here is stated in Restatement, Contracts, § 156, p. 191, as follows: "An assignment of either a fractional part of a single and entire right against an obligor, or of a stated amount from such a right, is operative as to that part or amount to the same extent and in the same manner as if the part had been a separate right, subject to the limitation that if the obligor has not contracted to make such a partial performance no legal proceeding can be maintained by such an assignee against the obligor over his objection, unless all persons having collectively a right to the entire performance are enjoined in the proceeding."

The rules of the cited cases and of Restatement, Contracts, appear to be supported by sound reasoning. Some of the elements of this reasoning are: That the debtor has a right to stand upon the contract with his creditor and pay the debt as a whole; that a creditor should not be allowed to divide an obligation due him into fragments, and assign them to a number of different persons, thereby subjecting his debtor to the annoyance of more than one claim; and that a debtor may not be put to the possibility of defending several law suits growing out of a single debt to a creditor.

The conclusion therefore is that an action at law upon a partial assignment may not be maintained against the debtor of an assignor alone in the absence of acceptance of the assignment by the debtor. This is to say, as applied to this case, that the summary judgment entered on the cause of action as pleaded, necessary parties not

being parties to the action, was properly entered and must be sustained.

We do not think this conclusion may be avoided by the statute which has abolished the distinction between actions at law and suits in equity.

By section 25-101, R. R. S. 1943, this distinction was abolished. The statute however did not abolish either the distinction between legal and equitable rights or the methods necessary to assert or defend respectively those rights. As has always been true an equitable right may not properly be asserted in an action unless all of the necessary parties have been made parties to the action. In State ex rel. Wright v. Barney, 133 Neb. 676, 276 N. W. 676, wherein this proposition was made clear, this court said: "Our Code provides that there shall be but one form of action, which shall be called a civil action. That provision has not changed the substantive rights of the parties. The substance of the common-law rules of legal procedure, and the principles by which the different forms of actions were previously governed, still remain as before. The abolition of the common-law names and forms of action has not and cannot change the essential character of judicial remedies."

For the reasons herein stated the judgment of the district court is affirmed.

AFFIRMED.

BOSLAUGH, J., participating on briefs.

DONALD W. SPRACKLIN, APPELLEE, V. OMAHA TRANSIT CO., SUBSTITUTED DEFENDANT FOR OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY, A CORPORATION, APPELLANT.
76 N. W. 2d 234

Filed April 6, 1956. No. 33872.

1. **Trial.** A motion for a directed verdict or for a judgment notwithstanding the verdict admits, for the purposes of a decision

of the motion, the truth of the material and relevant evidence on behalf of the party against whom the motion is directed, and he is entitled to have each controverted fact found in his favor and have the benefit of fair inferences deducible from the evidence.

2. ———. If there is evidence sufficient to sustain a finding for the party who has the burden of proof in an action triable to a jury the trial court may not disregard the proof and decide the case as a matter of law.

3. **Negligence: Trial.** If the evidence establishes that the negligence of plaintiff is more than slight as compared with the negligence of defendant the trial court may decide the case as a matter of law and instruct a verdict for the defendant or dismiss the action.

4. **Automobiles: Trial.** If reasonable minds may disagree on the issue of the exercise of the reasonable care required of an operator of an automobile under the circumstances of the situation in question, the issue of his negligence is one of fact to be decided by the jury.

5. **Negligence: Trial.** The trial court may, in a negligence case, grant a motion for an instructed verdict or for a judgment notwithstanding the verdict if the evidence, considered most favorably to the party against whom the motion is directed, is insufficient to sustain a verdict for him.

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

William P. Mueller and *Kennedy, Holland, DeLacy & Svoboda,* for appellant.

Pilcher, Haney & Howard, for appellee.

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

BOSLAUGH, J.

A motor bus of appellant operated in the conduct of its business of transporting persons within the city of Omaha and an automobile operated by appellee collided on or near the intersection of Maple and Sixty-ninth Streets. The collision was proximately caused, as appellee charges, by negligence of appellant. Injuries were thereby inflicted on the person of appellee

and he was compelled to incur liability for medical and hospital services. He seeks by these proceedings compensation for his injuries and expenditures.

A motion to direct a verdict or to dismiss the case was interposed by appellant when the evidence of the parties was concluded. The motion specifically and separately detailed each of the reasons upon which it was made. The motion was denied and the case was submitted to the jury. It returned a verdict for appellee. Judgment was rendered thereon and a motion for judgment notwithstanding the verdict was overruled.

The substance of the petition of appellee is as follows:

He was driving his automobile west on Maple Street near its intersection with Sixty-ninth Street in Omaha on January 31, 1954, at about 1:20 a. m. A bus of appellant was moving south on Sixty-ninth Street immediately north of the intersection. It did not obey the warning of a stop sign located near the northwest corner of the intersection before it traveled into and upon it. The bus failed to allow westbound traffic to cross the intersection before it moved into it. The bus proceeded into it directly in and across the lane of the highway in which appellee was operating his automobile towards the west and thereby caused it to collide with the left side of the bus and appellee to receive severe injuries from which he suffered disability. An ordinance of Omaha provides that where a stop sign has been placed at an intersection it is unlawful for the operator of a vehicle to proceed past it until he has brought the vehicle to a complete stop at the stop sign. Appellant negligently failed to stop the bus before it entered upon Maple Street; failed to allow the right-of-way to appellee as he traveled west on Maple Street, a favored street with the right-of-way in his favor; failed to keep a proper lookout for other vehicles on Maple Street, including the automobile of appellee proceeding west at the time and place of the accident; and failed to ascertain that the bus could safely enter

and travel upon the intersection before it was driven into Maple Street.

Appellant denied the claims of appellee as made in the petition and charged that the collision of the vehicles was the proximate result of the negligence of appellee and that his negligence was more than slight. The reply of appellee denied the charge of appellant that appellee was guilty of contributory negligence which proximately caused the accident.

Appellant makes two assignments of error: That the district court erred in denying the motion made by it at the close of the testimony that the case should be resolved as a matter of law for it; and that the court erred in overruling the motion of appellant for judgment notwithstanding the verdict. The challenge of the legality of the judgment by appellant is tantamount to saying that it is not sustained by sufficient evidence.

Appellee produced evidence of this version of the happenings important to this case:

Appellee was at the time of the accident 24 years of age, unmarried, and the owner of a 1951 Dodge automobile purchased by him about 6 months prior to the accident. The collision of his automobile and the bus of appellant was about 1:20 a. m., Sunday morning, January 31, 1954. He met his brother Saturday night at a bar and took him home. Appellee then went to an automobile service station where he was employed on a part-time basis at Seventy-third and Dodge Streets. He was not working that night but he remained there until probably 11 p. m., and then went to the bar where he had met his brother and drank beer. He then visited Steve's Grill about a block from the bar and had a light lunch. He departed from there about 1 a. m.

He was required to wear eyeglasses. His vision without glasses was 20-40 and with them 20-20. He had been involved in two previous automobile accidents, one on November 8, 1953, when he hit an automobile in

the rear, and the other December 1, 1953, when a taxi was involved in the accident.

He left Steve's Grill, traveled to Maple Street, and west thereon at a speed of 25 miles per hour. His statement is that he did not exceed 25 miles per hour at any of the time important to this litigation. Maple Street extends east and west. It is a favored, paved street 40 feet wide with four lanes and protected by appropriate traffic signs. He passed a car as he came over the crest of a hill near Sixty-seventh Avenue. He proceeded west down the hill in the passing lane immediately to the north of the center of the street toward Sixty-ninth Street. It was a clear, bright night. The street was dry, in good condition, and there was no interfering traffic along the street near where the accident happened. When he was 125 to 150 feet east of Sixty-ninth Street he first saw the bus of appellant about 15 feet north of the north boundary of Sixty-ninth Street. It was traveling south toward Maple Street at a speed of 3 or 4 miles per hour. He removed his foot from the gas feed of his automobile and placed it on the brake pedal but did not apply the brakes on his car.

There was a stop sign near the northwest corner of the intersection of Sixty-ninth and Maple Streets about 10 feet north of the north side of Maple Street and close to the west curb of Sixty-ninth Street. The bus did not stop at the stop sign but continued to move forward toward the south into the intersection of the streets. Appellee was then 80 or 90 feet east of the east curb of Sixty-ninth Street. The speed of the bus was increased suddenly as it came into the intersection to about 10 to 12 miles per hour and traveled in a southeasterly direction. Appellee applied the brakes on his automobile when he saw the bus was not going to stop before moving into the intersection. His brakes were in good condition but because of the condition of the surface of the street they were not entirely effective and the speed of his automobile was only reduced to

20 miles per hour and it and the bus collided. The point of contact was 3 or 4 feet behind the front wheel of the left side of the bus. The front of the automobile and the side of the bus came in contact and both were severely damaged. Appellee was rendered unconscious and remained in that condition until sometime Sunday when he regained consciousness in the hospital. He was severely injured by the collision.

The bus was about 35 feet long and 8 feet wide. Its front at the time of the collision was about on a line with the east curb of Sixty-ninth Street and the front of the bus was variously estimated by appellee as having been then 8 feet south of the center of Maple Street, 3 or 4 feet north of the south curb of Maple Street, and about even with the curb line of Sixty-ninth Street south of Maple Street. An officer who was at the scene soon after the accident and before the vehicles had been moved and who investigated the accident said there was a skid mark made by the left wheels of the car of appellee approximately on the center line of Maple Street extending for a distance of 93 feet back from where the automobile was stopped by its collision with the bus. The skid mark was 19 feet 8 inches north of the south curb of Maple Street. The officer said the right front wheel of the bus was 3 feet 8 inches south of the south curb of Maple Street. The bus was on a very slight angle with its front toward the south and slightly to the east. The east curb of Sixty-ninth Street north of Maple Street is about 2 feet east of the west curb of Sixty-ninth Street south of Maple Street. The officer said that he saw appellee at the hospital after the accident; that he smelled his breath; and that he had been drinking some kind of alcoholic beverage. Appellee said he did not change his position on the street as he approached and contacted the bus; he continued west in the lane north of and adjacent to the center of the street.

An ordinance of Omaha was placed in evidence. It

provides that where stop signs have been placed at any intersection it is unlawful for the operator of a motor vehicle to proceed past such stop sign until he has brought his vehicle to a complete stop at the stop sign. The driver of the bus said that there was a stop sign just west of the curb on Sixty-ninth Street and about 10 feet north of the north curb of Maple Street, and that he by it was required to stop before proceeding into the intersection of the streets.

The evidence produced by appellant concerning the things that transpired before and at the time of the accident and the cause of it is sharply in conflict with what was produced by appellee. It tends to show the following:

Appellee was seen to cross the intersection of Sixty-third and Maple Streets as he proceeded west to the place of the collision between his automobile and the bus at about 50 miles per hour. The witness who saw appellee at that time said that his car sounded like it was being operated in second gear. The witness turned from Sixty-third Street into Maple Street and followed appellee. He disappeared over a hill and the witness heard a crash. He continued west over the hill and saw that there had been an accident involving the automobile of the appellee and the bus.

Appellee passed a motorist, who was traveling about 27 miles per hour west on Maple Street, at about Sixty-seventh Avenue. When the motorist reached Sixty-eighth Street the collision of the car of appellee and the bus occurred. It caused a loud crash that was plainly heard by the motorist. The car of appellee when it passed the motorist was going fast. The front end of the bus was then about in the middle of Maple Street and it continued to move toward the south until the collision. The distance from the crest of the hill on Maple Street near Sixty-seventh Avenue to Sixty-ninth Street is slightly more than 1,000 feet. The distance between the west curb of Sixty-seventh Avenue and the east curb

of Sixty-eighth Street is about 236 feet. The distance between the east curb of Sixty-eighth Street and the east curb of Sixty-ninth Street south of Maple Street is about 380 feet.

The bus involved in the accident was on the Benson-Ak-Sar-Ben run and it ended on Sixty-ninth Street north of Maple Street about 40 feet where there was a short layover before beginning another trip on the assigned run. The headlights were turned off during the layover but the interior and marker lights were on. At the start of the trip shortly before the accident the operator of the bus put on the headlights, drove it to the location of the stop sign near the northwest corner of the intersection, and brought the bus to a complete stop. He looked west and east for any traffic on Maple Street. There was none from the west. There was an automobile at about Sixty-eighth Street approaching from the east at 20 to 25 miles per hour. The bus was then moving toward the intersection of Sixty-ninth and Maple Streets and when the front end of it was at about the center of Maple Street the operator saw another automobile coming from the east passing the first automobile he had seen. The second automobile was the car of appellee. It was 200 to 300 feet to the east of the bus when it was first seen by the operator and it was traveling at an estimated speed of 50 miles per hour about in the center of Maple Street. The operator accelerated the speed of the bus in an attempt to clear the street and escape the fast-moving automobile of appellee. The bus came into the intersection at about 3 miles per hour and the maximum speed it attained before the accident was about 8 miles per hour.

The front end of the bus was south of the south curb of Maple Street when the automobile of appellee hit it with a terrific crash on its left side about 4 feet back of the left front wheel and opposite the location of the motor of the bus. The left wheels of the automobile made a skid mark 93 feet long before it hit the

bus and its speed was only decreased 5 miles per hour after its brakes were applied. The impact of the car with the bus threw the operator out of his seat and his head hit the glass on the driver's side and shattered it. Another driver for appellant was in the bus on his way home from work. He was standing up and was thrown around the inside of the bus. The bus and its motor were badly and extensively damaged as was the automobile of appellee. The bus did not move after the collision. It was 34 feet long, a fraction less than 8 feet wide, and its weight was 15,260 pounds.

The issues of this case are negligence, contributory negligence, and proximate cause. The jury resolved all issues of fact favorably to appellee. The evidence as to each is conflicting. A conclusion that any of them may be resolved as a matter of law is not justified.

A motion for a directed verdict or for a judgment notwithstanding the verdict is, for the purposes of a decision thereof, an admission of the truth of material and relevant evidence on behalf of the party against whom the motion is directed, and he is entitled to have each controverted fact found in his favor and to have the benefit of fair inferences deducible from the evidence. If there is evidence sufficient to sustain a finding for the party who has the burden of proof in an action triable to a jury the trial court may not disregard the proof and decide the case as a matter of law. If the evidence is conclusive that negligence of the plaintiff is more than slight as compared with the negligence of defendant the trial court may instruct a verdict or dismiss the action. If reasonable minds may disagree on the issue of the exercise of the reasonable care required of an operator of an automobile under the circumstances of the situation in question the issue of negligence of the operator is one of fact to be decided by the jury. The court should, in a negligence case, grant a motion for an instructed verdict or for a judgment notwithstanding the verdict only if the evidence, viewed most favorably to the party against whom

the motion is directed, is insufficient to sustain a verdict for him. Pahl v. Sprague, 152 Neb. 681, 42 N. W. 2d 367; Haight v. Nelson, 157 Neb. 341, 59 N. W. 2d 576, 42 A. L. R. 2d 1; Shields v. County of Buffalo, 161 Neb. 34, 71 N. W. 2d 701; Griess v. Borchers, 161 Neb. 217, 72 N. W. 2d 820; Parsons v. Cooperman, 161 Neb. 292, 73 N. W. 2d 235. The court properly denied the motion of appellant for an instructed verdict or for a dismissal of the cause as a matter of law and the court properly overruled the motion of appellant for a judgment notwithstanding the verdict.

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

AFFIRMED.

VICTOR MEISINGER ET AL., APPELLANTS, V. WILLIS C. JOHNSON ET AL., APPELLEES.
76 N. W. 2d 267

Filed April 6, 1956. No. 33897.

1. **Trial.** When a defendant demurs to the evidence or moves for a dismissal at the close of plaintiff's evidence, he thereby admits plaintiff's testimony to be true together with every conclusion which may be reasonably drawn therefrom.
2. **Trusts.** The burden of establishing a resulting trust is always upon the person who bases his rights thereon and he must do so by evidence that is clear, satisfactory, and convincing.
3. **Partnership.** A loan or advance of money to be invested in some enterprise, the lender to have a share in the profits as a remuneration for such loan or advancement, he having no interest in the property made the subject-matter of the business, and no power of management or control of such property, does not constitute such lender a partner.
4. **Accord and Satisfaction.** An accord and satisfaction of a claim or demand, whether liquidated or unliquidated, may be, and, where the parties so intend or agree, is effected by the transfer and acceptance of property.
5. ———. The general rule that a smaller sum cannot be a satisfaction of a larger debt or demand, because there is no consideration for the discharge thereof, has no application to a

case of transfer of property, for a debtor is under no obligation to deliver, or a creditor to accept, anything other than money in discharge of a debt or demand, and when they do so, there is such a giving and acceptance of something other or different from that which is claimed or owed as to bring the transaction within the definition of accord and satisfaction, and to provide the requisite new consideration.

6. **Trial.** Where defendant pleads a counterclaim and upon conclusion of plaintiff's evidence moves for and procures a proper dismissal of plaintiff's cause of action without first withdrawing his counterclaim, he thereby waives it.

APPEAL from the district court for Lancaster County: JOHN L. POLK, JUDGE. *Affirmed in part, and in part reversed and remanded with directions.*

Ginsburg & Ginsburg and *Benjamin Novicoff*, for appellants.

Perry, Perry & Nuernberger, for appellees.

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

SIMMONS, C. J.

Plaintiffs are Victor Meisinger and Walter Meisinger. The defendants are Willis C. Johnson and Ruth G. Johnson, husband and wife. The defendant Willis C. Johnson will be hereinafter referred to as Johnson.

Plaintiffs pleaded that on or about January 27, 1953, the defendant Johnson undertook to procure from plaintiffs the sum of $6,000 with which to purchase 19 lots in an addition to the city of Lincoln; that Johnson agreed that he would use said sum to acquire the legal title to the real estate; that for convenience, title would be taken in the name of Johnson for the use and benefit of plaintiffs and Johnson; that Johnson agreed to sell the lots individually for the benefit of plaintiffs and Johnson; that out of the sale price received plaintiffs would be paid the amount of their advancement and the remaining profits divided equally; that until sold, the property would be held by Johnson for the use of

and in trust for the plaintiffs; and that in reliance on said agreement plaintiffs advanced to Johnson the sum of $6,000.

Plaintiffs further alleged that Johnson purchased the land; that the full purchase price paid was the sum of $6,000; and that he took title in his own name for the use and benefit of the plaintiffs.

It is further alleged that thereafter Johnson sold four of the lots, received the proceeds of the sale, and refused to account to plaintiffs.

It is further alleged that Johnson thereafter deeded ten of the lots to plaintiffs; that he refused to account to plaintiffs for the remaining five lots; and that he claimed to be the owner thereof.

Plaintiffs prayed for an accounting and judgment for the purchase price of the lots sold; and that title to the lots retained by Johnson be quieted in plaintiffs.

Defendants answered admitting that they are husband and wife and that plaintiffs loaned defendants $6,000. Defendants alleged that in payment thereof defendants delivered to plaintiffs a promissory note and that the note was usurious by its terms. Defendants admitted that they became the sole and only owners of the lots; and alleged a full and complete settlement by the conveyance of the ten lots to plaintiffs; that the value of the ten lots was $10,000; and that the amount received by plaintiffs in excess of the $6,000 was usurious.

Defendants prayed that plaintiffs' petition be dismissed.

By cross-petition defendants prayed for the recovery of usurious interest in the sum of $4,000 and $2,000 damages for loss of sales of the lots retained caused by the filing of a lis pendens against those lots.

The cause was tried. At the close of plaintiffs' case defendants moved to dismiss plaintiffs' cause of action.

The trial court held that plaintiffs had not established a resulting trust; that the parties had entered into a loose arrangement whereby plaintiffs loaned or in-

vested $6,000 under an agreement of the defendants to repay the sum of $6,000 and some share of the profits from the sale of the lots; that the defendants became the owners of the lots involved with the obligation to account for profits; and that the delivery of the deed to the ten lots to the plaintiffs and its acceptance by them constituted an accord and satisfaction.

The court decreed that plaintiffs' cause be dismissed, and that the cross-petition be withdrawn without adjudication.

Plaintiffs appeal.

We have deemed it advisable to set out the allegations of plaintiffs' petition due to the variance between those allegations and the proof. We consider the evidence in the light of the rule that: "When a defendant demurs to the evidence or moves for a dismissal at the close of plaintiff's evidence, he thereby admits plaintiff's testimony to be true together with every conclusion which may be reasonably drawn therefrom." Peterson v. Massey, 155 Neb. 829, 53 N. W. 2d 912.

The evidence offered by the plaintiffs as to the agreement involved is not in serious dispute.

Plaintiffs were engaged in the floor covering business, dealing with contractors, builders, and home owners. Defendant Johnson was a builder and a purchaser of floor coverings from plaintiff.

Johnson had located a parcel of unplatted land in Lincoln that he wanted to subdivide and sell as lots. Johnson did not have the purchase money. In December 1952, he approached the plaintiffs. They discussed a partnership of buying, developing, and selling lots for a profit. Plaintiffs objected to a partnership because it would place them in competition with their building contractor customers. It was agreed that Johnson would take title to the land and sell the lots and plaintiffs "would realize a profit." Johnson was to develop, plat, and sell the lots, and plaintiffs were to have no "part of that." Plaintiffs were to furnish the money. The first money

to be realized from the sale of lots was to "retire" the $6,000 and then the profits were to be "split." Plaintiffs were to get "at least half" when a lot was sold, depending on the amount of money needed by Johnson for further development.

It was understood that plaintiffs were to borrow $6,000 from a bank and the first money realized from the sale of lots was to be used to retire that loan. Plaintiffs borrowed the money from the bank at 6 percent interest.

On January 27, 1953, plaintiffs gave Johnson a check for $6,000. The money was to be used to purchase the land. Also on January 27, 1953, defendants made and delivered to plaintiffs and one Carl Wunder an instrument on a promissory note form for $6,000. In the space reserved for the due date is written the names of the makers. The contract interest rate was 10 percent from date. Plaintiffs testified that they wanted this as "security" in case something happened to Johnson.

Carl Wunder is a half brother of the plaintiffs and at the time here involved was a partner in the Meisinger Brothers business.

Johnson used part of the $6,000 to buy the property. Some of it was used in another business venture of plaintiffs and Johnson.

The above is all the material evidence which we find in the record as to the agreement between the parties.

The rule is: "To establish a resulting trust the evidence must be full, clear, and satisfactory." Klamp v. Klamp, 51 Neb. 17, 70 N. W. 525. See, also, Brodsky v. Brodsky, 132 Neb. 659, 272 N. W. 919. The above is but a different way of saying that the burden of establishing a resulting trust is always upon the person who bases his rights thereon and he must do so by evidence that is clear, satisfactory, and convincing. Peterson v. Massey, *supra.*

Plaintiffs' evidence does not meet that test so as to establish a resulting trust.

Here the interest of the plaintiffs was not an interest in the land, nor was the land charged with a trust. The interest of the plaintiffs was that of a contract, personal in nature, relating to the proceeds of the sale of lands. Ruggles v. Merritt, 166 Mich. 457, 132 N. W. 112. The subject matter of the agreement concerned alone the repayment of a loan and the matter of profits from the sale of lands purchased. The agreement was not a contract for any interest in land and did not create a trust in the land. Fencer v. Wills, 259 Mass. 546, 156 N. E. 841.

We have held: "A loan or advance of money to be invested in some enterprise, the lender to have a share in the profits as a remuneration for such loan or advancement, he having no interest in the property made the subject-matter of the business, and no power of management or control of such property, does not constitute such lender a partner." Waggoner v. First Nat. Bank of Creighton, 43 Neb. 84, 61 N. W. 112.

We affirm the judgment of the trial court in its findings as to the matters above discussed.

Johnson platted the parcel of land into 19 lots. He sold four of the lots at considerations fixed by him and retained the proceeds. He reported these sales to the plaintiffs. He did not tell the plaintiffs the amounts he had received from the sales. He built a house on one of the lots for a home for himself.

Plaintiffs asked Johnson for reports on his dealings as to these lots, but not as to the sum of money per lot. Plaintiffs wanted money to meet their indebtedness to the bank and to use in their business. They were demanding money.

In July 1954 plaintiffs became insistent. Johnson had no cash. He offered to deed lots to plaintiffs "but it wouldn't be a final reckoning." The quoted statement goes to an offer of settlement and was made preliminary to the transaction later had.

Thereafter, Mrs. Johnson delivered a deed to the ten

lots to the plaintiffs. With the deed Mrs. Johnson delivered a writing dated July 28, 1954, acknowledging receipt of the deed and containing this sentence: "We hereby declare any and all money owed us by Willis C. and Ruth G. Johnson to be paid in full as of this date." Plaintiffs were requested to sign the receipt at the time they accepted the deed.

Plaintiffs were not then ready to close the transaction. The deed and the receipt were left with the plaintiffs with the agreement that if they accepted the deed the receipt was to be returned signed to the Johnsons.

Defendants also at that time requested a return of the note. Plaintiffs said it was mislaid. Defendants requested a return of the note with the receipt. At the time the deed and receipt were delivered to plaintiffs there was no conversation about a definite sum involved.

Plaintiffs did not execute and return the receipt to the defendants. They did not return the note. They did accept the deed to the ten lots. They recorded the deed and thereafter sold some of the lots and otherwise treated the ten lots so conveyed as their own. The plaintiffs' evidence is that they took the deed because it "was better than nothing at all."

The petition herein was filed October 15, 1954.

Plaintiffs offered as admissions against interest, interrogatories propounded to the defendant Johnson. One of the questions was: "Were any of said above described lots deeded by you?" Johnson answered in part: "I deeded * * * (the ten lots to plaintiffs) in full settlement of plaintiffs' claims as stated in the petition herein and in full settlement of said promissory note and loan of January 27th, 1953, and in full settlement of all controversies between the parties hereto."

This evidence relates not to the preliminary offer which plaintiffs testified to that was not to "be a final reckoning" but to the conditions under which defendants tendered the deed that was accepted by the plaintiffs.

Defendants, when the deed was delivered, were under no contractual obligation to deed the lots to plaintiffs. Their obligation was to sell the lots, pay plaintiffs $6,000, and "split" the profits. Upon this evidence the trial court held that there was an accord and satisfaction. In that it did not err.

The rule is stated in 1 C. J. S., Accord and Satisfaction, § 20, p. 487, as follows: "It was apparently first laid down by a case in the time of Coke (Pinnel's Case, 5 Coke 117a) and has subsequently been treated by most authorities as settled law, that an accord and satisfaction of a claim or demand, whether liquidated or unliquidated, may be, and, where the parties so intend or agree, is effected by the transfer and acceptance of property, * * *. The general rule, stated infra § 29 a (1), that a smaller sum cannot be a satisfaction of a larger debt or demand, because there is no consideration for the discharge thereof, has no application to a case of transfer of property, for a debtor is under no obligation to deliver, or a creditor to accept, anything other than money, in discharge of a debt or demand, and when they do so, there is such a giving and acceptance of something other or different from that which is claimed or owed as to bring the transaction within the definition of accord and satisfaction, and to provide the requisite new consideration."

One further matter requires attention. The motion to dismiss made by defendants was unconditional. The trial court decreed that defendants' cross-petition was "withdrawn without adjudication." Plaintiffs assign this as error.

The rule is that where defendant pleads a counterclaim and upon conclusion of plaintiff's evidence moves for and procures a proper dismissal of plaintiff's cause of action without first withdrawing his counterclaim, he thereby waives it. Bedford v. Herman, 158 Neb. 400, 63 N. W. 2d 772.

The trial court should have held and decreed that defendants had waived their cross-petition.

We remand the cause with directions to render a decree in accord herewith.

All costs in this court and the trial court are taxed to plaintiffs.

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

BOSLAUGH, J., participating on briefs.

IN RE TRUSTEESHIP NO. 1924 OF ROBIN FREDERICK SCULLY. ROBIN FREDERICK SCULLY, APPELLEE, V. THOMAS A. SCULLY, APPELLANT.

76 N. W. 2d 239

Filed April 6, 1956. No. 33898.

1. **Courts.** The county court has original and exclusive jurisdiction in probate matters, which is conferred upon the district court in those matters appealed to it.
2. **Costs: Attorney and Client.** Either the county court or the district court on appeal ordinarily has discretionary power and authority to order payment of costs and in proper cases to order payment of reasonable fees to attorneys for services rendered a good faith trustee out of the trust estate in litigation. Such an award may be made either at time of trial in county court, or in district court on appeal, or in subsequent application made therefor.
3. **Attorney and Client.** A reasonable attorney's fee in any proceeding is to be determined by the nature of the case, the amount involved in the controversy, the results obtained, and the services actually performed therein, including the length of time necessarily spent in the case, the care and diligence exhibited, and the character and standing of the attorneys concerned.
4. **Trusts.** The burden of proving the termination of a trust, where the trust is proved or admitted and its termination is asserted, is on the party making such assertion, and where an effort is made to terminate a trust because its purposes are not carried out as the testator or settlor directed, the burden of proving such noncompliance by clear and satisfactory evidence is on the moving party.
5. ———. Where discretion is conferred upon the trustee with

respect to the exercise of a power, its exercise is not subject to control by the court, except to prevent an abuse by the trustee of his discretion.

6. ———. The extent of the discretion conferred upon the trustee is measured by the settlor's manifestation of intention, and the manner in which a trustee shall exercise his function rests ordinarily within his own discretion and judgment.

7. ———. In the matter of control of discretionary powers of a trustee, the real question is whether it appears that the trustee is acting in that state of mind in which it was contemplated by the settlor that he should act.

8. ———. The mere fact that, if the discretion had been conferred upon the court, the court would have exercised the power differently is not ordinarily a sufficient reason for interfering with the exercise of power by the trustee.

9. ———. If discretion is conferred upon the trustee in the exercise of a power, the court will not interfere unless the trustee in exercising or failing to exercise the power acts dishonestly, or with an improper even though not a dishonest motive, or fails to use his judgment, or acts beyond the bounds of a reasonable judgment.

10. ———. Where a trustee is directed to terminate the trust by transferring the trust property to the beneficiary if in the opinion of the trustee the beneficiary is competent to manage the property, the beneficiary can ordinarily compel the trustee to transfer the trust property to him if he shows so clearly that he is competent to manage the property that it would be an abuse of discretion for the trustee to refuse to transfer it to him. If, however, there is room for doubt whether the beneficiary has complied with the conditions, so that a reasonable person might believe and the trustee honestly believes that he has failed to comply with them, the court will not interfere with the exercise by the trustee of the discretion conferred upon him.

11. ———. In determining whether or not the trustee has abused his discretion in exercising or failing to exercise a power, the following elements may be relevant: (1) The extent of the discretion intended to be conferred upon the trustee by the terms of the trust; (2) the purposes of the trust; (3) the nature of the power; (4) the existence or nonexistence, the definiteness or indefiniteness, of an external standard by which the reasonableness of the trustee's conduct can be judged; (5) the motives of the trustee in exercising or refraining from exercising the power; and (6) the existence or nonexistence of an interest in the trustee conflicting with that of the beneficiary.

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

Cecil B. Brubaker, Emory P. Burnett, and *Van Pelt, Marti & O'Gara,* for appellant.

Cline, Williams, Wright & Johnson and *Charles E. Oldfather,* for appellee.

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

CHAPPELL, J.

Plaintiff, Robin Frederick Scully, originally filed an application in the county court of Nuckolls County seeking an order directing defendant, Thomas A. Scully, to render and deliver to plaintiff the full possession, management, and control of his trust estate and terminate the trust. Plaintiff alleged that he was 30 years old on March 20, 1954, and, being possessed of experience, judgment, and prudence, was a fit and proper person to be entrusted with the full management and control of his estate and have the trust terminated as provided by the terms of his father's will, but that defendant, although duly requested so to do, had wrongfully and arbitrarily refused to terminate the trust. Plaintiff admitted that defendant as trustee had accounted to the county court for all receipts and disbursements to and including February 28, 1953, and expressly waived an accounting by defendant to and including that date.

Defendant's answer admitted that plaintiff was 30 years old on March 20, 1954, and that defendant as trustee had accounted to the county court for all receipts and disbursements to and including February 28, 1953, as alleged. Defendant then denied generally and alleged that great trust and discretion were vested in defendant by plaintiff's father, whose intention, as disclosed by his will, was that plaintiff should have the full management and control of his trust estate to-

gether with the accumulations thereof only when he was 35 years old, unless in the judgment and discretion of defendant the plaintiff had shown to the satisfaction of defendant that he possessed sufficient experience, judgment, and prudence as in the judgment of defendant rendered plaintiff a fit and proper person to be entrusted with the full possession, management, and control of his estate at an earlier date. Defendant alleged that plaintiff had not yet so shown to the satisfaction of defendant that he possessed such experience, judgment, and prudence. Defendant prayed for dismissal of plaintiff's application and recovery of his costs. Plaintiff's reply was a general denial.

After hearing upon the merits, the county court rendered judgment, finding and adjudging that defendant had not abused his discretion in refusing to terminate plaintiff's trust, and denied plaintiff's application. Thereupon plaintiff appealed to the district court where comparable pleadings were filed, and after hearing upon the merits the trial court rendered judgment. It found and adjudged that plaintiff was possessed of experience, judgment, and prudence rendering him a fit person to be entrusted with the full possession, management, and control of his estate, and that although defendant was not guilty of any fraudulent intent, he abused his power of discretion in refusing to terminate the trust. It then ordered defendant to immediately terminate plaintiff's trust, make an accounting to date of termination thereof, and pay out of the trust funds all costs in the county court and district court, together with reasonable fees to defendant's counsel for services rendered in his behalf. Such attorneys' fees were fixed at $10,000 at a subsequent hearing reserved for that purpose whereat evidence was adduced which does not appear in this record.

Subsequently, motions for new trial respectively filed by plaintiff and defendant were overruled. Thereupon defendant appealed, assigning some 13 reasons why

the judgment was erroneous, the effect of which was to assign that the findings and judgment ordering termination of the estate was not sustained by the evidence but was contrary thereto and contrary to law. Thereafter plaintiff cross-appealed, assigning that the trial court erred in finding and ordering that all costs, including reasonable attorneys' fees to defendant's counsel, should be paid out of the trust funds, and erred in fixing such fees at $10,000. We sustain defendant's assignments. We also conclude that the assignments in plaintiff's cross-appeal should not be sustained.

In that regard, this court has said: "The county court has original and exclusive jurisdiction in probate matters, which is conferred upon the district court in those matters appealed to it." In re Estate of Marsh, 145 Neb. 559, 17 N. W. 2d 471.

It is clear also that the county court or the district court on appeal ordinarily has discretionary power and authority to order payment of costs and in proper cases to order payment of reasonable fees to attorneys for services rendered a good faith trustee out of the trust estate in litigation such as that at bar, and such an award may be made either at time of trial in county court or in district court on appeal, or upon subsequent application made therefor. In re Estate of Linch, 139 Neb. 761, 298 N. W. 697; Linn v. Linn, 146 Neb. 666, 21 N. W. 2d 283; Annotation, 9 A. L. R. 2d 1132; 2 Scott on Trusts, § 188.4, p. 1005.

As recently as Hardy v. Hardy, 161 Neb. 175, 72 N. W. 2d 902, this court, quoting with approval from Hemmer v. Metropolitan Life Ins. Co., 133 Neb. 470, 276 N. W. 153, said: " 'A reasonable attorney fee in any proceeding is to be determined by the nature of the case, the amount involved in the controversy, the results obtained, and the services actually performed therein, including the length of time necessarily spent in the case, the care and diligence exhibited and the character and standing of the attorneys concerned.' "

Also, as said in Reed v. Ringsby, 156 Neb. 33, 54 N. W. 2d 318: "We find no evidence as to the value of the services. Apparently the matter was left to the discretion of the trial court. The court exercised it. We see no reason for finding that the determination was unreasonable." Such statement has particular application here where the record discloses: "And on this same day in pursuance to said stipulation this matter came on for hearing as to the taxing of attorneys' fees on behalf of the trustee. Evidence is introduced and the matter is taken under adivsement (advisement). * * * The court further finds that the motion for new trial filed by the plaintiff on the 28th day of June 1955 relative to the allowance of any attorney's fees to defendant's attorneys out of the trust estate should be and the same is hereby overruled.

"The court further finds that the trustee should pay to his attorneys for their services rendered in the county court and in the district court in this matter the sum of $10,000, in addition to all the costs incurred in the trial of this matter both in the county court and in this court, from the funds held in the hands of the trustee." We find no merit in plaintiff's contention with regard to the allowance and payment of costs and attorney fees.

It is elementary that appeal to this court in an equity action such as that at bar is heard de novo upon the record.

In 54 Am. Jur., Trusts, § 604, p. 467, it is said: "The burden of proving the termination of a trust, where the trust is proved or admitted and its termination is asserted, is on the party making such assertion, and where an effort is made to terminate a trust because its purposes are not being carried out as the testator or settlor directed, the burden of proving such noncompliance by clear evidence is on the moving party." Although not discussed in direct language, it is clear that such burden of proof was imposed upon plaintiff

by this court in Patterson v. Lanning, 62 Neb. 634, 87 N. W. 338.

As stated in Annotation, 32 A. L. R. 441: "In order to justify the interference of the court the beneficiary must establish by proof of the clearest character that the refusal of the trustee to act was unreasonable." Such rule cited Morton v. Southgate, 28 Me. 41, wherein the court said: "The testator contemplated a time, when the property should be transferred, but the proper time involves a matter of judgment, confided solely to the trustee. But if the Court possessed the power, to direct a transfer, the exercise of it could only be justified, where the transfer was delayed, for reasons clearly unsubstantial and unjustifiable. The proof, to overrule the discretion, should be of the fullest and clearest character." Such rule was followed in Watling v. Watling, 27 F. 2d 193, where it is said: "But a court ought not to overrule the trustee's discretion, except upon the clearest of proof; that is, proof that it has not exercised a good faith discretion."

As stated in Cleveland Clinic Foundation v. Humphrys, 97 F. 2d 849: "The discretionary power vested in a trustee will not be disturbed by the Court in the absence of bad faith or fraud. Colton v. Colton, 127 U. S. 300, 322, 8 S. Ct. 1164, 32 L. Ed. 138."

In Roats v. Roats, 128 Neb. 194, 258 N. W. 264, this court held that: "The primary rule in the construction of trusts is that the court must, if possible, ascertain the intention of the creator of the trust.

"Courts are always reluctant to interfere with the exercise of a discretion lodged in a trustee.

"Courts of equity may, however, intervene in behalf of a beneficiary if the evidence discloses that a trustee's denial of the relief sought might be influenced by self-interest."

As stated in In re Moir Hotel Co., 186 F. 2d 377: " 'But the court will exercise this prerogative with great caution, and will not displace the trustee from exer-

cising his functions unless, upon a consideration of the reasons and grounds upon which he has acted, it appears that he has abused his trust and that his acts in the premises have not been within the limits of a sound and honest execution of the trust.' "

In In re Will of Sullivan, 144 Neb. 36, 12 N. W. 2d 148, this court held: "The extent of the discretion conferred upon a trustee is measured by the settlor's manifestation of intention."

In In re Estate of Vohland, 135 Neb. 77, 280 N. W. 241, this court held: "The manner in which a trustee shall exercise his function rests ordinarily within his own discretion and judgment. If he exceeds his powers, acts negligently, or abuses his discretion, courts can grant relief.

"The mere fact that, if the discretion had been conferred upon the court, the court would have exercised the power differently is not ordinarily a sufficient reason for interfering with the exercise of power by the trustee."

In Reed v. Ringsby, *supra,* this court held: "Where discretion is conferred upon the trustee with respect to the exercise of a power, its exercise is not subject to control by the court, except to prevent an abuse by the trustee of his discretion." See, also, Restatement, Trusts, § 187, p. 479.

As stated in Restatement, Trusts, § 187, comment e, p. 481: "If discretion is conferred upon the trustee in the exercise of a power, the court will not interfere unless the trustee in exercising or failing to exercise the power acts dishonestly, or with an improper even though not a dishonest motive, or fails to use his judgment, or acts beyond the bounds of a reasonable judgment." See, also, Annotation, 143 A. L. R. 468; 54 Am. Jur., Trusts, § 181, p. 143.

Also, as said in Restatement, Trusts, § 187, comment d, p. 480: "In determining the question whether the trustee is guilty of an abuse of discretion in exercising

or failing to exercise a power, the following circumstances may be relevant: (1) the extent of the discretion intended to be conferred upon the trustee by the terms of the trust; (2) the purposes of the trust; (3) the nature of the power; (4) the existence or non-existence, the definiteness or indefiniteness, of an external standard by which the reasonableness of the trustee's conduct can be judged; (5) the motives of the trustee in exercising or refraining from exercising the power; (6) the existence or non-existence of an interest in the trustee conflicting with that of the beneficiaries."

This court has held that: "In the matter of control of discretionary powers of a trustee, the real question is whether it appears that the trustee is acting in that state of mind in which it was contemplated by the settlor that he should act." Reed v. Ringsby, *supra.*

As stated in Restatement, Trusts, § 334, comment d, p. 1013: "By the terms of the trust the trustee may be given a discretionary power to terminate the trust in whole or in part. In such a case the exercise of the power is not subject to the control of the court, except to prevent an abuse by the trustee of his discretion (see § 187).

"Whether the trustee can properly consent to the termination of the trust and whether he is under a duty to consent to its termination depend upon the extent of the discretion conferred upon the trustee by the terms of the trust.

"If there is a standard by which the reasonableness of the trustee's judgment can be tested, the court will control the trustee in the exercise of the power where he acts beyond the bounds of a reasonable judgment, unless it is otherwise provided by the terms of the trust.

"If the trustee is guilty of an abuse of discretion in not terminating the trust, the court will direct the termination of the trust. Thus, if the trustee is directed to terminate the trust by transferring the trust property to the beneficiary if in the opinion of the trustee the

beneficiary is competent to manage the property, the beneficiary can compel the trustee to transfer the trust property to him if he shows so clearly that he is competent to manage the property that it would be an abuse of discretion for the trustee to refuse to transfer it to him. * * *

"If there is no standard by which the reasonableness of the trustee's judgment can be tested, the court will not control the trustee in the exercise of his power to terminate the trust if he acts honestly and does not act from an improper motive."

Finally, in 2 Scott on Trusts, § 187.2, p. 994, it is said: "There are cases in which the trustee is directed to pay the principal of the trust estate to a beneficiary if the trustee is satisfied that the beneficiary is * * * competent to manage the property. In these cases, if the trustee refuses to pay the trust fund to him although it clearly appears that the beneficiary has fulfilled the conditions specified by the settlor, the trustee can be compelled by the court to pay it to him. If, however, there is room for doubt whether the beneficiary has complied with the conditions, so that a reasonable person might believe and the trustee honestly believes that he has failed to comply with them, the court will not interfere with the exercise by the trustee of the discretion conferred upon him."

In the light of such applicable and controlling rules, we have examined the record. It is voluminous and we can only summarize pertinent parts thereof, which fairly disclose the following: A vast estate, consisting of many thousand acres of land in Illinois, Missouri, Kansas, Louisiana, and Nebraska, together with personal property worth several million dollars, was largely accumulated by William Scully, the father of defendant Thomas A. Scully, Frederick Scully, and Angelita Scully. When William Scully died in 1906, all of his property either went to his widow or had been previously transferred to her during his lifetime. Following his death, defend-

ant and Frederick Scully managed the lands and other property owned by their mother, William Scully's widow. They lived in Lincoln, Illinois, where, in 1907, their mother built an office building for their use, which was purchased by defendant and Frederick Scully in 1920 for $30,000. Each owned an undivided one-half interest therein. There they worked together and maintained an exceedingly close family and business relationship throughout their lives. Following their father's death, their mother distributed many bonds and large acreages of land to the two sons and gave their sister an equivalent in bonds. Lands owned by Frederick Scully included 60,000 acres in Kansas, 28,000 acres in Louisiana, and 56,768.48 acres in Nebraska, of which 22,815 acres were in Gage County and 33,953.48 acres were in Nuckolls County.

Frederick Scully, who was the father of plaintiff and plaintiff's brother, also named William Scully, died testate in October 1942. His wife, mother of plaintiff and William, died testate in September 1942. Plaintiff was born March 20, 1924, and became 30 years old March 20, 1954. His older brother William was born November 8, 1922, and became 30 years old November 8, 1952.

Their father's will, executed in 1936, was probated in Nuckolls County under ancillary proceedings. The first five paragraphs of his will provided for payment of debts and funeral expenses and made a number of specific devises and bequests which are of no importance here except that in paragraph Fourth he made a specific bequest to defendant as follows: "To my brother, Thomas A. Scully in appreciation of our close business and family relationship, I give and bequeath the sum of Fifty thousand dollars ($50,000.00)."

Paragraph Sixth devised all real estate owned by testator in Kansas, some 60,000 acres, to William, subject to trust. Paragraph Seventh devised all real estate owned by testator in Gage and Nuckolls Counties, Nebraska, some 56,768.48 acres, to plaintiff, subject to trust.

Paragraph Eighth devised all real estate owned by testator in Louisiana, some 28,000 acres, to plaintiff and William in equal shares, subject to trust. Paragraph Ninth devised testator's undivided one-half interest in the office building in Lincoln, Illinois, and all his real estate in Logan County, Illinois, to plaintiff and William in equal shares, subject to trust. Paragraph Tenth devised testator's undivided interest in a residence property and all real estate owned by him in Washington, D. C., to plaintiff and William as tenants in common, subject to trust. Paragraph Eleventh devised and bequeathed all of testator's vast amount of personal property of every kind and character and wheresoever situated in the United States, to plaintiff and William in equal shares, subject to trust.

Under Louisiana law, the trust provision could not be given effect insofar as it applied to lands located in that state, so at termination of executorship, such lands were turned over to plaintiff and William.

Paragraph Twelfth of testator's will then expressly appointed and constituted his brother, defendant herein, testamentary guardian and trustee for plaintiff and William, "to hold, manage and control all of the estate, real, personal and mixed hereinbefore devised or bequeathed" to them "with full power and authority to manage and control the same for the use and benefit of my said sons and to collect all rents, dividends, profits and income therefrom and to invest and reinvest the same from time to time and to collect, if called for redemption, bonds and securities so held and invest the proceeds thereof in securities suitable and proper for investment in his discretion and to sell and convert into money bonds and securities herein devised and bequeathed or hereafter purchased which in his discretion he may deem unsuitable for holding and to pay therefrom all debts, expenses and charges necessary and proper in the management and control of said property and to employ agents in the management of said real

estate as I have done in the management thereof and to maintain in connection with himself a head office at Lincoln, Illinois or elsewhere as he and I have done and to prorate the expenses thereof in the proportion in which he and I have prorated the same and to carry on said business in general in the manner in which I have carried on the same and after payment of all expenses and charges and costs incident thereto, including attorney fees for services rendered and to be rendered, to pay said sums so collected and rents, income, dividends and profits so received to my said sons the following amounts to-wit; To each of my said sons when he shall arrive at the age of twenty-one (21) years, the sum of Five thousand dollars ($5000.00) per annum;

"To each of my said sons when he shall have arrived at the age of twenty-five (25) years, the sum of Fifteen thousand dollars ($15,000.00) per annum;

"To each of my said sons when he shall have arrived at the age of thirty (30) years the sum of Twenty-five thousand dollars ($25,000.00) per annum;

"To each of my said sons when he shall have reached the age of thirty-five (35) years the full management, control and possession of the estate and property herein devised and bequeathed to such son together with the accumulation thereof.

"I do, however, hereby expressly provide and it is my will that if each or either of my said sons when he shall have reached the age of thirty (30) years shall have shown to the satisfaction of the said guardian and testamentary trustee in this will designated and appointed, that he, my said son, is possessed of experience, judgment and prudence such as in the judgment of the said testamentary guardian and trustee renders my said son, so having reached the age of thirty (30) years, a fit and proper person to be entrusted with the full management and control of his said estate in this will to him devised and bequeathed, then and in such event the said testamentary trustee shall in such exercise of

his discretion as aforesaid, render and deliver over unto him, my said son, the full possession, management and control of the estate so to him devised and bequeathed, and as to him, my said son, to whom such estate is so then rendered over and delivered the said trust shall cease and determine. * * * In the event my said brother, Thomas A. Scully, shall die or otherwise fail to serve and act as hereinbefore specified and provided, I constitute and appoint John C. Scully of Peoria, Illinois as successor and testamentary guardian and trustee with all the rights, powers and duties vested and reposed in my said brother, Thomas A. Scully." In that connection, John C. Scully was a cousin of defendant and testator.

Paragraph Thirteenth provided: "Realizing that the lapse of time for which the term of the above created trust is to continue and in view of the extent and amount of the said trust estate in lands and bonds, and realizing that it is difficult to foresee what changes in circumstances may render necessary or advisable the sale and conveyance of lands and the change of form in securities constituting any part in said trust estate, I do hereby expressly provide and direct that the said testamentary guardian and trustee, for my said sons appointed, may when either of my said sons shall have reached the age of twenty-one (21) years, with the consent in writing of such son, sell, transfer and convey the said real estate to such son so devised and bequeathed or any part or parts thereof from time to time at such sum as in his judgment and with the written consent of such, my said son, they shall deem reasonable and proper and to enter into all contracts and instruments in connection therewith and to make such sale upon such terms of credit as he, the said testamentary guardian and trustee, and such son, shall deem reasonable and proper and to take mortgages or other first lien securities upon the lands conveyed for the payment thereof and to release and discharge the same when

paid and to invest the proceeds thereof in bonds or real estate situated in the United States of America or elsewhere as the said testamentary guardian and trustee and my said son whose lands so to him devised are then sold and transferred and conveyed and to re-sell and re-convey such real estate so purchased and received as in the judgment of said testamentary guardian and trustee and with the written consent of my said son shall be deemed reasonable and proper. The said power in this paragraph of my will created is based upon a personal trust in the said testamentary guardian and trustee and shall not be exercised by any successor in trust except the said John C. Scully, if he shall succeed the said testamentary guardian and trustee, Thomas A. Scully, in the administration of said guardianship and trust."

Paragraph Fourteenth provided: "I hereby specifically provide that the compensation of said testamentary guardian and trustee shall not exceed the sum of Twenty-five hundred dollars ($2500.00) per annum."

Paragraph Fifteenth nominated, constituted, and appointed Thomas A. Scully, John C. Scully, and William E. Trapp, as executors of testator's estate and directed that no bond should be required of them other than their personal obligation. They qualified and served as such without bond.

Notwithstanding the vastness of the Frederick Scully estate and the established Scully policy of never mortgaging and only selling their lands when they could not be operated profitably, proceedings were had in the district court for Nuckolls County by the executors to sell Nebraska real estate in order to pay debts, inheritance taxes, and expenses of administration. In that respect, Frederick Scully died seized of stocks, bonds, securities, bank deposits, and other personal property appraised at $3,874,696.63, but owed debts and inheritance taxes amounting to $5,580,789. Although license to sell issued, such case was later dismissed when the obliga-

tions were met. In doing so, plaintiff and William each personally advanced $67,453.14, a substantial amount of which was subsequently reimbursed to them, and defendant herein entirely renounced his $50,000 legacy which was used in order to assist plaintiff and William in the preservation of their estates.

By final decree, the county court formally set up plaintiff's trust in the county court and ordered that upon acceptance and filing his oath as guardian and trustee without any bond being required, the possession, control, and management of all plaintiff's trust estate should be vested in defendant, and in the event of his death or disability to act, it should vest in his successor, John C. Scully, together with all the powers, duties, obligations, discretion, and authority specified in paragraphs Twelfth, Thirteenth, and Fourteenth of the last will of Frederick Scully, deceased. Thereafter, defendant so qualified, and on September 19, 1944, letters of trusteeship were duly issued to him and he has since continued to serve in such capacity. In that regard, it will be noted that defendant never was trustee of the estate devised and bequeathed in trust to plaintiff's brother William. John C. Scully was appointed and acted in that capacity. Being in such precarious health that he could no longer act as trustee, John C. Scully terminated that trust on December 23, 1952, after William became 30 years old.

On March 22, 1954, just 2 days after plaintiff became 30 years old, he wrote defendant expressing the wish that defendant would favorably consider turning over the estate to plaintiff so that he could undertake personal management of it. In such letter plaintiff thanked defendant for his counsel and advice already given and to be given in the future, and offered to undertake to obtain an agreement with William to sell defendant their one-half interest in the office building in Lincoln, Illinois, for a flat sum of $30,000, when plaintiff's trust had been terminated. Such sale would have paid de-

fendant and William each $15,000 for their respective interests. Also, subsequently on December 13, 1954, about 1 month before this action was tried and after William had purchased the office building for $51,000 at partition sale, William proposed to sell the building to defendant for that price and end all litigation, but only if defendant would promptly terminate plaintiff's trust.

In the meantime, on March 25, 1954, defendant acknowledged receipt of plaintiff's letter, suggesting that defendant resign as trustee and that plaintiff and William might sell defendant their one-half interest in such building for $30,000 when plaintiff's trust was terminated. Defendant called plaintiff's attention to the fact that the building, constructed in 1907, had been purchased in 1920 for $30,000; that, being 34 years older, it was showing many signs of age; and he would be willing to pay $15,000 for their one-half interest. He also said that he would consider the matter of resigning as trustee.

On April 6, 1954, plaintiff answered, stating that a total valuation of $60,000 for the building was the absolute minimum that he would consider and that unless defendant offered $15,000 to each for their interest, William would bring partition. Plaintiff then inquired how soon he could expect to receive defendant's decision about termination of the trust.

Thereafter, on April 21, 1954, without waiting for an answer to that letter, plaintiff filed this action wherein defendant testified that he did not terminate the trust when plaintiff became 30 years old or since because from things plaintiff had done and recommended to be done he had not shown to the satisfaction of defendant that plaintiff was yet possessed of experience, judgment, and prudence such as in defendant's judgment rendered plaintiff a fit and proper person to be entrusted with the full management and control of the vast estate devised to him by the will of his father.

The record discloses that in the fall of 1942 plaintiff entered Harvard University as a freshman. Later he entered the naval V-12 program but was separated therefrom in the fall of 1943 by disciplinary action. Following that time, plaintiff became a seaman in the navy and was discharged in the fall of 1945. In 1946 he came to Nebraska at the suggestion of defendant for the purpose of familiarizing himself with the trust properties and their manner of operation by the respective agents of defendant in Gage and Nuckolls Counties. Plaintiff testified that he had lived at the Paddock Hotel across the street from their agency office in Beatrice since that time. However, he admitted that his income tax returns all gave Lincoln, Illinois, as his residence and that his room at the Paddock Hotel was given up whenever he was away from Beatrice. In that regard, plaintiff was away about 3 months on vacation in England, where he had some race horses, during each summer from June until sometime in September, and when he was down in Louisiana about 2 or 3 months each fall, where during the last 4 or 5 years he had maintained a permanent apartment in New Orleans about 50 miles from the Louisiana lands. There also plaintiff and William maintained a rental agent and business office. There was ample competent evidence that because of urgent personal and business necessities that did and might arise, plaintiff was repeatedly requested by defendant to give him a definite mail or telegraph address while he was away from Beatrice, but plaintiff failed to do so.

Plaintiff testified with regard to his growing familiarity with the properties, his study with relation to farm crops, his participation in soil conservation activities and hiring of employees, his membership in several agricultural organizations, and his attendance at a short course at the College of Agriculture at the University of Nebraska in 1947, where he took three subjects but failed in one called "Feeds and Feeding,"

and could not recall whether or not his grades in the other two subjects were a low 70 or a high 60. Plaintiff also related that from time to time he had made suggestions for changes in lease forms, some of which had been adopted, and that he knew in a general way about farm rentals charged and collected by defendant and his agents. Defendant's agent in Gage County, who testified as a witness for plaintiff, verified such activities and said that plaintiff had "assisted nearly in every way that you would in the management field."

In that regard, what is known as the traditional "Scully system" of leasing and managing Scully farm lands was originally instituted by plaintiff's grandfather and continued by defendant and plaintiff's father with profitable returns. Such leases are ordinarily based upon an annual cash rental for 20 percent or less of gross production, with only year-to-year leases by tenants who own all improvements and are encouraged to remain on Scully land. Their tenants seldom if ever moved off the land. Rents were not fixed by defendant alone or based solely on crop experience for the immediately preceding year, but rather by local inspection and consultation with his agents and tenants. Plaintiff was usually present after 1946 and made constant efforts to raise rents, which, together with other reasons hereinafter discussed, led defendant to believe that plaintiff did not have the required experience, judgment, and prudence. For example, plaintiff suggested a 25 percent rental raise in Nuckolls County for 1953, then later reduced his suggestion to a 10 or 15 percent raise, which defendant, having had many years of experience in Gage and Nuckolls Counties since 1897, considered "entirely wrong" or "very unjustified," and no change was made. The related evidence justified that conclusion. In that respect, the Nuckolls County lands actually paid 35 percent rentals in 1953. The record also discloses that plaintiff could not remember the actual number of acres belonging to his

estate in either Gage or Nuckolls Counties, and that the maximum time spent by plaintiff in Nuckolls County in any one year was 13 days in 1947 and the minimum spent there was 3 days in 1954. All together, plaintiff spent only a total of 62 days in Nuckolls County during a period of 9 years, and 29 days of that time were during October in conjunction with annual inspections made by defendant.

In 1947 plaintiff purchased 80 acres of land near Beatrice for $8,000. It had no improvements upon it except some fencing and soil conservation placed there by plaintiff. It had been previously leased, but at time of trial plaintiff had not yet leased it for the 1955 crop year. In the fall of 1947 plaintiff proposed that defendant should build a house upon it at expense of the trust. However, defendant advised plaintiff that he should take the responsibility and pay for the cost out of his own ample private resources. Defendant also counseled and advised plaintiff in detail with regard to contractual employment of an architect and the obtaining of a proper performance bond. However, plaintiff did not assume such responsibility.

Plaintiff purchased an Adams patrol for $3,000, which was first used for conservation purposes in 1951. He was reimbursed therefor by defendant, but such patrol was defective and difficulty of maintenance followed, so plaintiff traded it and $8,000 cash for a Caterpillar patrol for which he was reimbursed by defendant. Plaintiff then purchased a concrete block garage in Beatrice for $8,000 in which to store the machinery. In the fall of 1950 plaintiff and William also purchased an office building in Beatrice, paying therefor in excess of $51,000 which defendant thought was too high a price. Thereafter plaintiff and William had offices in the building and defendant's Gage County agent became a tenant therein.

Plaintiff and William each owned an undivided one-half interest in the 28,000 acres of land in Louisiana.

It was generally designated as the Clovely farm. It was mostly swamp land except about 2,000 acres which had been reclaimed by their father. The principal crop was sugar cane. Commencing in 1946 plaintiff and William jointly operated the property until March 1949, when plaintiff leased his interest to William because the project lost money the preceding year. William then operated the land alone for 2 years but because of possible recall into military service he discontinued the operation, and they leased that land to the Valentine Sugar Company which still holds the lease. Some of the land is also leased for trapping purposes and an agent is employed to look after the leases. They also maintain an office there. The land is located in a large oil area and as a result of negotiations plaintiff and William formed a corporation to which all mineral rights thereon were transferred. They then sold second preferred stock in such corporation to the Superior Oil Company for one million dollars, plaintiff's share being $500,000. In 1951 they purchased an over-riding royalty interest in other oil properties in Louisiana for $80,000 which had been paying an income of about $12,000 or $13,000 a year. It was reasonable to believe that plaintiff's engagement in such oil transactions would not qualify him to engage in the management of his vast agricultural estate, and it will be noted that his agricultural experiment in Louisiana failed despite William's assistance therewith.

In that connection, in 1941 after the execution of his will, plaintiff's father gave him $1,000,000 in municipal and other bonds, and at time of trial plaintiff held approximately $1,160,000 of comparable securities. However, concededly such funds had been mingled with plaintiff's other funds which formed a part of that accumulation. In other words, the record does not show any accounting for plaintiff's $500,000 oil profit or his annual income from his oil or other transactions. In such respect plaintiff was very uncommunicative

with defendant and did not keep him informed of his business affairs other than those directly related to the trust.

Defendant testified in detail with reference to reasons why he had not terminated plaintiff's trust. Among such reasons was plaintiff's conduct while a V-12 student at Harvard, his continued absences from Nebraska while on trips to England or Louisiana and elsewhere without keeping defendant informed of his whereabouts, and his constant efforts to raise rents, which have been heretofore discussed.

Another reason was plaintiff's recommendations in 1950 that the following managerial steps should be taken by defendant, all of which defendant refused to do: First, plaintiff insisted that defendant's Nuckolls County agent, Mr. Hawley, should be retired because he was "entirely too old to be effective." In that regard, the record discloses without dispute that such agent was "an expert * * * very active * * * one of the very best agents that the Scullys ever had" and "a most excellent agent," having been continued in Scully employment from 1897 or 1898. Without dispute in 1950 he was thoroughly able and did carry on his work until his death in February 1951. In such respect it was reasonable to believe that the emotions of youth conflicted with the experience and wisdom of age.

Next, plaintiff insisted that Mr. Svendsen, who had been Mr. Hawley's assistant since June 1945, should be dismissed at the end of the fiscal year because plaintiff had "no confidence in" his "ability * * * to carry out an improved agricultural program" and was "no person to handle the management of a 45,000 acre agricultural estate." In that regard, the record discloses that Mr. Svendsen was and is a "thoroughly competent" employee. Therefore, he was not dismissed, but succeeded Mr. Hawley and has since continued to serve efficiently as Nuckolls County agent.

Next, plaintiff objected to the hiring of a Mr. Long whom Hawley and Svendsen wished to employ. Despite plaintiff's objections, defendant employed Long, relying entirely upon the recommendation of Hawley who "was an expert." Long is still employed and is "A very competent employee in conservation work and anything else to do with the estate." After he was employed plaintiff notified defendant that Long appeared to "be doing a fine job on waterways and soil conservation." At the trial plaintiff testified that he was "generally satisfied" with Long "as an employee;" and that "he had been doing a good job so far as the trustee" and his "interests are concerned."

Next, plaintiff insisted, without giving any reason, that the Nuckolls County office should be removed from Nelson, the county seat where it had been located for almost 80 years, to Superior, some 13 miles distant. At the trial plaintiff testified that he desired to so move the office because some employees he wanted to hire preferred to live in Superior where they had a good hotel, more attractive schools, a hospital, and better banks. However, defendant was certain that the office should remain at Nelson because it was the county seat, and there it remained.

In the fall of 1952 plaintiff, defendant, and Svendsen went on an inspection trip through Nuckolls County. It appears that plaintiff had ordered Svendsen to do some conservation work on other lands devised in trust to plaintiff by his mother, Betty Scully. Upon discovering that the work for some reason had not yet been done, plaintiff became "exceedingly incensed * * * completely lost his temper" and "apparently enraged * * * immensely * * * gave Mr. Svendsen a very thorough word slanging or whatever you would like to call it. It was a very unpleasant situation indeed." Defendant "didn't consider" that was "the way to talk to an agent at all" and stated that the aforesaid incidents were some reasons why he concluded that plaintiff was not

possessed of the required experience, judgment, and prudence.

Defendant gave as another reason for such conclusion that plaintiff had never yet married or settled down with some permanent home instead of living in a single room taken from day to day in the Paddock Hotel. In that connection, plaintiff's brother William was married and lived in Lincoln where he maintained a home for his wife and children who attended school there.

Upon cross-examination of defendant, plaintiff developed evidence upon two situations in an attempt to establish that defendant acted arbitrarily and with an improper motive when he refused to terminate plaintiff's trust. With regard to such situations, we are impressed at the outset with the fact that defendant without dispute was a multimillionaire in his own right; that he could never receive more than $2,500 in any one year as compensation for managing plaintiff's vast estate; and that defendant entirely renounced his own $50,000 legacy for the benefit of plaintiff and William in order to preserve their estates in which defendant had no remainder interest whatever. In such a situation it could not reasonably be concluded that defendant acted dishonestly or had any improper motive or selfish interest.

The first factual situation relied upon by plaintiff involved the proposed purchase by defendant and sale to him by plaintiff and William of their one-half interest in the office building in Lincoln, Illinois, where for almost half a century defendant and plaintiff's father had their offices and had managed all of their vast acres of land and personal property affairs, including the lands and personal property here involved. Concededly, plaintiff and William never had any desire to retain their interest in the building. Defendant, for sentimental reasons and to avoid sorting and rearranging a voluminous amount of papers and documents which had ac-

cumulated over a period of more than 100 years, and to avoid moving their three large safes, many files, furniture, and offices, offered to purchase their one-half interest. Several letters with relation thereto appear in the record showing negotiations over a period of time beginning on January 13, 1951. At that time defendant wrote plaintiff suggesting purchase of their one-half interest in the building upon the basis of a disinterested appraisal if agreeable. On January 23, 1951, plaintiff answered saying that after talking with William he had decided that he would probably be willing to sell if he knew what a fair market value of his interest was before he decided. He also inquired whether defendant, being trustee, could get good title thereto in Illinois. He suggested that defendant check that question before proceeding, and said that any agreement that defendant and John C. Scully might make with regard to appraisal could form a possible basis for settlement. On January 26, 1951, defendant replied with regard to the question of legality, designated it as a matter of small importance, suggested that on the basis of a disinterested appraisal for federal inheritance tax purposes made in 1942 the interest of plaintiff and William in the building, then some 43 years old, would be about $3,750 each. Defendant did not offer to pay such amount, but only requested a reply at plaintiff's convenience. On October 18, 1952, not having received any reply, defendant wrote plaintiff suggesting that both plaintiff and William should write him a definite letter without delay telling him whether or not they would sell their interest in the building at a fair and reasonable price because the matter of their small interests had then been delayed no less than 1 year and 9 months and it was time something was done about it. Again, on November 8, 1952, defendant wrote plaintiff suggesting that he had received no reply to his letter of October 18 and he would wait until November 11 and no longer in dealing with the matter. However, again

on December 9, 1952, defendant wrote plaintiff, enclosing an appraisal of the building for $38,000, made by two disinterested appraisers, and requested decision on whether or not plaintiff and William were willing to sell. On December 17, 1952, plaintiff replied, acknowledging receipt of defendant's letter enclosing the appraisal, and suggesting that he had talked with William who pointed out that defendant's letter did not in any way constitute an offer to buy. Plaintiff said that William thought the building was worth $100,000, and suggested a partition suit, but plaintiff might be able to get William to agree upon a vaulation of $80,000. On December 24, 1952, defendant answered plaintiff's letter saying: "In view of the fact that there appeared to be such a large difference in Williams, your and my opinion as to the fair value of this building, I think it best to drop the matter." No further effort was initiated by defendant thereafter to make the purchase.

We have heretofore discussed plaintiff's March 22, 1954, letter to defendant offering to sell their one-half interest for $30,000 when defendant terminated his trust, and William's proposition made December 13, 1954, about 1 month before this case was tried, to sell defendant the building for $51,000 and end all litigation, but only if defendant would promptly terminate plaintiff's trust. The reasonable inference from such evidence is that plaintiff and William postponed the matter of sale of the building to defendant until plaintiff became 30 years old for the purpose of inducing or tempting defendant to terminate plaintiff's trust despite any exercise of discretion. To the credit of the trustee, he rejected such offers. Instead of reflecting upon him, it firmly established his stature and integrity. If he had accepted such offers, he would have been derelict in duty. He would have been motivated by his own selfish interest and would not have been acting in the state of mind in which testator contemplated that he should act. Further, defendant took the position at all times that pur-

chase of plaintiff's and William's interest in the building was a comparatively small matter and testified that his failure to purchase the building did not influence his action with reference to termination of plaintiff's trust and had "nothing to do with it at all"; and that he had no "personal feelings or enmity toward" plaintiff, his "brother's son," for whom he cared as much as "at any time in the past."

The second situation relied upon by plaintiff involved the management of the Betty Scully land. Prior to his death, plaintiff's father deeded some 1,521.77 acres of land in Gage County, 6,667.40 acres in Nuckolls County, and 400 acres in Marshall County, Kansas, to plaintiff's mother, Betty Scully, who by her will duly probated bequeathed all of her personal property to plaintiff and William equally and devised such land to named trustees to be held in trust for the benefit of plaintiff and William in equal shares until they became 30 years old, when it should be divided between them and the trust should terminate. Such trust was terminated on March 20, 1954, when plaintiff became 30 years old. William E. Trapp and F. W. Ryan were trustees thereof. Both were long-time agents of plaintiff's father and defendant in Lincoln, Illinois. For a number of years such trustees managed the Betty Scully trust out of defendant's office, employing the same Gage and Nuckolls County agents as were employed by defendant. During each of the years while such joint operation continued, the Frederick Scully trust accounts received sizeable sums from the Betty Scully trust representing reimbursement for expenses incurred which were actually chargeable to the Betty Scully trust. Such joint operation was discontinued by direction of defendant effective the last day of February 1953. At that time John C. Scully had already terminated William's trust, and neither Ryan nor Trapp were any longer employed by defendant. Ryan had previously retired on September 30, 1951, because of ill health, and Trapp had pre-

viously retired on May 31, 1952, because of advanced age and ill health. In that regard, defendant testified that he had permitted the joint operation for several years "in order to help William and Robin along" but wanted to discontinue it when he found "that things were not going on so well and the accounts were getting complicated." There was "considerable complication of accounts" because they were all included in the same books as his own accounts in Lincoln, Illinois. Defendant testified that his failure to purchase the office building, heretofore discussed, had no influence or relationship whatever to his termination of such joint operation. We conclude that under the circumstances defendant had logical reason for so doing, and that such action could not be reasonably held to have any controlling relation to defendant's failure to terminate plaintiff's trust.

On rebuttal plaintiff testified that for each year ending in February 1950, 1951, and 1952, defendant had paid him in excess of $5,000. Some of it was paid for salary, but most of it was paid for travel expenses in connection with operation of his trust. In such respect, plaintiff complained that defendant had paid him nothing whatever for 1953 and 1954 although plaintiff had continued to do about the same kind of work. However, plaintiff admitted that such payments were to be made only after he had furnished statements therefor to defendant, which plaintiff had failed to do for any of such later years. Clearly, defendant could not be blamed for that situation, and we conclude that it had no relationship whatever to defendant's failure to terminate plaintiff's trust. Rather, it reasonably disclosed that plaintiff had failed to properly take care of his own business.

We conclude that plaintiff clearly failed to meet the burden of proof imposed upon him as required by authorities heretofore cited, and that defendant did not arbitrarily abuse his discretion in refusing to terminate plaintiff's trust. Therefore, that part of the judgment of

the trial court ordering that costs incurred in the county court and the district court and allowing defendant trustee's attorney a fee of $10,000, all to be paid by defendant trustee out of the trust estate, should be and hereby is affirmed. Defendant has also asked for an allowance of attorneys' fees for services rendered in his behalf in this court. In view of the amount of such allowance made in district court, we believe an additional $2,000 for services rendered here would be adequate. Therefore, such sum is allowed and ordered paid by defendant out of the trust estate. On the other hand, that part of such judgment which ordered that defendant trustee should immediately terminate plaintiff's trust and make an accounting to date of its termination, should be and hereby is reversed, and the cause is remanded with directions to render judgment accordingly in favor of defendant. All costs incurred in this court should be and hereby are taxed to plaintiff and ordered paid by defendant out of the trust estate.

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

MERRITT H. JOHNSON, APPELLANT, V. MARY GRAF, APPELLEE.

75 N. W. 2d 916

Filed April 6, 1956. No. 33935.

1. **Partnership.** The burden of establishing the existence of a partnership is upon the party asserting that the relationship exists. It is a question of fact to be determined from the evidence.
2. ———. More convincing evidence is required to prove the existence of a partnership where the alleged partners are the only litigants than where the controversy is between a third party and the partners.
3. ———. Where a partnership is formed to conduct a lawful business in an illegal manner, the courts will not recognize its

existence and will not lend their aid to assist either one of the parties thereto in an action against the other.

4. ———. The illegality of a partnership agreement need not be pleaded as a defense, but may be taken advantage of whenever it appears in the course of a trial.

5. ———. When the evidence offered to prove the existence of an oral partnership is weak, unconvincing, and uncorroborated to such an extent that it cannot sustain a finding that a partnership existed, it is proper for the trial court to dismiss the action at the close of plaintiff's evidence.

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

Phillip A. Tomek, John G. Tomek, and *William E. Tomek,* for appellant.

Dougherty & Reed and *Wagner, Wagner & Robak,* for appellee.

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

CARTER, J.

The plaintiff commenced this suit against Mary Graf, seeking to establish an oral partnership agreement between the parties, and for a decree dissolving such partnership, for an accounting, and for a division of profits. At the close of plaintiff's evidence the trial court sustained a motion to dismiss the action for the reason that the evidence was insufficient to establish a partnership. The plaintiff appeals.

The evidence on behalf of the plaintiff shows that in 1943 defendant was the owner of the Rondevous Tavern in Columbus, Nebraska, in which she was engaged in the sale of intoxicating liquors. Plaintiff testifies that on or about July 1, 1943, he met the defendant in her apartment and after talking over some business "she just comes up and grabs me and said - 'we are going to go in business', she says, 'And I want you to help me because I need a partner', and so it went on a little later, and she said - 'I want you to help me

because I need somebody to make business for me and help me get more business and customers in the place of business down here'. She said - 'we will and we will be partners'." Plaintiff testifies that he said he would do it, and that the partnership was to be a business secret because plaintiff was to do "all the hard work and make money and take all the raps for everything."

The plaintiff further testified that the partnership was to be kept secret because they contemplated selling liquor in violation of price regulations established by the federal government, that he was to take all raps for such violations and that the defendant was to be responsible to him for them, and in this way they would protect the money in the "sack." Plaintiff admits that he was paid $25 per week by the defendant for his services and that social security was deducted therefrom. This was admittedly paid for 4 or 5 years on the foregoing basis until defendant sold the tavern. The evidence is clear that when the previous bartender was discharged the defendant offered the job to plaintiff, and he accepted it at once. It is shown by the evidence that plaintiff tended bar, ordered whiskey and other supplies, and at times appeared to be in sole charge of the tavern, none of which activities was exclusively consistent with a partnership relation. There is evidence in the record that several tracts of real estate were purchased and sold at considerable profit. In each instance such real estate was paid for by the defendant and the title taken in her name. It is true that plaintiff assisted in these transactions by inspecting and recommending purchases and seeking purchasers for the resale of such lands. In every instance, however, defendant furnished the money with which to buy and retained possession of all money resulting from the sales. The record shows that plaintiff had experience as a stock buyer and that he purchased and sold some cattle and hogs while in the employ of defendant. De-

fendant furnished the money for these purchases and retained the proceeds from their sale. Plaintiff continued to buy and sell livestock for himself to a limited extent during this same period.

The record shows that in November 1948 and March 1949 plaintiff found it necessary to borrow money from the Central National Bank of Columbus. Plaintiff was unable to pay the notes when due. The defendant guaranteed the payment of the balance due on the notes and the interest due thereon by a formal instrument appearing in the record bearing the date of September 6, 1949.

There is evidence also that plaintiff and defendant each invested in the development of an oil well in which each appears to have lost money. There is no competent evidence that the oil well adventure was a partnership operation by the parties to this litigation.

It is shown that a modern home of the approximate value of $40,000 was built and occupied by the plaintiff and the defendant. The title was in the defendant. The defendant was a widow and plaintiff was divorced from his wife. The evidence indicates that a rather intimate relationship existed between these two parties and that they both lived in this new home until plaintiff became ill and was removed to a hospital. It is shown that plaintiff was afflicted with a nervous or mental condition, and after his release from the hospital defendant had no further transactions with him, business or otherwise.

The burden of establishing the existence of a partnership is upon the party asserting that such relationship exists. Baum v. McBride, 143 Neb. 629, 10 N. W. 2d 477. More convincing evidence is required to prove the existence of a partnership where the alleged partners are the only litigants than where the controversy is between a third party and the alleged partners. Carlson v. Peterson, 130 Neb. 806, 266 N. W. 608; Baum v. McBride, *supra.*

The evidence of the oral agreement to form a partnership is very indefinite as to its terms. It was not stated what the contributions of each to the partnership were to be; nor does such evidence indicate the interest of each in the profits and losses. The evidence of plaintiff does not state the extent of the business of the partnership, although it was indicated the partnership contemplated, if it in fact existed, the handling of intoxicating liquors by the package and by the drink. There is no evidence in the record tending to establish a partnership for the handling of real estate, the buying and selling of livestock, or the drilling and operation of oil wells.

The only evidence of an oral partnership agreement was that of the plaintiff and is clearly related to the operation of the tavern only. In explaining why he was to be a silent partner in the venture he stated that it was because they intended to sell intoxicating liquors in violation of government price regulations then in effect, that he would take all the raps which defendant would take care of, and in that manner their profits would be protected. A partnership may not be formed for an illegal purpose or for contracting business in a manner contrary to public policy. Even though it be lawful to sell intoxicating liquors, a partnership agreement to engage in the liquor traffic in an illegal manner will not be enforced. A court will not aid either party to an illegal agreement. When a partnership is formed to conduct a lawful business in an illegal manner, the courts will not recognize its existence and will not lend their aid to assist either one of the parties thereto in an action against the other. Perry v. Berger, 85 Neb. 753, 124 N. W. 133; Bohy v. Abbott, 154 Neb. 139, 47 N. W. 2d 95.

The plaintiff contends that the question of the illegality of the partnership agreement cannot be here considered for the reason that such issue was not pleaded as a defense. The controlling rule is stated in 68 C. J.

S., Partnership, § 7, p. 412, as follows: "The illegality of the partnership contract need not be pleaded as a defense, but may be taken advantage of whenever it appears in the course of a trial; and, if it is not so pleaded, the court may inquire into the nature of the partnership contract, and, if its illegality or opposition to public policy appears, may refuse to adjudicate on alleged rights which are dependent on it." See, also, Fitzgerald v. Fitzgerald & Mallory Construction Co., 44 Neb. 463, 62 N. W. 899; Wright v. Cudahy, 168 Ill. 86, 48 N. E. 39. The illegality of the partnership agreement appearing as a part of plaintiff's proof, the court could properly refuse to adjudicate any rights purporting to arise out of such agreement.

The evidence as a whole does not tend to support a finding that a partnership agreement as asserted by the plaintiff was ever contemplated. The evidence shows that on July 1, 1943, the date of the alleged agreement, the plaintiff and defendant were living in the same apartment under circumstances which necessarily bear upon the nature of their subsequent relationship. About this time defendant discharged the bartender at the Rondevous Tavern and offered the job to plaintiff. He accepted it and was paid $25 per week for his services. Deductions for social security were made. This situation existed until the tavern was sold 4 or 5 years later. The evidence bears out the statement that defendant made money which she invested in real estate and livestock. Plaintiff alleges that she accumulated between $200,000 and $250,000 during the period involved in this suit. There is nothing in writing of any kind that would indicate any interest in it on the part of the plaintiff. Defendant paid for all lands and livestock purchased, retained the title thereto in her own name, and retained all money obtained from sales thereof. It hardly seems probable that a partner would permit such a situation to continue to exist for so many years without some evidence of his claimed 50 percent interest in such a large

accumulation of profits. The evidence shows his lack of credit with financial institutions and the necessity for having defendant guarantee past-due notes on which only $1,200, or thereabouts, remained unpaid. It is beyond all comprehension that one having a one-half interest in $200,000, or more, should call upon the holder of the fund to guarantee notes aggregating less than $1,200. It would seem that one having such a partnership agreement, and under which such a sum was accumulated, would not wait approximately 10 years before instigating suit when he was in need of money during all the period. The inferences to be drawn from the facts as detailed in the record by the plaintiff point to the nonexistence of a partnership agreement and appear more worthy of belief than the conclusions to which he testifies. We find it difficult to give much credence to the evidence of the plaintiff. His evidence is conflicting. He could not seem to understand the most simple questions. His halting replies were confused and often unintelligible. He could not remember on one day what he had testified to the day before. On one occasion he stated: "Yes. I am always crazy. I know that." His evidence was weak and unconvincing. He was able to produce no evidence of a corroborating nature that pointed exclusively to a partnership arrangement. The evidence was clearly insufficient to sustain a finding that a partnership existed. It is proper under such circumstances for the trial court to dismiss the action at the close of plaintiff's evidence. The district court correctly sustained the motion to dismiss the action and its judgment must therefore be affirmed.

AFFIRMED.

CAROL LEA HEPPE ET AL., APPELLANTS, V. STATE OF NEBRASKA, DEPARTMENT OF ROADS AND IRRIGATION, ET AL., APPELLEES, VERN SHAW, INTERVENER-APPELLANT.

76 N. W. 2d 255

Filed April 13, 1956. No. 33863.

1. **Appeal and Error.** It is the duty of this court in an equity case to try the issues de novo and to reach an independent decision without being influenced by the findings of the trial court except if the evidence is in irreconcilable conflict this court may consider that the trial court saw the witnesses, observed their manner of testifying, and accepted one version of the facts rather than the opposite.
2. **Injunctions: Eminent Domain.** Injunction is a proper action in which to present the question of unlawful or improper exercise of the power of eminent domain.
3. **Eminent Domain.** The right to exercise the power of eminent domain must be conferred by statute, either in express words or by necessary implication. Such power being in derogation of common right, the acts conferring it are to be strictly construed in favor of the landowner.
4. ———. The power of eminent domain is an inherent attribute of sovereignty and it exists independently of constitution. Constitutional provisions relating thereto are in no sense a grant but are a limitation upon the power.
5. ———. The power of eminent domain is exercisable through the Legislature or through some department or agency by authority of the Legislature.
6. **Statutes.** Where the words of a statute are plain, direct, and unambiguous, no interpretation is needed to ascertain their meaning.

APPEAL from the district court for Scotts Bluff County: ERNEST G. KROGER, JUDGE. *Reversed and remanded with directions.*

Richard S. Wiles and *Holtorf & Hansen,* for appellants.

Clarence S. Beck, Attorney General, *Harold S. Salter, Willard F. McGriff,* and *Neighbors & Danielson,* for appellees.

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

MESSMORE, J.

This is an injunction action brought in the district court for Scotts Bluff County by Carol Lea Heppe and W. Charles Heppe, wife and husband, Christ Welsh, and Carol Lea Heppe, guardian of Peter Jensen Heppe and William Jensen Heppe, minors, as plaintiffs, against the State of Nebraska, Department of Roads and Irrigation, hereinafter referred to as the department, appraisers appointed by the county judge of Scotts Bluff County to appraise the land to be taken by condemnation instituted by the department, the City of Gering, and the Gering Irrigation District, defendants. Christ Welsh is a tenant and has no interest in this proceeding. The purpose of the action was to restrain and enjoin the department from proceeding with the condemnation action filed in the county court of Scotts Bluff County by the department for the purpose of securing a right-of-way across the plaintiffs' land and constructing a ditch thereon; to procure a mandatory injunction to require the department to remove certain culverts placed by it under State Highway No. 86 in such a manner as to divert the natural flow of surface water gathering on the plaintiffs' land by concentrating and compelling such water to flow through the culverts onto the plaintiffs' land; and to procure a permanent injunction against the defendants from interfering in any manner with the drainage of surface water through the ditches and channels along State Highway No. 86.

One Vern Shaw, by permission of the court, intervened, claiming an easement by prescription across a part of the plaintiffs' land which provided access to land owned by him, joined with the plaintiffs taking the action as he found it, and prayed for a permanent injunction in the same manner as the prayer of the plaintiffs' petition.

The trial court found generally in favor of the defendants, and each of them, and against the plaintiffs and intervener; that the department was entitled to

proceed with its condemnation action in order to secure right-of-way for the construction of a ditch across the land of the plaintiffs; that the temporary injunction granted to the plaintiffs and against the defendants, and each of them, should be dissolved; that the prayer of the plaintiffs' petition and the petition of the intervener for a permanent injunction should be denied; and that the prayer of plaintiffs for a mandatory injunction for the removal of certain culverts described in their petition should be denied. Judgment was entered in accordance with the findings. The plaintiffs and the intervener filed a motion for new trial. Upon the overruling of their motion for new trial, they appealed.

We might state at this point that the city of Gering and the Gering Irrigation District demurred to the plaintiffs' petition on the ground that the petition failed to allege sufficient facts to constitute a cause of action against them. These demurrers were sustained by the trial court. Later, by appropriate motion in this court, the appeal as to these defendants was dismissed, therefore they are not parties to this appeal and any matter concerning them or their rights, if any, is not for determination in this appeal. In addition, any right the intervener may have with reference to establishing an easement across the land of the plaintiffs as involved in this case is a matter that relates itself to condemnation proceedings. Suffice it is to say he has an adequate remedy at law.

Some contention is made that the department failed to comply with sections 76-702 and 76-704, R. S. Supp., 1953, with reference to making a valid attempt to agree with the plaintiffs, the owners of the land, as condemnees, or with the intervener with respect to the acquisition of the property sought by the department. This matter is not for determination in this appeal.

The condemnation proceedings here involved were commenced in the county court of Scotts Bluff County

by the department. The procedure in the county court contemplates an informal hearing by the appraisers, a view of the lands, no record of the testimony, and a report of damages assessed to be filed subject only to the right of appeal, not to confirmation by the appointing court. It is obvious that the plaintiffs and the intervener could only raise the proposition heretofore contended for by them on appeal to the district court in the condemnation proceedings. See Higgins v. Loup River Public Power Dist., 157 Neb. 652, 61 N. W. 2d 213.

"It is the duty of this court in an equity case to try the issues de novo and to reach an independent decision without being influenced by the findings of the trial court except if the evidence is in irreconcilable conflict this court may consider that the trial court saw the witnesses, observed their manner of testifying, and accepted one version of the facts rather than the opposite." Keim v. Downing, 157 Neb. 481, 59 N. W. 2d 602.

There is no doubt but that an action in injunction is proper to raise the matters contended for by the plaintiffs. As was said in Consumers Public Power Dist. v. Eldred, 146 Neb. 926, 22 N. W. 2d 188: "This court as well as the courts of other jurisdictions is committed to the rule that injunction is a proper action in which to present the question of unlawful or improper exercise of the power of eminent domain. Drummond v. City of Columbus, 136 Neb. 87, 285 N. W. 109; May v. City of Kearney, 145 Neb. 475, 17 N. W. 2d 448."

We summarize the following facts to disclose what the department proposed to condemn and the purpose for which the condemnation proceedings were instituted.

The plaintiffs own Lots 3 and 4 and the south half of the northwest quarter of Section 3, Township 21 North, Range 55 West of the 6th P. M., in Scotts Bluff County, which consists of 80 acres of land lying north of State Highway No. 86. State Highway No. 86 runs generally

east and west along the south edge of the Heppe land. The Heppe land is rather flat from the west to the east, and the natural surface drainage is toward the east. South of the highway the drainage course is to the east and northeast. The highway slopes slightly east toward the city of Gering. There are ditches along the north and south sides of the highway. The ditch on the north side would carry part of the drainage from the land north of the highway and the ditch on the south side would carry part of the drainage from the land south. There is not much drainage of surface water from the west in either ditch. North of the Heppe land and the highway is a canyon. Vern Shaw, the intervener, owns a small farm on the south edge of the canyon, east of the Heppe land, and north of the Johannes land which is east of the Heppe land. Approximately one-half mile east of the Heppe land the Gering Irrigation District maintains a canal which runs generally north and south and crosses the highway at that point. For many years surface water has run down the north and south ditches along the highway. Some of this water emptied into the Gering irrigation canal, and a part of it went over the bridge, across the canal, and toward the east.

It should be stated at this time that a previous condemnation proceeding was filed by the department with respect to the Heppe land for the purpose of condemning small strips of such land to enable the department to widen and improve the highway. We are not here concerned with that condemnation proceeding. The condemnation proceeding here involved is to condemn a strip of land 50 feet in width for a distance of about 800 feet and then 60 feet in width for the remaining distance of the ditch to be constructed. The ditch would be about 1,600 feet in length and would be across the east part of the Heppe land at a right angle to the highway. The purpose of the ditch is to carry surface water in the ditch and pour or dump it into the canyon

which is also on the land of the plaintiffs and the intervener.

The project engineer testified that he made the survey for the ditch. The ditch would run just west of the center line of the section on the Heppe land. He described the length and width as above stated, and testified that the bottom of the ditch would be 10 feet across and the depth 3 feet. The low point of the Heppe land would be at about the center of the ditch. The west side of the ditch from the highway north to the canyon would be higher than the surface of the ground next to it. There were to be pipes put through the dike, and the surface water draining off the Heppe land would come through such pipes with some considerable force. It is apparent from the record that the surface water would run where it was wont to flow with the exception that there would be some diversion permitting the pouring of some water into the canyon.

We deem it unnecessary to further summarize the evidence in view of the principal proposition to be determined in this appeal. Before stating this proposition, we deem it advisable to set forth certain well-established rules of law concerning the right of eminent domain.

The right to exercise the power of eminent domain must be conferred by statute, either in express words or by necessary implication. Such power being in derogation of common right, the acts conferring it are to be strictly construed in favor of the landowner. See, Higgins v. Loup River Public Power Dist., *supra;* Webber v. City of Scottsbluff, 155 Neb. 48, 50 N. W. 2d 533; 29 C. J. S., Eminent Domain, § 22, p. 806; 18 Am. Jur., Eminent Domain, § 26, p. 650.

The power of eminent domain is an inherent attribute of sovereignty and it exists independently of constitution. Constitutional provisions relating thereto are in no sense a grant but are a limitation upon the power. The power of eminent domain is exercisable through the Legislature or through some department or agency

by authority of the Legislature. See Consumers Public Power Dist. v. Eldred, *supra.*

There is no question in the instant case but that the Legislature had the right and did delegate the power to the department to do certain things.

Where words of a statute are plain, direct, and unambiguous, no interpretation is needed to ascertain their meaning, and the court cannot read a meaning into statutes that is not warranted by the legislative language. Neither is it within the province of a court to read plain, direct, and unambiguous language out of a statute. See, Mook v. City of Lincoln, 146 Neb. 779, 21 N. W. 2d 743; Federal Farm Mortgage Corp. v. Adams, 142 Neb. 202, 5 N. W. 2d 384; Franzen v. Blakley, 155 Neb. 621, 52 N. W. 2d 833.

Bearing in mind the foregoing, we now proceed to set forth the section of the statute directly involved in this appeal to determine the power delegated to the department by the Legislature. This statute is section 39-603, R. S. Supp., 1953, and reads as follows: "Any public highway or portion of a public highway, designated by law as a state highway, may be relocated, altered, or widened, channels or watercourses on or contiguous to a state highway may be straightened, and road materials therefor may be acquired as contemplated in section 39-619 when, in the opinion of the Department of Roads and Irrigation, the same is necessary for the public convenience and safety or for economy in the construction of state highways. For such purposes power is hereby conferred upon the department to enter upon any land for the purpose of examining and surveying the same, including soil investigations where necessary, determination of drainage data in contemplation of the establishment of the exact location to be used either for the highway itself, for channel changes, watercourses, or other operations incident to highway construction or reconstruction, and to take, hold, and acquire by negotiations or by eminent domain

so much real estate as may be necessary and convenient; Provided, that the department shall pay to the landowner for all damages incurred by landowner as a result of such examination or survey and upon the failure of the landowner and the department to agree upon the amount of damages, if any, the landowner may file a petition as provided for in section 76-705. The procedure to condemn property shall be exercised in the manner set forth in sections 76-704 to 76-724."

The above-quoted statute contains all the power delegated to the department by the Legislature. The statute is not ambiguous, but is clear and unequivocal as to such power. It provides that a highway may be relocated, altered, or widened, channels or watercourses on or contiguous to a state highway may be straightened, and road materials therefor may be acquired when it is necessary for the public convenience and safety or for economy in construction. By constructing the drainage ditch in question, it is apparent that the department is not attempting to relocate, alter, or widen State Highway No. 86, and the construction of this ditch bears no relation or connection to the widening, altering, or relocating of any highway. A different situation would probably develop in the event the drainage ditch was parallel to the state highway, but in the instant case the proposed drainage ditch will run at a right angle to the highway. There is no watercourse involved in the instant case, and no watercourse on the plaintiffs' land. In attempting to construct the proposed drainage ditch at a right angle to the highway and north on the plaintiffs' land, the department was not straightening any watercourse or channel. From a reading of the statute, it seems clear that the power of eminent domain is limited to the widening, relocating, or altering of a state highway, or to straightening a channel or watercourse contiguous to a state highway.

We are unable to find in the statute any express power delegated to the department, nor does the statute

by clear implication indicate any such power on the part of the department, to construct the drainage ditch in the manner contemplated by the department in the condemnation proceedings. The statute is clear and unambiguous as to the power granted to the department and cannot be enlarged by implication to contain the power sought by the department in the condemnation proceedings.

We find that the permanent injunction should have been granted by the trial court, and it is our conclusion that we should, and we do, grant a permanent injunction without prejudice on the part of the department to commence proceedings in accordance with section 39-1320, R. S. Supp., 1955, if it so desires.

With reference to granting a mandatory injunction to compel the removal of the culverts placed on State Highway No. 86 by the department, we find that under the circumstances presented by the record a mandatory injunction should not be granted in this case.

We reverse the judgment and remand the cause with directions to the trial court to enter judgment in conformity with this opinon.

REVERSED AND REMANDED WITH DIRECTIONS.

ALMA E. KOERWITZ, APPELLANT, V. FRANK A. KOERWITZ, APPELLEE.

76 N. W. 2d 264

Filed April 13, 1956. No. 33865.

1. **Divorce: Parent and Child.** In awarding custody of a child, the primary concern of the court in its sound discretion is the best interest and welfare of the child, having due regard for the rights of fit, proper, and suitable parents.
2. ———: ———. Children of tender years are usually awarded to the mother unless it is shown that she is unsuitable or unfit to have such custody.
3. **Divorce.** In determining the question of a division of property between the parties to a divorce suit 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 probably would 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.

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

Leonard J. Germer, Robert B. Waring, and *John C. Gewacke,* for appellant.

W. O. Baldwin, for appellee.

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

CARTER, J.

Plaintiff, Alma E. Koerwitz, brought suit for a divorce against the defendant, Frank A. Koerwitz. The defendant denied the allegations of plaintiff's petition and cross-petitioned for a divorce. The trial court sustained a motion to dismiss plaintiff's petition at the close of her evidence. Evidence was taken on the cross-petition of the defendant. The trial court granted a divorce to the defendant; gave the custody of their minor son, Gene, age 10, to the defendant; gave the custody of their minor son, Harlan, age 18, to the plaintiff; awarded the home to the plaintiff subject to a second lien in favor of the defendant in the amount of $3,700, payable at the rate of $45 per month; and ordered each party to pay his own costs and attorney's fees. From this decree the plaintiff appeals.

There are but two questions raised by this appeal. The first is whether or not the court erred in granting

the custody of the minor child, Gene, age 10, to the defendant. The second is the correctness of that part of the decree awarding defendant a second lien on the residence in the amount of $3,700, payable at the rate of $45 per month.

Plaintiff and defendant were married on April 12, 1931. Three children were born to the marriage: Donald, age 23; Harlan, age 18; and Gene, age 10. Plaintiff is 45 years of age and the defendant is 51. Plaintiff is employed in a restaurant and beer tavern at Goodland, Kansas, prior to which employment she had been earning approximately $128 per month. Defendant is the custodian of the Deshler high school building and earns a net take-home pay in the amount of $199 per month.

Plaintiff offered evidence in support of her prayer for a divorce on the ground of cruelty. She failed to make a case in the manner required by law and the trial court, on motion, dismissed her petition. The defendant offered evidence in support of his cross-petition for a divorce, which in substance showed the following: Commencing on or about May 19, 1954, the plaintiff commenced keeping company with men other than her husband. The evidence shows that she was out late at night with one Delbert Worm and that she made a trip with him to Sidney, Nebraska, in the company of others. On her return home she demanded a divorce from the defendant. In July 1954, plaintiff became enamored with one Herman Day. In August 1954, Day was working on a highway project near Stromsburg and Osceola. Plaintiff made week-end visits to or near these places where she met Day, according to inferences in the record which appear credible. She wrote letters to Day which found their way into the hands of the defendant, and were offered in evidence and preserved in the record before us. The letters tell a sordid story of a wife's unfaithfulness to her husband and family. On or about September 1, 1954, defendant, after learning of plaintiff's trips to visit Day and after coming into possession

of the letters referred to, left the home and took up his residence elsewhere. On November 1, 1954, Day moved into the home occupied by plaintiff and her sons. A Rev. E. C. Werner called at the home to visit Donald Koerwitz, who had been injured in an automobile accident and was told upon inquiry as to Day's identity: "That is the man my mother is going with." Day left the home during the latter part of January 1955, and went to Goodland, Kansas, where he opened a beer tavern. Plaintiff made many trips to Goodland, ostensibly to visit a son. In May 1955, plaintiff moved to Goodland and began working in the tavern owned by Day. She was working there at the time of the trial.

The record shows that defendant was employed by the school district as a building custodian. He was a hard-working man who was highly regarded in the community. All efforts to show any mistreatment of his wife and children failed. At the time of trial defendant was living with a Mr. and Mrs. Poppe across the street from the school building. The latter offered to help care for the boy, Gene. The Poppe home was shown to be a suitable place for the defendant to care for the boy.

The evidence shows beyond question that the mother was not a fit and proper person to have custody of the boy, Gene. The admitted escapades of the plaintiff brought humiliation and embarrassment upon the defendant and the children, and were in themselves sufficient to show her to be an unfit person to have the custody of her 10-year-old son, Gene. The trial court properly granted the custody of the son, Gene, to the defendant. This conclusion is supported by numerous decisions of the court holding that in awarding the custody of a child the primary concern of the court is the best interests and welfare of the child, having due regard for the rights of the parents. Swanson v. Swanson, 137 Neb. 699, 290 N. W. 908. Children of tender

age are usually awarded to the mother unless it is shown that she is unsuitable or unfit to have such custody. Cowan v. Cowan, 160 Neb. 74, 69 N. W. 2d 300.

The plaintiff complains about the division of property made by the trial court. With reference to the property owned by the parties, the record shows the following: At or shortly after the marriage of the parties, plaintiff's foster mother gave her the residence property here involved which was then of the reasonable value of $1,000. Defendant states that it is now worth $7,500 and the plaintiff fixes its value as $8,000. Defendant purchased materials for the remodeling of the house at the value of $1,206.69, which is conclusively established by the record. Defendant did the work largely himself and estimates the reasonable value of his labor at $1,000. There is a mortgage on the property in the amount of $2,500. It appears that $1,000 represented by the mortgage was used by the plaintiff to purchase an automobile which is represented in the automobile she now has and claims as her own. The balance was used to pay a part of the cost of remodeling the home. The value of the furniture and personalty is estimated at $520. There were debts remaining unpaid at the time of trial amounting to $762.70 which the defendant is obligated to pay. The rental value of the home is shown to be $50 per month.

The evidence shows that defendant had a substantial interest in the residence property. We find that such interest equaled that of the plaintiff. The value of the furniture was $520. The value of the automobile was at least $1,000. We find the value of the property of the parties to be $6,520. Under the record in this case each is entitled to an equal division of that amount, which is $3,260. The trial court awarded all the property to the plaintiff and awarded defendant a second lien on the residence property in the amount of $3,700, payable $45 per month. The present worth of this lien is about $3,058. It is clear therefore that the trial

court brought about an equal division of the property, which we find on a trial de novo on the record to be correct.

The rule applicable in the present case, with reference to the division of the property, is stated in Kidder v. Kidder, 159 Neb. 666, 68 N. W. 2d 279, as follows: "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." See, also, Chambers v. Chambers, 155 Neb. 160, 51 N. W. 2d 310; Eno v. Eno, 159 Neb. 1, 65 N. W. 2d 145.

We find that defendant is entitled to a divorce from the plaintiff on the grounds of extreme cruelty; that defendant is entitled to the custody of the minor son, Gene; that plaintiff is entitled to the custody of the minor son, Harlan, without any order for support as he is self-sustaining; that defendant shall pay the existing debts of the parties existing at the time of the decree of divorce shown to be in the amount of $762.70; that the family residence, furniture and personalty, and the automobile be awarded to plaintiff; and that defendant be awarded a second lien in the sum of $3,700 on the residence property, payable in the amount of $45

per month commencing on the 1st day of June 1955, all in accordance with the terms and conditions in the decree entered by the district court.

AFFIRMED.

ENNIS LIPSCOMB, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.

76 N. W. 2d 399

Filed April 13, 1956. No. 33887.

1. **Juries.** One of the purposes of the voir dire examination is to disclose whether or not a prospective juror knows one or more of the parties, or knows something about the case.
2. **Criminal Law: Evidence.** Where the accused is identified as having been at or near the scene of a crime about the time of its commission, evidence showing that he owned, possessed, or had access to any tools with which the crime was or might have been committed is admissible to show that the accused had the means to commit the offense in the manner that it was committed. It is a circumstance which the jury may consider.
3. **Criminal Law: Witnesses.** A defendant in a criminal case who becomes a witness subjects himself to the rules applicable to other witnesses.
4. **Criminal Law: Evidence.** The statute (section 25-1214, R. R. S. 1943) prescribes and limits the scope of any inquiry initiated by the State that may be made on cross-examination of a defendant in a criminal case. It permits inquiry of the defendant when he is a witness if he was previously convicted of a felony. If the answer is in the affirmative, he may be asked the number of such convictions, and if an answer is correctly given, the inquiry must end there. If any answer of the defendant in this regard is incorrect or if he claims he does not remember, the fact of his conviction or convictions may only be shown by "the record thereof."
5. ———: ———. In a criminal prosecution, any testimony, otherwise competent, which tends to dispute the testimony offered on behalf of the accused as to a material fact, is proper rebuttal testimony.
6. **Criminal Law: Trial.** The statute (section 25-1214, R. R. S. 1943) does not permit exploration of the charge or charges of which the defendant was previously convicted, the details thereof, or the sentence imposed.

7. ———: ———. Remarks in his argument by the county attorney brought about and made in answer to the arguments of prisoner's counsel, unless necessarily prejudicial to the accused, do not necessitate the reversal of a conviction.

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

Ralph R. Bremers, for plaintiff in error.

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

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

SIMMONS, C. J.

In this action the plaintiff in error, hereinafter called the defendant, was charged with the crime of robbery. The crime charged involved the elements of force, violence, or fear. He pleaded not guilty. Trial was had resulting in a verdict of guilty. Motion for new trial was made and overruled. Defendant was sentenced to serve a term in the penitentiary. Defendant brings the cause here by petition in error.

We affirm the judgment of the trial court.

We determine the argued assignments of error.

The bill of exceptions shows that during the voir dire examination the county attorney disclosed that he had spoken with a prospective juror who had disclosed to the attorney that his wife had sat on a jury in a case wherein this defendant was a defendant. The statement is shown to have been made in the presence of other prospective jurors. Defendant claims prejudice.

The voir dire examination is not shown. The transcript shows that the prospective juror did not sit as a juror in the case.

Obviously one of the purposes of the voir dire examination is to disclose whether or not a prospective juror knows one or more of the parties, or knows something about the case. Those are preliminary questions

asked time after time whenever juries are being selected. We see no merit in the assignment.

The evidence is that shortly before the robbery two men came near the scene of the robbery in a maroon-colored car, parked the car, and then walked toward the filling station where the robbery occurred. In a few minutes they returned. One got into the car and drove away. The other ran in the direction taken by the car. Within a few minutes the defendant and another man were arrested while in the car a few blocks from the scene of the robbery. These two men were identified as the men who entered the filling station, held the arms of the complaining witness, took a purse and billfold from his person, and then ran away.

The defendant, when arrested, was in the right front seat of the car. Under the front seat was found a piece of gas pipe, three-fourths of an inch in diameter and about 2 feet in length. One end was taped so as to make a handle. The other end had an elbow connection attached. It is not shown to have been used in the perpetration of the robbery.

Defendant claims its admission to have been prejudicial error.

We have recently stated the applicable rule as follows: "Where the accused is identified as having been at or near the scene of a crime about the time of its commission, evidence showing that he owned, possessed, or had access to any tools with which the crime was or might have been committed is admissible to show that the accused had the means to commit the offense in the manner that it was committed. It is a circumstance which the jury may consider." Liakas v. State, 161 Neb. 130, 72 N. W. 2d 677.

The assignment is without merit.

Defendant testified in his own behalf. On cross-examination he was asked how many times he had been convicted of a felony. He answered "Twice."

On rebuttal the State offered certified copies of the

records of a court in Dallas, Texas, showing that one Ennis Lipscomb in four different cases had on January 20, 1937, pleaded guilty to the offense of robbery and had in each case been sentenced to serve 15 years. The State then offered a witness identifying the defendant here as the defendant in the Texas cases. The State at the same time offered the record of a prior Nebraska conviction of a felony. The offer was to prove five prior convictions of a felony.

"The statute (section 25-1214, R. R. S. 1943) provides that: 'A witness may be interrogated as to his previous conviction for a felony, but no other proof of such conviction is competent except the record thereof.' A defendant in a criminal case who becomes a witness subjects himself to the rules applicable to other witnesses. * * * The statute prescribes and limits the scope of any inquiry initiated by the State that may be made on cross-examination of a defendant in a criminal case. It permits inquiry of the defendant when he is a witness if he was previously convicted of a felony. If the answer is in the affirmative, he may be asked the number of such convictions, and if an answer is correctly given, the inquiry must end there. If any answer of the defendant in this regard is incorrect or if he claims he does not remember, the fact of his conviction or convictions may only be shown by 'the record thereof.' " Latham v. State, 152 Neb. 113, 40 N. W. 2d 522.

The State here undertook to show that the answer as to the two previous convictions was incorrect.

The offer of the record of the previous convictions was a proper procedure. Defendant contends that they should have been offered in cross-examination and that it was error to receive them in rebuttal. The rule is: "In a criminal prosecution, any testimony, otherwise competent, which tends to dispute the testimony offered on behalf of the accused as to a material fact, is proper rebuttal testimony." Drewes v. State, 156 Neb. 319, 56 N. W. 2d 113.

Defendant then offered to testify as to the manner in which the proceedings were held in Texas and in particular that he did not have counsel; that he did not plead guilty; that he had no jury; and that he was sentenced only once and only convicted once in Texas. The trial court denied the offer. Defendant assigns error, relying on Reed v. State, 66 Neb. 184, 92 N. W. 321. In that case a witness was permitted to testify that he was not guilty of the offense for which he served a term in the penitentiary. We need not re-examine the soundness of that holding. It is not controlling here. Here the offer was to give oral testimony challenging the correctness of the certified records of the Texas court.

We answered this contention in Latham v. State, *supra*. There we held: "The statute does not permit exploration of the charge or charges of which the defendant was previously convicted, the details thereof, or the sentence imposed * * *." The assignment is without merit.

Exhibit 11 is the record of a conviction of one Ennis Lipscomb of the crime of larceny from the person in Nebraska. The exhibit was received in evidence. Defendant assigns the admission as error. The bill of exceptions shows that the State offered these five records of prior convictions in evidence and that defendant objected. There followed argument directed to the admission of the records from Texas. The court received the exhibits. Then followed more argument about the Texas records during which the defendant's attorney advised the court that he was "not objecting to the Nebraska one," but was objecting to those from Texas. Obviously the Nebraska record was admissible.

The State then called a witness to identify the defendant here as the defendant in the prior Nebraska case. The defendant then stipulated that the defendant named in exhibit 11 is the defendant in the instant case. The identifying witness was then excused.

The defendant then objected to the giving of the exhibits to the jury. During the argument of this matter counsel for defendant stated that he had no objection to the reading of the exhibits; he later objected to the reading. The court then gave the defendant the opportunity of stipulating that the exhibits "indicate five prior convictions of felonies," and otherwise the exhibits would be read in evidence. Neither the State nor defendant would so stipulate. The exhibits were then read to the jury in their numerical order. The defendant objected to the reading of the record of the Nebraska conviction on the ground that it was stipulated that that was "one of the two convictions which the defendant stated in open Court he was convicted of." The court permitted the reading of the exhibit. Defendant claims error in the reading of exhibit 11 to the jury.

The stipulation did not go to the extent claimed in the objection. The State had the right to prove the five prior convictions. The records were in evidence. It would be futile to introduce them in evidence if the jury was to be denied a knowledge of the proof they contained. Defendant compelled the disclosure. We find no error in what was done.

The bill of exceptions contains the argument to the jury made by the State.

The bill shows no objection made to any portion of the opening argument. The bill does not contain the argument of defense counsel.

It contains the closing argument of the State. During this argument of the State, reference was made to "a defense of alibi and conspiracy." The reference to a conspiracy appears to have been in reference to a charge that the State's witnesses were in a conspiracy to convict the defendant. Defendant took "exception to that" apparently referring to the evidence of the prior convictions as a part of the conspiracy. The court ordered that the State proceed. On the basis of this

one exception defendant undertakes to have a review of most of the argument of the State both in opening and closing as "calculated to inflame and impassion the jury against the defendant."

In Lee v. State, 124 Neb. 165, 245 N. W. 445, we held: "Remarks in his argument by the county attorney brought about and made in answer to the arguments of prisoner's counsel, unless necessarily prejudicial to the accused, do not necessitate the reversal of a conviction."

The remark of State counsel, to which exception was taken, appears to have been prompted by argument of the defendant's counsel. The argument of defense counsel is not shown. Under the circumstances no prejudice to defendant is shown in the record.

The defendant finally in one grouping complains of four instructions given on credibility of witnesses and the failure to give three requested instructions. We have examined the instructions given and refused and find no error therein when related to the issues and evidence before the jury.

Finally the defendant assigns as error, and urges as a reason for reversal, the refusal of the trial court to direct a verdict for the defendant. The assignment is not argued. We assume that it goes to the sufficiency of the evidence to take the case to the jury. We have examined the evidence and find no error in that regard.

The judgment of the district court is affirmed.

AFFIRMED.

EMMA M. RING, APPELLANT, V. GRANT DUEY, APPELLEE.
76 N. W. 2d 433

Filed April 13, 1956. No. 33917.

1. **Trial.** Instructions which withdraw from the consideration of the jury material issues of fact presented by the pleadings and the evidence are erroneous.
2. **Trial: Appeal and Error.** When a trial has been had on the

theory presented by the pleadings and so conducted in the trial court, it will be treated here on the same basis.

3. **Trial.** Instructions are to be considered together, to the end that they may be properly understood, and, if as a whole they fairly state the law applicable to the evidence when so construed, error cannot be predicated on the giving thereof.
4. **Automobiles: Negligence.** When one looks and does not see what is in plain sight he is in the same situation as one who does not look.
5. ———: ———. When one, being in a place of safety, sees or could have seen the approach of a moving vehicle in close proximity to him and suddenly moves from the place of safety into the path of such vehicle and is struck, his own conduct constitutes contributory negligence more than slight in degree, as a matter of law, and precludes recovery.

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

Robert B. Waring and *W. O. Baldwin,* for appellant.

John E. Dougherty, for appellee.

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

WENKE, J.

Emma M. Ring commenced this action in the district court for Thayer County against Grant Duey. The action was brought for the purpose of recovering damages resulting from injuries plaintiff sustained when struck by an automobile owned and being driven by the defendant. A jury returned a verdict for the defendant. The trial court thereupon dismissed plaintiff's action. Plaintiff then filed a motion for new trial and this appeal was taken from the overruling thereof.

The accident in which appellant was injured happened about 8:40 p. m. on Tuesday, October 28, 1952, on Lincoln Avenue in the city of Hebron, Thayer County, Nebraska. Lincoln Avenue is the main street of Hebron. It runs east and west, being the city route for U. S. Highway No. 81. It has a paved surface from curb to curb of 60 feet. The accident happened about

the middle of the block between Third and Fourth Streets, the latter streets running north and south. It resulted when a 1937 Chevrolet coupé, owned and being driven by appellee, ran into appellant. Appellant was seriously, painfully, and permanently injured as a result of being hit. At the time of the accident appellant was crossing from the north to the south side of Lincoln Avenue and appellee was driving his car thereon from the east toward the west.

Appellant pleaded that she "* * * was walking across Lincoln Avenue from the North to the South on a cross-walk halfway between Third Street and Fourth Street in the City of Hebron, Thayer County, Nebraska; that said cross-walk ran from the alley between the Beran Motor Company and the Standard Market on the North side of said street to the alley between Nacke's Hardware and the Penney Store on the South side of the street, and was clearly marked off for pedestrian traffic with white lines about seven feet apart; * * *."

In support of this allegation appellant either adduced evidence or offered proof of the fact that at the point where she was endeavoring to cross Lincoln Avenue from north to south, which was at a point midway between Third and Fourth Streets, the area in which she was walking had been marked as a cross walk with two painted white lines some 6 to 8 inches wide and about 7 feet apart; that these lines ran north and south; that they extended completely across the street, there being a 10-foot alley at this point running north and south through the blocks immediately north and south of Lincoln Avenue; that these lines had been there for many years; that the chief of police had placed them there at the direction of the mayor and city council; and that the public had used it as a cross walk.

Objections to this evidence, and the offer thereof, were sustained, the trial court instructing the jury there was no evidence introduced by appellant to show

there was a cross walk at the place where she attempted to cross Lincoln Avenue and that therefore appellee had the right-of-way. The court's ruling in this regard was based on the fact that it considered the foundation upon which such proof must necessarily rest to be either a resolution or ordinance of the city of Hebron establishing a cross walk at this point. No evidence was introduced or offered to that effect. Appellant tendered instructions, which were refused by the trial court, submitting the question as one of fact to the jury. Appellant's counsel was not permitted to argue the effect of this evidence to the jury insofar as it might be said to establish a cross walk.

Three questions arise by reason of the contentions made on appeal: First, did appellant, in the absence of a resolution or ordinance of the city of Hebron establishing a cross walk at this point, offer any competent evidence sufficient to establish, as a matter of fact, a cross walk at the point she crossed Lincoln Avenue and therefore give her the right-of-way? Second, if so, did the trial court err in refusing to receive this evidence and in not submitting to the jury the question of whether or not there was a cross walk and the appellant's corresponding rights if there was? Third, did the error, if committed, result in prejudicing appellant's rights to the extent that it can be said she did not have a fair trial?

Section 39-751, R. 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." (Italics ours.)

"A municipality has no authority to enact or enforce any rule or regulation contrary to the provisions of section 39-751, R. S. 1943." Gorman v. Dalgas, 151 Neb. 1, 36 N. W. 2d 561.

Under the foregoing statute a cross walk may be placed at any point on a highway within the business or residence district of any city or village if clearly marked as such. The statute recognizes the right of any city or village to do so. It can be done either by ordinance or resolution. See, Halliday v. Raymond, 147 Neb. 179, 22 N. W. 2d 614; 60 C. J. S., Motor Vehicles, § 35, p. 158. However, the statute does not so require. For the purpose of making the provisions of this statute reasonably applicable to the traveling public, we think the members thereof are entitled to assume that any markings which they find in the business or residential district of any city or village on a highway have been properly placed there by the authorities thereof. To hold otherwise would make such markings of little or no value and lead to confusion. We think the trial court erred in sustaining objections to the evidence offered in this regard and in refusing to submit the question of whether or not there was a cross walk as one of fact to the jury.

As stated in Nocita v. Guiliano, 130 Neb. 241, 264 N. W. 672: "Instructions which withdraw from the consideration of the jury material issues of fact presented by the pleadings and the evidence are erroneous." See, also, Harsche v. Czyz, 157 Neb. 699, 61 N. W. 2d 265.

Appellee contends there was no evidence offered that the accident occurred within the business or residential district of the city of Hebron as defined by section 39-741, R. R. S. 1943. The definitions therein contained are as follows: "(10) 'Business district' is the territory contiguous to a highway when fifty percent or more of the frontage thereon for a distance of three hundred feet or more is occupied by buildings in use for business.

(11) 'Residence district' is the territory contiguous to a highway not comprising a business district when the frontage on such highway for a distance of three hundred feet or more is mainly occupied by dwellings and buildings in use for business." We find this contention to be without merit.

Did the failure to submit this issue prevent the appellant from having a fair trial, considering the theory upon which she sought to recover? As the basis for her right to recover appellant alleged in her amended petition that: "* * * after she had reached the center of said street and was on the South half thereof, the defendant negligently and carelessly and without due regard for the safety of plaintiff and others upon said street violently drove a 1937 Chevrolet automobile, belonging to defendant and operated by him, into, against, and over the body of said plaintiff violently throwing her to the pavement of said street and causing the injuries hereinafter set out."

Appellant, who was 75 years of age at the time of the accident, testified she was familiar with the street, having crossed it since a little girl; that she first saw the car coming from the east after she had reached the center of the street and was on the south side thereof going south; that the car struck her when she was south of the center of the street; and that it knocked her down on the pavement, causing the injuries complained of. The trial court submitted to the jury the issue raised by the foregoing pleading and appellant's evidence offered in support thereof, that is, that she was run down and struck by appellee's car on the south side of the center line of Lincoln Avenue.

It was the appellee's theory that appellant was guilty of contributory negligence sufficient to defeat her right to recover by suddenly coming out from between two cars parked along the north side of Lincoln Avenue just west of the alley and into the path of his automobile. He offered competent evidence in support there-

of and the court also submitted that issue to the jury. The trial court submitted the case on both appellant's and appellee's theories.

We have said: "The trial was had on the theory thus presented by the pleadings, and, having been so conducted in the trial court, will be so treated here." Norton v. Bankers Fire Ins. Co., 115 Neb. 490, 213 N. W. 515. See, also, Nebraska State Bank v. May, 117 Neb. 262, 220 N. W. 276.

"Instructions are to be considered together, to the end that they may be properly understood, and, if as a whole they fairly state the law applicable to the evidence when so construed, error cannot be predicated on the giving thereof." Granger v. Byrne, 160 Neb. 10, 69 N. W. 2d 293.

The trial court instructed the jury to the effect that the statute provides vehicles shall be driven on the right half of a highway; that the driver of such vehicle must keep a lookout ahead in the direction of his travel or from which others may be expected to approach and take notice of and observe what is ahead of him for a reasonable distance; that the rights of a pedestrian to the lawful use of the streets in a city are in all respects equal to that of a person driving an automobile and that each is obliged to act with due care in regard to the movements of the other; and that a pedestrian is not guilty of contributory negligence for failure to look for an automobile approaching on the wrong side of the street.

We find the trial court fully and fairly presented to the jury the appellant's theory of her case as presented by her amended petition and the evidence she offered in support thereof. If the jury found the accident happened where she testified it did then she was as fully protected in her rights by the court's instructions as if the jury had found she was on a cross walk and had the right-of-way which the trial court properly defined as "the privilege of the immediate use of the street or

highway," and, under the instructions given, the jury would have been required to render a verdict in her favor.

On the other hand, if the jury found the accident happened as appellee and his witnesses testified it did, that is, by appellant, without looking, suddenly stepping out from between two parked cars and into the lane of travel for appellee's car then, under the instructions, appellant could not recover. This is proper for we said in Troup v. Porter, 126 Neb. 93, 252 N. W. 611: "It seems the evidence fairly establishes as a matter of law that the decedent herein in stepping from between two parked automobiles directly in front of the defendant's car without looking is more than slight negligence in comparison with the negligence of the defendant * * *."

Let us assume for the sake of discussion, although there is no evidence to that effect, that appellant was struck while still north of the center line of Lincoln Avenue but while in the lane of a cross walk. In such situation she would have the right-of-way over appellant's car; so let us say he was guilty of negligence in striking her, that is, let us say the jury could find appellee and his witnesses were wrong as to where appellant was crossing the street.

The instructions define negligence as "the doing of some act under the circumstances surrounding the accident involved, which a man of ordinary prudence would not have done, or the failure to do some act or to take some precaution which a man of ordinary prudence would have done or taken."

In Belville v. Bondesson, 130 Neb. 926, 266 N. W. 901, we set forth what an ordinarily prudent man would do when crossing an intersection. Therein we said: "In examining the question of plaintiff's contributory negligence, it is necessary for us to formulate some idea as to what an ordinarily cautious and prudent man would do under like circumstances. We think he would act

about as follows: On reaching the intersection, he would look both to his right and to his left. Seeing that no cars were coming from the right that would endanger him before reaching the center of the street and determining that he could safely cross in front of cars coming from his left, he would proceed, being watchful of the cars whose traffic lanes he was crossing. Arriving in the center of the street, he would devote the greater part of his attention to cars coming from the south whose traffic lanes he would cross in reaching the other side of the street, being alert, however, at all times, to the possibility that a car might appear where normally it would not be expected." See, also, Halliday v. Raymond, *supra.* We think the foregoing has application here.

Appellant testified she looked both east and west before stepping off the curb and starting across the street on the marked cross walk but saw no cars approaching; that she then proceeded south in the area of the cross walk until she cleared the cars to the east parked diagonally along the north side of Lincoln Avenue when she again looked to the east but saw no cars coming; and that she proceeded on south to cross the street, watching all the way.

The evidence is without dispute that appellee approached the point of the accident from the east on Lincoln Avenue; that he was stopped at the intersection of Lincoln Avenue and Fourth Street by a traffic signal; that when he received a "go" signal he proceeded west in low but shifted to second and, at the time of the accident, was traveling between 10 and 15 miles an hour; that his headlights were on dim; that appellant was familiar with the street and the traffic thereon; that the street was well lighted by street lights and storefront lights which made any objects thereon, such as cars, clearly visible; that appellant would only have been some 10 to 15 feet from appellee's car when she stepped into the lane of its travel; and that appellee im-

mediately applied his brakes and stopped his car within a few feet after the impact, his car only traveling about 12 feet after appellant stepped in front of it and before it hit her.

Under this situation, if appellant had looked, she would necessarily have had to see appellee's car as there was nothing to obstruct her vision. As stated in Schweidler v. Caruso, 269 Wis. 438, 69 N. W. 2d 611: "* * * when one looks and does not see what is in plain sight, he is in the same situation as one who does not look." If she had looked and seen the car which, under the circumstances she was bound to do, then the following has application: "When one, being in a place of safety, sees or could have seen the approach of a moving vehicle in close proximity to him and suddenly moves from the place of safety into the path of such vehicle and is struck, his own conduct constitutes contributory negligence more than slight in degree, as a matter of law, and precludes recovery." Cuevas v. Yellow Cab & Baggage Co., 141 Neb. 662, 4 N. W. 2d 790. See, also, Gade v. Carlson, 154 Neb. 710, 48 N. W. 2d 727.

While we find the court was in error with reference to its ruling on the admission of evidence offered to prove appellant was crossing Lincoln Avenue on a cross walk and in failing to submit that issue as one of fact to the jury we do not think, in view of what we have said, that it prejudiced her rights and prevented her from having a fair trial on the cause of action she pleaded and presented. We therefore affirm the judgment of the trial court refusing appellant a new trial.

AFFIRMED.