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REPORTS OF CASES

DECIDED BETWEEN

JANUARY 31, 1958 and JUNE 20, 1958

IN THE

Supreme Court of Nebraska

JANUARY TERM 1958

VOLUME CLXVI

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For the benefit of the State of Nebraska

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CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

JANUARY TERM, 1958

COMMONWEALTH TRAILER SALES, INC., APPELLEE, V. GEORGE BRADT ET AL., APPELLANTS.
87 N. W. 2d 705

Filed January 31, 1958. No. 34255.

1. **Usury.** The plea of usury as a defense is personal to the borrower and his sureties and privies.
2. ———. As a general rule, in the absence of an intent to defraud, general creditors are not allowed to set up usury exacted from a debtor in order to defeat or reduce liens on the debtor's assets.
3. ———. The rule as to who, besides the borrower, can avail themselves of the plea of usury includes the heirs, legal representatives, and devisees of the borrower or debtor and those who stand in the relation of sureties, guarantors, or accommodation indorsers, with respect to the tainted obligation.

APPEAL from the district court for Kimball County: ISAAC J. NISLEY, JUDGE. *Affirmed.*

Thomas D. Brower and *George P. Burke*, for appellants.

Healey, Davies, Wilson & Barlow, Jack R. Knicely, and *Patrick W. Healey*, for appellee.

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

WENKE, J.

This is an appeal from the district court for Kimball

County. It involves a replevin action commenced on September 12, 1956, by Commonwealth Trailer Sales, Inc., whereby it seeks to recover a 1951 Kit house trailer from George Bradt, the sheriff of Kimball County, and Guy Fleming. Plaintiff's right to the possession thereof is based on a chattel mortgage given it by Tommy and Maxine Williams. Trial was had to a jury. After both sides rested the trial court sustained plaintiff's motion for a directed verdict and rendered a judgment accordingly. Their motion for new trial having been overruled, the defendants perfected this appeal.

Appellee, Commonwealth Trailer Sales, Inc., is a Kansas corporation authorized to do business in the State of Nebraska. It engages in the selling of mobile homes, which includes house trailers. It has its principal place of business in Nebraska on U. S. Highway No. 30 near Sidney, in Cheyenne County. We will herein refer to this place of business as the Sidney office. Appellant George Bradt was, at all times herein material, the duly elected, qualified, and acting sheriff of Kimball County. We shall herein refer to him as the sheriff.

On September 10, 1955, appellee, through its Sidney office, sold to Tommy and Maxine Williams, husband and wife, of Kimball, Nebraska, a used 1951 Kit house trailer, serial No. 7917. We shall hereinafter refer to it as the house trailer and to Tommy and Maxine Williams as the Williams. The house trailer cost the Williams a total of $3,063.60. This total consisted of a cash price of $2,795; a time price differential of $88.85; an insurance premium of $170.75; and charges for credit investigation, filing, and title fees of $9. Of this total amount the Williams paid $200 in cash, thus leaving an unpaid balance of $2,863.60.

As evidence of owing this amount the Williams executed a note to appellee whereby they agreed to pay "$62.50 Dollars on the 22nd day of September, 1955 and a like amt. due on the 7th & 22nd days of each succeeding month thereafter for four months. $2301.10

due on the 25th day of Jan. 1956." The Williams paid all these installments except the balloon payment of $2,301.10 due on January 25, 1956. The installments paid thereon totalled $562.50.

To secure this indebtedness the Williams, on September 10, 1955, executed to appellee a chattel mortgage on the house trailer. This chattel mortgage appellee caused to be filed in the office of the county clerk of Kimball County. Thereafter, on October 27, 1955, appellee assigned to the Williams a transfer of its certificate of title to the house trailer. On January 11, 1956, the Williams obtained a new certificate of title thereto in their own names from the county clerk of Kimball County on which was endorsed the lien thereon as evidenced by the chattel mortgage.

When the $2,301.10 balloon payment became due on January 25, 1956, it was not paid but the time for the payment thereof was extended. A new note was taken therefor by appellee from the Williams on February 20, 1956. This renewal note was in the sum of $2,774.90 and payable as follows: "$77.50 Dollars on the 25th day of March, 1956 and each succeeding month thereafter for twenty months. $1234.90 due on the 25th day of the twenty first month (20 @ $77.50 & 1 @ $1234.90) * * *." The items included to arrive at this total are as follows: Balloon payment of $2,301.10 due January 25, 1956, under terms of the original note and which had not been paid; insurance premium of $100.14; and a handling charge, referred to as a "Time Price Diff." of $373.66. It is undisputed that this latter amount was the charge made by appellee for extending the indebtedness for the length of time and as hereinbefore set forth. To protect the indebtedness evidenced by the new note appellee secured from the Williams another chattel mortgage on the house trailer. It is dated February 20, 1956. The Williams paid $232.50 on this indebtedness and were given a credit of $67.80 thereon, being the amount due them as credit on life insurance coverage.

"The permissive provisions of sections 45-114 to 45-158, R. R. S. 1943, apply to licensees, but every inhibitory provision contained therein applies alike to licensees and nonlicensees and the officers and employees of either or both, * * *." State ex rel. Beck v. Associates Discount Corp., 162 Neb. 683, 77 N. W. 2d 215.

Section 45-138, R. S. Supp., 1955, provides, insofar as here material, as follows: "(1) 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. * * * (3) * * * Every loan contract shall provide for repayment of principal and charges in installments which shall be payable at approximately equal periodic intervals of time and so arranged that no installment is substantially greater in amount than any preceding installment."

Sometime in the summer of 1956 the Williams abandoned the house trailer. On August 22, 1956, the sheriff of Kimball County attached the house trailer. He did so under and pursuant to an order of attachment issued out of and by authority of the county court of Kimball County on that date. The order of attachment was issued at the instance of Henri Johnson, administrator of the Kimball County Hospital, in an action which the hospital had instituted in the county court against the Williams on an indebtedness of $101.40 which they claim the Williams were owing it. The sheriff again attached the house trailer on September 4, 1956. He did so under and pursuant to an order of attachment issued out of and by authority of the county court of Kimball County on that date in an action therein wherein Kenneth C. Fritzler, doing business as Kimball Finance Company, was seeking to recover from Tommy Williams the sum of $944.90. It was after the house trailer had been attached by the sheriff and while he

was holding it under such attachments that it was replevined by appellee. Under this situation the question is, can the sheriff, who has attached the house trailer for general creditors of the Williams, avail himself of the defense of usury as it applies to the installment loan of the Williams? We shall assume, for the purpose of discussing this question, that the transactions herein set forth between appellee and the Williams was in violation of the restrictive provisions of the Installment Loan Act hereinbefore set forth.

The general rule is that the defense of usury is for the benefit of the borrower and is personal to him. See, 91 C. J. S., Usury, § 71, p. 648; 55 Am. Jur., Usury, § 121, p. 409.

As stated in 91 C. J. S., Usury, § 71, p. 648: "Since usury laws are enacted for the protection of needy borrowers, and not to punish extortion in money lenders, the defense of usury is purely personal to the borrower, or those in privity with him, as discussed infra § 126, such as the debtor's sureties, guarantors, heirs, devisees, and personal representatives. This is true whether the statutes declare the contract void in whole or only to the extent of the usury, or whether a penalty is given for the taking. In order to question the validity of a usurious contract, the right must be based on the original debtor's right."

We held in Cheney v. Dunlap, 27 Neb. 401, 43 N. W. 178, 5 L. R. A. 465, that: "The plea of usury as a defense is personal to the borrower and his sureties and privies."

That is, persons in privity with a borrower have the right to attack a transaction as usurious. 91 C. J. S., Usury, § 126, p. 714; 55 Am. Jur., Usury, § 122, p. 410. But strangers thereto may not take advantage thereof. 91 C. J. S., Usury, § 125, p. 713. As stated in 91 C. J. S., Usury, § 124, p. 712: "* * * even though the taking of usury is prohibited and is made punishable as a misdemeanor, the usurious contract will not be void as to third persons."

However, the courts are not all in accord as to just what status a person must have in relation to the borrower in order to be entitled to attack a transaction as usurious. As stated in 55 Am. Jur., Usury, § 121, p. 409: "* * * the principal difficulty lies in determining who come within the exception in favor of privies of the debtor."

The sheriff here stands in the shoes of the attaching creditors insofar as any rights may have been obtained by the attachment in and to the property attached.

As stated in 91 C. J. S., Usury, § 131, p. 723: "As a general rule, in the absence of an intent to defraud, general creditors are not allowed to set up usury exacted from a debtor in order to defeat or reduce liens on the debtor's assets." See, also, 55 Am. Jur., Usury, § 124, p. 411.

But in any event the sheriff could acquire no greater rights in and to the property attached than the debtor-owner thereof possessed. We have often held that a purchaser of the equity of redemption cannot avail himself of the usurius contract of his grantor. See, Cheney v. Dunlap, *supra;* Male v. Wink, 61 Neb. 748, 86 N. W. 472; Bolen v. Wright, 89 Neb. 116, 131 N. W. 185. As stated in Bolen v. Wright, *supra:* "In support of this claim defendants have cited a number of cases, commencing with Cheney v. Dunlap, 27 Neb. 401, and ending with People's Building, Loan & Savings Ass'n v. Pickard, 2 Neb. (Unof.) 144. From an examination of those cases, it appears that the controlling point in each of them was that the person seeking to interpose the plea of usury was a stranger to the usurious contract, and it was held: 'A mere purchaser of the equity of redemption, being neither surety nor privy, cannot avail himself of the usurious contract of his grantor to which he is a stranger and plead usury in such contract.' Cheney v. Dunlap, supra." The same is true of our holding in a case wherein a subsequent lienholder to a mortgage loan that was usurious sought to raise this issue. See First

State Bank v. Niklasson, 116 Neb. 713, 218 N. W. 744. As therein stated: "The further contention of defendant that the note and mortgage of St. Edward bank was usurious cannot be sustained, for the reason that the defense of usury is personal to the debtor, his privies and sureties." In view of these, and other holdings of this court, we do not think the sheriff is in a position to raise the defense of usury. See, also, Fenby v. Hunt, 53 Wash. 127, 101 P. 492; Halsey v. Winant, 258 N. Y. 512, 180 N. E. 253. We think, as stated in 55 Am. Jur., Usury, § 122, p. 410, that: "The rule embraces the heirs, legal representatives, and devisees of the borrower or debtor and those who stand in the relation of sureties, guarantors, or accommodation indorsers, with respect to the tainted obligation." This classification would not include officers who attach the property of debtors for attaching creditors.

We realize there are cases to the contrary. See 55 Am. Jur., Usury, § 124, p. 411. Of these cases Marx v. Hart, 166 Mo. 503, 66 S. W. 260, 89 Am. S. R. 715, is an example. However, we do not think they come to a correct conclusion on any proper legal reasoning or logic in view of our previous holdings. It is true that the Legislature has broadened the scope of the effect of usury, as it relates to installment loans, in comparison to what it was and now is in the case of ordinary loans. See § 45-105, R. R. S. 1943. But it does not appear that the Legislature, by the enactments relating to installment loans, has extended the scope thereof as to those to whom it is available as has been previously fixed and determined by this court. If the Legislature intended to do so it could have easily done so by proper language. It is neither the privilege nor the desire of this court to do so in the absence thereof for what is usury, and the effect thereof, is a subject for the Legislature.

In view of the foregoing we find the trial court came

to the correct conclusion and therefore affirm its judgment for appellee.

AFFIRMED.

SIMMONS, C. J., dissenting.

"It is suggested that the plea of the statute is personal to the debtor, and that he cannot be compelled to plead it. On the other hand, it seems equally evident that the debtor cannot aid the creditor in defeating *his* creditors who have secured a lien upon the debt before the same was barred by the statute by such a plea. Such a holding would permit the garnishee to defeat the plaintiff, and, later on, by a plea of the statute defeat the claim of the debtor (its creditor), and thus retain the fund to which it has no legal claim." Jacoby v. Dvorak, 111 Neb. 683, 197 N. W. 428.

What the court there condemned it now embraces.

Plaintiff's alleged cause of action rests on an illegal usurious contract. It would not be permitted to recover if the Williams had pleaded the defense of usury.

The holding here permits the Williams (by inaction) "to defeat the" defendants who hold under a valid attachment and later on by a plea of usury "defeat the claim of the" plaintiff "and thus retain" the property free from the attachment of the valid creditors.

By doing nothing, the court has enabled the Williams to "defeat" the payment of their debts to the attaching creditors so far as securing payment out of this property is concerned. The defaulting debtor and the creditor holding the illegal instruments prevail.

It is suggested that the Williams can defeat the plaintiff's claim by a proper proceeding and that the creditors can *then* attach. This has two defects. First, it presupposes that the Williams will assert their rights. It leaves the attaching creditors no rights in the property if the Williams do not act. It leaves open to the attaching creditors action in the event the Williams resist the plaintiff's illegal alleged cause of action and in the event the attaching creditors can then locate and

reach the property, which is now in the custody of the court. Such a circuitous proceeding is not, in my opinion, an adequate remedy at law nor does it do justice.

The court relies on a proper rule when properly applied and that is that the plea of usury is personal to the borrower and his sureties and privies.

The court states that usury laws are "for the protection of needy borrowers, and not to punish extortion in money lenders, * * *." The rule is used here not to protect a borrower but to protect the usurer. All that is necessary here is to construe the rule so that the sheriff representing an attaching creditor is held to be in privity with the debtor as against the usurer.

The court has defined privity as meaning "Mutual or successive relationship to the same rights of property." Consumers Public Power Dist. v. Eldred, 146 Neb. 926, 22 N. W. 2d 188.

Other courts have considered this issue and have held contrary to the conclusion of the court herein. I refer to some of the other decisions that have stood the test of time. In Dix v. Van Wyck, 2 Hill (N. Y.) 522, the court said: "It has never been doubted that one who is privy in representation, as the executor—or in blood, as the heir, may set up the usury. So also may one who is privy in estate, as the grantee of him who made the usurious conveyance. * * * In short, the exception we are considering comes about to this—a mere stranger, or one who has no legal interest in the question, shall not officiously intermeddle in the matter, and take advantage of a statute which was not made for his benefit. But a creditor who has obtained a judgment and execution cannot be regarded as a mere stranger. He may seize and sell the property of his debtor, and try the title of any one who sets up a prior lien or incumbrance affected by usury."

In Thompson v. Van Vechten, 27 N. Y. 568, the court said: "The plaintiff's mortgage, being founded on an usurious consideration, was utterly void against all the

other parties having liens on the property." The court held: "Any party having a lien on a chattel may avoid for usury a mortgage claiming priority."

In Carow v. Kelly, 59 Barb. (N. Y.) 239, the court by Cardozo, J., held: "* * * the defense of usury is a personal one, and cannot be pleaded by one having neither privity of estate nor of blood with the borrower —that is to say, by a mere stranger. But a person who, like an execution creditor, asserts a lien upon the property, is not a stranger, within the meaning of the rule."

I quote these three decisions because in Stein v. Swensen, 44 Minn. 218, 46 N. W. 360, the Supreme Court of Minnesota following the New York decisions held: "It is suggested by the appellant that the sheriff was not authorized, by reason of his holding the property under attachment against the mortgagors, to avail himself in this action of the alleged invalidity of the mortgages for usury. We held that he might make that defence. It is held that the defence of usury may be made by creditors or the officer who has acquired a lien upon the property by execution. Dix v. Van Wyck, 2 Hill, 522; Thompson v. Van Vechten, 27 N. Y. 568; Carow v. Kelly, 59 Barb. 239. The legal privity in estate with the mortgagor, the owner of the property thus acquired, is sufficient to justify the assertion of the invalidity of the prior incumbrance on the property. There is no reason for a distinction in the case of liens by attachment."

In American Rubber Co. v. Wilson, 55 Mo. App. 656, it was held: "The defense of usury is a personal privilege of the debtor, his privies in representation, in blood, or in estate, as his vendee, execution creditor, or, as in this case, his attachment creditor who may defend against his debtor's mortgage on the ground that it secures usury, * * *."

This case is approved in Coleman v. Cole, 158 Mo. 253, 59 S. W. 106, and Marx v. Hart, 166 Mo. 503, 66 S. W. 260, 89 Am. S. R. 715.

Judgment creditors having a lien on the land mortgaged may set up the defense of usury against a mortgagee. Union Bank at Massillon v. Bell, 14 Ohio St. 200. See Carpenter v. Devitt, 49 Cal. App. 2d 473, 122 P. 2d 79, holding that a sheriff and creditors are privies.

In Hamilton Brown Shoe Co. v. Mayo, 8 Tex. Civ. App. 164, 27 S. W. 781, it was held that a bona fide creditor of an insolvent firm may set up usury, as against a preferred creditor, though his attachment lien is acquired after the accrual of the usurious debt.

Here the court relies upon and cites two decisions from other jurisdictions, one of which is Halsey v. Winant, 258 N. Y. 512, 180 N. E. 253. That case was decided on the basis of a particular New York statute. It has no application here as is shown by the following quotation from the opinion: "Thompson v. Van Vechten (27 N. Y. 568) was an action brought by the holder of a usurious chattel mortgage seeking injunctive relief for the appointment of a receiver and for payment into court for distribution. The defendants were lien holders under mortgages and executions on judgments. It was held that the plaintiff could not use his usurious mortgage to attack their liens.

"With the exception of Thompson v. Van Vechten, these cases are all actions at law, and in that case the plaintiff was seeking to enforce his usurious contract against lien holders." (The decision in Thompson v. Van Vechten is quoted *supra.*) I submit that Halsey v. Winant, *supra,* is no authority here.

This leaves the court for reliance on Fenby v. Hunt, 53 Wash. 127, 101 P. 492.

The six cases cited by the Supreme Court of Washington to sustain its decision in the above case may be analyzed briefly as follows: (1) Pritchett v. Mitchell, 17 Kan. 355, 22 Am. R. 287, was a case where a second mortgagee attempted to plead usury in order to defeat the first mortgage. He was held to be a "stranger to the transaction." Of this decision the Supreme Court

of Kansas has in State ex rel. Smith v. McMahon, 128 Kan. 722, 280 P. 906, 66 A. L. R. 1072, said: "* * * the ruling in Pritchett v. Mitchell, 17 Kan. 355, that the exaction of usury is a mere contractual matter of no concern to anybody but the parties themselves is imperatively in need of revision * * *." In that case the court directed the use of the injunctive process to stamp out the business of usury.

(2) Missouri Real Estate Syndicate v. Sims, 179 Mo. 679, 78 S. W. 1006. In this case a mortgagee extended the maturity of the note. He was paid usury for doing so. It was held that the creditor could not retain the payment and plead usury when sued for a breach of the contract. This case was decided on the theory that the usury laws were solely for the protection of the debtor. However, in the subsequent case of Johnson v. Grayson, 230 Mo. 380, 130 S. W. 673, the court criticized the above decision. We shall return to Johnson v. Grayson, *supra,* later. In any event the court now admits that Missouri holds contra to that decision.

(3) In Pardoe v. Iowa State Nat. Bank, 106 Iowa 345, 76 N. W. 800, on the theory that the right to take advantage of usury was personal to the debtor and on the language of a statute it was held that a usury paying debtor could not transfer his right to recover the penalty.

(4) Mason v. Pierce, 142 Ill. 331, 31 N. E. 503, holds that a judgment creditor is not in privity with a mortgagor so as to enable him to set up the defense of usury in his own behalf. It was a case, however, where the mortgagor has paid the mortgage by a conveyance of the land. The suit was one to cancel the deed and redeem.

(5) Adams v. Robertson, 37 Ill. 45. Here two debts were secured by a common mortgage. It was held that one of the creditors who had not had illegal interest taken from him and from whom none is sought cannot raise the claim of usury in behalf of a debtor against the other creditor.

(6) Bensley v. Homier, 42 Wis. 631, held that in a suit to foreclose a mortgage, a junior judgment creditor could not make the defense for himself that the mortgage was void for usury. The court limited its opinion to the precise question there presented. Of interest is the case of Bennett v. Keehn, 57 Wis. 582, 15 N. W. 776, stating first that the judgment in Bensley v. Homier, *supra,* "went upon special grounds" and holding that a grantee in a deed, where a mortgage debt was not assumed nor the amount thereof deducted, could "interpose the same defenses to the mortgage that the mortgagor might have interposed." I cite this here because of its bearing on the court's reliance on the equity of redemption rule.

In Boleman v. Citizens' L. & B. Assn., 114 Wis. 217, 90 N. W. 199, the court referred to Ludington v. Harris, 21 Wis. 239, where it was held that a grantee by quitclaim could raise the defense of usury against a mortgage, he not having agreed that "the mortgage debt shall be paid out of the land." It pointed out that Ludington v. Harris, *supra,* was decided when the statute declared the usurious contract "void" and held: "Where the contract is declared void by the statute, there is good ground for saying that anyone whose property is affected by it may take advantage of the fact." I quote this here although it directly supports my views on the last proposition advanced in this dissent.

The Washington case is a weak crutch.

The court quotes from 91 C. J. S., Usury, § 131, p. 723, stating that as a general rule general creditors are not allowed to set up usury. The court quits reading too quickly. The same authority in section 131 on page 723 states: "While there is authority apparently to the contrary (citing only Fenby v. Hunt, *supra),* according to some cases an attaching creditor is a privy in representation with the debtor in attachment and therefore may take advantage of usury in a prior transaction or

lien between the debtor and the usurer in the absence of waiver by the debtor."

But the court says: "We have often held that a purchaser of the equity of redemption cannot avail himself of the usurious contract of his grantor."

This reasoning is faulty when applied to this case. It assumes that the Williams had only an equity of redemption in the property, whereas under our decisions, referred to hereinafter, they were the owners of the entire interest in the property. We are not dealing here with an equity of redemption. One who holds merely an equity of redemption takes subject to the mortgage debt.

The rule is stated in 55 Am. Jur., Usury, § 133, p. 417, as follows: "* * * it is generally held that a plea that the mortgage is void for usury cannot be made by the purchaser of the mere equity of redemption, it being presumed that in making the purchase he took the mortgage into consideration." Cheney v. Dunlap, 27 Neb. 401, 43 N. W. 178, 5 L. R. A. 465, is cited as authority.

The reason for the rule is obvious. Its limitations and its nonapplicability to the situation here is demonstrated in National Mutual Building & Loan Assn. v. Retzman, 69 Neb. 667, 96 N. W. 204. In that case the purchaser of an equity of redemption took subject to a mortgage, "assuming balance unpaid, which may be found to be due." The parties used the language treating the "mortgage as tainted with usury." The purchaser retained out of the purchase price only enough to pay what was due "without usury." Plaintiff claimed defendant, as purchaser of the equity of redemption, was estopped to set up the plea of usury and that he not being "a privy to the contract" could not plead the defense of usury. Plaintiff relied upon Cheney v. Dunlap, *supra,* and subsequent cases, as does the court here. The court held: "We think the authorities are very clear to the effect that usury is a defense personal to the

borrower, his privies or representatives, to be waived by him but only available to him, and not to one who purchases his equity recognizing the validity of the mortgage, and retaining from the purchase price a sum sufficient to pay such mortgage in full. The reason of the rule is not far to seek. Equity declares that the purchaser under such circumstances shall not be permitted to get a larger estate than he bargained for. The rule is based in the universal requirement of good faith, so that when the owner of the equity of redemption permits a reduction from his interest of the full amount of the usurious incumbrance, he never intends this as a gift or concession to his vendee, but as a waiver of the personal defense of usury; and when the vendee takes subject to the full incumbrance, including the usury, he forfeits the defense of usury, because he has already gotten all he bargained for, and the defense of usury would give him more than that, namely, the amount deducted from the purchase price by the owner of the equity upon the belief that the full amount of the incumbrance would be paid. Equity will not aid a purchaser to get an estate at a less price than he has agreed to pay for it."

So much for the reason for the rule.

What was its application? The court held that the original mortgagor would not have been obligated to pay more than the principal sum with legal interest; the purchaser of the equity of redemption retained only enough of the purchase price to pay the debt without usury; and that *the purchaser of the equity of redemption could plead usury.* The court held there was no injustice in permitting the plea. There was no reason in the nature of an estoppel to deny the right to the plea of usury. And so here, there is no reason to deny the right of the defendants to plead usury, there is no estoppel, there is no injustice in permitting it. To deny it here is to permit the plaintiff to succeed in enforcing a usurious contract fully and completely condemned by

the statutory laws and the decisions of this court.

This reasoning also applies to First State Bank v. Niklasson, 116 Neb. 713, 218 N. W. 744, relied on by the court. The holding was: The defense of usury is personal to the debtor, and may not be successfully pleaded by the holder of a junior mortgage expressly taken subject to the mortgage to which the defense is sought to be applied.

The court in deciding this case resorts to a judicially declared rule of law. It is not a statutory rule. It is not a rule of property. It is a rule that is subject to reasonable construction and application. It has its limitations and exceptions as the above holdings demonstrate. It is a rule declared and controlled by the court. The court needs no legislative permission to do justice in this case. Up to this point we have been considering that rule of law and its inapplicability to this case.

I now turn to a legislative rule of law applicable to the loan here involved.

The Legislature has spoken in clear and unmistakable language. Under the general usury statute the contract "shall not on that account be void." § 45-105, R. R. S. 1943. Only the recovery of interest cannot be recovered in an action on the contract. The obligation to repay the indebtedness without interest is enforceable.

The court quotes part of a sentence from State ex rel. Beck v. Associates Discount Corp., 162 Neb. 683, 77 N. W. 2d 215. I quote the entire sentence, emphasizing the part not quoted by the court: "The permissive provisions of sections 45-114 to 45-158, R. R. S. 1943, apply to licensees, but every inhibitory provision contained therein applies alike to licensees and nonlicensees and the officers and employees of either or both, *and the violation thereof by such persons in connection with any indebtedness, however acquired by them, renders such entire indebtedness void and uncollectible.*"

In Johnson v. Grayson, *supra,* the court was dealing

with a statute that declared mortgages or pledges of property to secure the payment of a usurious obligation to be "invalid and illegal." Our statute and our decisions say "void and uncollectible."

A plea of usury was interposed against one who undertook to recover on a pledge of a promissory note. Material here is the holding of the court that: "Is the pledge void only upon the plea of the pledgor or his privies? Is it void only when the immediate parties to the illegal transaction desire it to be void? The statute does not say so. It says it is void 'in any case' when the validity of the lien is drawn in question. *It is not void because the immediate parties to the transaction invoke its invalidity, but because the General Assembly has said it is void. Public policy condemns it, and it matters not from what source the objection comes.*" (Emphasis supplied.)

As against a legislative declaration that any contract of loan made in violation of this section, 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 (§ 45-138, R. S. Supp., 1955, quoted in State ex rel. Beck v. Associates Discount Corp., *supra,* and McNish v. General Credit Corp., 164 Neb. 526, 83 N. W. 2d 1), the court now holds that the indebtedness is void and uncollectible *only* upon the plea of the pledgor or his privies.

The statute does not say so. The statute says that it is the violation of the usury laws that renders the indebtedness void and uncollectible. The court now says that result is to be accomplished only if the debtor or his privies wish to raise the question.

In McNish v. General Corp., *supra,* the court held it was the duty of a court to lend its aid to carry out the declared "public policy of the Legislature." The court now says it has that duty only if the debtor or his privies desire it, and that although the court held in the

McNish case that: "Public policy, as it relates to the effect of any violation of statutes dealing with installment loans by those engaged in the making thereof, *has been fixed by the Legislature and not the courts.*" (Emphasis supplied.)

Using the language of the Supreme Court of Missouri, I would hold that public policy as declared by the Legislature condemns this transaction and it matters not from what source the objection comes. In fact, in State ex rel. Beck v. Associates Discount Corp., *supra,* we did just that. In the Beck case the Attorney General pleaded usury. He sought an injunction. The right of the plaintiff to raise that issue and secure an adjudication of the validity of contracts was presented. The court answered that contention in part in holding that "all of such borrowers are regarded not as in pari delicto but as in viniculus to defendants, * * *." The court affirmed this language by a direct quote in the McNish case, and now the court holds that the captive debtor in his "chains" or his privy, must plead usury or else the public policy of the Legislature declaring these transactions void and uncollectible cannot be carried out. The captive debtor now has it in his power to render inoperative and ineffective a solemn legislative act. The court no longer says to the Legislature, "Thy will be done," but "Thy will be done if the usurer's captive chained borrower permits."

I disagree.

CARTER and CHAPPELL, JJ., concurring.

We agree with the majority opinion. However, in view of the dissent we desire to point out the fallacy of its reasoning. The general usury law of this state since 1879 has provided that if interest is contracted for, received, or reserved, in excess of the maximum fixed by law, no interest is collectible. Under the holdings of this court, only the debtor and those in privity with him could avail themselves of the benefits of this statute. Under the Installment Loan Act, if usurious interest is

contracted for, received, or reserved, neither interest nor principal is collectible. The penalty for the violation of the usury provisions has been increased, but the rule that the defense of usury is available only to the debtor and his privies has not been changed. Such a change is a proper subject of legislation and not one that properly can be made effective by judicial pronouncement.

ANNA WECKER, APPELLEE, V. THOMAS WECKER ET AL., APPELLANTS, IMPLEADED WITH MILFORD WECKER, APPELLEE.
87 N. W. 2d 624

Filed January 31, 1958. No. 34295.

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. ———. All parties to a cause tried in the district court who may be affected by the modification or reversal of the judgment must be made parties in the proceedings to review the said cause in the Supreme Court.
3. **Trusts.** The burden of proof is upon one seeking to establish the existence of a constructive trust to do so by evidence which is clear, satisfactory, and convincing in character.
4. **Trusts: Frauds, Statute of.** Trusts arising by implication, or by operation of law, are excepted from the operation of the statute of frauds. Resulting and constructive trusts therefore fall within the exception.
5. **Trusts: Fraud.** When a person obtains the legal title to an interest in real estate belonging to another by means of fraud or misrepresentation, actual or constructive, the law constructs a trust in favor of the party upon whom the fraud or imposition has been practiced. A court of equity will enforce such a trust for the benefit of the grantor or those claiming under him.
6. **Fraud.** The existence of an intent to defraud at the time the promise was made may be inferred from the failure to comply with the promise, and the promisor may be presumed to have intended, when he made the promise, to do what he finally did do with respect thereto.

APPEAL from the district court for Pierce County: LYLE E. JACKSON, JUDGE. AFFIRMED.

Hutton & Hutton, for appellants.

E. D. Beech and *Frederick M. Deutsch,* for appellees.

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

CHAPPELL, J.

Plaintiff, Anna Wecker, the surviving widow of H. A. Wecker, deceased, brought this action in equity against defendants, Thomas Wecker, a son, Lorraine Wecker, his wife, and Milford Wecker, a son, to determine the rights of the parties in a transaction which occurred on September 20, 1951. In such transaction plaintiff, who then owned a certain $5,000 note and real estate mortgage theretofore executed and delivered to her by defendants Milford Wecker and Alice V. Wecker, husband and wife, had allegedly endorsed the note, assigned the mortgage, and delivered same to defendant, Thomas Wecker, in trust for plaintiff. Plaintiff's petition alleged in substance that at that time said defendant orally agreed and promised that plaintiff would be paid and receive the interest thereon during her lifetime; that said defendant would, during that time, advance plaintiff such additional sums as might be necessary for her support and maintenance over and above her income from her life estate in certain real estate; that upon her death, said defendant would pay for and provide a funeral for plaintiff of the quality which had been furnished her late husband; and that then any part of the remaining indebtedness should become the absolute property of defendant Thomas Wecker. Plaintiff alleged that said defendant had specifically performed part of said promises as agreed, but subsequently repudiated their agreement, refused to further perform same, and claimed that he was the sole owner of the note and mortgage.

Plaintiff's action sought a determination that defendant Thomas Wecker held the note and mortgage in trust for plaintiff, together with an accounting between the parties; the appointment of a successor-trustee; a transfer of the note and mortgage to such trustee; and equitable relief.

Defendant Milford Wecker, in his separate answer filed December 6, 1956, admitted the execution and delivery of the note and mortgage to plaintiff and H. A. Wecker, her husband, or the survivor thereof, on June 16, 1947; and that upon the death of H. A. Wecker on May 26, 1950, plaintiff became the owner thereof. He then alleged substantially that on September 20, 1951, the note and mortgage were assigned and transferred to defendant Thomas Wecker in trust upon the terms and conditions set forth in plaintiff's petition; that defendant Milford Wecker paid all interest accruing upon the debt to H. A. Wecker during his lifetime and to plaintiff up to and including that due December 1, 1954; that about December 31, 1954, defendant Thomas Wecker claimed ownership of the note and mortgage and demanded that all future payments be made to him; and that since that time defendant Milford Wecker has paid defendant Thomas Wecker $2,500 upon the principal debt and all interest up to June 1, 1956, leaving a balance unpaid of $2,500 with interest at 4 percent from June 1, 1956. He prayed for an accounting of payments made by him upon the note and mortgage, a determination of ownership of the debt together with the balance due thereon, and for such other relief as the premises merited. In that connection, the judgment of the trial court discloses that the interest from June 1, 1956, to December 1, 1956, was paid on the latter date by defendant Milford Wecker to the clerk of the district court.

On February 7, 1957, defendants Thomas Wecker and Lorraine Wecker, his wife, filed a joint answer and cross-petition. Therein they denied generally and alleged in substance that no such agreement was ever

entered into by them with plaintiff; and that defendant Thomas Wecker was never a trustee of plaintiff for the note and mortgage but same was freely and voluntarily assigned by plaintiff to said defendants without either of them entering into an agreement with plaintiff to advance or give her any amounts of money, although upon stated occasions they did loan plaintiff some $975, including the interest payments made to her by defendant Milford Wecker during 1952, 1953, and 1954. Defendants also alleged that Lorraine Wecker had no present or assignable interest in the note and mortgage. However, their joint answer prayed for dismissal of plaintiff's petition at plaintiff's costs, and their joint cross-petition prayed for judgment against plaintiff for $975 and interest upon the alleged loans heretofore mentioned, and costs.

After a trial on the merits, judgment was rendered which in effect relieved and exonerated defendant Milford Wecker upon condition that he pay the clerk of the district court forthwith $50, reflecting the interest due June 1, 1957, which left a balance of $2,500 due on the note and mortgage, with interest thereon from June 1, 1957, according to the terms thereof. In that connection, there is no controversy before this court except between plaintiff and defendants, Thomas Wecker and Lorraine Wecker, who will be hereinafter designated by name or as defendants.

In such respect, the judgment of the trial court found and adjudged the issues generally in favor of the plaintiff upon her petition and against said defendants upon their answer and cross-petition. It concluded that Thomas Wecker was trustee of the note and mortgage; made a specified accounting between plaintiff and said defendants; appointed a named successor-trustee; specified his duties in carrying out the terms of the trust; ordered Thomas Wecker to formally assign the note and mortgage then in custody of the trial court to such trustee without recourse; and ordered Thomas Wecker

to pay the clerk of the district court $2,500, a principal part of the note and mortgage already collected by said defendant, together with interest thereon from June 1, 1957, at 6 percent, for which judgment was rendered against Thomas Wecker. It ordered the successor-trustee to invest said $2,500 and interest in approved, short-term securities; to administer the balance of the note and mortgage, together with the income and interest therefrom, and pay such income and interest to plaintiff; and to also pay plaintiff from the corpus of the fund such sum as was necessary for her support and maintenance over and above her other income upon the order and direction of the court. It also ordered that upon plaintiff's death, the successor-trustee should provide plaintiff with a funeral of the same quality as was furnished her late husband, then pay any balance of the indebtedness remaining to Thomas Wecker. Costs were taxed to Thomas Wecker.

Thereafter, Thomas Wecker and Lorraine Wecker filed a joint motion for new trial which was overruled, whereupon they jointly appealed, assigning that: (1) "The trial court erred in failing to dismiss Lorraine Wecker as a party defendant as to the plaintiff's cause of action when the record shows she had no interest in the action"; and substantially that (2) the judgment was not sustained by the evidence. The assignments have no merit.

The record discloses that at conclusion of all the evidence, defendants moved that Lorraine Wecker be dismissed as a party in the action for the reason that the record disclosed she had no interest in the note and mortgage. That motion was not directly disposed of, and defendants argued that the trial court erred in failing to sustain such motion. The contention has no merit.

In the application of Lorraine Wecker for a continuance, filed March 20, 1957, she insisted: "That the defendant as a party to this action is a necessary party and a necessary witness to said trial * * * relative to

the plaintiff's cause of action which is the basis of this suit." In a joint answer and cross-petition defendants did allege that Lorraine Wecker was the wife of Thomas Wecker but had no present or assignable interest in the note and mortgage. However, in said answer and cross-petition, defendants denied that they or either of them ever had any agreement with plaintiff as alleged by her, but they alleged that as the only relatives who would loan plaintiff money, Thomas Wecker and Lorraine Wecker had on various stated occasions loaned plaintiff money, including the interest on the note and mortgage for 1952, 1953, and 1954, and because thereof they jointly prayed for judgment against plaintiff for $975 and costs. The effect of the judgment rendered by the trial court was to hold only Thomas Wecker liable as constructive-trustee of the note and mortgage; to deny both defendants any relief upon their joint cross-petition; and to tax all costs to Thomas Wecker. Defendants then filed a joint motion for new trial which was overruled, and they jointly appealed, contending that the judgment was erroneous. Lorraine Wecker could not have been prejudiced in any manner by the trial court's failure to dismiss her as to plaintiff's cause of action because the effect of the judgment was to do just that. Further, in the situation presented here, plaintiff's petition and defendants' joint answer and cross-petition were necessarily interrelated, and such defendants would both be affected in material respects by any modification or reversal of the judgment.

We have held that: "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." State ex rel. Heintze v. County of Adams, 162 Neb. 127, 75 N. W. 2d 539.

Also, as held in Donisthorpe v. Vavra, 134 Neb. 157, 278 N. W. 151: " 'All parties to a cause tried in the district court who may be affected by the modification

or reversal of the judgment must be made parties in the proceedings to review the said cause in the supreme court.' Barkley v. Schaaf, 110 Neb. 223, 193 N. W. 267." The first assignment of error has no merit.

We turn then to the second assignment of error in disposing of the merits. Such cases are triable de novo, as reaffirmed in Pike v. Triska, 165 Neb. 104, 84 N. W. 2d 311.

In Musil v. Beranek, 160 Neb. 269, 69 N. W. 2d 885, this court held, citing numerous authorities: "The burden of proof is upon one seeking to establish the existence of a constructive trust to do so by evidence which is clear, satisfactory, and convincing in character.

"Trusts arising by implication, or by operation of law, are excepted from the operation of the statute of frauds. Resulting and constructive trusts therefore fall within the exception.

"When a person obtains the legal title to real estate belonging to another by means of fraud or misrepresentation, actual or constructive, the law constructs a trust in favor of the party upon whom the fraud or imposition has been practiced. A court of equity will enforce such a trust for the benefit of the grantor or those claiming under him.

"The existence of an intent to defraud at the time the promise was made may be inferred from the failure to comply with the promise, and the promisor may be presumed to have intended, when he made the promise, to do what he finally did do with respect thereto."

By analogy from that opinion, such rules would apply to and be controlling in the case at bar, wherein Thomas Wecker allegedly so obtained the legal title to an interest in real estate.

In the light of such rules, we have examined the record and conclude, upon trial de novo, that the following facts were established by clear, satisfactory, and convincing evidence: Plaintiff, Anna Wecker, had been diabetic for several years and was 74 years old at the

time of trial. She was the mother of Thomas Wecker and the surviving widow of H. A. Wecker who died intestate May 26, 1950. Lorraine Wecker was the wife of Thomas Wecker. On September 20, 1951, plaintiff was the owner of a life estate in a residence property in Osmond where she lived alone, and the owner of a life estate in a quarter section of land in Pierce County. Prior to the death of plaintiff's husband, the residence property had been deeded to two of their daughters, subject to plaintiff's life estate therein, and a described quarter section of land had been deeded to three sons other than Thomas Wecker, subject to plaintiff's life estate therein. Plaintiff also owned a $5,000 note dated June 16, 1947, due June 1, 1957, with interest at 4 percent per annum from June 1, 1947, payable semiannually, but providing for "Optional payments on any interest date of any amount." The note, payable to plaintiff and her late husband, or the survivor thereof, was signed and delivered by Milford Wecker and his wife Alice V. Wecker, who secured payment of the note by the execution and delivery of a duly recorded real estate mortgage on described farm land in Pierce County owned by Milford Wecker.

Thomas Wecker was aggrieved because he received no part of his father's estate except his share of money left in the bank, and because plaintiff had refused to pay a claim by him against his father's estate for an alleged loan made to his father during his lifetime, and such claim had been denied. Thus, he often importuned plaintiff, his mother, to have her give him the note and mortgage here involved. Plaintiff had a place to live but no money except her share of crop rentals from the farm, of which she had the life estate. Such income was not always adequate to meet her needs. Nevertheless, she was induced by defendants on September 20, 1951, to go to her bank, get her note and mortgage, and accompany defendants to the office of Thomas Wecker's attorney in Pierce. There plaintiff

endorsed the note to Thomas Wecker, executed an assignment of the mortgage to him, and delivered the note, mortgage, and assignment to Thomas Wecker, who immediately recorded the assignment. The purported consideration therefor upon its face was: "One & No/100 DOLLARS and love and affection to her in hand paid by Thomas Wecker." However, the true consideration therefor was an oral agreement between plaintiff and Thomas Wecker that: (1) Plaintiff would receive and be paid all interest accruing on the note and mortgage as long as she lived; (2) that if plaintiff's income from her farm crops was insufficient to meet her needs, he would provide her with needed money when she requested it; and (3) that he would see that plaintiff, after her death, had a funeral just as good as plaintiff's late husband had. In that connection, said defendants denied that such an agreement was ever made or talked about, but claimed that the assignment was a voluntary gift by plaintiff. In such respect, it is worthy to here note that Thomas Wecker's attorney, who handled the transaction, took no part in the trial, but was available and concededly in the courtroom from time to time during the trial, even within the last 20 minutes before the end of defendants' evidence, but he was not called as a witness by defendants.

The existence of the foregoing agreement, together with the promises of Thomas Wecker contained therein, made at the time of receiving the note and mortgage, and that he never intended to perform same, was corroborated by the actions and conduct of both Thomas Wecker and Lorraine Wecker. In that regard, after September 20, 1951, plaintiff, with the knowledge and consent of defendants, was paid and received all of the semiannual interest due and paid on the note and mortgage to and including December 1, 1954, as follows: $100 on December 1, 1951; $100 on June 2, 1952; $100 on December 1, 1952; $100 for June 1, 1953, same being $83 cash paid May 8, 1953, and $17 previously advanced;

$100 on December 1, 1953; $100 for June 1, 1954; and $100 on December 17, 1954. During all of that period Thomas Wecker never claimed to be entitled to such interest and never repudiated the aforesaid agreement in any manner, and at the trial gave no plausible explanation of why plaintiff was paid the interest aforesaid.

Further, defendants produced evidence which corroborated the fact that Thomas Wecker made the alleged oral agreement with and promises to plaintiff as contended by her at the time of receiving the note and mortgage, and that he never intended to perform the promises made by him. In that connection, between the time the note and mortgage were received by Thomas Wecker and the repudiation thereof by him in 1954, and at no other times, defendants advanced needed money to plaintiff when she requested it upon various specified occasions, which acts and conduct conformed with the agreement with plaintiff and the promises made to her by Thomas Wecker.

In late December 1954, more than 3 years after the note had been endorsed to and the assignment of the mortgage had been made to Thomas Wecker and immediately recorded by him, he wrote his brother, Milford Wecker, a registered letter claiming for the first time that he was absolute owner of the note and mortgage and that all future payments should be made to him. Milford Wecker then discussed the matter with Thomas Wecker and told him his understanding of the existing agreement of Thomas Wecker with plaintiff, his mother, whereupon Thomas Wecker equivocally admitted its existence, but said "it was her word against his."

Sometime before the June 1, 1955, interest payment became due, plaintiff learned for the first time that on February 9, 1955, Milford Wecker had paid Thomas Wecker $2,500 on the principal of the note and mortgage, and $19.45 interest to that date. It was then that Thomas Wecker unequivocally repudiated his agree-

ment with plaintiff and claimed the note and mortgage as a gift. When confronted by plaintiff with the agreement between them, Thomas Wecker responded, "that is just" plaintiff's "word against his." At the trial he never denied that such statement was made to plaintiff. However, he did deny part of the alleged conversation with Milford Wecker.

We conclude that Thomas Wecker made the oral agreement with and promises to plaintiff at the time he received the note and mortgage, as alleged by her, and that at that time he never intended to perform the promises which he finally repudiated. Therefore, the trial court properly adjudged that Thomas Wecker held the note and mortgage as constructive trustee for plaintiff; properly appointed a successor-trustee to administer same; and correctly made an accounting between the parties. Any other conclusion would permit Thomas Wecker to perpetrate a fraud upon his mother, the plaintiff.

For reasons heretofore stated, we conclude that the judgment of the trial court should be and hereby is affirmed. All costs are taxed to Thomas Wecker.

AFFIRMED.

IN RE APPLICATION OF CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, APPELLANT, V. TED BURGESS ET AL., APPELLEES.

87 N. W. 2d 630

Filed January 31, 1958. No. 34323.

1. **Railroads: Public Service Commissions.** An application by a railroad company to discontinue the operation of specified trains in passenger service, for the reason that no public need exists for the service they afford, is a matter within the scope of the powers of the Nebraska State Railway Commission.
2. **Appeal and Error: Public Service Commissions.** On appeal to

the Supreme Court from an order of the Nebraska State Railway Commission, while acting within its jurisdiction, the question for determination is whether the order is arbitrary and unreasonable.

3. **Railroads: Public Service Commissions.** In determining the necessity for continued operation of motor passenger trains on a branch line of railroad, consideration should be given to the public rather than to individuals.

4. ———: ———. A final order of the Nebraska State Railway Commission, denying a railroad company permission to discontinue motor passenger trains operated at a loss and for the operation of which no public need exists, is unreasonable and arbitrary.

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

J. W. Weingarten and *Walter P. Loomis,* for appellant.

Crosby, Pansing & Guenzel and *Leon A. Sprague,* for appellees.

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

CARTER, J.

The Chicago, Burlington & Quincy Railroad Company commenced this proceeding before the Nebraska State Railway Commission to secure permission to discontinue motor passenger trains Nos. 15 and 16, which are operated daily, between Wymore and Oxford, Nebraska, except Sunday from Wymore and Monday from Oxford. Objections were filed by Ted Burgess as the representative of the towns located on the line of railroad on which trains Nos. 15 and 16 are presently operating. The commission, after a public hearing, denied the application, and the railroad company has appealed.

There are 23 communities served by these trains on the 172.3 mile run between Wymore and Oxford. The terminal points are adequately served by other trains. Superior, the largest town served by these trains, is adequately served by other railroads, and truck and

bus lines. Many of the other communities are served by common-carrier truck and bus lines. All are on roads which are used by private automobiles and trucks in preference to the passenger service afforded. The record conclusively shows that the public has for all practical purposes abandoned the use of these trains in favor of the afore-mentioned modes of transportation.

The evidence shows that the trains are operated at a net loss to the company. In 1955 and 1956 the net losses of the company were $21,948 and $16,211 respectively. The net loss for January 1957 was $1,797. The principal source of income has been the delivery of mail under government contracts. Head-end shipments of express and cream are very small. Passenger traffic has gradually decreased to a low of 1.1 passengers per train mile in March 1957 on train No. 15, and .7 passengers per mile on train No. 16 during the same month. The company proposes, if trains Nos. 15 and 16 are discontinued, to initiate tri-weekly mixed train service between Wymore and Oxford. It is true that a few persons and businesses will be adversely affected by the discontinuance of these trains, but this is not a controlling factor where the public generally has abandoned the service. We conclude that the remaining service, including common-carrier trucks and buses, and private automobiles and trucks, in addition to the proposed tri-weekly mixed train service, is adequate to support the needs of the communities involved. Neither the evidence nor the findings of the commission show a public necessity for trains Nos. 15 and 16 as a means of transportation of passengers between Wymore and Oxford when other available services of the company and other private and common carriers are considered. A railroad company is not required to operate trains at a loss where public convenience and necessity do not require it. The evidence is without substantial dispute, and the findings of the commission to the contrary are

without evidentiary support and are necessarily arbitrary.

A complete review of the mass of evidence adduced at the hearing will serve no useful purpose and would unduly prolong this opinion. The conclusions to be drawn therefrom bring the case squarely within our holdings in In re Application of Chicago, B. & Q. R. R. Co., 138 Neb. 767, 295 N. W. 389; In re Application of Chicago, B. & Q. R. R. Co., 152 Neb. 352, 41 N. W. 2d 157; In re Application of Chicago, B. & Q. R. R. Co., 152 Neb. 367, 41 N. W. 2d 165. On the authority of these decisions we hold the order of the commission, in denying the application of the company, to be without evidentiary support and consequently unreasonable and arbitrary.

The order of the commission is vacated and the issues raised by the application are remanded to the commission for further consideration in accordance with the holdings of this opinion.

REVERSED AND REMANDED.

IN RE APPLICATION OF CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY.

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, APPELLANT, V. FARMERS UNION CREAMERY ET AL., APPELLEES.

87 N. W. 2d 616

Filed January 31, 1958. No. 34324.

1. **Railroads: Public Service Commissions.** An application by a railroad company to discontinue the operation of specified trains in passenger service, for the reason that no public need exists for the service they afford, is a matter within the scope of the powers of the Nebraska State Railway Commission.
2. **Appeal and Error: Public Service Commissions.** On appeal to the Supreme Court from an order of the Nebraska State Railway Commission, while acting within its jurisdiction, the question for determination is whether or not the order is arbitrary and unreasonable.

3. **Railroads: Public Service Commissions.** Where some inconvenience will result from the discontinuance of specified passenger trains operated at a loss, but other existent services can absorb the business handled by such trains, it is unreasonable and arbitrary for the Nebraska State Railway Commission to deny an application to discontinue such trains.
4. ———: ———. When an application is made by a railroad company to discontinue an existing service operated at a loss, the primary question to be determined is the public convenience and necessity therefor.
5. ———: ———. A final order of the Nebraska State Railway Commission, denying a railroad company permission to discontinue specified trains operated at a loss and for the operation of which no public need exists, is unreasonable and arbitrary.

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

Milton V. Thompson, Thomas I. Megan, and *Chambers, Holland, Dudgeon & Hastings,* for appellant.

Crosby, Pansing & Guenzel, Edwin T. McHugh, Arthur J. Denney, and *George P. Burger,* for appellees.

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

CARTER, J.

The Chicago, Rock Island and Pacific Railroad Company commenced this proceeding before the Nebraska State Railway Commission to secure permission to discontinue passenger trains Nos. 25 and 26 operating between Omaha and the Nebraska-Kansas state line near Thompson, Nebraska. Protests were filed by the Farmers Union Creamery and Randall's Florists of Fairbury in behalf of themselves and all others similarly situated and in behalf of the public generally. A second protest was filed by George Vogel of South Bend, William Roker of Clatonia, and Nancy Snavely, Ruth Taylor, and Mrs. Earl Keller of Alvo. The commission after a public hearing, denied the application and the railroad company has appealed.

There are 20 communities served by these trains be-

tween Omaha and the Nebraska-Kansas state line. Four of them, Omaha, Lincoln, Havelock, and Fairbury, are adequately served by other trains and competing lines. The use of private automobiles and trucks has reduced passenger traffic on these trains to a very low average. Common-carrier buses and trucks have taken their toll from the passenger and head-end services. For 1952, 1953, 1954, and 1955 the average number of passengers per train mile was 2.4, 2.7, 2.4, and 2.9, respectively. The average passenger revenue per day for these 4 years was $14.52, $15.74, $13.92, and $16.73. The average daily wage expense for the train crew for these 4 years was $133.71, $136.98, $149.97, and $143.10. The losses sustained by the company for the same 4 years are shown to be $21,277, $20,934.30, $38,452.23, and $37,746.94.

The main source of income from these two trains is the carrying of mail. The applicant is not a common carrier of mail and any alleged inconvenience with respect to the handling of mail is not relevant to the issues. In re Application of Chicago, B. & Q. R. R. Co., 152 Neb. 352, 41 N. W. 2d 157. The evidence shows that the railroad proposes to originate or extend truck service to handle business now handled as head-end service on these trains. It therefore appears that the handling of milk, cream, and express in the event of the discontinuance of these trains is adequately provided for.

There is evidence of certain individuals in the record to the effect that they would be discommoded by the discontinuance of the operation of these trains. While the evidence is proper to be considered in determining the issues, it is not necessarily controlling. It is the necessity of the public as distinguished from individuals that must receive the first consideration by this court. In re Application of Chicago, B. & Q. R. R. Co., 138 Neb. 767, 295 N. W. 389.

It is contended that, as the company shows an overall profit during the years immediately prior to the filing of the application to discontinue trains Nos. 25

and 26, they should not be discontinued. It must be conceded that the fact that these trains are operated at a loss is not the controlling factor. As a common carrier the company has the obligation of performing service necessary to meet the needs of the public. On the other hand, a common carrier is required to operate its business efficiently and economically. It is not required to operate trains at a loss where public convenience and necessity do not require it. The public convenience and necessity is the controlling factor, and where it does not exist it is the duty of the commission to eliminate economic loss by permitting the abandonment of the service resulting in such loss. The evidence in this case clearly shows that the service remaining after the discontinuance of these trains, and the service afforded by other common carriers in the territory, are adequate to meet the public need. Under such circumstances the denial of permission to discontinue passenger train service operated at a loss is unreasonable and arbitrary. In re Application of Chicago, B. & Q. R. R. Co., 138 Neb. 767, 295 N. W. 389; In re Application of Chicago, B. & Q. R. R. Co., 152 Neb. 352, 41 N. W. 2d 157; In re Application of Chicago, B. & Q. R. R. Co., 152 Neb. 367, 41 N. W. 2d 165; Chicago, B. & Q. R. R. Co. v. Order of Railroad Telegraphers, 155 Neb. 387, 52 N. W. 2d 238; Chicago & N. W. Ry. Co. v. City of Norfolk, 157 Neb. 594, 60 N. W. 2d 662. On the authority of these decisions we hold the order of the commission, denying the application of the company, to be without evidentiary support and therefore unreasonable and arbitrary.

The order of the commission is vacated and the issues raised by the application are remanded to the commission for further consideration in accordance with the holdings of this opinion.

REVERSED AND REMANDED.

CLARENCE BODTKE ET AL., APPELLEES, V. JOSEPH BRATTEN, APPELLANT.
88 N. W. 2d 159

Filed February 7, 1958. No. 34283.

1. **Evidence.** The admissibility of expert testimony to interpret, explain, or draw conclusions from photographs depends mainly upon whether such testimony will be of appreciable aid to the jury. If there is no need of expert testimony in order for the jury to understand and interpret the photograph, such testimony will not be permitted.
2. ———. If, however, a photograph cannot be relied upon as proof in itself of the objects represented or the relative proportion of such objects except through evidence of personal knowledge or scientific experience accurately to demonstrate the facts sought to be established, testimony of experts in the interpretation of the photograph is admissible.
3. **Contracts.** Generally, a party who has failed or refused to perform the terms and conditions imposed upon him by a contract, or has not been ready, willing, and able to perform same, cannot recover for a breach thereof by the other party.
4. **Trial.** The purpose of an instruction is to furnish guidance to the jury in its deliberations, and to aid it in arriving at a proper verdict; and, with this end in view, it should state clearly and concisely the issues of fact and the principles of law which are necessary to enable it to accomplish the purpose desired.
5. **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.
6. ———: ———. 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.
7. **Trial.** Where a party has produced proof tending to sustain his theory of the case, he is entitled to have such theory submitted to the jury by suitable instructions, without qualifying words calculated to mislead the jury into the belief that, although it may find the theory of such party to be true, it may return a verdict for the opposing party.
8. **Trial: Appeal and Error.** An error in an instruction is not cured by the giving of other instructions, where such error

consists, not of an omission of some material fact, but of an affirmative statement by the court which, when considered with the other instructions, tends to confuse the jury.

9. **Trial.** A trial court may not make the success of a party to the case dependent upon a hypothesis foreign to the litigation. 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.

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

Beatty, Clarke, Murphy & Morgan, Frank E. Piccolo, Jr., and *Donald W. Pederson,* for appellant.

Edward E. Carr and *Robert E. Roeder,* for appellees.

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

CHAPPELL, J.

Plaintiffs, Clarence Bodtke and Edward Summers, who were jointly interested in the business of boarding and caring for cattle for others on certain lands in Lincoln County, brought this action against defendant, Joseph Bratten, seeking to recover for breach of a contract by defendant whereby, for an agreed consideration, plaintiffs agreed to and allegedly did furnish the kind of pasturage, feed, and care which they agreed to furnish for certain cattle owned by defendant. In that connection, by answer and cross-petition, defendant sought to recover damages from plaintiffs for breach of the contract by them in failing to furnish defendant's cattle the kind of pasturage, feed, and care they agreed to furnish, which allegedly caused defendant's cattle to be injured and damaged.

Plaintiffs' petition alleged in substance as follows: That on or about June 10, 1956, plaintiffs and defendant entered into an oral contract whereby plaintiffs agreed to accept 100 cows with calves, and a herd bull, belonging to defendant, and provide such pasturage, feed, and care for them as might be necessary under the circumstances

until October 1, 1956, for which defendant agreed to pay $5 per cow and calf per month, with the herd bull being kept and cared for free of cost; that, as agreed, defendant placed such cattle in plaintiffs' pasture on June 18, 1956, and paid $500, the first month's rent, in advance; that, as agreed, plaintiffs then commenced to graze defendant's cattle by furnishing the proper pasturing and watering as good husbandry required, and continued to do so until August 8, 1956, when defendant, without just cause or permission of plaintiffs, entered upon their lands and removed his cattle from plaintiffs' custody and control, and refused to pay further for their pasturage, feed, and care, in violation of the terms of the contract; that thereafter plaintiffs diligently attempted to obtain other cattle to keep and care for until October 1, 1956, and thus mitigate the damages caused by defendant's wrongful breach of the contract, but plaintiffs were unable to do so until September 16, 1956, when they did obtain other cattle and mitigate plaintiffs' damages $95.94; and that plaintiffs fully performed as agreed, but defendant failed and neglected to do so, whereby plaintiffs suffered a loss of $1,233.24, less $95.94, or $1,137.30. Plaintiffs prayed judgment against defendant for that amount and costs.

To plaintiffs' petition, defendant filed an answer and cross-petition. Therein he denied generally, but admitted that on or about the date alleged plaintiffs and defendant orally agreed that defendant would furnish the cattle aforesaid for pasturage and care by plaintiffs during the summer of 1956 at the price alleged, and that defendant did so as agreed on or about June 18, 1956, and paid plaintiffs $500 advance pasturage thereon. On the other hand, defendant alleged that plaintiffs agreed to look after said cattle, care for them in a good and proper husbandry-like manner, and keep them upon broom and alfalfa pasturage, but plaintiffs failed and neglected to do so, which caused defendant's cattle and calves to lose weight and be stunted and damaged; that

on or about August 4, 1956, defendant became aware of plaintiffs' failure to furnish the pasturage, feed, and care as agreed, whereupon defendant told plaintiffs that he would move his cattle away unless they furnished pasturage as agreed, but they failed to do so; and that on August 8, 1956, defendant removed his cattle from plaintiffs' pasture and refused to pay plaintiffs for any further pasturage. Defendant alleged that plaintiffs' failure to provide pasturage, feed, and care as agreed damaged his cattle $3,000, and that the $500 paid plaintiffs in advance was obtained by misrepresentation and without consideration. Defendant prayed for judgment against plaintiffs for $3,500 and costs, together with dismissal of plaintiffs' action. Plaintiffs' reply to defendant's answer and answer to his cross-petition was a general denial.

Upon trial to a jury, it returned a verdict which found for plaintiffs on their petition, and against defendant on his cross-petition, and awarded plaintiffs $737.30. Subsequently, defendant's motion for new trial was overruled and judgment was rendered on the verdict, plus $5 interest and costs. Therefrom defendant appealed, assigning some 15 alleged errors, the effect of which was to contend, insofar as important here: (1) That the verdict and judgment were clearly against the weight of the evidence and contrary to law; (2) that the trial court erred prejudicially in the admission of certain evidence; and (3) that the trial court erred in the giving and refusing to give certain instructions. We sustain assignment No. 3.

A search of the voluminous record discloses that there was no material dispute with regard to the making of the contract or the details thereof, except the kind of pasturage plaintiffs agreed to furnish and the duration of the contract, although defendant admitted in his answer and cross-petition that it was "during the summer of 1956."

The primary issues for the jury were: (1) Did plain-

tiffs furnish defendant's cattle the kind of pasturage, feed, and care they agreed to furnish, and if they did so but defendant breached the contract, what amount of credit should defendant be given in mitigation of plaintiffs' alleged damages; and (2) if plaintiffs breached the contract by failing to furnish defendant's cattle the kind of pasturage, feed, and care they agreed to furnish, were defendant's cattle injured and damaged thereby, and if so, how much?

To recite the evidence in detail would serve no purpose except to unduly prolong this opinion. It is sufficient to say that the testimony of the several witnesses called by the parties was conflicting in material respects upon the foregoing issues. The evidence adduced by plaintiffs sustained their theory of recovery as alleged in their petition except with regard to the amount of mitigation, and the evidence adduced by defendant sustained his theory of defense and recovery pleaded in his answer and cross-petition. The jury heard and observed the witnesses and reached a conclusion by its verdict. It is elementary that this court has no authority to set aside such a verdict unless it is clearly wrong as not supported by competent evidence or contrary to law. Under the facts and circumstances presented herein, we conclude that the first assignment should not be sustained.

With regard to the second assignment, defendant argued that the trial court erred prejudicially in the admission of certain testimony by one Guy Baker, who had been an animal husbandman at an experimental station since 1942, and was an expert cattleman of many years experience. Plaintiffs had taken three photographs of some of defendant's cattle and calves on August 8, 1956, the time of their removal by defendant. Such photographs had been offered by plaintiffs and received in evidence without objection, and, although plaintiffs' witness, Guy Baker, had never seen defendant's cattle and calves, and knew nothing about their previous con-

dition, he was permitted, over objection, to interpret and give his opinion, from observation of the photographs, that defendant's cows were in good condition and his calves were in fair or better condition on that date.

The objections of defendant to such testimony were that it would be incompetent, irrelevant, and immaterial, and call for a conclusion of the witness, the jury being as qualified and competent to pass upon it as the witness. Objections to the admission of such testimony, and comparable motions to strike it, were overruled.

One of the primary issues for determination by the jury was whether or not plaintiffs had furnished defendant's cattle pasturage, feed, and care as agreed, so that defendant's cows would not be damaged by losing weight and having their milk dry up, and the suckling calves would not be stunted and damaged. A determination of that issue depended in large part upon the comparative condition of the cows and calves on or about June 18, 1956, when placed in plaintiffs' pasture, and on August 8, 1956, when defendant removed them from plaintiffs' pasture.

In 20 Am. Jur., Evidence, § 821, p. 691, citing authorities, it is said: "The admissibility of expert testimony to interpret, explain, or draw conclusions from photographs depends mainly upon whether such testimony will be of appreciable aid to the jury. If there is no need of expert testimony in order for the jury to understand and interpret the picture, such testimony will not be permitted. If, however, a photographic picture cannot be relied upon as proof in itself of the objects represented or the relative proportion of such objects except through evidence of personal knowledge or scientific experience accurately to demonstrate the facts sought to be established, testimony of experts in the interpretation of the photograph is admissible." We believe that the admission of such testimony of Guy Baker, about which defendant complained, was error,

which then presents the question of whether or not its admission was prejudicially erroneous. We conclude that it was not.

It will be noted at the outset that Guy Baker's testimony, about which defendant complains, was adduced by plaintiffs in rebuttal. In that connection, one Oliver L. Brittenham testified as a witness for defendant. He was a substantial rancher and cattleman of long experience, whose land adjoined defendant's, and who was familiar with defendant's cattle, having helped round them up when they were taken to plaintiffs' pasture. He testified that they were then in good shape and flesh. On cross-examination, and without objection, he was shown one of plaintiffs' photographs and asked about the condition of the calves shown therein. His answer was: "They don't look good to me." Also, on redirect, the witness was shown one such protograph, told to take a look at it, and asked to tell whether: "* * * the cattle are pretty well jammed together so you can't say much about them, aren't they?" His answer was: "They are." Further, defendant's counsel called particular attention of that witness to one white-necked calf shown in the photograph and asked: "* * * should calves like this * * * (indicating) have long hair on it in August on proper feed and with proper care?" His answer was: "If they had feed and care, they wouldn't; no."

Also, one Rich Peckham testified as a witness for defendant. He was another substantial rancher and cattleman of long experience. He was shown two of plaintiffs' photographs and, without objection, testified on cross-examination that the cows and calves shown therein didn't look good to him; they were shallow-bodied, pretty thin, and stunted. Also, defendant had taken three photographs of some of his cattle the evening of August 8, 1956, after they were removed from plaintiffs' pasture. Defendant had such photographs identified, and they were received in evidence without ob-

jection, whereupon defendant testified on redirect that such pictures represented the general condition of all of his cows that were brought home. Defendant's witness Peckham was also shown defendant's three photographs on redirect, and, without objection, was asked: "* * * if cows ought to look that way in August when they are on good substantial pasture?" His answer was: "They should not at the age these cows were." Under the facts and circumstances heretofore recited, we conclude that the admission of Guy Baker's testimony aforesaid was not prejudicially erroneous.

We turn then to the third assignment, relating to the giving and refusing to give certain instructions. In that connection, instruction No. 2 purportedly outlined the substance of plaintiffs' petition. Therein, however, no mention was made of that part which recited the kind of pasturage, feed, and care which plaintiffs agreed to furnish defendant's cattle. It simply recited, as an allegation, that: "Plaintiffs have fully performed all the covenants and conditions on their part; * * *."

Instruction No. 5 then told the jury, among other things, that the burden was on plaintiffs, before they could recover, to prove by a preponderance of the evidence: "1. That on or about the time and place stated and substantially in the manner alleged in their petition they entered into a contract with the defendant for the pasturing of defendant's stock, 100 cows, some with calves at side, and a herd bull, for the period of June 18, 1956 to October 1, 1956, at the agreed price of $500.00 per month. 2. That the defendant placed his cattle in plaintiffs' pasture and kept them there until August 8, 1956, at which time without just cause he removed said cattle. 3. * * * that plaintiffs provided the *proper and necessary care* for said cattle while in their pasture." (Italics supplied.) No suggestion was made that it was necessary for plaintiffs to prove by a preponderance of the evidence that they furnished the kind of pasturage,

feed, and care for defendant's cattle, which they contracted with defendant to furnish.

It has long been established as a general rule that a party who has failed or refused to perform the terms and conditions imposed upon him by a contract, or has not been ready, willing, and able to perform same, cannot recover for a breach thereof by the other party. Chicago, B. & Q. R. R. Co. v. Cochran, 42 Neb. 531, 60 N. W. 894; Hale v. Sheehan, 52 Neb. 184, 71 N. W. 1019. See, also, Oman v. City of Wayne, 152 Neb. 341, 40 N. W. 2d 916, citing Lang v. Todd, 148 Neb. 726, 28 N. W. 2d 434. In that connection, the foregoing rule could have been applied to plaintiffs' right of recovery on their petition or to defendant's right of recovery on his cross-petition, but the trial court erroneously failed and refused to give any instruction which correctly stated the rule and told the jury how to so apply it. In such respect, the last paragraph of defendant's tendered instruction No. 7, which was refused, correctly stated the rule, but the first paragraph thereof confined its application solely to plaintiffs' right of recovery on their petition.

Instruction No. 8-a did tell the jury that if it found, "* * * that the plaintiffs failed to furnish to the defendant the kind of pasture that they contracted to furnish and defendant's cattle was being damaged thereby, defendant had a legal right to come and get his cattle." However, instruction No. 7 given by the trial court told the jury: "* * * that a person who takes in cattle for pasturing is under a duty to exercise the degree of care which an ordinary prudent man would take or give to animals entrusted to him, and must furnish proper food and water." Such instruction was erroneous as misleading and conflicting. This is not a case wherein there was no express contract as to the kind of pasturage, feed, and care which was to be furnished defendant's cattle by plaintiffs, as in Calland v. Nichols, 30 Neb. 532, 46 N. W. 631. Also, it is not a case

wherein, without dispute, plaintiffs simply agreed to furnish defendant's cattle good pasturage, feed, and care, as in Darr v. Donovan, 73 Neb. 424, 102 N. W. 1012.

As we view it, the given instructions aforesaid were so misleading, confusing, and conflicting that the jury would not be able to understand or comprehend what plaintiffs were obliged to prove in order to recover from defendant. As recently as Egenberger v. National Alfalfa Dehydrating & Milling Co., 164 Neb. 704, 83 N. W. 2d 523, we said: " 'The purpose of an instruction is to furnish guidance to the jury in their deliberations, and to aid them in arriving at a proper verdict; and, with this end in view, it should state clearly and concisely the issues of fact and the principles of law which are necessary to enable them to accomplish the purpose desired.' Langdon v. Loup River Public Power District, 144 Neb. 325, 13 N. W. 2d 168. See, also, Barney v. Adcock, *supra*.

" '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.'

" '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.' Cover v. Platte Valley Public Power & Irr. Dist., 162 Neb. 146, 75 N. W. 2d 661. See, also, Brooks v. Thayer County, 126 Neb. 610, 254 N. W. 413.

" 'Where a party has produced proof tending to sustain his theory of the case, he is entitled to have such theory submitted to the jury by suitable instructions, without qualifying words calculated to mislead the jury into the belief that, although they may find the theory of such party to be true, they may return a verdict for

the opposing party.' Brownfield v. Union Pacific R. R. Co., 74 Neb. 440, 104 N. W. 876.

" 'An error in an instruction is not cured by the giving of other instructions, where such error consists, not of an omission of some material fact, but of an affirmative statement by the court which, when considered with the other instructions, tends to confuse the jury.' Wilch v. Western Asphalt Paving Corp., 124 Neb. 177, 245 N. W. 605."

In Barney v. Adcock, 162 Neb. 179, 75 N. W. 2d 683, this court said, citing numerous authorities: "A trial court may not make the success of a party to the case dependent upon a hypothesis foreign to the litigation. * * * 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. * * * 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." See, also, Harsche v. Czyz, 157 Neb. 699, 61 N. W. 2d 265.

It is admittedly elementary that instructions must be construed together and considered as a whole to ascertain whether or not they are prejudicially erroneous, but such construction and consideration in the case at bar only makes the situation more conflicting, confusing, and erroneous. For example, instruction No. 6 told the jury that the burden was upon defendant, before he could recover on his cross-petition, to establish by a preponderance of the evidence: "1. That the pasture furnished by the plaintiffs for defendant's cattle was inferior to the pasturage agreed upon to be furnished by plaintiffs, and that defendant's cattle could not live and thrive upon said pasturage; and that by reason thereof the defendant sustained damages in loss

of weight of his cattle, and the amount thereof.

"2. And for the $500.00 first month's rent paid.

"Should you conclude from *all the evidence* and under these instructions that the defendant has established each and all of the above and foregoing propositions by a preponderance of the evidence, then your verdict should be for the defendant on his cross-petition for whatever amount he has established.

"Should you conclude from *all the evidence* and under these instructions that the defendant has failed to establish the above and foregoing propositions by a preponderance of the evidence, then your verdict should be for the plaintiffs on the defendant's cross-petition or counter-claim." (Italics supplied.)

Said instruction No. 6 was not prejudicially erroneous because it failed to give defendant the benefit of plaintiffs' evidence, if any, which tended to prove the allegations contained in defendant's answer and cross-petition as argued by defendant, because that instruction and several others as well could reasonably be construed to properly advise the jury that defendant was entitled to the benefit thereof.

However, instruction No. 6 was prejudicially erroneous because part 2 heretofore quoted was entirely unintelligible by jurors. In view of the fact that the judgment is reversed and the cause is remanded, we conclude that part 2 should not have been given in any event. In such respect, defendant's cross-petition sought recovery of damages from plaintiffs for breach of contract, and not for rescission thereof. Under the facts and circumstances appearing herein, the measure of defendant's damages, if any, would be what defendant's cattle were impaired and depreciated in value by plaintiffs' failure to perform as agreed. In other words, the measure of defendant's damages, if any, would be the difference between the value of defendant's cattle on August 8, 1956, and what their value would have been at that time had plaintiffs furnished the pasturage, feed,

and care which they contracted to furnish. The trial court did not so define the measure of defendant's damages in any instruction, and confused the jury in instructions Nos. 6, 8-b, and 10 with regard to the $500 advance monthly rent paid by defendant, which he was not entitled to recover under the facts and circumstances presented in this case. Defendant did not cite any authority and none has been found which would have sustained any recovery of the $500 aforesaid.

Also, contrary to defendant's contention, he would not be entitled, under the facts and circumstances appearing in this case, to mitigate plaintiffs' damages in the amount of $200 or any other amount alleged to have been received by plaintiffs for pasturage after October 1, 1956. Defendant has not cited any authority and we have found none which would sustain the allowance of such mitigation.

In that connection, instruction No. 6-a permitted the jury to mitigate plaintiffs' damages $400 allegedly received by plaintiffs for other pasturage after August 8, 1956, and prior to October 1, 1956, and the jury gave defendant credit therefor in its verdict, of which plaintiffs make no complaint here. However, since the judgment is reversed and the cause is remanded, it should be said that the question of the allowance of such credit was for the jury but such allowance was erroneously predicated upon a finding from a preponderance of the evidence that it would be necessary for plaintiffs to use pasture No. 1 a second time in pasturing defendant's cattle before October 1, 1956. On the other hand, instruction No. 9 was erroneous as entirely in conflict with instruction No. 6-a. In that regard, instruction No. 9 told the jury that if it found for plaintiffs, "* * * then their amount of recovery would be the balance of the money due under the contract, less a credit of $95.94."

Defendant also complained that instruction No. 8-c was erroneous. We do not agree. With regard thereto, it is sufficient to say that the giving of such instruc-

tion, under facts and circumstances comparable with those presented herein, was approved by this court in Loomer v. Thomas, 38 Neb. 277, 56 N. W. 973. See, also, Uhlig v. Barnum, 43 Neb. 584, 61 N. W. 749.

Other matters were presented and argued in the briefs, but they require no discussion or determination. For reasons heretofore stated, we conclude that the judgment of the trial court should be and hereby is reversed and the cause is remanded. All costs are taxed to plaintiffs.

REVERSED AND REMANDED.

SIMMONS, C. J., participating on briefs.

IN RE APPLICATION OF THE SKEEDEE INDEPENDENT TELEPHONE COMPANY, ST. EDWARD, NEBRASKA. SKEEDEE INDEPENDENT TELEPHONE COMPANY, APPELLANT, V. FARM BUREAU ET AL., APPELLEES.

87 N. W. 2d 715

Filed February 7, 1958. No. 34308.

1. **Public Utilities.** While the state may regulate with a view to enforcing reasonable rates and charges, it is not the owner of the property of public utility companies and is not clothed with the general power of management incident to ownership.
2. **Public Service Commissions.** The Nebraska State Railway Commission has the duty to give full, adequate, and fair consideration to the claims of an applicant for rate increases. The applicant has the right to require that that be done.
3. **Public Service Commissions: Appeal and Error.** On appeal to the Supreme Court from an order of the Nebraska State Railway Commission, while acting within its jurisdiction, the question for determination is the sufficiency of the evidence to prove that the order is not unreasonable or arbitrary.
4. **Public Utilities.** A public utility is entitled to rates for its service that may normally be expected to yield a fair return upon the reasonable value of the property that is being used for the public convenience.

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

O'Hanlon & O'Hanlon, for appellant.

Earl Hasselbalch, for appellees.

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

SIMMONS, C. J.

This is an appeal from an order of the Nebraska State Railway Commission granting in part, and subject to condition, an application of the Skeedee Independent Telephone Company for an increase in rates. The above parties will be referred to herein as the commission and the applicant.

The applicant appeals. We reverse the order of the commission and remand.

Applicant filed its application with the commission on August 7, 1956. Over 5 months later on January 16, 1957, the commission set the matter down for public hearing at St. Edward, Nebraska, to be held on January 29, 1957. Applicant filed an amended application, bringing fact and figure allegations to date, on January 18, 1957.

The application was based on the contention that substantially increased rates for telephone service were necessary to meet increased wage requirements of plant and traffic personnel, taxes, depreciation, and interest requirements on borrowed money, and to provide a reasonable return to investors.

The hearing on January 29, 1957, appears to have taken most of the day. Eight days later on February 6, 1957, the commission made a finding that it had considered the application, filings, and evidence, and denied the application on the ground that the proposed rates were not in the best interests of the public. The commission made no findings of fact on any of the matters advanced by the applicant to sustain the increased rates. The hearing was before an examiner. There is no examiner's report or recommendation shown. The

testimony given at the hearing was transcribed and submitted to the commission and the applicant on April 6, 1957, 2 months after the above denial order was entered.

Rule 4.7 of the Rules of Practice and Procedure before the commission (effective October 15, 1950), provides for an examiner's report and recommendation to be served upon the interested parties, and a 10-day period for parties to file and serve exceptions thereto. And: "If no exceptions are filed within ten days after the mailing of the Examiner's report and recommendation, the Commission will consider same and render its decision." Obviously this rule was not observed by the commission.

On March 1, 1957, the applicant moved for rehearing and reconsideration. No ruling on the motion appears in the transcript. On April 15, 1957, the commission set the matter for rehearing at St. Edward on June 11, 1957. It was again heard before an examiner. The transcript of the testimony was certified by the reporter on August 16, 1957. No examiner's report or recommendation appears in the transcript. Nevertheless, the commission on July 2, 1957, entered an order reciting that it had considered the application and the evidence adduced at the hearing and rehearing. It made no findings of fact on any matter advanced by the applicant to sustain an increase of rates.

It did find that the applicant should be authorized to increase its rates so as to produce an additional gross revenue of $2,539.02 "with which to increase employees wages" as set forth in exhibits offered by applicant. It authorized the increased rates to that extent, subject to that condition, and otherwise denied the application.

The applicant appeals from that order.

A mere recital of this record is sufficient to show that the commission's acts, violating its own rules made for its own proceedings and violating those rules made

by it for the protection of the rights of an applicant, were unreasonable and arbitrary. The applicant, for all this record shows, was accorded no hearing before the commission. The commission listened to no argument (section 75-402, R. R. S. 1943); it made no finding of facts; it gave the applicant no reason for its action; and it provided no basis for a review of findings of fact.

At the first hearing the applicant offered evidence of its financial position and its needs for more revenue to meet wage increases, increased maintenance items, some modernization of its system, interest payments, and returns to its investors. Those resisting the application did not challenge the correctness of the figures or conclusions. The resistance was premised on a drought in the agricultural region served by applicant, with its resultant economic recession and the contention that subscribers should not be required to pay more for service due to the economic condition of the patrons, not the applicant.

At the second hearing, applicant offered evidence that it had operated at a loss for three out of the first four months of 1957; that its rate of return on its investment would be 1.61 percent and, on the proposed rates, 3.17 percent. It offered evidence that the commission had approved rate applications of other companies allowing a return of in excess of 6 percent figured on the same base rate as that of the applicant, and had approved applications authorizing service charges as great or greater than those sought by applicant. Applicant also offered evidence showing substantially increased cost of material items that go into maintenance, modernization, and extension of their system. Those resisting the application did not controvert those figures in any way.

The applicant offered evidence that the proposed wage increases would absorb from 65 to 70 percent of the anticipated increased total revenue. The commission allowed a rate increase sufficient to meet the require-

ment. It marked the funds as to be used for that purpose only.

In doing so it invaded the province of management. It also denied applicant any relief on the other matters involved in the application.

The order of the commission authorizing a limited rate increase, subject to the condition, in effect was an order fixing wage scales at the proposed rates set out in the applicant's evidence as a foundation for its need of additional revenue. It in effect directed the payment of that wage scale. It was the only item advanced by applicant that was not seriously resisted by those opposing a rate increase.

We have been cited to no authority (and find none) which authorizes the commission to fix wage scales or direct expenditures of funds for a particular purpose. In State of Missouri ex rel. Southwestern Bell Telephone Co. v. Public Service Commission, 262 U. S. 276, 43 S. Ct. 544, 67 L. Ed. 981, 31 A L. R. 807, it was held that "while the State may regulate with a view to enforcing reasonable rates and charges, it is not the owner of the property of public utility companies and is not clothed with the general power of management incident to ownership."

It is obvious that the part of the order conditioning the expenditure was unauthorized, unreasonable, and arbitrary.

The effect of the order is to find that there was need for more revenue so that the applicant could increase its wage and salary payments. To that extent the commission accepted, at full value, the undisputed evidence of the applicant.

Likewise the effect of the order is to find that there was no need for more revenue so that the applicant could meet the needs of its property for maintenance, betterments, and extension of service. Also that there was no need for more revenue to meet the applicant's fixed charges such as taxes and interest. Also that

there was no need for more revenue to meet the payment of an adequate fair return to its stockholders. As to these three areas of need, the evidence was unchallenged. The commission denied any relief to the applicant without an examiner's report, without a hearing by the commission, and apparently without access to the transcript of the evidence. The evidence as to need for increased rates in these three areas is just as clear and convincing as it is in the area of need in wage and salary increases. The duty of determining what conclusion should be made as to those matters rests upon the commission. The commission has the duty to give full, adequate, and fair consideration to the claims of an applicant for rate increases. The applicant has the right to require that it be done.

Generally, the items advanced as a basis for a wage increase involve consideration of factual matters. As to those we express no opinion as to whether they should be considered as necessary in whole, in part, or at all. The commission should consider each of the several items and make findings of fact thereon. In that way if the applicant is dissatisfied, we, on appeal, may consider the matter in the light of the rule that: On appeal to the Supreme Court from an order of the Nebraska State Railway Commission, while acting within its jurisdiction, the question for determination is the sufficiency of the evidence to prove that the order is not unreasonable or arbitrary. Chicago, B. & Q. R. R. Co. v. Keifer, 160 Neb. 168, 69 N. W. 2d 541.

The evidence here does not meet that test.

There is evidence here which, without dispute, demonstrates that the commission's finding denying any rate increase applicable thereto was unreasonable and arbitrary.

A public utility is entitled to rates for its service that may normally be expected to yield a fair return upon the reasonable value of the property that is being used for the public convenience. Marquis v. Polk County

Telephone Co., 100 Neb. 140, 158 N. W. 927; Omaha & C. B. St. Ry. Co. v. Nebraska State Railway Commission, 103 Neb. 695, 173 N. W. 690.

Here there is no question about the base determination of value of the property that is being devoted to public use. There is no question about the return that the rates required by the commission may normally be expected to yield. There is no question about the amount that the applicant may be able to pay to its investors. There can be no question that it is not a fair return on invested capital.

The order of the commission is clearly wrong. It is reversed and the cause remanded.

REVERSED AND REMANDED.

FRANCES GROSSE, APPELLEE, V. SIEGFRIED GROSSE, APPELLANT.
87 N. W. 2d 900

Filed February 7, 1958. No. 34321.

1. **Trial.** A litigant is obligated to prepare for the trial of his case and to meet the issues thereof at the trial. If he fails in this respect he cannot be heard to complain.
2. ———. The law will not intervene to assist a litigant who has not exercised due diligence to prevent the result of which he complains and which is attributable to his own neglect.
3. ———. It is the policy of the law to afford a litigant an opportunity to prosecute or defend his case in court. If he has had this privilege and deliberately or negligently does not avail himself of it he cannot have another or further trial of the case.
4. **Evidence.** A litigant should not be permitted to cross-examine a witness on a matter foreign to the scope of his direct examination.
5. **Evidence: Appeal and Error.** A ruling of the trial court in regard to the scope of cross-examination will be sustained unless it is an abuse of the discretion accorded the court.
6. **Evidence.** The receiving in evidence of a copy of an instrument as secondary evidence is erroneous in the absence of proof

that the original was in fact executed, that it is not available, and that the offered instrument is a true copy thereof.

APPEAL from the district court for Johnson County: VIRGIL FALLOON, JUDGE. *Affirmed as modified.*

Philip F. Nestor and *Ginsburg, Rosenberg & Ginsburg,* for appellant.

Robert S. Finn and *Dwight Griffiths,* for appellee.

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

BOSLAUGH, J.

The subject of this litigation is a divorce, settlement of property rights, and statutory allowances. Appellee by an amended petition presented in substance these matters: The parties were married August 31, 1928. Their legal residence was Johnson County. The two children of the parties have attained more than legal age. Appellee has been faithful to and performed her marital and maternal obligations toward appellant and the children of the parties. Appellee has performed without assistance the duties of caring for the household of the parties in a proper manner and has for a period of about 24 years assisted appellant in the operation of the business managed by him by performing office work, keeping books containing the records of the business, waiting on customers, and frequently doing the character of work that a male employee would have done in connection with the business. Appellee contributed as much effort and service as appellant did in the acquisition and accumulation of the property owned by the parties to this cause. Appellant has, in disregard of his obligations to appellee, indulged in cruel and inhuman conduct, both physical and mental in character, toward appellee. Specifically, appellant on the evening before Mother's Day about 3 years before the commencement of this action, on Labor Day about 2 years before this case was instituted, and on January 11, 1957, assaulted,

struck, beat, wounded, and injured appellee. The mental cruelty inflicted by appellant on appellee consisted of profane and abusive language, unnecessary display of jealousy without reason therefor, untruthful charges of improper conduct of appellee, the absenting of appellant from the home of the parties especially at night and his irregular times of return, sullenness, and complete disregard by appellant for the home life of the parties. Appellant, after each of the first two assaults and beatings inflicted upon appellee as stated above, importuned her forgiveness and appellant made promises he would not again be unkind or cruel to her. Appellant begged appellee to remain in the home and continue as his wife. Appellee on each occasion accepted the request of appellant and his representations and promises of good behavior as sincere. She relied thereon, remained in the home of the parties, and resumed and continued to live with appellant as his wife. Misconduct of appellant toward appellee caused her to become disabled in body and mentally ill with the result that she could no longer continue as the wife of appellant. The parties by their joint efforts since their marriage accumulated and acquired real and personal property of the value in excess of $100,000. Appellee asked the court to award her an absolute divorce, an equitable property settlement, and statutory allowances.

The answer of appellant to the amended petition of appellee admitted the marriage and residence of the parties as stated by her and that they were not the parents of any child of less than legal age. Appellant alleged appellee had been guilty of the same misconduct toward him as she had charged against him. He said she had a violent and ungovernable temper, had on many occasions attempted to inflict injury on the body of appellant by beating and hitting him with various objects, and had forced him to protect himself from an assault by her. He charged that appellee had been quarrelsome and abusive; that she had made untrue

accusations concerning the conduct of appellant without provocation or basis of fact; and that appellee had frequently indulged in excessive use of alcoholic liquors to the embarrassment, concern, and anguish of appellant. The facts pleaded, asserted the appellant, precluded appellee from a divorce or any equitable relief.

The contents of the cross-petition of appellant are not required to be recited because no evidence was offered at the trial in support thereof.

The reply of appellee denied the affirmative allegations of the answer of appellant except the admissions therein.

The trial of the case resulted in a decree in favor of appellee, the settlement of the property rights of the parties, an award of property and alimony to appellee, and an allowance of compensation for her counsel. A motion for a new trial made by appellant was denied and he by this appeal contests the correctness of the judgment of the trial court.

Appellant was not present nor did he offer his testimony in any manner at the trial of the case. He was represented by counsel and they participated for appellant in the trial by making a statement at the commencement thereof, making objections to evidence offered by appellee, cross-examining the witnesses presented by her, entering into stipulations, and calling and examining a witness on behalf of appellant. There was no objection by appellant as to the time of the trial and no application by him for a delay or postponement of the time of the trial of the case. His absence from and nonparticipation personally in the trial were deliberate and with knowledge of all pertinent facts. His counsel in the statement made at the opening of the trial stated, according to a showing contained in the record, that appellant would probably not appear and would probably not offer any evidence in support of his answer and cross-petition because he did not wish to embarrass his wife by presenting evidence in support of his allega-

tions. Counsel for appellant then stated that he assumed that since the evidence would not be contradicted by appellant, the appellee would be awarded a divorce.

Appellant, after the district court had rendered a judgment in the case adverse to him, made application for leave to withdraw his rest made at the conclusion of the trial and for permission to produce additional evidence. The reason given by him for not presenting all the evidence he had at the trial was that he was induced to refrain in that respect because he was improperly influenced by appellee. He asserted he had evidence to establish the statements of his pleading but he did not present it at the trial because of representations and assurances made to him by his wife that if he would not appear or produce evidence of his alleged defense and cross-action, she would effect a reconciliation with him but if he did there would be no possibility of a reconciliation of the parties. He said these were made to and did induce him not to personally appear and participate in the trial and that appellee intended not to honor the promises, representations, and assurances previously given him but that she intended to and did defraud him. Immediately after judgment in the case was rendered appellee refused to permit appellant to be in her presence and advised him that she would have nothing to do with him in the future.

The trial court denied the leave and permission requested by appellant. He raised the alleged misconduct of appellee at the trial in his motion for a new trial of the case. The motion was overruled. Appellant made a showing and offers of proof tending to establish the promises, assurances, and representations alleged to have been made by appellee in this regard but he was not in any way corroborated. She denied the claims of appellant. Appellee presented evidence of numerous persons that appellant had stated to each of them that he did not intend to and would not attend the trial of the case. Appellant complains of the denial by the court

of his application for permission to withdraw his rest and produce additional evidence in the case and the denial of his motion for a new trial as constituting prejudicial error.

Kasai v. Kasai, 160 Neb. 588, 71 N. W. 2d 105, was an action for divorce. The defendant therein was the husband of the plaintiff. He was represented by counsel, filed an answer and cross-petition, and he and his counsel were present in court on the morning of the day the case was to be tried. He caused his attorney to withdraw his appearance and defendant withdrew his answer and dismissed his cross-petition. At the request of the attorney for the wife it was expunged from the record. The wife was granted a divorce and property was awarded her as she claimed in her petition. The defendant within 6 months made an application in the case to have the judgment set aside because, as he alleged, it was obtained by the fraud of the wife and by perjured testimony. The parties had negotiated the day of the judgment before it was rendered. They disagreed as to what was said. The court denied the application of the husband. It is related in the opinion: "There is no corroboration whatever for defendant's story. All later circumstances tend to support the one told by plaintiff. For example, the decree entered on the very day of the alleged promise quieted title to all the property in plaintiff. This was contrary to what plaintiff had promised if defendant's story is true * * *. Where a default has been regularly entered, as it was in this case, it is largely within the discretion of the trial court to say whether the defendant shall be permitted to come in afterwards and make his defense and, unless an abuse of discretion is made to appear, this court will not interfere."

The reason given by appellant at the commencement of the trial for his personal nonappearance was that he "did not wish to embarrass plaintiff by offering evidence in support of his allegations." This is the only reason

he assigned therefor until after the judgment was rendered. The following statement from the case above quoted is appropriate here: "Defendant's statement that plaintiff's reason for promising to pay him $10,000 to withdraw was her desire to avoid a scandal questions itself when it is remembered that he had already filed in the clerk's office, open to public inspection, his cross-petition containing all of the scandalous material that he relied upon and there was no way she could have been relieved of scandal."

If an issue of fact exists in a pending case, a litigant must anticipate that his adversary will produce proof to establish the averments of his pleading and that he desires to obtain and keep what he has asked the court to give him. The litigant may not deliberately withhold proof he has or knows of and take his chances on a favorable result until an adverse judgment has been rendered against him and then successfully seek a further trial of the issue. It is the policy of the law to give every litigant an opportunity to prosecute or defend his case in court. If he has had an opportunity to do this and deliberately or negligently does not avail himself of it, he cannot obtain a retrial or a further hearing in the case. The law will not generally intervene to assist a litigant who has not exercised due diligence to prevent the results of which he complains and which were attributable to his own fault or negligence. This court said in Davies v. DeLair, 148 Neb. 395, 27 N. W. 2d 628: "But there must be an end to litigation and therefore there is an obligation on the part of litigants to prepare for the trial and to be ready to meet the issues when tried and if they fail to do so they cannot later be heard to complain." See, also, Secord v. Powers, 61 Neb. 615, 85 N. W. 846, 87 Am. S. R. 474; Kielian v. Kent & Burke Co., 131 Neb. 308, 268 N. W. 79; Roberts v. Roberts, 157 Neb. 163, 59 N. W. 2d 175. The character of the case and the primary relief sought were the antithesis of reconciliation. The conduct of

appellee in prosecuting the case was a warning to appellant which he could disregard only at his peril that appellee had no desire for or intention of a reconciliation. The court did not abuse its discretion in denying appellant leave to withdraw his rest or in deciding that appellee was not guilty of misconduct in the trial of the case.

It is argued by appellant that the trial court was wrong in excluding the interrogatories propounded by appellant to appellee and the answers thereto made by her. There were 10 interrogatories. Appellee answered several of them and she timely filed written objections to each of the unanswered interrogatories. Appellant offered in evidence the interrogatories and the answers to the ones to which appellee responded. Appellee objected that the use of interrogatories is limited by statute, that the offer was improper because appellee was present, that she had been examined and cross-examined, and that she was available for any further proper examination. Whereupon counsel for appellant stated to the court: "My purpose in offering the interrogatories was that there were ten interrogatories, and she saw fit to answer only six of them." Counsel for appellee then advised the court that appellee had filed objections to the interrogatories not answered and the objections had not been heard or decided. The court excluded the offer made by appellant. The testimony of appellee when she was examined and cross-examined agreed with the answers she gave to the interrogatories to which she responded. The conclusion is justified that the purpose of the offer was to cross-examine appellee concerning the unanswered ones. This would not have been proper procedure. Section 25-1267.37, R. R. S. 1943, provides in part that answers to interrogatories to which objections are made shall be deferred until the objections are determined. Appellant could have examined appellee as a witness on any pertinent subject. In any event the record in this case fails to indicate that

appellant suffered any prejudice because the offer was rejected.

Appellant complains that the trial court unduly restricted the cross-examination of appellee. The basis of this is that the court sustained objections to inquiries made of appellee during the cross-examination concerning conversations between appellant and appellee relating to the subject of a reconciliation of the parties. The objections were that it was not cross-examination because the inquiries had no relation to the direct examination of the witness; that they concerned no issue in the case; and that they were not competent, relevant, or material. There was no mention of the subject of the inquiries during the direct examination of the witness and consequently the objection on that ground was valid. Appellant says in argument that appellee said she had no conversation with appellant after the incident of January 11, 1957. This is an inaccurate estimate of her testimony. What she said was that there was no conversation by the parties concerning the incident of January 11, 1957, after it happened and not that they had not conversed at all after that event. There was no statement in or any issue of reconciliation made by the pleadings in the case. Abuse of discretion by the trial court in its action in this respect does not appear from the record. It was not permissible for appellant to pursue a collateral matter as a basis of subsequent contradiction or impeachment of the witness. The opinion in Griffith v. State, 157 Neb. 448, 59 N. W. 2d 701, declares: "If a witness is cross-examined on a matter collateral to the issue he cannot as to his answer be subsequently contradicted by the party putting the question. * * * The trial court in this instance strictly observed and properly applied the rule of practice that a party should not be permitted to cross-examine a witness as to a matter foreign to the scope of his direct examination. * * * The rule of strict cross-examination has been adopted and is in force in this state. The rul-

ing of the trial court in regard to the scope of cross-examination will be sustained unless it is an abuse of discretion." Appellant was not unduly restricted in the examination of appellee in the respect urged by this assignment.

It is asserted by appellant that there was error in the action of the court in refusing the offer in evidence of a document referred to in the record as "Schedule C." It is said, but not otherwise verified, that this was a part of a copy of the 1956 income tax return of the Grosse Produce Station. Schedule C did not purport to be an original instrument. It was unsigned. The original was not accounted for or shown not to be available. There was no proof that if there was an original it was executed by any person. These matters were likewise true as to the alleged instrument or document of which Schedule C was said to be a part. The hypothesis of appellant is that the instrument offered was admissible because the inquiry propounded the witness was: "You supplied those figures to your husband, didn't you?" Her answer thereto was: "Yes, they look familiar." The witness first saw the instrument when it was shown to her in the course of her examination. She testified that she did not recognize or identify the figures contained in the instrument as any within her knowledge, that she could not say she knew that they were correct, and that she had never seen the 1956 income tax return made by the Grosse Produce Station. The offer was secondary evidence without compliance with the legal foundational requirements. These were recorded in National Fire Ins. Co. v. Evertson, 153 Neb. 854, 46 N. W. 2d 489, as follows: "The receiving in evidence of a copy of a written agreement as secondary evidence is erroneous in the absence of proof that the original was in fact executed, that the original is not available, and that the offered instrument is a true copy thereof." See, also, Powell v. Anderson, 147 Neb. 872, 25 N. W. 2d 401. The foundation was not sufficient to require the

court to receive in evidence the instrument designated "Schedule C."

The specifications of the motion of appellant for a new trial discussed by him on this appeal have each been considered and disposed of in the foregoing. The other assignments of the motion have been considered in connection with the contents of the record. This appeal must be considered and decided de novo upon the record by this court without being influenced by the findings or action of the trial court. The conclusion on this phase of the appeal is that the action of the trial court is correct in refusing to grant appellant a new trial of the case. Jensen v. John Hancock Mutual Life Ins. Co., 145 Neb. 409, 16 N. W. 2d 847, was an action for a new trial because of alleged newly discovered evidence. The court appropriately remarked therein: "Applications for a new trial are entertained with reluctance and granted with caution, because of the manifest injustice in allowing a party to allege that which may be the consequence of his own neglect in order to defeat an adverse verdict * * *."

The primary objective of this litigation was to obtain an adjudication divorcing appellee as the wife of appellant. The record contains a considerable volume of evidence attributing serious misconduct and inexcusable omissions of appellant in support of the charge and conclusion of extreme cruelty inflicted by him upon appellee. This court is relieved from an extensive and detailed recital in this regard because there is no issue on this appeal that the award by the district court of an absolute divorce is not sustained by the evidence. A reference to the proof as to three incidents will be sufficient on this phase of the case. The substance concerning these as related by appellee at the trial July 8, 1957, is as follows:

The first occurred 4 years ago on the Saturday night before Mother's Day. The parties had worked at their place of business that day and until about 11 p. m.

They drove around in their automobile for a time before going home. When they arrived there and were closing the garage doors appellant without warning struck appellee. She got away from him and reached the outside door of the home. Appellant grabbed her, threw her out into the yard, and injured her so that she could not get up from where she was prostrate on the ground. Appellant left her and entered the home but soon returned to where she was and demanded that she get up, stating to her that she was not hurt. When she did not respond to his command he kicked her. He left her a second time and went into the house. Later he returned and helped her up. She had a fractured collar bone and bruises. She was taken to a doctor the next morning where she was examined and an X-ray was taken. She was assisted during her recuperation period of 6 weeks by a doctor and a neighbor, Mrs. Suhr.

The second of the incidents referred to above happened 2 years ago last Labor Day when the parties were returning from a fishing trip and when they were about a mile from Tecumseh. Their wedding anniversary was the day before. Appellant purchased for appellee a deep fryer at Auburn about a week before which he had been promising to do for some 10 years. Appellee did not show much interest in the gift. He remarked as they were driving along the road that she did not like her present. She replied that she would have liked it better if he had bought it at Tecumseh where they lived and were in business. He brought the automobile to a stop and said: "That's it," and struck her. She got out of the car. He came after her. She had a flashlight in her hand and she hit him with it. She walked home a mile west and a mile north. He attempted to overtake her. She was fearful of further violence and injury and to avoid him she got under a fence and hid. She suffered a black eye, a substantial cut on the back of her head 2 or 3 inches in length,

and bruises from the violence of appellant on that occasion. The cut on her head bled profusely. She had blood on her head, face, and clothing. Her hair was matted with blood. Mrs. Suhr, her neighbor, came to the home of appellee and assisted her. She washed off the blood, cut the hair from around the wound on her head, and administered medication. It required 3 or 4 weeks for appellee to recover from her injuries. During that time she did not leave the home.

Appellant after each of the attacks he made on appellee as above related importuned and begged her to forgive him and he assured her he would not hit or wrong her again. She believed, relied upon, and accepted what he said as sincere and because thereof she continued to live with him as his wife.

The last of the three incidents was on the night of January 11, 1957, in their home. Appellant left the home after the evening meal. Appellee finished her household duties and retired. She was asleep when he returned in the early hours of the morning. The noise he made awakened her. She arose and went to the room where he was. She was greeted with a motion like he was going to strike her. When she came to she was on the davenport covered with blood and appellant was on the floor with a pan of water washing up blood which had flowed from her injuries. The room was a large one, 18 feet square. The davenport was on the east. There was a table in the center of the room. She found her upper denture in the northwest corner of the room, fractured in pieces. Her watch was on the floor under the table in the center of the room and it had stopped at 1:20 a.m. She was knocked unconscious. She had a large cut on the front of her head slightly to the right and just above the hairline. It was about 3 inches long and quite deep. Her right eye was black and the left side of her face mutilated down into her neck. The left eye was full of blood. The left side of her face became black and swollen. She

suffered a severe injury to her cheekbone. Appellant left her in that condition and went to bed. She did what she could to care for herself. Mrs. Suhr came to the home of appellee and assisted in caring for her. She consulted a doctor and a dentist repaired her denture. Appellee did not leave her home for 5 weeks because of her injuries. She testified it was habitual with and characteristic of appellant not to threaten violence or to give warning before striking her.

Appellee was abundantly corroborated by her neighbor, Mrs. Suhr, the doctor, and the dentist. The parties did not associate after January 11, 1957, as husband and wife. Appellee refrained from taking legal action at once because her son and his family were coming home for a last visit before he was to leave for overseas duty as a member of the United States Air Force. The separation was effectuated February 19, 1957, and on that date this litigation was commenced. The evidence sustained the adjudication of the district court awarding appellee an absolute divorce from appellant.

The parties were without property at the time of their marriage. The acquisitions and accumulations of property that have been made during the almost 29 years of the marriage were the result of the labor, effort, and contributions of each of them. There are variations in the estimate of the value of the different parts of the property. The appellee does not seek to have the award made to her in the settlement of the property matters by the trial court disturbed. She asks that the judgment be affirmed by this court except she seeks a determination of the ownership of the crops growing on the 240-acre farm awarded to her at the time the judgment was rendered in this case. Appellant contests the award made appellee as too much. A review by this court convinces that the findings and conclusion of the district court in making division of the property between the parties and in awarding alimony to appellee are just and equitable and they are adopted and made the find-

ings and conclusion of this court except the judgment should be and it is modified to provide that appellee shall have and enjoy as her property the crops growing on the land awarded to her at the time the judgment was rendered or the proceeds of them in the event they have been disposed of or converted. The judgment should be and it is affirmed as modified. Allowance should be and is made as compensation for the services of counsel for appellee in this court in the amount of $1,000 which should be and it is ordered to be taxed as a part of the costs, and all costs in this court are taxed against appellant.

AFFIRMED AS MODIFIED.

DONALD S. DARGUE ET AL., APPELLEES, V. ERNEST CHAPUT ET AL., APPELLANTS.
88 N. W. 2d 148

Filed February 14, 1958. No. 34281.

1. **Fraud.** Fraud is never presumed, but must be clearly proved in order to entitle a party to relief on the ground that it has been practiced on him.
2. ———. Direct evidence is not essential to establish fraud. It may be inferred from circumstances; but such inference must not be guesswork or conjecture, but the rational and logical deduction from the circumstances proved.
3. ———. The intent or good faith of the person making false statements is not in issue in such a case.
4. **Vendor and Purchaser: Fraud.** As between vendor and purchaser, where material facts and information are equally accessible to both, and nothing is said or done which tends to impose on the purchaser or to mislead him, the failure of the vendor to disclose such facts does not amount to actionable fraud; but where such facts are known by the vendor and he knows them to be not within reach of the reasonably diligent attention, observation, and judgment of the purchaser, and they are such as would readily mislead the purchaser as to the true condition of the property, the vendor is bound to disclose such facts.
5. **Principal and Agent: Fraud.** A principal who authorizes an

agent to conduct a transaction for him, intending that the agent shall make representations to another in the course of it which the principal knows to be untrue, is liable for such misrepresentations as if he himself had made them intentionally; if, although he does not intend that the agent shall make misrepresentations, he should know that the agent will do so, the principal is liable as if he himself had made them negligently.

6. **Fraud: Damages.** In such cases the measure of damages is generally the difference in value between the article or thing purchased if it had been as represented and its actual value.
7. **Fraud.** A right of action for fraud may be waived. Thus, while the defrauded party may retain what he received, stand to his bargain, and recover for the loss occasioned by the fraud, he cannot do so where, having full knowledge, he does an act indicating his intention to waive the fraud.
8. ———. It is, however, difficult and perhaps hazardous to formulate or to apply general rules as to what will constitute such a waiver, and each case in which the question arises must be considered and disposed of on its own special facts, the underlying question being one of intent.
9. ———. Accordingly acts in affirmance of the contract amount to a waiver of the fraud only where they are done with full knowledge of the fraud and of all material facts and with the intention clearly manifested of abiding by the contract and waiving all right to recover for the deception.

APPEAL from the district court for Sarpy County: JOHN M. DIERKS, JUDGE. *Affirmed.*

Victor H. Schmidt, for appellants.

Neely, Otis & Neely, for appellees.

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

WENKE, J.

This is an appeal from the district court for Sarpy County. It involves an action instituted therein on July 24, 1956, by Donald S. Dargue and Garnet A. Dargue against Ernest Chaput and Angelyn Chaput for the purpose of rescinding a contract entered into by the plaintiffs with the defendants for the purchase of a residential property located at 8525 Bellevue Boulevard in Sarpy County, Nebraska. The grounds alleged as a

basis for rescinding are that plaintiffs were induced to enter into the contract by the fraudulent misrepresentation and concealment of certain facts relating to the condition of the property purchased.

"A party who has been induced to enter into a contract by fraud has, upon its discovery, an election of remedies. He may either affirm the contract and sue for damages or disaffirm it and be reinstated to the position he was in before it was consummated." Russo v. Williams, 160 Neb. 564, 71 N. W. 2d 131.

Trial was had and on January 9, 1957, the trial court rendered its decision which denied plaintiffs the rescission they had asked for. In view of the evidence adduced at that hearing the trial court was justified in doing so in view of our holding in Russo v. Williams, *supra.* Therein we quoted with approval the following from 66 C. J., Vendor and Purchaser, §§ 476 and 477, pp. 824 and 825: "If the purchaser has knowledge of the grounds upon which he is entitled to rescind, an unreasonable delay upon his part, especially if accompanied by such change of circumstances as makes it impracticable for him to place the vendor in statu quo, * * * prevents him from exercising his right to rescind. Even where time is not of the essence of the contract, a purchaser may still lose his right to rescind by delaying action to a time, which, under the circumstances, is unreasonable. * * * The question whether laches exists in a particular case depends upon its own peculiar circumstances and is addressed to the sound discretion of the court, the question of the unreasonableness of the delay depending largely upon the nature of the property in the particular case."

However, the trial court did not thereupon dismiss plaintiffs' action but granted them 60 days in which to amend their pleadings to state a cause of action in fraud for damages. This was in accordance with our holding in Russo v. Williams, *supra,* under the principle that: " 'It is the practice of courts of equity, when they once

have obtained jurisdiction of a case, to administer all the relief which the nature of the case and the facts demand, and to bring such relief down to the close of the litigation between the parties.' (Herrin v. Johnson Cashway Lumber Co., 153 Neb. 693, 46 N. W. 2d 111.)" The plaintiffs filed a second amended petition on March 7, 1957, seeking recovery of damages because of fraud.

In their second amended petition, on which the cause was tried, the plaintiffs alleged that:

"In the showing of said premises and endeavoring to effect a sale, nothing whatsoever was said to the plaintiffs, or either of them, by defendants or by the agent of the defendants, Joseph M. Morgan, to effect that said house was built on ground incapable of supporting it, nor was there at any time prior to August 20, 1955, any evidence patent and available to the plaintiffs that the said house was not structurally sound and in good condition. Moreover, said agent agreed specifically that the house was to be finished in a manner of good workmanship. The plaintiffs believed the statements and representations of said agent as aforesaid to be true and relied upon them and as a result of the same were induced to purchase the property. * * *

"Plaintiffs further allege that the aforesaid house was constructed without there being provided adequate drainage, in the form of drainage tile or otherwise, of the front, or west, yard of the premises. As a result of this inadequacy, water has been allowed to pocket in front or to the west of the west basement wall, causing a continual settlement of the fill in front of it and exerting upon it a pressure accentuating the eastward tipping of the east wall as it settles on inadequate ground support. * * *

"Plaintiffs further allege that defendants at all times referred to had full knowledge of all the facts that lead to the ultimate conclusions: (1) That the foundation of the house rested on filled earth, or on earth of insufficient bearing value to support the load of the house

in violation of good building practices, and (2) that the front, or west yard of the house was provided with inadequate drainage to the end that water was allowed to accumulate in the fill lying to the west of the west basement wall exerting a pressure upon said wall and upon the house in general to the end that it was tipped and is still being tipped to the east, all in violation of good building practices. Defendants intentionally, wilfully and fraudulently withheld and concealed said information from the plaintiffs for the express purpose of deceiving and defrauding them. * * *

"Plaintiffs further allege that had the defendants Chaput not made the representation that the house would be finished in a manner of good workmanship as aforesaid and had the plaintiffs known that the house had been built on filled ground or on ground inadequate to support it or that ground water to to (the) west would be allowed to exert an undue pressure on the west wall, they would not have purchased said premises. Plaintiffs relied upon said representations and without knowledge to do otherwise acted upon them to their damage."

Trial was had on the action for damages. On May 27, 1957, the trial court rendered a judgment for the plaintiffs in the sum of $4,287.50 with interest at 6 percent from June 10, 1955. Defendants filed a motion for new trial and, from the overruling thereof, perfected this appeal.

Appellees, Donald S. Dargue and Garnet A. Dargue, are husband and wife. We shall herein refer to them as the Dargues and to Donald S. Dargue individually as Dargue. Appellants, Ernest Chaput and Angelyn Chaput, are husband and wife. We shall herein refer to them as the Chaputs and to Ernest Chaput as Chaput.

Sometime in 1948 the Chaputs bought a home located at 8521 Bellevue Boulevard in Sarpy County, Nebraska. This home was on a 9½-acre tract of wooded and pasture land lying east of and adjacent to Bellevue Boulevard. The Chaputs purchased the entire tract. Belle-

vue Boulevard is a surfaced street and will hereinafter be referred to as the boulevard. The Chaputs established a road across this tract. The road is located just south of their residence at 8521 Bellevue Boulevard and runs east from the boulevard. They named it Chaput Drive. The 9½-acre tract extended south of Chaput Drive on the boulevard for a distance of 175 feet. In 1954 the Chaputs decided to improve the area south of Chaput Drive as it faces the boulevard and, for that purpose, divided it into two lots each 87½ feet wide as they front to the west on the boulevard, and 150 feet in depth from the boulevard toward the east.

Chaput contacted Norris L. Keenan, a building contractor who lived in the neighborhood, in regard thereto. Chaput had roughly sketched out plans of the kind of houses he wanted built on these two lots from plans he had borrowed from a neighbor. These he presented to Keenan. Keenan then caused drafts to be drawn of floor plans of a house in accordance with Chaput's suggested ideas and, based thereon, submitted specifications and a bid for the construction thereof. Chaput accepted Keenan's bid. On November 4, 1954, Chaput and Keenan entered into a written contract for the construction of a house in accordance therewith at 8523 Bellevue Boulevard, which is the lot immediately south of Chaput Drive.

After Keenan had started construction of this house Chaput and Keenan testified they entered into an oral agreement to construct a house on the south lot, identified as 8525 Bellevue Boulevard, based on the same floor plans, specifications, and bid as used in connection with 8523 Bellevue Boulevard. This was sometime in January 1955. The construction of this house began in either January or February of 1955 and was, for all practical purposes, completed by June 10, 1955, on which date the Dargues entered into a written agreement with the Chaputs for the purchase thereof. The sale was consummated through Joseph M. Morgan, a real estate

broker of Bellevue, Nebraska, with whom the Chaputs had listed the property for sale. Before buying the house Dargue made a thorough inspection thereof.

The house constructed is a one-story bungalow type. It is in about the center of the lot from north to south and faces west toward the boulevard. It is some 40 feet from the surfaced area thereof, being about 25 feet from the boulevard itself. It has a full basement which is constructed with cement block walls and has a rear walkout door to the east. The main floor of the house, which rests on the basement walls, is some 3 or 4 feet below the level of the surfaced part of the boulevard. The garage is attached to and located at the north end of the house. The width of the front of the house is 42 feet, the garage 14 feet. A driveway leads from the garage west to the boulevard. The areas all around the house were filled to adjust to this construction, the area west of the house being filled in so as to slope down from the boulevard. The filled ground was landscaped and contoured so any water coming onto the surface thereof would flow east from the area north of the driveway and south and east from the area south of the driveway and west of the house.

The Dargues moved into the house in the early part of July 1955. Sometime between August 20 and 25, 1955, the Dargues noticed a thin vertical crack appearing in the north wall of the house at a point some short distance west of the northeast corner thereof. Dargue immediately notified Chaput thereof. Chaput thereupon contacted Keenan who immediately inspected this condition. The crack widened, particularly at the top of the wall. After some 4 months it was about 1½ inches wide at the top and wide enough to permit a person's hand to be inserted therein. Chaput and Keenan conferred on what to do. Winter was coming on so they did not think it advisable to try and repair the wall then, especially not before the condition causing the crack had been eliminated. Chaput and Keenan

could not agree as to what should be done to eliminate the cause, each having his own ideas in that regard. Keenan advocated the construction of cement pylasters against the outside of the east wall just below the filled-in grade line. These were put in in October 1955. Chaput advocated reinforcing the east wall by the use of rods under the basement floor welded to a 3 x 4 inch steel beam, 20 feet long, placed therein in cement parallel to the east, which rods would be run through holes in steel plates lodged against the outside of the east wall just below the filled-in grade line and tightened by the use of nuts placed on the ends thereof. This was done in November 1955. Thereafter, in the latter part of March and the first week of April 1956, the northeast corner of the cement block wall that was above the ground level was replaced for a distance of some 20 feet to the south and 6 feet to the west of the northeast corner. The floor in the northeast corner of the basement was also repaired. These safeguards and corrective measures were apparently taken on the theory that the crack in the north wall was caused by a settling of the foundation of the house at the northeast corner thereof. While this was true, it was not the primary cause thereof. This is evidenced by the fact that new vertical cracks started to appear therein shortly after the wall was repaired. They appeared not only in the north wall just west of where the first crack had been but also in the south wall of the house. We have herein only referred to the damage to the house as it appeared in the outer walls. Similar cracks appeared at various places in the house and caused substantial damage thereto.

The Dargues had an expert in this field check the house. He came to the conclusion that the damage was primarily being caused by lateral pressure on the west wall of the basement, resulting from water pressure thereon, which was causing the frame structure of the house to tip and thus place eastward or outward pres-

sure on the top of the east wall and causing it to tilt outward. It was his opinion that this pressure primarily caused the damage to the house. The Chaputs also had an expert examine the premises and while he also came to the conclusion that water pressure was causing the damage he was of the opinion it resulted from pressure on the west side of the east wall below the basement floor. It was his theory that water coming against the west wall would seep under it and then move east under the basement floor until it reached the east wall and cause pressure thereon. While these experts disagreed as to where the pressure that was causing the damage was being exerted both agreed that it was being caused by lateral pressure from water seeping from west of the house.

In its natural state the area south of Chaput Drive sloped down toward the east from the boulevard at about 45 degrees. It also sloped down from Chaput Drive toward the south and from the south edge of this area toward the north thus forming, as it was referred to by Chaput, a "gully." When the house was constructed the main floor thereof was some 3 or 4 feet below the surface of the boulevard. This made necessary a very substantial fill to the west thereof in order to make the front yard come up to near floor level. While doing this with a caterpillar tractor the vibration thereof on the filled dirt, together with the pressure of the packing of the filled dirt against the foundation, caused a crack to appear in the west basement wall between the second and third tier of cement blocks down from the top thereof. This crack, which was about 25 feet long, necessitated a repairing of the wall. When this occurred, which was after the foundation had been built and the frame of the house partly constructed, Keenan contacted Chaput as to what should be done. As a result of this conference five 4-inch-square "H" steel piling were placed on the inside of the west wall to hold it against the pressure of this filled dirt. These

steel piling were anchored in cement at their base and fastened to the rafters at the top. The surface of the filled ground was contoured to drain but nothing else was done in regard to draining off any water that would naturally flow thereon and seep into the ground.

It is apparent that this filled dirt was not sufficiently packed when put in and soon settled and formed a pocket or basin from which the water coming thereon could not escape. When water collected therein its natural tendency was to seep into the ground and flow toward the east and against the west wall. Whether it resulted in pressure against this or the east wall, a question about which the experts seem to be in dispute, it is apparent that the lateral pressure of this water against one of these walls caused the damage to the house. We think it was the result of pressure on the west wall which the evidence shows was damp and bulged inward.

In view of the natural drainage of the ground on which this house was built, we think the manner in which the drainage thereof was handled was faulty and resulted in a latent defect which could not be observed by a purchaser thereof upon inspection of the property prior to any damage being caused to the house by reason thereof. Before discussing the facts further we think it would be desirable to set out the legal principles applicable thereto and to which we will hereinafter relate our discussion thereof.

This action had its inception in equity. Although the original relief asked for was not available to the appellees the trial court retained jurisdiction to administer all the relief which the nature of the case and the facts demanded. In this situation our review is governed by section 25-1925, R. R. S. 1943, and, upon such review, "* * * when the evidence on material questions of fact is in irreconcilable conflict this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their

manner of testifying and must have accepted one version of the facts rather than the opposite." Rettinger v. Pierpont, 145 Neb. 161, 15 N. W. 2d 393. See, also, Russo v. Williams, *supra.*

" 'If, with the intent to deceive, either party to a contract of sale conceals or suppresses a material fact, which he is in good faith bound to disclose, this is evidence of and equivalent to a false representation, because the concealment or suppression is in effect a representation that what is disclosed is the whole truth. The gist of the action is fraudulently producing a false impression upon the mind of the other party; and if this result is accomplished, it is unimportant whether the means of accomplishing it are words or acts of the defendant, or his concealment or suppression of material facts not equally within the knowledge or reach of the plaintiff.' (Stewart v. Wyoming Cattle Ranche Co., 128 U. S. 383.)" Linton v. Sheldon, 98 Neb. 834, 154 N. W. 724. See, also, Wolford v. Freeman, 150 Neb. 537, 35 N. W. 2d 98.

"Fraud is never presumed, but must be clearly proved in order to entitle a party to relief on the ground that it has been practiced on him." Davidson v. Crosby, 49 Neb. 60, 68 N. W. 338. See, also, Krelle v. Bowen, 128 Neb. 418, 259 N. W. 48.

"* * * courts of equity do not restrict themselves by the same rigid rules as courts of law in the investigation of fraud and in the evidence and proofs required to establish it." 19 Am. Jur., Equity, § 43, p. 67. See, also, Rettinger v. Pierpont, *supra;* Russo v. Williams, *supra.*

"The rule is: 'Direct evidence is not essential to establish fraud. It may be inferred from circumstances; but such inference must not be guesswork or conjecture, but the rational and logical deduction from the circumstances proved.' Alter v. Bank of Stockham, 53 Neb. 223, 73 N. W. 667." Herlan v. Bleck, 148 Neb. 816, 29 N. W. 2d 636. See, also, Russo v. Williams, *supra.*

" 'Whether in an action for damages for false representations it is necessary either to aver or prove the scienter, the authorities do not agree. The better rule, and the one adopted by this court, is that the intent or good faith of the person making false statements is not in issue in such a case.' Johnson v. Gulick, 46 Neb. 817." Newberg v. Chicago, B. & Q. R. R. Co., 120 Neb. 171, 231 N. W. 766. See, also, Taxpayers' League v. Wightman, 139 Neb. 212, 296 N. W. 886; Russo v. Williams, *supra*.

"As between vendor and purchaser, where material facts and information are equally accessible to both, and nothing is said or done which tends to impose on the purchaser or to mislead him, the failure of the vendor to disclose such facts does not amount to actionable fraud; but where such facts are known by the vendor and he knows them to be not within reach of the reasonably diligent attention, observation, and judgment of the purchaser, and they are such as would readily mislead the purchaser as to the true conditions of the property, the vendor is bound to disclose such facts." Wolford v. Freeman, *supra*. See, also, O'Shea v. Morris, 112 Neb. 102, 198 N. W. 866; Restatement, Contracts, § 472, p. 897; Clauser v. Taylor, 44 Cal. App. 2d 453, 112 P. 2d 661; Gellis v. Claremont Masonic Assn., 85 N. H. 416, 159 A. 295.

If the defects are concealed, such as was the situation here, they are latent. Russo v. Williams, *supra*. Under the foregoing principles the vendor of real property is not guilty of fraud for a failure to disclose material latent defects which are unknown to him unless it can be shown that he was aware of such circumstances that a reasonable inference can be said to arise therefrom that he either knew or should have been aware of the fact that such latent defective conditions existed.

We come then to the specific claims of misrepresentation and concealment alleged by the Dargues as the basis on which they seek to recover damages because they relied thereon and were defrauded thereby. Joseph M.

Morgan, the real estate broker with whom the Chaputs listed the property for sale, was their agent and in selling the property to the Dargues through him they were bound by his conduct in doing so to the following extent: " 'A principal who authorizes an agent to conduct a transaction for him, intending that the agent shall make representations to another in the course of it which the principal knows to be untrue, is liable for such misrepresentations as if he himself had made them intentionally; if, although he does not intend that the agent shall make misrepresentations, he should know that the agent will do so, the principal is liable as if he himself had made them negligently.' 1 Restatement, Law of Agency, 565." Ashby v. Peters, 128 Neb. 338, 258 N. W. 639, 99 A. L. R. 843. See, also, Wolford v. Freeman, *supra;* Newberg v. Chicago, B. & Q. R. R. Co., *supra;* Modern Woodmen v. Berry, 100 Neb. 820, 161 N. W. 534, Ann. Cas. 1918D 302.

During the course of the negotiations between Dargue and Morgan leading up to the sale of the premises neither was aware that there were any latent structural defects therein as a careful examination thereof made by Dargue failed to disclose any as he testified the house seemed to be structurally sound. In fact neither Dargue nor Morgan was aware of the fact that any latent structural defects existed and Morgan made no statements in regard thereto or in regard to the condition of the house in respect to its structural soundness. Dargue did discover several items that the builder of the house had failed to properly finish, such as a failure to connect a light switch to a circuit, a failure to connect the doorbell, a failure to supply storm windows, and other things of that nature. In order to make sure that these items would be taken care of the following language was put in the purchase agreement: "House to be finished in a manner of good workmanship." This provision was not intended to guarantee that the house was structurally sound but rather to guarantee that the things which

Dargue had discovered as being unfinished would be taken care of and apparently they were. We find nothing in the record to the effect that Morgan in any way misrepresented or concealed any facts from Dargue during the negotiations leading up to the sale of the property of which he was aware and which it was his duty, as agent, to disclose.

It is, of course, true that if Morgan had made a positive statement to the effect that the house was structurally sound, when in fact it was not although he was not aware of that fact, his principal would be bound thereby and the Dargues would be entitled to relief. As stated in Phillips v. Jones, 12 Neb. 213, 10 N. W. 708: "* * * if a party, without knowing whether his statements are true or not, makes an assertion as to any particular matter upon which the other party has relied, the party defrauded in a proper case will be entitled to relief." See, also, Russo v. Williams, *supra*. In Hoock v. Bowman, 42 Neb. 80, 60 N. W. 389, 47 Am. S. R. 691, we said: "A purchaser of real estate has a right to believe and rely upon representations made to him by his vendor as to the character, quality, and location of the property, when the facts concerning which the representations are made are unknown to the vendee." But that is not the situation here.

While the evidence in regard thereto is in direct conflict we think it establishes there was faulty construction in the building of the house by placing the foundation thereof, particularly at the northeast corner, on ground with insufficient weight-bearing qualities to sustain the weight placed thereon. While we do not think it was the primary cause of the damage that subsequently occurred to the house, however, we find that it did permit a vertical settling and a slight tipping of the east wall at that point and contributed directly to causing the damage in the north wall when pressure came on top of the east wall due to the frame of the house being moved slightly to the east from lateral

pressure against the west wall of the house when water started pressing against it.

This water pressure resulted from inadequate drainage being provided for water collecting on the filled ground to the west thereof. This faulty construction permitted this water to collect there and seep down against the west wall, thus causing the lateral pressure we have already mentioned and which caused the frame structure of the house to exert outward pressure against the top of the east cement block wall. The amount of water that collected west of the house was increased by the fact that a gutter was placed along the west edge of the roof thereof which was inadequate to carry the water coming into it during a heavy rain and, as a consequence, water would spill out onto the yard in front of the house. The failure to provide adequate drainage for all water coming on the front yard we find was the primary cause of the damage to the house and was latent in its character since it could not be detected merely by observation. We do not think any lack of care in keeping up the yard by the Dargues caused this condition to arise or in any material way contributed thereto.

The question then arises, was Chaput aware of these conditions? The evidence discloses that Chaput had, through experience, considerable knowledge concerning drainage and that he was fully acquainted with the land on which the house at 8525 Bellevue Boulevard was built since it was part of a tract he had owned since 1948 and which was only some 200 feet from where he lived at 8521 Bellevue Boulevard. After the construction of the house began at 8525 Bellevue Boulevard he was there at least as often as once a week. When there he would look over the construction and confer with Keenan about different features thereof and make suggestions in regard thereto. When the crack occurred in the west wall as the result of the caterpillar incident Keenan contacted Chaput about it and, as a result, the steel beam supports were put on the inside of the west

wall. At that time Chaput must have observed the fill that was being made west of the house, the effect it was having and would have on the west wall, and what was being done to take care of the water that would naturally fall and flow thereon. We do not think Chaput is now in a position to say he did not know what was being done by Keenan in this respect.

But the Chaputs contend that Keenan was an independent contractor and that, insofar as they are concerned, the following principle applies to their relationship with him: "* * * one who contracts for a stipulated price to build a house for another who reserves no direction over the conduct of the work is an independent contractor; * * *." Restatement, Agency, § 2, p. 13.

It is true that both Chaput and Keenan testified that Keenan orally agreed to build the house at 8525 Bellevue Boulevard for the same price as he had, by written contract, agreed to build the house he constructed for Chaput at 8523 Bellevue Boulevard, the idea being to use the same plans and specifications as were used in constructing 8523 Bellevue Boulevard. The statements submitted to Chaput by Keenan and the payments thereof, made by check, would bear this out. However, as we said in Bodwell v. Webster, 98 Neb. 664, 154 N. W. 229, Ann. Cas. 1918C 624: "The relation existing between defendants and Hanford is not evidenced wholly by the written instrument. (Here an oral agreement.) It is affected by extrinsic facts and circumstances from which different deductions may reasonably be drawn. Under these conditions, whether Hanford was an independent contractor was a question for the jury. (Here the court.)"

As already stated, during the course of constructing the house at 8525 Bellevue Boulevard, Chaput would confer with Keenan in regard thereto and make suggestions as to the construction thereof and, when difficulties arose, Keenan would call on Chaput for advice in regard thereto. When Dargue informed Chaput of the

crack Chaput immediately contacted Keenan and the two of them attempted to solve the problem and subsequently caused the damaged wall and basement floor to be repaired. In doing so they used material and labor from other properties they were constructing on the Chaputs' land on a 50-50 partnership basis. These were to the north and east of 8525 Bellevue Boulevard on Chaput Drive. In other words, Chaput and Keenan were bearing the expense of the damage to the Dargue house on a 50-50 basis. We think, considering all of the circumstances, that Keenan did not build the house at 8525 Bellevue Boulevard as an independent contractor but as he was building the other houses, that is, on a 50-50 basis with Chaput.

Considering the entire situation, which we have set out in rather full detail, we can come to no other conclusion than that Chaput either knew, or should have known, of the faulty construction by Keenan in building the house purchased by the Dargues. Since the defects caused thereby were latent, and could not possibly have been observed by Dargue when he was making an inspection of the property for the purpose of purchasing it, the Chaputs are liable for the damage to the property caused thereby. The measure of such damages has been stated by this court to be: "In such cases the measure of damages is generally the difference in value between the article or thing purchased if it had been as represented and its actual value." Rankin v. Bigger, 128 Neb. 800, 260 N. W. 202. See, also, Welch v. Reeves, 142 Neb. 171, 5 N. W. 2d 275; Rothery v. Pounds, 150 Neb. 25, 33 N. W. 2d 347.

The evidence of an expert real estate appraiser fixed that amount at $4,287.50. There is no other evidence on this issue. But the Chaputs contend that the Dargues waived any right to damages when they requested that the damage be repaired. The record shows that Dargue made such a request and in response thereto the repairs were made which have hereinbefore been referred

to. It should be observed here that the repairs made to the walls and basement floor were not too satisfactory.

As stated in 37 C. J. S., Fraud, § 69, p. 362: "A right of action for fraud may be waived. Thus, while the defrauded party may retain what he received, stand to his bargain, and recover for the loss occasioned by the fraud, he cannot do so where, having full knowledge, he does an act indicating his intention to waive the fraud. * * * It is, however, difficult and perhaps hazardous to formulate or to apply general rules as to what will constitute such a waiver, and each case in which the question arises must be considered and disposed of on its own special facts, the underlying question being one of intent. * * * Accordingly acts in affirmance of the contract amount to a waiver of the fraud only where they are done with full knowledge of the fraud and of all material facts and with the intention clearly manifested of abiding by the contract and waiving all right to recover for the deception; * * *." See, also, 24 Am. Jur., Fraud and Deceit, § 214, p. 44.

Here the repairs made did not correct the trouble because the parties, at the time they were made, were not fully aware of all the factors that were causing the trouble. In fact, as already stated, the walls continued to crack after they had been made. In view thereof we do not think the Dargues waived their right to recover damages, although they did request that the repairs be made.

The Chaputs ask that they be given credit for the repairs made at Dargue's request, which they testified cost some $1,200. There is no evidence to the effect that they improved the value of the property nor that what was done corrected the cause thereof. In view thereof we think the trial court was correct in denying them any credit therefor.

In view of what we have said and held herein we come to the conclusion that the trial court was correct in rendering the judgment that it did in favor of the

Dargues. We therefore affirm the judgment of the trial court.

AFFIRMED.

GERTRUDE HARTMAN, APPELLANT, V. EDITH D. DRAKE ET AL., APPELLEES.
87 N. W. 2d 895

Filed February 14, 1958. No. 34292.

1. **Partition: Life Estates.** When there is an outstanding estate for life vested in another to the whole of the premises of which partition is sought, a remainderman cannot maintain an action in partition over the objection of the holder of such life estate.
2. **Partition: Estates.** A partition action may be maintained where a tenant in common or a joint tenant in remainder commences it and the life tenant who has the possession or the right of possession defaults or fails to object to partition of the premises.
3. ———: ———. The purpose of a partition action is to divide a jointly-owned interest in property so that each owner may enjoy and possess in severalty.
4. **Life Estates.** A life estate is a freehold interest in lands.
5. **Estates.** An estate of freehold is an estate of indeterminate duration other than an estate at will or by sufferance.
6. ———. An estate for a term of years is less than a freehold.
7. **Landlord and Tenant.** Generally, a leasehold for a term of years is a chattel real, falling within the classification of personal property.
8. **Partition.** The purpose of partition at common law was to obtain a division of the freehold, i.e., a division of the seisin.
9. **Landlord and Tenant.** An encumbrance includes all interest in the land which may subsist in a third person to the diminution of the value of the land, but consistent with the passing of the fee by conveyance; hence, an outstanding lease for a period of years is an encumbrance.
10. **Partition.** Section 25-21,109, R. R. S. 1943, provides that one claiming to be an encumbrancer may, in default of the owner, appear and act as his representative. This provision means that an encumbrancer can assert the rights of an owner of the encumbered property who is in default so as to protect the encumbrancer in his rights.

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

William S. Padley, for appellant.

Edward E. Carr, Robert E. Roeder, and *Donald V. Lowe,* for appellees.

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

SIMMONS, C. J.

This is an action to partition farm land. The land was owned in fee simple by Claude O. Drake and was the homestead of Claude O. and Edith D. Drake. Mr. Drake died intestate. It was stipulated that title to the property descended, an undivided one-half interest and a life estate in the entire property, to Mrs. Drake. The other undivided one-half interest descended to heirs of Mr. Drake subject to the life estate.

Mrs. Drake leased the land to Mark L. Miller for cash rent for a period of 5 years with an option of renewal for a 5-year period.

Plaintiff is the owner of an undivided interest in the half interest in remainder. The defendants are Mrs. Drake, Mr. Miller, and the other owners of the remainder interests. Wives and husbands of the parties are made defendants.

Defendant Miller answered alleging his lease and praying that the petition be dismissed or if not dismissed that decree be entered fixing his rights to the use of the property superior to the rights of the plaintiff and all other defendants.

Lester L. Drake, owner of an undivided interest in remainder, answered resisting partition. Other remainder owners filed answers resisting partition unless there was a waiver of the life interest by Mrs. Drake.

Mrs. Drake did not answer or otherwise plead. Prior to trial, default was entered against Mrs. Drake and other nonanswering defendants. Mrs. Drake testified as a witness for the plaintiff as to the lease to Mr. Miller.

The court found that there was a privity of estate

between Mrs. Drake, the life tenant, and Mr. Miller, the lessee, which gave him the right to object to the partition action, and having objected, the objection should be sustained and the action dismissed. That was done.

Plaintiff appeals. We reverse the judgment of the trial court and remand the cause for further proceedings.

The established rule is: When there is an outstanding estate for life vested in another to the whole of the premises of which partition is sought, a remainderman cannot maintain an action in partition over the objection of the holder of such life estate. Bodeman v. Cary, 152 Neb. 506, 41 N. W. 2d 797. See, also, Weddingfeld v. Weddingfeld, 109 Neb. 729, 192 N. W. 227; Bartels v. Seefus, 132 Neb. 841, 273 N. W. 485.

It may also be now accepted as the rule that a partition action may be maintained where a tenant in common or a joint tenant in remainder commences it and the life tenant who has the possession or the right of possession defaults or fails to object to partition of the premises. Baskins v. Krepcik, 153 Neb. 36, 43 N. W. 2d 624.

The question here is: Does a lessee in possession for a term of years under a lease from the life tenant have the power to object and prevent partition where the life tenant defaults or fails to object to partition?

We hold that he does not.

Section 25-2170, R. R. S. 1943, provides that: "The petition must describe the property, and the several interests and estates of the several joint owners, or lessees thereof, if known. All tenants in common, joint tenants, or lessees of any estate in land or interest therein, or of any mineral, coal, petroleum, or gas rights, may be compelled to make or suffer partition of such estate or estates in the manner hereinafter prescribed."

Section 25-2170.01, R. R. S. 1943, provides that: "Any joint owner of any real estate or of any interest therein or of any mineral, coal, petroleum, or gas rights, whether held in fee or by lease or otherwise, may com-

pel a partition thereof in the manner provided in sections 25-2170 to 25-21,111."

The above sections do not answer the problem.

The reference to lessees was included in the above sections by amendment in 1951. Laws 1951, c. 72, § 1, p. 228. The material part of the title of the act is: "* * * to redefine what persons may compel and what interests may be subject to partition; to authorize the partition of *joint ownership* in mineral rights; * * *." (Emphasis supplied.)

Section 25-2170, R. R. S. 1943, provides that the petition must describe the several interests of the "several joint owners, or lessees thereof, if known."

The purpose of a partition action is to divide a jointly-owned interest in property so that each owner may enjoy and possess in severalty. 68 C. J. S., Partition, § 1, p. 8; 40 Am. Jur., Partition, § 2, p. 4.

The lessee here has an entire interest. As to him there is no leasehold to partition among "several * * * lessees."

This does not mean, however, that Miller as the owner of a separate interest can prevent partition by those who have partitionable interests in the real estate.

The answer to this question is found in an analysis of the titles held by the life tenant and her lessee.

A life estate is a freehold interest in lands. 31 C. J. S., Estates, § 30, p. 39; 19 Am. Jur., Estates, § 56, p. 518. An estate of freehold is an estate of indeterminate duration other than an estate at will or by sufferance. 31 C. J. S., Estates, § 7, p. 16; 19 Am. Jur., Estates, § 4, p. 464.

An estate for a term of years is less than a freehold. "Such estates are regarded as chattel interests, that is, interests in incorporeal hereditaments, not amounting to freeholds, as distinguished from freehold interests; and are regarded as 'chattels real,' that is estates or interests which are annexed to or concern real estate, and include all estates and interests in real property

less than estates of freehold." 31 C. J. S., Estates, § 12, p. 27. See 19 Am. Jur., Estates, § 57, p. 519: "Such an estate, being merely a chattel interest, is inferior in legal contemplation to an estate for life."

Generally, a leasehold for a term of years is a chattel real, falling within the classification of personal property. Offutt Housing Co. v. County of Sarpy, 160 Neb. 320, 70 N. W. 2d 382, affirmed 351 U. S. 253, 76 S. Ct. 814, 100 L. Ed. 1151.

The purpose of partition at common law was to obtain a division of the freehold, i.e., a division of the seisin. 2 Tiffany, Real Property (3rd ed.), § 476, p. 318. See Restatement, Property, § 174, p. 672. So the rule protects a life tenant who has seisin and right of possession from partition of the seisin against the will of the life tenant. That reasoning does not apply to the holder of a lease for a term for years.

We have held: An encumbrance includes all interest in the land which may subsist in a third person to the diminution of the value of the land, but consistent with the passing of the fee by conveyance; hence, an outstanding lease for a period of years is an encumbrance. Albin v. Parmele, 73 Neb. 663, 103 N. W. 304. The above case held a lease for years on a life estate to be an encumbrance.

Mr. Miller is, then, the holder of an encumbrance on the life estate of Mrs. Drake. He is entitled to protection as an encumbrancer of that life interest according to the terms of his contract with Mrs. Drake. The statute provides for that protection. Section 25-2187, R. R. S. 1943, authorizes the court to appoint a referee to inquire into and report as to the nature and amount of encumbrances.

Section 25-2190, R. R. S. 1943, provides: "If any encumbrance is ascertained to exist, the proceeds of the sale of that portion, after the payment of costs, or so much thereof as is necessary, shall, if the owner consents, be paid over to the encumbrancer."

Section 25-2191, R. R. S. 1943, provides: "If the owner objects to the payment of such encumbrance, the money shall be retained or invested by order of the court to await final action in relation to its disposition, and notice thereof shall be forthwith given to the encumbrancer, unless he has already been made a party."

Section 25-2192, R. R. S. 1943, provides: "The court may direct an issue to be made up between the encumbrancer and the owner, which shall be decisive of their respective rights.

Section 25-2193, R. R. S. 1943, provides: "If an estate for life or years be found to exist as an encumbrance upon any part of said property, and if the parties cannot agree upon the sum in gross which they will consider an equivalent for such estate, the court shall direct the avails of the encumbered property to be invested, and the proceeds to be paid to the encumbrancer during the existence of the encumbrance."

Section 25-2194, R. R. S. 1943, provides: "The proceedings in relation to the encumbrances shall not delay the distribution of the proceeds of other shares in respect to which no difficulties exist."

Section 25-21,109, R. R. S. 1943, provides: "Any persons claiming to hold an encumbrance upon any portion of the property involved in the suit, may, in default of the owner, appear and act as his representative in any of the proceedings under sections 25-2170 to 25-21,111."

Mr. Miller here contends that section 25-21,109, R. R. S. 1943, implies that he, as an encumbrancer, can enforce any legal right that Mrs. Drake could enforce, including the right of the life tenant to object to partition.

So far as we can determine this section of our statute has never been construed by us. Neither party here cites any decisions helpful to a construction. This language was adopted in the original act by our Territorial

Legislature in 1855. Laws 1855, § 648, p. 117. It was an adoption of an Iowa code.

It appears further that Iowa originally adopted this language as a part of a partition statute in 1839 in an act approved January 4, 1839. See Statutes of Iowa 1843, c. 110, § 52, p. 464. It appears to have been omitted from the Iowa act in an 1873 revision. We have been unable to trace its origin beyond that point nor to find other similar provisions or decisions construing it.

The answer to the meaning of the provision is found in the statute itself. Section 25-2191, R. R. S. 1943, provides for the giving of notice to an encumbrancer, "unless he has already been made a party." This suggests that the encumbrancer may be a proper but not a necessary party to that point in accord with the rules concerning parties. See, 40 Am. Jur., Partition, § 66, p. 54; 68 C. J. S., Partition, § 77, p. 121.

Section 25-2192, R. R. S. 1943, provides that the court may direct issues to be made up between the encumbrancer and the owner which shall be decisive of their rights.

Section 25-21,109, R. R. S. 1943, provides that one claiming to be an encumbrancer may, in default of the owner, appear and act as his representative. This provision means that an encumbrancer can assert the rights of an owner of the encumbered property who is in default so as to protect the encumbrancer in his rights. Or, stated otherwise, the owner by defaulting in asserting his rights cannot defeat the rights of the encumbrancer. This does not mean that the encumbrancer can represent the owner to the extent of exercising a discretionary right that is peculiarly that of the owner and not that of the encumbrancer.

It is accordingly held that the trial court erred in dismissing the action.

The judgment of the trial court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

CARTER, WENKE, and BOSLAUGH, JJ., concurring.

We concur with the opinion of the majority. We feel, however, that the reason for the holding that the lessee was not in privity with the owner of the life tenancy should have been set out in the opinion. The lessee of the property is in privity with the owner of the life estate to the same extent that any lessee is in privity with his lessor. This is in harmony with section 25-21,109, R. R. S. 1943, providing that where the owner defaults, an encumbrancer may appear and represent the owner. But as between the lessee and the owner of the life estate as such there is no privity. Consequently, a lessee may not assert the rights of the owner of the life tenancy which are peculiar to the life tenancy. The lessee therefore has no right by reason of privity to assert the right of the life tenant to object to partition, such right being one arising solely out of her status as owner of the life tenancy and not as lessor.

STATE OF NEBRASKA EX REL. CLARENCE S. BECK, ATTORNEY GENERAL, PLAINTIFF, V. WILLIAM NIKLAUS, DEFENDANT.
87 N. W. 2d 894

Filed February 14, 1958. No. 34367.

Attorney and Client: Contempt. The Supreme Court possesses the inherent power to punish for contempt any person assuming to practice law within the state in violation of a valid order of disbarment.

ORIGINAL ACTION. *Judgment for plaintiff.*

Clarence S. Beck, Attorney General, and *Gerald S. Vitamvas,* for plaintiff.

John McArthur, for defendant.

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

CARTER, J.

This is a contempt proceeding commenced by the State of Nebraska on the relation of the Attorney General against the defendant, William Niklaus. The information and citation for contempt alleges that defendant willfully, contumaciously, knowingly, and unlawfully engaged in the practice of law at numerous times and places therein set forth. The defendant filed an answer. The Attorney General thereafter filed a motion for judgment on the pleadings. The defendant conceded that the motion should be sustained and submitted the case on the pleadings.

The pleadings show that the defendant was admitted to the practice of law in this state on July 1, 1914. On June 29, 1948, his license to practice law in the State of Nebraska was revoked and he was disbarred from the practice of law. State ex rel. Nebraska State Bar Assn. v. Niklaus, 149 Neb. 859, 33 N. W. 2d 145. The order of disbarment is still in full force and effect.

The pleadings also show that defendant did willfully and knowingly represent various persons and parties in various legal matters in the courts of this state in contempt of the power, dignity, and authority of the Supreme Court to disbar attorneys from the practice of law. In view of the state of the record, we do not deem it necessary to set forth the numerous instances in which the defendant purported to act as an attorney at law in violation of the order of the Supreme Court. It is sufficient to say that each of the five counts adequately charge a contempt of this court. The effect of defendant's action in joining in the motion for a judgment on the pleadings, made in open court, is to admit the allegations of specific violations set forth in the information filed by the Attorney General. For the purposes of this proceeding the defendant admits the truth of the charges made against him.

The Supreme Court possesses the inherent power to punish for contempt any person assuming to practice

law within the state in violation of a valid order of disbarment.

For the reasons given, and after consideration of all the facts contained in the pleadings, the defendant, William Niklaus, is adjudged guilty of contempt on each of counts 1, 2, 3, 4, and 5, and it is ordered that he pay into the office of the Clerk of the Supreme Court a fine of $100 on each of said counts, and that he pay the costs of the action. It is further ordered that upon failure to pay said fine and costs within 30 days from the entry of judgment, the defendant be confined in the county jail of Lancaster County, Nebraska, until such fine and costs are satisfied in the manner provided by law.

JUDGMENT FOR PLAINTIFF.

DALE CARLSON, APPELLANT, V. R. T. HANSON, FIRST AND REAL NAME UNKNOWN, APPELLEE.
88 N. W. 2d 140

Filed February 21, 1958. No. 34288.

1. **Automobiles.** 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" is the basic speed rule. Other provisions following in the section are specific speed restrictions based on the existence of the fact situation or situations mentioned in the act.
2. **Automobiles: Highways.** Sections 39-746 and 39-748, R. R. S. 1943, are to be construed together. The "right half of the highway" as that term is used in section 39-746, R. R. S. 1943, means the right half of the main-traveled portion of the highway available for traffic.
3. **Trial: Appeal and Error.** 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. **Trial.** Where a jury renders a special verdict finding the degree of negligence of the driver of the plaintiff's motor vehicle,

involved in an accident with the driver of the defendant's motor vehicle, to be more than slight and the negligence of the defendant's driver to be less than gross, and the evidence is sufficient to support the verdict, it is the duty of the court to render judgment on the special verdict dismissing the plaintiff's petition.

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

William S. Padley, for appellant.

Stewart & Stewart, for appellee.

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

MESSMORE, J.

This is an action at law brought by Dale Carlson, plaintiff, in the district court for Dawson County against R. T. Hanson, first and real name unknown, defendant, to recover damages sustained by the plaintiff to his truck and trailer, the loss of a part of its cargo, and the loss of two tarpaulins, due to the negligence of the defendant's driver in forcing the plaintiff's driver off of the road. The verdict of the jury was returned as a special verdict under the instructions of the court. The court entered judgment on the verdict and dismissed the plaintiff's petition. The plaintiff filed a motion for new trial. Upon the overruling of the motion for new trial, the plaintiff appeals.

For convenience we will refer to the plaintiff's truck as the Carlson truck; to its driver, Dale Jack, as Jack; to the defendant's truck as the Hanson truck; and to its driver, Harry Snowden, as Snowden.

The plaintiff's petition alleged in substance that on October 8, 1955, he was the owner of a 1952 GMC truck with trailer attached which was being operated on a graveled highway 8.6 miles east of Cozad, Nebraska, by Dale Jack, his employee; that Jack was operating said vehicle at a rate of speed not to exceed 40 miles

an hour in a westerly direction at 11:30 p.m., on the date above mentioned; that the defendant's International Diesel semitrailer truck, owned by him and being driven by his employee Harry Snowden, was traveling in an easterly direction at the point as above stated and at the same time; that the road on which the vehicles were traveling was a graveled road; that the county maintenance department of Dawson County had spread a layer of gravel 1 foot deep and 4½ feet wide along the south edge of the road, leaving a space 1 foot wide between the gravel and the south shoulder of the road; that as the trucks approached each other from opposite directions, the truck driven by Snowden was across the layer of gravel on the south side of the road and proceeded forward in an easterly direction prior to the trucks meeting; that at a distance which did not allow the plaintiff's driver, Jack, to stop his truck, the defendant's truck and its driver cut sharply across the gravel strip and onto the left side of the road, forcing the plaintiff's driver to turn off the road to avoid a collision; that as a result, the plaintiff's driver was forced into a borrow pit and plaintiff's truck was overturned; that he lost 278 bushels of corn, was required to spend money to salvage the remainder of the load of corn, lost two tarpaulins, and suffered damage to his truck resulting in the loss of use of the truck for 10 days; and that the defendant, through his employee, was negligent in the following respects: (1) He failed to keep his vehicle under control at all times; (2) he failed to yield half of the traveled portion of the highway; and (3) he failed to keep a lookout for other vehicles on the highway and failed to maintain sufficient control of his vehicle in order that he might stop to avoid collision with other vehicles. The plaintiff prayed for judgment in the amount of $2,542.76.

The defendant's answer admitted the ownership of the vehicles as alleged in the plaintiff's petition; that the defendant's vehicle was being driven in an easterly di-

rection at a point 8.6 miles east of Cozad at the time and place referred to in the plaintiff's petition; and that the defendant's truck was being driven by Harry Snowden, an employee of the defendant. The answer denied all allegations of the plaintiff's petition not admitted, and alleged that the defendant's employee was not involved in any accident with plaintiff's vehicle; that if an accident did occur, the damages referred to in the plaintiff's petition were the direct, sole, and proximate result of the negligence of the plaintiff's employee; and that the defendant's employee exercised due and proper care and caution under the circumstances. The prayer of the answer was that plaintiff's petition be dismissed.

Plaintiff's reply denied all allegations of the defendant's answer not admitted.

The record shows that the plaintiff's truck was a straight truck, the total capacity of the truck and trailer being 20 tons at the time of the accident. There was approximately 40,000 pounds of weight on this vehicle. It was loaded with shelled corn. It was equipped with a 6-ton box on the truck, with a special hitch to haul the trailer and pull the load. The whole vehicle was 46½ feet long and weighed 23,000 to 24,000 pounds. The defendant's truck was a cab-over truck, and a semi-trailer equipped with a livestock rack with a capacity of 5 or 6 tons. The wheel base was 140 inches from the center of the front axle to the center of the rear axle. The tractor and trailer were 49.6 feet long. It was loaded with cattle. It was stipulated that each truck was 8 feet wide. The defendant's vehicle consisted of a 1954 International truck pulling a 1955 Wilson semi-trailer.

A Nebraska safety patrolman testified that he was called to the scene of an accident on October 8, 1955, at 11:35 p.m., on what is known as the "old Highway 30" west of Lexington, Nebraska. When he arrived, he saw a semi-truck parked on the south side of the road a short distance from a bridge. The truck was facing

east. He also saw a second semi-truck on its side in the north borrow pit. The width of the road at the point where the accident occurred was 21 feet. The road was heavily graveled, with a large gravel ridge on the south side of the road. The gravel ridge took up an average of 4½ feet of the main-traveled portion of the road. On the south side of the gravel ridge there was a portion of the crest of the road a foot or a foot and a half wide. The gravel ridge was 4½ feet out from the south side of the roadway, leaving the traveled portion of the road 21 feet minus 4½ feet. The Carlson truck, driven by Jack, started sinking into the soft shoulder of the road 124 feet west of the bridge. From that point this truck traveled 131 feet farther to where it came to rest in the borrow pit on the north side of the road. The Hanson truck, driven by Snowden, was eastbound and appeared to have pulled into the gravel ridge and traveled approximately 100 feet with one wheel on the inside of the gravel ridge. Then it appeared that one of the right dual wheels, he could not say which one, came out of the gravel ridge sharply and then appeared to go back into the gravel ridge and traveled 105 feet farther east in the gravel ridge. The right dual wheel of this truck passed through the gravel ridge. The gravel along this highway was from 6 to 8 inches deep, and the shoulder on the north side of the road was soft. He further testified that he could see where the Hanson truck had pulled into the gravel ridge, had crossed it, and had driven on the south side of it. Prior to that time it appeared that Snowden had been driving the Hanson truck on the north side of the gravel ridge. Snowden told the patrolman that prior to the accident he had been traveling 40 to 45 miles an hour. He was eastbound, and saw the other vehicle coming from the opposite direction. At that time he slowed down and pulled into the gravel ridge. After he had pulled into the gravel ridge, his truck came back out, and he pulled it back into the gravel ridge again and started to stop.

The patrolman further testified that the road was straight in the area of the accident. There was a slight elevation to the west. The weather was clear, the gravel was loose, and the road was dry. The driver of the Carlson truck told this witness that prior to the accident he was driving 50 miles an hour. On re-direct examination this witness testified that the soft shoulder of the road where the Carlson truck started to sink was approximately 6 inches south of the north side of the road.

Dale Jack, the driver of the Carlson truck, testified that on October 8, 1955, he was proceeding west with a load of 40,000 pounds of shelled corn; that there was a bridge; and that he slowed down as he approached it because he thought the truck coming from the opposite direction might meet him on the bridge which was narrow and would not permit two trucks to pass. He further testified that before he reached the bridge he had traveled approximately 4½ miles on this freshly graveled road. He had traveled this road many times and had been over it within 2 weeks before the accident. After he crossed the bridge, he estimated his speed to be 30 to 35 miles an hour. He was unable to tell, because his speedometer was broken. When he crossed the bridge, the Hanson truck was on the right side of the road and, with reference to the strip of gravel on the south side of the road, the Hanson truck was straddling it. Just before the Hanson truck met him it had gone through the gravel ridge, and just as the Carlson truck approached it seemed to this witness that the Hanson truck "just came right out in the road" and there was not room enough for him to proceed between it and the north edge of the road. He further testified that he kept his truck on the soft shoulder of the road a short distance but was not able to pull back over into the road, and went into the ditch. He did not have time, from the time he saw the Hanson truck pull through the gravel, to stop before he would meet it.

He believed he tried to apply his brakes when he was driving, and endeavored to come to a stop.

On cross-examination this witness testified that no part of the Carlson truck touched the Hanson truck, but that it was "Too close for comfort." On re-direct examination he testified that he got the Carlson truck onto the soft shoulder of the road to miss the Hanson truck.

The driver of the Hanson truck testified that as he approached the scene of the accident he did not cross the gravel ridge which varied in depth from a foot to 6 inches and was freshly graveled; that he was driving east at a speed of 40 to 45 miles an hour; that the right front wheels were in the gravel ridge when the Carlson truck passed him; that the Carlson truck and the Hanson truck were at least 2 feet apart when they passed; that he was going about 10 miles an hour when he passed the Carlson truck and there was no contact between the two trucks; that he made no sudden turn to the north nor across the gravel ridge; and that the Carlson truck was approaching fast from the east for the condition of the road. He was unable to estimate the actual speed of the Carlson truck, but testified that it was traveling in the neighborhood of 40 miles an hour. When he passed the Carlson truck he was not on its side of the road, and when he came out of the gravel ridge he was not on the left side of the road.

On cross-examination this witness admitted a statement to the effect that the space north of the gravel was a foot too narrow for trucks to pass and the approaching truck was forced to drive into the ditch. He also testified that he cut back into the gravel on the south side of the road because he knew that the approaching truck needed more room at the speed it was approaching.

Alma Snowden, the wife of Harry Snowden the driver of the Hanson truck, was riding with him on the night of the accident. She testified that she was a truck driver;

that when the two vehicles passed, the Hanson truck was in the gravel ridge; that the Carlson truck looked like it was coming fast; and that when the two vehicles passed, the Carlson truck was on the road and not in the ditch or on the shoulder.

There were also witnesses who testified with reference to the damage to the plaintiff's truck, the loss of the cargo and the two tarpaulins, and the amount of such damage.

The plaintiff assigns as error that the court erred in submitting the question of contributory negligence for the reason that there was not sufficient evidence adduced to warrant the submission to the jury of this issue; that the court erred in giving instruction No. 8 with reference to speed, for the reason that there was no evidence to sustain the defendant's contention that speed was an element in the case; that the court erred in giving instruction No. 13; that the court erred in confusing the jury by the giving of instructions Nos. 3, 4, and 15 with reference to the degrees of negligence; and that the court erred in dismissing the petition of the plaintiff after the verdict of the jury.

With reference to the plaintiff's contention that the evidence was insufficient to submit the issue of contributory negligence to the jury, the plaintiff asserts that the only evidence adduced on behalf of the defendant relating to the charge of contributory negligence on the part of the plaintiff was that the plaintiff's driver was driving too fast. The record discloses that the plaintiff's driver was aware of the condition of this road, that it was being graveled, and that the gravel was loose for a distance of 4½ miles prior to the time that he arrived at the narrow bridge. The plaintiff's driver had been over this road on occasions within at least 2 weeks previous to the time of the accident. He knew the condition of the road east of the narrow bridge, and apparently knew the width of the traveled portion of the road to be 16½ feet and the depth of the gravel.

He was traveling at 11:30 at night, and he saw the Hanson truck approaching at a distance.

The law provides that no person shall drive a vehicle on a highway at a speed greater than is reasonable and prudent under the conditions then existing. The fact that the speed of a vehicle is lower than the prima facie limits shall not relieve the driver from the duty to decrease speed by reason of the highway conditions, and speed shall be decreased as may be necessary to avoid colliding with any vehicle on or entering the highway in compliance with legal requirements and the duty of all persons to use due care. See § 39-7,108, R. R. S. 1943.

In Krepcik v. Interstate Transit Lines, 154 Neb. 671, 48 N. W. 2d 839, this court said: "The provision in section 39-7,108, R. S. Supp., 1949, that 'No person shall drive a vehicle on a highway at a speed greater than is reasonable and prudent under the conditions then existing' is the basic speed rule. Other provisions following in the section are specific speed restrictions based on the existence of the fact situation or situations mentioned in the act." See, also, cases cited therein.

There is also evidence in this record that at the time the defendant's truck passed the plaintiff's truck he was not over on the plaintiff's side of the road. There is evidence by the patrolman that he did not find any marks made by the defendant's truck that were north of the south half of the 16½ foot roadway.

We conclude that the evidence was sufficient to submit the issue of contributory negligence on the part of the plaintiff's driver to the jury.

With reference to the plaintiff's contention that the court's instructions were so indefinite as to confuse the jury, this assignment of error relates to instructions Nos. 3, 8, 13, 15, and 4. Instruction No. 4 will be discussed later in the opinion in connection with the verdict.

The plaintiff asserts that his driver was confronted with an immediate and imminent danger that arose as a result of the negligence of defendant's driver and that he was without warning or notice of the danger in time to allow him to do anything except the act that he did. In other words, the plaintiff's driver was confronted with a sudden emergency and therefore he is not chargeable with negligence because the judgment which he used in the emergency might be wrong. Instruction No. 12 given by the trial court adequately covers the rule relating to a sudden emergency. The plaintiff offers no criticism of this instruction, therefore it needs no further comment.

The plaintiff asserts that there was no evidence to indicate that his driver did not at all times yield one-half of the right-of-way, nor was there any evidence that he failed to keep a proper lookout. In this connection, the plaintiff refers to instruction No. 8 and quotes part of it.

Before setting forth instruction No. 8, we believe instruction No. 7 should be considered in connection with instruction No. 8.

In instruction No. 7, the court instructed with reference to drivers of vehicles proceeding in opposite directions and their duties toward each other in such situation, and also on the statute relating to speed, to the effect that no person shall operate a motor vehicle at a rate of speed greater than is reasonable and proper, having regard for the traffic and use of the road and the condition of the road.

In Krepcik v. Interstate Transit Lines, *supra*, we said that sections 39-746 and 39-748, R. S. 1943, now R. R. S. 1943, should be construed together. Section 39-746, R. R. S. 1943, refers to the "right half of the highway." As that term is used in said section it means the right half of the main-traveled portion of the highway available for traffic. Section 39-748, R. R. S. 1943, provides that drivers of vehicles proceeding in opposite directions

shall pass each other to the right, each giving to the other at least one-half of the main-traveled portion of the roadway as nearly as possible.

Instruction No. 8 provided as follows: "Reference has previously been made to the statute relating to operation on the right half of the road. The main traveled portion of the road is the part available for and used in the movement of traffic in both directions at the time. When roads are undergoing maintenance, it is necessary for each driver to consider the effect of such maintenance upon the operation of not only his own vehicle but also the particular approaching vehicles. Each driver should use the judgment of a reasonable, prudent man to determine the half-way point of the main traveled portion of the road and to yield his left half as nearly as possible to approaching driver. You will consider this duty of each driver in determining whether he exercised reasonable care in keeping a proper lookout, exercising proper control and driving at a reasonable speed. If the evidence shows that defendant's driver did not use reasonable care to determine and to yield one-half of the main traveled portion of the road as nearly as possible, you may find him negligent in that way. If the evidence is evenly balanced or preponderates to show that he did use reasonable care in such determination and yielding, you will not find him negligent in that way."

We believe that under the evidence as heretofore set out instructions Nos. 7 and 8 were proper, and that the plaintiff's objection thereto is without merit.

The plaintiff also objects to instruction No. 13. This instruction is as follows: "The occurrence of damage to a vehicle furnishes no evidence of negligence. You will make your findings as to each driver according to the evidence relating to the amount of care exercised by each. The law does not allow recovery for damage unless the jury finds from the evidence that the damage was caused by negligence."

The plaintiff asserts that the evidence of damage to his vehicle and the manner in which it occurred tends to dispel any claim of contributory negligence. The occurrence of damage to a vehicle does not furnish evidence of negligence of the respective drivers of the vehicles involved.

The court in instruction No. 3 properly defined "reasonable care," "negligence," "slight negligence," "gross negligence," and "proximate cause."

Instruction No. 15 made reference to the special findings, that is, if Nos. 1, 2, 3, and 4, contained in instruction No. 4, were answered in the affirmative, then the jury would proceed to compare the negligence of each driver with the negligence of the other, determining the degree thereof according to the definitions of "slight negligence" and "gross negligence" in instruction No. 3. The instruction then said: "In determining a degree of negligence, you should consider the danger which should have been observed by the driver, his intention or desire to avoid such danger, the lack of care shown by his negligence and the extent to which his negligent acts or omissions contributed to the proximate cause. As to defendant's driver, you will determine and state in Special Finding 5-A, whether his negligence was gross or less than gross. As to the plaintiff's driver, you will determine and state in Special Finding 5-B whether his negligence was slight or more than slight." There is other matter contained in this instruction that is not relevant to the issue here involved and need not be stated.

In considering instructions Nos. 4 and 15 together, it is apparent that all the jury was required to find under these instructions was the degree of negligence of the plaintiff's driver and of the defendant's driver. This the jury did by rendering a special verdict finding that the negligence of the defendant's driver was less than gross and the negligence of the plaintiff's driver was more than slight.

"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.

We find the plaintiff's contention to be without merit.

As heretofore pointed out, the plaintiff objects to instruction No. 4 on the ground that when the special findings themselves are inconsistent then judgment on the general verdict is proper. The jury was told in instruction No. 4 that its determination of the facts in issue in this case would be shown by its answers to special findings. The special findings in this instruction are the same as appear in the special verdict except that the questions, of course, were not answered until the jury returned its verdict.

The verdict was a special verdict and it was rendered in accordance with instruction No. 4 which set forth the findings for the consideration of the jury in rendering its verdict. The verdict rendered by the jury was as follows: "SPECIAL FINDINGS: 1. Was the defendant's driver negligent at the time of or immediately before the overturning of plaintiff's vehicle in any one or more of the ways stated in Issue No. 1, Instruction No. 5? Answer yes or no." The ways set forth in issue No. 1 of instruction No. 5 are as follows: "a. In negligently failing to keep a proper lookout for other vehicles. b. In negligently failing to yield one-half of the traveled portion of the highway, as nearly as possible. c. In negligently failing to exercise proper control over the operation of his vehicle." The answer in the verdict was "Yes."

Special finding No. 2 stated: "Was such negligence a part of the proximate cause of the overturning of the plaintiff's vehicle? Answer yes or no." The answer was "Yes."

Special finding No. 3 stated: "Was plaintiff's driver

negligent at the time of or immediately before the overturning of plaintiff's vehicle in any one or more of the ways stated in Issue No. 3, Instruction No. 6? Answer yes or no." The ways stated in issue No. 3 of instruction No. 6 were as follows: "a. In negligently driving at an excessive rate of speed. b. In negligently failing to keep his vehicle under proper control." The answer in the verdict was "Yes."

Special finding No. 4 stated: "Was such negligence a part of the proximate cause of the overturning of plaintiff's vehicle? Answer yes or no." The answer was "Yes."

Special finding No. 5 stated: "(To be answered only if Special Findings 1, 2, 3 and 4 have all been answered 'Yes.') What degree of negligence do you find as to each driver by comparison: A. Defendant's driver? (Check one.) (1) Gross (2) Less than gross." The answer was "Yes" to "Less than gross." "B. Plaintiff's driver? (Check one) (1) Slight (2) More than slight." The answer was "Yes" to "More than slight."

Section 25-1120, R. R. S. 1943, provides: "When the special finding of facts is inconsistent with the general verdict, the former controls the latter, and the court may give judgment accordingly."

Section 25-1121, R. R. S. 1943, provides in part: "In every action for the recovery of money only, or specific real property, the jury, in their discretion, may render a general or special verdict. In all other cases the court may direct the jury to find a special verdict, in writing, upon all or any of the issues; and in all cases may instruct them, if they render a general verdict, to find upon particular questions of fact to be stated in writing, and may direct a written finding thereon."

Section 25-1122, R. R. S. 1943, provides: "The verdict of a jury is either general or special. A general verdict is that by which they pronounce, generally, upon all or any of the issues either in favor of the plaintiff or defendant. A special verdict is that by which the jury

finds the facts only. It must present the facts as established by the evidence, and not the evidence to prove them; and they must be so presented that nothing remains to the court but to draw from them conclusions of law."

Within the contemplation of the above-cited statutes, the verdict rendered in this case was a special verdict.

Section 25-1151, R. R. S. 1943, provides: "In all actions brought to recover damages for injuries to a person or to his property caused by the negligence of another, the fact that the plaintiff may have been guilty of contributory negligence shall not bar a recovery when the contributory negligence of the plaintiff was slight and the negligence of the defendant was gross in comparison, but the contributory negligence of the plaintiff shall be considered by the jury in the mitigation of damages in proportion to the amount of contributory negligence attributable to the plaintiff; and all questions of negligence and contributory negligence shall be for the jury." The court gave a proper instruction in accordance with this statute.

In the instant case the jury found by a special verdict that the negligence of the defendant was less than gross and the negligence of the plaintiff was more than slight in comparison. We find no prejudicial error in the record and conclude the judgment of the trial court dismissing the plaintiff's petition to be proper.

In view of our holding, we deem it unnecessary to discuss other assignments of error.

For the reasons given in this opinion, the judgment of the trial court is affirmed.

AFFIRMED.

ROBERT W. JURGENSON, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.
88 N. W. 2d 129

Filed February 21, 1958. No. 34289.

1. **Indictments and Informations.** The statute directing the entry of the prisoner's plea on the back of the indictment also relates to an information and is not mandatory but directory merely, and the failure to so enter it is no ground for a reversal of the judgment.
2. **Criminal Law.** A motion to withdraw a plea of guilty, and to be allowed to enter a plea of not guilty, addresses itself to the discretion of the trial judge before whom the plea is entered, and, in the absence of a clear abuse of that discretion, this court will not interfere.
3. ———. Where the record shows that the defendant had full knowledge of the charge against him and of his rights and the consequences of a plea of guilty, and entered his plea understandingly, the court may, without abusing its discretion, refuse to permit him to withdraw it.

ERROR to the district court for Douglas County: JAMES T. ENGLISH, JUDGE. *Affirmed.*

James E. Abboud, Jr., and *Hugh J. Boyle*, for plaintiff in error.

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

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

MESSMORE, J.

On April 17, 1957, Robert W. Jurgenson, plaintiff in error, hereinafter referred to as defendant, by information was charged with the crime of manslaughter in the district court for Douglas County. On April 18, 1957, the defendant was brought into court in the custody of the sheriff, and without counsel. It appearing that the defendant was in indigent circumstances and unable to employ counsel, upon motion of the county attorney the court appointed the public defender to represent the de-

fendant. The defendant waived the filing of a complaint and preliminary examination, and, upon being arraigned, pleaded guilty to the charge of manslaughter. Sentence was deferred pending further investigation by the adult probation officer.

On April 30, 1957, the defendant was brought into court in custody of the sheriff, and counsel employed by defendant being present, the defendant was arraigned for sentence. Testimony was taken on the defendant's motion to withdraw his plea of guilty entered on April 18, 1957, and to enter a plea of not guilty. This motion was overruled by the court and the defendant was sentenced to imprisonment in the Nebraska State Penitentiary for a period of 10 years.

On May 6, 1957, the defendant filed a motion for new trial, and on May 20, 1957, defendant filed an amended motion for new trial. The motion for new trial was overruled. On May 28, 1957, the defendant gave notice of his intention to apply for a writ of error and requested the sentence imposed upon him be suspended and he be released on bond. This application was denied. The defendant brings error proceedings to this court.

The defendant made a statement at the central police station in Omaha to John J. Hanley, chief deputy county attorney of Douglas County, and Alvin Clinchard of the Omaha police department. The statement was taken by a court reporter at 4:10 p.m., on April 16, 1957. We set forth in substance the pertinent facts contained in this statement.

The defendant stated that he had been questioned previously concerning an incident that took place in his home on Sunday morning, and that he had requested the right to talk to the chief deputy county attorney of Douglas County at the time of this hearing; that it was his intention to give a second statement concerning the events that took place in his home on Sunday morning about 2 a.m., April 14, 1957; that he voluntarily made this statement, and had previously been advised that

he did not have to make it and could stand upon his constitutional rights; that he understood his constitutional rights; that understanding such rights, he wished to give a statement; and that there had been no promises, threats, or abuse of any kind toward him, or anything like that to procure the statement. He further stated that on Saturday evening, April 13, 1957, he and his wife, Phyllis Jurgenson, with a woman referred to as Pat Dockweiler, went for a drive in his car. The three of them went to the Lee Bar and each had a drink of seltzer high and whiskey. They stayed in the Lee Bar about 30 minutes. The three of them left the Lee Bar and went to the Silver Tap. Arriving at the Silver Tap, they sat down in a booth and ordered a round of drinks. A man sitting at the bar came over to talk to the defendant. The defendant's wife and Pat Dockweiler were dancing together at the time. The man asked to join them. They all had a couple of rounds of drinks and left the Silver Tap about 10:30 p.m. They then went to the Gay Time Bar at Twenty-fourth and Leavenworth Streets, arriving there about a quarter to 11 or 11 o'clock. They occupied a booth and had a round of drinks. There were two men there whom Pat Dockweiler knew. These men joined the party, and they had another round of drinks. The man who joined them at the Silver Tap left. When the five of them were sitting at a large table, the defendant's wife danced with one of these men three or four times. The defendant's wife then went to a ladies rest room and the defendant followed her. The defendant asked her what she was doing and she said: "I am writing down my name and phone number for Pat, * * * This guy wants Pat's name and phone number, * * * I am going to give him mine," or something like that, and said it was so that he could get hold of her. Then the defendant and his wife went back and sat down, the defendant asked her what she was doing with that paper, and she said she was going to give it to Pat. The defendant then suggested that

they go home. This was between 12 and 12:30. They went home, the defendant's wife doing the driving. Upon arriving at their home, they sat in the car 15 or 20 minutes and discussed the matter of the defendant's wife giving her phone number. They kissed and made up while in the car. They then went upstairs. After going upstairs, the defendant sat in the kitchen for a while and his wife went to the bathroom to get ready to go to bed. He asked her if she wanted him to fry a couple of steaks or get something to eat, and she said she did not want anything. After about 15 minutes, the defendant went to the bedroom and found his wife sitting on the edge of the bed in her night clothes. He sat down beside her and they again talked about the matter of the phone number. He told her she was lying about getting the address for Pat, and she said she was not lying. She then admitted that she was getting it for herself. He asked her: "How come you are getting it for yourself?" She said: "I don't know, I was drinking." She had been drinking, but was not drunk. Then the defendant went to the dresser and got a gun and twirled it around a couple of times. His purpose was to scare his wife. He was mad. The gun had one shell in it. He twirled it around and it went "bang." After he had fired, he saw her head going over and he dropped the gun, or laid it down, and went to the telephone and dialed for help. The bullet had entered his wife's forehead and killed her. He was angry at her when he fired the shot.

The record shows that when the defendant entered his plea of guilty to the charge of manslaughter on April 18, 1957, he was accompanied by the public defender of Douglas County appointed by the court to defend him. The public defender stated to the court that he was present in court on April 18, 1957, when the defendant entered his plea of guilty of manslaughter; that he had talked to the defendant previous to that time and advised the defendant absolutely as to his constitutional

rights; that he talked to the defendant on three occasions; that the defendant told him his story; that it was the defendant's desire to plead guilty, and the public defender advised him that he was entitled to a trial if he wanted it, that a man charged with the commission of a crime was deemed innocent until he was found guilty, and advised the defendant what his rights were again and asked him if he desired to plead guilty; and that the defendant intimated what he wanted to do.

A Mr. Hayes, an attorney in the office of the public defender, told the court he was present at the last conference had between the defendant and the public defender, and the defendant was fully advised as to his constitutional rights.

The public defender withdrew from the case and the defendant's employed attorney took over the proceedings thereafter.

On April 30, 1957, before sentence was pronounced, the defendant testified that he was and had been a pipe fitter since 1950; that he was married and the father of three children ages 10, 8, and 7; that he went through the fifth grade in school; that he was brought to jail by two detectives who questioned him; and that other people questioned him until about 6 o'clock in the morning. This would be Monday morning, April 15, 1957. The defendant further testified that he was questioned again later; and that about 4 days later he was brought to the county courthouse where he talked to the chief deputy county attorney, Mr. Hanley, who told the defendant that it was no accident, and that he was going to throw a first degree murder charge at him, that is, a first or second degree murder charge. This witness could not remember exactly, he was mixed up and everybody was talking. He further testified that Hanley said if he would tell his story the way Hanley wanted him to, then he would be charged with manslaughter; that he made the statement heretofore set out in substance; and that he talked to the public defender and was told

by him of his rights and that he did not have to plead guilty. He was asked why he had pleaded guilty and his answer was: "I don't know; I was scared, I guess." He was asked: "Q- Scared of what? A- Going to charge me with first degree murder. Q- You were scared of their intimidations? A- Yes. Q- And that is the only reason you pleaded guilty? A- Yes."

On cross-examination the defendant testified that he talked to Captain Clinchard of the Omaha police department the next day after the incident happened, and talked to him on several occasions; and that Captain Clinchard never threatened or abused him in any way, had been pretty close to the investigation, and had conducted it. Hanley asked the defendant: "And you gave me a statement of exactly how it happened, after you had thought it over, that night; and you gave another statement to me, didn't you? A- The day I was in your office you told me you were going to throw a first or second degree murder charge at me." The defendant did recall that at his request Hanley discussed with him the degrees of murder, first, second, and manslaughter, and told him those would be the charges involved in this case. He further testified that the first and second degree murder charges that he might be faced with scared him, and that Hanley did scare him in this respect.

On re-direct examination the defendant testified: "Q- They never abused you physically, did they? A- No. Q- Then you would say that the only reason that you agreed to plead to manslaughter was that they threatened you with first degree murder if you did not? A- Yes, sir."

Hanley, the chief deputy county attorney, testified: "We did discuss at his (defendant's) request the degrees of homicide, and I told him there was a first degree, second degree, and manslaughter; and that depended upon what evidence there was in the particular case, which would determine what charge was to be filed."

Captain Clinchard testified that at the conference, and later when the reported statement was taken at the Omaha police station, the chief deputy county attorney, Hanley, did not at any time in that conference threaten the defendant with a first or second degree murder charge if he did not make a plea of guilty to manslaughter; that this witness was convinced the defendant fully understood the charge of manslaughter, and that he wished to make a direct plea; and that he had explained to the defendant the degrees of murder prior to the time of taking the written statement heretofore mentioned.

The court overruled the defendant's motion to withdraw his plea of guilty and denied the defendant's motion to enter a plea of not guilty. The defendant was then sentenced as heretofore set forth.

The defendant sets forth several assignments of error which are interrelated and which present to this court the question: Did the court err in refusing the request of the defendant to withdraw his plea of guilty and enter a plea of not guilty?

Before taking up this question, the defendant contends that from an examination of the information, the court did not legally record on the information the plea of guilty of the defendant. Attention is directed to section 29-1820, R. R. S. 1943, which provides as follows: "If the accused pleads 'guilty,' the plea shall be recorded on the indictment, and the accused shall be placed in the custody of the sheriff until sentence."

In Preuit v. People, 5 Neb. 377, it was held: "The statute directing the entry of the prisoner's plea on the back of the indictment is not mandatory, but directory merely, and the failure to so enter it is no ground for a reversal of the judgment, when the plea is contained in another part of the record."

Section 29-1604, R. R. S. 1943, provides that the law relating to indictments applies to informations in the same manner and to the same extent.

As heretofore shown, it is a matter of record that the defendant did appear before the court on April 18, 1957, and entered a plea of guilty to the charge of manslaughter. We find no prejudicial error in the court's failure to endorse on the information the defendant's plea of guilty to the charge of manslaughter.

As to whether a plea of guilty entered in a criminal case may be withdrawn and a plea of not guilty entered, it is said in 14 Am. Jur., Criminal Law, § 286, p. 960, that the matter in capital cases, as well as other criminal cases, is usually considered as resting in the discretion of the court and the exercise of such discretion as not being subject to reversal by an appellate court unless it clearly appears that there was an abuse of discretion. The action of a trial court in refusing leave to withdraw a plea of guilty is reviewable on appeal or writ of error; and if it appears that such action was arbitrary and not the exercise of a sound judicial discretion, the appellate court will not hesitate to reverse the judgment of the trial court. See, also, 2 Am. Jur., Appeal and Error, § 141, p. 935.

As in other cases of discretionary power, no general rule can be laid down as to when a defendant will be permitted to withdraw his plea. The decision in each case must depend to a great extent on the particular attendant circumstances. See 14 Am. Jur., Criminal Law, § 287, p. 961.

A motion to withdraw a plea of guilty, and to be allowed to enter a plea of not guilty, addresses itself to the discretion of the trial judge before whom the plea is entered, and, in the absence of a clear abuse of that discretion, the appellate court will not interfere. See Annotation, 66 A. L. R. 628, citing cases from the United States courts, Arkansas, California, Idaho, Illinois, Indiana, Louisiana, Michigan, Minnesota, Mississippi, Missouri, Montana, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, Rhode Island, Washington,

West Virginia, and Wisconsin. See, also, Sandlovich v. State, 104 Neb. 169, 176 N. W. 81.

Leave should ordinarily be given to withdraw a plea of guilty if it was entered by mistake or under a misconception of the nature of the charge; through a misunderstanding as to its effect; through fear, fraud, or official misrepresentation; was made involuntarily for any reason; or even where it was entered inadvisedly, if any reasonable ground is offered for going to the jury. If such a plea has been received by the court without observance of the precautions and solemnities required by law, the court should permit the plea to be withdrawn. On the other hand, if a defendant, with full knowledge of the charge against him and of his rights and the consequences of a plea of guilty, enters such a plea understandingly and without fear or persuasion, the court may, without abusing its discretion, refuse to permit him to withdraw it. See, 14 Am. Jur., Criminal Law, § 287, p. 961, and cases cited in the notes thereunder. See, also, 22 C. J. S., Criminal Law, § 421, p. 642; Annotation, 20 A. L. R. 1445, 1454; Annotation, 66 A. L. R. 628, 638; Annotation, 149 A. L. R. 1403, 1413.

The defendant and the State both cite Bordeau v. State, 125 Neb. 133, 249 N. W. 291. The defendant cites the case to show that the defendant in the cited case was a very young man of more than ordinary intelligence, education, and poise, and capable of making his own choice, while the defendant claims in the instant case that he is not of ordinary intelligence and education, but is a pipe fitter with only a fifth grade education. The State cites the case because of the similarity in some of the elements therein to the instant case. The defendant, Bordeau, through jealousy, stabbed a man by the name of Workman to death with an ice pick because of Workman's attentions to Bordeau's wife. On October 16, 1930, the defendant was questioned by the county attorney and made answers in writing, after having been fully advised as to his immunity. On the

morning of October 17, 1930, he was taken to the county court for his preliminary hearing. He was offered an opportunity to consult counsel and was informed that he would be furnished counsel if he so desired. He asked if he could act as his own attorney, and did so. He was bound over to the district court. He immediately requested the county attorney to explain to him the different degrees of homicide, which was done. He offered to plead guilty to manslaughter, if the county attorney would charge that offense. The county attorney refused on the ground that he thought the facts indicated at least second degree murder. Later that day the defendant told the county attorney he would plead guilty to murder in the second degree, if so charged. When he was so charged and was brought before the district court to be arraigned, the court very carefully and methodically explained to him his right to have counsel (either of his own or appointed by the court) and all other rights afforded him by law, including the nature of the charge and the penalties. He told the court he had not been influenced by promises or coercion or in any other manner in reaching this decision to plead guilty. Upon acceptance of such a plea, the court told defendant he could have any one he desired talk to the court and that a full investigation would be made before sentence. On November 3, 1930, Bordeau was sentenced to serve a term of 25 years in the penitentiary. After his sentence but during the same term of court he filed a motion to vacate the judgment so as to permit him to withdraw his plea and plead not guilty. This motion was overruled and the defendant prosecuted error proceedings to the Supreme Court. In affirming the decision of the trial court, this court said: "Defendant waived his right to an attorney. If he had not previously indicated a willingness to plead guilty to murder in the second degree, an information might have been filed by the county attorney charging murder in the first degree, with a possi-

bility for that extreme offense. A decision of fact, submitted to the trial court by affidavits, will not ordinarily be set aside on review unless unsupported by the evidence or clearly wrong. We are of the opinion that the findings and judgment of the district court were sustained by the evidence and were not contrary to law, that there was evidence justifying the finding of murder in the second degree, and that the district court did not abuse its discretion in refusing to set aside the plea of guilty and to permit a defense and trial by jury on the merits."

In the instant case the evidence shows that the defendant was fully advised of his constitutional rights. He had the benefit of legal counsel at the time he entered his plea of guilty to manslaughter and prior thereto by utilizing the services of the public defender. The public defender apparently more than once advised the defendant of his constitutional rights, told him every man was presumed to be innocent until he was found guilty, and that he was entitled to a trial if he wanted one. There is no evidence that the defendant was threatened in any manner by anyone connected with the case, that is, by any officer of the law or any person from the county attorney's office. There is no evidence that the defendant was abused physically by anyone seeking to obtain information from him with reference to the case. The captain of police of Omaha who investigated his case explained to him the different degrees of murder, and so did the chief deputy county attorney. The defendant voluntarily made his statement with reference to what happened. In fact, he wanted to make the statement and requested the privilege to do so. There is no evidence in the record that the defendant was induced by threats or promises to tell his story, or that any improper means was used to obtain it.

It is the defendant's contention that he pleaded guilty for fear that a more serious charge would be filed against him. He did not plead guilty until after the charge of

manslaughter had been filed. His defense against the charge of manslaughter is that the firing of the gun which killed his wife was an accident. By the defendant's version of the facts, he was mad at his wife; he knew the gun was loaded; and he got the gun in order to scare his wife. This constituted an assault within the contemplation of section 28-411, R. R. S. 1943.

In Turpit v. State, 154 Neb. 385, 48 N. W. 2d 83, this court said: "Where one intentionally points a loaded gun at another, he is guilty of an unlawful assault, and if such gun is unintentionally discharged and the person assaulted is killed thereby, he is guilty of manslaughter." See cases cited in the opinion.

The defendant's claim that he is an ignorant pipe fitter with a fifth grade education and consequently is of subnormal intelligence and incapable of understanding the crime he is alleged to have committed, and acted through fear of being charged with a greater crime, is not very persuasive. His age is not shown by the record. However, he was a married man with the responsibility of raising three children. There is nothing to show that he was not a good workman in his employment, that he was void of employment, or that he was not a responsible person. As we view his statement to the chief deputy county attorney, his response to the questions showed intelligence and continuity of thought and reason.

We conclude that the trial court, under the circumstances presented by the record in the instant case, did not abuse its sound legal discretion in denying the defendant the right to withdraw his plea of guilty and enter his plea of not guilty.

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

AFFIRMED.

YEAGER, J., participating on briefs.

CHICAGO & NORTH WESTERN RAILWAY COMPANY, A CORPORATION, APPELLANT, V. CITY OF SEWARD, NEBRASKA, A MUNICIPAL CORPORATION, APPELLEE.
88 N. W. 2d 175

Filed February 21, 1958. No. 34297.

1. **Statutes.** The fundamental principle of statutory construction is to ascertain the intent of the Legislature, and to discover that intent from the language of the act itself, and it is not the court's duty nor within its province to read a meaning into a statute that is not warranted by legislative language.
2. ———. All statutes in pari materia must be taken together and construed as if they were one enactment, and, if possible, effect given to every provision.
3. ———. Statutes should be so construed as to give effect to the intention of the Legislature, and, if a statute is plain and unambiguous, there is no room for construction or interpretation.
4. **Municipal Corporations: Taxation.** The general rule in this state in construing applicable statutes is that the legislative power and authority delegated to a city to construct local improvements and levy assessments for payment thereof is to be strictly construed and every reasonable doubt as to the extent or limitation of such power and authority is resolved against the city and in favor of the taxpayer.
5. ———: ———. The word "intersections" as used in section 17-520, R. R. S. 1943, is not limited by the language thereof and therefore includes all types thereof, which would include "T" intersections.
6. ———: ———. The only foundation for a local assessment lies in the special benefits conferred upon the property assessed by the improvement to pay which the assessment is made.
7. ———: ———. When a party attacks a paving assessment for the reason that it is illegal, or for an unauthorized purpose, the burden is on him to prove the invalidity of the assessment, or that it was for an unauthorized purpose.
8. **Railroads: Taxation.** A railroad company's right-of-way and other real property specially benefited by a public improvement is liable for special assessments in its general relations and apart from its particular use for railroad purposes, in the same manner and upon the same basis as other property owners in a public improvement district.

APPEAL from the district court for Seward County: H. EMERSON KOKJER, JUDGE. *Affirmed.*

Neely, Otis & Neely, for appellant.

Paul H. Bek and *Ivan A. Blevens*, for appellee.

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

WENKE, J.

This is an appeal from the district court for Seward County. It involves a claim for refund by the Chicago & North Western Railway Company from the City of Seward of a part of a special assessment made against it by the city and paid by the railroad, the claim being made by the railroad under and pursuant to the provisions of section 77-1735, R. R. S. 1943. The district court disallowed the claim for refund and dismissed the action. The railroad filed a motion for new trial and filed this appeal from the overruling thereof.

The factual situation out of which this claim had its origin is not in dispute. The railroad, a Wisconsin corporation, operates a line of its railroad through the city of Seward, Nebraska, and owns real property therein. It owns all the real estate in Seward immediately abutting on the west side of Tenth Street for a distance of 1,137 feet between the north property line of South Jackson Street and the north property line of Moffitt Street. In 1953 the city of Seward, a city of the second class, created Improvement District No. 60 under and pursuant to the authority granted it by section 17-511, R. R. S. 1943. The work contemplated by this improvement district included the paving of that part of Tenth Street, which runs north and south, between the north property line of South Jackson Street and the north property line of Moffitt Street or that part of Tenth Street lying just east of the real estate owned by the railroad. After the improvements contemplated by Improvement District No. 60 had been made the city levied an assessment against the real estate of the railroad lying just to the west of Tenth Street, which has hereinbefore been fully described, in the sum of $8,692.35

or at the rate of $7.645 per foot on the 1,137 lineal front feet abutting on the west side of Tenth Street. The railroad paid this amount to the city but asked for a refund of $2,446.40 thereof.

In the area of Tenth Street as it abuts on the railroad's property it is intersected by four streets from the east, each of which is 80 feet wide, being North Jackson, Bradford, Roberts, and Moffitt Streets. These streets, west of Tenth Street, had previously been vacated, thus they create a "T" intersection as they intersect Tenth Street. As to the cost of improving and paving the areas of these four intersections the city charged the east one-half thereof upon all of the taxable property of the city under the authority of section 17-520, R. R. S. 1943, whereas it is the railroad's thought that thereunder the cost of improving and paving the entire area of these four intersections should have been assessed upon all of the taxable property of the city. If that is true then it seems to be the thought of the railroad that its property immediately to the west of these intersections should be free of being taxed for the cost of the improvements made by the city under and pursuant to the authority of Improvement District No. 60, that is, it should not have been assessed on the 320 feet of its property immediately to the west of the four "T" intersections at the rate of $7.645 per lineal front foot or the sum of $2,446.40, which amount it asks that we require the city to refund.

There are two questions involved: First, are the areas created by "T" intersections within those covered by section 17-520, R. R. S. 1943; and second, if they are, does that fact relieve the railroad's property at the top of the "T" intersections from the levy of special assessments resulting from special benefits conferred thereon by the improvement?

The whole act relating to improvement of streets and alleys by cities of the second class by means of improvement districts contemplates the levy of special

assessments for the cost thereof upon the lots and parcels of land in the improvement district which abut on or are adjacent to the streets and alleys improved to the extent that such lots and parcels of land are specially benefited thereby, and in proportion to such benefits, but not to exceed the cost thereof. See, §§ 17-509, 17-510, 17-511, 17-524, R. R. S. 1943. In considering the cost thereof for this purpose the city should, of course, first determine what should not be included. In this respect section 17-520, R. R. S. 1943, provides, in part, as follows: "For all paving and improvements of the intersections and areas formed by the crossing of streets, avenues or alleys, * * * the assessment shall be made upon all of the taxable property of the city or village; * * *. Nothing herein shall be construed as authorizing the mayor and council or board of trustees to pave or gravel any intersections or areas formed by the crossing of streets, avenues or alleys, unless in connection with one or more blocks of street paving or graveling of which the paving or graveling of such intersection or area shall form a part."

"The fundamental principle of statutory construction is to ascertain the intent of the Legislature, and to discover that intent from the language of the act itself, and it is not the court's duty nor within its province to read a meaning into a statute that is not warranted by legislative language." Lang v. Sanitary District, 160 Neb. 754, 71 N. W. 2d 608.

"All statutes relating to the same subject are considered as parts of a homogeneous system and later statutes are considered as supplementary to preceding enactments. So, also, statutes relating to the same subject, although enacted at different times, are in pari materia and should be construed together." Enyeart v. City of Lincoln, 136 Neb. 146, 285 N. W. 314.

"All statutes in pari materia must be taken together and construed as if they were one enactment, and, if possible, effect given to every provision." Logan County

v. Carnahan, on rehearing, 66 Neb. 693, 95 N. W. 812.

"Statutes should be so construed as to give effect to the intention of the legislature, and if a statute is plain and unambiguous, there is no room for construction or interpretation." Shellenberger v. Ranson, 41 Neb. 631, 59 N. W. 935, 25 L. R. A. 564.

"The general rule in this state in construing applicable statutes is that the legislative power and authority delegated to a city to construct local improvements and levy assessments for payment thereof is to be strictly construed and every reasonable doubt as to the extent or limitation of such power and authority is resolved against the city and in favor of the taxpayer." Chicago & N. W. Ry. Co. v. City of Omaha, 156 Neb. 705, 57 N. W. 2d 753. See, also, Chicago & N. W. Ry. Co. v. City of Omaha, 154 Neb. 442, 48 N. W. 2d 409.

"Statutes empowering municipal boards to perform certain functions will be strictly construed, and all doubt will be resolved against the exercise of the power, rather than in favor of it." Garver v. City of Humboldt, 120 Neb. 132, 231 N. W. 699.

It seems only fundamental that what the city did in considering the cost of improving and paving the intersections created by these four streets intersecting but not crossing Tenth Street cannot be approved. Either the entire area was or was not within the language of section 17-520, R. R. S. 1943. There are states wherein division is expressly authorized by statute but such is not the situation in this state.

The city seems to rely on our holding in Price v. City of Lincoln, 103 Neb. 366, 171 N. W. 921, and our citing therein of the case of City of Crowley v. Police Jury of Acadia Parish, 138 La. 488, 70 So. 487, as authority for what it did in dividing the area into two parts for the purpose of applying the provisions of section 17-520, R. R. S. 1943, thereto. The case of Price v. City of Lincoln, *supra,* did not involve the question here presented nor did our citing of the case of City of Crowley

v. Police Jury of Acadia Parish, *supra,* therein in support of the language that "The term 'intersections,' as applied to streets, is defined as 'the space occupied by two streets at the point where they cross each other' " make it authority for the question here presented. The factual situation as to what was and what was not included in an intersection was not involved in Price v. City of Lincoln, *supra,* and what was said therein in that regard was merely dicta.

The city also calls our attention to the history of section 17-520, R. R. S. 1943. In its original enactment it related solely to "The cost of improving the intersections in any such district" and left it optional with the municipal authorities as to whether or not that cost should be paid by the municipality or assessed against the property in the district specially benefited thereby. See Laws 1909, c. 22, § 1, p. 193. The 1919 Legislature changed this to the language of the present statute. Laws 1919, c. 50, § 1, p. 147. The principal change was that which made the cost thereof a mandatory charge to be assessed upon all of the taxable property of the city or village. We do not think, by adding the words "and areas formed by the crossing of streets, avenues or alleys," the Legislature intended to materially limit what had previously been meant by the word "intersections."

We have been unable to find any Nebraska decisions dealing directly with this subject and none have been pointed out to us. The word "intersections" as used in section 17-520, R. R. S. 1943, in our opinion includes all types thereof which would include "T" intersections. We do not think the language added to the act by the 1919 Legislature in any way limited its meaning in this respect. In this respect we think the legislative definition of the term "intersections" as contained in section 39-741, R. R. S. 1943, which deals with "Rules of the Road" is significant. Therein, in subsection (7) thereof, the Legislature said: "(7) The term 'intersection' includes the area embraced within the pro-

longation of the lateral curb lines or, if none, then the lateral boundary lines of two or more highways which join one another at an angle, whether or not one such highway crosses the other." We think the city should have assessed all of the cost of improving and paving these four "T" intersections upon all of the taxable property of the city.

But would this relieve the railroad of the assessment made against any of its property abutting on Tenth Street? We think not. Special assessments on property in improvement districts are made on the basis of special benefits accruing thereto and not on the basis of the cost of the improvement immediately in front of such property. See, Biggerstaff v. City of Broken Bow, 112 Neb. 4, 198 N. W. 156; Chicago & N. W. Ry. Co. v. City of Albion, 109 Neb. 739, 192 N. W. 233; Chicago & N. W. Ry. Co. v. City of Omaha, 156 Neb. 705, 57 N. W. 2d 753. As stated in Chicago & N. W. Ry. Co. v. City of Albion, *supra*: "That special assessments can only be based upon special benefits to the property assessed, and that such an assessment beyond the special benefits conferred would be a taking of private property for public use without just compensation, as appellant urges, is settled law in this state." And in Chicago & N. W. Ry. Co. v. City of Omaha, 156 Neb. 705, 57 N. W. 2d 753, we said: "The court went on to say, quoting from Cain v. City of Omaha, supra (42 Neb. 120, 60 N. W. 368): ' "The only foundation for a local assessment lies in the special benefits conferred upon the property assessed, by the improvement to pay which the assessment is made, and an assessment beyond the benefit so conferred is a taking of property for public use without compensation, and therefore illegal." ' "

Has the railroad shown that its property abutting on and immediately to the west of these four "T" intersections was not specially benefited by the improvement of Tenth Street?

As stated in Chicago & N. W. Ry. Co. v. City of

Omaha, 156 Neb. 705, 57 N. W. 2d 753: "When a party attacks a paving assessment for the reason that it is illegal, or for an unauthorized purpose, the burden is on him to prove the invalidity of the assessment, or that it was for an unauthorized purpose." And in Chicago & N. W. Ry. Co. v. City of Omaha, 154 Neb. 442, 48 N. W. 2d 409, quoting from Munsell v. City of Hebron, 117 Neb. 251, 220 N. W. 289, we said: " 'The owner of property in a municipality cannot lawfully be assessed for a public improvement thereon or adjacent thereto beyond the amount of the present benefit or such reasonably prospective benefit as such owner may derive from the improvement in question.' However, 'When a party attacks a paving assessment as void * * * the burden is on him to prove the invalidity of the assessment.' "

What should have been done by the city in computing the cost of the improvement in order to assess the lots and parcels of land abutting on or adjacent to the street improved was to take the total cost of these four "T" intersections and deduct it therefrom and assess such lots and parcels for the balance to the extent they had been specially benefited thereby but not in excess thereof and assessed all of the taxable property of the city for the costs of improving and paving the four intersections. In this respect the railroad's property was taxable for all special benefits that had accrued thereto by reason of the improving of Tenth Street. See, Chicago & N. W. Ry. Co. v. City of Omaha, 154 Neb. 442, 48 N. W. 2d 409; Chicago & N. W. Ry. Co. v. City of Albion, *supra;* Chicago & N. W. Ry. Co. v. City of Omaha, 156 Neb. 705, 57 N. W. 2d 753. As stated in Chicago & N. W. Ry. Co. v. City of Omaha, 156 Neb. 705, 57 N. W. 2d 753: "In Chicago & N. W. Ry. Co. v. City of Albion, 109 Neb. 739, 192 N. W. 233, it was concluded that a railroad company's right-of-way and other real property specially benefited by a public improvement was liable for special assessments in its general rela-

tions and apart from its particular use for railroad purposes, in the same manner and upon the same basis as other property owners in a public improvement district."

Did the railroad show that its property had not been specially benefited? As we said in Chicago & N. W. Ry. Co. v. City of Omaha, 156 Neb. 705, 57 N. W. 2d 753: "When a party attacks a paving assessment for the reason that it is illegal, or for an unauthorized purpose, the burden is on him to prove the invalidity of the assessment, or that it was for an unauthorized purpose." We think the following from Chicago & N. W. Ry. Co. v. City of Omaha, 154 Neb. 442, 48 N. W. 2d 409, has application here. Therein we said: "There is not sufficient competent evidence in this record which would justify the district court or this court in avoiding or annulling the assessment. In the situation presented, the action of the taxing authorities in levying special assessments as provided for by law is conclusive because plaintiff has not proved that such taxing body making such special assessments proceeded upon an illegal principle or an erroneous rule of law."

It is probably true that too large an amount of the costs of the improvements of Improvement District No. 60 were assessed to the owners of lots and parcels of land abutting on or adjacent to the street improved and not enough to all the taxable property of the city but this does not make void any part of the special assessments levied on the railroad's property unless it has shown its property has not been specially benefited in that amount. That it has failed to do. Consequently we affirm the action of the trial court.

AFFIRMED.

STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, PLAINTIFF, V. J. CEDRIC CONOVER, DEFENDANT.

88 N. W. 2d 135

Filed February 21, 1958. No. 34363.

1. **Trial.** A motion by plaintiff for judgment on the pleadings admits facts well pleaded or admitted in the answer in the cause.
2. ———. If statements contained in the pleadings legally entitle a litigant to judgment in his favor, the court should accordingly render judgment in the cause.
3. **Judges.** A county judge is prohibited by Article V, section 14, of the Constitution from practicing law in any court in a matter arising in or growing out of any proceeding in his court.
4. **Attorney and Client.** The ethical standards relating to the practice of law in this state are the Canons of Professional Ethics of the American Bar Association and any others adopted by this court.
5. ———. Misconduct of a lawyer acting as a judge may justify his disbarment as a member of the bar. A violation of his judicial oath aggravates the offense of disregarding his oath as a lawyer.
6. ———. Money of a client or other trust property coming into the possession of a lawyer should be promptly reported and accounted for and should not under any circumstances be commingled with his own or used by him.
7. ———. Restitution of money or property improperly detained by a lawyer until he is threatened with or involved in proceedings concerning his legal accountability therefor is not exoneration of his unprofessional conduct.
8. ———. Implicit in an admission to the bar is an obligation that the licensee will inform himself of and will meticulously discharge his duties, uphold and obey the Constitution and laws of the state, honor the standards of professional ethics, and abjure all offensive practices.
9. ———. Courts have a duty to maintain the integrity of the legal profession by excluding any member thereof whose conduct has a tendency to bring the courts or the profession of law into disrepute or to affect adversely the administration of justice.
10. ———. The primary purpose of a disciplinary proceeding is not to punish the subject of it but to ascertain and determine in the public interest if he should be permitted to continue as a member of the bar.

ORIGINAL ACTION. *Judgment of disbarment.*

Clarence S. Beck, Attorney General, and *Gerald S. Vitamvas*, for plaintiff.

Townsend & Youmans, for defendant.

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

BOSLAUGH, J.

Defendant became a member of the bar of Nebraska June 27, 1934, and has been licensed to practice law in the state since that date. He was during the period of January 7, 1937, to May 1, 1951, judge of the county court of Morrill County. It had a population of less than 16,000. He has been since March 6, 1954, county attorney of that county. This is an original proceeding in this court by the State of Nebraska on the relation of the Nebraska State Bar Association.

The complaint accuses the defendant of unlawful and unethical conduct in practicing law in the court of which he was judge; of influencing persons interested in matters pending in the court of which he was judge in reference to the selection of an attorney to represent and act for them therein; of failing to account for and pay to the county the costs received by him which had accrued in proceedings had in the court of which he was judge; and of receiving and retaining attorney's fees taxed as costs in tax foreclosure cases prosecuted by him as county attorney on behalf of the aforesaid county. The facts stated in the complaint are admitted by the answer of defendant. Plaintiff has applied for judgment on the pleadings. Its motion in this respect is well taken. A motion of plaintiff for judgment on the pleadings admits facts well pleaded or admitted in the answer in the cause. If statements contained in the pleadings legally entitle a litigant to a judgment in his favor, the court should accordingly render judgment in the cause. State ex rel. Nebraska State Bar Assn. v. Wiebusch, 153 Neb. 583, 45 N. W. 2d 583.

The record discloses that in the interval from June 1947 to May 10, 1950, defendant accepted employment as an attorney by persons interested in the estates of four deceased persons; that he performed services in accordance with his employment; and that he received and retained compensation therefor. The proceedings in which he acted were each in the court of which he was judge and are identified as follows: In the matter of the estate of Dorothy Peck Harkins, deceased; in the matter of the estate of Della Putman, deceased; in the matter of the estate of Lou M. Bonham, deceased; and in the matter of the estate of Fannie L. Bulck, deceased. Defendant conducted proceedings for the administration of each of the estates in the court of which he was judge in the same manner as he would have done as attorney for the persons he represented if he had not been judge of the court except he procured another member of the bar to permit his name to appear of record in each proceeding as nominal attorney for the parties by which defendant was employed and for whom he in fact acted. Defendant says in his answer that he then believed that all the law required under the circumstances was that some lawyer other than defendant appear of record as the attorney for the persons represented by defendant in the administration proceedings. This indicates that defendant was conscious of an impropriety in his conduct and is a concession that the records of the court were made to exhibit a misrepresentation. It also justifies the conclusion of a regrettable inattention to or an inexcusable disregard of the legal literature of the state.

The record definitely establishes that defendant practiced law in matters arising in and growing out of proceedings in the court of which he was judge and that he acted in the matters and proceedings in the dual capacity of attorney and judge. The participation of defendant therein as counsel for interested parties was a violation of the provisions of the Constitution that no county judge shall practice law in any court in any mat-

ter arising in or growing out of any proceeding in his court. Art. V, § 14, Constitution of Nebraska; State ex rel. Nebraska State Bar Assn. v. Wiebusch, *supra;* State ex rel. Nebraska State Bar Assn. v. Bates, 162 Neb. 652, 77 N. W. 2d 302. It was contrary also to the prohibition of the applicable statute. § 7-111, R. R. S. 1943. The unprofessional conduct ascribed to the defendant in this respect by the complaint and verified by the record transgressed section 31 of the Canons of Judicial Ethics of the American Bar Association which states in part: "If forbidden to practice law, he should refrain from accepting any professional employment while in office." The ethical standards relating to the practice of law in this state are the Canons of Professional Ethics of the American Bar Association and those that are approved from time to time by this court. These are recognized and applied in any proper case as rules governing the professional conduct of lawyers.

Defendant, as a part of his admission to practice law in the state, was required to obligate himself by an oath that he would support the Constitution of the state and that he would faithfully perform the duties of a member of the bar of Nebraska. § 7-104, R. R. S. 1943. Likewise he was required before he entered upon his official duties to take an oath to support the Constitution of the state and to faithfully discharge the duties of his office. Art. XV, § 1, Constitution of Nebraska. Misconduct of a lawyer acting as a judge may justify his disbarment as a member of the bar. A violation of his judicial oath aggravates the offense of disregarding his oath as a lawyer. State ex rel. Nebraska State Bar Assn. v. Wiebusch, *supra;* State ex rel. Nebraska State Bar Assn. v. Bates, *supra;* Tucker v. Heirs of Myers, 151 Neb. 359, 37 N. W. 2d 585.

The costs of each of the administration proceedings described above were paid to defendant while he was judge of the county court. He made no accounting of these to the county during his incumbency of the office.

After he had notice of the investigation concerning his conduct and the charges before the committee on inquiry of the bar association he paid the costs in one of the estate proceedings on October 5, 1957, to the county. The costs of the other three administration proceedings were not paid by defendant to the county until October 15, 1957, after the hearing before the committee on inquiry. The amount of the costs was retained by defendant after their receipt by him for more than 6 years.

The payment of the costs specified above was properly made to defendant as judge of the county court. § 24-549, R. R. S. 1943. He was a salaried officer and his compensation during the period involved was specified by law. Art. V, § 15, Constitution of Nebraska; § 23-1104, R. S. Supp., 1945; § 23-1104, R. S. Supp., 1949; Hamilton v. Foster, 155 Neb. 89, 50 N. W. 2d 542. The defendant was required to report the costs received to the board of county commissioners and to pay the amount thereof to the county treasurer not later than the 15th day of the month following the month during which they were received. § 33-130, R. R. S. 1943. A failure to comply with the statute was an offense for which sanctions were prescribed. § 33-132, R. R. S. 1943.

Defendant, while county attorney of Morrill County, received from the clerk of the district court an amount taxed as an attorney's fee for plaintiff in each of three cases for the foreclosure of tax liens prosecuted in the name and for the benefit of the county of Morrill. The dates the remittances were received by defendant were September 10, 1954, November 10, 1954, and May 18, 1956. He deposited these in his individual checking account in the bank of his choice. The Auditor of Public Accounts of the state challenged two of the amounts on April 25, 1957. The defendant paid the amount of these to the county treasurer on April 30, 1957, and he paid the amount of the third item to the county treasurer October 5, 1957, after he had notice of the complaint before the committee on inquiry. Defendant,

as county attorney, was obligated to institute and prosecute any action of the county to foreclose a tax lien. § 77-1918, R. R. S. 1943. He was not entitled to any amount taxed therein as an attorney's fee. § 23-1206, R. R. S. 1943. See, County of Sarpy v. Gasper, 149 Neb. 51, 30 N. W. 2d 67; Strawn v. County of Sarpy, 156 Neb. 797, 58 N. W. 2d 168.

The accepted doctrine is that money of a client, money collected for a client, or other trust property coming into the possession of a lawyer should be promptly reported and accounted for and should not under any circumstances be commingled with his own or be used by him. § 11, Canons of Professional Ethics of the American Bar Association. The belated restitution to the county of the costs which defendant had received and retained as above related and the payment to the county of the amount he had received without right from the clerk of the district court when he was threatened with or involved in proceedings concerning legal accountability therefor was not exoneration of the unprofessional conduct of defendant in reference thereto. State ex rel. Nebraska State Bar Assn. v. Hungerford, 159 Neb. 468, 67 N. W. 2d 759; State ex rel. Nebraska State Bar Assn. v. Feehan, 161 Neb. 9, 71 N. W. 2d 518.

Defendant does not deny the transgressions charged against him. He only pleads in effect that they were the result of absence of knowledge of the law, mistake, or error. These do not justify or excuse his serious repetitious derelictions. An assertion of illiteracy of constitutional provision, statutory enactments, and definitive pronouncements of the court of final decision is a futile haven for a judge or a lawyer. Likewise, an often-repeated claim of mistake or error in the handling of trust funds has small convincing influence. Implicit in each admission to the bar is an obligation that the licensee will know and will meticulously discharge his duties, uphold and obey the Constitution and the laws of the state, honor the standards of professional ethics,

and abjure from all offensive practices. State ex rel. Nebraska State Bar Assn. v. Feehan, *supra.*

Courts have a duty to maintain the integrity of the legal profession by excluding any member thereof whose conduct has a tendency to bring the courts or the profession of law into disrepute or to affect adversely the administration of justice. Hence the primary purpose of a disciplinary proceeding is not to punish the subject of it but to ascertain and determine in the public interest if he should be permitted to continue in the practice of law. State ex rel. Nebraska State Bar Assn. v. Wiebusch, *supra.* The charges made against defendant have been established. The judgment is that the defendant should be and he is disbarred from the practice of law in this state.

JUDGMENT OF DISBARMENT.

CARTER, J., did not participate in the decision of this case.

W. IRVING WILKIE, APPELLANT, V. ERNST J. BANSE ET AL., APPELLEES.
88 N. W. 2d 181

Filed February 28, 1958. No. 34280.

1. **Appeal and Error.** Suits in equity, on appeal to this court, are triable de novo, subject to the rule that when evidence on material questions of fact is in irreconcilable conflict, this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying and accepted one version of the facts rather than another.
2. **Specific Performance: Accounting.** A party who seeks to compel performance of a written contract and an accounting of the profits alleged to have accrued therefrom has the burden of proving the contract and that he has performed in accordance with its terms.
3. **Contracts.** In order to prove an express contract, a definite offer by the offerer, and an unconditional and absolute acceptance thereof by the offeree, must be shown.

4. ———. Mutuality of obligation is an essential element of the right to enforce a contract in a court of equity. Where the offer requires a promise on the part of the offeree, a communicated acceptance is essential.
5. ———. An offer does not ripen into a contract unless accepted, and if the offeree does not accept within a reasonable time it may be treated as rejected.
6. ———. An offeree will not ordinarily be permitted to withhold acceptance, or to violate a contract until the risk of loss under the agreement has passed, and then to belatedly assert rights in it when its financial success appears to be assured.

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

Burbridge & Burbridge, for appellant.

Frost, Meyers & Farnham, for appellees.

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

CARTER, J.

This is a suit in equity to enforce two written contracts, and to have the plaintiff declared to be the owner of a one-half interest in the property within the scope of such agreements, and for an accounting by the defendants of all money received by the principal defendants from sales thereof. The principal defendants denied the existence of any agreements between them and the plaintiff, and prayed for a dismissal of the suit and a judgment for costs against the plaintiff. The trial court found for the defendants and dismissed the suit. The plaintiff has appealed.

There are two alleged contracts dealing with two separate tracts of real estate within the city of Omaha involved in this suit. The descriptions of the two tracts are set out in the pleadings. For convenience we shall refer to them as the north and south tracts. The plaintiff, W. Irving Wilkie, is a licensed real estate broker residing in the city of Omaha, whom we shall subsequently refer to as Wilkie. The primary defendant, Ernst

J. Banse, was employed by Wilkie for approximately 3 years, his employment having been amicably terminated on February 15, 1956. We shall, for convenience, refer to him as Banse. Other defendants were purchasers of lots and the holders of accommodation deeds to unsold lots within the two tracts here involved. There appears to be no dispute between the principal parties to the suit as to the actual interest, if any, of the other defendants. There is therefore no issue to be determined here other than that existing between Wilkie and Banse.

Prior to February 8, 1956, Banse had some negotiations with the owner for the purchase of the north tract which consisted of about 5 acres. He had in mind the replatting and developing of this tract as a new residential area. He approached his employer, Wilkie, about joining him in the project. The discussions culminated in a meeting on February 8, 1956, during which a letter agreement was drawn up by which both were to engage in the venture on a fifty-fifty basis. Banse signed both the original and copy of the letter agreement. He asked Wilkie to sign, but the latter demurred, stating that he desired to look into it further. Banse obtained his copy of the agreement which Wilkie had not signed. Banse testified that he made repeated efforts to obtain Wilkie's signature, but that Wilkie procrastinated and did not sign on any of these occasions. Banse proceeded to close the deal for the purchase of the north tract, agreeing to build a house on one lot in the tract and deed it to the purchaser as a consideration for the conveyance of the north tract to him. Banse proceeded to have the north tract rezoned, replatted, and graded. He contracted for the building of the house for the seller of the tract in accordance with the contract of purchase. All contracts for the needed services in developing the north tract were made by Banse and all payments thereon were also made by him.

In February 1956, Banse became interested in buying

the south tract, which consisted of approximately 5 acres adjoining the north tract on the south. Banse suggested to Wilkie that they acquire this south tract and develop it as a residential area as a joint venture on a fifty-fifty basis. Wilkie indicated that he was interested, and on or about June 20, 1956, a letter agreement was prepared. Banse signed the original and the copy of this letter agreement. The copy of the letter agreement in the possession of Banse was never signed by Wilkie.

The evidence shows that Harold W. Graham, a real estate broker, handled the sale of the south tract for the owners. He had some previous negotiations with Wilkie about this tract. In early 1956 Banse became interested in the tract. In the latter part of February Wilkie and Banse met with Graham, and a sale price was agreed upon. Graham said he dealt with Wilkie as a purchaser, and refused to split the broker's commission with Wilkie. On or about March 30, 1956, Graham advised Banse he had received the deed for the south tract from the owners and that the deal was ready for closing. Banse contacted Wilkie, who said he did not have his share of the money to close the deal and advised Banse to stall with Graham on the settlement. Graham agreed to wait until April 14, 1956. When that date arrived, Wilkie still had no money and asked Banse to stall Graham again. Graham agreed to wait until April 30, 1956. On the arrival of this date Wilkie still had no money to close the deal and Banse paid the consideration, amounting to $10,021.33. Banse and his wife were the grantees in the deed. The evidence shows that Banse employed engineers and surveyors, and entered into contracts in going ahead with the development of this tract. Contracts for grading, sewerage, water, and gas were entered into. Banse testified he had obligated himself on the two tracts to the extent of $50,000 by June 20, 1956. He said that on that date he insisted that Wilkie sign the letter agreements covering both

tracts, or that the whole deal would be off between them. Wilkie did not sign.

Wilkie testified that he signed two copies of each agreement and delivered one of each to Banse. Wilkie also testified that he did not remember the date on which he signed the copies of the agreements. There were no witnesses to the purported signing and delivery of the agreements. It is the contention of Wilkie that it was agreed the property should be held in the name of Banse and his wife and that all income and expenses were to be received and paid by Banse. The general tenor of the agreements was that the property was to be held in the name of Banse for the benefit of both Wilkie and Banse, and that each should be jointly liable for the cost of the land and all costs of abstracting, street improvement, grading, paving, taxes, etc. All money received was to be divided on a fifty-fifty basis. The agreement did not provide that Banse would do all the work, pay all the expenses, and obligate himself personally on all the contracts necessary to be made in the development of these projects. The proposed agreement was to the effect that each would pay one-half of all expenses. The evidence establishes, and Wilkie admits, that he did not contribute any money to the venture.

Banse contends that but one original and one copy was made of each of the two agreements. This does not appear to be directly disputed in the record. The stenographer who prepared the first letter agreement testified in this case. While she was not asked, she did not testify that more than one original and one copy was made. The record is clear that the copies of the agreements in the possession of Banse were neither signed nor authorized to be signed by Wilkie.

The evidence shows that lots began to sell in this replatted area during the early spring and summer of 1956. During the late summer it appeared that the lots were going to sell to advantage and that the venture

would become a financial success. On September 20, 1956, this suit was commenced.

We are required under rules of law, often stated, to try the case de novo in this court. There are irreconcilable conflicts in the evidence of Wilkie and Banse in this case. In such instances this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying and must have accepted one version of the facts rather than another. Sofio v. Glissmann, 156 Neb. 610, 57 N. W. 2d 176. Applying this rule, we conclude from all the evidence that the plaintiff failed to make a case.

Briefly stated, the evidence shows that Wilkie and Banse carried on negotiations among themselves to develop the two tracts of real estate as a joint venture. Written contracts were contemplated and letter agreements were prepared which were signed by Banse. Wilkie procrastinated about signing. The evidence sustains a finding that Wilkie did not sign the agreements until it appeared that the venture was a financial success. He put nothing into the venture as required by the agreements. The record fails to show that Wilkie signed and delivered any instrument obligating himself in the venture. The evidence does not reveal that there was ever a meeting of the minds of the parties. It fails to show an acceptance of the proposed letter agreements on the part of Wilkie. The evidence sustains a finding that Wilkie procrastinated and refused to sign the agreements during the period when the financial success of the venture was uncertain, and sought to accept the benefits only when its financial success was assured.

A party who seeks to compel performance of a written contract, and demands an accounting of the profits alleged to have accrued therefrom, has the burden of proving the contract and that he performed in accordance with its terms. Sopcich v. Tangeman, 153 Neb.

506, 45 N. W. 2d 478; Sofio v. Glissmann, *supra*. It is elementary law that in order to prove an express contract, a definite offer, and an unconditional and absolute acceptance thereof, must be shown. Beskas v. Calkins, 135 Neb. 323, 281 N. W. 29; Griggs v. Oak, 164 Neb. 296, 82 N. W. 2d 410. Mutuality of obligation is an essential element of the right to enforce a contract in a court of equity. Herrin v. Johnson Cashway Lumber Co., 153 Neb. 693, 46 N. W. 2d 111. An offer does not ripen into a contract unless accepted, and if the offeree does not accept the offer within a reasonable time it may be treated as rejected. Where the offer requires a promise on the part of the offeree, a communicated acceptance is essential. Standard Oil Co. v. O'Hare, 126 Neb. 11, 252 N. W. 398. A party seeking to enforce an alleged contract must not only prove the agreement but must also prove that he has substantially complied with its terms. He will not ordinarily be permitted to withhold his acceptance, or to violate the contract until the risk of loss in the object of the agreement has passed, and then to belatedly assert rights in it when its financial success appears to be assured. In the instant case it is not shown that Wilkie accepted Banse's offer within a reasonable time. In fact, it is not shown that the offer was ever accepted other than the vague evidence of Wilkie that he signed the letter agreements and delivered copies to Banse on a date that he does not remember.

After a consideration of the rules of law herein announced, we conclude that the offers of Banse in the form of letter agreements directed to Wilkie to enter into a joint venture for the development of the two tracts of real estate for residential purposes were not accepted by Wilkie within a reasonable time, if at all. Consequently Banse could properly treat the offers as rejected.

The findings of the trial court are in accord with the findings of this court. The judgment of the district

court dismissing plaintiff's cause of action is therefore affirmed.

AFFIRMED.

YEAGER, J., participating on briefs.

GEORGE H. BRASIER, APPELLANT, V. R. F. CRIBBETT ET AL., APPELLEES.
88 N. W. 2d 235

Filed February 28, 1958. No. 34291.

1. **Appeal and Error.** When a demurrer to a petition is sustained, the plaintiff's action dismissed, and a motion for a new trial and rehearing is filed, in the event it is ruled upon, then under section 25-1912, R. R. S. 1943, the time for appeal begins to run from the date of the ruling on the motion for a new trial and rehearing.
2. ———. During the pendency of a motion for a new trial timely filed, no appealable order is considered as having been rendered until the motion for a new trial is disposed of.
3. **Municipal Corporations.** All lawful enterprises of a municipal corporation must be engaged in for a public purpose, and the fact that a particular enterprise is for a public purpose does not determine whether such enterprise is a corporate or proprietary function, in the exercise of which the municipality is subject to tort liability, or a governmental function immune from such liability.
4. ———. The distinction between a governmental and proprietary function of a municipal corporation is a judicial and not a legislative question, and legislative declaration as to the nature of the authority delegated by the statute is not controlling.
5. ———. A municipality or the officers, agents, servants, or employees thereof, may be subject to a suit sounding in tort in the operation, superintendence, or management of a municipal airport or other air navigation facility.
6. **Principal and Agent.** The distinguishing features of agency are its representative character and its derivative authority. Whether a particular relationship is an agency depends on the relations of the parties as they in fact exist, without regard to what they call their relationship.
7. ———. Agency is the relationship which results from the manifestation of consent by one person to another that the

other shall act on his behalf and subject to his control, and consent by the other so to act.

APPEAL from the district court for Saunders County: JOHN D. ZEILINGER, JUDGE. *Reversed and remanded.*

J. A. Hayward, for appellant.

Kanouff & Brown, Lloyd E. Chapman, and *Louis E. Dolezal,* for appellees.

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

MESSMORE, J.

This is an action at law brought in the district court for Saunders County by George H. Brasier, plaintiff, against R. F. Cribbett, the City of Wahoo, and the mayor and members of the city council of the city as defendants. Service of process was had on the defendants R. F. Cribbett and the City of Wahoo, but not on the members of the city council of the city. The mayor and members of the city council made no appearance in this case. Therefore, the defendants may be designated as R. F. Cribbett and the City of Wahoo. The defendants R. F. Cribbett and the City of Wahoo demurred to the plaintiff's petition. The trial court sustained both demurrers. The plaintiff filed a motion for rehearing. The trial court overruled the motion for rehearing. The plaintiff elected to stand on his petition, and the trial court dismissed the plaintiff's petition. The plaintiff appeals.

The plaintiff's petition, insofar as it need be considered here, alleged in substance that the City of Wahoo is a duly constituted city of the second class; that the plaintiff is the owner of a licensed aircraft and is a licensed pilot; and that R. F. Cribbett was the lessee and operator of the Wahoo Municipal Airport pursuant to a valid lease agreement entered into by him and the city council of the City of Wahoo, the lease agreement being attached to the petition and made a part thereof by refer-

ence. The plaintiff further alleged that he entered the Wahoo Municipal Airport on August 18, 1955; that he surveyed his approach to the ramp upon landing and proceeded to that point in the apparent route; that he applied the necessary power to the aircraft to consummate the approach and, owing to an unmarked obstruction on the approach to said ramp left by the carelessness and negligence of the defendants, plaintiff's aircraft came in contact with said obstruction, a drainage pipe, while under power, which caused the aircraft to tip forward striking the propeller against the ground, damaging it beyond repair and concurrently causing the left tire to blow out and the landing gear to collapse, thereby causing the left wing to drop to the ground damaging the landing gear assembly which was beyond repair, and damaging the wing tip which was adjudged by the repair firm as not being absolutely necessary to repair but was in effect damaged; and that the injuries to the plaintiff's aircraft amounted to $303.43. For the second cause of action the plaintiff alleged that he sustained and suffered damages in the sum of $1,000 for loss of use and rental of said aircraft for the purpose used by him in his enterprise at the rate of $50 a day. The petition further alleged that the plaintiff made due claim upon the City of Wahoo, and the claim was denied; that notice of appeal had been given concurrently with the filing of the petition; and that the plaintiff, as such claimant, appealed from the decision denying the claim. The prayer was for judgment in the amount of $1,303.34, against the defendants and each of them, and for costs.

"An exhibit incorporated in a pleading is a part of it for all purposes in the case and it may be considered in deciding if the pleading states a cause of action or a defense." Reller v. Ankeny, 160 Neb. 47, 68 N. W. 2d 686.

We herewith set forth exhibit "A" attached to the petition which, in substance, is an agreement made Sep-

tember 12, 1951, by and between the City of Wahoo, party of the first part, and R. F. Cribbett, party of the second part. It provided that the party of the first part was the owner of the Wahoo Municipal Airport and the party of the second part was desirous of leasing a part of said airport. It was agreed that the party of the second part should have a lease upon all of the airport except 60 acres which had theretofore been leased to the Wahoo Milling Company for a period of 2 years from the date thereof, with an option of 3 additional years thereafter on a year to year term. The instrument further provided that the party of the second part was to operate the airport for the general use of the public and provide facilities, services, and commodities with a charge therefor comparable to those offered by like municipal airports; that the party of the second part was to maintain the administration buildings, city hangars, and runways, making necessary repairs and construction with the consent of and at the expense of the party of the first part; that the party of the second part was to maintain a telephone in the administration building, pay for the same, and pay the electricity bill for the maintenance of the city-owned hangars and administration building and provide adequate tie-down facilities for airplanes; that the party of the second part was to make an inspection of the said premises at least once a week and after storms to determine if any dangerous conditions or hazards existed on said airport; that the party of the second part, for his services, was to receive free hangar use for one plane, free use of the administration building and airport; that the party of the second part was to retain all hangar rentals due the city on other hangars than the one used by him, and to retain all profits on oil, gasoline, and commodities sold by him on the premises; that the party of the second part should enforce all rules and regulations of the Civil Aeronautics Administration and the State Department of Aeronautics of the State of

Nebraska, and should further enforce any rules, regulations, orders, or policies of the council of the City of Wahoo theretofore adopted; that the party of the first part should not be liable for any act or acts of the party of the second part, nor should the party of the second part bind, or attempt to bind, the city in any manner; and that nothing therein contained should be construed as creating the relation of employer and employee between the parties, the party of the second part being deemed at all times an independent contractor. It was further agreed that the party of the second part should at all times provide workmen's compensation insurance for any employees hired by him in any capacity at said airport.

The defendants' demurrers to the plaintiff's petition were primarily based on the grounds that the facts alleged therein were not sufficient to constitute a cause of action.

On March 9, 1957, the court sustained the demurrers of defendants R. F. Cribbett and the City of Wahoo, and gave the plaintiff 30 days to file an amended petition.

On March 23, 1957, the plaintiff elected to stand upon his petition.

On April 11, 1957, the plaintiff filed a motion for rehearing, moving the court to vacate its judgment dismissing the proceedings.

On May 1, 1957, the plaintiff filed a motion to withdraw his motion for rehearing. This motion was sustained. The plaintiff having elected to stand on his petition, the court dismissed the plaintiff's petition. On the same day the plaintiff refiled his motion for rehearing.

On May 7, 1957, the cause came on for hearing on the plaintiff's motion for rehearing and was taken under advisement.

On June 17, 1957, the plaintiff's motion for rehearing was overruled.

On June 20, 1957, the plaintiff gave notice of appeal.

The defendant R. F. Cribbett contends that where a demurrer to a petition is sustained, the demurrer admits all of the material facts averred in the petition.

A general demurrer admits all allegations of fact in the pleading to which it is addressed, which are issuable, relevant, material, and well pleaded; but does not admit the pleader's conclusions of law or fact. Babin v. County of Madison, 161 Neb. 536, 73 N. W. 2d 807.

The defendant R. F. Cribbett further contends that after the sustaining of the defendants' demurrers and on May 1, 1957, when the plaintiff elected to stand on his petition and the trial court dismissed his petition, this constituted a final appealable order; that section 25-1142, R. R. S. 1943, defining a motion for new trial, provides in part: "A 'new trial' is a reexamination in the same court of an issue of fact after a verdict by a jury, report of a referee, or a decision by the court"; and that in the instant case there were no facts to be reexamined, they were admitted. The defendant further asserts that it is not a matter of a motion for a new trial being necessary for a review of the proceedings, it is a matter of a motion for a new trial as defined in section 25-1142, R. R. S. 1943, being impossible for the district court to grant, and a matter of the impossibility of the appellant in the instant case to have made a motion which would be within the scope of section 25-1142, R. R. S. 1943.

It is apparent from what has been said above with respect to defendant Cribbett's contention, that he also contends that there is nothing before this court to determine in this appeal, for the reason that the notice of appeal was not given until June 20, 1957, and therefore the appeal is out of time within the contemplation of section 25-1912, R. R. S. 1943.

Section 25-1912, R. R. S. 1943, provides that appeals to the Supreme Court must be initiated within 1 month after the rendition of the judgment, decree, or final order, or within 1 month from the overruling of a motion for a new trial, by filing with the clerk of the district

court a notice of intention to appeal signed by the appellant or the attorney for the appellant, and by depositing with said clerk the docket fee required by law.

We believe the following to be decisive of the above contention.

In the case of McGerr v. Marsh, 148 Neb. 50, 26 N. W. 2d 374, we overruled the holding in Huffman Automobile Co. v. Moline Plow Co., 110 Neb. 279, 193 N. W. 747, that the filing of a motion for a new trial in a case in which a judgment was entered dismissing the action before any evidence was taken is of no avail to extend the time for taking of the appeal.

In Harkness v. Central Nebraska Public Power & Irr. Dist., 154 Neb. 463, 48 N. W. 2d 385, we held: "When a demurrer to a petition is sustained, the plaintiff's action dismissed, and a motion for a new trial and rehearing is filed, in the event it is ruled upon, then under section 25-1912, R. R. S. 1943, the time for appeal begins to run from the date of the ruling on the motion for a new trial and rehearing. During the pendency of a motion for a new trial timely filed, no appealable order is considered as having been rendered until the motion for a new trial is disposed of." Quoting from McGerr v. Marsh, *supra,* we said: " 'If the defeated litigant desires to give the trial court an opportunity to correct his judgment, if he has made an error, by filing a motion for a new trial or rehearing, it is our opinion that the time for appeal to this court should not be cut off until that motion has been overruled by the district court, and it stands to reason that the rule should be uniform in all cases.' The phrase 'in all cases' applies both in actions at law or suits in equity."

In Harkness v. Central Nebraska Public Power & Irr. Dist., *supra,* the court went on to say: "The general rule as stated by text writers is that a pending motion for a new trial seasonably filed keeps the cause in the trial court and so long as it remains undisposed of there can be no final judgment within the meaning of

the statutes regulating appeals. As soon as a motion for a new trial is filed the district court's jurisdiction over the case is retained and continued. During the pendency of a motion for a new trial no appealable order is considered as having been rendered until the motion for a new trial is disposed of."

We conclude that the contention of the defendant Cribbett is not sustainable.

The plaintiff assigns as error that the trial court erred in dismissing the plaintiff's petition; and that the trial court erred in failing to find that the Wahoo Municipal Airport was being operated outside the scope and protection of the Revised Airports Act, sections 3-201 to 3-238 and section 18-1502, R. R. S. 1943, either actually or constitutionally. The statutes here involved are as follows.

Section 3-238, R. R. S. 1943, provides: "Sections 3-201 to 3-238, and 18-1502 may be cited as the 'Revised Airports Act.' "

Section 3-237, R. R. S. 1943, provides for the manner in which the act shall be construed: "Sections 3-201 to 3-238, and 18-1502 shall be so interpreted and construed as to make uniform so far as possible the laws and regulations of this state and other states and of the government of the United States having to do with the subject of aeronautics."

Section 3-206, R. R. S. 1943, provides: "The (1) acquisition of any lands for the purpose of establishing airports or other air navigation facilities, the (2) acquisition of airport protection privileges, the (3) acquisition, establishment, construction, enlargement, improvement, maintenance, equipment and operation of airports and other air navigation facilities and the (4) exercise of any other powers herein granted to municipalities are hereby declared to be public, governmental and municipal functions, exercised for a public purpose, and matters of public necessity. Such lands and other property, easements and privileges acquired and used by

such municipalities in the manner and for the purposes enumerated in sections 3-201 to 3-238, and 18-1502 shall and are hereby declared to be acquired and used for public, governmental and municipal purposes and as a matter of public necessity."

Section 3-207, R. R. S. 1943, provides: "No action or suit sounding in tort shall be brought or maintained against any municipality, or the officers, agents, servants or employees thereof, on account of any act done in or about the construction, enlargement, improvement, maintenance, operation, regulation, superintendence or management of any airport or other air navigation facility."

Subdivision (2) of section 3-215, R. R. S. 1943, provides that the city shall be authorized to adopt and amend all needful rules, regulations, and ordinances for the management, government, and use of any properties under its control, whether within or without the territorial limits of the municipality.

Subdivision (3) of the above section relates to the leasing of such airports, other air navigation facilities or real property acquired or set apart for airport purposes to private parties, any municipal or state government, the national government, or any department of any such government for operation, etc., and provides that in each case the public shall not be deprived of its rightful, equal, and uniform use thereof.

Section 18-1501, R. R. S. 1943, relates to aviation fields, their acquisition, procedure, and rates.

Section 18-1506, R. R. S. 1943, provides: "Any property acquired, owned, controlled or occupied by a city for the purposes enumerated in section 18-1501, shall be and is hereby declared to be acquired, owned, controlled and occupied for a public purpose, and as a matter of public need."

While subdivision (3) of section 3-215, R. R. S. 1943, and section 18-1509, R. R. S. 1943, relate to the right of a municipality to lease an airport or other air navigation

facilities under the circumstances as provided by said sections of the statute, we are, in the instant case, primarily and specifically concerned with sections 3-206 and 3-207, R. R. S. 1943.

While there is a question presented in the instant case as to whether the instrument here being considered with the petition is or is not a lease and the relation of landlord and tenant exists, as will appear later in the opinion, we do not deem the sections of the statutes referred to above relating to the right of a municipality to lease its airport or air navigation facilities necessary to a determination of this appeal.

In Greenwood v. City of Lincoln, 156 Neb. 142, 55 N. W. 2d 343, 34 A. L. R. 2d 1203, the court said that a municipal corporation occupies a dual relation to its citizens and the public. In the performance of its governmental or public duties it is the representative of the state. It has the governmental powers conferred and the burdens imposed upon it by the Legislature, and is entitled to the privileges, immunities, and exemptions given it by law. The governmental functions of a city are for the benefit of the public and not the corporate entity. A municipal corporation has and is obligated also to perform corporate duties, those expressly imposed upon it by the Legislature, and also those that devolve upon it by reason of the governmental powers and privileges it has, such as the duty to maintain its streets, alleys, and sidewalks in a reasonably safe condition for their intended use. Its corporate functions are for the benefit of the city as well as advantageous to the public. A municipal corporation is sometimes authorized to own and conduct a business or commercial enterprise and when it engages therein it is said to be acting in its private or proprietary capacity. It has no duty to conduct such an undertaking and when it does it is entirely voluntary on its part and it thereby enters into a third relation distinct from the dual relations above noted. While occupying this third

relation it is engaged in conducting a business and is subject to the law and procedure applicable to a private corporation or person conducting a like business. It has in that regard no governmental functions or corporate duties and has no more privileges or exemptions than a private corporation. See, also, Henry v. City of Lincoln, 93 Neb. 331, 140 N. W. 664, 50 L. R. A. N. S. 174; Platte Valley Public Power & Irr. Dist. v. County of Lincoln, 144 Neb. 584, 14 N. W. 2d 202, 155 A. L. R. 412.

In Nelson-Johnston & Doudna v. Metropolitan Utilities Dist., 137 Neb. 871, 291 N. W. 558, this court said: "The powers granted to a municipal corporation can be divided into two general classes,—the one including those which are legislative, public or governmental, and import sovereignty; the second, those which are proprietary or quasi private, conferred for the private advantage of the inhabitants and the city itself as a legal entity."

What is a public purpose is primarily for the Legislature to determine. However, in Platte Valley Public Power & Irr. Dist. v. County of Lincoln, *supra,* we said: "A public purpose has for its objective the promotion of the public health, safety, morals, security, prosperity, contentment, and the general welfare of all the inhabitants." See, also, United Community Services v. The Omaha Nat. Bank, 162 Neb. 786, 77 N. W. 2d 576.

In Nelson-Johnston & Doudna v. Metropolitan Utilities Dist., *supra,* we said: "The authority given a municipality to engage in the operation of a business enterprise carries with it the power to conduct it in the same manner in which a private corporation would deal with its property under similar circumstances." See, also, United Community Services v. The Omaha Nat. Bank, *supra;* State ex rel. Johnson v. County of Gage, 154 Neb. 822, 49 N. W. 2d 672; Henry v. City of Lincoln, *supra.*

The question to be determined in this appeal is whether or not the City of Wahoo, on August 18, 1955,

was operating the Wahoo Municipal Airport as a public governmental function or in a proprietary capacity.

The second question to determine is whether or not the defendant R. F. Cribbett was a lessee of the Wahoo Municipal Airport at that time or just what his relationship was with respect to the operation of the airport.

In the case of Rhodes v. City of Asheville, 230 N. C. 134, 52 S. E. 2d 371, it was held on rehearing, 230 N. C. 759, 53 S. E. 2d 313: "The distinction between a governmental and proprietary function of a municipal corporation is a judicial and not a legislative question, and legislative declaration as to the nature of the authority delegated by the statute is not controlling." In the original opinion the court said: "And even though a municipal activity has been held to be for a public purpose, we may still have difficulty in determining whether such activity is a corporate or proprietry (sic) function, and is therefore subject to suits in tort, or a governmental function and immune from such suits." The State of North Carolina had in force a statute that was similar to section 3-206, R. R. S. 1943, cited as G. S. 63-50, which declares the construction, maintenance, and operation of an airport by municipalities pursuant to the provisions of Chapter 63 of the General Statutes of North Carolina, "to be public, governmental and municipal functions exercised for a public purpose and matters of public necessity," and the use of the property and equipment in connection with the construction, operation, and maintenance of a municipal airport is "to be acquired and used for public, governmental and municipal purposes and as a matter of public necessity." The defendants contended that said statutes were controlling, and therefore, the acts of the officers, agents, and employees of the municipalities operating such airport were immune from suits in tort.

In the above-cited case and here, the identical question now before us is one of first impression, and in view of the numerous exceptions to the definitions that

have been laid down in an effort to define what is a governmental function of a municipality and what is a corporate or proprietary one, we deem it proper to examine the decisions from other jurisdictions bearing on the question under consideration. The court said: "The overwhelming weight of authority is to the effect that the construction, operation and maintenance of an airport by a municipality is a proprietary function and that such municipality may be held liable in tort for the negligent operation thereof. Mayor and City Council v. Crown Cork & Seal Co. (C. C. A. Fourth Circuit 1941), 122 F. 2d 385; Peavey v. City of Miami, 146 Fla. 629, 1 So. 2d 614; Pignet v. City of Santa Monica, 29 CA 2d, Cal. 286, 84 P. 2d 166; City of Blackwell v. Lee, 178 Okla. 338, 62 P. 2d 1219; Christopher v. City of El Paso (Texas Civ. App.), 98 S. W. 2d 394; Mollencop v. City of Salem, 139 Ore. 137, 8 P. 2d 783; Coleman v. City of Oakland, 110 Cal. (q.) 715, 295 P. 59; City of Mobile v. Lartigue, 221 Ala. 36, 127 So. 257; Fixel on The Law of Aviation (3d Ed. 1948), p. 198; Aviation Accident Law by Rhyne (1947), p. 149." See, also, Granite Oil Securities v. Douglas County, 67 Nev. 388, 219 P. 2d 191, 16 A. L. R. 2d 1069.

There are cases that tend to support the opposite view, however, it will be observed that in the majority of such cases the statutes are somewhat different than the two sections here being considered.

In Stocker v. City of Nashville, 174 Tenn. 483, 126 S. W. 2d 339, 124 A. L. R. 345, the city of Nashville owned a large park-like area lying beyond the city limits, on which it erected and maintained a municipal airport, pursuant to the provisions of Chapter 116, Public Acts of 1933 (Williams' Annotated Code, Section 2726.22), an act to prohibit the bringing or maintaining of any action or suit against any municipality, or its officers, agents, servants, or employees, in or about the superintendence or management of any municipal airport. This act provided that the construction, maintenance, and

operation of municipal airports was thereby declared a public governmental function, and no action or suit should be brought or maintained against any municipality, or its officers, agents, servants, or employees, in or about the construction, maintenance, operation, superintendence, or management of any municipal airport. The petition charged negligence on the part of the municipality. A demurrer to the petition was sustained. The judgment was affirmed and the suit dismissed. The court held: "The statute declaring the maintenance of municipal airports to be a public governmental function and that no action should be brought against any municipality relating thereto is not unconstitutional on ground of creating an arbitrary classification in that municipal electric plants are subject to suit, since statute applies to all municipalities alike * * *."

In the case of Abbott v. City of Des Moines, 230 Iowa 494, 298 N. W. 649, 138 A. L. R. 120, the court held that the defendant could not be held liable in tort in connection with the operation of its airport, since the liability of a city or town in connection with the operation of its airport was fixed by statute to be "no greater than that imposed upon municipalities in the maintenance and operation of public parks." And the construction and maintenance of a park by a municipality in that state has been repeatedly held to be purely a governmental function. See Smith v. City of Iowa City, 213 Iowa 391, 239 N. W. 29.

Also, in the case of Mayor & Aldermen of Savannah v. Lyons, 54 Ga. App. 661, 189 S. E. 63, the city of Savannah constructed an airport pursuant to special legislative authority, and such airport being repeatedly referred to in the legislative acts as "landing field or park," the court held the airport was a governmental institution in the nature of a park; and the city could not be held liable for the defective maintenance of a road inside the airport. The Legislature of Georgia passed, in 1933, a uniform airport act, Code sections

11-201 to 11-209, which provides, among other things: "Any lands acquired, owned, leased, controlled, or occupied by such counties, municipalities, or other political subdivisions for the purpose or purposes enumerated in section 11-201, shall and are hereby declared to be acquired, owned, leased, controlled, or occupied for public, governmental, and municipal purposes." The fact that this statute declares a municipal airport to be "for public, governmental, and municipal purposes," does not seem to have been considered as controlling on the question of immunity from a tort action.

However, in Caroway v. City of Atlanta, 85 Ga. App. 792, 70 S. E. 2d 126, the court held: "Section 2 of the Uniform Airports Act (Ga. L. 1933, p. 102; Code § 11-202), which provides that lands acquired, controlled, or occupied as landing fields for the use of aircraft shall be so acquired or controlled for public, governmental, and municipal purposes, was intended to be a declaration on the part of the legislature of the public purpose as to which the authorization was given, and not as a limitation immunizing such municipalities from suit regardless of circumstances. * * *." The court, in analyzing the petition wherein the city was sued for tort, held that the city was engaged in a proprietary function and liable to one injured by negligent performance thereof.

As stated in Ex parte Houston, 93 Okl. Cr. 26, 224 P. 2d 281, decided in the latter part of 1950 and reviewing the cases generally, quoting from City of Sand Springs v. Gray, 182 Okl. 248, 77 P. 2d 56: " 'The more recent and better considered rule makes plain the line of demarcation, beyond which a municipality is not to be excused from liability. The test is based upon the nature of the duties with which they are charged. If for the general good of the public they are considered as being strictly governmental, and in case of negligence in their discharge, no liability can attach. But, if they are duties which do not concern the public as a

whole, but which are for the benefit of the municipality in its private or corporate capacity, then the municipality must stand ready to accept liability the same as any private individual or corporation.' "

As stated in Coleman v. City of Oakland, 110 Cal. App. 715, 295 P. 59, quoting from the case of Chafor v. City of Long Beach, 174 Cal. 478, 163 P. 670, Ann. Cas. 1918D 106, L. R. A. 1917E 685: " 'But it is of course true that modern cities and towns enter upon many forms of activity, operate utilities for the benefit of the inhabitants, and provide many means for the easing or improving of the condition of the people that were never dreamed of at common law. Nevertheless the uniform holding as to all such activities, on principle manifestly just to the people themselves, is that no matter how beneficial they may be in a general sense to the inhabitants of the municipality, unless they are governmental in essence, the municipality's conduct in managing them is controlled by the same rules of liabiilty that apply to an individual.' " The court went on to say: "We have no hesitancy in deciding that in the conduct of an air port the municipality is acting in a proprietary capacity. An air port falls naturally into the same classification as such public utilities as electric light, gas, water, and transportation systems, which are universally classed as proprietary. Its nearest analogy is perhaps found in docks and wharves. 'An air port with its beacons, landing fields, run-ways and hangars, is analogous to a harbor with its lights, wharves and docks; the one is a landing place and haven of ships that navigate the water; the other of those that navigate the air.' (Dysart v. St. Louis, 321 Mo. 514 [62 A. L. R. 762, 11 S. W. (2d) 1045].)"

In City of Mobile v. Lartigue, 23 Ala. App. 479, 127 So. 257, it was held that the maintenance of an airport by a city constituted a corporate or proprietary function, and not a governmental function. It was said: "Airports are landing and taking off places for airplanes

which traverse the air instead of, as automobiles and horse-drawn vehicles and railway trains, the land. As stated, they are essentially and primarily an incident to transportation." And it was held that since the maintenance of the airport was a commercial undertaking, the city was not exonerated from liability by the fact that its operations were not profitable.

In Christopher v. City of El Paso (Tex. Civ. App.), 98 S. W. 2d 394, the court, after citing a number of authorities, said: "From these authorities, we have concluded that the operation of the airport in this case was a proprietary function and that the city was liable for the negligence of its agent in such operation the same as other private corporations would have been. We agree with appellee that a determination of whether a city is acting in a governmental or proprietary capacity depends, in a measure, upon the facts of the particular case; but we cannot agree that the Legislature in granting the power to incorporated cities in Texas to own and operate airports made the exercise of such power a governmental function." The court said that provisions of the statute dealing with municipal airports which exempted cities from liability for injuries to persons caused by negligence of their operating agents was unconstitutional, despite presumption in favor of validity of legislative acts, as violating the equal protection clause of the federal Constitution and the due process clause of the state Constitution.

In Peavey v. City of Miami, 146 Fla. 629, 1 So. 2d 614, the court said: "The weight of judicial authority seems to hold the operation of an airdrome by a municipality to be a 'proprietary' function as distinguished from a 'governmental' function. * * * That is, this is true where the municipality does not devote the airport exclusively to municipal or governmental purposes, but undertakes to conduct an enterprise of a commercial character from which it seeks to derive revenue. * * * While the record is silent as to the character of the

use for which the airdrome was maintained, we shall assume that it was of a commercial nature, and therefore the municipality would be liable for any torts committed by it, or its agents, in respect thereto in the same manner and to the same extent that a private operator would be."

We conclude that the distinction between a governmental and a proprietary function of a municipal corporation is a judicial and not a legislative question, and the legislative declaration as to the nature of the authority delegated by the statute is not controlling; and that in the light of the great weight of authority of the courts of this country that have passed on the question, the City of Wahoo was performing a proprietary function in the operation of its municipal airport at the time in question.

The defendant R. F. Cribbett contends that the agreement under which he was operating the Wahoo Municipal Airport was a contract of employment or agency, and that as an employee or agent of the City of Wahoo he is entitled to the immunity granted by the Legislature in section 3-207, R. R. S. 1943. As we view the instrument purporting to be a lease, we believe it comes within a contract of agency. We will not repeat the terms of the agreement, except to say that the City of Wahoo retains certain supervisory authority over the operation of the airport. The agreement requires this defendant to manage and operate the airport in a certain manner and under certain conditions, to do certain things and make certain charges, and sets the extent of charges to be made. If the agreement were a lease, hangar rentals would not be due the city, the city could not give him free use of a hangar for one plane nor of the profits from the sale of gasoline and oil and other commodities sold on the premises, and he would not receive the emoluments as set forth in the lease for his services. He was devoid of control over who could use the airport facilities, and he was without

any right to exclusive possession of any of the airport except that part received by him for his services rendered, as shown by the agreement. Under the circumstances, we believe the following to be applicable.

In Valentine Oil Co. v. Powers, 157 Neb. 87, 59 N. W. 2d 160, this court said: "Agency is the relationship which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act.

"The distinguishing features of agency are its representative character and its derivative authority. Whether a particular relationship is an agency depends on the relations of the parties as they in fact exist, without regard to what they call their relationship." See, also, Restatement, Agency, § 1, p. 7; 2 C. J. S., Agency, § 2, p. 1026.

We are in accord with this defendant's contention as to his relationship to the City of Wahoo. We are not in accord with his contention that bearing such relation to the city he is immune from tort under section 3-207, R. R. S. 1943.

In the light of what we have heretofore said, we conclude that a municipality or the officers, agents, servants, or employees thereof, may be subject to a suit sounding in tort in the operation, superintendence, or management of a municipal airport or other air navigation facility.

For the reasons given herein, we conclude that the trial court committed prejudicial error in sustaining the demurrers of the defendants, and the judgment of the trial court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

ELEANOR C. SHOMAKER, APPELLEE, V. WILLIAM LAWRENCE SHOMAKER, APPELLANT.

88 N. W. 2d 221

Filed February 28, 1958. No. 34305.

1. **Divorce.** Any unjustifiable conduct by either the husband or wife which destroys the legitimate ends and objects of matrimony constitutes "extreme cruelty" as defined in section 42-302, R. R. S. 1943.
2. ———. A decree of divorce cannot be granted solely on the declarations, confessions, or admissions of the parties. There must be corroborative evidence of the facts necessary to be established, as required by section 42-335, R. R. S. 1943.
3. ———. It is impossible to lay down any general rule as to the degree of corroboration required in a divorce action, as each case must be decided on its own facts and circumstances.
4. ———. In a divorce suit, where the court has jurisdiction of the parties, it has power to adjust all their respective property interests.
5. ———. The division of property and the allowance of alimony and support money in divorce actions are always to be determined by the facts in each case relating to and in accord with the many factors and elements heretofore announced by this court.
6. ———. A divorce from bed and board is in the nature of a conditional decree, leaving the legal status of the parties unchanged in many respects, but relieving both parties from all obligations and rights to cohabitation while an adjustment of their respective property interests and the amount of support thereafter are determined and fixed by the decree.
7. ———. Where a party has prayed for a divorce from bed and board and has adduced sufficient proof duly corroborated in support thereof, and in the same action the other party has prayed for an absolute divorce but has not adduced sufficient proof duly corroborated in support thereof, then the trial court has no discretion in granting the remedy, but must grant a divorce from bed and board as prayed.
8. **Divorce: Appeal and Error.** Where the evidence in a divorce suit sustains a finding of cruelty on the part of the husband towards the wife, and is corroborated as required by law, the action of the district court in granting a divorce to the wife is proper and ordinarily will not be interfered with by this court on appeal.
9. **Divorce: Attorney and Client.** The fee allowed for the service of an attorney for a wife in a divorce suit should be sufficient

to adequately compensate for the service necessary to be performed.

10. ———: ———. On appeal in a divorce suit from the amount of the fee allowed to the wife for services rendered by her attorney, wherein there is no direct evidence of the value thereof other than the record of the proceedings, this court will interfere only to correct a patent injustice resulting from an allowance which is clearly excessive or insufficient.

11. Divorce: Costs. On appeal in a divorce suit from any other allowance made to the wife for necessary expenses of investigation and carrying on the litigation, the same must be supported by competent evidence appearing in the bill of exceptions.

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

Fitzgerald, Hamer, Brown & Leahy and *Marti, O'Gara, Dalton & Sheldon,* for appellant.

Hotz & Hotz, for appellee.

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

CHAPPELL, J.

Plaintiff, Eleanor C. Shomaker, brought this action against defendant, William Lawrence Shomaker, alleging extreme cruelty and seeking a divorce from bed and board, custody and control of their three minor sons, support allowances together with a fair disposition of the assets and liabilities of the parties, and such additional relief as the court deemed just. Defendant, by answer and cross-petition, denied generally and, alleging extreme cruelty by plaintiff, sought an absolute divorce and dismissal of plaintiff's petition. He also sought to have the court determine custody and control of their children and award a reasonable allowance for their support if they remained with plaintiff, together with a reasonable amount of alimony to plaintiff, a reasonable allowance of attorneys' fees for her attorneys, and the granting of such additional equitable relief as might be necessary.

After a trial on the merits during all or parts of February 6, 7, 8, 14, 15, and 26, 1957, the cause was taken under advisement. Subsequently, a judgment was rendered which granted plaintiff a divorce from bed and board; awarded her the custody and control of their three minor sons then 17, 16, and 9 years of age, with right of reasonable visitation by defendant; determined and ordered allowances to be paid by defendant for the support, maintenance, and education of their children and the support of plaintiff; fixed and disposed of the assets and liabilities of the parties; and dismissed defendant's cross-petition. All costs were taxed to defendant, including an allowance of attorneys' fees for plaintiff's attorneys, together with claimed necessary expenses of investigation and carrying on the litigation.

Thereafter, defendant's motion for new trial was overruled and he appealed, assigning substantially that the trial court erred as follows: (1) In dismissing defendant's cross-petition and refusing to grant him an absolute divorce; (2) in granting plaintiff a divorce from bed and board; and (3) in awarding plaintiff an excessive and disproportionate amount of the property accumulated during the marriage, and allowing excessive attorneys' fees for plaintiff's attorneys, together with excessive expenses for investigation and carrying on the litigation. We conclude that the assignments have no merit, except for the allowance of such expenses.

Preliminary to a discussion and disposition of the assignments, we point out certain rules of law which are applicable and controlling. In that connection, it has long since become elementary that such cases are triable de novo upon appeal to this court and that any unjustifiable conduct by either the husband or wife which destroys the legitimate ends and objects of matrimony constitutes "extreme cruelty" as defined in section 42-302, R. R. S. 1943.

In Workman v. Workman, 164 Neb. 642, 83 N. W. 2d 368, this court held: "A decree of divorce cannot be

granted solely on the declarations, confessions, or admissions of the parties. There must be corroborative evidence of the facts necessary to be established as required by section 42-335, R. R. S. 1943.

"It is impossible to lay down any general rule as to the degree of corroboration required in a divorce action, as each case must be decided on its own facts and circumstances.

"In a divorce suit, where the court has jurisdiction of the parties, it has power to adjust all their respective property interests.

"The division of property and allowance of alimony in divorce actions are always to be determined by the facts in each case."

Such opinion also set forth the elements which should generally be considered in making a division of property and allowing alimony and support money in divorce cases. See, also, Spencer v. Spencer, 158 Neb. 629, 64 N. W. 2d 348; Prosser v. Prosser, 156 Neb. 629, 57 N. W. 2d 173.

This court has concluded that a divorce from bed and board is in the nature of a conditional decree, leaving the legal status of the parties unchanged in many respects, but relieving both parties from all obligations and rights to cohabitation while an adjustment of their respective property interests and the amount of support thereafter are fixed by the decree. We have also concluded that where a party has prayed for a divorce from bed and board and has adduced sufficient proof duly corroborated in support thereof, and in the same action the other party has prayed for an absolute divorce but has not adduced sufficient proof duly corroborated in support thereof, then the trial court has no discretion in granting the remedy, but must grant the divorce from bed and board as prayed. The foregoing principles and rules were announced, discussed, and applied in Yost v. Yost, 143 Neb. 80, 8 N. W. 2d 686.

Also, as stated by this court in Robinson v. Robinson,

164 Neb. 413, 82 N. W. 2d 550, and reaffirmed in Birth v. Birth, 165 Neb. 11, 84 N. W. 2d 204: "A divorce or legal separation must be grounded on a legal fault within the grounds enumerated in the statutes and proved in the manner therein provided. One party may not create the grounds that will sustain him or her in maintaining such a suit. It is not the province of the courts to grant such decrees for sociological reasons. The policy of the state relative to marriage is fixed by the Legislature. It is not for this court to do what it deems best for the parties. The only relief that may be granted is that provided by statute when the evidence is sufficient to bring the case within its purview."

In Prosser v. Prosser, *supra*, this court held: "Under the provisions of section 42-318, R. R. S. 1943, the earnings of a husband and his ability to earn are proper elements to be taken into consideration in determining the amount of alimony to be awarded in a suit for divorce.

"Although the statute provides that the wife shall be allowed alimony out of the husband's estate in such an amount as the court shall deem just and reasonable, having regard to the ability of the husband, his earning capacity is an element to be considered and, in a proper case, the allowance of permanent alimony may exceed the value of the husband's estate at the time the marriage is dissolved.

"The amount of alimony to be granted a wife is not to be determined alone from the property possessed by the husband. Many other factors enter into the determination such as the husband's age, health, earning capacity, future prospects, and social standing."

In that connection, also, section 42-313, R. R. S. 1943, provides in part: "* * * also upon every divorce from bed and board, the wife shall be entitled to the immediate possession of all her real estate in like manner as if her husband were dead." Further, section 42-314, R. R. S. 1943, provides in part: "* * * upon every di-

vorce from bed and board, the court may make a further decree for restoring to the wife the whole, or such part as it shall deem just and reasonable, of the personal estate that shall have come to the husband by reason of the marriage, or for awarding to her the value thereof, to be paid by her husband in money." See, also, § 42-318, R. R. S. 1943.

Finally, in Dwinnell v. Dwinnell, 165 Neb. 566, 86 N. W. 2d 579, we held: "Where the evidence in a divorce suit sustains a finding of cruelty on the part of the husband towards the wife, and is corroborated as required by law, the action of the district court in granting a divorce to the wife is proper and ordinarily will not be interfered with by this court on appeal.

"In an action for divorce, if the evidence is principally oral and is in irreconcilable conflict, and the determination of the issues depends upon the reliability of the respective witnesses, the conclusion of the trial court as to such reliability will be carefully regarded by this court on review.

"The fee allowed for the service of an attorney for a wife in a divorce suit should be sufficient to adequately compensate for the service necessary to be performed.

"On appeal in a divorce suit from the amount of the fee allowed to the wife for services rendered by her attorney, this court will interfere only to correct a patent injustice resulting from an allowance which is clearly excessive or insufficient."

At the outset it should be said that we discover from an examination of the voluminous record that the testimony of plaintiff and defendant with regard to their allegations of extreme cruelty was in irreconcilable conflict in some material respects, but we find no competent evidence which in any manner corroborated defendant's testimony that plaintiff had been guilty of extreme cruelty. As a matter of fact, the testimony of the only witness called by defendant, purportedly for the purpose of corroborating his testimony, actually cor-

roborated the testimony of plaintiff in several material respects. In that connection, we conclude that the trial court properly denied defendant an absolute divorce and dismissed his cross-petition. The first assignment has no merit.

We turn then to defendant's contention that the trial court erred in granting plaintiff a divorce from bed and board. We conclude that such contention has no merit. In that respect, the record, as briefly summarized, discloses the following: At the time of trial plaintiff was 50 years old. Although generally in good health, she was simply a housewife and mother without other employment during her marriage to defendant. She was a Catholic but defendant was not. At time of trial, defendant was a prominent and able business executive, 49 years old, who was earning a salary of $39,000 a year. He was generally in good health except for palpitation or muscle spasm of his heart at rare intervals of stress and strain, for which no medical treatment had ever been prescribed and which did not generally interfere with his employment.

The parties were married at St. Joseph's Rectory at Owatonna, Minnesota, on October 22, 1938. Plaintiff contributed several hundred dollars to the marriage. Defendant was then and ever since has been employed by the Northern Natural Gas Company, hereinafter generally called the company. Soon after their marriage the parties came to Omaha for a few weeks, then went back to Owatonna for another few weeks, while defendant arranged the opening of an office for the company in Minneapolis, where the parties moved and lived from January 1939 until March 1944. They then moved to Omaha and have since resided there.

In 1939 defendant's salary was $3,600 a year. However, his salary was gradually increased each year thereafter until it was $8,416.74 in 1947. Thereafter, his yearly salary, payable semimonthly, was materially increased each year until it was $36,000 in 1956, and $39,000 in

1957. Previously, defendant had been made a vice-president of the company in charge of wholesale marketing, public relations, and area development. He was an officer of and interested in other related companies and associations. He also became active in certain business and social organizations and took some part in the budget problems of a Methodist church in Omaha, although he seldom attended either that church or plaintiff's church. In the meantime, plaintiff became active in St. Margaret Mary's Catholic Church, the P. T. A., Creighton Prep Mother's Club, and the Christ Child Society, all of which were related to the welfare of the family.

During the first few years of their marriage, defendant's salary required the parties to live modestly, and they had financial difficulties. However, in later years defendant's increases in salary permitted them to assume a more modern and comfortable social manner of living. In that connection, from about 1942 until this action was filed on September 25, 1956, defendant's semimonthly salary checks were deposited in a joint bank account. Thereupon, as requested by defendant, because he was not interested and did not want to be bothered about it, plaintiff kept the family books, generally wrote all checks except for defendant's personal use, paid all home and family bills and expenses, and, with defendant's assistance, plaintiff transacted part of their business matters during which time they purchased their home and accumulated certain personal property hereinafter discussed.

The first serious marital difficulty between the parties occurred in late 1941 and early 1942, but then, and again at other times, they became more or less reconciled until in January 1950. From that time, except for short intervals until this action was filed, there existed a state of marital and family uncertainty, tension, and unhappiness. To state the lurid reasons for it at length would serve no useful purpose. It is sufficient to say

that plaintiff's evidence, corroborated not only by five witnesses, one of whom was called by defendant, but also by certain exhibits appearing in this record, clearly established defendant's sullen, irresponsible, disloyal, and calculatingly cruel treatment of plaintiff and their children.

The record also established by amply corroborated evidence that plaintiff was a good housekeeper and cook; that she was a good mother who loved and properly cared for and disciplined her children, who loved and respected her, and whose conduct was excellent; and that plaintiff did everything reasonably within her power to retain the love and respect of defendant and to secure, protect, and preserve the marriage relation and the happiness and welfare of the family, but defendant would have none of it, preferring only to satisfy his own selfish ambitions and desires. We conclude that plaintiff had a right to maintain and be granted a divorce from bed and board, and that the trial court was right when it granted such relief. The second assignment has no merit.

We turn then to defendant's contention in the third assignment that the trial court erred in awarding plaintiff an excessive and disportionate share of the property accumulated. We conclude that such contention has no merit. In that connection, for the full support and maintenance of plaintiff and their three minor children, including their education through high school and college, the oldest of whom was ready for college and the next oldest would soon be ready for college, the defendant was ordered to pay to the clerk of the district court for plaintiff the following allowances, to wit: The sum of $15,000 per year in 12 monthly installments for each of the 5 years following the date of the decree; thereafter, to so pay $10,000 per year for each of the succeeding 5 years; thereafter, to so pay $7,500 per year for each of the succeeding 5 years; and thereafter to so pay $2,500 per year for each of the succeeding

10 years. Such payments were ordered to commence immediately upon entry of the decree, giving defendant credit for any amounts previously paid for such purposes after the commencement of this action.

It will be noted that defendant's salary was $39,000 per year, and there is competent evidence that he offered plaintiff $18,000 per year for an absolute divorce, although he testified that he only offered $10,000 or $12,000 a year. Be that as it may, as stated in defendant's brief, and reiterated in oral argument: "Defendant does not assign as error the amount of this allowance." Doubtless that position was taken by defendant because, under the terms of the present decree, defendant would ultimately pay $187,500, but during such period, at his present salary of $39,000 per year, defendant would have earned the sum of $975,000, leaving him $787,500 to spend, without any responsibility for raising or educating his children or maintaining a home for plaintiff and his family. In that connection, the total indebtedness of the parties at time of trial, except the mortgage on their home hereinafter discussed, was only about $3,000 plus current obligations.

Although defendant did not contest the aforesaid allowances, he did request a modification of their terms so that he could supervise the proportionate manner of the use and expenditure of such allowances and thus be assured that they would in fact be used for the proper support and education of his children as well as for plaintiff's support. Such request has no merit because we find no reason in this record for concluding that plaintiff will not be able and willing to properly and fairly supervise and make the expenditure of such allowances without any supervision thereof by defendant, who had generally delegated such responsibility to plaintiff since 1942.

The real estate owned by plaintiff and defendant was Lot 24, in Block 134, Dundee Place, an addition to Omaha. It was their home, known as 301 South Fifty-

first Avenue, which the parties had purchased for $20,500 in 1949, but which was probably worth about $23,500 or $24,500 as of November 1, 1956. There the family had lived until this action was filed, when defendant left, having theretofore lived in the same house with plaintiff but having entirely refused any marriage relations with her after July 1953. That property was encumbered by a mortgage. The balance still owing thereon by the parties was $5,000 as of November 1, 1956. The decree awarded that home to plaintiff absolutely, but required her to assume and pay such mortgage indebtedness as of the date of the decree, and to pay any other claims or liens against said property. The decree also gave plaintiff absolutely all the furniture, fixtures, household effects, and appliances owned by the parties in the home, for the use of plaintiff and their children. Some of such property was new, some old, some valuable, and some not, but it was all worth about $6,000. Defendant, who lived in a hotel in Omaha and could not legally remarry, would have no use for such property.

In that connection, plaintiff and the children were certainly entitled to the exclusive use and benefit of all such property in any event. To have disposed of it by simply giving plaintiff and their children the use of it would not have deprived plaintiff of her interest in the real estate, but would have imposed substantial obligations upon defendant which he had not in the past cared to assume, and would have permitted him to continue to interfere with and harass the family. We conclude that the trial court wisely and properly disposed of the home and contents as it did.

A 1955 Chrysler New Yorker automobile, worth about $2,150, and owned by the parties, was awarded absolutely to plaintiff for the use and benefit of the family. It was purchased for such purpose, and defendant seldom if ever used it. He did not need to do so because he had the continuous use of an Oldsmobile sedan owned and

furnished him by his employer. On the other hand, plaintiff doubtless needed the automobile to transport their children to and from school and elsewhere, and for her own necessary transportation. We conclude that the disposition of their automobile was proper in every respect.

A savings account in plaintiff's name in the Omaha National Bank, which account contained $1,300 (actually $1,309.50), was properly awarded to plaintiff for her immediate necessary use.

Twenty-four United States Savings Bonds in the face amount of $2,400, which were purchased in the names of both parties, were properly divided equally between them.

Defendant owned 31 shares of Husky Oil Company stock, worth $341, 12 shares of Husky Oil Limited stock worth $156, and 2 shares of Occidental Building & Loan Association stock worth $400. Such shares of stock were awarded absolutely to defendant. Of course, he could make no complaint about that.

Some 294 shares of Northern Natural Gas Company stock, purchased in the names of both parties, and worth about $53 a share as of February 7, 1957, together with dividends thereon payable to both parties and accruing since this action was filed, were divided equally between the parties. All stock of the same company which might be acquired pursuant to a certain stock purchase plan after entry of the decree was awarded to defendant absolutely. All option rights to purchase 6,000 shares of such company stock at $40.50 a share under an agreement dated April 28, 1956, were limited to defendant, except that plaintiff, upon appropriate written instructions to defendant and tender of adequate purchase money therefor, was permitted to so acquire not to exceed 2,400 shares of such stock at the option price. We conclude that the disposition aforesaid of their shares of such stock was proper and just in every respect.

A Connecticut General Life Insurance Company policy, No. 778999, on defendant's life, in the amount of $20,000, wherein plaintiff was named as beneficiary, was ordered to be kept in force by defendant without any change of beneficiary or encumbrance by loan. Such disposition was proper in every respect in order to protect the future support and maintenance of plaintiff and their children. In that connection, certain other policies of life insurance upon defendant's life, and all group policies in force by virtue of defendant's employment, were ordered delivered to defendant to be held under his full control and disposition. All insurance policies upon the life of plaintiff or their children were required to be maintained by plaintiff so long as she desired to continue them in force and effect for her own benefit. Certainly defendant could not reasonably complain about such disposition.

In order to carry out the terms of the decree and make division of the property owned by the parties as provided in the decree, each was appropriately ordered to execute and deliver such instruments as were necessary to effect transfer of such rights as provided in the decree, and upon failure to do so, the decree was given full force and effect as if that had been done.

Plaintiff was allowed $6,500 as attorneys' fees for the services of her attorneys in the district court, together with $800 for expenses of investigation and carrying on the litigation, less a credit for any unexpended part of $300 already paid by plaintiff to her attorneys for such purposes. In that connection, the record discloses that plaintiff rested, except for the introduction of additional supporting evidence pertaining to attorneys' fees and expenses in connection with the matter as might be necessary, the thought being that at a later time the court and counsel for plaintiff and defendant might get together and the matter could then be handled. That was satisfactory to defendant's attorney, who indicated that it might be a matter that could be handled

without evidence, but if it was not, such evidence could be put in later and probably better after they knew what the decision was. In that connection, we have found no direct evidence in the bill of exceptions either with regard to the value of the services of plaintiff's attorneys in the district court or that establishes any amount of expenses necessarily incurred to enable plaintiff to investigate and carry on the litigation, or how much if any of the $300 paid by plaintiff for such purposes remained unexpended. The failure to adduce any evidence of the value of the services of plaintiff's attorneys in the district court is not fatal to their allowance because that matter is controlled by the opinion in Dwinnell v. Dwinnell, *supra,* and an examination of the entire record of the proceedings presented to the trial court and reviewed by this court. We therefore conclude that the allowance of $6,500 for the services of plaintiff's attorneys in the district court was not clearly excessive.

However, in the light of the record before us, we conclude that the allowance of $800 for expenses of investigation and carrying on the litigation, less a credit for any unexpended portion of $300 paid by plaintiff for such purposes, was erroneous as without support of any competent evidence appearing in the bill of exceptions, as required. We conclude that in such respect, and that only, the judgment of the trial court should be and hereby is modified to entirely eliminate such allowance for expenses of investigation and carrying on the litigation. In all other respects, we conclude that the judgment of the trial court should be and hereby is affirmed.

All costs are taxed to defendant, including an allowance of $3,500 for services of plaintiff's attorneys in this court.

AFFIRMED AS MODIFIED.

JULE ROBINSON, APPELLANT, V. H. F. MEYER ET AL., APPELLEES.
88 N. W. 2d 219

Filed March 7, 1958. No. 34260.

1. **Appeal and Error.** The filing of a transcript of the proceedings in the district court is not a jurisdictional requirement to the lodging of an appeal in the Supreme Court.
2. ———. Where a transcript is deficient, either as to content or time of filing, because of the negligence of the appellant, this court will not permit a supplemental transcript to be filed after the cause has been submitted to the court on its merits in the absence of a reasonable excuse which due diligence would not have prevented.

APPEAL from the district court for Dodge County: RUSSELL A. ROBINSON, JUDGE. *Motions to file supplemental transcript and for a rehearing overruled.*

Spear, Lamme & Simmons, for appellant.

Sidner, Lee, Gunderson & Svoboda, for appellees.

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

CARTER, J.

Subsequent to the filing of the former opinion in this case, Robinson v. Meyer, 165 Neb. 706, 87 N. W. 2d 231, the plaintiff filed a motion for a rehearing and a motion for leave to file a supplemental transcript. These motions present questions requiring disposition by a further opinion by this court.

The plaintiff filed his notice of appeal on May 10, 1957. On May 31, 1957, the transcript of the proceedings on file in the office of the clerk of the district court of Dodge County was filed in this court. On August 22, 1957, plaintiff filed a supplemental transcript containing an instruction requested by the plaintiff. The case was argued and submitted to this court on December 3, 1957. The opinion of this court affirming the judgment of the district court was filed on December

27, 1957. A motion for rehearing, which included a motion to file a second supplemental transcript, was filed on January 15, 1958. On January 29, 1958, plaintiff filed a separate motion for leave to file a second supplemental transcript.

The second supplemental transcript which has been tendered to the court for filing contains an amended motion for a new trial by the plaintiff in the district court. The instructions given by the trial court are therein properly alleged to be erroneous as grounds for a new trial.

The rules of the Supreme Court provide that supplemental transcripts may be filed at any time without leave of court before submission of the case, but thereafter leave must be obtained. Rule 4 c, Revised Rules of the Supreme Court for 1957. The question presented is whether or not the plaintiff should be permitted to file a supplemental transcript after the case has been submitted and a decision rendered.

It is the duty of the clerk of the district court to prepare and file a certified transcript with the Clerk of the Supreme Court. § 25-1912, R. R. S. 1943. Such a transcript was so filed in the present case in accordance with a praecipe filed by the plaintiff. The praecipe did not include, nor did the clerk of the district court certify, the amended motion for a new trial as a part of the transcript. On August 22, 1957, plaintiff filed a supplemental transcript containing a requested instruction which was offered but not given by the trial court. At no time prior to the submission of the case did plaintiff attempt to have the amended motion for a new trial included in the transcript.

The filing of a transcript in this court is not a jurisdictional act. If a transcript is filed out of time, or not at all, or if a defective one be filed, due to the fault of the clerk of the district court, this court will ordinarily permit a proper transcript to be filed where the requesting party is free from negligence. Gliss-

mann v. Bauermeister, 141 Neb. 288, 3 N. W. 2d 555.

In this case the clerk of the district court filed a transcript in this court in accordance with the praecipe filed by the plaintiff. The plaintiff had the transcript in his possession on and after August 3, 1957, for use in the preparation of his brief. On August 22, 1957, he filed a supplemental transcript containing a requested instruction which was refused by the trial court. During all the time thereafter until the date of argument of the case, plaintiff took no steps to bring his amended motion for a new trial to the attention of this court by supplemental transcript. He briefed the question of the correctness of the instructions, although any alleged error in their giving was not properly assigned. He negligently and carelessly failed to discover the inadequacy of the record to raise alleged errors in the instructions. No adequate cause is shown to excuse the failure of the plaintiff to have the record in order so as to properly present the alleged errors committed by the trial court on or before the submission of the case to this court. The fault is that of the plaintiff and not that of any public officer.

Where a transcript is deficient, either as to content or time of filing, because of the negligence of a party to the action, this court will not ordinarily permit a supplemental transcript to be filed after the cause has been submitted to the court on its merits, in the absence of a reasonable excuse which due diligence would not have prevented. It is not the practice of courts to try cases piecemeal and thereby permit a litigant who has submitted his case and taken his chances on the outcome, to thereafter, after an adverse decision, raise new issues and seek a more favorable result on different grounds. Adequate cause has not been shown to entitle plaintiff to the remedy he seeks. The motion for leave to file a supplemental transcript is denied.

Our former opinion contains the following: "In fact, the transcript of the proceedings in the trial court does

not show any proposed instructions which were requested by the plaintiff." The record shows that on August 22, 1957, a supplemental transcript containing one requested instruction was filed in the office of the Clerk of the Supreme Court. To this extent our former opinion is in error. However, we desire to point out that the motion for a new trial fails to allege error by the trial court in refusing to give any requested instruction. The refusal of the trial court to give plaintiff's requested instruction was not properly raised and plaintiff is in no manner prejudiced by the erroneous statement in our former opinion. In other respects the motion for a rehearing is without merit and it is overruled.

MOTIONS TO FILE SUPPLEMENTAL TRANSCRIPT AND FOR A REHEARING OVERRULED.

VIVIAN HEFTI, APPELLANT, V. HARVEY HEFTI, APPELLEE.
88 N. W. 2d 231

Filed March 7, 1958. No. 34317.

1. **Witnesses.** A witness who testifies as an expert on a subject requiring special knowledge and skill is, in the absence of a special contract, entitled only to the statutory fee.
2. **Divorce.** Divorce cases are triable de novo upon appeal to this court and the amount of alimony and support money awarded the wife will be increased or diminished by this court on appeal therefrom when all the facts and circumstances establish that the amounts awarded by the trial court are not just and reasonable.
3. ———. In rendering a decree for alimony, the court may take into account all of the property owned by the parties at the time of rendering the decree, whether accumulated by their joint efforts or acquired by inheritance, and make such award as is proper under all the circumstances disclosed by the record.
4. ———. The granting of alimony and the allowance of support money in divorce actions are always determined by the facts and circumstances in each case relating to and in accord with the many factors and elements heretofore announced by this court.

APPEAL from the district court for Cedar County: JOHN E. NEWTON, JUDGE. *Affirmed as modified.*

Leamer & Graham, for appellant.

Philip H. Robinson and *Hutton & Hutton,* for appellee.

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

CHAPPELL, J.

On November 19, 1956, plaintiff, Vivian Hefti, was granted an absolute divorce from defendant, Harvey Hefti, and was awarded the care, custody, and control of their daughter, who was born March 18, 1956, together with temporary allowance for their support until further order of the court. Thereafter, on July 8, 1957, a supplemental decree was rendered which granted plaintiff $2,500 permanent alimony, payable $50 a month beginning August 1, 1957, and continuing each month thereafter until paid in full, and also allowed plaintiff $50 a month for child support beginning August 1, 1957. Thereafter, plaintiff's motion to vacate the decree rendered July 8, 1957, and grant a new trial or to modify said decree by materially increasing the amount allowed as permanent alimony and support money, was overruled and plaintiff appealed.

In doing so, plaintiff assigned substantially that under the evidence and applicable law, the trial court erred as follows: (1) In granting plaintiff only $2,500 as permanent alimony and in restricting payment thereof to $50 a month; (2) in allowing plaintiff only $50 a month as child support; and (3) in assessing costs. Those are the sole questions presented here, and we sustain the first assignment.

With regard to the third assignment, plaintiff argued that the trial court erred in refusing to assess as costs $25 paid by plaintiff as a witness fee to a physician whose deposition was taken by plaintiff and used in the trial. In Peek v. Ayres Auto Supply, 155 Neb. 233,

51 N. W. 2d 387, citing authorities, we reaffirmed that: "A witness who testifies as an expert on a subject requiring special knowledge and skill is, in the absence of a special contract, entitled only to the statutory fee." In Ulaski v. Morris & Co., 106 Neb. 782, 184 N. W. 946, we said: "There is, however, no provision in the law for the payment of expert witness fees. The expert witnesses are therefore allowed the usual and lawful witness fee, and no more. Main v. Sherman County, 74 Neb. 155." In that connection, only the usual and lawful witness fee for the physician involved should be assessed as costs herein, as provided by section 33-139, R. R. S. 1943. The third assignment should not be sustained.

We turn then to the first and second assignments, which will be discussed and disposed of together. In that connection, we increase plaintiff's award of permanent alimony and the monthly payments thereof as hereinafter set forth, but we do not increase the allowance for child support because the child is now less than 2 years old and the allowance appears to be adequate at this time. In other words, we sustain the first assignment but do not sustain the second.

It is elementary that such cases are triable de novo upon appeal to this court, and that the amount of alimony and support money awarded the wife will be increased or diminished by this court on appeal therefrom when all the facts and circumstances establish that the amounts awarded by the trial court are not just and reasonable. In that respect, the many factors and elements which should be considered by the court in granting alimony and awarding support money require no repetition here. They have been heretofore announced and reaffirmed in such cases as Workman v. Workman, 164 Neb. 642, 83 N. W. 2d 368; Koerwitz v. Koerwitz, 162 Neb. 411, 76 N. W. 2d 264; Eno v. Eno, 159 Neb. 1, 65 N. W. 2d 145; Strasser v. Strasser, 153 Neb. 288, 44 N. W. 2d 508.

Also, in Prosser v. Prosser, 156 Neb. 629, 57 N. W. 2d 173, we held: "Although the statute provides that the wife shall be allowed alimony out of the husband's estate in such an amount as the court shall deem just and reasonable, having regard to the ability of the husband, his earning capacity is an element to be considered and, in a proper case, the allowance of permanent alimony may exceed the value of the husband's estate at the time the marriage is dissolved.

"The amount of alimony to be granted a wife is not to be determined alone from the property possessed by the husband. Many other factors enter into the determination such as the husband's age, health, earning capacity, future prospects, and social standing." We reaffirmed the foregoing rule in Eno v. Eno, *supra*.

Also, in DeVore v. DeVore, 104 Neb. 702, 178 N. W. 621, we held: "In entering a decree for alimony, the court may take into account all of the property owned by the parties at the time of entering the decree, whether accumulated by their joint efforts or acquired by inheritance, and make such award as is proper under all the circumstances disclosed by the record." See, also, Strasser v. Strasser, *supra*.

In that connection, the granting of alimony and the allowance of support money in divorce actions is always determined by the facts and circumstances in each case relating to and in accord with the many factors and elements heretofore announced by this court.

In the light of such rules, we have examined the record. The parties were married on December 2, 1951. Thereafter, for some 10 months they lived with defendant's parents near Coleridge on a 280-acre farm owned by defendant's father. At the end of such period defendant's parents left that farm and moved to Coleridge, but plaintiff and defendant continued to live there together without any serious marital difficulties until after their daughter was born.

At the time of marriage plaintiff was a farmer's

daughter, with an eighth-grade education. Her earning ability was and is limited to being a domestic and baby sitter. She had no real estate and owned no personal property of any consequence at the time of marriage. During the marriage plaintiff cooked, kept a clean house, did chores, and assisted defendant as a farmer's wife ordinarily does until their only child was born in a Norfolk hospital. Six days thereafter plaintiff returned to the farm in a weakened physical condition and faced with the responsibilities of a farmer's wife and an inexperienced mother with her first baby. She was then unable to efficiently assume those responsibilities, and serious marital difficulties occurred, whereupon, as a result thereof and as a result of a previous illness and her pregnancy, plaintiff had a nervous breakdown and was removed to a hospital for 13 days. During such period and thereafter, defendant's parents took charge of plaintiff's baby, and upon her recovery and return from the hospital to the farm, they retained custody of the baby, at defendant's instigation, until after this action was filed. In the meantime, defendant's unjustifiable extreme cruelty, which was established by plaintiff's testimony, amply corroborated by other competent evidence, compelled plaintiff to leave defendant and the farm in June 1956, and this action was filed July 11, 1956.

At time of trial, plaintiff was 31 years old and in good health but without employment or funds except temporary allowances made therefor by the court with which to support herself and child, whose custody and care required constant attention.

At time of marriage and ever since, defendant and his father farmed 280 acres of land near Coleridge as equal partners. Each owned his own machinery. However, defendant's father owned the land which had been conveyed to him by defendant's uncle, but defendant and his father were required to pay the uncle $400 a year as rental, and pay the taxes on the land. At time of

marriage, defendant owned no real estate, but in 1953 he acquired 154 acres of land by inheritance from his grandfather. Such land had no improvements upon it except a corncrib, windmill, and hog house, but the land was free of encumbrance and then appraised at $15,270. At time of trial and theretofore as well, defendant had rented that land to a tenant on a two-fifths crop-share basis. At the trial a real estate agent, called as a witness by defendant, testified that the market value of such land was between $100 and $125 an acre, which would be a value of $15,400 to $19,250. He testified that it was worth more than some farms he had sold because it was on the highway and in the Coleridge school district. In that connection, plaintiff's witness, a neighbor, testified that such land was worth $150 an acre, which would be a value of $23,100.

At time of marriage defendant had about $1,400 in the bank and owed no debts. He then owned certain described farm machinery and two Ford cars, for all of which he had paid $3,107. Defendant also then owned 46 head of livestock and one-half of whatever hay and grain there was on the 280-acre farm, but the value of such property cannot be definitely ascertained from the record.

At time of trial, defendant was 31 years old. He then claimed to have some disability in his back but he was able to work, and owned an undivided one-half interest in 129 head of livestock. He also owned 75 or 80 bushels of corn, 260 bales of alfalfa hay, his growing crops not yet harvested, and 2 life insurance policies. One such policy was for $5,000, payable to his parents, and one was for $2,500, payable to his estate. However, the value of the foregoing property cannot be definitely ascertained from the record. At time of trial, defendant also owned 10 pieces of described farm machinery and a car. Such items had been respectively purchased by him as follows: One in 1950; three in 1951; one in 1953; four in 1954; one in 1955; and one in 1956, at a

total cost of $5,187.60. Of course, defendant would be entitled to some depreciation on the value of such items, but not 50 percent or more, as claimed by defendant. Further, at time of trial, defendant had $41.70 in the bank, owned at least $500 of United States government bonds, and a television set worth about $50. As near as can be ascertained, defendant then had an indebtedness of $6,487.13 for taxes, for money borrowed from a bank, for back rent, for current obligations, for services of his attorneys, and for money claimed to be owing on his father's farm account.

True, defendant's farm crops had not been as bountiful as usual during 1955 and 1956, but his net income for 1955, figured on a cash basis, was some $1,100, and he deposited some $6,400 in the bank during 1956, although he claims that some of it was money borrowed from the bank. However, bearing in mind the substantial assets owned by defendant as heretofore set forth, it may be fairly concluded that defendant had a net worth of nearer $20,000 than of $13,752.48, as argued by defendant.

We are mindful also that when plaintiff was compelled to leave the farm in June 1956 she took nothing from their farm home but the meager clothing belonging to her. She also had no place to live or means of support for herself and child, whereas defendant not only had an income but also still had a furnished home where he lived alone, bought his groceries with cream checks, cooked some of his meals there, and ate the rest with his parents in Coleridge. On the other hand, plaintiff was later compelled to rent an inadequate furnished apartment for $45 a month, and she was unable to work as a domestic or baby sitter because she was compelled to care for a baby of her own. In that connection, the record discloses that plaintiff and her baby need more than $100 a month, which provides only a bare existence, much less proper living conditions, clothing, and food. Defendant owed the duty to maintain and sup-

port his child in a suitable manner, and likewise to so support plaintiff for at least the next 5 years until their child is old enough to attend school, and permit plaintiff to earn a livelihood, which is all that she has sought.

We conclude that defendant is amply able financially to meet those obligations and that he should be required to do so. Therefore, the judgment of the trial court should be and hereby is modified to award plaintiff $6,000 permanent alimony, payable $100 on the first day of August 1957, and $100 on the first of each and every month thereafter until paid in full. In all other respects, the judgment of the trial court should be and hereby is affirmed. All costs are taxed to defendant, including an allowance of $250 for the services of plaintiff's attorneys in this court.

AFFIRMED AS MODIFIED.

YEAGER and WENKE, JJ., participating on briefs.

BERT L. FUCHS ET AL., APPELLANTS, V. PARSONS CONSTRUCTION COMPANY, A CORPORATION, ET AL., APPELLEES.

88 N. W. 2d 648

Filed March 7, 1958. No. 34319.

1. **Actions.** The substantial distinctions between actions on contract and those in tort exist notwithstanding the adoption of the code.
2. ———. If a petition states a cause of action for breach of contract, additional averments appropriate to a cause of action for a wrong will not convert the cause of action into one for tort and the part of the pleading appropriate to an action in tort will be considered surplusage.
3. ———. If the averments make it doubtful whether the action is on contract or in tort, the doubt will be resolved in favor of an action on contract.
4. ———. The determination of whether an action is on contract or in tort requires knowledge of the source or origin of the duty, the nature of the grievance, and what is said concerning them in the pleading in the cause.

5. ———. If an action is not maintainable without pleading and establishing the contract or if the essence of the action is breach of contract, whether by acts of omission or commission, it is in substance, whatever may be the form of the pleading, an action on contract.
6. Contracts. If the contract of a contractor is that he will perform a designated undertaking as detailed and required by prescribed plans and specifications, the contractor may not vary from them in completing the work even if he deems them improper or insufficient.
7. ———. In such an instance the contractor does not guarantee that the work performed as required by the plans and specifications will be free from defects or that it will accomplish the purpose intended.
8. ———. If the contract specifies what a contractor is to do and the manner and method of doing it and he does the work as the contract requires, his engagement is performed and satisfied.
9. Actions. Causes of action involving different defendants cannot be joined unless each cause of action affects all the defendants and they have a joint or common liability or interest.

APPEAL from the district court for Douglas County: CARROLL O. STAUFFER, JUDGE. *Affirmed.*

Crawford, Garvey, Comstock & Nye, for appellants.

King, Haggart & Kennedy and *Crossman, Barton & Quinlan,* for appellees.

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

BOSLAUGH, J.

The recovery appellants seek herein is damages from appellees because of the alleged negligent construction of a building on premises owned by appellants by the Parsons Construction Company, hereafter referred to as the contractor, and on account of the alleged negligent, insufficient, and improper supervision of Steele, Sandham & Steele, called herein the architects, of the construction of the building. The legal sufficiency of the second amended petition of appellants, hereafter designated the petition, was contested by special and general

demurrer of each of the appellees. The grounds thereof were identical. They were that there was a defect of parties defendant, that several causes of action were improperly joined, and that the petition did not state facts sufficient to constitute a cause of action. The demurrers were, without specification of the reason therefor, sustained by the trial court and a judgment of dismissal of the case was rendered. The issue of this appeal is the correctness of the action of the trial court in its disposition of the case.

The substance of the parts of the petition relevant to this inquiry is:

Plans and specifications for the construction of a building on the described real estate owned by appellants were prepared at their instance and request by the architects, specifying in detail and with particularity the manner in which the building should be constructed including specific instructions as to the excavating, backfilling, and piling that were required. Instructions to bidders were attached to the plans and specifications. The proposal as exhibited by the plans and specifications was accepted by appellants. These were submitted to contractors and bids for construction of the proposed building were invited. A bid was made by the contractor for the construction of the building according to the plans and specifications prepared by the architects and approved by appellants and the bid of the contractor was accepted as made by it. A contract was made with the contractor in accordance with the bid and the contractor engaged in the actual construction of the building as provided by the plans and specifications therefor. The architects were employed by the owners to supervise the construction of the building in compliance with the plans and specifications and they acted in that capacity and status.

The specifications were made for Fuchs Machinery & Supply Co. Building. The parties to the construction contract were the contractor, Andrew Murphy & Son,

Inc., a corporation, and Fuchs and Crawford, a partnership. Fuchs Machinery & Supply Co., a partnership, Andrew Murphy & Sons, Inc., a corporation, and Fuchs & Crawford, a partnership, each assigned their interest and rights to appellants.

The contractor and the architects were charged in separate paragraphs of the petition with many negligent acts of omission and commission. The specific acts of negligence alleged in each paragraph are identical except where it is said that the contractor was negligent in failing to do a specified thing, the corresponding act charged against the architects is in their failing to require the contractor to do the identical thing; and where it is said the contractor was guilty of an act of commission, the corresponding act of negligence charged against the architects is that they permitted the contractor to do the identical thing.

The matters to be considered and decided on this appeal do not require that the very numerous allegations of negligence be summarized or detailed herein. It is sufficient that they are all concerned with the subject matter covered in detail by the contract providing for the construction of the building in accordance with the plans and specifications aforesaid. Appellants seek a joint and several judgment against the contractor and architects for the alleged damages resulting from the asserted negligence of appellees.

It is important to determine the character of the cause of action asserted against the contractor. The appellants say it is in tort and the contractor thinks it is on contract. Notwithstanding the adoption of the code, the substantial distinctions between actions on contract and those in tort exist. State ex rel. Wright v. Barney, 133 Neb. 676, 276 N. W. 676; First Nat. Bank of Wayne v. Gross Real Estate Co., 162 Neb. 343, 75 N. W. 2d 704. If the petition contains a cause of action for breach of contract, additional averments appropriate to a cause of action for a wrong will not change the action from

contract to tort and if there is a doubt as to the character of the action it will be resolved in favor of an action on contract. In such an instance the statements appropriate to an action in tort will be considered surplusage. Douglass v. Loftus, 85 Kan. 720, 119 P. 74, L. R. A. 1915B 797, Ann. Cas. 1913A 378; Dixon v. Texas Co., 222 S. C. 385, 72 S. E. 2d 897; Southern Pacific R. R. Co. v. Gonzalez, 48 Ariz. 260, 61 P. 2d 377, 106 A. L. R. 1012; Andersen v. Thude, 42 Ariz. 271, 25 P. 2d 272; Delaney v. Great Bend Implement Co., 79 Kan. 126, 98 P. 781. In order to decide the form of the redress, whether contract or tort, it is necessary to know the source or origin of the duty or the nature of the grievance. Attention must be given to the cause of the complaint; in other words, the character of the action must be determined from what is asserted concerning it in the petition in the cause. It is not important what the plaintiff calls his action. If he does attempt to identify it and is mistaken, that is immaterial. This is the rationale of the code provision that a petition is a statement of facts constituting a cause of action in ordinary and concise language. Driekosen v. Black, Sivalls & Bryson, 158 Neb. 531, 64 N. W. 2d 88; Nathan v. Locke, 108 Cal. App. 158, 287 P. 550; Schneider v. Ft. Dearborn Casualty Underwriters, 258 Ill. App. 58; Douglass v. Loftus, *supra;* Van Oss v. Synon, 85 Wis. 661, 56 N. W. 190.

The sole source or origin of the duty of the contractor was the construction contract. The nature of the grievance charged against the contractor was that it obligated itself by written contract to erect a building for appellants as required by the plans and specifications under the direction and supervision of the architects acting for appellants and that it failed by omission and commission to construct the building in that manner. This is definitely and precisely demonstrated by the language of the petition: "* * * that plans and specifications for the construction of a building * * * were, at plaintiffs' special instance and request, prepared for

the plaintiffs by the defendant Steele, Sandham & Steele, specifying specifically the manner in which the building * * * was to be constructed, both generally and specifically, and including specific instructions in regard to the excavating, backfilling and piling; * * * that the defendant Parsons Construction Company did submit a bid, which said bid was accepted for the completion of said building * * * according to the plans and specifications above referred to * * * and the defendant Parsons Construction Company undertook the construction of said building under said plans and specifications."

The pleading of appellants lacks allegations of other or different duty assumed by or imposed upon the contractor. The injuries for which appellants seek redress were the rights which accrued to them, according to the pleading, exclusively as the result of the construction contract. This is confirmed and emphasized by the conclusion of the pleading that appellants expended a large amount of money for a building "according to the plans and specifications" and if the building had been completed according to the plans and specifications, the value of the building constructed would have been equal to the expenditures made by appellants. In such a situation allegations of negligence are insignificant. It is recognized that if an action is not maintainable without pleading and establishing the contract, if the gist of the action is the breach of contract, either by malfeasance or nonfeasance, it is in substance, whatever may be the form of the pleading, an action on the contract. City of East Grand Forks v. Steele, 121 Minn. 296, 141 N. W. 181, 45 L. R. A. N. S. 205, Ann. Cas. 1914C 720; International Printing Pressmen & Assistant's Union v. Smith, 145 Tex. 399, 198 S. W. 2d 729; McDermott v. Morris Canal & Banking Co., 38 N. J. Law 53; Masters v. Stratton, 7 Hill (N. Y.) 101; Wilbur v. Brown, 3 Den. (N. Y.) 356.

The contract concerned in this case prescribed the

scope and manner of completing the work to be done by the contractor. Hence its obligation was to erect the building according to the contract and the plans and specifications with skill and in workmanlike manner. The whole of the obligation of the contractor was contractual and any failure of performance afforded a resort to an action for breach of contract. State v. Commercial Casualty Ins. Co., 125 Neb. 43, 248 N. W. 807, 88 A. L. R. 790, concerned a contract between the State of Nebraska and a contractor for the building of a steam line for the construction of which the contract specified the materials. The completed improvement proved to be faulty and the State sued for damages. This court therein said: "Whether the pipe line, as designed by plaintiff's engineers, and the specific material required and manner of construction were sufficient were questions on which the contractor was not required to pass judgment. Its duty was to perform and fulfil the contract according to the specific terms and directions therein. * * * Where plans and specifications for an improvement are prepared by engineers of the owner, who are to inspect and supervise the construction and see to it that materials are furnished and work performed in accordance with the specifications, ordinarily the contractor is not liable for the sufficiency of the specifications, but only for the skill with which he performs the work and the soundness of the materials used by him. * * * In the case of Friederick v. County of Redwood, 153 Minn. 450, it was said: 'Where a contractor makes an absolute and unqualified contract to * * * perform a given undertaking, it is the general * * * rule that he assumes the risks attending the performance of the contract * * *. But where he makes a contract to perform a given undertaking in accordance with prescribed plans and specifications, this rule does not apply. Under such a contract he is not permitted to vary from the prescribed plans and specifications even if he deems them improper and insuffi-

cient; and therefore cannot be held to guarantee that work performed as required by them will be free from defects, or withstand the action of the elements, or accomplish the purpose intended. Where the contract specifies what he is to do and the manner and method of doing it, and he does the work specified in the manner specified, his engagement is fulfilled, and he remains liable only for defects resulting from improper workmanship or other fault on his part.' "

The claim of damages by appellants against the contractor was for breach of the construction contract. The present action is and was required to be in contract and not in tort.

McNeel v. State, 120 Neb. 674, 234 N. W. 786, concerned a contract for the construction of a highway. The violations of it by the State, as claimed by the contractor, were failure to furnish clay for surfacing, failure to permit him to perform the work without delay, and failure to permit him to complete the construction. This court determined the action was contract and not tort. It is stated therein: "A statement of the law supported by precedent follows: 'The mere breach of an ordinary contract does not constitute a tort, and if there is no liability except that arising out of a breach of a purely contractual duty, the action must be in contract, and an action in tort cannot be maintained.' 1 C. J. 1016, sec. 139, notes 52 and 53, and cases cited therein, including Russell & Co. v. Polk County Abstract Co., 87 Ia. 233. * * * The gist of an action for tort is a wrong or breach of duty imposed by law as distinguished from a mere breach of contract. 1 C. J. 1019, sec. 141, note 33."

It is said in Atlanta Gas Light Co. v. Newman, 88 Ga. App. 252, 76 S. E. 2d 536: " 'Where the breach complained of is simply the neglect of a duty such as is expressly provided for by the contract itself, the action will be construed and treated as one brought ex contractu.' Fain v. Wilkerson, 22 Ga. App. 193, 194 (2)

(95 S. E. 752); Howard v. Central of Georgia Ry. Co., 9 Ga. App. 617 (71 S. E. 1017). The duty of the defendant to furnish the plaintiff with gas arose solely through their contract * * *; and the remedy of the plaintiff for a breach of that duty, even though the breach is occasioned by the defendant's negligence, is in contract and not in tort."

City of East Grand Forks v. Steele, *supra,* states: "An action to recover damages arising from the negligence of an expert employed to audit certain accounts is founded on breach of contract, and not in tort. The cause of action is the breach of the contract, and the different items of damage resulting therefrom do not constitute separate causes of action."

International Printing Pressmen & Assistant's Union v. Smith, *supra,* contains the following: "This contract * * * pledged the union to recognize Smith as a member thereof and to allow him all of the benefits incident thereto upon compliance with the terms of the contract. He complied with the contract, but the union breached it. * * * All the rights for which he seeks redress arose by virtue of the agreement of the parties. Smith's action was therefore founded upon a contract in writing."

McDermott v. Morris Canal & Banking Co., *supra,* declares: "When a count in a declaration sets forth a cause of action arising out of a contract, and maintainable only by referring to the contract as creating the right for violation of which the plaintiff complains, a recovery can be had only in an action on contract, and not in action for tort."

The language in Garber v. Whittaker, 36 Del. 272, 174 A. 34, is: "Generally, where action is based entirely on breach of contract and not on violation of duty imposed by law, action on the case will not lie, and suit must be brought in contract."

Federal Life Ins. Co. v. Maxam, 70 Ind. App. 266, 117 N. E. 801, states the doctrine in this manner: "In a certain sense a wrong is involved in every breach of a

contract. But such wrong may be distinguished from the wrong which constitutes a tort. * * * In a suit for damages for the breach of a contract, the action arises out of the agreement of the parties, and is generally denominated an action ex contractu, whereas the right of action for a tort arises out of a breach of duty fixed by law, is independent of the will or agreement of the parties, and is usually denominated an action ex delicto. * * * The case at bar is founded on the breach of a contract and not upon the violation of any duty imposed by law independent of the contractual relations of the parties. It is an action ex contractu * * *."

In Louisville & Nashville R. R. Co. v. Spinks, 104 Ga. 692, 30 S. E. 968, the court said: "Every person who makes a contract of any kind is, of course, under a duty of performing it; but it would never do to hold that every breach of a civil contract, though necessarily in a sense involving a breach of the duty thereby imposed, would give rise to an action ex delicto. Judge Cooley says that at common law: 'Breaches of contract were mere failures to perform agreements, and the actions for redress in the courts of law were actions on contracts, or actions ex contractu.' * * * There was simply an executory agreement between the plaintiff and the defendant * * *. Assuming that the plaintiff performed his part of the agreement, the defendant's refusal to comply with its obligations thereunder was like any other breach of an ordinary contract, involving no violation of a public duty or of a private duty resulting in any invasion of a vested right of the plaintiff in the premises. If the railroad company had owed him wages for work already done, a failure to pay the same would, of course, in a certain sense, be the breach of its duty to him; but at the same time, such failure would not constitute a tort. The breach of the contract now under consideration is of a similar nature and stands upon precisely the same legal footing. We are unable to see that the case has a single element of tort."

In Nathan v. Locke, *supra,* the court observed that if a complaint states a cause of action in contract and it appears that this is the gravamen of the action, the nature of the action is not changed by the fact that there are also allegations in regard to tortious conduct on the part of the defendant and the court concluded: "* * * if there is no liability except that arising out of the breach of a purely contractual duty the action must be in contract and an action in tort cannot be maintained."

It is declared in Mulvey v. Staab & Co., 4 N. M. 172, 12 P. 699: "Where the foundation of the action is a contract, in whatever way the declaration is framed, it is an action of assumpsit * * *. Here a contract is stated by way of inducement, and the true question is whether, if that were struck out, any ground of action would remain. There is no duty independently of the contract, and therefore it is an action of assumpsit. * * * An action on the case will not lie for the mere breach of a contract."

In Barrett v. New England Telephone & Telegraph Co., 80 N. H. 354, 117 A. 264, 23 A. L. R. 947, the court said: "The plaintiff's declaration sets out a contract with the defendant and alleges a negligent failure to perform the same. * * * The charge here is a negligent failure to perform a duty to render service. If the suit were between private parties, an action sounding in tort could not be maintained. It is not now necessary to go further than to hold that the fact that the defendant is engaged in the public service, does not make its mere failure to perform its duty to serve a wrong different in character from what it would be in the case of a private agreement." See, also, In re Appeal Roadmix Constr. Corp., 143 Neb. 425, 9 N. W. 2d 741; Dixon v. Texas Co., *supra;* Southern Pacific R. R. Co. v. Gonzalez, *supra;* Walser v. Moran, 42 Nev. 111, 173 P. 1149, on rehearing, 180 P. 492; Gumaerd Lead & Zinc Co. v. Erie R. R. Co., 92 N. J. Law 216, 104 A. 134; Schneider v. Ft. Dearborn Casualty Underwriters, *supra.*

Appellants argue that if there has been negligence in the performance of a contract, an action in tort may be had because the injury in such an instance results not from a breach of contract but from negligence in the performance of it and that accompanying every contract is a common-law duty to perform the thing to be done with skill and in a workmanlike manner.

Russell & Co. v. Polk County Abstract Co., 87 Iowa 233, 54 N. W. 212, 43 Am. S. R. 381, referred to with approval in McNeel v. State, *supra,* as supporting the view there expressed by this court, considered a statement from Addison on Torts, page 13, relied on by appellant in that case to support its hypothesis that the action was in tort. The statement quoted and discussed was: " 'If a contract imposed a legal duty upon a person, the neglect of that duty is a tort founded on contract * * *.' " The Iowa court said: "When the law imposes a duty from one person to another, independent of contract, the duty thus imposed is a legal one, one enjoined by the law. Its neglect is a tort. * * * It can not be said that the legal duty referred to means duties arising solely upon contract, for, if it does, then all duties in pursuance of contract are, within the meaning of the rule, legal duties, and, hence, a neglect to discharge them is a tort. This, followed to its legal conclusion, would make every breach of contract a tort. The duties arising upon contracts are, of course, legal duties, within the most comprehensive meaning of the term, but the sanction of the law making them so is invoked by the contract, and, hence, in an important and practical sense, we regard and express the obligations and duties thus arising between parties as contractual, and in that way distinguish them from other legal duties or obligations. The learned author was evidently preserving this distinction. * * * In the case at bar the defendant, independent of the contract, owed no duty to the plaintiff. The neglected duty was one alone enjoined by contract. The failure to perform by the defendant was a failure

to discharge its agreement, which is solely a breach of contract. No refinement of reasoning can, or should, avoid the conclusion. The fact that the act is alleged as negligently done does not change the situation. It is an allegation only as to the manner of making the breach. The liability of the defendant company in no way depends on the fact of negligence."

In Federal Life Ins. Co. v. Maxam, *supra,* it is said: "In a suit for damages for the breach of a contract, the action arises out of the agreement of the parties, and is generally denominated an action ex contractu, but the right of action for a tort arises out of a breach of duty fixed by law, independent of the will or agreement of the parties, and is usually denominated an action ex delicto."

In Garber v. Whittaker, *supra,* it is stated: "As a general rule, it is equally clear, however, that where the action is based entirely on a breach of the terms of a contract between the parties, and not on a violation of some duty imposed by law, an action on the case will not lie, and the plaintiff must sue, if at all, in contract. * * * In other words, as was said in Diver v. Miller, 4 W. W. Harr. (34 Del.) 207, 148 A. 291, 293: 'In order to constitute a tort there must always be a violation of some duty owed to the plaintiff; but generally speaking such a duty must arise by operation of law and not by the mere agreement of the parties.' "

In Louisville & Nashville R. R. Co. v. Spinks, *supra,* the court remarked on this subject: "Every person who makes a contract of any kind is, of course, under a duty of performing it; but it would never do to hold that every breach of a civil contract, though necessarily in a sense involving a breach of the duty thereby imposed, would give rise to an action ex delicto."

In Pecos & N. T. Ry. Co. v. Amarillo St. Ry. Co. (Tex. Civ. App.), 171 S. W. 1103, it is said: "A cause of action arising from breach of a promise is an 'action ex contractu,' and when a duty, for the breach of which

an action is brought, would not be implied by law by reason of the relation of the parties and depends solely upon the fact that it has been expressly stipulated for, the remedy is in contract and not in tort; but a cause of action arising from a breach of duty growing out of the contract is in form an 'action ex delicto.' "

The court said in Walser v. Moran, *supra*: "Where the law imposes a duty arising from the relation rather than the contract, and there is a breach of duty, the aggrieved party may sue in trespass on the case, but if there be no legal duty, except arising from the contract, there can be no election, and the party must rely upon the agreement alone * * *."

Schneider v. Ft. Dearborn Casualty Underwriters, *supra*, states: "This general rule is recognized in the case of Nevin v. Pullman Palace Car Co., 106 Ill. 222, 223, where it is held that the general principle is, that where the duty for the breach of which the action is brought would not be implied by law by reason of the relation of the parties, whether such relation arose out of the contract or not, and its existence depends solely upon the fact that it has been expressly stipulated for, the remedy is in contract and not in tort."

This subject is discussed in Rich v. New York Cent. & Hud. Riv. R. R. Co., 87 N. Y. 382, in this manner: "Ordinarily, the essence of a tort consists in the violation of some duty due to an individual, which duty is a thing different from the mere contract obligation. When such duty grows out of relations of trust and confidence, as that of the agent to his principal or the lawyer to his client, the ground of the duty is apparent, and the tort is, in general, easily separable from the mere breach of contract. * * * It rests upon the idea that unless a contract creates a relation, out of which relation springs a duty, independent of the mere contract obligation, though there may be a breach of the contract, there is no tort, since there is no duty to be violated. * * * But such legal duty may arise, not merely

out of certain relations of trust and confidence, inherent in the nature of the contract itself, * * * but may spring from extraneous circumstances, not constituting elements of the contract as such * * *. Whatever its origin, such legal duty is uniformly recognized, and has been constantly applied as the foundation of actions for wrongs; and it rests upon and grows out of the relations which men bear to each other in the framework of organized society. It is then doubtless true, that a mere contract obligation may establish no relation out of which a separate or specific legal duty arises, and yet extraneous circumstances and conditions, in connection with it, may establish such a relation as to make its performance a legal duty, and its omission a wrong to be redressed."

There is no foundation in the circumstances of this case as made by the petition for the argument of appellants in this regard. Likewise, there is no basis for an action by appellants against the contractor for a tort. The present action against it is on contract for damages for a breach of the construction contract.

The petition does not assert that the architects are liable to appellants because of the contract to construct the building, entered into by the contractor. The architects are strangers to it. Likewise, there is no claim in the petition that the contractor has any responsibility to appellants because of their transaction with the architects concerning supervision of the construction of the building. The contractor is a stranger to it. There is no similarity between the principles of law applicable to the relationship of owner and architect and the principles of law governing the relationship of owner and contractor. An architect is generally an agent of the owner. A contractor is an independent contractor in relation to the owner. The contractor was responsible for the erection of the building in harmony with his contract and the plans and specifications as the architects interpreted them and as they directed the con-

tractor. There was no area of common interest, common duty, or common benefit of the architects and contractor. The interest of the contractor was adverse to that of the architects. The function and responsibility of each were separate. They had neither a joint nor common liability or interest. It is the doctrine of this jurisdiction that causes of action involving different defendants cannot be joined unless each cause affects them all and they have a joint or common liability or interest. Separate causes against different defendants cannot lawfully be joined. § 25-702, R. R. S. 1943; Barry v. Wachosky, 57 Neb. 534, 77 N. W. 1080; Radcliffe v. Lavery, 100 Neb. 31, 158 N. W. 387; Drainage District v. O'Neill, 109 Neb. 552, 191 N. W. 685; Sickler v. City of Broken Bow, 143 Neb. 542, 10 N. W. 2d 462; Brchan v. The Crete Mills, 155 Neb. 505, 52 N. W. 2d 333. There was a defect of parties defendant. The trial court properly sustained the demurrers and dismissed the case. The judgment should be and it is affirmed.

AFFIRMED.

YEAGER, J., participating on briefs.

LLOYD PUEPPKA ET AL., APPELLEES, V. THE IOWA MUTUAL INSURANCE COMPANY, A MUTUAL COMPANY, APPELLANT.
88 N. W. 2d 657

Filed March 14, 1958. No. 34111.

1. **Appeal and Error: Costs.** The cost of preparation of a bill of exceptions is fixed by section 24-342, R. R. S. 1943, and an official court reporter may not charge in excess of that amount.
2. ———: ———. The following rule of court is promulgated by this opinion: The certificate of the official court reporter shall include a statement of the cost of the bill of exceptions and an averment that such amount is one permitted to be charged by section 24-342, R. R. S. 1943.

APPEAL from the district court for Lincoln County: JOHN H. KUNS, JUDGE. On motion for rehearing. See

165 Neb. 781, 87 N. W. 2d 410, for original opinion. *Costs retaxed and motion for rehearing overruled.*

Beatty, Clarke, Murphy & Morgan, Donald W. Pederson, and *Frank E. Piccolo, Jr.,* for appellant.

Crosby, Crosby & Nielsen, Halligan & Mullikin, Maupin, Dent, Kay & Satterfield, and *William E. Morrow, Jr.,* for appellees.

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

CARTER, J.

Subsequent to the filing of the former opinion in this case, Pueppka v. Iowa Mutual Ins. Co., 165 Neb. 781, 87 N. W. 2d 410, appellees filed a motion for a rehearing. In addition thereto a plain error in the assessment of costs, which was not assigned, has been noted as authorized by Rule 8 a 2(4) of the rules of this court. An opinion is deemed necessary to dispose of the question raised.

The record shows that the amount charged for the preparation of the bill of exceptions was $930. This item is chargeable as costs to the unsuccessful party. The five volumes of the bill of exceptions contain 1,429 pages of evidence. The bill of exceptions contains 269,819 words by actual count. The amount to be charged for the preparation of the bill is fixed by section 24-342, R. R. S. 1943, the pertinent part of which provides: "It shall be the duty of such reporter to furnish on the application of the county attorney, or any party to a suit in which a stenographic report of the proceedings has been made, a transcribed copy of the proceedings so recorded, or any part thereof. The reporter shall be entitled to receive in addition to his salary, a fee of fifteen cents per hundred words, to be paid by the party requesting the same; * * *." On the basis of this provision of the statute, the proper charge for the bill of exceptions in the instant case is $404.85. The over-

charge for the preparation of the bill of exceptions is $525.15.

The bill was properly prepared and it includes no material not proper to be included in it. There is no question of opinion or judgment involved. It is purely a matter of calculation in accordance with the cited statutory provision. The cost of preparation of a bill of exceptions is controlled by section 24-342, R. R. S. 1943, as this court has previously held. Barton v. Barton, 126 Neb. 835, 254 N. W. 561.

It is the function of courts to handle litigation expeditiously and at a minimum cost. The fixing of fees and charges for the services of administrative officers of the court is a legislative matter. If the charges fixed by the statute are deemed inadequate, the remedy is an appeal to the Legislature and not by the overcharge of litigants. It is the duty of courts to see that its administrative officers adhere to statutory provisions as to fees and charges which are to be taxed as costs.

The cost of preparation of the bill of exceptions in the instant case is hereby fixed at $404.85, and the district court is directed to retax the cost of preparation of the bill of exceptions in that amount.

We hereby promulgate a rule of court with reference to bills of exceptions, effective on the filing date of this opinion, as follows: The certificate of the official court reporter shall include a statement of the cost of the bill of exceptions and an averment that such amount is one permitted to be charged by section 24-342, R. R. S. 1943.

The former opinion of the court has been reexamined in the light of the objections thereto raised by the motion for a rehearing. We find no material error in the statement of the facts of the case or in the principles of law applicable thereto. The motion for a rehearing is therefore overruled.

COSTS RETAXED AND MOTION FOR REHEARING OVERRULED.

M. J. O'HARA AND R. J. O'HARA, DOING BUSINESS AS O'HARA PLUMBING COMPANY, A COPARTNERSHIP, APPELLEE, V. FREDERICKSON BUILDING CORPORATION ET AL., APPELLANTS, CENTRAL SURETY AND INSURANCE CORPORATION, APPELLEE.
88 N. W. 2d 643

Filed March 14, 1958. No. 34274.

1. **Appearances.** If a defendant invokes the judgment of the court in any manner upon any question, except that of the power of the court to hear and decide the controversy, his appearance is general.
2. ———. Where a defendant files a cross-petition asking for affirmative relief, it constitutes a general appearance and gives the court jurisdiction of the person of the cross-petitioner.
3. **Contracts: Damages.** A party who claims to have been damaged by a breach of a contract is required to prove the amount of his damage when that is an issue.
4. ———: ———. A party who claims to have been damaged by a breach of a contract is required to prove that the person sought to be charged is liable therefor when that is an issue.
5. **Appeal and Error.** A party who claims error in a proceeding is required to point out the factual and legal basis that shows error.
6. **Damages.** The general rule is that damages, to be recoverable, must be direct and certain.
7. ———. Damages which are uncertain, contingent, conjectural, or speculative, cannot be made the basis of a recovery, whether applied to the existence, nature, or proximate cause thereof.

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

Robert Lloyd Jeffrey, for appellants.

Kelly & Kelly, for appellee O'Hara.

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

SIMMONS, C. J.

This is an appeal from a judgment for the plaintiff in a law action.

The plaintiff is a copartnership, and will hereinafter be referred to as plaintiff.

The defendant Frederickson Building Corporation will be hereinafter referred to as Frederickson, when required. The defendant Peerless Casualty Company, a corporation, will be hereinafter referred to as Peerless, when required. Jointly Frederickson and Peerless will be referred to as defendants, when required. Peerless is joined as surety of performance of Frederickson of a contract between plaintiff and Frederickson. During the proceedings Central Surety and Insurance Corporation was impleaded. It will be hereinafter referred to as Central.

Defendants' first two assignments of error go to the refusal of the trial court to sustain their special appearance. Frederickson was served with process in Platte County. As to Peerless, service was made on the Secretary of State under the provisions of section 21-1201, R. R. S. 1943. Frederickson appeared specially and objected to the jurisdiction of the court over its person for the reason that it had its residence and principal place of business in a county other than Hall where the suit was brought. Peerless appeared specially and objected to the jurisdiction of the court over its person for the reason that it is a nonresident corporation and that there was no proper joinder in that there was no service upon a resident defendant in Hall County.

The trial court overruled the special appearances.

Thereupon the defendants, asserting a reservation of their special appearances, moved that the petition of plaintiff be made more definite and certain. This motion was overruled.

Defendants, asserting a reservation of the special appearances, then demurred. No ruling appears thereon. Defendants, asserting a reservation of the special appearances, then answered denying generally.

Defendants then asserting a reservation of their special appearances moved for an order making Central a party on the ground that it was the surety on the con-

tract between plaintiff and Frederickson. They moved for service upon Central and asked leave to file amended answer and cross-petition against Central and plaintiff, asserting that they had affirmative defenses and causes of action against plaintiff and Central.

The motion was sustained.

Defendants, asserting a reservation of their special appearances, filed an amended answer and cross-petition against plaintiff and Central in which they sought a dismissal of plaintiff's petition and a judgment for Frederickson against plaintiff and Central.

Plaintiff and Central filed a reply and answer denying generally.

On these issues the matter went to trial.

We need not discuss the theories upon which defendants rested their special appearances.

It has long been the rule that if a defendant invokes the judgment of the court in any manner upon any question, except that of the power of the court to hear and decide the controversy, his appearance is general. Bankers Life Ins. Co. v. Robbins, 59 Neb. 170, 80 N. W. 484.

Making specific application of this rule, we have held that where a defendant files a cross-petition asking for affirmative relief, it constitutes a general appearance and gives the court jurisdiction of the person of the cross-petitioner. Linton v. Heye, 69 Neb. 450, 95 N. W. 1040, 111 Am. S. R. 556; Edgar v. Anthes, 109 Neb. 546, 191 N. W. 682; Pollard v. Larson, 115 Neb. 136, 211 N. W. 998.

The defendants' assignment is not sustained.

This brings us to the assignments of error which involve the merits of the causes.

Plaintiff sought judgment on two causes of action. The first was for the balance due on a contract whereby plaintiff agreed to furnish material and labor on a contract to install plumbing. The balance alleged to be due was $27,290. The second cause of action was for

extras furnished in connection with the contract in the sum of $915.95.

Defendants by answer denied generally.

By cross-petition defendants sought judgment against plaintiff and Central in the sum of $106,789.65. This in turn was divided into two classifications: The claim in the amount of $103,914.10 consisted of 11 items of damage allegedly suffered by Frederickson in connection with plaintiff's performance of the contract. The second classification was for items of material and labor furnished plaintiff by Frederickson for which credit was not given. The amount here claimed was $2,875.55.

The issues were tried to the court, a jury being waived.

The trial court in its judgment allowed recovery by plaintiff on substantially its entire claim in its two causes of action. The judgment for plaintiff was for $24,-238.14, with interest. The amount of that allowance is not questioned here. The court further allowed Frederickson credit for the amounts claimed by it as damages in items 1 and 3 of its first classification and the amount claimed by it for material and labor furnished in the second classification. Those allowances are not in dispute here.

The issue involved in the appeal here goes to the denial of the court of items 2, 4, 5, 6, 7, 8, 9, 10, and 11, claimed by Frederickson as damages.

Defendants here offer 22 assignments of error. We have determined the first two above.

The next 18 assignments charge error in overruling a motion for a new trial; irregularities preventing a fair trial; abuse of discretion; the judgment is contrary to law and contrary to the preponderance of the evidence; errors of law occurring at the trial; error in the exclusion of evidence in support of three items of alleged damages; error in failing to award damages to the full extent thereof; error in plaintiff offering evidence of negotiations concerning settlement; and error in fail-

ing to find for the defendants on each of 9 items of damages set out in their cross-petition.

Defendants elect to argue these assignments together —and do so.

Frederickson was the prime contractor with the United States government on this project. There was a clause in that contract providing for liquidated damages of $100 a day for delay in performance. Under this clause the United States government withheld payments of $9,300 for a time. Frederickson and plaintiff had a like clause in their contract. Under it Frederickson withheld $7,900 for 79 days' delay allegedly due to plaintiff's failure to perform as agreed. After a few weeks the United States government waived the liquidated damages and paid the $9,300 to Frederickson. Frederickson then credited the plaintiff with the $7,900 charged to it.

Defendants then spend the major part of their argument on the legal proposition that stipulated damages having been waived they had the right to recover actual damages.

Plaintiff by argument contends that the liquidated damage clause controls and, liquidated damages having been waived, defendants can collect no damages by reason of failure to complete the contract on time, and that in any event damages cannot be allowed which are uncertain, conjectural, or speculative.

Defendants then spend two pages of their brief reciting alleged facts of the nine items as set out in their cross-petition. With one exception, there is no reference to sustaining testimony as required by our rules 8a2(6), 8a2(7), and 8a3(3).

Nevertheless we have read the entire testimony covering 4 days of trial. We have found evidence that apparently relates to various items of the claimed damages. With few exceptions no reference was made to the item number in the testimony so as to connect the testimony with the claim. In some instances there

is a failure to prove an essential element necessary to the calculation of damages; in some instances there is a failure of proof showing plaintiff's liability in the event damage followed; in at least one instance we found no reference to one of the items of claimed damage; and in at least three instances we found neither facts nor law to sustain the claims.

We agree with defendants in the rule stated from Lee v. Carroll Normal School Co., 1 Neb. (Unoff.) 681, 96 N. W. 65, that a party who claims to have been damaged by a breach of a contract is required to prove the amount of his damage when that is an issue. It was an issue here.

It is axiomatic that a party who claims to have been damaged by a breach of a contract is required to prove that the person sought to be charged is liable therefor, when that is an issue. It was an issue here.

It is also axiomatic that a party who claims error in a proceeding is required to point out the factual and legal basis that shows error. Here defendants do not do so. Our research does not disclose error.

Defendants say that it is difficult to understand why the court found for it on items 1 and 3 and failed to do so on items 2, 4, 5, 6, 7, and 8. Without designating it by item number, defendants here "for example" discuss item 2. This is for graveling roads to make them usable during the winter months. Here the liability of plaintiff is assumed. The claim is for 11,800 square yards of gravel, requiring 980 cubic yards of gravel delivered and spread at $2.15 per cubic yard. The sum claimed is calculated on 980 cubic yards at $2.15 per cubic yard.

Frederickson's principal officer and witness testified that he did not know how much gravel was used and that he did not recall the exact cubic yardage, but that they covered between 11,000 and 12,000 yards. The theory of defendants was that this was necessary because of the delay in paving, yet Frederickson testified that

they spread gravel over all the roads and loading aprons. There was no attempt to limit the items in the testimony to those areas where plaintiff was alleged to have some liability.

The task of defendants here is not to understand why the court found against them on the items named, but to demonstrate why the court should have found for them. That they have not done.

Defendants make brief argument as to certain items, to wit, 9, 10, and 11. Item 9 is a claim for damages in the sum of $1,180 because the paving contractor could not commence work in the fall of 1952 and the work was done in the spring of 1953 at an increased cost of 10 cents per square yard, being the difference in cost of $2.15 per square yard and $2.25 per square yard. There is ample evidence in the record to sustain the conclusion that the weather became too cold in the fall and winter of 1952 to permit paving, during the time that plaintiff was not in default of the performance of its contract. The evidence with reference to the $2.15 per square yard figure is that in the fall of 1952 a paving contractor got in touch with Frederickson and offered to do the paving for $2.15 per yard but that a contract was not made until 1953. The trial court pointed out this deficit in the evidence in this regard to the defendants. Although considerable evidence was received thereafter we find no further reference to the matter.

Defendants do not undertake to point out here on what basis plaintiff would be liable for the damage in any event.

Item 10 was a claim for $2,917.44 for interest on the liquidated damages and other retainages withheld by the United States, and collection expense and attorneys' fees in the sum of $667.87. As to the last item we find no evidence whatever.

As to the interest item, Frederickson offered its calculation known as exhibit No. 22. This shows that the liquidated damages were withheld at the rate of $100

a day beginning on December 11, 1952, continuing for 93 days; and that on May 5, 1954, Frederickson was paid the sum of $9,300. Defendants calculate interest on that sum for that period at 6 percent to be $853.05.

We are unable to calculate the interest so as to reach that sum.

Defendants then calculated 6 percent interest on "other than Liquidated Damages deduction" and reached a total in this category of $2,064.39. There is no showing as to what this involves and any possible liability of plaintiff to pay it. Defendants, without citation to the record, tell us in their brief that the total of $2,917.44 is the amount of interest which Frederickson was obliged to pay to its bank. Again we find no evidence of that in the record and no showing of any legal basis upon which to base a liability of the plaintiff.

Item 11 is for the "Loss of normal profit" on the contract alleged to have been caused by plaintiff's negligence and delay in performance in the sum of $68,832.95.

To sustain this item Frederickson offered an analysis of its gross profits on contracts for 5 years and on two other contracts with the United States. On one of these latter contracts it made a gross profit of 13.255 percent. It calculated 13.255 percent of $519,297.69 listed as the "gross sales" in this contract and arrived at the amount of $68,832.95 as its loss of profit on this contract. It showed no loss otherwise. It appears to be Frederickson's theory that because it made gross profits on its other contracts, it should have done so on this one and that plaintiff is obligated to make up the alleged loss. Defendants advise us that the trial court "had difficulty in understanding" this exhibit. We have the thought that the trial court understood the exhibit but had difficulty in understanding upon what possible theory it could be used as the foundation proof for the damages claimed. We are of like mind.

In Ballmer v. Smith, 158 Neb. 495, 63 N. W. 2d 862, we restated the rule that: The general rule is that

damages, to be recoverable, must be direct and certain.

Stated otherwise, the rule is that damages which are uncertain, contingent, conjectural, or speculative, cannot be made the basis of a recovery, whether applied to the existence, nature, or proximate cause thereof. Bitler v. Terri Lee, Inc., 163 Neb. 833, 81 N. W. 2d 318.

Those rules control here.

Finally defendants by two assignments of error assert bias of the trial court, a misconception and a narrow view of the issues and of rulings on the admission of evidence, and other matters of like nature. Perhaps the approach of defendants to those assignments of error is best illustrated by the assertion in the brief that the case was being tried 4 years after the events being inquired into had taken place; that its burden of proof "was a heavy one"; and that Frederickson should have had a wider latitude in the presentation of its case "quite apart from the fact that a foreign insurance company and a non-resident contractor were the defendants against a local subcontractor."

The record of this case is that of a patient trial judge carefully granting to all the parties a full and fair hearing on the issues presented by them according to the established rules of procedure and evidence. We find no basis for a charge of bias or prejudice or prejudicial result in the trial of the case.

The oblique inference of improper motives on the part of the trial judge is without merit.

The judgment of the trial court is affirmed.

AFFIRMED.

YEAGER, J., participating on briefs.

JAMES ROBERT BROWN, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.
88 N. W. 2d 775

Filed March 14, 1958. No. 34290.

1. **Escape: Criminal Law.** Record examined. The facts proven establish the commission of an offense under section 28-736, R. R. S. 1943.
2. ———: ———. Section 28-731, R. R. S. 1943, does not apply to those cases where no escape is actually made.

ERROR to the district court for Douglas County: JAMES T. ENGLISH, JUDGE. *Affirmed.*

Raymond T. Coffey and *T. Victor Jorgensen,* for plaintiff in error.

Clarence S. Beck, Attorney General, and *John E. Wenstrand,* for defendant in error.

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

SIMMONS, C. J.

Plaintiff in error, hereinafter called the defendant, was convicted under the provisions of section 28-736, R. R. S. 1943, by a verdict of a jury of attempting to escape legal custody. He brings error here. His assignments are that the court erred in not sustaining his motion for a directed verdict and in the giving of one instruction to the jury.

We affirm the judgment of the trial court.

Defendant was involved in a disturbance in an apartment house in Omaha on March 25, 1956. Property was damaged and glass was broken. Defendant was taken to a hospital where stitches were put in a cut in his arm. He was then taken to the police station and later into municipal court. It was there determined that he should be delivered to the juvenile authorities. He with his attorney and mother then went to the office of the probation officer. There an informal conference

was held. It was decided that defendant should be allowed to go to his doctor to have stitches removed from his arm and should then return to custody to be held until investigation disclosed what should be done. That was done. He returned, and on April 3, 1956, was placed in custody in the juvenile ward in the jail of the courthouse, that being a place provided by the county authorities for that purpose. He was placed there under the direction of the probation officer as a juvenile delinquent.

On April 5, 1956, the probation officer filed a petition, sworn to on information and belief, that on January 30, 1953, a petition had been filed alleging that defendant was a delinquent child in that he "with another unlawfully took a car"; that a hearing was had on said petition and it was determined that the charges of delinquency were true; and that defendant was placed on probation. It was further alleged that in violation of the terms of his probation he was, in July 1955, involved in assault on several persons. It then alleged that defendant continued to be delinquent both because of the event in the apartment house and general allegations of waywardness. On the same day a praecipe for a summons was filed.

Late that afternoon at 5:45 p.m., defendant and another inmate of the juvenile ward assaulted the matron, threw her to the floor, took the keys from her, and attempted to open the doors not only to the enclosure where they were, but to the cells in another ward housing adult prisoners, one of whom was known to defendant.

The attempted escape was prevented by the arrival of two officers. Defendant was then charged with an offense under the provisions of section 28-736, R. R. S. 1943, which is in part: "If any person * * * in legal custody, or confined in any jail, either awaiting trial on any complaint lodged against him, or upon conviction for any offense, shall break such custody and es-

cape therefrom, or attempt to do so, he shall, upon conviction thereof, be fined not more than five hundred dollars, or be punished by confinement in the penitentiary for a period of not less than one year nor more than ten years."

Defendant raises a number of contentions under his assignment that a directed verdict for the defendant should have been had on his motion.

The first contention here is that it must be shown that he be in "legal custody" as required by section 28-736, R. R. S. 1943; that the evidence shows his confinement to be illegal; and that, therefore, he had a right to escape. Defendant's theory seems to be that when placed in the juvenile ward it was only on the direction of the juvenile officer. We need not debate that contention. It is clear that when the attempt to escape was made a complaint had been filed against him under the provisions of section 43-205, R. R. S. 1943. Defendant was obviously in legal custody sufficient to authorize his detention, subject always to challenge in the methods provided by law. We find no merit in the contentions of defendant. See Stinehagen v. Olson, 145 Neb. 653, 17 N. W. 2d 674.

Defendant's next contention is that he was not "awaiting trial on any complaint lodged against him." Quite clearly a "petition" had been filed against him that meets the requirements of section 43-205, R. R. S. 1943. A praecipe for summons had been issued therein fixing the time of the hearing and requiring the attendance of the mother and the complaining witness. The fact that the complaint was denominated a petition is of no importance. In fact in Laurie v. State, 108 Neb. 239, 188 N. W. 110, the terms "petition" and "complaint" are used interchangeably. Section 43-207, R. R. S. 1943, denominates the hearing on the complaint to be a trial. We find no merit to the contention.

Section 28-736, R. R. S. 1943, was reenacted in 1951. Laws 1951, c. 81, § 1, p. 243. Defendant contends that

if his confinement came within the purview of section 28-736, R. R. S. 1943, then it is unconstitutional as an amendment of the Juvenile Court Act without reference thereto in the title or body of the act. He cites no authorities or reasons for the contention. It is without merit. The detention of the defendant awaiting hearing on the juvenile delinquency complaint set up the factual condition that made the attempt to escape custody an offense.

This brings us to the alleged error in the instruction.

The State's evidence was that the defendant was the principal actor in the assault on the matron and the attempt to escape. The defendant testified that the other juvenile assaulted the matron, threw her to the floor, and held her there; and that all he did was take the keys by direction and undertake to unlock the doors.

Under these circumstances the trial court gave an instruction under the provisions of section 28-201, R. R. S. 1943, which was as follows: "You are further instructed that the Criminal Code of the State of Nebraska provides: 'Whoever aid (sic), abets, or procures another to commit any offense, may be prosecuted and punished as if he were the principal offender.'

"In this connection, you are instructed that evidence has been offered tending to establish the guilt of the defendant by reason of being an abettor, accessory, and accomplice."

The court then defined accessory, abettor, and accomplice.

Defendant does not contend that he was improperly charged under the provisions of section 28-736, R. R. S. 1943. Rather he contends that section 28-731, R. R. S. 1943, is the applicable special statute that covers the offense of assisting a prisoner to escape. Section 28-731, R. R. S. 1943, provides: "If any person shall aid or assist or attempt to aid or assist any prisoner, confined in any jail or other place of confinement, charged

with, or convicted of any offense against the laws of this state, or against the laws of any other state or territory of the United States, to make his or her escape from such jail or place of confinement, every person so offending shall be fined not more than five hundred dollars or be imprisoned in the jail of the county not exceeding six months, or both, at the discretion of the court."

We need point out only one of several patent reasons why section 28-731, R. R. S. 1943, has no application to the fact situation here. It provides punitive sanctions for assisting any prisoner "to make his or her escape." Prior to 1915 this provision had the qualifying clause "although no escape be actually made." § 8747, Rev. St. 1913. In 1915 by amendment, the qualifying clause was deleted from the act. Laws 1915, c. 160, § 1, p. 331. At the same time section 28-732, R. R. S. 1943, was amended in other particulars, but the clause "whether such escape be effected or attempted or not" was not deleted from the prior act. § 8748, Rev. St. 1913.

Under these circumstances it is patent that section 28-731, R. R. S. 1943, does not apply to those cases where no escape is actually made. It follows that the assignment is without merit.

The judgment of the trial court is affirmed.

AFFIRMED.

YEAGER, J., participating on briefs.

ROSE S. FRANKEL, DOING BUSINESS AS HARRY A. FRANKEL COMPANY, APPELLANT, V. NATHAN PITLOR ET AL., APPELLEES.

88 N. W. 2d 770

Filed March 14, 1958. No. 34298.

1. **Appeal and Error.** In an action at law where a jury has been waived, it is not the province of this court to resolve conflicts in the evidence. If there is conflict in the evidence this court

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.

2. **Landlord and Tenant.** A printed provision in a lease providing for its termination at the end of any calendar month after 6 months' notice is not defeated by the typewritten provision of the lease fixing the term of the lease at 1 year when such provisions are not ambiguous or inconsistent.
3. **Customs and Usages: Contracts.** A local usage is binding only upon persons who have knowledge of it and those who, because of the circumstances of the case, ought to have known of it. To be regarded as a part of a contract a usage must be actually or constructively known and must be consistent with the contract.

APPEAL from the district court for Douglas County: L. ROSS NEWKIRK, JUDGE. *Affirmed.*

Edward Shafton and *Smith & Smith,* for appellant.

Irvin C. Levin and *Jerry M. Gitnick,* for appellees.

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

CARTER, J.

In this action plaintiff seeks to recover a judgment on a contract for a real estate commission. Defendants alleged that plaintiff failed to find a purchaser who unconditionally accepted the offer to sell, contained in the listing agreement. A jury was waived. The trial court found for the defendants, and plaintiff appealed.

On August 12, 1955, the defendants entered into a listing agreement with the plaintiff, a licensed real estate broker in the city of Omaha. The agreement provided in substance that plaintiff was authorized exclusively to sell the property described therein for the sum of $35,000. For her services the agreement provided that defendants would pay a 5 percent commission. As a part of the listing agreement it was agreed that "the buyer will lease the above property to you for at least one year, from the date of sale for the rental of Two hundred & twenty-five ($225.00) per month."

On September 8, 1955, plaintiff procured a purchaser of the property for the agreed price of $35,000. The purchase agreement tendered to the defendants contained the following provision: "Upon transfer of title, it is specifically understood that purchaser will lease the above premises to the seller for a period of one year from date of closing at the rate of Two Hundred Twenty-five ($225.00) Dollars per month, payable monthly in advance. Lease to be written on accepted forms used by the Omaha Real Estate Board."

The defendants refused to sign the purchase agreement because of provisions in the accepted form of lease used by the Omaha Real Estate Board, which they asserted were contrary to the listing agreement. A copy of the real estate board lease was received in evidence. The parts to which objection was made were those providing for the termination of the lease at the end of any calendar month on 6 months' notice, the part dealing with maintenance and repair by the lessee, and the part providing for a lien upon the personal property of the lessee for any amount owing the lessor under the terms of the lease. The purchaser refused to remove the provision requiring that the lease be on the form used by the real estate board. Defendants refused to sign the purchase agreement. Plaintiff now contends that the purchase agreement was in compliance with the listing agreement, that she has fulfilled the agreement on her part, and that she is entitled to the real estate commission from the defendants.

This being a law action in which a jury was waived, the findings of the court have the effect of a verdict of a jury and will not be disturbed unless clearly wrong. In such a case it is not within the province of this court to resolve conflicts or to weigh evidence. If there is 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. We necessarily conclude that the conflicts in

the oral testimony offered at the trial must be resolved in favor of the defendants. Ord v. Benson, 163 Neb. 367, 79 N. W. 2d 713; Wallace v. Insurance Co. of North America, 162 Neb. 172, 75 N. W. 2d 549.

It is contended by the plaintiff that as the provision in the purchase agreement providing for the lease of the property to the defendants for 1 year was typed into the purchase agreement and the termination clause of the proposed lease appears in printed form, the former prevails over the latter. The rule that the typed portion is controlling over the printed part applies where ambiguity or inconsistency exists. The two provisions here in question are neither ambiguous nor inconsistent. In Pearson v. Howell, 184 Iowa 990, 169 N. W. 368, the court in discussing similar provisions in a lease said: "Appellant contends that the typewritten provision is inconsistent with the paragraph of the lease reserving the right to sell the premises and terminate the lease, and definitely fixes the term thereof; and that it was the understanding and intention of the parties that the printed clause should be disregarded. To be inconsistent, different provisions of the lease must, directly or impliedly, relate to the same thing. If effect is given to the printed clause, it must be construed as reserving to the defendant the right to sell the building and terminate the lease upon 30 days' notice. If, however, the typewritten clause is construed as fixing a certain and definite term for one year, to be extended for four years at the option of plaintiff, thereby actually or impliedly destroying the effect of the reserved right to sell, then plaintiff's contention is right, and defendants should be permanently enjoined from interfering with or molesting him in the occupancy and use of the building. The two clauses in the lease are not, however, inconsistent. * * * Each separate provision of the contract must be given effect, if possible. Unaided by extrinsic evidence, the court would be required to construe the typewritten provision as fixing a definite term,

subject, however, to be defeated by the other provision of the lease. The two provisions are not necessarily inconsistent, and, therefore, the former does not necessarily control the latter." See, also, Papulias v. Wirtz, 331 Ill. App. 376, 73 N. E. 2d 122.

The defendant Nathan Pitlor was engaged in the plumbing business. His place of business was located on the property described in the listing agreement. He made it clear that he had to have possession for at least a year after a sale of the real estate in order to dispose of the business. It was so stipulated in the listing agreement. He refused to sign a purchase agreement providing for a lease back to him which was subject to termination on 6 months' notice. Since the purchase agreement provided for a lease that could be terminated at the end of any calendar month after 6 months' notice, he could properly assert that the purchase agreement was not an unconditional acceptance of his offer to sell, as set forth in the listing agreement. If defendants had signed the purchase agreement tendered to them, the termination provision in the lease could have been enforced against them. Van Sant v. Beuder, 101 Neb. 680, 164 N. W. 711.

The acceptance of an offer must be an unconditional acceptance of the offer made, otherwise there is no contract. There must be no substantial variation between the offer and the acceptance. If the acceptance differs from the offer or is coupled with any condition that varies or adds to the offer in any material respect, it is not an acceptance, but is a counterproposition. The case of Griggs v. Oak, 164 Neb. 296, 82 N. W. 2d 410, and the authorities cited therein, conclusively establish this to be the law of this state. Since the proposed purchaser did not unconditionally accept defendants' offer to sell, as contained in the listing agreement, defendants could properly reject it as an unacceptable counteroffer.

It is contended by the plaintiff that the provision in

the listing agreement to the effect that the property was to be leased to the defendants for at least 1 year at a rental of $225 a month implies a lease usually and customarily used in leasing business properties in the city of Omaha. Plaintiff contended that a lease to be written on accepted forms used by the Omaha Real Estate Board is such a lease and that the insertion of the condition in the purchase agreement is therefore in conformity with the listing agreement.

The plaintiff testified that the real estate board lease is the regular business property lease used by that board. She said she uses only this form of lease but that she had seen other forms and that there are distinctions between them. She further testified that the real estate board lease was the only one in use in Omaha that had a termination clause in it. She also gave an affirmative answer to the following question: "And is that a form that is in standard and ordinary use in Omaha in leasing of business properties?"

The foregoing evidence is not sufficient to establish such a general usage of the Omaha Real Estate Board lease that it can be said to be a part of the listing agreement. The element of knowledge is particularly applicable to usages alleged to create or affect contractual obligations. To be thus available the usage must be so well established, notorious, general, or universal in its application, as reasonably to induce the belief of a party's knowledge of it and to raise the presumption that he dealt with reference to it, or he must be shown to have had actual knowledge of the usage if nothing is said to the contrary. To be regarded as part of a contract, a usage must be actually or constructively known and must be consistent with the contract. The requirement of knowledge is especially important in situations where reliance is placed on the existence of usages which are local in character. A usage which is local is binding only upon persons who have knowledge of it, or which reasonably should be known to the parties.

Andrews v. Dehner, 147 Neb. 641, 24 N. W. 2d 649; Peterson v. State Automobile Ins. Assn., 160 Neb. 420, 70 N. W. 2d 489; O'Gara Coal Co. v. Chicago, M. & St. P. Ry. Co., 114 Neb. 584, 208 N. W. 742; Shambaugh v. City Bank of Elm Creek, 118 Neb. 817, 226 N. W. 460, 65 A. L. R. 804.

In the case at bar the plaintiff was a licensed real estate broker. The defendant Nathan Pitlor was engaged in the plumbing business. A usage commonly accepted by real estate brokers might have no application at all to persons in other lines of endeavor. There is no evidence in this record that the usage testified to by the plaintiff was known to the defendants, or that it was of such a character that they could be presumed to have had it in mind and intended it to be a part of the listing agreement. The common usage under consideration was a local one. It is sought to be applied to parties not in the same trade or business. It clearly is not one which a person engaged in the plumbing business could be expected to know about in the absence of evidence from which it could reasonably be inferred that he knew or ought to have known of such usage.

We conclude that the purchase agreement tendered to the defendants was not an unconditional acceptance of defendants' offer to sell as contained in the listing agreement. Having come to this conclusion on the basis of one material variance between the listing agreement and the purchase agreement, it is not necessary to discuss other alleged variances. Since the plaintiff did not find a buyer who was willing to unconditionally accept defendants' offer, she has not fulfilled the agreement on her part. In the absence of performance by plaintiff in accordance with the terms of the listing agreement, she has no cause of action for the real estate commission. The trial court having entered a judgment in conformity with these holdings, the judgment is affirmed.

AFFIRMED.

WILLIAM OWEN, ADMINISTRATOR OF THE ESTATE OF MARY OWEN, DECEASED, APPELLEE, V. ROBERT MOORE, APPELLANT.

88 N. W. 2d 759

Filed March 14, 1958. No. 34299.

1. **New Trial.** If the trial court gives reasons for the granting of a new trial, the duty rests upon the appellant to present those reasons and in appropriate manner support his contentions that those reasons are not sustainable from the record and applicable rules of law. The appellee then has the duty, if he desires, of meeting those contentions. The appellee also has the right to point out and submit additional reasons to sustain the trial court's judgment.
2. ———. A motion for new trial is a statutory remedy, and a new trial can be granted by a court of law only upon the grounds, or some of them, provided by statute.
3. **New Trial: Appeal and Error.** Errors sufficient to cause the granting of a new trial must be errors prejudicial to the rights of the unsuccessful party.
4. **Trial.** It shall be the duty of the judges of the several district courts, in all cases, both civil and criminal, to reduce their charges or instructions to the jury to writing, before giving the same to the jury, unless the so giving of the same is waived by the counsel in the case in open court, and so entered in the record of said case. § 25-1111, R. R. S. 1943.
5. **Trial: Appeal and Error.** No oral explanation of any instruction authorized by sections 25-1111 to 25-1114, R. R. S. 1943, shall, in any case, be allowed, and any instruction or charge, or any portion of a charge or instructions, given to the jury by the court and not reduced to writing, as aforesaid, or a neglect or refusal on the part of the court to perform any duty enjoined by the preceding sections, shall be error in the trial of the case, and sufficient cause for the reversal of the judgment rendered therein. § 25-1115, R. R. S. 1943.
6. **Negligence.** An "unavoidable accident" means when an unexpected catastrophe occurs without any of the parties thereto being to blame for it.
7. **Trial.** The charge of the trial court to the jury should be confined to the issues presented by the pleadings and supported by evidence.
8. **Automobiles: Highways.** A driver of a vehicle about to enter a street or highway protected by stop signs must stop as directed, look in both directions, and permit all vehicles to pass which are at such a distance and traveling at such a speed

that it would be obviously dangerous for him to proceed across the intersection.

9. ———: ———. It is the driver's duty, when crossing a protected street or highway, to look both to right and left; and if a vehicle is approaching on the main or arterial street or highway, it is his duty to wait until such vehicle has passed, unless a prudent person would have reasonable ground to believe that such other vehicle proceeding at a lawful speed is so far distant from the intersection that he could safely cross in advance thereof.

10. **Automobiles: Municipal Corporations.** The duties and obligations which attend a motorist when he approaches a stop sign erected pursuant to city ordinance are the same as those which attend when he approaches one erected pursuant to statute or statutory rules of the road.

11. **Trial.** 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.

12. **Municipal Corporations: Evidence.** While a municipal court may take notice of a city ordinance, proof of its existence is ordinarily required in courts of general jurisdiction.

13. **Negligence: Parent and Child.** The negligence of a parent cannot be imputed to an infant who is injured through the carelessness of another party.

14. **Automobiles.** Where the negligence of the driver of a vehicle in which plaintiff is riding as a passenger is the sole proximate cause of a collision in which plaintiff is injured, plaintiff cannot recover from a third person for such injury.

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

Theodore L. Kowalski, for appellant.

McCormack & McCormack and *A. Lee Bloomingdale,* for appellee.

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

WENKE, J.

This is an appeal from the district court for Douglas County. It involves a tort action brought therein by

William Owen as the duly appointed, qualified, and acting administrator of the estate of Mary Owen, deceased, against Robert Moore wherein the administrator claims, as a basis for his right to recover damages, that decedent's injuries, and subsequent death, were the result of a car accident caused by the negligent conduct of defendant. Defendant answered. Therein he claims the accident, in which decedent was injured, was caused solely by the negligence of Marion Owen, the driver of the car in which decedent was riding. Trial was had and the jury's verdict was for defendant. Plaintiff filed a motion for a new trial and, from the granting thereof, defendant has perfected this appeal.

The accident, in which Mary Owen was injured, occurred sometime between 5:30 and 5:45 p.m. on Thursday, March 15, 1956, in the intersection of Farnam and Forty-fourth Streets in the city of Omaha. At the time of the accident Mary Owen, who was then 4 years of age, was riding in the front seat of a 1949 black Tudor Ford sedan which was being driven east on Farnam Street by her mother, Marion Owen. Marion Owen had driven onto Farnam Street from Saddle Creek Road, a north-south street which crosses Farnam Street a block west of Forty-fourth Street. At this same time appellant, driving a 1951 Buick Tudor sedan, was approaching Farnam Street from the north on Forty-fourth Street. He had stopped at a stop sign located at the northwest corner of the intersection. The weather was clear, the pavement dry, and visibility good. Farnam Street is paved to a width of 40 feet and ordinarily is a four-lane street with two lanes for traffic in each direction. However, at the time of the accident the north two lanes were barricaded and not being used for traffic because some utility company had dug a ditch therein between Forty-second Street and Saddle Creek Road in which to lay a pipe line. As a consequence only the two south lanes were being used for traffic, eastbound traffic using the extreme south lane and westbound

traffic the normal eastbound lane for traffic just south of the center line. There were no slow or stop signs controlling the traffic on Farnam Street at the point of its intersection with Forty-fourth Street. There was an automatic traffic signal at the Saddle Creek Road intersection with Farnam Street. Farnam Street was protected from traffic coming onto it off Forty-fourth Street by stop signs.

After Marion Owen turned east onto Farnam Street she continued east thereon in the extreme south lane thereof at a speed between 20 and 25 miles an hour. At this time, due to the heavy traffic on Farnam Street to the west being confined to one lane, cars thereon were traveling bumper to bumper and partially stopped because of the traffic signal to the west at the Saddle Creek Road intersection. There was a break in the barricade on the north half of Farnam Street at the Forty-fourth Street intersection and planks had been placed across the filled ditch to permit traffic to cross at that point. After appellant had been stopped at the stop sign at the northwest corner of the intersection for sometime a car in the lane of traffic moving west, which was just east of this opening, stopped to permit appellant to proceed south. This he did, crossing the ditch on the planks. As he proceeded south the right front of his car came in contact with the left front side of the Owen car. The impact occurred in the south lane for eastbound traffic on Farnam Street at a point about the center of Forty-fourth Street as it crosses Farnam Street. After the impact the appellant's car came to an immediate stop but the Owen car continued on to the southeast for a distance of some 25 to 30 feet where it ran into a large tree.

As a result of this accident Mary Owen was seriously injured, especially her left eye. Subsequently it was decided to remove her left eye in order to try and save the sight of her right eye. An operation for this purpose was being performed on March 30, 1956, when,

during the course thereof, Mary Owen died.

Marion Owen also brought suit against Robert Moore because of injuries she suffered in this same accident. Since the facts as to the accident would be the same the two suits were consolidated for the purpose of trial, the verdict in each case being for the appellant (defendant). In addition to finding for the appellant the jury added to the verdict the following: "NOT GUILTY OF NEGLIGENCE UNAVOIDABLE ACCIDENT."

In granting a new trial the court made this statement: "I better make this statement for the record in this case. There are two cases, William Owen, Administrator of the Estate of Mary Owen, deceased, Plaintiff, versus Robert Moore, Defendant; and Marion Owen, Plaintiff, versus Robert Moore, Defendant. The two cases were tried as one. They are carried in separate records, 478-236 and 237. After the Jury had been out awhile and had gone to lunch at 12:00 o'clock, shortly after they came back, the Bailiff told me that the Jury wanted to see me about some law that they wanted to know. The Foreman came out here and said, 'If this was an unavoidable accident, how can we bring in a verdict?' I said, 'Well, if you find as a matter of fact from the evidence that it was an unavoidable accident, then the Plaintiffs can't recover and you can't bring in a verdict except for the Defendant.' Well, that's all and they went out, and then in a few minutes they came in with a verdict for the Defendant and had written on the verdict with a pencil that it was an unavoidable accident, and the fact was that the words 'Unavoidable accident' had never been mentioned during the trial by anybody."

Under this situation the following rule applies: "* * * if the trial court gave reasons for the granting of a new trial, the duty rests upon the appellant to present those reasons and in appropriate manner support his contentions that those reasons are not sustainable from the record and applicable rules of law. The appellee has

then the duty, if he desires, of meeting those contentions. The appellee has the right to point out and submit additional reasons to sustain the trial court's judgment." Greenberg v. Fireman's Fund Ins. Co., 150 Neb. 695, 35 N. W. 2d 772.

In determining whether or not the trial court was justified in granting a new trial the following principles apply:

"The motion for a new trial is a statutory remedy, and a new trial can be granted by a court of law only upon the grounds, or some of them, provided for by the statutes." Greenberg v. Fireman's Fund Ins. Co., *supra.*

"Errors sufficient to cause the granting of a new trial must be error prejudicial to the rights of the unsuccessful party." Greenberg v. Fireman's Fund Ins. Co., *supra.*

"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." Greenberg v. Fireman's Fund Ins. Co., *supra.*

As to instructions to be given a jury by a trial court the statutes relating thereto provide:

"It shall be the duty of the judges of the several district courts, in all cases, both civil and criminal, to reduce their charges or instructions to the jury to writing, before giving the same to the jury, unless the so giving of the same is waived by the counsel in the case in open court, and so entered in the record of said case; * * *." § 25-1111, R. R. S. 1943.

"No oral explanation of any instruction authorized by the preceding sections shall, in any case, be allowed, and any instruction or charge, or any portion of a charge or instructions, given to the jury by the court and not reduced to writing, as aforesaid, or a neglect or refusal on the part of the court to perform any duty enjoined by the preceding sections, shall be error in the trial of

the case, and sufficient cause for the reversal of the judgment rendered therein." § 25-1115, R. R. S. 1943.

Appellant suggests that what the trial court did is not in violation of these statutes and comes within the following principle stated in Grammer v. State, 103 Neb. 325, 172 N. W. 41, and approved in Schreiner v. State, 155 Neb. 894, 54 N. W. 2d 224, to wit: " 'The charge or instructions required by law to be reduced to writing is only that which the court may have to say to the jury in regard to the principles of law applicable to the case and to the evidence; and hence an oral statement or communication by the court to the jury, which is rather in the nature of a cautionary direction, and not fairly and strictly a direction or instruction upon some question or rule of law involved in or applicable to the trial, need not be in writing.' 16 C. J. 1032, sec. 2468."

We said in Wright v. Lincoln City Lines, Inc., 163 Neb. 679, 81 N. W. 2d 170: "An 'unavoidable accident' means when an unexpected catastrophe occurs without any of the parties thereto being to blame for it."

In Wright v. Lincoln City Lines, Inc., *supra,* quoting from McClarren v. Buck, 343 Mich. 300, 72 N. W. 2d 31, we said: " 'Under the facts in this case 1 or both of the drivers of the colliding cars were guilty of negligence. Under such circumstances it was error to give the quoted instruction (the issue of unavoidable accident) to the jury.' " And therein, quoting from Hicks v. Brown, 136 Tex. 399, 151 S. W. 2d 790, we said: " '* * * if the evidence does not raise the issue that something other than the negligence of one of the parties caused the injuries, then it does not raise the issue of unavoidable accident.' "

Here both parties pleaded that the proximate cause of the accident was the negligence of the other driver and offered evidence to that effect. It was neither pleaded nor was any proof offered to establish that the accident was unavoidable. We have often said that: "The charge of the trial court to the jury should be con-

fined to the issues presented by the pleadings and supported by evidence." Perrine v. Hokser, 158 Neb. 190, 62 N. W. 2d 677.

We think the oral instruction given to the jury by the trial court presented to it an issue that was neither presented by the pleadings nor supported by the evidence adduced and, therefore, clearly in violation of the requirements of the statute relating thereto.

Appellant suggests that since appellee did not raise the question involved and did not assign and discuss it in his brief that it has been waived under our holding in Carter v. Zdan, 151 Neb. 185, 36 N. W. 2d 781, to the effect that assignments of error not discussed will not be considered. In this respect appellant overlooks the fact that the duty rests upon him to present the reasons given by the trial court for the granting of a new trial and his contentions why those reasons are not sustainable. The appellee then has the duty, if he desires, of meeting these contentions. His failure to do so does not make the appellant's reasons necessarily correct but we shall, in such case, carefully examine them to see whether or not the trial court's reasons for granting a new trial are sufficient for that purpose. We find the reason given was sufficient for the granting of a new trial.

As stated in the rule here applicable, appellee has the right to point out and submit additional reasons for sustaining the trial court's granting of a new trial. This he has done.

First, appellee contends that the trial court, in submitting the two cases to the jury, violated the following principle: "The stating of the issues by substantially copying the pleadings of the parties, almost verbatim, as was done here, has been repeatedly condemned by this court. If it results in prejudice to the complaining party, it is sufficient ground for reversal." McClelland v. Interstate Transit Lines, 139 Neb. 146, 296 N. W. 757. We have examined the pleadings and the instruction relat-

ing thereto and have come to the conclusion that this contention is without merit.

Appellee contends the trial court erred in giving instruction No. 4, which is as follows:

"This is what is known as an intersection collision, and you are instructed that an intersection is a square bounded by extending the curb lines across both streets.

"Ordinances of the City of Omaha have been received in evidence providing that when two motor vehicles reach or approach an intersection, the first one to enter the intersection has the right of way and the other must yield until the first one entering has cleared the intersection; and, when two motor vehicles reach the intersection at approximately the same time, the *the* driver of the motor vehicle to the right has the right of way and the other must yield until the one to the right has cleared the intersection.

"You are instructed that a violation of the Ordinances is not negligence, but is evidence which you may take into consideration in arriving at your conclusion as to whether or not the one so violating is guilty of negligence."

This is the rule applicable at ordinary crossings unprotected by stop signs. See Long v. Whalen, 160 Neb. 813, 71 N. W. 2d 496.

But here appellee pleaded that the Owen car was "on an arterial highway protected by stop signs" and the evidence adduced shows that Farnam Street, at Forty-fourth Street, was a through street and protected from traffic coming onto it from Forty-fourth Street by stop signs.

Appellee introduced ordinance No. 14924, ch. 55, § 55-7.12(b), of the Ordinances of the City of Omaha, which provides as follows: "Vehicles entering a Through Street: The driver of any vehicle who has stopped as required by law at the entrance of a Through Street shall yield to other vehicles within the intersection, or approaching so closely on the Through Street as to con-

stitute an immediate hazard, but said driver, having so yielded, may proceed and other vehicles approaching the intersection on the Through Street shall yield to the vehicle so approaching into or across the Through Street." Appellee also tendered the following instruction: "You are hereby instructed that a motorist by stopping at a stop sign before entering a protected street is not thereafter authorized to blindly and without looking drive into the intersection. It is his duty to look both to right and left, and if a vehicle is approaching on the main or arterial highway, it is his duty to wait until such vehicle has passed, unless a prudent person would have reasonable ground to believe that such other vehicle proceeding at a lawful speed is so far distant from the intersection that he could easily cross in advance thereof."

The rule here applicable is stated in Meyer v. Hartford Bros. Gravel Co., 144 Neb. 808, 14 N. W. 2d 660, as follows: "A driver of a vehicle about to enter a highway protected by stop signs must stop as directed, look in both directions and permit all vehicles to pass which are at such a distance and traveling at such a speed that it would be obviously dangerous for him to proceed across the intersection." See, also, Dale v. Omaha & C. B. St. Ry. Co., 154 Neb. 434, 48 N. W. 2d 380; Fairchild v. Sorenson, 165 Neb. 667, 87 N. W. 2d 235; Borcherding v. Eklund, 156 Neb. 196, 55 N. W. 2d 643. As stated in Borcherding v. Eklund, *supra,* quoting from 5 Am. Jur., Automobiles, § 303, p. 668: "'* * * it is his duty to look both to right and left; and if a vehicle is approaching on the main or arterial highway, it is his duty to wait until such vehicle has passed, unless a prudent person would have reasonable ground to believe that such other vehicle proceeding at a lawful speed is so far distant from the intersection that he could safely cross in advance thereof.'"

"The duties and obligations which attend a motorist when he approaches a stop sign erected pursuant to

city ordinance are the same as those which attend when he approaches one erected pursuant to statute or statutory rules of the road." Borcherding v. Eklund, *supra*. See, also, Dale v. Omaha & C. B. St. Ry. Co., *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." Coyle v. Stopak, 165 Neb. 594, 86 N. W. 2d 758.

We think instruction No. 4 was clearly not applicable to the situation here presented by the pleadings and the evidence offered in support thereof and, therefore, prejudicial to appellee's right to recover herein.

But appellant contends, because appellee introduced in evidence section 55-7.12(a), ordinance No. 14924, of the Ordinances of the City of Omaha, which provides: "When two vehicles approach an intersection at approximately the same time, the driver of the vehicle on the left shall yield to the driver on the right," that he is not now in a position to complain of the court's instruction No. 4 because of the principles announced in Pierce v. Fontenelle, 156 Neb. 235, 55 N. W. 2d 658. Therein we said: "A party may not predicate error upon or be heard to complain about a ruling which he has procured or has been instrumental in bringing about." We also held in Quivey v. City of Mitchell, 133 Neb. 727, 277 N. W. 50, as follows: "They cannot cause and induce the trial court to commit an error, and then be heard to complain of that error here."

It is true that appellee offered in evidence section 55-7.12(a), ordinance No. 14924, of the Ordinances of the City of Omaha, to which instruction No. 4 has application. But here the pleadings, evidence (including § 55-7.12(b), ordinance No. 14924), and the instruction offered by appellee present an issue not covered by instruction No. 4. Under this situation we do not think

the principles appellant relies on have application. It was the duty of the trial court, even without request, to instruct on this issue as presented by the pleadings and which finds support in the evidence. Clearly instruction No. 4 does not find such a background for its support. We find this contention to be without merit.

Appellant further contends these ordinances were improperly received into evidence, over objection, for the reason they were not pleaded and that no proper foundation was laid for their admission.

We think any ordinance relating thereto is admissible when a party pleads, as here, that: "In failing to accord to the automobile in which the deceased, Mary Owen, was riding as a passenger the right of way, said automobile being on an arterial highway protected by stop signs and having the right of way at said intersection." See Carter v. Zdan, *supra*.

It is, of course, true, as stated in Spomer v. Allied Electric & Fixture Co., 120 Neb. 399, 232 N. W. 767: "While a municipal court may take notice of a city ordinance, proof of its existence is ordinarily required in courts of general jurisdiction." The ordinance was offered and received, over objection, without any foundation being laid for its admission. We will not discuss this matter further since a new trial must be had in any event and the same question may not again arise.

Appellee also complains of the fact that the trial court did not inform the jury that the negligence of Marion Owen, if any, could not be imputed to the decedent, Mary Owen, since Mary Owen was only 4 years of age at the time and a guest passenger in the car being driven by her mother. It is, of course, true that no negligence of the driver of the car in which she was riding could be imputed to her. See, Wilson v. Thayer County Agricultural Society, 115 Neb. 579, 213 N. W. 966, 52 A. L. R. 1393; Shiers v. Cowgill, 157 Neb. 265, 59 N. W. 2d 407. As stated in Wilson v. Thayer County Agricultural Society, *supra*: "* * * under the rule long

in force in this state, 'The negligence of a parent * * * cannot be imputed to an infant who is injured through the carelessness of another party.' Huff v. Ames, 16 Neb. 139; * * *."

Appellant pleaded, and endeavored to prove, that the accident in which decedent was injured was caused solely by the negligence of decedent's mother who was driving the car in which decedent was riding. As we said in Shiers v. Cowgill, *supra*: "Where the negligence of the driver of an automobile in which plaintiff is riding as a passenger is the sole proximate cause of a collision in which plaintiff is injured, plaintiff cannot recover from a third person for such injury." If this were the only issue presented to the jury in this respect we do not think, in properly presenting it, that it would have been necessary for the trial court to have informed the jury as to the question of imputed negligence for, as quoted from Shiers v. Cowgill, *supra*, the appellee would not have been entitled to recover if that were true. But here two cases were joined. In the case of Marion Owen against appellant, the appellant charged in his answer that Marion Owen was guilty of contributory negligence. If that issue is properly presented to a jury it could find Marion Owen could not recover by reason thereof although appellant was also guilty of negligence. If the two cases are again tried together, and the question of contributory negligence on the part of Marion Owen is submitted as a question for the jury, then the jury should be informed that negligence on the part of Marion Owen, if any, could in no event be imputed to decedent.

In view of what we have herein held we come to the conclusion that the trial court properly granted appellee a new trial. We therefore affirm its action doing so.

AFFIRMED.

YEAGER, J., participating on briefs.

MARION OWEN, APPELLEE, V. ROBERT MOORE, APPELLANT.
88 N. W. 2d 768

Filed March 14, 1958. No. 34300.

1. **New Trial: Appeal and Error.** Errors sufficient to cause the granting of a new trial must be errors prejudicial to the rights of the unsuccessful party.
2. **Negligence: Trial.** In a case 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.
3. **Negligence: Appeal and Error.** Where a jury found the defendant to be free from negligence in a personal injury action, an error in the instruction stating the measure of damages is necessarily harmless.

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

Theodore L. Kowalski, for appellant.

McCormack & McCormack and *A. Lee Bloomingdale,* for appellee.

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

WENKE, J.

This is an appeal from the district court for Douglas County. Therein Marion Owen brought this action against Robert Moore for the purpose of recovering damages which she claims she suffered because of injuries received in a car accident, which she alleges was caused by the negligence of defendant in operating the car he was then driving. Defendant filed an answer wherein he alleged that plaintiff was guilty of contributory negligence sufficient to defeat any right to recover which she might otherwise have. This case was combined with Owen v. Moore, *ante* p. 226, 88 N. W. 2d 759, for trial and verdict was returned for defendant as to both plaintiffs. Marion Owen filed a motion for

new trial and defendant has appealed from an order sustaining that motion.

As already indicated this case was combined with Owen v. Moore, *supra,* for trial in the district court, consequently the facts relating to the accident in which appellee was injured, as therein set forth, are applicable here. No purpose would be served by restating them herein but the statement thereof in that opinion is made a part of this opinion by reference. The same is true of all the questions therein discussed except that relating to imputed negligence. What has been therein said and held relating thereto is applicable and controlling herein.

In addition to the questions raised and fully discussed and answered in Owen v. Moore, *supra,* appellee has raised two other contentions as to why the ruling of the trial court granting her a new trial was correct. She contends the court erred by submitting the question of contributory negligence on the part of appellee without instructing on the doctrine of comparative negligence. See § 25-1151, R. R. S. 1943. It is true appellant pleaded the question of appellee's negligence and the court so advised the jury but did not instruct on the doctrine of comparative negligence. The trial court instructed that: "If you find that either or both of the Plaintiffs have proved by a preponderance of the evidence that the collision was caused by negligence of the Defendant in the operation of his automobile as alleged in their Petitions, then it will be your duty to return a verdict in favor of either or both Plaintiffs and against the Defendant in whatever sum you may find that she or he was damaged."

"Errors sufficient to cause the granting of a new trial must be errors prejudicial to the rights of the unsuccessful party." Vielehr v. Malone, 158 Neb. 436, 63 N. W. 2d 497. See, also, Dixon v. Coffey, 161 Neb. 487, 73 N. W. 2d 660; Wright v. Lincoln City Lines, Inc., 163 Neb. 679, 81 N. W. 2d 170.

While the trial court should instruct on the doctrine of comparative negligence, when the issue of contributory negligence is submitted, it was not here an error of which appellee can complain because it would be to her advantage since the issue is one of defense and applicable to appellant. A party is not in a position to properly complain of what has been done unless it can be shown that he has been injured thereby in some way.

As to whether or not the issue of contributory negligence should be submitted under the evidence adduced we do not here determine. The rule applicable is stated in Dryer v. Malm, 163 Neb. 72, 77 N. W. 2d 804, as follows: "In a case 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." It should, of course, be remembered, as stated in Allen v. Clark, 148 Neb. 627, 28 N. W. 2d 439, that: "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."

Appellee also complains of the court's failure to include as an element in its instructions on damages, as it relates to appellee, the element of her loss of earnings. It is true that if the pleadings and evidence relating thereto are sufficient in that regard recovery may be had therefor. See Montgomery v. Miller, 83 Neb. 625, 120 N. W. 197. We do not here decide whether or not, under the pleadings and evidence adduced, that element should have been included in the instruction informing the jury what it could consider in determining the amount of appellee's recovery in case it found she was entitled thereto. What was said in In re Estate of Potts, 144 Neb. 729, 14 N. W. 2d 323, is here applicable.

Therein we said: "Where a jury found the defendant to be free from negligence in a personal injury action, an error in the instruction stating the measure of damages is necessarily harmless." Until a jury finds appellee is entitled to recover any error in the instruction relating to damages could not be prejudicial.

In view of what we said and held in Owen v. Moore, *supra,* which is here controlling, we find the trial court was correct in granting appellee a new trial. We therefore affirm its action doing so.

AFFIRMED.

YEAGER, J., participating on briefs.

STATE OF NEBRASKA EX REL. BERN R. COULTER ET AL., APPELLEES, V. ROBERT D. MCFARLAND, COUNTY JUDGE, APPELLANT.

88 N. W. 2d 892

Filed March 21, 1958. No. 34249.

1. **Mandamus.** An alias writ of mandamus is a duplicate of the original and a substitute therefor, being issued when the original writ of the same kind has been issued without effect. In such case the command of the alias writ should be the same as the original.
2. **Judgments.** The function of a nunc pro tunc order is not to correct some affirmative action of the court which ought to have been taken, but its function is to correct the record which has been made so that it will truly express the action taken but which, through inadvertence or mistake, was not truly recorded.
3. **Officers.** If a matter of public interest in the proper administration of the duties of a public office is involved then a public official occupying such office, who is being mandamused in regard thereto, has such an interest therein that he can appeal therefrom.
4. ———. The foregoing does not apply to matters of a private nature in which the public officer merely seeks to vindicate what he has done in regard thereto.
5. **Appeal and Error.** As a general rule, since appellate courts do not sit to give opinions on moot questions or abstract propo-

sitions, an appeal or error proceeding will be dismissed where no actual controversy exists between the parties at the time of the hearing. This general rule, however, does not necessarily apply to appeals or error proceedings involving matters of public interest.

APPEAL from the district court for Morrill County: CLAIBOURNE G. PERRY, JUDGE. *Reversed and remanded with directions.*

Wright, Simmons & Harris, for appellant.

Neighbors & Danielson, James L. Macken, and *Bern R. Coulter,* for appellees.

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

WENKE, J.

This is an appeal from the district court for Morrill County. It involves a mandamus action brought therein by relators Bern R. Coulter, C. Palmer Dunlap, and May D. Anderson against respondent Robert D. McFarland, the then duly elected, qualified, and acting county judge of Morrill County, Nebraska. Thereby relators sought to require respondent to "sign and file in his office in the matter of the estate of Christina D. Dugger, deceased, the Order Fixing Date for Hearing on Will as hereinabove set forth, said order providing that said petition will be heard on the 13th day of May, 1957, at the hour of nine o'clock A. M., and further commanding said respondent forthwith to sign and file in his office in the matter of the estate of Christina D. Dugger, deceased, the Notice of Hearing, which notice notifies all persons interested in said estate that said hearing will be held in the County Court room, Morrill County, Nebraska, on the 13th day of May, 1957, at the hour of nine o'clock A.M. of said day."

The factual background out of which this action had its origin is as follows: Christina D. Dugger, a resident of Morrill County, died on September 21, 1956. She

was thought to have died intestate so two of her heirs at law filed a petition for the administration of her estate in the county court of Morrill County. They were relator May D. Anderson, a niece, of Chehalis, Washington, and Ellen Boyd Yocum, a niece, of Las Vegas, Nevada. Their petition was filed on September 27, 1956, by relator Bern R. Coulter, an attorney at law. Coulter was appointed and qualified to act as administrator of the estate and letters of administration were issued to him on November 5, 1956. These proceedings were had prior to respondent becoming county judge. After respondent became county judge he found an instrument which had been deposited in his office, which instrument appeared to be a will of Christina D. Dugger, deceased. He found it on April 11, 1957. It was dated May 28, 1913. On the same day respondent called relator Coulter on the telephone and advised him of that fact and later that same day permitted Coulter to take the will to his office to make copies thereof and prepare a petition for its probate. Thereafter, at about 11 a.m. on April 18, 1957, Jack E. Lyman and Marvin L. Holscher, attorneys at law, filed a petition in behalf of Agnes D. Lynn of Coopersville, Michigan, a sister of the deceased, asking for the probate of this will and that the court fix a time and place for a hearing for that purpose and to publish the necessary notice thereof as by law required. This the county court did, fixing the time for hearing at 10 a.m. on May 17, 1957, in his office and caused notice thereof to be published accordingly. On the same day (April 18, 1957) at about 4:30 p.m. relator Coulter left with respondent a petition asking to have the will probated, which was signed by the other two relators, and submitted with it two orders for the respondent to sign and file. The first order was captioned as an "Order Fixing Date for Hearing on Will" and the second as a "Notice of Hearing." The first of these orders set the date for hearing at 9 a.m. on May 13, 1957, in the county courtroom and directed the

notice to be published in the Bridgeport News-Blade. The respondent filed the petition but refused to sign the order fixing a time, date, and place for hearing on the application for the allowance of the will and also refused to sign a notice to be published pursuant thereto, entering an order to that effect. This order of refusal was based on the fact that such an order and notice had already been issued. This mandamus action followed immediately, being filed on April 19, 1957.

On April 20, 1957, the district court granted relators the relief they had asked for in the following language: "IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED BY THE COURT that a Peremptory Writ of Mandamus issue against the respondent, Robert D. McFarland, County Judge, commanding him to forthwith sign and file in the proceedings of the estate of Christina D. Dugger, deceased, the Order Fixing Date of Hearing on Will and to forthwith sign and file in the proceedings of the estate of Christina D. Dugger, deceased, the Notice of Hearing as set forth in the petition filed herein, and that he deliver to relators a copy of said Notice of Hearing for publication. The costs of this action in the sum of $28.25 are taxed against the respondent."

A writ of mandamus was issued pursuant thereto and served upon respondent. It provided as follows: "Now, therefore, we command you immediately upon receipt of this writ to sign and file in the proceedings in the matter of the estate of Christina D. Dugger, deceased, the Order Fixing Date of Hearing on Will, which order fixes the date of said hearing on the 13th day of May, 1957, at the hour of nine o'clock A.M., and we command you further to immediately upon receipt of this writ to sign and file the Notice of Hearing in the proceedings in the estate of Christina D. Dugger, deceased, said Notice of Hearing fixing the date of hearing on May 13th, 1957, at the hour of nine o'clock A.M., * * *."

Respondent did not comply with the command there-

of. As a result the relators made application for an alias writ, asking that: "* * * the court enter an order allowing Alias Peremptory Writ of Mandamus requiring the respondent to immediately and forthwith enter an order Nunc Pro Tunc as of April 20, 1957, fixing the date of hearing on the petition of May D. Anderson and C. Palmer Dunlap for the probate of the Will of Christina D. Dugger, deceased, and the appointment of Bern R. Coulter as Administrator thereof with Will Annexed, on the 13th day of May, 1957, at the hour of nine o'clock A.M., and that the respondent be further required to immediately and forthwith sign and file a notice of hearing in said proceedings fixing the date of hearing on May 13, 1957, at the hour of nine o'clock A.M., and to deliver a copy of said notice of hearing to relators for publication." On April 27, 1957, an alias peremptory writ of mandamus was ordered to be issued. Therein the district court commanded respondent to comply, nunc pro tunc, with the previous writ issued on April 20, 1957. An alias writ was issued. When respondent still refused to comply therewith he was ordered committed to jail until he did so. It was after this order was issued that respondent complied with the command of the writ, doing so involuntarily. After respondent's motion for new trial had been overruled he took this appeal. We shall herein refer to appellant as respondent and to the individual appellees as relators.

It should be noticed that before he involuntarily complied with the command of the writ that respondent unsuccessfully endeavored to get the district court to fix the amount of bond necessary to supersede the court's judgment, the court holding he was not entitled to supersede, and also unsuccessfully endeavored to get the trial court to suspend enforcement of the jail commitment while he appealed to this court.

There is some dispute between the parties, and conflict in the record, as to just what language was used by the trial court in rendering its order directing the

issuance of an alias peremptory writ of mandamus. However, we do not think this is important because of what is hereinafter held and because, as stated in 3 C. J. S., Alias, p. 514: "Alias writ. * * * The phrase has been defined as meaning a second writ; a second or further writ which is issued after the first writ has expired, a writ issued where one of the same kind has been issued before in the same cause; a second writ issued when the first has failed its purpose; one which is issued when a former writ has not produced its effect. * * * has been defined as a mere duplicate of an original and a substitute therefor." And, as stated in Black's Law Dictionary (1891 Ed.), p. 58: "An alias writ is a second writ issued in the same cause, where a former writ of the same kind had been issued without effect. In such case, the language of the second writ is, 'We command you, as we have before (sicut alias) commanded you,' * * *." The command contained in the original writ is definite and certain and is the command to which the alias writ must necessarily relate itself.

Since the respondent had failed to comply with the command of the original writ he could not, as of April 27, 1957, enter a nunc pro tunc order on that date as of April 20, 1957, for, as stated in Akins v. Chamberlain, 164 Neb. 428, 82 N. W. 2d 632: "The function of a nunc pro tunc order is not to correct some affirmative action of the court which ought to have been taken, but its purpose is to correct the record which has been made, so that it will truly express the action taken but which through inadvertence or mistake was not truly recorded."

Section 25-2156, R. R. S. 1943, provides: "The writ of mandamus may be issued to an inferior tribunal, corporation, board or person, to compel the performance of an act which the law specifically enjoins as a duty resulting from an office, trust or station. Though it may require an inferior tribunal to exercise its judgment, or proceed to the discharge of any of its functions, it

cannot control judicial discretion." See, also, State ex rel. Garton v. Fulton, 118 Neb. 400, 225 N. W. 28.

Appellees contend that no substantial right of the respondent was affected by the writ of mandamus within the meaning of section 25-1902, R. R. S. 1943, and that, consequently, no appealable controversy is presented. We do not agree with this contention if a matter of public interest in the proper administration of the duties of a public office is involved. In such instance we think the public official who is being mandamused in regard thereto has such an interest in the proper administration of the duties of his office that he can appeal therefrom. While we have never directly passed on this question we have, in at least three instances, permitted public officials to do so. See, State ex rel. Garton v. Fulton, *supra* (county judge); State ex rel. Sutton v. Towl, 127 Neb. 848, 257 N. W. 263 (city officials); and Summit Fidelity & Surety Co. v. Nimtz, 158 Neb. 762, 64 N. W. 2d 803 (municipal judges).

It should be understood that this does not apply in matters of a private nature in which the public officer merely seeks to vindicate what he has done in regard thereto. As stated in McCloskey v. Renfro, 47 Ariz. 534, 57 P. 2d 1140: "He has no property or financial interest in the litigation and the way the case was decided is a matter of absolute indifference to him as a presiding judge. The action is between Whiting and Renfro, who are the interested parties. We know of no rule of law that will permit a judge whose judgment is annulled or vacated to become a party to the action and prosecute an appeal. * * * If the superior court erroneously vacated the judgment entered by appellant in the justice court, the party injured thereby may, in a proper proceeding, seek to have the matter reviewed, but not the judge of the court." Although a mandamus action, the court in Bowles v. Dannin, 62 R. I. 36, 2 A. 2d 892, used the same reasoning in reaching the result it did because of the purpose for which it concluded the respondent

therein was appealing. As therein stated: "Essentially, therefore, the appellant's position is the same as if he were defending his decision on an appeal therefrom to the superior court. The fact that he is named as a party respondent in the mandamus petition does not give him a right to appeal." The court then went on to say: "He must be a party aggrieved, either personally or in an official capacity as a representative of the public."

It is further contended by appellees that respondent's compliance with the writ, although involuntary, makes it impossible for this court to grant effective relief on the merits of this case and, since only the question of taxing costs is involved, there is no ground for appellate review.

As to costs they cite Betts v. State ex rel. Jorgensen, 67 Neb. 202, 93 N. W. 167; State ex rel. Hoctor v. Trainor, 91 Neb. 848, 137 N. W. 876. As stated in Dodge Agricultural Credit Assn. v. Tighe, 121 Neb. 458, 237 N. W. 404: " 'Some cases hold that an appeal in a case which has become moot will not be retained merely for the purpose of determining the question of costs.' 4 C. J. 577.

"This view was taken in a former opinion. State v. Trainor, 91 Neb. 848."

As to the question of the issues being moot they cite Betts v. State ex rel. Jorgensen, *supra;* State ex rel. Hoctor v. Trainor, *supra;* McCarter v. Lavery, 101 Neb. 748, 164 N. W. 1054; Banning v. Marsh, 124 Neb. 207, 245 N. W. 775; School Dist. No. 65 v. McQuiston, 163 Neb. 246, 79 N. W. 2d 413. As stated in School Dist. No. 65 v. McQuiston, *supra:* "A defeated party's compliance with the judgment destroys his right to appeal where such compliance makes it impossible for the appellate court to grant him effective relief on the merits."

But, as stated in 5 C. J. S., Appeal and Error, § 1354(1)a, p. 404: "As a general rule, since appellate courts do not sit to give opinions on moot questions or abstract propositions, an appeal or writ of error will be

dismissed where no actual controversy exists between the parties at the time of the hearing. This general rule, however, is subject to some exceptions, as where the question involved is a matter of public interest; * * *." See, also, Best & Co., Inc. v. City of Omaha, 149 Neb. 868, 33 N. W. 2d 150.

We think the question here involved presents a matter of public interest as it affects all county courts of this state in the proper handling of estates when the deceased dies testate.

Some question is raised by appellees as to the authority of the county judge to make the order and issue the notice that it did when the first petition for probate was filed, citing the requirements of section 30-217, R. R. S. 1943. This statute provides, insofar as here material, that: "When any will shall have been delivered into or deposited in any probate court having jurisdiction of the same, together with a petition for its probate, such court shall appoint a time and place for proving it, when all concerned may appear and contest the probate of the will, and shall cause public notice thereof to be given by publication under an order of such court, in such newspaper printed in this state as the judge shall direct, three weeks successively, and no will shall be proved until notice shall be given as herein provided; * * *." See, also, § 30-331, R. R. S. 1943. It should be remembered that the will was on deposit in the county court when discovered and therefore in its legal custody. See, §§ 30-210, 30-212, 30-214, R. R. S. 1943. The mere fact that relator Coulter had been permitted to take it to his office for personal reasons did not change that status. When the first petition for probate of the will was filed at 11 a.m. on April 18, 1957, to which it related, the will had already been deposited with the county court. The county court thereupon had authority to appoint a time and place for proving it and cause public notice thereof to be given by publication for the length of time as required by

law, the time and place being in its discretion within that limited by the notice required. However the word "shall," as used in this statute, required the county court to enter such order and give the notice provided for. One of the questions here is, can the county court be required to issue additional orders and notices as contemplated by this statute whenever any one authorized to file a petition for that purpose does so after an order for hearing has been entered and a notice thereof has been given?

An estate proceeding is in the nature of a proceeding in rem. See, In re Estate of Sieker, 89 Neb. 216, 131 N. W. 204, 35 L. R. A. N. S. 1058; In re Estate of Sweeney, 94 Neb. 834, 144 N. W. 902; In re Estate of Marsh, 145 Neb. 559, 17 N. W. 2d 471; Rohn v. Kelley, 156 Neb. 463, 56 N. W. 2d 711. When a petition is filed in the county court for the purpose of administering or probating an estate therein the proceedings become one in rem to which everyone interested therein is a party, whether he is named or not. In re Estate of Sweeney, *supra;* In re Estate of Marsh, *supra;* Rohn v. Kelley, *supra.* The filing of such a petition in the county court is in no sense an action within the ordinary meaning of that word. The petition filed is for the benefit of all persons interested therein. It is, in effect, a petition or application directed to the court to put in operation the functions of that office if the petition states the necessary jurisdictional requirements. It is the duty of the court to protect the interests of all parties thereto whether actually before the court or not. See, In re Estate of Marsh, *supra;* In re Estate of Glover, 104 Neb. 151, 175 N. W. 1017. As stated in In re Estate of Glover, *supra*: "The instant the petition is filed the further operation or control of the matter passes out of the hands of the petitioner and into the hands of the court."

No claim is made here, except one that has already been discussed and disposed of, that the first petition

filed for the probate of decedent's will failed to state such jurisdictional requirements.

While we think the entering of an order, after a proper petition to probate a will is filed, fixing a time and place for the hearing thereon is obligatory on the county court in the first instance we are, however, of the opinion that once that has been done, and the court has obtained jurisdiction of all the parties interested therein, that the filing of additional petitions for the same purpose, by others entitled to do so, does not require the county court to issue additional orders to the same effect and cause notices to be issued and published for hearing thereon. Doing so would serve no useful purpose but would unnecessarily hinder, delay, and cause confusion in the proper probating of such estates.

In view of the foregoing we find the district court was in error when it issued the peremptory writ of mandamus against respondent for the purpose that it did. We therefore reverse its action doing so with directions that the relief prayed for by appellees be denied and costs of this proceeding be taxed to appellees.

REVERSED AND REMANDED WITH DIRECTIONS.

YEAGER, J., participating on briefs.

PAUL S. KRUGER, APPELLEE, V. ERVIN CLARK CONSTRUCTION COMPANY, A PARTNERSHIP, APPELLANT.
88 N. W. 2d 778

Filed March 21, 1958. No. 34307.

1. **Automobiles: Highways.** A left turn across a public highway between intersections is fraught with danger, and one making such a movement is required to exercise a degree of care commensurate with the danger.
2. ———: ———. When the driver of a motor vehicle turning across a highway between intersections fails to look to the front and rear for oncoming traffic at a time and place when to look

would be effective, or looks and negligently fails to see that which is in plain sight, or is in a position where he cannot see, a question for the court is usually presented.

3. ———: ———. The giving of the statutory signal for a left turn under such circumstances will not absolve the driver from negligence where he fails to exercise care for his own safety, and that of others, by looking to the front and rear for the approach of other vehicles using the highway.

APPEAL from the district court for Washington County: CARROLL O. STAUFFER, JUDGE. *Reversed and remanded.*

Cassem, Tierney, Adams, Kennedy & Henatsch, for appellant.

O'Hanlon & O'Hanlon, for appellee.

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

MESSMORE, J.

This is an action at law brought by Paul S. Kruger as plaintiff, against Ervin Clark Construction Company, a partnership, defendant, in the district court for Washington County to recover damages to the plaintiff's vehicles, and for personal injuries sustained by the plaintiff as a result of a collision between the plaintiff's vehicles and a vehicle driven by an employee of the defendant. The defendant filed a counterclaim to recover damages to its truck. The parties waived a jury trial and the trial was had to the court. The court rendered judgment in favor of the plaintiff, fixing the amount of his recovery in the sum of $693.40 and costs, and found against the defendant on its counterclaim. The defendant filed a motion for new trial or for dismissal of the plaintiff's cause of action. This motion was overruled. From this order, the defendant appeals.

The record discloses that the plaintiff is a farmer and cattle feeder. On October 1, 1956, at about 9 a.m., on a calm, clear day, he was driving a 1950 Ford pickup truck, the overall length of which was 14 feet. Attached to the truck by a 6-foot stub tongue was an en-

silage wagon 12 feet in length. The total length of the vehicles he was driving was 32 feet. The truck was 6 feet wide, and the ensilage wagon was 7 feet wide. There were about 5 bushels of ear corn in the truck box, and the ensilage wagon was loaded with ensilage which was "rounded up" in the wagon. The truck was equipped with a rear view mirror above the windshield, but there was no rear view mirror on the outside of the truck. The road the plaintiff was traveling on was a county road, 24 feet wide with a covering of gravel and crushed rock. The graveled portion of the road was 18 feet wide. The road runs east and west in a straight direction, with visibility good. The plaintiff was hauling ensilage from a farm owned by him to another farm when the accident occurred about a mile and a half east of Fort Calhoun.

The plaintiff testified that the ensilage was picked up about three-quarters of a mile east and about 100 rods south of the point of impact; that he turned onto the county road and proceeded west; that as he proceeded down the road he was traveling at a rate of speed of 10 to 15 miles an hour, intending to turn into a driveway to his farm; that the driveway was about 20 feet wide; that he extended his arm out of the left window which was down, and his head was close to the window, to signal the turn to the left; that when he first gave this signal he was 50 or 60 feet east of the driveway he was going to enter and at that time his speed was 3 miles an hour; and that he could see the load behind him on the ensilage wagon, and could see over it. He glanced in the rear view mirror at the time he was giving the signal and saw nothing behind him, and did not see the defendant's truck. Asked whether he could see back along the road for a considerable distance, he answered: "Well, that is hard to say. The truck isn't in shape—to reconstruct the accident, the ensilage was piled up so that there wasn't a good vision. You couldn't see clear down the road but

you could have seen the cab of a truck approaching from the rear." When he first saw the defendant's truck he had turned his front wheels just about off of the road and heard a "sliding of tires or whatever it was." He looked, and the truck was almost on him. That was the first indication he had that the defendant's truck was approaching. He heard no signal. At the time of the impact, the front wheels of the plaintiff's truck were over the culvert (this would be on the south side of the road) and the back wheels were on the left-hand traveled track. The ensilage wagon was trailing in an "arc." The truck was facing due south. The rear wheels were in the southern-most lane. The defendant's truck, at the time of the impact, "was coming down the middle" and struck the plaintiff's truck on the left rear wheel and the ensilage wagon on the left front side. The plaintiff's truck ended up on the south side of the road and the ensilage wagon in the ditch on the north side of the road.

On cross-examination the plaintiff testified that there were no signs or anything to indicate his lead-off road; that there were no lights on the ensilage wagon; and that he was 30 to 40 feet from the turn when he signaled. He further testified that he did not see the defendant's truck until just at the time of the impact; that the plaintiff's truck at that time was across the road; and that at the point of impact there is a clear view back to the east for a distance of 2 miles. He further testified on cross-examination that he was aware that a number of trucks were carrying riprap along that road; that at the time of the impact his vehicles were stretched completely across the county road; that the back wheels of the ensilage wagon were over next to the bank on the north shoulder of the road; that before making a left turn he pulled over to the right as far as possible, it being a sharp turn; and that he got over to the extreme right about 100 yards from the turn.

The defendant's driver testified that he was driving the defendant's truck westward at the time of the accident, carrying rock from the quarry to the river. The load weighed about 12 tons. The total number of trips made by defendant's trucks averaged 50 to 55 a day. He further testified that he saw the plaintiff's pickup truck and wagon when he was probably a mile or a mile and a half down the road; that he kept gradually working up to this truck to go around it, at a speed of 30 to 35 miles an hour, and was gradually closing the gap between the truck he was driving and the plaintiff's vehicles; and that the plaintiff's vehicles were traveling about 10 miles an hour and were on the right, or north, side of the road as he approached. At that time the left, or south, side of the road was open. As he attempted to pass the plaintiff's vehicles he reduced his speed to 20 miles an hour. The plaintiff made a left turn across the road into a private driveway. This witness was not aware of this driveway and had never seen a vehicle enter it. The plaintiff executed a sharp turn in front of him, at which time the defendant's vehicle was about 30 feet from the rear of the plaintiff's ensilage wagon and 60 feet from the front of the plaintiff's truck. He did not see a signal, and could not see the left door of the plaintiff's pickup truck because it was obscured by the ensilage wagon and its contents. When the plaintiff negotiated his turn to the left in front of the defendant's truck, this witness applied his brakes, at which time his speed was approximately 15 miles an hour. At 15 miles an hour it would take approximately 70 to 75 feet to stop this truck. His brakes took hold and slid his wheels on the gravel surface, and he proceeded ahead approximately 10 feet at a speed of 10 miles an hour. This witness further testified that at the time of the impact he was on the left, or south, side of the road; and that at that time the front of the plaintiff's pickup truck was in the driveway a little ways, and the rear end of that truck was out in the road. The

ensilage wagon was across the road. The truck he was driving turned over in the ditch on the north side of the road about 10 feet beyond the point of impact. He did not sound his horn at any time. He applied his brakes when he was 20 feet from the point of the impact.

He further testified that when he was about 150 to 175 feet from the plaintiff's vehicles he started moving to the left, or south, side of the highway in an endeavor to go around the plaintiff's vehicles; that he reached the extreme south side of the highway approximately 100 feet from the point of impact; that as he approached to pass the plaintiff's vehicles, the plaintiff was on the extreme north or right side of the road and the truck this witness was driving was on the extreme south or left side of the road; and that the plaintiff suddenly turned in front of the defendant's truck when it was 30 feet from the rear of plaintiff's ensilage wagon.

The defendant sets forth four assignments of error. For the purpose of this appeal, we consider one which is to the effect that the plaintiff was guilty of negligence to such an extent as to bar recovery on his part.

Section 39-7,115, R. R. S. 1943, pertinent to this appeal, provides in part: "(a) No person shall turn a vehicle from the direct course upon a highway unless such movement can be made with reasonable safety, * * * and after giving an appropriate signal in the manner hereinafter provided in the event any other vehicle may be affected by such movement. (b) A signal of intention to turn right or left shall be given continuously during not less than the last fifty feet traveled by the vehicle before turning."

In the case of Ambrozi v. Fry, 158 Neb. 18, 62 N. W. 2d 259, it is said: " 'A left-hand turn across a public highway between intersections is fraught with danger, and one making such a movement is required to exercise a degree of care commensurate with the danger.' Petersen v. Schneider, 153 Neb. 815, 46 N. W. 2d 355."

In Petersen v. Schneider, 153 Neb. 815, 46 N. W. 2d

355, the factual situation was somewhat similar to that in the instant case. The court said: "The giving of the statutory signal for a left turn under such circumstances will not absolve the driver from negligence where he fails to exercise care for his own safety, and that of others, by looking to the front and rear for the approach of other vehicles using the highway."

As we said in Petersen v. Schneider, *supra,* referring to section 39-7,115, R. R. S. 1943: "A violation of this statute constitutes evidence of negligence under our holdings. * * * The most dangerous movement on public streets or highways is the left-hand turn. While the left-hand turn at intersections is within the purview of this statement, the left-hand turn across a favored public highway between intersections is a particularly dangerous one. Legislatures have seen fit to regulate such movements and courts have required a degree of care commensurate with the danger. * * * the giving of the statutory signal is not enough, one must exercise reasonable care under all the circumstances. He cannot rely on holding out his arm and trust that all may see it. He must take reasonable precautions for his own safety and the safety of others before he undertakes a left turn between intersections where such movements are not anticipated. As was stated in Brown v. Perkins, (La. App.) 144 So. 176: 'It cannot be said that the holding out of the left hand without seeing the condition of traffic in the rear will absolve the driver from negligence any more than it could be said that such a signal would absolve him from negligence even though he saw it was either unseen or unheeded by the traffic in front.' * * * 'One driving in the rear of another car has the right to assume that a motorist will obey the law of the road and is not bound to anticipate that a car will leave its proper side and cross the highway, at least where there is no intersection of public highways, and nothing to lead one in the exercise of reasonable

care to foresee such action.' Young v. Cerrato, 2 Cal. App. 2d 421, 37 P. 2d 1063."

It is true that in the foregoing case there was no signal given while in the instant case there was a signal given under the circumstances as heretofore set out. In any event, it was difficult to see because of the obstruction caused by the load of ensilage on the wagon.

Referring again to the case of Petersen v. Schneider, *supra,* the court said: "We think the correct rule to be applied in cases of this kind is: Where the driver of a vehicle turning across a street or highway between intersections fails to look at all at a time and place where to look would be effective, or looks and negligently fails to see that which is plainly in sight, or is in a position where he cannot see, a question for the court is usually presented. Where he looks but does not see an approaching automobile because of unusual conditions or circumstances, or sees the approaching vehicle and erroneously misjudges its speed or distance, or for some reason assumes he could safely complete the movement, the question is usually one for the jury."

In the case of Brown v. Perkins (La. App.), 144 So. 176, cited in Petersen v. Schneider, *supra,* and pertinent to the case at bar, it was the intention of the driver of a truck to turn left across a paved highway into a side road, and for this purpose he had driven to the extreme right side of the road in order to make the turn. In anticipation of this intended turn, and in compliance with the provisions of Act No. 296 of 1928, he had held out his left hand as a signal of his intention. For some unknown reason, probably due to the width of the body of the truck, this signal was not seen by the plaintiff. So that, for all intents and purposes, the situation was the same as though no signal was given either by the overtaking vehicle or by the overtaken truck. The truck was traveling 15 or 20 miles an hour. The automobile following was traveling 35 to 40 miles an hour. The driver of the truck was not at any time aware of the

presence of the automobile, either in the rear or at his side. The driver of the truck testified that his truck was equipped with a rear view mirror and that it did not disclose the presence of the plaintiff's car in the rear. So, acting on the assumption that there was no danger from an overtaking car, he proceeded to make his left turn into the side road. The court said: "This case involves the alleged negligence of the driver of a forward car in making a left turn, and the contributory negligence of the driver of the overtaking car. * * * It is the contention of the defendants that the driver of the truck was not aware of the presence of the plaintiff; that he held out his left hand as required by law and made his left turn. The driver of the truck testified that his truck was equipped with a rear-view mirror which gave him a perfect view of the rear, but that in addition he turned his head around and looked to the rear when he was 30 feet from the side road and saw no one. He says that he then held out his hand and started to make his turn, and that the first knowledge he had of the presence of the plaintiff was when the two vehicles collided. From the evidence it is certain that at the moment before the truck began its left turn plaintiff was within a relatively short distance behind (that is, a distance of between 39.25 and 60 feet). * * * Plaintiff says he was about and nearly even with the truck. In any event, the driver says he did not see him. If his mirror did not reveal him, it did not meet the requirements of the law * * * which says that the rear-view mirror must 'reflect to the driver a view of the highway for a distance of at least two hundred feet to the rear of such vehicle.' If the driver looked outside to the rear he was negligent in not seeing the approaching automobile. If he had seen him where he actually was, the left-hand turn should not have been undertaken until the automobile had passed, for it would certainly be negligence on the part of a driver of a loaded truck to undertake to make a left-hand turn while an automobile was attempt-

ing to pass as close by as plaintiff is bound to have been. The fact that the driver of the truck did not see the plaintiff does not relieve him of negligence, for under our law he is supposed to have seen what he ought to have seen. This is so elemental and fundamental there should be no need of citation to support it." See, also, Vigilant Ins. Co. v. Lumbermen's Mutual Cas. Co. (La. App.), 85 So. 2d 87.

With the foregoing authorities in mind, a summary of the pertinent facts shown by the record may be in order. The plaintiff was driving his pickup truck, and attached thereto was an ensilage wagon. The length of such vehicles was 32 feet. The ensilage wagon was not licensed and there were no lights on the rear end of it to indicate that a turn would be made. This wagon was wider than the truck, and was loaded with ensilage to such an extent that it obscured the vision of the plaintiff. The road was a straight, level, graveled, county road. The plaintiff was traveling west. He endeavored to execute a turn across the highway to enter a private driveway on the south side of the highway. In doing so, he made a sharp turn which brought the truck and the ensilage wagon completely across the road. The defendant's driver was endeavoring to pass the plaintiff's vehicles. The plaintiff contends he made a left-turn signal with his left arm when he was a distance of from 40 to 30 feet from the driveway. The plaintiff did not see the defendant's truck until just about the moment of the impact, although there was a clear view back to the east for 2 miles. The defendant's driver had been watching the plaintiff's vehicles as he approached and had seen no signal. He could not see the left door of the plaintiff's truck because it was obscured by the ensilage wagon. He was approximately 30 feet from the rear end of the ensilage wagon and 60 feet from the front of the plaintiff's truck at the time the plaintiff executed his turn to the left. The defendant's driver immediately applied his brakes. His speed was not over

20 miles an hour. His brakes took hold and his wheels slid on the graveled surface. At the time of the impact his speed was 10 miles an hour. The defendant's driver was unable to turn to the right or left to avoid the plaintiff's vehicles since they were stretched completely across the highway. In addition, there were ditches on either side of the highway.

We hold that under the undisputed facts of this case the judgment of the trial court was clearly wrong, and that the defendant's motion for new trial should have been sustained.

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

REVERSED AND REMANDED.

IN RE GUARDIANSHIP OF CLAYTON OCHSNER, INCOMPETENT. CLAY COUNTY, NEBRASKA, APPELLEE, V. JOHN A. BOTTORF, GUARDIAN OF CLAYTON OCHSNER, INCOMPETENT, APPELLANT.

88 N. W. 2d 898

Filed March 21, 1958. No. 34337.

1. **Counties.** A grant of authority to a county is strictly construed and enjoyment of the grant requires a compliance with any condition or restriction of the grant.
2. **Insane Persons.** The generally accepted view is that at common law public authorities could not recover from an incompetent person or his estate any expenses incurred on his account.
3. ———. A statute creating such an obligation and containing requirements relative to determining and enforcing the obligation is exclusive and must be strictly complied with.
4. **Counties: Insane Persons.** A condition precedent of a recovery by a county from the estate of an incompetent person by virtue of section 83-352, R. S. Supp., 1955, of the expense of his care and maintenance in a state hospital which has been paid by the county is that the county allege in the statement of its cause of action and prove at the trial that the incompetent is possessed of an estate and income sufficient to meet the expense of his

care and maintenance at the hospital without depriving those dependent upon him of their necessary support.

5. Statutes. If a right is created by statute which did not exist at common law, the Legislature may impose a condition thereon and such condition is an integral part of the enactment and must be complied with in the manner therein prescribed.

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

Massie, Bottorf & Massie, for appellant.

Clarence S. Beck, Attorney General, *Homer L. Kyle,* and *S. W. Moger,* for appellee.

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

BOSLAUGH, J.

The trial of a charge of a felony against Clayton Ochsner in the district court for Clay County resulted in a verdict of not guilty because of his insanity at the time of the alleged commission of the offense. That court, because of the verdict, adjudged that Clayton Ochsner, hereafter referred to as the incompetent, should be and he was committed to the state hospital for the mentally ill at Ingleside. He was admitted to that institution March 14, 1952, and he has since been there confined and cared for as a mentally ill person. The incompetent was a resident of Clay County and John A. Bottorf was appointed by the county court of that county guardian of him.

The amount of the charge for the care and maintenance of the incompetent at the state hospital for the period of March 14, 1952, to April 1, 1956, was paid to the hospital by appellee and it filed a claim for the amount thereof in the matter of the guardianship of the incompetent. The county court allowed the claim and ordered the guardian to pay it with funds of the guardianship. The guardian appealed therefrom to the dis-

trict court. Appellee, by its petition therein, alleged the confinement of the incompetent in the state hospital commencing with March 14, 1952; the amount of the charge for his care and maintenance in the hospital for that time; the payment thereof to the hospital by appellee; the ownership by the incompetent of an estate and income sufficient to meet the expense of his care and maintenance in the hospital without depriving those dependent upon him of their necessary support; and the refusal of the guardian to pay the amount of the expense for the designated period. Appellee demanded judgment therefor against the appellant. The answer of appellant contained a general denial of the contents of the petition of appellee.

The district court found the facts in favor of appellee and rendered judgment for it and against appellant for the amount claimed. His motion for a new trial was denied and this appeal presents the record for review. The validity of the judgment is contested by appellant because, as he asserts, it is not supported by the evidence and is contrary to law.

Appellee relies upon the authority of section 83-352, R. S. Supp., 1955, for the successful prosecution of the claim involved in this litigation. It contains these relevant provisions: "If any patient in a state hospital for the mentally ill * * * is possessed of an estate and income sufficient to meet the expense of the patient's care and maintenance in the hospital without depriving those dependent upon such patient * * * of their necessary support, the guardian * * * of such patient shall pay to the superintendent of the hospital, quarterly during the time the patient is in the hospital, a sum to be fixed by the Board of Control which shall be an amount equal to the per capita cost of maintaining the patient in the hospital. * * * The amounts to be paid under this section shall constitute a claim against the estate of the patient and be collectible therefrom. * * * It shall be the duty of the county board of each county to investi-

gate all unpaid claims and cause action to be brought in the name of the county by the county attorney to recover thereon, where it is probable that some recovery can be made."

The grant of authority to the county by this enactment must be strictly construed against the county. State ex rel. Johnson v County of Gage, 154 Neb. 822, 49 N. W. 2d 672. It does not purport to create a general, absolute, and unconditional liability.

The statute considered in Howard County v. Enevoldsen, 118 Neb. 222, 224 N. W. 280, recited that every person who could not earn a livelihood because of bodily infirmity, mental deficiency, or other unavoidable cause should be supported by designated relatives, if any of them had sufficient ability, and if they refused when directed by the county board, they should pay for that purpose the amount fixed by the county board not in excess of a designated maximum. The case concerned the refusal of a father to contribute for an unfortunate daughter. The court said the right of Howard County was statutory and was required to be established under the provisions of the statute. This language is contained in the report of that case: "Before a cause of action accrues in favor of a county or its county board under section 5140 against a relative who fails to furnish support to an indigent relative entitled to support under the provisions of said section, it is necessary that such delinquent relative be first directed by order of the county board to furnish support and refuse to do so." In the opinion the court said: "Under that statute, before a recovery could be had the plaintiffs were required to prove that Fredricka Petersen was a poor person unable to earn a livelihood in consequence of some bodily infirmity, idiocy, lunacy or other unavoidable cause. There is no evidence to show that she was unable to earn a livelihood in consequence of any bodily infirmity, idiocy or lunacy; so, if plaintiffs are entitled to recover in this action it must be because of evidence showing

inability by reason of some 'other unavoidable cause.' "

Estate of Hahto, 236 Wis. 65, 294 N. W. 500, concerned a statute which required a designated officer to make reasonable and proper efforts, giving "due regard in all cases to others who may be lawfully dependent upon such property for support, to recover the cost of maintenance furnished" to an inmate of a state institution. The subject matter of the case was a claim against the estate of a deceased wife for care and maintenance of her incompetent husband furnished by the State Department of Mental Hygiene. In the opinion the court said: "Before the amendment an investigation and a determination upon the terms of liability were conditions precedent to the enforcement of a claim. Although the new statutory procedure is different from the old, it is still a condition precedent to recovery."

County of Audrain v. Muir, 297 Mo. 499, 249 S. W. 383, declares: "The provision made by law for the support of an indigent insane wife by the county is a charitable provision, from which no implication of a promise by her husband to pay for the expense of her confinement in a state hospital arises in the absence of fraud * * *; and in order for the county to recover back from him the amount of money it has paid the hospital for keeping her it must bring itself within the statutory provision * * * and show that the husband was 'bound to provide' for his wife's support and maintenance and was of 'sufficient ability to pay the same.' "

The common law did not recognize liability of an insane person for the expense of his care and maintenance while he was confined in a public institution for the mentally ill. The statutory enactment creating such an obligation and containing requirements relative to determining such liability is exclusive. Public authorities to recover for such expense of the care and maintenance of an incompetent must bring themselves within the terms of the statute.

Wiseman v. State (Tex. Civ. App.), 94 S. W. 2d 265,

declares: "Right of state to reimbursement for care and maintenance of demented persons did not exist at common law, state's only right being statutory * * *. State which did not pursue right provided by statute, allowing state to contract for liability by incompetent's estate for incompetent's care or secure judicial ascertainment at instance of board of control to determine whether incompetent's estate was legally liable for his care, held not entitled to recover for care provided incompetent by state subsequent to passage of such statute * * *." See, also, In re Application of St. Lawrence State Hospital for the Insane, 13 App. Div. 436, 43 N. Y. S. 608; In re Bedford, 11 N. J. Misc. 589, 168 A. 134; Estate of Hahto, *supra;* 44 C. J. S., Insane Persons, § 75 b, p. 177, § 75 c (3) (a), p. 183.

In Duhrkopf v. Bennett, 108 Neb. 142, 187 N. W. 813, this court said: "Where a right has been created by statute which did not exist at the common law, the legislature may impose restrictions thereon, and the conditions so imposed qualify and are an integral part of the act and must be fully complied with in the manner therein prescribed." See, also, Park v. School District, 127 Neb. 767, 257 N. W. 219; Johansen v. Farmers Mutual Hail Ins. Assn., 133 Neb. 118, 274 N. W. 393; Ray v. Sanitary Garbage Co., 134 Neb. 178, 278 N. W. 139.

The observation of the court in Swaney v. Gage County, 64 Neb. 627, 90 N. W. 542, is appropriate: "It must be conceded that the legislative body, which created the right of action, had absolute power to determine the conditions under which it must be brought * * *. Without such a law the plaintiff in this case would have had no right of action at all * * *."

The statute above quoted is indispensable to the cause of action asserted by appellee. It creates a right that did not exist at common law. It requires as a condition precedent to the existence and enjoyment of the right that the incompetent be possessed of an estate and income sufficient to meet the expense of the incompe-

tent's care and maintenance in the hospital without depriving those dependent upon him of their necessary support. This is not a matter of defense to be pleaded and established by the incompetent or his guardian. It is by the statute made a condition of the right and of the remedy. Appellee could only allege a cause of action by asserting that the requirements of the condition implicit in the statute did exist and appellee could establish a right to recover on the claim exhibited by its petition only by establishing by evidence the existence of the facts made necessary by the condition. Appellee complied with the requirements in this respect in its petition in the district court. It alleged a legally sufficient cause of action but it produced or offered no evidence that the incompetent was possessed of an estate and income sufficient to meet the expense of his care and maintenance in the hospital without depriving those dependent upon him of their necessary support. The record sustains the assignment of appellant that the judgment is not sustained by the evidence and that it is contrary to law. This is fatal to it.

The judgment should be and it is reversed and the cause is remanded to the district court for Clay County with directions to render a judgment in the cause disallowing and dismissing the petition and claim of appellee.

REVERSED AND REMANDED WITH DIRECTIONS.

IN RE ESTATE OF MAUDE C. CRANE, DECEASED.
FAYE LUTCAVISH, APPELLANT, V. PAUL H. EATON, ADMINISTRATOR OF THE ESTATE OF MAUDE C. CRANE, DECEASED, APPELLEE.
89 N. W. 2d 44

Filed March 28, 1958. No. 34275.

1. **Courts.** Courts are bound to take notice of the limits of their authority, and accordingly a court may of its own motion, even

though the question is not raised by the pleadings or is not suggested by counsel, recognize the want of jurisdiction, and it is its duty to act accordingly by staying proceedings, dismissing the action, or otherwise noticing the defect, at any stage of the proceedings.

2. **Actions.** Want of jurisdiction of the subject matter of the action is a defect which it is the duty of the court to notice, of its own motion, by dismissal of the action or other suitable action, at any stage of the proceedings.
3. **Appeal and Error.** On appeal to the district court from the county court where the county court had no jurisdiction of the subject matter such appeal confers no jurisdiction upon the district court.
4. **Wills: Executors and Administrators.** The construction of a will in probate court is for the information and benefit of the executor or administrator only, in order to advise him what course to pursue. It adjudicates nothing beyond his rights and liabilities in the execution of his office. Controversies between the executor or administrator and persons claiming adversely to the estate will not be affected thereby.
5. **Wills: Courts.** The rights of a residuary legatee to property constituting the residue of an estate which has been settled cannot be determined by filing a claim in the intestate estate of the principal beneficiary under the will. Where the pleadings of the respective parties disclose adverse and divergent contentions, the determination of any rights the residuary legatee may have involves a construction of the will under which he claims the right to the residue of the estate, and the court having jurisdiction is the district court.

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

Dwight Griffiths, Paul E. Rhodes, and *Simon Lantzy,* for appellant.

Paul H. Eaton and *Robert J. Bulger,* for appellee.

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

MESSMORE, J.

This is an appeal from a judgment of the district court for Morrill County dismissing a claim allowed by the county court on the ground that the district court

did not have jurisdiction over the subject matter of the action. On December 29, 1955, the claimant, Faye Lutcavish, filed a claim in the county court of Morrill County against the estate of Maude C. Crane who died July 25, 1955, intestate. Paul H. Eaton was appointed administrator of the estate of Maude C. Crane, deceased. The claimant, Faye Lutcavish, is the same person named and designated as Faye Crane in the last will and testament of Fred A. Crane, deceased. Fred A. Crane died February 11, 1950. His last will and testament was admitted to probate in the county court of Morrill County March 21, 1950. The estate was settled and distribution made in accordance with his will. Faye Lutcavish was Fred A. Crane's daughter by his first wife. Maude C. Crane was the second wife of Fred A. Crane.

The will of Fred A. Crane, deceased, provides in part as follows: "SECOND, After the payment of such funeral expenses and debts, I give, devise, and bequeath to my loving wife Maude Crane, all of my real and personal property, of whatever it may consist, and wherever it may be found, and it is my will that she sell or dispose of any of said property as she may see fit. It is my will that should there be any property, real or personal, remaining, at the time of the death of my said wife, Maude Crane, then said property which has come to the said Maude Crane as a result of this bequeath (bequest) shall be given to my daughter Faye Crane."

In addition to stating some of the facts above set out, the claimant set forth in her claim the following in substance: That upon the distribution of the personal estate of Fred A. Crane, deceased, Maude C. Crane received all the personal estate of Fred A. Crane, deceased, consisting of two shares of capital stock of the Farmers Equity Cooperative Creamery Association of the value of $29.37, and the sum of $2,174.91 in cash, and the same was delivered into the possession and con-

trol of Maude C. Crane for her use and benefit during her natural life; that under and by virtue of the terms and provisions of the last will and testament of Fred A. Crane, deceased, this claimant, Faye Lutcavish, became the owner of all the property, both real and personal, owned by Fred A. Crane at the time of his decease, subject only to the provisions of his last will and testament directing the payment of his funeral expenses and debts, and subject only to the life estate of Maude C. Crane in said property of Fred A. Crane, deceased; and that Maude C. Crane, now deceased, wrongfully converted the above-described stock of the Farmers Equity Cooperative Creamery Association and cash funds in the amount of $2,174.91, to her own use and commingled the same with her own funds. The claimant prayed for allowance of her claim in the amount of $2,204.28 against the estate of Maude C. Crane, deceased, or for such other amount that the court determined just and proper to adequately reimburse her for her share of the property and estate of Fred A. Crane, deceased, to which this claimant was entitled under the terms of his last will and testament.

The administrator of the estate of Maude C. Crane, deceased, filed objections to the claim, in which he admitted that the last will and testament of Fred A. Crane was admitted to probate and contained the provisions as heretofore set out; and admitted that upon the entry of the final decree in the probate proceedings of the estate of Fred A. Crane, deceased, there was distributed to Maude Crane, who was one and the same person as Maude C. Crane named therein, stock in the Farmers Equity Cooperative Creamery Association appraised at the value of $20, but having a book value of $29.37 at the time of distribution, and also the sum of $2,174.91 and no other property, but that listed in the inventory of the estate of Maude C. Crane, deceased, were items consisting of a watch and pocket knife believed to have belonged to Fred A. Crane, deceased. The

administrator alleged that he had made an investigation and found that Maude C. Crane cashed or sold back to the Farmers Equity Cooperative Creamery Association said stock of the book value of $29.37; that the proceeds therefrom were applied or used by her for her support, comfort, and enjoyment; that the residue received by Maude C. Crane from the estate of Fred A. Crane, deceased, on September 26, 1950, was in the sum of $2,174.91; that she deposited the sum of $1,930 in her postal savings account; that the remaining $244.91 was commingled with her own money and funds and may have become a part of the purchase price paid in the sum of $375 for a United States savings bond of $500 denomination purchased by her on October 5, 1950, or she may have used the $244.91 of the residue for her support and maintenance; that Maude C. Crane had money of her own on deposit in her postal savings account when she deposited the $1,930 of the residue of the estate of Fred A. Crane, deceased, in said account; that thereafter she made further additions to said account out of her own money; that on April 28, 1953, she closed out the postal savings account and received a government check for $2,518.20, which sum would include her own money, the earnings on the entire deposit, and the sum of $1,930 from the residue of the estate of Fred A. Crane, deceased; that on or about the same day she deposited the government check to her account in the Lisco State Bank, and later purchased government savings bonds, three of such bonds for the amount of $750 each, and two for $75 each; that she cashed two of the bonds purchased for $75 each and one of the bonds purchased for $750, using the proceeds for living and medical expenses, leaving two savings bonds purchased for the sum of $750 each in the hands of the administrator of her estate; and that it was for the court to determine whether the two United States savings bonds remaining should be construed as being personal property of the estate of Fred A. Crane, deceased, purchased from the residue of

his estate and subject to distribution to the claimant, or whether they were to be distributed to the heirs of Maude C. Crane, deceased, as a part of her separate estate. The administrator denied that Maude C. Crane had received any other property from the estate of Fred A. Crane, and denied the right of the claimant to recover or have any interest, income, or benefits from the residue of the estate of Fred A. Crane, deceased, or the right to an accounting for moneys used by Maude C. Crane for her support, maintenance, use, and comfort. The administrator alleged that the only accounting required of the Maude C. Crane estate was the residue unused by the deceased during her lifetime, and prayed that the claim be disallowed, save and except for any portion of the residue from the estate of Fred A. Crane, deceased, that the court might find and determine to remain at the time of the death of Maude C. Crane, deceased.

Objections to the claim were also filed by Fred A. Buerstetta and Lucy E. Jones, brother and sister of Maude C. Crane, deceased, as two legal heirs of Maude C. Crane, deceased. The allegations of this pleading were quite similar to the objections filed by the administrator of the estate of Maude C. Crane, deceased, and need not be summarized.

The claim was heard in the county court on January 22, 1957. The objectors, Lucy E. Jones and Fred A. Buerstetta, did not appear except as heirs of Maude C. Crane, deceased, being represented in that capacity by the administrator and attorney for the estate of Maude C. Crane, deceased. The claim was allowed by the county court in the amount of $2,204.28, and the administrator of the estate of Maude C. Crane, deceased, was ordered to surrender the watch and pocket knife to the claimant.

The administrator of the estate of Maude C. Crane, deceased, appealed to the district court from the order of the county court allowing the claim. The claimant filed a petition in the district court in substantially the

same form as the claim filed in the county court. The administrator filed an answer and objections to the petition, setting forth in substance the same facts as appeared in his objections in the county court. An answer and reply denying generally the allegations of the administrator's answer and objections was filed by the claimant. No filing or appearance was made in the district court by Lucy E. Jones or Fred A. Buerstetta as heirs of Maude C. Crane, deceased.

The matter came on for hearing in the district court on May 13, 1957. Trial to a jury was waived. The facts were stipulated and the stipulation was filed. The claimant offered the stipulated facts in evidence. The administrator objected to the introduction of any evidence for the reason that the district court and the county court had no jurisdiction to consider this matter, and that the district court on appeal had no jurisdiction to hear and consider this matter. The objection to the introduction of evidence was sustained. The administrator then moved to dismiss the claim for lack of jurisdiction, and this motion was sustained. The court then entered its order dismissing the claim for lack of jurisdiction. The claimant filed a motion for new trial, and later filed an amended motion for new trial. On the overruling of the amended motion for new trial, the claimant appealed to this court.

The appellant assigns as error the district court's dismissal of her claim for lack of jurisdiction as being contrary to law.

Courts are bound to take notice of the limits of their authority, and accordingly a court may of its own motion, even though the question is not raised by the pleadings or is not suggested by counsel, recognize the want of jurisdiction, and it is its duty to act accordingly by staying proceedings, dismissing the action, or otherwise noticing the defect, at any stage of the proceedings. Stewart v. Herten, 125 Neb. 210, 249 N. W. 552.

Want of jurisdiction of the subject matter of the ac-

tion is a defect which it is the duty of the court to notice, of its own motion, by dismissal of the action or other suitable action, at any stage of the proceedings. Lippincott v. Wolski, 147 Neb. 930, 25 N. W. 2d 747, 169 A. L. R. 1236. See, also, Stewart v. Herten, *supra*.

On appeal to the district court from the county court where the county court had no jurisdiction of the subject matter such appeal confers no jurisdiction upon the district court. In re Trust Estate of Myers, 151 Neb. 255, 37 N. W. 2d 228.

The appellant, Faye Lutcavish, asserts that the basic question for determination by this court is whether or not the county court had jurisdiction over the subject matter of the action, that is, to have and determine her claim against the estate of Maude C. Crane, deceased. The appellant assumes that it is the contention of the appellee, administrator of the estate of Maude C. Crane, deceased, that to determine the claim of the appellant required a construction of the will of Fred A. Crane, deceased.

The appellant contends: (1) That the determination of her claim filed in the county court against the estate of Maude C. Crane, deceased, does not require and does not involve a construction of the will of Fred A. Crane, deceased; (2) that if a construction of the will of Fred A. Crane, deceased, was necessary, the county court was not thereby excluded from jurisdiction over the claim; (3) that the appellee, administrator of the estate of Maude C. Crane, deceased, did not, in the county court, raise the issue of the construction of the will of Fred A. Crane, deceased, in his pleadings, but in fact therein admitted that the claimant was entitled to the residue of the estate of Fred A. Crane, deceased, remaining after the death of Maude C. Crane; and (4) that not only did the county court pleadings preclude construction of the will of Fred A. Crane, deceased, as an issue, but that issue had been previously foreclosed at the time of the final settlement of the Fred A. Crane estate, for the

reason that in the final decree entered in the Fred A. Crane estate the court construed the will for the benefit of Maude C. Crane, executrix, in carrying out the terms of the will and assigned the residue to Maude C. Crane "as by said Will provided and that if there should be any of said property or residue remaining at the time of the death of said Maude Crane, the said Faye Lutcavish shall be entitled thereto."

In Hahn v. Verret, 143 Neb. 820, 11 N. W. 2d 551, we said: "The construction of a will, in the probate court, for the information and benefit of the executor only in order to advise him what course to pursue adjudicates nothing beyond his rights and liabilities in the execution of his office. Controversies between adverse claimants under a devise or bequest or between the executor and persons claiming adversely to the estate will not be affected thereby."

As stated in Annable v. Ricedorff, 140 Neb. 93, 299 N. W. 373: "This jurisdiction was long ago committed to the doctrine: 'The construction of the will in such a case (in probate court) is for the information and benefit of such executor or administrator only, in order to advise him what course to pursue. It adjudicates nothing beyond his rights and liabilities in the execution of his office; controversies between adverse claimants under the devise or between the executor or administrator and persons claiming adversely to the estate, will not be affected thereby.'" See, also, Youngson v. Bond, 69 Neb. 356, 95 N. W. 700; Fisher v. Fisher, 80 Neb. 145, 113 N. W. 1004; Klug v. Seegabarth, 98 Neb. 272, 152 N. W. 385.

In DeWitt v. Sampson, 158 Neb. 653, 64 N. W. 2d 352, an action was started in the district court to have the will of Theodore C. Sampson construed. Certain residuary legatees of the estate of Laura Sampson, deceased, and spouses of some of the legatees were plaintiffs. The executor of the last will and testament of Laura Sampson, deceased, was also a plaintiff. The action was

brought against certain residuary legatees of the will of Theodore C. Sampson, deceased, defendants. The cause of action pleaded by the plaintiffs was to have the will of Theodore C. Sampson construed and, on the basis of the construction, to have title to what they contended to be the assets of the estate of Laura Sampson, deceased, quieted in them as legatees of the estate of Laura Sampson. Theodore C. Sampson died on October 15, 1937, and his estate was duly probated. At the time of the death of Theodore C. Sampson his estate consisted of lands and personal property. The lands were sold in accord with the powers granted by the provisions in the will. On October 17, 1952, Laura Sampson died testate and her will was probated in the county court. On her death, according to the petition, certain defendants named therein as residuary legatees of Theodore C. Sampson, made claim apparently in the county court against her estate for $31,950.66 which they asserted was due them as the residue under the provisions of the will of Theodore C. Sampson. The prayer of the petition was to have the will of Theodore C. Sampson construed. To the petition, a plea in abatement and a demurrer were filed, which were sustained. The court said: "The purport and effect of the plea in abatement and the demurrer is to say that the subject matter of appellants' pleaded cause of action is a claim by appellees against the estate of Laura Sampson, deceased, a matter over which the county court has exclusive jurisdiction. The appellants on the other hand have proceeded on the theory that since the rights, if any, which appellees had flowed from the will of Theodore C. Sampson the rights of all parties should be determined in an action in the district court. It was this contention which was determined adversely to appellants by the dismissals based on the plea in abatement and the demurrer. * * * More than a mere claim is involved here. The basic question involved is that of the rights of the parties to this action under the terms of the will of Theodore C.

Sampson, deceased. The determination of this question cannot be made except by a construction of that will. The only proper forum for that determination is the district court. * * * It must be said that the district court had jurisdiction of the cause of action pleaded, that the petition was not vulnerable to demurrer, and that therefore the action was erroneously dismissed."

The above-cited case is in point with the instant case on the jurisdictional question raised.

As we view the pleadings, the appellant asserts that Maude C. Crane had a life interest only in the estate of Fred A. Crane, deceased; that she was not privileged to convert any of the property of such estate to her own use or commingle the same with funds of her own and by doing so she wrongfully violated the rights of the appellant under the will of Fred A. Crane, deceased; and that the appellant is the owner of all of the residue after completion of the administration, subject only to the life use of Maude C. Crane. On the other hand, the appellee, by pleadings, asserts that the interest of Maude C. Crane was a life estate coupled with the power to sell and dispose of any of the property left under the will of Fred A. Crane for the purposes as stated therein; that she had a right to commingle the same with her own funds as long as the identity of the corpus of the residue was not lost; that she could use all or any part of the property for her wants, needs, and reasonable desires; and that upon the death of Maude C. Crane, the appellant would become the owner of such residue, if any, not consumed during the lifetime of Maude C. Crane for her support, maintenance, and comfort.

It appears from the pleadings of the respective parties that their contentions regarding the will of Fred A. Crane, deceased, and what it means, are adverse to each other to such an extent that the contentions of the parties can be resolved only by a construction of the will of Fred A. Crane, deceased.

Whatever interest the appellant Faye Lutcavish has,

she must establish under and by virtue of the will of Fred A. Crane, deceased. This estate has been probated, distribution made as provided by the will, and the estate settled. The estate in which Faye Lutcavish filed a claim is the intestate estate of the second wife of her father. Under the circumstances presented, we conclude that this is not a proper claim against the estate of Maude C. Crane, deceased. In the event the district court construes the will of Fred A. Crane, deceased, and finds that the appellant is entitled to certain property of that estate she then has a proper remedy at law to obtain it.

While it may appear that some language in the earlier decisions of this court might be in conflict with the later decisions of this court cited herein on this point of jurisdiction, suffice it is to say that for some considerable period of time this court has been committed to the rules announced heretofore in this opinion regarding the question of jurisdiction of the county court and the district court pertaining to wills.

For the reasons given herein, the judgment of the district court is affirmed.

AFFIRMED.

SIMMONS, C. J., dissenting.

I refer to the claimant herein as the plaintiff and to the administrator as the defendant.

The result of this decision is compounded confusion.

The confusion rests on two premises. The first is a failure to analyze and find the reason of a rule of law as a guide to its application. The second is a failure to confine the scope of the decision to the issue presented.

In the third full paragraph of the opinion the court states the plaintiff's claim is one based on the *conversion* of stocks and cash by deceased *in her lifetime.* The value of the property converted is claimed to be $2,204.28, being the value of stock and cash received by Mrs. Crane from the Fred A. Crane estate. Plaintiff alleges an indebtedness of $2,204.28 and prays for an al-

lowance of her claim for that *amount of money.* The issues were so treated in the county court and the claim allowed.

So the court starts off with a recognition of the fact that plaintiff's claim is one based on an alleged tort of the intestate during her lifetime and sought the payment of a money claim. So stated it is nothing more than a claim against an estate.

The court then quotes from three of our recent decisions. It then concludes that the allowance or disallowance of the claim calls for a construction of the will of Fred A. Crane, deceased, and that the district court, and not the county court, has original jurisdiction of that matter.

That would seem to decide the matter upon the issue presented to the trial court and presented here, which is that of jurisdiction of the subject matter. The issue is: What court had jurisdiction to construe the will?

The court goes further and in the second from the last paragraph of its opinion holds that "this is not a proper claim against the estate of Maude C. Crane, deceased." Here the court changes the issue to: "What does the will mean?" No reason is given for such a holding. Here the court, having concluded that the plaintiff at no time had her claim pending before a court having jurisdiction of the subject matter, and there never having been a trial of the issue on the merits of the claim presented, it then decides the issue on the merits and holds that plaintiff does not have a proper claim.

I fail to see where this court gets jurisdiction to decide that issue. It does it in a case in which it is first held that neither the county court nor the district court has jurisdiction of the subject matter.

The next sentence demonstrates that I have not misconstrued the court's opinion. It is: "In the event the district court construes the will of Fred A. Crane, deceased, and finds that the appellant is entitled to *certain property* of that estate she then has a proper remedy

at law to obtain it." (Emphasis supplied.) Here the court denies to the plaintiff an election of remedies, and makes an election for her.

The court construes the will to the extent of holding that it does not support a "proper claim" against the estate of Maude C. Crane. That was the issue that the county court held in favor of the plaintiff. The district court held that it did not have jurisdiction to decide that matter and dismissed the claim because both the county court and the district court had no jurisdiction of the subject matter.

This court affirms the lack of jurisdiction and then decides the issue of the merits of the claim and in favor of defendant.

The court goes further and suggests an original action in the district court to construe the will. The court does not suggest who are necessary parties to that proceeding, but presumably the defendant here should be a defendant there if he is to be bound by the construction of the will. That construction would be subject to appeal here. Obviously it would be limited to a determination of whether or not the plaintiff was "entitled to certain property" of the Fred A. Crane estate, for the question of whether the will can be construed to support "a proper claim" against the Maude C. Crane estate is made res judicata by this opinion.

Just as obviously when that action is ultimately decided plaintiff must bring a third action which would be "a proper remedy" to obtain "certain property." Just what that remedy is and what court has jurisdiction is left to the conjecture of the plaintiff.

It is also to be remembered that defendant both in the county court and the district court conceded the right of the plaintiff to the "residue" of the Fred A. Crane estate and by elaborate pleading traced part of the moneys into bonds which he held as administrator. So this court determines the issue largely in favor of the defendant while the subject matter at all times is held

to be without the jurisdiction of the court.

While this action has been pending, while the next action to construe the will will be pending, and then while the action to recover "certain property" is pending (each consecutively), the closing of the probate of the Maude C. Crane estate will be suspended "between the heaven and the earth," a result "sacrilegious in a court of conscience." Gilbert v. Provident Life and Trust Co., 1 Neb. (Unoff.) 282, 95 N. W. 488.

Since the days of the Magna Charta our judicial system has been dedicated to the denial of delays that result in the denial of justice.

It is because of the above considerations that I say the result of this decision is compounded confusion.

All of this can be avoided if we go back to examine, restate, and follow the considered opinions of this court on the matters of jurisdiction of the county court in probate matters and of the district court in law and equity matters.

The difficulty is that over a period of years the jurisdiction of the county court in this one respect has been diminished in our decisions by a slow process of decretion.

The established rule is: The word "claim" includes every species of liability which an executor or an administrator of an estate can be called upon to pay, or provide for payment, out of the general fund of the estate. Mueller v. Shacklett, 156 Neb. 881, 58 N. W. 2d 344.

I take it that there is no dispute that, on her theory of the construction of the will and her election of remedies, the plaintiff has a claim against the estate of Maude C. Crane. The dispute arises because that claim rests on language in a will long since probated and the estate which it controlled administered.

Here the basic issue is the determination of the rights of the plaintiff and Maude C. Crane under the will of Fred A. Crane. The important matter is the rights of

the parties. The incidental fact is that, *in this instance,* those rights are determined by language in a will. Had the identical right been created by a contract or any written instrument other than a will, no one would think to challenge the county court's jurisdiction to construe it as a foundation to allowing or disallowing the claim. The confusion arises because a will is involved and because of "some language" in our more recent decisions.

I have doubts if the rule relied on by the court has any application to a will that has been probated and the estate closed. But I prefer to meet the issue on the basis of the court's opinion.

I have searched for the reason for the rule to determine its applicability.

A proper understanding of the applicable rules requires that we begin with decisions antedating those cited by the court.

In Reischnick v. Rieger, 68 Neb. 348, 94 N. W. 156, we had an almost identical fact situation and issue presented. In that case the plaintiff was the administrator of the estate of a deceased beneficiary of a will. He represented the rights of the beneficiary. He sued the executor of the testator's will, praying for a construction of the will. The ultimate relief sought was the payment of one-eighth part of $450. The trial court construed the will and rendered judgment against the executor for $56.25 and costs. On appeal here the defendant contended that the subject matter of the suit was within the exclusive original jurisdiction of the county court and that the district court was without jurisdiction. We affirmed that contention. We held that: "* * * the decree is a construction of the will, and an order for distribution of a part of the estate of the testator. The assignment of the estate of a decedent is peculiarly a probate matter, and section 289, chapter 23, Compiled Statutes (Annotated Statutes, 5154) (now as amended section 30-1302, R. R. S. 1943), expressly provides for a

decree therefor by the county court. That the construction of a will is also a probate matter is equally clear, because a construction of the will, when there is one, is necessarily involved in such decree. That being true, the question arises whether the original jurisdiction of the county court in such matters is exclusive. Article 6, section 16, of the constitution gives the county court original jurisdiction in all probate matters. Such jurisdiction is exclusive. Section 3, chapter 20, Compiled Statutes (Annotated Statutes, § 4787) (now section 24-503, R. R. S. 1943). In such matters it is a court of general jurisdiction. * * * Within its exclusive jurisdiction, its chancery powers are plenary. * * *.

"It seems to us, from the constitutional and statutory provisions quoted, taken in connection with the cases cited, the conclusion is irresistible that, on the case stated, the district court was without original jurisdiction. It is true, as has been urged by counsel, that it has been the practice in this state to invoke the original jurisdiction of the district court for the construction of wills, and the practice appears to have been recognized by this court. But we are aware of no case in which this court held that the district court has original jurisdiction in such actions, nor in which the question was squarely raised. We do not wish to be understood, however, as holding that the district court has no jurisdiction, under any circumstances, to construe a will. On the contrary, we can readily conceive of actions of which the *district court has original jurisdiction*, wherein the construction of a will *would be necessarily involved*. But in an action involving only matters of which the county court, as a court of probate, has jurisdiction, such jurisdiction is exclusive, and the district court can acquire jurisdiction only by appeal." (Emphasis supplied.) The above is one of the earlier decisions which the court brushes aside.

Youngson v. Bond, 64 Neb. 615, 90 N. W. 556, was an action brought in district court by an administrator with

the will annexed against the widow and heirs of the testator. It was an action to reform a will and to quiet title to real estate. The question of jurisdiction of the subject matter was raised. The construction of the will was involved. The trial court rendered judgment reforming the will and quieting title in the administrator. We reversed and dismissed the cause. On rehearing it was contended that the action was one for the construction of a will and hence was within the original jurisdiction of the district court. We denied that contention in Youngson v. Bond, on rehearing, 69 Neb. 356, 95 N. W. 700. We held: "It is well settled that the county court has full and complete equity powers as to all matters within its exclusive jurisdiction. Clothed with these powers, its authority to construe a will, when necessary to enable its officers to settle an estate properly, is as clear as its authority to set aside on equitable grounds an order admitting a will to probate. Is its jurisdiction in such a case exclusive? This, we think, must depend upon the purpose and end of the proceeding. Where a suit in equity is to be regarded as part of the proceedings for settlement of the estate of a deceased person and has no further object than *to procure or advance such settlement,* it must be brought in the county court. *The obvious purpose of the statute is to give all powers necessary to complete and speedy settlement of estates to one court, and to require all proceedings toward that end to be brought in that court in the first instance.* To permit a concurrent equity jurisdiction, as to such proceedings, in the district court, in view of the principle that a court of equity which has acquired jurisdiction for one purpose will hold it for all purposes so far as necessary to give complete relief and render a full decree covering the whole controversy, would be very likely to lead us back little by little to the old time suits for administration. (In this connection see 19 Am. Jur., Equity, § 172, p. 156; 30 C. J. S., Equity, § 61, p. 404-410; 4 Pomeroy's Equity Jurisprudence (5th Ed.), § 1155, p.

461.) *For these reasons, we think a suit by an administrator with the will annexed for construction of the will, in order to enable him to administer the estate properly, is not maintainable in the first instance in the district court.* Such a suit is in reality a part of the proceedings for settlement of the estate. It is very different from a suit by trustees under a will, after settlement of the estate, to obtain a construction of the provisions of the will relating to their trust. Such a suit is not in any sense a part of the settlement of the estate. The district court has undoubted jurisdiction over such a trust, whether to enforce it, to give directions for its execution, or to appoint new trustees. Hence its power to construe the instrument creating the trust is clear. With respect to the administrator with the will annexed pending settlement of the estate, the case is entirely distinct. The estate is not before the district court for settlement, nor can it come before that court except by appeal. Hence that court ought not to be giving directions to the officer of another court, how to administer an estate in the other court, except as its appellate jurisdiction is invoked." (Emphasis supplied.) The syllabus points were: Where a suit in equity is to be regarded as part of the proceedings for settlement of the estate of a deceased person, it must be brought in the county court, which has exclusive original jurisdiction of such matters. Hence a suit by an administrator with the will annexed for construction of the will in order to enable him to administer the estate properly is not maintainable in the first instance in the district court.

The above case is cited by the court in the instant case but no quotes are taken from it. It is another one of those "earlier decisions" that is put aside.

In both of these above decisions it will be noted that we recognized that there were cases within the original exclusive jurisdiction of the district court where the construction of a will was necessarily involved.

This is pointed up by our decision in Fisher v. Fisher, 80 Neb. 145, 113 N. W. 1004, again cited but not quoted from by the court in the instant case. That was an action brought in the district court to partition real estate. The answer turned upon the construction of a will. It was contended that the county court had jurisdiction to hear and determine the issue. Reischick v. Rieger, *supra,* and Youngson v. Bond, 69 Neb. 356, 95 N. W. 700, were relied on. We denied the contention holding: "It is the rule, doubtless, that the county court has jurisdiction in an action by the executor to construe a will for the purpose of affording information to the executor for the administration of the estate, but the principal action here is to partition the land. *The construction of the will is only incidental to the main relief sought.* It is quite clear that the county court could not have jurisdiction in an action to partition the land, and, we think, it is likewise clear that it would not have jurisdiction of an action for the construction of a will between two or more heirs or devisees claiming title to the same tract of land." (Emphasis supplied.) This case also is one of the "earlier decisions" that is now brushed aside.

In this connection see, also, Gotchall v. Gotchall, 98 Neb. 730, 154 N. W. 243, where we held, in an action to *declare a trust* and to determine the rights and duties of the trustee, that the "construction of the will is only incidental to the real purpose of the action" and that the county court was without jurisdiction to determine the issues.

The above decisions, then, lay down the basis of these rules:

When the nature of a proceeding is such that it falls within the original jurisdiction of the county court, that court has the power to construe a will as an incident to the exercise of its jurisdiction.

When the nature of a proceeding is such that it falls within the original jurisdiction of the district court, that

court has the power to construe a will as an incident to the exercise of its jurisdiction.

The rule is stated that: "In the absence of statutory provision therefor, courts of equity generally have no power to construe wills, except as incident to their jurisdiction over trusts, or where other recognized grounds of equity jurisdiction exist." 96 C. J. S., Wills, § 1075, p. 741.

I have analyzed those decisions called to our attention by counsel and our own research. They show that where the court has held that the district court had original jurisdiction to construe a will, it has been done in cases involving trusts or other recognized grounds of equity jurisdiction.

The three decisions relied on by the court for quotations all fall into the above classification. Hahn v. Verret, 143 Neb. 820, 11 N. W. 2d 551, was an action to quiet title. Annable v. Ricedorff, 140 Neb. 93, 299 N. W. 373, was an action in partition. DeWitt v. Sampson, 158 Neb. 653, 64 N. W. 2d 352, was an action to quiet title.

The construction of a will in the above cases was, as we said in Fisher v. Fisher, *supra,* "incidental to the main relief sought." St. James Orphan Asylum v. Shelby, 75 Neb. 591, 106 N. W. 604, was an action to quiet title. Fisher v. Fisher, *supra,* was an action in partition. Klug v. Seegabarth, 98 Neb. 272, 152 N. W. 385, cited but not quoted by the court, was an action to have a specific bequest declared a lien upon real estate; Mohr v. Harder, 103 Neb. 545, 172 N. W. 753, was an action in partition; Abbott v. Wagner, 108 Neb. 359, 188 N. W. 113, was an action to impress a trust upon a residuary estate; Krause v. Krause, 113 Neb. 22, 201 N. W. 670, was an action in partition; Merrill v. Pardun, 125 Neb. 701, 251 N. W. 834, was an action to declare and enforce a trust; In re Estate of Stieber, 139 Neb. 36, 296 N. W. 336, was an action in partition; Jones v. Shrigley, 150 Neb. 137, 33 N. W. 2d 510, was an action to quiet title and for specific performance; In re Trust Estate of

Myers, 151 Neb. 255, 37 N. W. 2d 228, involved the disposition of a trust estate; and Jacobsen v. Farnham, 155 Neb. 776, 53 N. W. 2d 917, 33 A. L. R. 2d 543, was an action to quiet title.

The above cases, in result, are in full accord with the rule that the district court has jurisdiction to construe a will as an incident to the exercise of its equity jurisdiction.

The effect of our decisions is that we have limited the original jurisdiction of the district court to construe wills to those cases where the construction of the will is *an incident* to the exercise of its original jurisdiction.

It is also patent that the court in its "earlier decisions" started on the theory that the construction of a will by the district court exercising its original jurisdiction was in the nature of an exception to the rule that the county court in the exercise of its probate power had that jurisdiction generally.

Such is the fair import of our decision in Reischick v. Rieger, *supra,* quoted above, where we held that we could "conceive of actions" where the district court had original jurisdiction. In Abbott v. Wagner, *supra,* we held the action involving a trust maintainable in district court "*even* though it involves a construction" of a will. (Emphasis supplied.)

In Andersen v. Andersen, 69 Neb. 565, 96 N. W. 276, we held: "It is true that the district court has jurisdiction in equity of actions to construe wills, in cases where a trust relation exists by reason of the terms of the instrument itself * * * and to determine the rights of parties thereunder; while the county court has exclusive original jurisdiction in the probate and contest of wills, and in their construction for the purposes of administration *and settlement of estates.*" (Emphasis supplied.)

Pomeroy states the Nebraska position as follows: "In the states of the second class (including Nebraska), the jurisdiction of the probate courts over everything pertaining to the regular administration and settlement of

decedents' estates is virtually exclusive. The equitable jurisdiction over the subject is neither concurrent nor auxiliary and corrective. It exists only in matters which lie outside of the regular course of administration and settlement, which are of purely equitable cognizance, and which do not come within the scope of the probate jurisdiction." 4 Pomeroy's Equity Jurisprudence (5th Ed.), § 1154a, p. 455.

In Youngson v. Bond, 69 Neb. 356, 95 N. W. 700, the major premise of the decision was: "Where a suit in equity is to be regarded as part of the proceedings for settlement of the estate of a deceased person and has no further object than *to procure or advance such settlement,* it must be brought in the county court." The minor premise was: "* * * a suit by an administrator with the will annexed for construction of the will, in order to enable him to administer the estate properly, is not maintainable in the first instance in the district court." (Emphasis supplied.)

The difficulty in our decisions is that in applying Youngson v. Bond, 69 Neb. 356, 95 N. W. 700, we have largely overlooked the broad scope of the major premise and have taken the minor premise as the rule of the case. We have in some of our decisions restricted the rule of the minor premise by making it the exclusive rule for the jurisdiction of the county court to construe a will.

In Fisher v. Fisher, *supra,* we stated the minor premise as the rule. In In re Estate of Buerstetta, 83 Neb. 287, 119 N. W. 469, we said: "It is *conceded* that the authority of the county court in actions to consider wills is *confined* to the purpose of giving necessary and proper directions to an executor so that he may effectually execute the intentions of the testator * * *." (Emphasis supplied.)

In Merrill v. Pardun, *supra,* we stated a rule, applicable to that case, that the county court had "no jurisdiction to construe wills to determine rights of devisees or legatees as between themselves, * * *."

In In re Estate of Gibson, 130 Neb. 278, 264 N. W. 762, we stated the rule to be that the county court had original jurisdiction to construe wills insofar as it is necessary to enable the personal representatives of the decedent to properly administer decedent's estate.

In Austin v. Austin, 147 Neb. 109, 22 N. W. 2d 560, we held that: "The construction of the devise by a probate court is *solely* for the guidance of the legal representatives of the estate, * * *." (Emphasis supplied.)

In Klug v. Seegabarth, *supra,* we stated a rule more nearly in accord with the rule of the major premise in Youngson v. Bond, 59 Neb. 356, 95 N. W. 700. It is: "Where the purpose of the proceeding is (1) to further administration or settlement of the estate, (2) to construe a will for the guidance of the executor or administrator, then the only court having original jurisdiction is the county court; * * *." ((1) and (2) supplied by me.)

Certainly where a claim is filed for the payment of money, the determination of whether it is a valid claim in whole or in part is a necessary proceeding to further the administration and settlement of the estate.

In In re Estate of Mattingly, 131 Neb. 891, 270 N. W. 487, we held: "Although the county court, as a court of probate, has exclusive original jurisdiction as to all matters of probate, and in allowing claims it does so generally as in a civil law action, still the county court while so acting by virtue of its plenary powers in probate matters has power to try and determine matters of an equitable character in connection with such law matters and grant equitable relief to the same extent as the district court has in the exercise of its general equitable jurisdiction."

The allowance or disallowance of a claim against an estate is one of the first duties of the county court in a probate proceeding. In the performance of that duty, the county court has full authority to construe the will. The county court had jurisdiction of the subject matter

of this claim and full authority to adjudicate it. The district court likewise had jurisdiction on appeal.

The court holds that the plaintiff's remedy is to proceed in district court in an original action and there secure a construction of the will and a determination only of her rights to "certain property."

The difficulties with this position are many. It makes the construction of the will the primary, and not the incidental, matter for decision. We have approved the rule: " 'There must be some contest or controversy of which *equity* will take jurisdiction, which necessitates a construction of a will, before the interpretation will be made.' " Price v. Shiels, 149 Neb. 330, 31 N. W. 2d 91. (Emphasis supplied.)

The district court does not have original jurisdiction to allow or disallow claims against estates. We have directly held: The district courts of this state have no original jurisdiction to allow claims against the estate of a decedent or to order the payment of such claims out of funds in the hands of the administrator. Craig v. Anderson, 3 Neb. (Unoff.) 638, 92 N. W. 640. This was approved in Rehn v. Bingaman, 151 Neb. 196, 36 N. W. 2d 856.

By the finding made herein this rule is avoided, for plaintiff's only remedy now is to sue somebody for "certain property."

The allowance of the claim is the primary relief sought by the plaintiff. The original jurisdiction of the county court and the lack of original jurisdiction of the district court to allow or disallow the claim brings this matter clearly within the jurisdiction of the county court and the district court on appeal. The county court has the power to construe the will as an incident to the exercise of its original jurisdiction to allow or disallow claims. I would so hold.

CHAPPELL and WENKE, JJ., concurring.

We agree with the majority opinion. This concurrence is filed to respectively alleviate any misconcep-

tions that may be engendered by the dissent filed in this case.

This purported claim against the estate of Maude C. Crane, deceased, involves a construction of the will of Fred A. Crane, deceased, to determine the nature and extent of the property rights of the parties in the action under such will. It is a controversy between adverse claimants, Faye Lutcavish and Maude C. Crane, who were devisees or legatees under the same will, which is foreign to the estate of Maude C. Crane. It involves no question pertaining to any function lodged exclusively in the county court. If the purported claim of Faye Lutcavish was based on conversion by Maude C. Crane during her lifetime, that issue depends upon construction of the will of Fred A. Crane, and an accounting of the funds and property involved. The question to be finally determined is the meaning of the will of Fred A. Crane and the respective rights of Faye Lutcavish and the representative of Maude C. Crane as between themselves under that will.

If the funds and property involved belong to Faye Lutcavish, as contended, and not to the estate of Maude C. Crane, it is no part of Maude C. Crane's estate and the administrator thereof wrongfully has it in his possession. If this be true, it can afford no basis for a claim against Maude C. Crane's estate. This is not a case wherein the county court had original jurisdiction to construe a will of Maude C. Crane insofar as necessary to enable her executor or administrator to properly administer her estate.

The proper action in the situation at bar is a suit by Faye Lutcavish in the district court to interpret the will of Fred A. Crane and recover a judgment for the amount found due, if any, upon an accounting against the party or parties wrongfully withholding from her the funds and property to which she is allegedly entitled by the will of her father, Fred A. Crane, which will is foreign to and not any part of Maude A. Crane's estate.

The district court, under the cases cited in the majority opinion, has exclusive jurisdiction of such an action. Also, in that connection, a careful analysis of the cases relied upon in the dissent do not justify any other conclusion.

The dissent seems to infer that original jurisdiction of the county court can be sustained by the use of terminology which makes it appear to be a claim against the estate of Maude C. Crane. In that connection, courts will look through form to the substance of an action in determining jurisdiction.

The dissent also appears to rely upon the alleged fact that unreasonable expense and delay of decision will follow because Faye Lutcavish first invoked the powers of the county court, therefore we should conclude that such court had original jurisdiction. It is fundamental that jurisdiction depends solely upon the nature of the cause of action and not upon economic or sociological grounds.

We cannot agree that the general power of the county court to allow or disallow claims against an estate being administered by a county court authorizes such court to determine the respective rights of a devisee or legatee and the representative of another devisee or legatee who are adverse claimants as between themselves under the same will in another estate which has long since been closed. The claims over which the county court has jurisdiction are those for which Maude C. Crane was liable in her lifetime and those accruing after her death for which her estate is liable by statute. The construction of the will of Fred A. Crane and a determination of the respectively alleged rights of Faye Lutcavish and Maude C. Crane under it are clearly matters within the exclusive jurisdiction of the district court. It involves nothing pertaining to the administration of the estate of Maude C. Crane, a proceeding which is admittedly within the exclusive jurisdiction of the county court.

ROBERT D. BENEDICT, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.
89 N. W. 2d 82

Filed March 28, 1958. No. 34278.

1. **Indictments and Informations.** An information must inform the accused, with reasonable certainty, of the charge being made against him in order that he may prepare his defense thereto and also be able to plead the judgment rendered thereon as a bar to a later prosecution for the same offense.
2. ———. The information must expressly and directly state each fact that is an essential element of the crime intended to be charged so that the accused will not be required to go beyond the information to learn the nature of the charge against him or the issue he must meet. It cannot be aided by intendment, by anything stated therein by way of mere recital, or by inference or implication.
3. ———. In charging the commission of an offense in an information it is not necessary that the exact words of the statute be used, provided the words employed are the equivalent in meaning of those contained in the statute.
4. ———. It shall be sufficient in any information, where it shall be necessary to allege an intent to defraud, to allege that the party accused did the act with intent to defraud without alleging an intent to defraud any particular person or body corporate.
5. **Appeal and Error.** This court takes 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, or as extended by the trial judge or this court.
6. ———. A trial judge is without authority to settle and allow a bill of exceptions not prepared in the manner and within the time fixed by the statute.
7. ———. In the absence of a bill of exceptions there is no question of fact determined by the district court for review in this court and no question will be considered here, a determination of which necessitates an examination of evidence produced in the trial court.

ERROR to the district court for Douglas County: JAMES T. ENGLISH, JUDGE. *Affirmed.*

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

Clarence S. Beck, Attorney General, and *John E. Wenstrand*, for defendant in error.

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

WENKE, J.

This is an error proceeding from the district court for Douglas County. In an amended information therein filed on March 26, 1957, it was charged, insofar as here material, that: "* * * on or about the 18th day of February in the year of our Lord one thousand nine hundred fifty-six ROBERT D. BENEDICT * * * did, with the intent to defraud, utter or publish as true and genuine, a false, forged, and counterfeited check for the payment of money, which bank check was of the following tenor, towit:

WESTERN FLAVOR SEAL COMPANY

No. 15409

OMAHA, NEBR., February 15, 1956 27-6

1040

PAY	$92 and 71 cts	$92.71
	WESTERN FLAVOR SEAL COMPANY	
TO THE ORDER OF	Thomas F. Bradley 3820 Dodge St. Omaha, Nebraska	R. T. Caldwell G. D. Devereaux

the said defendant, ROBERT D. BENEDICT, well knowing said check to be false, forged, and counterfeited, contrary to the form of the Statutes in such cases made and provided, * * *." A jury found the defendant guilty of the charge made against him and, after his motion for a new trial had been overruled on May 10, 1957, he was sentenced by the court to serve a term of 7 years in the State Penitentiary. Defendant thereafter filed a petition in error in this court on June 7, 1957. We shall herein refer to the petitioner in error as the defendant.

Defendant claims the information does not state a

cause of action in that it does not charge that the instrument was published with the intent to prejudice, damage, or defraud any person or persons, party politic or corporate.

The statute, under and pursuant to which the charge was made, provides, insofar as here material, that: "* * * whoever shall utter or publish as true and genuine or cause to be uttered or published as true and genuine or shall have in his possession with intent to utter and publish as true and genuine, any of the above-named false, forged, counterfeited, falsely printed or photographed matter, above specified and described (which includes a check for the payment of money), knowing the same to be false, altered, forged, counterfeited, falsely printed or photographed, with intent to prejudice, damage or defraud any person or persons, body politic or corporate, * * *." § 28-601, R. R. S. 1943.

The defendant contends that since this statute requires that the instrument be uttered "with intent to prejudice, damage or defraud any person or persons, party politic or corporate" and since the amended information fails to set out these essential elements of the crime charged it therefore fails to charge a crime, is void, and gives the court no jurisdiction in regard thereto. It will be noted that the information does not specifically name any person or persons, body politic or corporate that the defendant was intending to defraud by uttering or publishing the forged check nor does it include the words "prejudice" and "damage" in charging what were his intentions in uttering or publishing the check.

We said in May v. State, 153 Neb. 369, 44 N. W. 2d 636, that: "An information must inform the accused with reasonable certainty of the charge against him that he may prepare his defense and be enabled to plead the judgment thereon as a bar to a later prosecution for the same offense. * * * It must state expressly and directly each fact that is an essential element of the crime intended to be charged so that the accused will not

be required to go beyond the information to learn the nature of the charge against him or the issue he must meet, and it cannot be aided by intendment, by anything stated therein by way of mere recital, or by inference or implication."

It will be noted that the words used in the statute dealing with the intent with which a false, forged, or counterfeited check for the payment of money is uttered or published as true and genuine by anyone knowing the same to be false, forged, or counterfeited, are in the disjunctive so that the use of any one thereof to describe the intent with which the act was done would be sufficient.

Black's Law Dictionary (1891 Ed.) includes, in its definition of these words, the following:

Damage—"Loss, injury, or deterioration, caused by the * * * design * * * of one person to another, in respect of the latter's person or property." P. 315.

Prejudice—"* * * means injury, loss, * * *." P. 928.

Defraud—"* * * to deprive a person of property or any interest, estate, or right by fraud, deceit, or artifice." P. 347.

It thus becomes evident that the use of the word "defraud" would include the meaning of the word "damage" and also "prejudice" as used in the statute. In Whitman v. State, 17 Neb. 224, 22 N. W. 459, we said: "In charging the commission of an offense in an indictment, it is not necessary that the exact words of the statute be used, provided the words employed are the equivalents in meaning of those contained in the statute." And in Peterson v. State, 64 Neb. 875, 90 N. W. 964, we said: "An information which charges in the language of the statute, or in words equivalent thereto, the commission of an offense as therein denounced, is sufficient, and such information is invulnerable to a demurrer."

Section 29-1506, R. R. S. 1943, provides: "It shall be sufficient in any indictment where it shall be necessary to allege an intent to defraud, to allege that the

party accused did the act with intent to defraud without alleging an intent to defraud any particular person or body corporate, and on the trial of any such indictment, it shall not be necessary to prove an intent to defraud any particular person, but it shall be sufficient to prove that the party accused did the act charged with intent to defraud."

In Davis v. State, 58 Neb. 465, 78 N. W. 930, we held that: " 'It shall be sufficient in any indictment, where it shall be necessary to allege an intent to defraud, to allege that the party accused did the act with intent to defraud, without alleging an intent to defraud any particular person or body corporate.' * * *."

Section 29-1604, R. R. S. 1943, provides: "The provisions of the criminal code in relation to indictments, and all other provisions of law, applying to prosecutions upon indictments to writs and process therein, and the issuing and service thereof, to motions, pleadings, trials and punishments or the execution of any sentence, and to all other proceedings in cases of indictments, whether in the court of original or appellate jurisdiction, shall in the same manner and to the same extent, as nearly as may be, apply to informations, and all prosecutions and proceedings thereon."

In view of what we have hereinbefore said and held, we find defendant's contention that the amended information does not charge a crime under section 28-601, R. R. S. 1943, to be without merit.

The defendant also contends the evidence adduced by the State is insufficient to sustain his conviction because it fails to meet the rule laid down in such a case by this court in Berg v. State, 157 Neb. 863, 61 N. W. 2d 837. Therein we held that: "The rule is that to sustain a conviction for forgery it is not sufficient to show that the signature is not that of the party whose name is used, but it must also affirmatively be shown that the signing was made without his authority." See, also, Crawford v. State, 164 Neb. 231, 82 N. W. 2d 1.

Since this contention raises a question of fact we must first determine whether or not we have a proper bill of exceptions for, as stated in Burke Lumber & Coal Co. v. Anderson, 162 Neb. 551, 76 N. W. 2d 630: "This court takes 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." See, also, Neighbors & Danielson v. West Nebraska Methodist Hospital, 162 Neb. 33, 74 N. W. 2d 854; Bryant v. Greene, 163 Neb. 497, 80 N. W. 2d 137; Gernandt v. Beckwith, 160 Neb. 719, 71 N. W. 2d 303; Bednar v. Bednar, 146 Neb. 726, 21 N. W. 2d 438. As stated in Bryant v. Greene, *supra:* "A trial court is without authority to settle and allow a bill of exceptions not prepared in the manner and within the times fixed by the statute."

Section 24-342, R. R. S. 1943, insofar as here material, provides: "It shall be the duty of the reporter to deliver to the party requesting it or his attorney of record such transcribed copy of the proceedings therein, including all remarks of the court made in the presence of the jury * * * in criminal cases within forty days from the time petition in error is filed in the Supreme Court, unless such time is extended by order of court."

Section 29-2020, R. R. S. 1943, which relates to procedure in criminal cases, provides that: "* * * the taking, preparing, signing, and sealing of such bill shall be governed by the rules established in such matters in civil cases."

Sections 25-1140 to 25-1140.07, R. R. S. 1943, establish the rules governing bills of exception in civil cases. In Neighbors & Danielson v. West Nebraska Methodist Hospital, *supra,* we fully discussed, analyzed, and laid down the application of these rules.

The defendant's petition in error was filed in this court on June 7, 1957. Thereafter, on July 9, 1957, defendant obtained the following order from the judge who tried the case: "IT IS HEREBY ORDERED that

the defendant be and hereby is allowed forty days from the 9th of July, 1957 to *prepare and serve* a Bill of Exceptions in the above entitled cause." (Emphasis ours.) The official court reporter's certificate shows the preparation of the bill of exceptions was completed on Saturday, August 17, 1957, it was received from the reporter by defendant's attorney on Monday, August 19, 1957, and it was served on the attorneys for the State on Monday, August 19, 1957. It was returned by the State's counsel on Monday, August 19, 1957, and settled by the trial judge on Wednesday, August 21, 1957.

The following principles from Neighbors & Danielson v. West Nebraska Methodist Hospital, *supra,* have application here:

"* * * 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. * * * 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."

"* * * 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."

"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."

"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. * * * These limitations as to time are mandatory and they may not be waived."

"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."

"Any attempt to allow a bill of exceptions 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."

We made it abundantly clear in Neighbors & Danielson v. West Nebraska Methodist Hospital, *supra,* that each step in the preparation, serving, return, and settlement of a bill of exceptions must be done within the time provided therefor by statute or order of the judge who tried the cause and that a failure to do so left the trial judge without authority to settle and allow it.

In view of when the petition in error was filed here the official court reporter had until July 17, 1957, in which to prepare the bill of exceptions. This she did not do. However, in the meantime defendant obtained the order hereinbefore set forth and by which he and this court are now bound. Considering the fact that the statute provides 10 days for serving the bill of exceptions, which cannot be waived by either party, this order, since it included time for serving, left only 30 days from July 9, 1957, or to August 8, 1957, for the official court reporter to prepare and certify the bill of exceptions. This the record shows she failed to do. In view thereof the trial judge was without authority to allow and settle the bill of exceptions.

We held in Bryant v. State, 153 Neb. 490, 45 N. W. 2d 169: "In the absence of a bill of exceptions there is no question of fact determined by the district court for review in this court, and no question will be considered here, a determination of which necessitates an examination of evidence produced in the trial court."

Having come to the conclusion that defendant's contentions are either without merit or not here for our consideration, we affirm the judgment of the trial court.

AFFIRMED.

YEAGER, J., participating on briefs.

EVERETT P. SAWYER, APPELLANT, V. JOHN A. KUNKEL, APPELLEE.

88 N. W. 2d 906

Filed March 28, 1958. No. 34286.

1. **Appeal and Error.** A bill of exceptions in a case tried in the district court must be authenticated by the certificate of the clerk thereof and filed in the office of the clerk of the district court before it may be considered in the Supreme Court.
2. ———. This court will, on its own motion, refuse to consider a bill of exceptions when it is not authenticated as such by the certificate of the clerk of the district court and not filed in the office of such clerk.
3. ———. A bill of exceptions must be filed in this court on or before the time the case is submitted if it is to be considered by this court, unless, for good cause shown, the court by order permits its filing thereafter.
4. ———. In the absence of a bill of exceptions it is presumed that an issue of fact presented by the pleadings was established by the evidence, that it was correctly decided, and the only issue that will be considered on appeal is the sufficiency of the pleadings to support the judgment.

APPEAL from the district court for Lincoln County: ISAAC J. NISLEY, JUDGE. *Affirmed.*

Halligan & Mullikin and *Baskins & Baskins,* for appellant.

Beatty, Clarke, Murphy & Morgan, Donald W. Pederson, and *Frank E. Piccolo, Jr.,* for appellee.

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

CARTER, J.

Plaintiff sued to recover damages for injuries sustained in an automobile accident which occurred at a street intersection in North Platte, Nebraska. At the close of plaintiff's evidence the trial court sustained a motion for a directed verdict and dismissed the action. The plaintiff has appealed.

We are required to take notice of the fact that there is no proper bill of exceptions filed in this case. The record shows that the plaintiff failed to have the bill of exceptions authenticated by a certificate of the clerk of the district court, as required by section 25-1922, R. R. S. 1943, and filed in the office of the clerk of the district court, as required by section 25-1140.06, R. R. S. 1943. In Wabel v. Ross, 153 Neb. 236, 44 N. W. 2d 312, this court said: "A transcript of the proceedings at the trial to constitute a bill of exceptions must be settled as provided by statute and 'filed with the papers in the case' in the office of the clerk of the district court where the case was brought and prosecuted. § 25-1140.06, R. R. S. 1943. If it is desired to use the original bill of exceptions in this court, it is indispensable that it be authenticated by a certificate of the clerk of the district court. § 25-1922, R. R. S. 1943. It was many years ago determined, has since been frequently repeated, and quite recently reiterated that a bill of exceptions in a case tried in the district court must be authenticated by the certificate of the clerk of such court to entitle it to be considered in the Supreme Court. If a purported bill of exceptions has not been so authenticated, its contents will not be examined or considered by this court for any purpose. Martin v. Fillmore County, 44 Neb. 719, 62 N. W. 863; Romberg v. Fokken,

47 Neb. 198, 66 N. W. 282; Bednar v. Bednar, 146 Neb. 726, 21 N. W. 2d 438; Ratay v. Wylie, 147 Neb. 201, 22 N. W. 2d 622."

The record shows further that the plaintiff failed to file the purported bill of exceptions in this court prior to the submission of the case, in accordance with Rule 7d, Rules of Practice in the Supreme Court, which provides: "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." The meaning of this rule is that a bill of exceptions must be filed in this court on or before the time of the submission of the case and it may be filed at any time prior to such submission. A bill of exceptions is a record of the district court. It is fundamental that this court cannot consider any record of the district court on appeal that is not filed in this court within the time provided, or, in a proper case for good cause shown, within the time permitted by order of this court.

The practice is firmly established in this state, and consistently adhered to, that this court will on its own motion refuse to consider a document purporting to be a bill of exceptions which has not been authenticated and filed in accordance with applicable statutes and the rules of this court. Wabel v. Ross, *supra;* Neighbors & Danielson v. West Nebraska Methodist Hospital, 162 Neb. 33, 74 N. W. 2d 854; Bryant v. Greene, 163 Neb. 497, 80 N. W. 2d 137. We are required to hold that there is no bill of exceptions before us which can be considered on this appeal for any purpose.

In the absence of a bill of exceptions the only question remaining is whether or not the pleadings support the judgment. Wabel v. Ross, *supra.* It will be presumed in such a case that the issues of fact raised by the pleadings were sustained by the evidence and that they were correctly determined. The pleadings in this case

are sufficient to support the judgment and the judgment of the district court is affirmed.

AFFIRMED.

DOROTHY R. BAKER, APPELLANT, V. ROBERT F. BAKER, APPELLEE.
89 N. W. 2d 35

Filed March 28, 1958. No. 34316.

1. Divorce. Where the evidence in a divorce action establishes adultery on the part of one of the parties thereto, the court is required to grant the prayer of the other party seeking a divorce on that ground unless prevented from doing so by applicable statutory provisions.
2. ———. Where a wife is found to be guilty of adultery she is ordinarily an unfit person to have the care and custody of her minor children as against the husband she has wronged.
3. ———. Where adultery by a wife is established, she is not entitled to an award of alimony and ordinarily will not be allowed an attorney's fee or an award of costs.
4. ———. Our holdings in Speck v. Speck, 164 Neb. 506, 82 N. W. 2d 540, and Yost v. Yost, 161 Neb. 164, 72 N. W. 2d 689, are modified to the extent that they are in conflict with this opinion.

APPEAL from the district court for Custer County: ELDRIDGE G. REED, JUDGE. *Affirmed.*

Stewart & Stewart, for appellant.

Wagener, Marx & Galter and *Lee & Huston,* for appellee.

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

CARTER, J.

Plaintiff, Dorothy R. Baker, brought suit for divorce against the defendant, Robert F. Baker. The defendant denied generally the petition of the plaintiff and filed a cross-petition praying that a divorce be granted to him. The trial court denied plaintiff's petition and granted a

divorce to the defendant on his cross-petition. The custody of the three minor children was granted to the defendant. A division of the property owned by the parties was made and alimony was denied. From the decree so providing, the plaintiff has appealed.

The evidence shows that the parties were married on June 2, 1946. Three children were born to the marriage: Lesley Jean, a daughter 9 years old, Randall Fred, a son 5 years old, and Robin Rae, a daughter 4 years old. The plaintiff alleged nonsupport and cruelty as grounds for divorce. In his cross-petition the defendant charged the plaintiff with numerous clandestine relations with other men, including adultery, as grounds for divorce. It was upon these issues that the case was tried.

The parties resided in Broken Bow, Nebraska, following their marriage. Defendant was engaged in the business of photography. In May 1955, they sold their home and business and purchased a resort in Minnesota. The venture was not a success and they returned to Broken Bow in October 1955. Being in financial distress they moved in with plaintiff's parents. Each sought and obtained employment. Plaintiff worked in Broken Bow and defendant in Des Moines during the times important here. By an arrangement between themselves each was to make payments on specified obligations of the parties. The defendant did so to the full extent of his means. The relationship of the parties appears to have been very harmonious until April 28, 1956, when plaintiff wrote the defendant that she would not live with him again. The charge of nonsupport is not sustained by the record, the funds earned by the defendant having been expended in accordance with the mutual understanding of the parties. The allegations of cruelty are not sustained by the evidence, but even if they were, the evidence shows a condonation of the acts of the defendant alleged to constitute cruelty.

The evidence is sufficient to sustain the granting of a divorce to the defendant. The record shows that plain-

tiff was drinking intoxicating liquor to excess. She engaged in many indiscretions with other men, particularly with one man named in the record. They are established by the evidence of several reliable witnesses. While there were no eyewitnesses to any act of adultery, a court would be naive, indeed, if it did not conclude from the evidence in the record that plaintiff was guilty of that offense against the marriage relation. A recitation of the lurid facts recited in evidence would serve no useful purpose in this opinion. The trial court found the plaintiff guilty of adultery. No other conclusion could properly have been reached from the evidence in this record.

Under the foregoing findings plaintiff is not entitled to alimony. She has as a matter of fact proclaimed her unfitness to have the care and custody of the minor children of the marriage. Their care and custody was properly granted to the defendant. The trial court made a division of the property between the parties which was in all respects proper and to which no complaint appears to have been made. The case falls within the rules announced in Speck v. Speck, 164 Neb. 506, 82 N. W. 2d 540, and Yost v. Yost, 161 Neb. 164, 72 N. W. 2d 689, in the form in which they have been reannounced in this opinion.

The decree of divorce is in all respects correct and it is affirmed. The costs in this court are taxed to the plaintiff.

AFFIRMED.

YEAGER and WENKE, JJ., participating on briefs.

SIMMONS, C. J., dissenting.

This case presents a quite unusual situation and calls for the exercise of a quite unusual remedy.

Plaintiff sued defendant for divorce on the ground of cruelty.

Defendant denied generally and by cross-petition sought a divorce on the grounds of cruelty and adultery.

The unusual situation to which I refer arises as a result of these facts.

On October 28, 1955, there was filed our opinion in Yost v. Yost, 161 Neb. 164, 72 N. W. 2d 689, where (quoting from the syllabus) we stated these three rules:

"9. Where a wife is conclusively found to be occupying an adulterous relationship with a man not her husband, she is an unfit person as a matter of law to have the care and custody of her minor children as against the husband she has wronged.

"10. Where in a suit for divorce adultery on the part of the defendant is conclusively proved, the trial court is required to grant a divorce to the plaintiff on that ground.

"11. Where adultery of a wife is established, she is not entitled to an award of alimony or attorneys' fees. The costs of the action in such a case are taxable to the wife."

Yost v. Yost, *supra,* stated the rules to guide the trial court when this case was decided. Defendant cites it as controlling authority here.

The court now modifies syllabus point 10 in the Yost case and states the rule as follows:

"1. Where the evidence in a divorce action establishes adultery on the part of one of the parties thereto, the court is required to grant the prayer of the other party seeking a divorce on that ground unless prevented from doing so by applicable statutory provisions."

As I see it the rule as modified contains error. I shall return to that later herein.

The court now modifies syllabus point 9 of the Yost case and states the rule as follows:

"2. Where a wife is found to be guilty of adultery she is ordinarily an unfit person to have the care and custody of her minor children as against the husband she has wronged."

This makes the rule conform generally with our holding in Meredith v. Meredith, 148 Neb. 845, 29 N. W. 2d

643, wherein we held that a mother, guilty of adultery, should have possession of her child of tender years. The children here are of tender years. The claimed unfitness of the plaintiff arises solely because of the "indiscretions" and an act of "adultery" (as in the Meredith case) of which she is found guilty.

The court now modifies syllabus point 11 of the Yost case and states the rule as follows:

"3. Where adultery by a wife is established, she is not entitled to an award of alimony and ordinarily will not be allowed an attorney's fee or an award of costs."

It will thus be seen that the rules of law applicable to this case have been changed materially since the trial and decision in the district court. The amelioration of the rigors of the rules is favorable to the plaintiff. The court has no way of knowing what the judgment of the trial court would have been had it heard and decided this case under the rules now announced—and yet its decision on every matter is affirmed.

I now return to syllabus point 1 of the court in the instant case. The rule as stated is that where adultery is established the court "is required" to grant a divorce "unless prevented from doing so by applicable statutory provisions." My objection goes to the two quoted matters.

"Required" is a mandatory word meaning commanded. There is no command in the statute. Section 42-301, R. R. S. 1943, provides that a divorce "may be decreed" for any one of seven reasons, one of which is adultery. The permissive "may" is used also in sections 42-302 and 42-302.01, R. R. S. 1943. Neither reason nor authority is given for changing the statutory discretionary rule to a mandatory rule denying all discretion to the trial court save as permitted by the exception. It may be pointed out that the Legislature used the mandatory "shall" in section 42-304, R. R. S. 1943, to which I refer presently.

The exception is "unless prevented from doing so by

applicable statutory provisions." The exception is an improvement over the all-inclusive mandatory rule as stated in syllabus 10 of the Yost case above quoted. As a statutory provision it permits the court to deny a divorce where adultery is established and (1) where procurement or connivance of the complaining party is shown; (2) where there has been forgiveness or condonation; or (3) where there has been knowledge of the adultery for 5 years before suit is brought. § 42-336, R. R. S. 1943. It permits a trial court to obey the mandatory "no divorce shall be decreed" of section 42-304, R. R. S. 1943.

The rule as now stated permits a trial court to recognize the recrimination rule "where the party complaining shall be guilty of the same crime or misconduct charged against the respondent." § 42-304, R. R. S. 1943. It excludes all other application of the recrimination rule.

However, independent of statute, this court has long recognized the recrimination rule and that it was not limited to offenses of the same nature, and specifically holding that extreme cruelty may be shown in recrimination of a charge of adultery. See Wilson v. Wilson, 89 Neb. 749, 132 N. W. 401; or as put in Wilson v. Wilson, 93 Neb. 182, 139 N. W. 1043, extreme cruelty is a defense to adultery. See, also, Peyton v. Peyton, 97 Neb. 663, 151 N. W. 150, where a husband guilty of extreme cruelty was denied a divorce from a wife guilty of adultery who was described in the opinion as a "wholly abandoned character." See, also, Egbert v. Egbert, 149 Neb. 227, 30 N. W. 2d 669, where these rules were quoted and approved.

I see no reason for overruling the recrimination rule save as it is provided for in a limited way in section 42-304, R. R. S. 1943. The rule, as now stated by the court in this case, has that effect. However, if that is to be done, it should affirmatively so appear in order that the

bench and bar of the state may know, understand, and follow the law.

The rule as now stated denies the plaintiff the right to prove cruelty as a defense to adultery although all of our decisions, excepting the Yost case and this one, accord that right to a party.

I refer now to syllabus point 3 of the present opinion. As stated in the Yost opinion, adultery on the part of the wife barred both alimony and attorneys' fees, and costs. Acting when that rule of law was in force, the trial court denied alimony, attorneys' fees, and costs to the plaintiff. Concededly as now stated, the trial court has a discretion in the matter of attorneys' fees, although section 42-318, R. R. S. 1943, bars alimony where adultery of the wife is established. Ordinarily attorneys' fees are allowed a wife even though she is unsuccessful in the litigation. Here they were denied by the trial court in obedience to the rule as stated in the Yost case. Here the court affirms, although the mandatory rule is relaxed. The question comes: What would the trial court have done had the rule been correctly stated?

Here, contrary to our usual practice, all the costs are charged to the wife, although that was done in the now modified Yost opinion.

The court says that the acts of cruelty charged by the plaintiff "are not sustained by the evidence, but even if they were" they are condoned. I submit that condonation has a part in this opinion only if cruelty is established. We should be able to make up our minds which it is. The evidence establishes cruelty of the defendant. There are two corroborated incidents of physical assault by the defendant against the wife, made in public places when angry and in the presence of mutual friends. There is other corroborated evidence of the "acts of the defendant" constituting cruelty. Defendant did not deny them, and in part admitted them.

The court holds "plaintiff was drinking intoxicating liquor to excess." The record shows it was largely done

in companionship with defendant at places where he took her, and among people with whom defendant caused her to associate. That defendant was also drinking intoxicating liquor to excess is shown by his own witnesses as well as those of the plaintiff. The plaintiff's use of intoxicants is held against her. The defendants like use is not mentioned by the court. We had a similar situation in Cowan v. Cowan, 160 Neb. 74, 69 N. W. 2d 300, where we arrived at a different result.

Section 42-304, R. R. S. 1943, bars relief to the defendant on the ground of cruelty because he is guilty of the same offense.

If there was condonation by the plaintiff, there was likewise condonation by the defendant, for the claimed condonation rests on cohabitation. So if plaintiff is barred from a divorce, the same rules bar a divorce to the defendant. Divorce laws should not be partial to husbands in these matters.

The cruelty and liquor above referred to did not wreck this marriage.

So far as the plaintiff was concerned the bale of hay that broke the camel's back was the things said by the defendant about the plaintiff and their son and defendant's totally ignoring the plaintiff with reference to the son's care. That manifest cruelty was not condoned. However, under the rule as stated in the Yost case the only decision for the court, assuming adultery to have been proven, was the mandatory duty to grant the defendant a divorce, deny the custody of the children to the plaintiff, deny plaintiff alimony and attorneys' fees, and tax all costs to her!

The question is: Was adultery of the plaintiff proven?

According to this record, plaintiff engaged in indiscretions with one man not her husband. That testimony is corroborated by a detective and others partial to defendant, and goes to just what the word indiscretions signified, and no more. The wife of this third party testified as a witness for the plaintiff.

Did the trial court consider this evidence sufficient to establish adultery? We have no way of knowing—and that because of other evidence that was admitted. I now refer to the "lurid facts recited in evidence," as stated by the court.

The defendant produced a witness who prefaced his testimony by an assertion of his own uprightness. He knew his subject matter. He testified voluntarily to help his friend, the defendant. He testified to the "lurid facts" of one act of sodomy which he stated the plaintiff performed with him. This witness testified to things told him by plaintiff at that time regarding things done in her employment in Nebraska. It is clear from the testimony of both plaintiff and defendant that the employment had not then occurred. This admitted sodomist is the man who testified plaintiff was not fit to have the custody of her children.

What effect did that story have on the trial court? We have no way of knowing. Obviously it would be difficult to get a witness who would testify as an eyewitness to an act of sodomy. However, there are witnesses, including the defendant, who could have testified about the events immediately preceding the alleged act. They were not called. There is, then, no corroboration whatever of this "lurid" story.

Even if proven, does it establish adultery as a matter of law? Here there appears to be no dispute. The answer is that it does not. Sodomy is defined in section 28-919, R. R. S. 1943. Our statutes classify sodomy under "Crimes against nature." In one way or another it is so classified by the text writers. The decisions all agree that sodomy is not adultery. All agree that it may constitute cruelty. I cite the only decisions and texts I have been able to find: Anonymous, 2 Ohio N. P. Reports 342; Crutcher v. Crutcher, 86 Miss. 231, 38 S. 337; Poler v. Poler, 32 Wash. 400, 73 P. 372; Cohen v. Cohen, 200 Misc. 19, 103 N. Y. S. 2d 426; Keezer, Marriage and Divorce (3d ed.), § 487, p. 525; Schouler Di-

vorce Manual, § 90, p. 119; 27 C. J. S., Divorce, § 28, p. 559; 17 Am. Jur., Divorce and Separation, § 83, p. 308.

I submit, then, that the finding in the court's opinion that the plaintiff was guilty of adultery, based as we must assume it was on the testimony as to sodomy, cannot be sustained as a matter of fact because it was in nowise corroborated. It cannot be sustained as a matter of law because the act testified to constituted the offense of sodomy and not adultery.

Further, although it may be cruelty, the defendant here did not know of the alleged sodomy until after this divorce proceeding began. It in nowise contributed to the separation of the parties and the breakup of this marriage.

But cruelty or not, sodomy is not adultery and the whole base of the court's opinion is accordingly erroneous.

It is quite apparent that counsel considered the evidence of sodomy as going to the issue of adultery. They so present it here. There is no indication that the trial court was otherwise advised. Obviously, also, this court has not put aside the "lurid" story of the sodomy.

I would further correct the errors in what is syllabus point 1 of the court in this opinion.

The unusual remedy I invoke would be to reverse the judgment of the trial court and remand this cause for a new trial under the rules of law now held applicable so that the trial court may weigh the evidence in the light of hearing the witnesses testify, make full use of the advantages it has for determining the truth of the testimony, and the proper construction to be given to it—"advantages which this court does not possess." Peyton v. Peyton, *supra*. The plaintiff has not had the trial in district court under proper rules of law that our system grants to her.

On trial de novo here, after such a hearing, we can act with a far better understanding of the case if we have

the trial court's determination of the issues presented based on the evidence and the law.

We are entitled to know whether the trial court received the evidence of sodomy as proof of adultery; whether it viewed the "indiscretions" as proof of adultery; whether it considered cruelty or intoxication a moving cause for divorce; whether it would accord the plaintiff alimony; whether it would accord her the custody of her young children; and whether it would award her costs and attorneys' fees under the rules now announced.

I readily concede that we have the power to decide the issues on this record. But the whole theory of trial de novo here involves the element of our having the benefit of the judgment of the trial court. The parties are entitled to have that sort of a judgment here.

It is denied in this case because it is manifest that the trial court decided issues based on erroneous rules of law as stated by this court and likewise considered evidence as proof of adultery when it does not have that effect.

WENKE, J., concurring.

While I agree with the majority opinion and think it correctly reflects the conclusions of fact to be drawn from the evidence adduced, considering the principles of law applicable thereto, however, because I feel the dissenting opinion comes to erroneous conclusions as to certain principles of law involved and fails to properly and sufficiently set out the conduct of appellant as it relates to the charge of adultery made against her, I deem it desirable to express my views in regard thereto.

The author of the dissent comes to the conclusion that syllabus point No. 1 of the opinion overrules the law relating to recrimination originally announced by this court in Wilson v. Wilson, 89 Neb. 749, 132 N. W. 401, and followed as recently as Egbert v. Egbert, 149 Neb. 227, 30 N. W. 2d 669. The rule is as follows: " 'Upon an application for a divorce, where both parties

are found guilty of any of the enumerated offenses for which a divorce may be granted, the court should dismiss the bill.' "

Syllabus point No. 1 of the opinion is as follows: "Where the evidence in a divorce action establishes adultery on the part of one of the parties thereto, the court is required to grant the prayer of the other party seeking a divorce on that ground *unless prevented from doing so by applicable statutory provisions.*" (Emphasis mine.) The language emphasized is the part of this syllabus point which the author of the dissent contends has that effect. In order to understand to what our holding in Wilson v. Wilson, *supra,* must necessarily have application, the jurisdiction and authority of the district court in divorce proceedings, and this court on appeal, should be understood. That jurisdiction and authority are set forth in Harrington v. Grieser, 154 Neb. 685, 48 N. W. 2d 753, as follows:

"Jurisdiction of the court in matters relating to divorce and alimony is given by the statute *and every power exercised by the court with reference thereto must look for its source in the statute or it does not exist.*

"Courts of general jurisdiction have the inherent power to do all things necessary for the proper administration of justice and equity *within the scope of their jurisdiction.*" (Emphasis mine.)

The jurisdiction of the district court to deny a divorce on the ground of recrimination is given to it by section 42-304, R. R. S. 1943, which provides, insofar as here material, that: "No divorce shall be decreed in any case * * * where the party complaining shall be guilty of the same crime or misconduct charged against the respondent." This has always been the law of the state. See R. S. 1866, Pt. I, c. 16, § 9, p. 129. Consequently our holding in Wilson v. Wilson, *supra,* must, of necessity, be related thereto and be a construction thereof because that is the basis and scope of our jurisdiction to deal therewith. In view thereof the doctrine

therein announced has not, in my opinion, been either overruled or modified.

The author of the dissent seems to be of the opinion that this rather simple divorce case presents such an unusual situation that it calls for the exercise of an unusual remedy, that is, to send it back to the district court for a new trial. This idea is apparently based on the fact that since we have herein modified certain rules relating to divorce that the trial court should be given an opportunity to decide this case in view thereof.

It is elementary, as stated in Stratbucker v. Junge, 153 Neb. 885, 46 N. W. 2d 486, that: "A wrong reason for a correct conclusion does not militate against the decision." The record discloses that the trial court did not exclude any competent, material evidence and, it is also apparent, that both parties were given the opportunity to, and did, fully present their side of the case. Section 25-1925, R. R. S. 1943, provides that it is the duty of this court, on appeal in equity cases, "to retry the issue or issues of fact involved" de novo and "reach an independent" decision based thereon. As stated in Spencer v. Spencer, 158 Neb. 629, 64 N. W. 2d 348: "In an action in equity this court is required to try the issues de novo and to reach an independent conclusion as to what findings are required under the pleadings and evidence without regard to the conclusions reached by the district court." This statute applies to divorce actions. See Spencer v. Spencer, *supra*.

Under this principle it seems to me that all the author of the dissent speaks of as being the basis for his recommending a new trial are things we could and should consider in this case under the foregoing statutory duty. In fact, the majority opinion has applied the rules herein announced to the evidence adduced by the parties. That is all a new trial could accomplish except to delay the ultimate decision, which is something we should not foster.

We come then to the issue of adultery. The dissent

seems to leave the impression that our finding the appellant guilty of adultery is erroneous because it must necessarily be based on the testimony of the witness Kenneth W. Casey relating to a certain act carried on between him and appellant which constituted sodomy. See § 28-919, R. R. S. 1943. I am sure the author of the opinion, as well as the other members of the court, are fully capable of and understand the difference between sodomy and adultery and what is required to establish either one or the other.

In view of what is said in the dissent in regard thereto it seems to me it is necessary to discuss somewhat in detail the facts established by the evidence adduced as they relate to the issue of adultery. Ordinarily a statement of our conclusion reached in regard thereto would be sufficient as a recitation of such facts serves no useful purpose and only leaves a permanent record to possibly embarrass the three small children here involved after they grow up. The dissent eliminates the basis of this restraint exercised by the writer of the majority opinion in dealing with the sordid facts recited in the evidence.

The record shows these parties had considerable trouble during the period of their married lives because of jealousy and drinking which often resulted in quarrels and abusive conduct. Later in their married life they were also bothered with financial problems. However, whatever happened in this regard was condoned by both and they apparently got along fairly well until April 28, 1956, when appellant wrote appellee a letter, addressed to him at Des Moines, Iowa, where he was then working, wherein she advised him that as far as she was concerned their marriage was all over and she did not care to see him again. Appellee had, prior thereto, been suspicious of appellant's relationship with Clark Triplett, who operated an appliance store in Broken Bow, Nebraska. After receiving appellant's letter he proceeded to find out if that relationship was

what caused their marriage to break up. He obtained the services of Myrl Jones, a private detective, to assist him in this effort. He was also assisted by his mother, Mary E. Baker, who lived in Broken Bow and had a business there.

As early as State v. Way, 5 Neb. 283, by adopting certain language from Thayer v. Thayer, 101 Mass. 113, we said of the crime of adultery, which, in a criminal action, must be proved beyond a reasonable doubt, that: " 'The evidence by which the act of adultery is proved is seldom direct. The natural secrecy of the act makes it ordinarily impossible to prove it, except by circumstantial evidence. The circumstances must be such, indeed, "as to lead the guarded discretion of a reasonable and just man to the conclusion of guilt." But when adulterous disposition is shown to exist between the parties at the time of the alleged act, then mere opportunity, with comparatively slight circumstances showing guilt, will be sufficient to justify the inference that criminal intercourse has actually taken place.' "

The evidence shows that for a long time appellant was, on many occasions, alone with Triplett and at such times they were conducting themselves in a manner that it was evident to those who observed them that their relationship was not merely that of friends but that each was interested in the other in an amorous way.

Mary E. Baker, appellee's mother, testified that about 10:45 p.m. on July 19, 1956, appellant and Triplett were in the latter's store and turned out the lights and stayed therein until about 1 a.m., July 20, 1956; that many evenings she saw them alone in Triplett's store; and that many times she saw them together and alone at places other than the store.

Myrl Jones and appellee both testified that on the evening of August 3, 1956, appellant went to the Triplett store; that when she went there she was neatly dressed and tidy in appearance; that apparently a beer party was being held in the store; that about 1:05 a.m.

on August 4, 1956, the last guest left leaving appellant and Triplett alone in the store; that all the lights in the store were then turned off except one red night light; that about 1:10 a.m. they saw appellant and Triplett embracing each other; that at dawn (4:45 a.m.) both Triplett and appellant left the store; that when she left her hair was mussed and her clothing untidy, her blouse being pulled out of her skirt; and that when he left his clothing was also untidy, his shirttail being out of his trousers. There are other incidents of like character described by Jones as having taken place on the evening of September 24, 1956, and again on September 25, 1956.

Sarah Ann Holm, who worked in the Baker home, testified that in the spring of 1954 appellant was talking to her in the kitchen of the Baker house and there told her the operation she had had, which resulted in some of her female organs being removed, would prevent her from bearing any more children; that she then took some contraceptives (rubbers) from her purse and said that because thereof (meaning the operation) she and Clark (meaning Triplett) would not be needing them anymore; and that she thereupon threw them in the wastebasket.

Kenneth W. Casey, with whom the Bakers became acquainted when they were running their resort near Park Rapids, Minnesota, in 1955, testified as to appellant's attitude while alone with him, which was on numerous occasions. He testified she tried to induce him to be intimate with her by her conduct and when that was not successful asked him to be, saying she had been intimate with Triplett at Broken Bow and just how they did it on his office swivel chair.

I could recite additional facts these several witnesses testified to which show appellant's attitude toward and desire for sexual relations with others than her husband during the period of their marriage and while they were living together and the fact that she satisfied such desires with Triplett. Naturally appellant denied being

intimate with Triplett but in view of what I have set forth the following from Speck v. Speck, 164 Neb. 506, 82 N. W. 2d 540, has application here: "Direct evidence, of course, is not ordinarily procurable to establish such improper conduct. But where the evidence and circumstances show, as they do here, that every element is present except direct proof of the act itself, the court is not required to close its eyes to the obvious. It may properly determine even as against the protestations of one or both of the parties that the result followed which usually grows out of such a relationship."

The record in this case presents one of the strongest cases of adultery against a party that I have reviewed since being on the court and, in my opinion, fully satisfies all the requirements as to the burden of proof which is placed on a party seeking a divorce. It presents a factual situation which establishes the fact that appellant is totally unfit to raise the minor children and the sooner they are removed from her custody and placed with appellee the better it will be for their future welfare.

A. BORCHMAN SONS, APPELLANT, V. BERNARD CARPENTER ET AL., APPELLEES.

COOPER CONSTRUCTION COMPANY, APPELLANT, V. PAUL E. OTTO ET AL., APPELLEES.

PARSONS CONSTRUCTION COMPANY, APPELLANT, V. JOSEPH W. TRIPP ET AL., APPELLEES.

89 N. W. 2d 123

Filed March 28, 1958. Nos. 34332, 34333, 34334.

1. **Appeal and Error.** By the provisions of sections 48-639 and 48-640, R. R. S. 1943, of the Employment Security Law, the district court and this court consider the cause de novo upon the record.
2. ———. It is the duty of this court to retry the issue or issues of fact involved in the finding or findings of fact complained of and reach an independent conclusion thereon.

3. **Social Security and Public Welfare.** The disqualification of an employee exists under section 48-628(d), R. R. S. 1943, when the unemployment is due to a stoppage of work because of a labor dispute as set out in the act.
4. ———. The provisos of section 48-628(d), R. R. S. 1943, set out the conditions under which the disqualification may be removed.
5. ———. Where a disqualification for benefits exists, the burden of proof under section 48-628(d), R. R. S. 1943, of each claimant is to establish that he as an individual was not within any of the alternatives of proviso (1) and that he did not belong to a grade or class of workers within any of the alternatives of proviso (2).
6. ———. A labor dispute that affects the wages, the hours of work, and general conditions of employment causes all employees concerned to be directly interested.
7. ———. This is not a contingent, remote, or speculative interest, but rather must be regarded as directly within the meaning of the statute.
8. ———. The rule applies to members of unions who do not strike and to nonunion employees.

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

King, Haggart & Kennedy, for appellants.

David D. Weinberg, for appellees Carpenter, Otto, and Tripp.

John E. Sidner, for appellee Weasmer.

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

SIMMONS, C. J.

These appeals involve the construction and application of section 48-628, R. R. S. 1943, of the Employment Security Law. These matters arose, had been determined, and the appeal filed in the district court before the amendment to this section in 1955. The causes were decided in September 1957. Hence we cite the earlier act and call attention to the amendment which is of no effect here.

The claimants here are Mr. Otto, Mr. Carpenter, and Mr. Tripp. They filed claims for benefits under section 48-629, R. R. S. 1943. The claim of Tripp was allowed and those of Carpenter and Otto disallowed.

Appeals were taken in each instance to the appeal tribunal as provided in section 48-634, R. R. S. 1943. The tribunal found all claimants entitled to benefits. Pursuant to section 48-638, R. R. S. 1943, appeals were taken to the district court where the court entered a decree in each case holding that the claimant was eligible to receive the benefits of the act.

Pursuant to section 48-640, R. R. S. 1943, appeals were brought here.

The claims have been kept separate so far as pleadings, records, findings, and decrees are concerned. However, before the tribunal and in the district court the material evidence in each case was stipulated to be the evidence in all three cases, so that for trial purposes the claims were consolidated in fact. It is such a consolidated evidence record that we have here.

Preliminary to a statement of fact and issues, it is necessary that we determine two matters. First. By the provisions of sections 48-639 and 48-640, R. R. S. 1943, of the Employment Security Law, the district court and this court consider the causes de novo upon the record, or "in other words to try the case anew." Beecham v. Falstaff Brewing Corp., 150 Neb. 792, 36 N. W. 2d 233. This means also that it is the duty of this court to "retry the issue or issues of fact involved in the finding or findings of fact complained of" and "reach an independent conclusion" thereon. § 25-1925, R. R. S. 1943.

Second. Section 48-628, R. R. S. 1943, provides: "An individual shall be disqualified for benefits: * * * (d) For any week with respect to which the commissioner finds that his total unemployment is due to stoppage of work which exists because of a labor dispute at the factory, establishment or other premises at which he is or was last employed; Provided, that this subsection shall

not apply if it is shown to the satisfaction of the commissioner that (1) he is not participating in or financing or directly interested in the labor dispute which caused the stoppage of work, and (2) he does not belong to a grade or class of workers of which, immediately before the commencement of the stoppage, there were members employed at the premises at which the stoppage occurs, any of whom are participating in or financing or directly interested in the dispute; * * *."

The issues are submitted here as to whether the claimants, severally, are disqualified to receive the benefits of the act because of the existence as a fact of one or more of the reasons enumerated in the provisos under (1) and (2).

That is not the test.

The disqualification of an employee exists under section 48-628, R. R. S. 1943, when the unemployment is due to a stoppage of work because of a labor dispute as set out in the act. See subsection (d) thereof.

The provisos of section 48-628 (d), R. R. S. 1943, set out the conditions under which the disqualification may be removed.

It necessarily follows that where a disqualification for benefits exists, the burden of proof under section 48-628(d), R. R. S. 1943, of each claimant is to establish that he as an individual was not within any of the alternatives of proviso (1) and that he did not belong to a grade or class of workers within any of the alternatives of proviso (2); or as was said in Auker v. Review Board, Indiana Employment Security Division, 117 Ind. App. 486, 71 N. E. 2d 629, the burden was upon claimants to requalify themselves for benefits by establishing not one, but both of the separate conditions which would requalify them. Lanyon v. Administrator, Unemployment Compensation Act, 139 Conn. 20, 89 A. 2d 558; Martineau v. Director of the Division of Employment Security, 329 Mass. 44, 106 N. E. 2d 420; In re Stevenson, 237 N. C. 528, 75 S. E. 2d 520; Queener v. Magnet Mills, Inc., 179

Tenn. 416, 167 S. W. 2d 1; 81 C. J. S., Social Security and Public Welfare, § 219, p. 315.

The trial court in its decree based its conclusion on a finding that the claimants, severally, were not within the provisos of section 48-628(d), R. R. S. 1943.

The assignments of error are that the decision in each case is contrary to the evidence and contrary to law.

It is not seriously urged here, and could not be on this record, that each claimant's unemployment was not due to a stoppage of work which existed because of a labor dispute on the premises at which he was last employed.

The precise question for decision here, then, is this: Has each of the claimants met his burden of proof so as to remove the disqualification for benefits under the act?

The controlling fact situation here is not in serious dispute.

In the building industry in the Omaha area a number of general contractors had formed an association for the purpose of representing all members in matters of common interest. This association had the power of acting as bargaining representative for all of its members in labor contract matters.

The labor unions engaged in the industry were organized on a craft basis. Each union retained its bargaining power in labor matters so far as contracts were concerned, with the exception of the carpenter's union. Several local unions of carpenters had a council representing them.

However, all of the unions involved had a building trades council for the declared purposes, among others, "to aid each other to secure adequate working hours and a just compensation therefor; * * *," and "The object of this organization shall be to unite the wisdom, interest and experience of the organized building trades, so that they form one compact body, with common interest, to prevent that which may be injurious, and to properly perfect and to carry into effect the principles

agreed to in our Preamble, and to promote that which may be advantageous for the common good of all."

This council was composed of delegates from the various unions, on a membership representative basis, and was supported by dues paid by the constituent unions on a membership basis.

It will then be seen that the contractors and the unions were each in a position to use their combined strength to enforce economic sanctions against the other.

The contractors had labor contracts with the several labor unions, all of which expired on March 31, 1953. Several weeks before that date the contractors association and the building and construction trades council began negotiating on the matter of new contracts. The representatives of the unions were demanding wage increases in all instances and welfare fund increases in some or all instances.

An agreement was not had. The deadline of April 1, 1953, was approaching. It appears that an effort was made through the carpenters council to find a basis for new contracts. The carpenters authorized their representatives to call a strike. On April 1, 1953, the operating engineers called a strike and put out picket lines on those jobs where the larger number of engineers were employed.

Claimant Tripp was a member of the laborers union. Pickets were placed on the job where he was employed shortly before noon on April 1, 1953. Tripp and others left the job and did not return that day or on the succeeding days. There were no picket lines placed on the jobs where claimants Otto and Carpenter, members of the carpenters union, were employed. They worked all day on April 1, 1953. It is stipulated that work on all jobs was suspended on April 2, 1953, by the election of the contractors. The evidence shows without contradiction that although work on these jobs could have progressed for a short time, economy and efficiency required the availability and service of all crafts. It is

also quite apparent that the strike of the operating engineers was the immediate cause of the shutdown.

What happened thereafter is not at all clear in the evidence, save that work was resumed on all projects at least by May 18, 1953.

The question, then, is: Does this evidence show that the claimants have met the burden of proving the removal of the disqualification which is the mandate of the law, save for the exception?

Here we have a situation where all unions, including those to which claimants belong, have a common interest and purpose of securing increased wages and one union strikes and produces the unemployment that is the basis of the claims.

Are the members of the unions that are not striking entitled to the benefits of the act?

We have above set out the burden on the claimants. One of the several tests which the statute requires is that they show they are not "directly interested in the labor dispute which caused the stoppage of work."

Chrysler Corp. v. Smith, 297 Mich. 438, 298 N. W. 87, 135 A. L. R. 900, states the rule as follows: "'* * * a labor dispute that affects the wages, hours of work, and general conditions of employment, causes all employees concerned to be directly interested. This is not a contingent, remote, or speculative interest, but rather must be regarded as directly within the meaning of the statute.'" See, also, Local No. 658 v. Brown Shoe Co., 403 Ill. 484, 87 N. E. 2d 625. The rule applies to members of unions who do not strike (Lanyon v. Administrator, Unemployment Compensation Act, *supra*), and to nonunion employees. See Martineau v. Director of the Division of Employment Security, *supra*. There the court held: "The statute, however, does not confine disqualification to those employees who participate in or finance the labor dispute. In addition, it withholds benefits from employees who are 'directly interested in the labor dispute.' * * * a person is 'directly interested' in

a dispute when his wages, hours, or conditions of work will be affected favorably or adversely by the outcome. It is of no consequence that the person is not a member of the union conducting the strike or that he may not be in sympathy with its purposes." See, also, Auker v. Review Board, Indiana Employment Security Division, *supra*.

The claimants having failed to meet their burden of proof in the matter here involved, we need not consider the other elements of the statute which must be met to remove the disqualification of the act.

The judgment of the trial court is reversed in all three causes and the causes are dismissed.

REVERSED AND DISMISSED.

YEAGER, J., participating on briefs.

ALEX J. SNODGRASS, APPELLEE, V. CITY OF HOLDREGE, NEBRASKA, A MUNICIPAL CORPORATION, ET AL., APPELLANTS.

89 N. W. 2d 66

Filed March 28, 1958. No. 34335.

1. **Workmen's Compensation: Appeal and Error.** On an appeal to this court in a workmen's compensation case, the cause will be here considered and determined de novo upon the record.
2. **Workmen's Compensation.** In order to recover in a compensation case, the burden of proof is upon the plaintiff to establish by a preponderance of the evidence that personal injury was sustained by him as an employee of defendant by an accident arising out of and in the course of his employment.
3. ———. The contract under which service is performed, and the performance thereunder, determine the relationship between the contracting parties.
4. ———. An independent contractor is generally distinguished from an employee as being an independent workman who contracts to do a particular piece of work for a specific price according to his own method and is not subject to control of his employer except as to the results of the work.
5. ———. On the issue of whether a workman is an employee

as distinguished from an independent contractor, his relationship to his employer should be determined from all the facts and circumstances rather than from any particular feature of the employment or service.

6. ———. The act of the employer in giving such directions as may be found necessary to secure compliance with the contract according to the plan adopted by him and agreed upon between the parties is not necessarily inconsistent with the existence of the status of his workman as an independent contractor.

APPEAL from the district court for Phelps County: FRANK J. MUNDAY, JUDGE. *Reversed and dismissed.*

Person & Dier, for appellants.

Anderson, Storms & Anderson, for appellee.

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

CHAPPELL, J.

This is a workmen's compensation case. After hearing before one judge of the Nebraska Workmen's Compensation Court, the petition of plaintiff, Alex J. Snodgrass, was dismissed upon the ground that he was an independent contractor and not an employee of defendant, City of Holdrege, within the purview of the Workmen's Compensation Act. Thereafter, plaintiff waived a rehearing and appealed directly to the district court, as provided by section 48-181, R. R. S. 1943. After hearing in that court, a judgment was rendered which found that plaintiff was an employee of defendant city and entitled to an award which was granted, giving plaintiff compensation for temporary total disability from April 10, 1956, to July 16, 1956; compensation for partial disability from that time until December 1, 1956; and $259 for medical and hospital expenses incurred by plaintiff. Subsequently, defendants' motion for new trial was overruled, and they appealed, assigning and arguing in substance that the findings and award of the trial court were not supported by the evidence and law. We sustain the assignment.

The Ocean Accident and Guaranty Corporation, Limited, was made a party defendant because it was allegedly a compensation insurance carrier for defendant city, which said city will be hereinafter called defendant.

It is without dispute that plaintiff received a broken right leg by a falling tree limb on April 10, 1956, while he was trimming and removing certain trees from property owned by defendant. Also, the amount of compensation and expenses awarded as aforesaid were not questioned because the sole issue was and is whether plaintiff was an employee of defendant or an independent contractor. We conclude that plaintiff was an independent contractor.

In that connection, on an appeal to this court in a workmen's compensation case, the cause will be here considered and determined de novo upon the record. A compensable injury within the Workmen's Compensation Act is one caused by an accident to an employee arising out of and in the course of his employment, and in order to recover therefor the burden of proof is upon the plaintiff to establish by a preponderance of the evidence that personal injury was sustained by him as an employee of defendant by an accident arising out of and in the course of his employment. It has long been established also that an award of compensation under the Workmen's Compensation Act cannot be based on possibilities, probabilities, or speculative evidence. Also, the rule of liberal construction under the Workmen's Compensation Act applies to the law and not to the evidence to support a claim under the law, and does not dispense with the necessity that plaintiff shall prove his right to compensation within the rules above set forth nor permit a court to award compensation where the requisite proof is lacking. Feagins v. Carver, 162 Neb. 116, 75 N. W. 2d 379.

As early as Petrow & Giannou v. Shewan, 108 Neb. 466, 187 N. W. 940, this court concluded that plaintiff therein was an independent contractor. In doing so, it

was held that: "An independent contractor is generally distinguished from an employee as being a workman who contracts to do a particular piece of work according to his own method, and is not subject to the control of his employer, except as to the results of the work.

"The act of the employer in giving such directions as may be found necessary to secure compliance with the contract, according to the plan adopted by him and agreed upon between the parties, is not necessarily inconsistent with the existence of the status of his workman as an independent contractor."

In that opinion, citing numerous authorities, this court said: "The issue as to whether or not a workman is an employee, as distinguished from an independent contractor, is to be determined from all the facts in the case. There is no single test by which that determination can be made. An independent contractor is generally distinguished as being a workman who is independent in his employment; one who contracts to do a particular piece of work according to his own method, and is not subject to the control of his employer, except as to the results of his work. He is not in such a case a servant of his employer; nor can he be controlled by the employer in the manner of doing the work, except to the extent that the employer has the right to give such directions as may be found necessary to insure compliance with the contract." In that case, plaintiff was also to receive pay at an hourly rate, but the court concluded that such measure or method of payment was not a controlling criterion. The opinion gave particular significance to the fact that a substitute for plaintiff, who was obtained by plaintiff, completed the work without reporting to defendants or rendering a bill to them after he had finished the job, but plaintiff rendered a statement to defendants covering the entire cost of material and labor contributed by both plaintiff and his substitute, whereupon plaintiff was paid therefor and he paid his substitute. The opinion also pointed out that

it was not necessary that plaintiff personally perform the work, but that it was material that he should accomplish it according to plan by any method, manner, or means he pleased, with such help as plaintiff deemed necessary to employ, and without control of defendant except as to results of the work.

In Reeder v. Kimball Laundry, 129 Neb. 306, 261 N. W. 562, this court also concluded that plaintiff therein was an independent contractor. In doing so, it was held that: "An independent contractor is one who renders the service in the course of an independent occupation, representing the will of his employer only as to the result of the work, and not as to the means by which it is accomplished."

That opinion pointed out that there was no hard and fast rule by which to decide whether a claimant was an employee or an independent contractor, but that such relation must be determined from all the facts and circumstances in each particular case rather than from any particular feature of the employment. In that connection, the opinion said: " 'The true test of a "contractor" would seem to be, that he renders the service in the course of an independent occupation, representing the will of his employer only as to the result of his work, and not as to the means by which it is accomplished. * * * In actual affairs an independent contractor generally pursues the business of contracting, enters into a contract with his employer to do a specified piece of work for a specific price, makes his own subcontracts, employs, controls, pays and discharges his own employees, furnishes his own material and directs and controls the execution of the work. Where these conditions concur there is, of course, no difficulty in determining his character as such. It is only where one or more of them is lacking that a question arises. The one indispensable element to his character as an independent contractor is that he must have contracted to do a specified work and have the right to control the mode

and manner of doing it.' 1 Shearman and Redfield, Law of Negligence (6th ed.) 395, sec. 164. * * *

"The plaintiff contends that the defendant, in instructing the plaintiff where to get the coal, where to put it and how to approach the coalbins, exercised such control as would make plaintiff an employee. In the case of Petrow & Giannou v. Shewan, 108 Neb. 466, this court said: 'The giving of such instructions by the defendants, however, would not be inconsistent with the relationship of the plaintiff toward them as an independent contractor, since, were he an independent contractor, the defendant would have had the right to instruct him as to what had to be done, so as to secure the fulfilment of their contract. This could be and was done in this case, without in any way interfering with the plaintiff's right to perform the contract in whatsoever manner or by what method he chose.' The evidence in this case clearly sustains the claim of the defendant that the instructions given were those necessary only to secure the fulfilment of the contract."

In Prescher v. Baker Ice Machine Co., 132 Neb. 648, 273 N. W. 48, this court said: "An independent contractor usually enters into a contract to do a specified piece of work for a specific price; makes his own subcontracts; employs, controls, pays and discharges his own employees; furnishes his own tools and materials; and directs and controls the execution of the work. As we said in the case of Reeder v. Kimball Laundry, 129 Neb. 306, 261 N. W. 562, where these conditions concur, there is no difficulty in determining his character as such. It is only when one or more of these conditions do not exist that a question arises.

"The one indispensable element to his character as an independent contractor is that he must have contracted to do a specified piece of work for a specific price. The agreement in the case at bar to unload one car of coal for 25 cents a ton provides this necessary element."

In addition, that opinion concluded that decedent was

an independent contractor, pointing out that he and his assistant fixed their own hours and controlled the method and means of doing the work; that after decedent's injury, his assistant engaged another to help him complete the job; and that defendant's assistance in spotting the carload of coal and the furnishing of certain tools and equipment in unloading same was not a controlling criterion because it was quite apparent that defendant was interested only in having the car of coal unloaded and not in the manner and means of its accomplishment.

Also, in Lowe v. Chicago Lumber Co., 135 Neb. 735, 283 N. W. 841, this court reaffirmed the holdings and conclusions in and quoted with approval from Petrow & Giannou v. Shewan, *supra,* Reeder v. Kimball Laundry, *supra,* and Prescher v. Baker Ice Machine Co., *supra.* In doing so, that opinion said: "In Potter v. Scotts Bluff County, 112 Neb. 318, 199 N. W. 507, the opinion at page 321 cites Barrett v. Selden-Breck Construction Co., 103 Neb. 850, 174 N. W. 866, wherein it was held: 'The right to supervise, control, and direct the work is one of the tests for determining whether a person is an independent contractor or an employee, but it is not the sole and only test. * * * A test is whether the contract requires the work to be done by the particular person contracting, or whether his personal services are not required, and any person whom he may employ may, under the agreement, do the job.' " See, also, Wilds v. Morehouse, 152 Neb. 749, 42 N. W. 2d 649, wherein this court reaffirmed the holdings and conclusions in Prescher v. Baker Ice Machine Co., *supra,* and Lowe v. Chicago Lumber Co., *supra,* and cited other supporting authorities.

Further, in Riggins v. Lincoln Tent & Awning Co., 143 Neb. 893, 11 N. W. 2d 810, this court concluded that the deduction by defendant of social security taxes from the earnings of plaintiff, or the payment of social security taxes thereon by defendant, was evidence tending to show that plaintiff was an employee and not an

independent contractor. On the other hand, if the record discloses that the contrary was true, then by analogy, of course, such facts would constitute evidence that plaintiff was an independent contractor and not an employee of defendant.

In the light of the foregoing authorities, we have examined the record de novo. As summarized, it fairly discloses the following: For many years plaintiff had been independently engaged in the business of tree trimming, tree removal, and lawn and shrub care in the city of Holdrege. He was an expert in that field. He offered such services to the public generally, including defendant, whenever it had need for such services, and plaintiff was available to render them. He rendered such services for many persons in Holdrege, and upon various occasions throughout the years he rendered such services for defendant, but he was never carried as an employee thereof. He had no downtown office, but carried on his business from his home. He had other persons in his employ whenever needed, and they were paid by plaintiff out of funds received from his customers, including defendant. Statements or claims for services rendered by him and those in his employ were handled in plaintiff's own name as a total amount due therefor from his customers, without including the names of those associated with him and in his employ. His method of billing defendant for services rendered it from time to time was the same as for services rendered his other customers. Several claims against defendant which appear in this record were usually submitted to it periodically at the end of the month or months during which he had rendered such services for defendant. Such claim would generally itemize the job or jobs he had performed, with the dates thereof, and state the charges therefor, which would be in a total amount due with no showing of hours worked, hourly rates, or names of other persons who might be working with or for him in performing the work. However, plaintiff

testified that such claims were made on the basis of $1.25 an hour by an agreement of long standing with defendant's water and light commissioner, but the total amounts charged did not generally total an amount due upon any such hourly basis. In that connection, plaintiff employed whatever help he might want or need, and they were paid by him and not by defendant. Also, such claims against defendant were handled by it just like the claims of all independent contractors, and at a different time and in a different manner than the claims of its employees. Further, plaintiff generally had no definite hours when he might perform work for defendant, and he would normally perform it when his schedule would permit, although on some occasions the city water and light commissioner would ask plaintiff if he could perform it at or within a certain time and ask for an estimate of the cost thereof.

There is some testimony adduced by plaintiff that he, his associate, and his employees could have quit or been discharged by defendant at any time without liability, but such evidence was a mere conclusion, and like any other indicia, that fact alone would not be controlling under all the facts and circumstances presented in this record.

Plaintiff usually furnished and used his own tools and equipment, although defendant had some tools and equipment which plaintiff could use if necessary. Sometimes plaintiff furnished materials or bought trees and shrubs for the city, then took them to his home, used them as his work progressed, and included a charge therefor when he eventually billed defendant.

Plaintiff was a qualified expert in the field of his particular business, and the details, method, manner, and means of performing work by him for defendant were left entirely in his hands with responsibility for completing the job, without supervision or control by defendant except to tell him where, when, and what was to be done.

Another man, named Adolph Bureman, was also engaged in the same type of business as plaintiff in Holdrege. He had too much work for one man, so on or about March 29, 1956, he "put it up to Alex (plaintiff) when I needed help he would help me and if he needed help he could call me and he says 'That's a fair 'nuf deal, we'll just go together' and that's the way we worked it" from that time on. It was then agreed between them that if Bureman worked on a job with plaintiff, or vice versa, he would turn it over to plaintiff to collect therefor in plaintiff's name, unless he was paid outright, and after plaintiff was paid, then Bureman would be paid by plaintiff out of such funds at $1.25 an hour.

On April 9, 1956, plaintiff and Bureman were working for one of their customers at Brewster Court in Holdrege when defendant's water and light commissioner came there and arranged with plaintiff to remove certain trees in order to make way for an electric power line across some of defendant's property. They went with the commissioner to the place where the trees were to be removed, and plaintiff was told what particular trees to remove and to employ such help as he might need to complete the job by tomorrow. Plaintiff then employed another man to assist him and Bureman, and the next morning, April 10, 1956, the three of them started the work of removing the trees. Neither the water and light commissioner nor any other employee of defendant was present that day while the trees were being removed by plaintiff, his associate, and the other man. As a matter of fact, defendant's water and light commissioner was out of the city that day when plaintiff was injured about 9:30 a. m. and was removed to a hospital by Bureman, where plaintiff remained for 4 days.

After plaintiff was removed to a hospital, Bureman and the other man working for plaintiff completed the job without solicitation or direction by defendant, although its water and light commissioner knew that Bure-

man was doing so. Several months thereafter, on September 4, 1956, plaintiff submitted a claim to defendant for the total charge for removal of the trees. In that connection, the city was not billed by the men who were working with or for plaintiff at the time of the accident and who completed the work, and neither the hours worked, nor the hourly rate, nor the names of plaintiff's associate or helper were shown on such claim, as was also true of claims for services theretofore performed by plaintiff for defendant.

While plaintiff was in the hospital, and thereafter at home, he continued to carry on and supervise his business and employees in the same manner as theretofore, except that while temporarily totally disabled he was not personally present during performance of any work for defendant and the many customers of his own and Bureman, who admittedly did all the work during such period with the help of other employees of plaintiff.

Social security taxes were never withheld from plaintiff's earnings or paid by defendant, as was regularly done with its employees. Rather, plaintiff had a social security number which was never given to the city, and he paid his own social security taxes as a "self-employed" person on his own earnings, including those from defendant, and he so reported same in his income tax returns. Also, defendant never withheld any of plaintiff's earnings for income tax purposes, as was regularly done with its employees, but all such earnings were reported by plaintiff in his income tax returns as a "self-employed" person. Further, none of plaintiff's earnings were ever included or reported through payroll channels of defendant for the purpose of determining workmen's compensation insurance premiums, as normal procedure required, and there is no competent evidence that defendant carried workmen's compensation insurance coverage for plaintiff. In that connection, plaintiff testified that defendant's water and light commissioner had told him several years ago that when-

ever he went to work for the city he "would be under the same coverage as any other city employee." However, plaintiff had no idea about when or where he had such a conversation. The water and light commissioner testified as a witness for plaintiff that several years ago the question came up whether plaintiff and others, particularly electricians, who were picked up to do emergency work, were covered by workmen's compensation insurance, and after talking with the person who sold such a policy to defendant (what answer such person gave is not disclosed), the witness told plaintiff "It was under my thought that he was covered * * * I told him that was my thoughts; right" but "I didn't check to see if they were covered with insurance when I would pick them up and then I dropped it at that, I dropped it until this occasion of Mr. Snodgrass came up and then there was the question that came up again."

We are convinced from this record that plaintiff was an independent contractor. In that connection, authorities relied upon by plaintiff are distinguishable upon the facts and law. Some of such authorities have already been distinguished in cases heretofore cited and discussed, and it would serve no useful purpose to discuss them again in this opinion. However, plaintiff relied primarily upon Schneider v. Village of Shickley, 156 Neb. 683, 57 N. W. 2d 527, a later case which should be discussed. In that case we held: "The contract under which service is performed and the performance thereunder determine the relationship between the contracting parties.

"On the issue as to whether a workman is an employee as distinguished from independent contractor, his relation to his employer should be determined from all of the facts, rather than from any particular feature of the employment or service."

In that opinion we concluded, citing authorities, that while the record contained some indicia that decedent was performing work for the village as an independent

contractor, we were nevertheless of the opinion that the indicia taken as a whole established that he was an employee of the village and performing services as such at the time he was accidentally killed. Therein decedent, a qualified and experienced electrician, had an oral agreement with the village that whenever he was contacted by anyone for the village and asked to perform some electrical work for the village, that he would respond as soon as convenient and perform any and all work in connection with the village's distribution system that the village might ask him to do. He was so employed instead of employing a full-time employee for that purpose. Such agreement had continuity, although the work he was to perform was neither fixed as to amount nor time. His agreement was not to perform a particular piece of work for a specific price within a specified time, and his compensation did not depend upon completion of a job. Also, after decedent's accident and death, no one was employed on his behalf to complete the work, but that was done by the village which, with small exceptions, furnished the material and supplies used in connection with the work to be performed. Therein the village expected decedent to personally perform the work although he could employ others to help him, and no definite time was fixed within which the work was to be performed.

On the other hand, the case at bar is distinguishable on the facts. Herein plaintiff was a qualified and expert tree trimmer and remover, but there was no agreement that he was to perform all of such work for the city that might be necessary, although he was generally called upon at different times to perform it and was compensated therefor by the city in the same manner as all independent contractors. Plaintiff was not required to personally perform the work, but he assumed and was given the responsibility of supervising and completing it by use of his own method, manner, and means, and he employed and paid his own associate and

helpers in order to do so. Herein plaintiff's agreement lacked comparable continuity. In other words, he was thereby required to do a particular piece of work according to his own method, manner, and means for a specific price within a specified time and was not subject to control of defendant except as to results of the work. Also, after plaintiff's accident, his associate and plaintiff's employee actually completed the job without employment therefor by the city to do so, and plaintiff was later compensated for the complete job, whereupon he paid his associate and employee.

While the record here contains some indicia that plaintiff was an employee, we are convinced that the facts and circumstances as a whole established that he was an independent contractor.

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.

YEAGER, J., participating on briefs.

LEWIS C. DUNLAP ET AL., APPELLEES, V. AGNES D. LYNN ET AL., APPELLANTS.
89 N. W. 2d 58

Filed March 28, 1958. No. 34352.

1. Wills. A patent ambiguity is one which appears upon the face of the instrument.
2. ———. A patent ambiguity in a will must be removed by interpretation according to legal principles and the intention of the testator must be found within the will.
3. ———. The intention of the testator as determined from the will must be given effect if it is not inconsistent with any rule of law.
4. ———. The intention within the ambit of this rule is the one the testator expressed by the language of the will and not an entertained but unexpressed intention.
5. ———. In searching for the intention of the testator the court

must examine the entire will, consider each of 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.

6. ———. In the accurate use of language only those entitled to inherit at the death of another can be called his heirs. Generally a gift in a will to the heirs of a person will be construed as a gift to such heirs determined as of the time of the death of the testator.

7. ———. The general rule in this regard will yield where it appears that the testator used the word "heirs" in an inaccurate sense to denote a hypothetical and artificial class composed of those who would have become his heirs had their ancestor lived until some then future time.

8. ———. In the absence of anything in a will to the contrary, the presumption is that the ancestor intended that his property should go where the law carries it which is supposed to be the channel of natural descent.

9. ———. The channel of natural descent is recognized by statute. Section 30-228.03, R. R. S. 1943, directs that where a devisee, being a child or other relation of the testator, dies before the testator, such issue if any surviving the testator take the estate devised to the ancestor unless a different disposition shall be made or directed by the will.

10. ———. There is a presumption that the testator intended to dispose of his entire estate and not to die intestate either as to the whole or any part thereof. Where a provision of a will is fairly open to more than one construction, a construction resulting in an intestacy as to any part of the estate will not be adopted if, by reasonable construction, it can be avoided.

APPEAL from the district court for Morrill County: RICHARD VAN STEENBERG, JUDGE. *Affirmed.*

Heaton & Heaton, for appellants.

Bern R. Coulter, Neighbors & Danielson, and *James L. Macken,* for appellees.

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

BOSLAUGH, J.

This is a proceeding in equity to obtain an adjudication of the meaning and effect of the part of the will

of Christina D. Dugger, deceased, which disposes of the residue of her estate. There is no issue of fact.

The will of Christina D. Dugger, a resident of Morrill County, was made May 28, 1913. The following persons related to her were then living: George W. Dugger, her husband; James P. Dunlap, her father; Christina C. Dunlap, her mother; Nelson C. Dunlap, a brother; Agnes D. Lynn, a sister; Patience D. Boyd, a sister; and Lewis C. Dunlap, a brother. Christina D. Dugger, sometimes hereafter referred to as testatrix, and her husband were divorced and their property rights adjudicated August 3, 1916. Testatrix did not remarry and she died without issue.

Christina C. Dunlap died April 7, 1924, and left surviving her James P. Dunlap, her husband, who departed this life January 21, 1929; Nelson C. Dunlap, a son; Agnes D. Lynn, a daughter; Patience D. Boyd, a daughter; Christina D. Dugger, a daughter; and Lewis C. Dunlap, a son.

Nelson C. Dunlap died April 25, 1930, and left surviving him a son, C. Palmer Dunlap, and a daughter, May D. English, who is now May D. Anderson. They are grandchildren of Christina C. Dunlap and a nephew and niece of Christina D. Dugger.

Patience D. Boyd died May 21, 1942, and she left surviving her two daughters, Ellen Boyd Yocum and Beatrice B. Landis. They were granddaughters of Christina C. Dunlap and nieces of Christina D. Dugger.

Agnes D. Lynn survives and has one child, Margaret Hamilton, who is living, is a granddaughter of Christina C. Dunlap, and a niece of Christina D. Dugger.

Lewis C. Dunlap is living and has no issue.

The grandchildren of Christina C. Dunlap above named were each born before the will of Christina D. Dugger was made. They are living and are the only grandchildren of Christina C. Dunlap.

Christina D. Dugger died September 21, 1956, a resident of and the owner of real estate in Morrill County.

Her will was admitted to probate by the county court of that county May 21, 1957. She was survived by Lewis C. Dunlap, her brother; Agnes D. Lynn, her sister; Margaret Hamilton, her niece, the daughter of Agnes D. Lynn; C. Palmer Dunlap, her nephew, and May D. Anderson, her niece, children of Nelson C. Dunlap, deceased; and Ellen Boyd Yocum and Beatrice B. Landis, her nieces, daughters of Patience D. Boyd, deceased.

The part of the will of Christina D. Dugger, deceased, concerned in this case is the paragraph thereof numbered and designated "FIVE" the language of which is: "If Christina C. Dunlap shall die before I do and there shall be no heirs born to me, then and in that case all of my property above described and all other property, both real and personal which shall belong to me at my demise shall descend to the heirs of Christina C. Dunlap share and share alike, and should there be grand children of the said Christina C. Dunlap they shall share and share alike of the share falling to their parent, under this will."

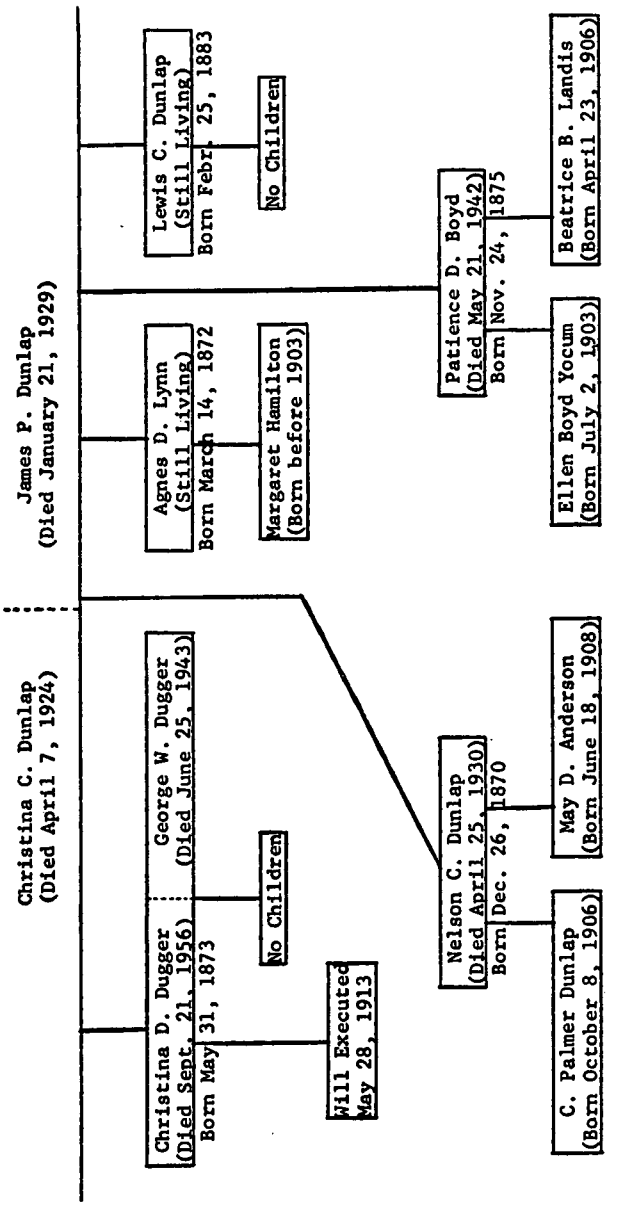
The district court found and adjudicated that Lewis C. Dunlap, Agnes D. Lynn, C. Palmer Dunlap, May D. Anderson, Ellen Boyd Yocum, and Beatrice B. Landis were, by the terms of the will of Christina D. Dugger, the only devisees and legatees under the will and the only persons entitled to share in the estate of the testatrix; that Lewis C. Dunlap and Agnes D. Lynn were each entitled to an undivided one-fourth of all the property owned by Christina D. Dugger at the time of her death; that C. Palmer Dunlap, May D. Anderson, Ellen Boyd Yocum, and Beatrice B. Landis were each entitled to an undivided one-eighth of all the property owned by Christina D. Dugger at the time of her death; and that Margaret Hamilton was not a devisee or legatee under the terms of the will of Christina D. Dugger and was not entitled to any of the property owned by the testatrix at the time of her death.

A motion of Agnes D. Lynn and Margaret Hamilton

for a new trial was denied and they by this appeal present the record to this court for review. The action of the trial court produced the precise result appellees sought by this litigation and, of course, they approve and attempt to sustain it on this appeal.

Appellants argue that the language of the will "they (grandchildren) shall share and share alike of the share falling to their parent" means that the gift to the grandchildren and their parents is an original gift to the former subject to the condition that they take only if the parents were living at the time of the death of the testatrix and received a part of her property under the will; that nothing "fell" under the will to Nelson C. Dunlap or Patience D. Boyd because they each predeceased the testatrix and any gift to them lapsed; that because thereof the grandchildren, C. Palmer Dunlap and May D. Anderson, children of Nelson C. Dunlap, deceased, and Ellen Boyd Yocum and Beatrice B. Landis, children of Patience D. Boyd, deceased, take no part of the estate of the testatrix; that the will says the grandchildren shall share in the share falling to their parent but nothing fell to the parents of the four grandchildren last above named and because of this there is nothing in which the four grandchildren can share; that Agnes D. Lynn and Lewis C. Dunlap are the only "heirs" of Christina C. Dunlap surviving the death of the testatrix; and that because of section 76-113, R. R. S. 1943, Agnes D. Lynn has a life estate in one-half of the property of the testatrix, her daughter Margaret Hamilton owns the remainder thereof in fee, and the other half of the property of the testatrix is vested in Lewis C. Dunlap in fee.

The family tree of testatrix is reproduced from the record.


Christina C. Dunlap
(Died April 7, 1924)
James P. Dunlap
(Died January 21, 1929)
Christina D. Dugger
(Died Sept. 21, 1956)
Born May 31, 1873
George W. Dugger
(Died June 25, 1943)
No Children
Will Executed
May 28, 1913
Agnes D. Lynn
(Still Living)
Born March 14, 1872
Margaret Hamilton
(Born before 1903)
Lewis C. Dunlap
(Still Living)
Born Febr. 25, 1883
No Children
Patience D. Boyd
(Died May 21, 1942)
Born Nov. 24, 1875
Ellen Boyd Yocum
(Born July 2, 1903)
Beatrice B. Landis
(Born April 23, 1906)
Nelson C. Dunlap
(Died April 25, 1930)
Born Dec. 26, 1870
May D. Anderson
(Born June 18, 1908)
C. Palmer Dunlap
(Born October 8, 1906)

There is an obvious patent ambiguity in the part of the will of the testatrix with which this case is principally concerned. A patent ambiguity must be removed by interpretation according to legal principles and the intention of the testator must be found in the will. In searching for the intention of the testator the court must examine the entire will, consider each of 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. The intention of the testator as determined from the will must be given effect if it is not inconsistent with any rule of law. The intention within the ambit of this rule is the one the testator expressed by the language of the will and not an entertained but unexpressed intention. Kramer v. Larson, 158 Neb. 404, 63 N. W. 2d 349; Blochowitz v. Blochowitz, 130 Neb. 789, 266 N. W. 644; Dahlke v. Dahlke, 155 Neb. 169, 51 N. W. 2d 266; § 76-205, R. R. S. 1943.

It is important to determine the time for ascertaining the heirs of Christina C. Dunlap. The part of the will in dispute says "heirs of Christina C. Dunlap." The will was made May 28, 1913. Christina C. Dunlap died April 7, 1924, and Christina D. Dugger departed this life September 21, 1956. The testatrix must have intended that the heirs of her mother would be determined as of one of these dates.

The heirs of Christina C. Dunlap on May 28, 1913, were her husband and her five children. The terms of sections 30-101 and 30-103, R. R. S. 1943, which existed in identical words on May 28, 1913, and April 7, 1924, gave one-third of the property of Christina C. Dunlap to her husband James P. Dunlap and the residue of her property would have vested in equal shares in her children. The husband would have received five-fifteenths and each of the children, including Christina D. Dugger, would have become the owner of two-fifteenths. Christina C. Dunlap died April 7, 1924. Her husband

and five children survived her. Heirship was the same as it was on May 28, 1913. Her heirs and the proportions that they would have taken at the time of her death were identical with what they were on May 28, 1913, when the will was made. Christina D. Dugger was an heir of her mother and she would have inherited two-fifteenths of the property on April 7, 1924. It is convincingly obvious that the testatrix did not intend to be an heir to a part of the property she owned. She was an heir of her mother on each of the dates May 28, 1913, when the will was made and April 7, 1924, when her mother died so it may be concluded that the word "heirs" in paragraph five of the will was not used in a technical sense. There is nothing to indicate that Christina D. Dugger intended to die partially intestate. It must be concluded that the word "heirs" as used in paragraph five is used in a nontechnical sense to denote a hypothetical or artificial class and that the heirs of Christina C. Dunlap must be determined as of the time of the death of Christina D. Dugger on September 21, 1956.

The law of descent and distribution of this state provides that the heirs at law of a person who shall leave no husband or wife surviving shall be his children, in equal shares, and the lawful issue of any deceased child by the right of representation. §§ 30-102 and 30-103, R. R. S. 1943. The heirs at law of Christina C. Dunlap at the time Christina D. Dugger died September 21, 1956, and their proportionate shares were C. Palmer Dunlap and May D. Anderson, children of her deceased son Nelson C. Dunlap, each one-eighth; Agnes D. Lynn, her daughter, one-fourth; Ellen Boyd Yocum and Beatrice B. Landis, children of her deceased daughter Patience D. Boyd, each one-eighth; and Lewis C. Dunlap, her son, one-fourth. It is clear that the word "heirs" was not used in this will in a technical sense and that the heirs of Christina C. Dunlap should be decided as of the date of the death of the testatrix.

In Brandeis v. Brandeis, 150 Neb. 222, 34 N. W. 2d 159, the will of the testator provided that upon the death of his wife to whom a life interest was left, the shares of stock owned by him should vest in his brothers, Arthur and Emil, in equal shares and that if either of his brothers should die during the life of his wife, "his lawful male heirs, as of the date of her death, shall take his share." His brother Emil died during the life of his wife. The problem was whether Emil's heirship should be determined as of the date of his death or as of the date of the death of the testator's wife. If the former, only one nephew would have received the stock; if the latter, the stock would be distributed among three nephews. The court held that heirship should be determined as of the date of the death of the testator's wife, which was 1946, even though Emil died 34 years earlier in 1912. It is said therein: "The burden devolving upon the court is to determine, within the limits of this inquiry, whether in the use of the quoted words H. Hugo Brandeis had reference to those who were lawful male heirs of Emil Brandeis at the date of his, Emil's, death, or those who would have been his lawful male heirs at the death of Lyela Brandeis had he survived the testator, his brother Arthur D. Brandeis, and his sister Sarah Brandeis Cohn. If he intended the former then the defendants are entitled to prevail. If he intended the latter then the plaintiffs are entitled to prevail. There is no contention on the part of any of the parties to this action that the intention of the testator in this respect, no matter what it shall be found to have been, may not be allowed to prevail. * * * In this light it is clear from the will that the testator did not use the term 'heirs' in a technical sense but with the purpose and intention of indicating those of a particular class closest in blood relation to the named beneficiary if such beneficiary died prior to the death of Lyela Brandeis. To accept and enforce such an inten-

tion and purpose will conform to well-accepted principles of law."

In Tyler v. City Bank Farmers Trust Co., 314 Mass. 528, 50 N. E. 2d 778, this appears: "In the accurate use of language, only those entitled to inherit at the death of another can be called his heirs. Accordingly, unless a contrary intention appears, a gift in a will to the heirs of a person, whether he be the testator or a life tenant or another, will be construed as a gift to such heirs determined as of the time of death of that person. * * * The general rule will yield, however, where it appears that the testator used the word 'heirs' in an inaccurate sense, to denote a hypothetical and artificial class composed of those who would have become heirs had their ancestor lived until some then future time * * * and the intention of the testator will be given effect."

The heirs at law of the testatrix and the heirs of Christina C. Dunlap as of the time of the death of the testatrix are the same and they take in the same proportion as stated in detail above. If patent ambiguity exists, and the will does not require a different interpretation, it is presumed that the testatrix intended that the property should go where the statute of descent would have taken it if there were no will. This is true because the statute of descent recognizes as the natural objects of one's bounty those who bear the closest blood relation to the deceased and that heirs at law are not disinherited by mere speculation.

In Herter v. Herter, 97 Neb. 260, 149 N. W. 795, this court declared: "In the absence of anything in a will to the contrary, the presumption is that the ancestor intended that his property should go where the law carries it, which is supposed to be the channel of natural descent."

It is said in Heilman v. Reitz, 89 Neb. 422, 131 N. W. 909: "Heirs will not be disinherited by conjecture, but only by express words or necessary implication."

It is said in Hunter v. Miller, 109 Neb. 219, 190 N. W.

583: "Where there is a doubt as to the distribution of property under a will, the heirs at law will be favored, and, so far as consistent with the terms of the will, or the reasonable inferences to be drawn therefrom, the law of descent will be followed as presumptively in accord with the intention of the testator."

Roberts v. Roberts, 147 Neb. 494, 23 N. W. 2d 774, contains this: "The channel of natural descent is recognized by statute. Sec. 30-228, R. S. 1943, directs that where a devisee, being a child or other relation of the testator, dies before the testator, his issue, if any survive the testator, take the estate devised to the ancestor 'unless a different disposition shall be made or directed by the will.' "

There is no language in the will and it yields no inference which is contrary to the presumption that the estate should descend and be distributed in accordance with the statute of descent and the nonlapse statute. § 30-228.03, R. R. S. 1943. The reasonable interpretation of paragraph five is consistent with this presumption. Another interpretation would be strained and capricious. If this presumption is recognized, the grandchildren become substitutional beneficiaries who take per stirpes and the will becomes a reasonable and sensible instrument.

Appellants contend that no niece or nephew takes under the will unless his parent survives the testatrix. If this is true and the brothers and sisters of the testatrix had died before she departed this life, she would have died intestate. This could have happened. The will was made May 28, 1913. The testatrix was then about 40 years of age. Her brother Nelson C. Dunlap was 42 years of age, her sister Agnes D. Lynn was 41 years of age, her sister Patience D. Boyd was 37 years of age, and her brother Lewis C. Dunlap was 30 years of age. The will was not rejected and another will was not made. The testatrix lived more than 43 years after its execution. She died when she was more than 83 years

of age. Nelson C. Dunlap had been dead for 26 years, Patience D. Boyd for 13 years, and Agnes D. Lynn was 84 years of age. It is not difficult to presume that there was a reasonable probability, of which the testatrix was aware, that Agnes D. Lynn and Lewis C. Dunlap would predecease her. If they had and the construction placed on paragraph five by appellants is correct, no brother or sister would have taken, no grandchild would have taken, and the testatrix would have died wholly intestate. A construction which might have resulted in intestacy should not be adopted if, by reasonable construction, it can be avoided. In Attebery v. Prentice, 158 Neb. 795, 65 N. W. 2d 138, this court declared: "There is a presumption that a testator intended to dispose of his entire estate and not to die intestate either as to the whole or as to any part thereof. Where a provision of a will is fairly open to more than one construction, a construction resulting in an intestacy as to any part of the estate will not be adopted if, by a reasonable construction, it can be avoided." See, also, Polsky v. Continental Nat. Bank, 240 F. 2d 732. Intestacy will not result from the construction urged by appellants but that is only because a brother and sister survive the testatrix. If they had not survived her and if the interpretation was adopted that appellants suggest, there would have been total intestacy. It must be presumed that the testatrix did not intend that should happen. The grandchildren of Christina C. Dunlap were all living when the will was made May 28, 1913. The oldest grandchild, Margaret Hamilton, was about 10 years of age and May D. Anderson, the youngest was 4 years of age. The words "should there be grand children" cannot be said to refer to a future contingent event. It happened before the will was executed. These words must be given a rational meaning. The facts of life indicate that the grandchildren would survive their parents. Likewise the language that the grandchildren should "share and share alike of the share falling to

their parent" should be given a sensible meaning. If the grandchildren were not to participate by way of representation, the words last quoted are without meaning. It may not be presumed that the testatrix used language that had no application or effect. If the words "if their parents should predecease me" are read into the paragraph in dispute, the intention of the testatrix is beyond doubt. It may be, considering all the circumstances, reasonably said that the suggested words were implied and necessary implication is equivalent to expression. Therefore nothing is added to the will.

The conclusion is that the meaning of paragraph five of the will is that the testatrix thereby devised and bequeathed her property to her sister Agnes D. Lynn and to her brother Lewis C. Dunlap each one-fourth and to her nephew and nieces, C. Palmer Dunlap, May D. Anderson, Ellen Boyd Yocum, and Beatrice B. Landis, the grandchildren of Christina C. Dunlap, each one-eighth.

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

AFFIRMED.

SIMMONS, C. J., did not participate in the decision of this case.

JOHN EDEN, A MINOR, BY CLAUDE EDEN, HIS NEXT FRIEND AND NATURAL GUARDIAN, APPELLEE, V. RICHARD E. KLAAS, APPELLANT.

89 N. W. 2d 74

Filed March 28, 1958. No. 34357.

1. **Infants: Negligence.** A child, 5 years of age, may not properly be charged with contributory negligence.
2. **Automobiles: Negligence.** The negligence of the operator of an automobile in which a child of 5 years is riding as a guest can not be imputed to such child.
3. **Torts.** Where independent tortuous acts of two persons combine to produce an injury indivisible in its nature, either or both tort-feasors may be held for the entire damage, not

because each is responsible for the act of the other, but because his own act is regarded in law as a cause of the injury.

4. **Trial.** Where different minds may draw different conclusions from the evidence in regard to negligence, the question should be submitted to a jury.
5. ———. In testing the sufficiency of evidence to support a verdict it must be considered in the light most favorable to the successful party, that is, every controverted fact must be resolved in his favor and he should have the benefit of every inference that can reasonably be deduced therefrom.
6. ———. A trial court is not required to give instructions in the form presented. It is sufficient in that respect if the trial court fairly and correctly instructs the jury on all the issues.
7. ———. The trial court should refuse a requested instruction that is not applicable to any issue of fact submitted to the jury.
8. **Trial: Appeal and Error.** Where a party charged with negligence suffered a complete loss of memory due to injuries sustained in an accident, it is not prejudicial error for the trial court to refuse to instruct that a presumption exists that he was free from negligence where there is evidence tending to establish negligent conduct on his part.
9. **Evidence: Appeal and Error.** A party is entitled on cross-examination to show the interest of a witness in the litigation as affecting his credibility, but the limits of such cross-examination are ordinarily subject to the discretion of the trial judge, and, unless abused, its exercise is not error.
10. **Damages: Appeal and Error.** In an action for damages, where the law furnishes no legal rule for measuring them, the amount to be awarded rests largely in the sound discretion of the jury; and it will not be disturbed on appeal unless it can be said, as a matter of law, that upon a consideration of all the evidence the amount of the verdict is excessive.

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

Frederick M. Deutsch, Warren G. Albert, and *Gordon L. Gay,* for appellant.

Brogan & Brogan and *Wagner, Wagner & Conrad,* for appellee.

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

CARTER, J.

This is an action for damages brought by a guest in an automobile driven by his father at the time it became involved in a collision with an automobile driven by the defendant. The jury returned a verdict for the plaintiff in the amount of $2,500. Judgment was rendered in this amount, and the defendant has appealed.

The collision involved in the present action occurred at a road intersection located 2 miles south and 1 mile west of Humphrey, Platte County, Nebraska, on November 4, 1955, at about 4:30 p.m. Both intersecting roads were graveled, level, and unprotected by stop signs. Immediately prior to the accident the automobile in which the plaintiff was riding was being driven by his father in an easterly direction toward the intersection at a speed of about 40 miles an hour. The automobile of the defendant was being driven north toward the intersection, the defendant entering the intersection from plaintiff's right. The collision occurred near the center of the traveled portion of the intersection. The evidence shows that the driver of the car in which plaintiff was riding looked to his right when 150 to 200 feet from the intersection and did not see defendant's automobile approaching from the south. He admittedly did not look again to his right. He was guilty of contributory negligence sufficient to bar any recovery by him as a matter of law, as this court held in the companion case of Eden v. Klaas, 165 Neb. 323, 85 N. W. 2d 643.

The plaintiff was a boy, 5 years of age at the time of the accident. He was riding in the front seat between his father and his brother Richard when the collision occurred. This plaintiff, a boy 5 years of age, is incapable of being charged with contributory negligence. Connors v. Pantano, 165 Neb. 515, 86 N. W. 2d 367. In addition thereto, in his capacity as a guest in his father's automobile, the negligence of the father is not imputa-

ble to him. Burhoop v. Brackhan, 164 Neb. 382, 82 N. W. 2d 557.

It is the rule that where the negligence of the driver of an automobile, in which a person is riding as a guest, is the sole proximate cause of a collision in which the guest is injured, the guest cannot recover for such injuries from a third person. But where such injuries are the result of the negligent acts of his host and the driver of the other car participating in the collision, either or both tort-feasors may be held for the entire damage because the negligent acts of each are regarded in law as a cause of the injury. Burhoop v. Brackhan, *supra*. The sole question as to the liability of the defendant is, therefore, whether or not the evidence is sufficient to sustain a verdict finding the defendant guilty of negligence which, together with the negligence of plaintiff's host, combined to produce plaintiff's injury.

The defendant testified that because of the injuries he sustained in the accident he suffered a loss of memory and was unable to recall any of the circumstances surrounding the accident.

The evidence of negligence on the part of the defendant is largely dependent upon the sufficiency of the evidence of Mark Eden, the 13-year-old brother of the plaintiff, who was riding in the back seat of the Eden car, which, according to the evidence of his father, approached the intersection at a speed of 40 miles an hour. Mark Eden testified that when the Eden car was about 100 feet from the intersection he saw the Klaas car approximately 200 feet south of the intersection. He turned and looked at his father and before he could speak the collision occurred. During the period that he observed the Klaas car he said that it appeared to be in the center of the road, but that it was skidding and swerving from one side of the road to the other. He testified on cross-examination that he concluded the defendant had applied his brakes at that time. The witness was properly precluded from testifying to the

speed of defendant's car because of a want of foundation upon which to base an estimate of speed. It is clear, however, that the jury could properly infer from the evidence of this witness that defendant's car was traveling at a greater speed than the Eden car, based on the distances each was from the intersection when defendant's car was observed by the witness. The jury could also infer that defendant was driving at such a speed that he was unable to stop his car within 200 feet in order to avoid the accident. The evidence tends to establish the want of proper control of his car by the defendant rather than the rate of speed at which he was traveling. We think the jury could properly conclude from this evidence that defendant was negligent, the credibility and weight of Mark Eden's evidence being for the jury to determine. In testing the sufficiency of the evidence to support a verdict it must be considered in the light most favorable to the successful party in accordance with the rule announced in Kohl v. Unkel, 163 Neb. 257, 79 N. W. 2d 405. It is elementary that a verdict of a jury will not be set aside by this court unless it is clearly wrong. We cannot say as a matter of law that such is a fact in the present case. The evidence was sufficient to take the case to the jury on the question of defendant's negligence.

The defendant contends that evidence of excessive speed was based on a time-and-distance-traveled computation made on approximate factors only and, consequently, the result was speculative and conjectural, and insufficient to support a verdict. In support of this contention defendant cites Lofgren v. Omaha & C. B. St. Ry. Co., 103 Neb. 723, 174 N. W. 222, and Burns v. Harfst, 42 Wash. 2d 795, 259 P. 2d 379. We do not think the rule announced in these cases has any application here. The trial court meticulously refused to permit Mark Eden to testify to the speed of defendant's car because of its speculative and conjectural foundation. There is no evidence in the record as to the speed of

defendant's car, other than the evidence of Mark Eden that it was skidding and swerving as the result of the application of brakes when it was 200 feet from the intersection, and the conclusion that could properly be drawn therefrom that defendant was unable to control his car within that distance and avoid the accident. This evidence raised the factual issue as to whether or not defendant was driving his automobile at a speed that was reasonable and proper under the circumstances.

Defendant, by his assignments of error numbered 3 to 9, inclusive, claims error in that the trial court by its instruction No. 1 set forth allegations of fact which had no support in the evidence. We have examined the instruction with reference to the assignments of error directed at its correctness and find that the court committed no prejudicial error in the respects claimed.

Defendant assigns as error the giving of instruction No. 8 by the trial court and asserts that the correct rule is contained in defendant's requested instructions Nos. 3 and 4, and that the latter instructions should have been given. The instruction given by the court contained explanatory statements as to the application of the statute with reference to right-of-way at open intersections. The effect of the instruction as a whole was to advise the jury that "if two vehicles are approaching an intersection at lawful rates of speed and under such relative conditions as to speed and distance that both will reach the intersection at the same instant or so near the same instant as to make it apparent to a man of ordinary prudence that there will be a collision or the risk of a collision, then it may be said that they will reach the intersection at approximately the same time." We think the trial court correctly stated the law on the subject. The requested instructions were likewise correct, but the court having instructed and covered the substance of the requested instructions, the latter were properly refused. Campbell v. Slater, 127 Neb. 231, 254 N. W. 897; Miceli v.

Equitable Life Assurance Society, 138 Neb. 367, 293 N. W. 112.

Defendant complains of error in the giving of instruction No. 9, which stated: "You are instructed that in arriving at the rate of speed at which either driver was driving his car at the time of the accident, you may take into consideration, in addition to the evidence bearing directly on speed, the distance that either car traveled after the collision, and any and all other facts and circumstances tending to show the rate of speed at which either driver was driving." The complaint made to this instruction is that there was no credible evidence bearing directly on the speed of defendant's automobile. While it is true that there was no evidence as to the speed of defendant's automobile as to the miles per hour it was traveling, there is evidence that defendant applied his brakes approximately 200 feet from the intersection and that his car was skidding and swerving immediately thereafter. We think the jury could properly infer from this evidence that defendant was driving his car as it approached the intersection at a speed that was not reasonable and proper under the circumstances; that defendant saw the Eden car 200 feet from the intersection and was unable to bring his car under such control in that distance so as to avoid a collision; and that the jury could properly find, as it did, that defendant was driving at a speed which was not reasonable and proper under the circumstances. We think the instruction was a proper one under the evidence in this case.

Defendant complains of instruction No. 10 given by the trial court because it contains the statement that "you should consider, in arriving at the amount of plaintiff's damages, the nature and extent of his injuries and whether the same are temporary or permanent, his pain and suffering and the disability suffered together with such as the evidence shows he has suffered in the past and will with reasonable certainty suffer in the

future, if any, * * *." The basis of the claimed error is that there was no evidence of future pain, suffering, or disability. There is evidence in the record that plaintiff has small scars over his right eye and posterior to the right ear. He suffered a severe cerebral concussion in the accident. There is evidence that he has headaches and that he has a twitching or blinking of one eye, particularly late in the day when the boy becomes tired, which the only physician who testified on that subject could not rule out as not having resulted from the cerebral concussion which he suffered. Defendant's expert medical witness was asked this question: "So you couldn't tell for sure whether or not any injury to the central nervous system would be observed in this boy for a period of years, could you?" To which he answered: "No, except that the child impressed me as being one that was of normal temperament. He did not appear to be a very highstrung individual and, at the time I examined him, he didn't exhibit anything suggestive of that." The trial court properly instructed the jury that it was limited to such future pain, suffering, and disability which the evidence shows with reasonable certainty that plaintiff would suffer in the future. We are of the opinion that the evidence warranted the trial court in giving its instruction No. 10.

Complaint is made of the failure of the trial court to give defendant's requested instruction No. 5 which stated: "If motorist entering intersection fails to see automobile which is favored over him under the rules of the road, he is guilty of negligence sufficient to bar recovery as a matter of law." The foregoing requested instruction has no application in the present case. Plaintiff was a guest in the Eden car and the negligence of its driver did not bar a recovery by the plaintiff. The issue in the case was whether or not the defendant was guilty of any negligence which, together with the negligence of plaintiff's host, combined to produce plaintiff's injury. The trial court was therefore correct in refus-

ing to give defendant's tendered instruction No. 5. Campbell v. Slater, *supra*.

As to defendant's claim of error in refusing to give his requested instruction No. 6, dealing with the subject of contributory negligence as it applied to the driver of the Eden car, the instruction was properly refused for the same basic reason as that given in approving the trial court's refusal to give instruction No. 5.

Complaint is made of the refusal of the trial court to give defendant's requested instruction No. 7. The effect of this tendered instruction was to advise the jury that, as defendant suffered a complete loss of memory as a result of the injuries which he sustained in the accident, a presumption existed that defendant was free from negligence, and that such presumption is rebuttable and disappears if there is credible evidence in the case reasonably tending to rebut and overcome it. There was evidence in the case tending to show negligence on the part of defendant which was not disputed. This being true, the presumption disappears, and it was not prejudicial error for the court to refuse to give the instruction.

Defendant complains that he was unduly restricted in his cross-examination of the witness Mark Eden. The trial court permitted defendant to show the interest of the witness, in that he had a suit pending growing out of the same accident. The trial court refused to permit him to show the nature of the injuries for which he had sued, or the amount of damages claimed. We think the trial court was correct in its ruling. Defendant clearly had the right to show the interest of the witness as affecting his credibility, but defendant's right of cross-examination does not extend to an examination into the issues of that case or to the amount sought as damages. Such matters were foreign to the issues in the case being tried and the trial court did not abuse its discretion in limiting the cross-

examination as it did. Rakes v. State, 158 Neb. 55, 62 N. W. 2d 273.

Lastly, the defendant urges that the verdict and judgment were excessive. The evidence shows that plaintiff was taken to a hospital immediately following the accident, where he was confined for a period of 10 days. He was unconscious for approximately 36 hours. He suffered a fracture of both collarbones, which required a period of from 6 to 8 weeks to heal. He was required to wear a clavicle splint for both fractures for about a month, which caused irritation and pain. He had multiple cuts, bruises, and scratches on his head. He has a small scar over his right eye and another that was posterior to the right ear, which are permanent. The latter injury did not heal properly and a cauterization of the granulated tissue was subsequently required. There is evidence that plaintiff suffered a severe cerebral concussion of the brain and that pain, suffering, and disability could normally first manifest itself within a period of years after the accident. There is evidence that plaintiff had an abnormal blinking or twitching of one eye, which the medical witnesses could not rule out as not being caused by the concussion. The evidence shows that plaintiff not only might show manifestations of damage to his nervous system for a period of years in the future, but there was evidence that he in fact was manifesting such damage at the time of the trial. After considering all the evidence on the subject in the record, we conclude that the verdict and judgment were not so excessive as to require a reversal of the case.

The controlling rule is: In an action for damages, where the law furnishes no legal rule for measuring them, the amount to be awarded rests largely in the sound discretion of the jury, and courts are reluctant to interfere with a verdict so rendered. A verdict may be set aside as excessive by this court only when it is so clearly exorbitant as to indicate that it was the result of passion, prejudice, mistake, or some means not ap-

parent from the record, clearly indicating that the jury disregarded the evidence or the applicable rules of law. A verdict will not be disturbed on the ground of excessiveness unless it can be said as a matter of law, after a consideration of all the evidence, that it is exorbitant. Southwell v. DeBoer, 163 Neb. 646, 80 N. W. 2d 877; Wolfe v. Mendel, 165 Neb. 16, 84 N. W. 2d 109.

We conclude that the instructions when considered as a whole fully and fairly submitted the issues to the jury, and that the verdict returned is supported by sufficient evidence. Finding no prejudicial error in the record, the judgment of the district court is affirmed.

AFFIRMED.

THE J. R. WATKINS COMPANY, A FOREIGN CORPORATION, APPELLANT, V. VERN ALFRED SORENSON ET AL., APPELLEES.
88 N. W. 2d 902

Filed March 28, 1958. No. 34366.

1. **Attachment: Trial.** The hearing of a motion to dissolve an attachment is a "trial" of the issues of law or fact or both in an action or cause within the meaning of that term employed in section 25-1103, R. R. S. 1943.
2. ———: ———. In a case where the facts stated in an affidavit for an attachment are denied by a motion to dissolve, the burden is cast upon plaintiff to sustain his charges by a preponderance of the evidence.
3. **Attachment: Appeal and Error.** An order granting or denying a motion to discharge an attachment based upon conflicting evidence will not be reversed unless clearly wrong.
4. **Attachment.** An attachment based on an affidavit alleging nonresidence of the debtor is wrongful and the proceedings are void if such allegations are untrue.
5. ———. The question of residence in attachment proceedings is generally one of intention coupled with affirmative action, and is determined from the facts and circumstances in each particular case.
6. ———. In that connection, mere temporary absence from the state for the purpose of business, pleasure, or health is not of itself such an abandonment of a party's place of abode

where service of summons may be lawfully made within the state so as to authorize the issuance of an attachment against him on the ground of nonresidence.

APPEAL from the district court for Dixon County: JOHN E. NEWTON, JUDGE. *Affirmed.*

Leamer & Graham, for appellant.

Addison & Stertz, for appellees.

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

CHAPPELL, J.

Plaintiff, The J. R. Watkins Company, a foreign corporation, brought this action in two causes of action, seeking to recover from defendants, Vern Alfred Sorenson and his parents, Alfred Sorenson and Helen Sorenson, upon a debt or demand arising upon contract. Therein plaintiff filed an affidavit for attachment, alleging nonresidence of defendants Alfred Sorenson and Helen Sorenson. Thereupon an order of attachment issued and a levy thereof was made August 20, 1957, upon their described farm in Dixon County. Subsequently said defendants filed a motion to discharge the attachment for the reason that the allegations of plaintiff's affidavit for attachment were false and the attachment was unlawfully obtained.

After a hearing on said motion, whereat evidence was adduced, the trial court ordered the attachment discharged. Plaintiff's motion for new trial was overruled, and it appealed, assigning: (1) That the trial court's decision was not sustained by sufficient evidence and was contrary to law; and (2) that the trial court erred in admitting in evidence the affidavit of a physician over objections of plaintiff. We conclude that the assignments have no merit.

With regard to assignment of error No. 2, plaintiff never preserved and presented that alleged assignment of error to the trial court in its motion for new trial.

Therefore, it is elementary that it cannot be considered by this court upon appeal. Such assignment requires no further discussion except to cite Schwank v. County of Platte, 152 Neb. 273, 40 N. W. 2d 863, and Wabel v. Ross, 153 Neb. 236, 44 N. W. 2d 312.

Hereinafter, Alfred Sorenson will generally be called defendant, but when speaking of both him and defendant Helen Sorenson, his wife, they will generally be called defendants.

At the outset we point out and reaffirm certain rules of law which have application and are controlling, to wit: The hearing of a motion to dissolve an attachment is a "trial" of the issues of law or fact or both in an action or cause within the meaning of that term employed in section 25-1103, R. R. S. 1943. Gibson v. Sidney, 50 Neb. 12, 69 N. W. 314.

In a case where the facts stated in an affidavit for an attachment are denied by a motion to dissolve, the burden is cast upon plaintiff to sustain his charges by a preponderance of the evidence. National Reefer Service, Inc. v. Felman, 164 Neb. 783, 83 N. W. 2d 547.

An order granting or denying a motion to discharge an attachment based upon conflicting evidence will not be reversed unless clearly wrong. Johnson v. May, 49 Neb. 601, 68 N. W. 1032.

An attachment based on an affidavit alleging nonresidence of the debtor is wrongful and the proceedings are void if such allegations are untrue. German Nat. Bank v. Kautter, 55 Neb. 103, 75 N. W. 566, 70 Am. S. R. 371.

The question of residence in attachment proceedings is generally one of intention coupled with affirmative action, and is determined from the facts and circumstances in each particular case. In that connection, mere temporary absence from the state for the purpose of business, pleasure, or health is not of itself such an abandonment of a party's place of abode where service of summons may be lawfully made within the state

so as to authorize the issuance of an attachment against him on the ground of nonresidence. Johnson v. May, *supra*. See, also, 7 C. J. S., Attachment, § 32, p. 217, and 4 Am. Jur., Attachment and Garnishment, §§ 432-438, pp. 822-825, inclusive, with authorities cited therein.

In the light of the foregoing authorities, we have examined the record. There is some equivocal conflict in the evidence, but so far as important here, it discloses the following from which we conclude that the trial court's order discharging the attachment was not clearly wrong but was amply supported by the evidence. Defendants had been married 39 years and had resided in Dixon and Cedar counties, Nebraska, most of their natural lives. In 1943 defendant purchased the farm involved in Dixon county, and ever since 1947 he and his family have continuously lived on such premises, which were encumbered by a mortgage indebtedness of about $7,800 together with some interest and taxes. During such period defendant farmed that property at all times except as hereinafter noted.

During the last 10 years defendant had suffered a chronic asthmatic condition which required medical attention. In the spring of 1957 such condition failed to respond to prescribed medical treatment and became so aggravated that defendant could not physically carry on his farming operations without help. Defendant's physician then advised him that, because of his age and physical condition, he should try a temporary change of climate and see if he could improve his health which would be necessary if he were to continue farming. Defendant told his physician that he could go to California and visit his son who lived there, and defendant's physician instructed him to do so.

Thus, on or about April 1, 1957, defendants went to California where a son lived, but their daughter remained at their farm home until the last week in May 1957, when she also went to California. When defendants left, they had no intention of moving to Cali-

fornia or abandoning their residence on their farm, so they left all of their household goods, furniture, dishes, and other household equipment in their home on the farm. They took with them only some clothing and bedding and a few other small items, fully intending to return to their home as soon as they determined the effect of the change of climate on defendant's health. When defendant went to California he sold none of his property except some livestock. In other words, he left all of his property on their farm, including all of his machinery and farming equipment owned and used by him there. He also left 4 cows, 1 bull, 15 hogs, and the corn and grain owned by him on the premises. His son-in-law, who lived nearby, agreed to care for defendant's stock and property, and to plant defendant's crops and care for them until defendants returned. In doing so, the son-in-law went upon the premises once or twice daily. Further, arrangements were made with defendants' daughter and their son-in-law to take care of defendants' home, household goods, livestock, grain, and business, and defendants kept in touch with them and directed their actions with regard to defendants' property and business affairs.

During their absence, defendants did not obtain California license plates for their car, or obtain California driver's licenses. They paid personal property taxes and federal income taxes in Nebraska, and reported their residence therein as at their farm home in Nebraska. They maintained their Nebraska farm mailing address, and mail sent there was forwarded to them by their daughter and son-in-law. Defendants continued their banking business in the American State Bank of Newcastle, Nebraska, and kept a checking account there at all times.

After going to California, defendants lived with their son for about a month. Defendant had slowly improved in health but not as much as contemplated, so defendants rented a small furnished house on a month-

to-month basis, and being without sufficient funds to live, they obtained part-time employment, and did not return to their home in Nebraska until after this action was filed.

Defendant testified unequivocally as a witness for plaintiff and later as a witness for defendants that his home in Nebraska was their permanent residence and place of abode where they at all times intended to return, and that they now intended to remain in Nebraska.

In the light of the authorities heretofore cited, and the evidence heretofore set forth, we conclude that the judgment of the trial court should be and hereby is affirmed. All costs are taxed to plaintiff.

AFFIRMED.

HENRY BLOHME, APPELLANT, V. HEINZ BLOHME ET AL., APPELLEES.
89 N. W. 2d 127

Filed April 4, 1958. No. 34270.

1. **Witnesses.** A wife is incompetent as a witness against a husband, over objection of the husband, as to a transaction between the husband and wife relating to the acquisition of real estate which transaction took place during the existence of the marriage relation.
2. **Quieting Title: Frauds, Statute of.** In order to make a prima facie case to quiet title to real estate based on an oral contract the party seeking to have title quieted must prove an oral contract the terms of which are clear, satisfactory, and unequivocal, and also part performance, and that the acts done in performance were referable solely to the contract sought to be enforced and not such as might be referable to some other or different contract, and further that nonperformance by the other party would amount to a fraud upon the party seeking performance.

APPEAL from the district court for Jefferson County: CLOYDE B. ELLIS, JUDGE. *Affirmed.*

B. W. Stewart and *Ernest A. Hubka,* for appellant.

Arthur J. Denney and *Robert V. Denney,* for appellees.

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

YEAGER, J.

This action as originally instituted was by Henry Blohme, plaintiff and appellant, against Heinz Blohme, also known as Henry Blohme, and Sophia Blohme, his wife, defendants, and certain other nominal defendants, who require no further mention herein. Before the case was tried the defendant Heinz Blohme, also known as Henry Blohme, died. As to this defendant the action was revived in the name of Sophia Blohme, executrix, and the proceedings were thereafter conducted in her name as executrix and in her name in her personal capacity as defendants. She is appellee herein in these two capacities.

The case was tried on a second amended petition wherein the plaintiff claimed that he was the owner of the northeast quarter of Section 35, Township 1 North, Range 4 East of the 6th P.M., in Jefferson County, Nebraska, and that he was entitled to have title thereto quieted in him against the defendants and anyone claiming under them. This claim was denied by the defendants. The case was tried to the court and at the conclusion of the evidence of the plaintiff the defendants moved for a dismissal of plaintiff's action for the reason that the plaintiff had failed to prove prima facie the cause of action pleaded. The motion was sustained and the action was dismissed. The plaintiff duly filed a motion for new trial which motion was overruled. From the judgment dismissing the action and the order overruling the motion for new trial the plaintiff has appealed.

Some important incidents in the background of this action, not in dispute, are that on and prior to July 15, 1937, the defendant Heinz Blohme, also known as

Henry Blohme, and Elise Blohme were husband and wife; the plaintiff is their son and on July 19, 1937, he was of the age of 9 years; on July 19, 1937, a warranty deed was executed by Harriet E. Roberts and Robert E. Roberts, wife and husband, conveying this land to Henry Blohme; this deed was recorded on February 26, 1938; on October 11, 1943, Elise Blohme was granted a divorce from Heinz Blohme, also known as Henry Blohme, who will be hereinafter referred to as Henry Blohme; thereafter Henry Blohme was married to Sophia Blohme who was his wife at the time of his death; and on January 31, 1955, Henry Blohme and Sophia Blohme transferred this land to one Ann Leonard by deed, whereupon Ann Leonard transferred it by deed to Henry Blohme and Sophia Blohme in joint tenancy.

The true contention of the plaintiff by his pleaded cause of action is that these two deeds are void and of no effect for the reason that he had full title and right to the land by the deed of July 19, 1937, which was in fact a deed to him, and not to his father, under an oral agreement entered into by Elise Blohme, Henry Blohme, and the plaintiff on or about July 15, 1937. Particularly he declared in his petition that on or about July 15, 1937, the plaintiff, Henry Blohme, and Elise Blohme entered into an oral agreement whereby this real estate was to be purchased with the combined funds of Henry Blohme and Elise Blohme, together with the combined labor and assistance of the plaintiff, Henry Blohme, and Elise Blohme in the operation of the farm, with title to be taken and to vest in the name of the plaintiff, with possession to be in Henry Blohme and that he should have the fruits and benefits thereof so long as he continued to live on and operate and manage the land and when he ceased to operate the land his use and possession should terminate. The defendants have by their pleadings denied this contention.

The only competent evidence in the record tending directly to prove the oral contract alleged is found in

the testimony of the plaintiff. This testimony was of his recollection of a conversation between his father and mother which purportedly took place in the home of Elise Blohme in July 1937. That testimony with the questions by which it was elicited is as follows: "Q. * * * What did your mother say and what did your father say? * * * A. My father said he wanted the money to pay down on the farm. * * * And my mother told him, 'no; don't you have any money of your own?' My father said he was broke, he only had his return ticket to New York. My mother said, 'I am not going to loan you any money. You don't know how to handle your money. You have been a bankrupt and you haven't paid me back the money "loaned" from me there in the store.' * * * Q. Yes. A. She said, 'You can't own any land anyway; you're not a citizen; and before I put the farm in your name I'll put it in my own.' My father said, 'All right, then; put it in your boy's name, then, like you wanted to do.' Q. And what did your mother say? A. My mother said, 'All right, we'll put it in the boy's name.' Q. Was there any other conversation? A. Yes. Q. All right. Relate the conversation. A. My father said, 'I'm going back to New York;' and he said, 'That's right, I'm not a citizen; I can't own any land'; and my mother said, 'You couldn't'—this is referring back—* * *. He said this was to be in my name—this was to be in my name to protect the farm; that it can't be lost; and she said to my father that 'you can live on there whenever you feel that you want to farm,' and he didn't want the farm at present. * * * Q. Well, now, just a minute. Was that—was there any more conversation? A. Yes. Q. Just tell the court what your mother said or what your father said, or with reference to this conversation? A. My mother said that all of proceedings of the farm, it was supposed to pay for itself, and that anything that she gave or was given was to go for the farm for me. Q. Was there anything else in this conversation that you overheard? A. No."

There was testimony of Elise Blohme, to which sufficient objection was made, which if considered could be regarded as being in proof of the oral agreement alleged. This testimony was clearly inadmissible since it related to a transaction or transactions between Henry Blohme and Elise Blohme while they were husband and wife which testimony would have the effect of being antagonistic to the rights of the husband. See, Lihs v. Lihs, 44 Neb. 143, 62 N. W. 457; Buckingham v. Roar, 45 Neb. 244, 63 N. W. 398; Scroggin v. Johnston, 45 Neb. 714, 64 N. W. 236; Stenger Benevolent Assn. v. Stenger, 54 Neb. 427, 74 N. W. 846; Bank of Cedar Bluffs v. LeGrand, 127 Neb. 183, 254 N. W. 892; § 25-1203, R. R. S. 1943.

There is testimony of other witnesses in the record as to purported admissions against interest of Henry Blohme, which has value only if there is evidence prima facie sufficient to establish the existence of the alleged oral agreement. It will be referred to specifically in the event that the conclusion is reached that this prima facie sufficiency has been established.

The rule as to whether or not a prima facie case has been made in an action to quiet title to real estate based on an oral contract is the same as the rule in actions for specific performance of an oral contract for the conveyance of real estate. This is made clear in Garner v. McCrea, 147 Neb. 541, 23 N. W. 2d 731. The rule is stated in Anderson v. Anderson, 150 Neb. 879, 36 N. W. 2d 287, as follows: "Before a court of equity may decree specific performance, on the basis of performance, of an oral contract for the conveyance of real estate declared void by the statute of frauds the party seeking specific performance must prove an oral contract the terms of which are clear, satisfactory, and unequivocal, and also part performance, and that the acts done in performance were referable solely to the contract sought to be enforced, and not such as might be referable to some other or different contract, and further that non-

performance by the other party would amount to a fraud upon the party seeking specific performance."

The testimony which had been referred to as to the existence of the alleged oral agreement fails to satisfy the requirements of this rule. The following are instances of this failure. The terms are not clear and unequivocal. The estate which it was contemplated that plaintiff should take, if any, is not defined. It could be said as readily that title was to be taken by plaintiff to hold for Henry Blohme or Henry Blohme and Elise Blohme, as that he was to take a fee simple title. The conditions of purchase and payment were not made clear. The matter of use and occupancy rests in uncertainty. In addition to all of these there has been no competent evidence that the plaintiff was the person named or intended to be named in the deed. The evidence of the plaintiff and all of the reasonable inferences to be drawn therefrom are to the contrary.

The grantee named in the deed from the Robertses was Henry Blohme. On September 20, 1940, Henry Blohme and Elise Blohme executed a mortgage on this land in favor of the Bankers Life Insurance Company of Nebraska in which they declared that title was in them, and in the mortgage they covenanted to warrant and defend the title.

On September 2, 1942, they executed a like mortgage on this land in favor of the Phoenix Mutual Life Insurance Company. This mortgage also contained a covenant of warranty of title.

On July 3, 1943, Elise Blohme filed a petition for divorce from Henry Blohme, in which petition he was so named, in Gage County, Nebraska. In that petition she alleged that her husband "has a farm in Jefferson County, in which he has an equity of $5,000.00; * * *."

On October 11, 1943, Elise Blohme signed a stipulation which was filed in the proceeding for divorce in which she agreed that in case a divorce was granted she would

release her husband from any interest which she had in his real or personal property.

This is the evidence of the plaintiff and it is the only competent evidence of the identity of the grantee in the deed from the Robertses. Certainly in the light of all this it may not well be said that the evidence of the plaintiff satisfies the requirements of the rule stated with regard to the sufficiency of evidence to sustain an action for specific performance of an oral agreement for the conveyance of real estate.

It is true that there is evidence that both before and after the deed was executed and delivered the plaintiff was at times referred to as Henry Blohme, although his true name was Henry William Blohme, but none of this was related in any manner to the execution of the deed.

It necessarily follows that if this case is to turn upon whether or not the evidence was sufficient prima facie to prove the contract alleged then the motion to dismiss was, under the rule hereinbefore stated, properly sustained. See, Paul v. McGahan, 152 Neb. 578, 42 N. W. 2d 172; Inslee v. City of Bridgeport, 153 Neb. 559, 45 N. W. 2d 590.

The plaintiff urges however that even if the evidence is insufficient upon which to base a decree quieting title in him, still it is sufficient upon which to declare a trust. The theory of this contention however has not been made clear, but whatever it may be it finds no basis in law. It is well settled that an oral agreement to create a trust in land is not enforceable in a court of equity.

In Anderson v. Anderson, *supra,* it was said: "Where an attempt is made to enforce an oral promise the purpose of which is to establish an interest in land the attempt is to establish an oral trust in real estate and it must fail, since such a promise is void under the statute of frauds." See, also, Pollard v. McKenney, 69 Neb. 742, 96 N. W. 679; Norton v. Brink, on rehearing, 75 Neb. 575, 110 N. W. 669, 121 Am. S. R. 822.

The conclusion reached is that the motion to dismiss

the action was properly sustained, therefore the judgment of the district court is affirmed.

AFFIRMED.

MESSMORE, J., not participating.

IN RE ESTATE OF HERBERT G. MUELLER, DECEASED. MERLE H. FINCHAM, JR., BY MERLE H. FINCHAM, SR., HIS FATHER AND NEXT FRIEND, APPELLANT, V. WILBERT L. MUELLER, ADMINISTRATOR OF THE ESTATE OF HERBERT G. MUELLER, DECEASED, APPELLEE.
89 N. W. 2d 137

Filed April 4, 1958. No. 34304.

1. **Infants: Actions.** In this state the action of an infant must be brought by his guardian or next friend, who alone is liable for the costs.
2. **Witnesses.** One who has a direct legal interest in the result of a cause, in which the adverse party is the representative of a deceased person, is not, in certain situations, a competent witness therein; liability for the costs of the action is such a direct legal interest.
3. ———. A direct legal interest in the result of an action disqualifies a witness from testifying to any transaction or conversation with the deceased, whether such interest be great or small.
4. ———. The word "transaction," as used in section 25-1202, R. R. S. 1943, embraces every variety of affairs, the subject of negotiations, actions, or contracts between the parties.
5. ———. Section 25-1202, R. R. S. 1943, makes no distinction between actions based on contract and actions based on tort. Nor do we think there is any distinction in reason. The statutory policy that living parties should not be permitted to tell their stories when the lips of adverse parties are sealed by death applies with equal force to torts and contracts. In torts, as in contracts, all the parties ordinarily are cognizant of the circumstances attending the tort. And if by reason of death some of them cannot testify, the others should not. That is the policy of the statute.
6. ———. A transaction or conversation, within the meaning of section 25-1202, R. R. S. 1943, is an action participated in by

witness and decedent and to which the decedent could testify of his own personal knowledge, if alive.

7. ———. An automobile accident is a "transaction" within the meaning of section 25-1202, R. R. S. 1943, and the disqualification provided for therein has application when the factual situation brings it within the scope thereof.

8. **Negligence.** 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.

9. **Negligence: Trial.** Negligence is never presumed. The burden of proving negligence is on the party alleging it and merely establishing that an accident happened does not prove it.

APPEAL from the district court for Dodge County: RUSSELL A. ROBINSON, JUDGE. *Affirmed.*

Richards, Yost & Schafersman, for appellant.

Spear, Lamme & Simmons, for appellee.

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

WENKE, J.

This is an appeal from the district court for Dodge County. The cause of action appealed had its origin in the county court of Dodge County when, on March 6, 1956, Merle H. Fincham, Sr., as next friend and father of Merle H. Fincham, Jr., filed a claim in his son's behalf against the estate of Herbert G. Mueller, deceased, then being probated therein, for damages which he claims Merle H. Fincham, Jr., suffered as a result of injuries received in an accident which is it claimed was caused by the negligent conduct of Herbert G. Mueller. The county court disallowed the claim and an appeal was taken therefrom to the district court for Dodge County. A trial was had and, at the conclusion of plaintiff's (claimant's) evidence, the trial court sustained defendant's motion for a directed verdict and dismissed plaintiff's petition. Plaintiff thereupon filed

a motion for new trial and this appeal was taken from the overruling thereof.

The basic facts as to the accident in which Merle H. Fincham, Jr., whom we shall hereinafter refer to as the son, was injured are not in dispute. The accident happened about 12:05 p.m. on Saturday, October 29, 1955, in a county road intersection located about 6½ miles north and slightly west of Ames, Nebraska. At the time of the accident Merle H. Fincham, Sr., whom we shall hereinafter refer to as the father, was driving his 1955 Chevrolet station wagon with his son, who was then 8 years of age, as his guest. He was driving from Ames, Nebraska, to Snyder, Nebraska, on business and, at the time, was proceeding in a northerly direction. At this same time Herbert G. Mueller, whom we shall hereinafter refer to as decedent, was driving his 1954 Chevrolet sedan in an easterly direction toward the intersection wherein the accident occurred. The traveled portion of both the east-west and north-south roads were graveled to a width of some 18 to 20 feet, travel being generally down the center of the graveled part thereof. At the intersection, and for a distance of some 100 to 150 feet to the west and south thereof, the road was quite level, however, further on it sloped downgrade to the south and upgrade to the west. At the southwest corner of the intersection, and extending to the west therefrom, were trees, bushes, and grass. The trees and bushes still carried their foliage. These trees, bushes, and grass came fairly close to the southwest corner and, because thereof, substantially obstructed the vision of the drivers of cars coming from either the west or south to see cars coming toward the intersection on the other of these two roads. The weather was cold, windy, and somewhat cloudy, but the road was dry. The debris from the impact of the car and station wagon, which consisted of chrome from the grille and glass from the parking lights and headlights of the station

wagon, indicates the collision took place at about the center of the intersection, and the damage to the vehicles indicates that the front of the station wagon hit the right side of the sedan at about the center thereof. As a result of the impact the sedan rolled over and came to rest on its top in the ditch on the north side of the east-west road and just to the east of the intersection. It was facing northwest when it came to rest but more west than north. The front end thereof was some 43 feet from the center of the intersection. The driver thereof, Herbert G. Mueller, was killed. The station wagon continued on north after the impact, coming to a stop with the front end, which was facing north, some 47 feet 8 inches from the center of the intersection. It stopped to the east of the graveled portion of the north-south road and just out of the intersection. It was facing generally north but slightly to the northwest. As a result of the accident the son was injured.

As a basis for recovery it is claimed that decedent was negligent in the following respects and that such conduct on his part was the proximate cause of the accident and the resulting injuries to the son, to wit:

"(a) In driving his car at a high and dangerous rate of speed and at a rate of speed greater than was reasonable and proper and not having any regard for the traffic and conditions of the road, to-wit: 60 miles per hour.

"(b) In failing to have his car under proper control.

"(c) In failing to keep a proper look-out for other traffic upon said roads and in particular, for traffic to his right at the intersecting County road.

"(d) In failing to yield the right-of-way to the automobile in which this plaintiff was riding, said automobile being on his right.

"(e) In failing to yield the right-of-way to the automobile in which this plaintiff was riding, the same being the first in said intersection.

"(f) In failing to apply his brakes in time to avoid

colliding with the automobile in which the plaintiff was riding."

There is no question here of imputed negligence as the son was riding as a guest of his father.

There are three questions raised by appellant: First, did the trial court err in holding that the father and next friend had a direct legal interest in the suit within the meaning of section 25-1202, R. R. S. 1943? Second, if so, was he barred from testifying as to the acts of the decedent driver and of himself in regard to the operation of their respective vehicles immediately before and at the time of the collision? And third, did the trial court err in directing a verdict at the conclusion of appellant's case?

It is apparent that the trial court applied section 25-1202, R. R. S. 1943, to certain testimony of the father. He excluded all the testimony of the father, which was properly offered, as to what he observed as to decedent's car but, with some exceptions, permitted him to testify in regard to his own vehicle and his operation thereof. Since the question presented has never been passed on by this court, and is now properly before us, we will consider the matter of whether or not an automobile accident can be said to be a transaction within the meaning of the statute.

Section 25-1202, R. R. S. 1943, insofar as here material, provides: "No person having a direct legal interest in the result of any civil action or proceeding, when the adverse party is the representative of a deceased person, shall be permitted to testify to any transaction or conversation had between the deceased person and the witness, * * *."

Section 25-308, R. R. S. 1943, provides: "The guardian or the next friend is liable for the costs of the action brought by him, and, when he is insolvent, the court may require security for them. Either may be a witness in an action brought by him."

In Kleffel v. Bullock, 8 Neb. 336, 1 N. W. 250, we held:

"In this state, the action of an infant must be brought by his guardian or next friend, who alone is liable for the costs. The infant is not liable to a judgment therefor." See, also, §§ 25-307 and 25-308, R. R. S. 1943.

"One who has a direct legal interest in the result of a cause, in which the adverse party is administrator of a deceased person, is not a competent witness therein; liability for the costs of the action is such an interest." Ransom v. Schmela, 13 Neb. 73, 12 N. W. 926. See, also, Smith v. Perry, 52 Neb. 738, 73 N. W. 282; In re Estate of Jelinek, 146 Neb. 452, 20 N. W. 2d 325.

In Tecumseh Nat. Bank v. McGee, 61 Neb. 709, 85 N. W. 949, we quoted with approval the following from Kroh v. Heins, 48 Neb. 691, 67 N. W. 771, that: "A direct legal interest in the event of an action disqualifies a witness from testifying to transactions or conversations with the deceased, whether such interest be great or small."

Under these holdings it becomes self evident that the father, being liable for the costs, had such a direct legal interest in the result of the action as to bring him within the provisions of section 25-1202, R. R. S. 1943, provided the factual situation involved comes within the scope thereof.

It is further contended that the last sentence of section 25-308, R. R. S. 1943, makes the guardian or next friend bringing such suit exempt from the provisions of section 25-1202, R. R. S. 1943. It is a little difficult to understand this reasoning. At common law all parties to a suit were incompetent as witnesses. See, Wright v. Wilson, 154 F. 2d 616, 170 A. L. R. 1237; Hallowach v. Priest, 113 Me. 510, 95 A. 146; Shaneybrook v. Blizzard, 209 Md. 304, 121 A. 2d 218; Andreades v. McMillan (Tex. Civ. App.), 256 S. W. 2d 477; McCormick on Evidence, § 65, p. 142. As stated in Wright v. Wilson, *supra*: "At common law both the parties to a suit were incompetent as witnesses on the ground of interest." The common law, with certain limitations, is the law of this

state. See § 49-101, R. R. S. 1943. To avoid the effect of this common law rule our original code of civil procedure (§ 328, R. S. 1866) and present law (§ 25-1201, R. R. S. 1943) provide, with certain exceptions therein enumerated, that: "Every human being of sufficient capacity to understand the obligation of an oath, is a competent witness in all cases, civil and criminal, * * *." Apparently it was to make certain this common law rule would not apply to the guardian or next friend who was bringing a suit under section 25-307, R. R. S. 1943, that caused the Legislature to add the last sentence to section 25-308, R. R. S. 1943. Sections 25-307 and 25-308, R. R. S. 1943, were also a part of our original code of civil procedure. We find that the last sentence of section 25-308, R. R. S. 1943, is not intended to avoid the effect of section 25-1202, R. R. S. 1943, when the latter is applicable to a guardian or next friend bringing a suit pursuant to section 25-307, R. R. S. 1943.

In addition to the exceptions contained in section 25-1201, R. R. S. 1943, to the general rule that every human being of sufficient capacity to understand the obligation of an oath is a competent witness in all cases, there is the exception contained in section 25-1202, R. R. S. 1943. The purpose of the exception contained in section 25-1202, R. R. S. 1943, which is a statutory provision common to many states that have adopted the common law of England, has been well stated in Krause v. Emmons, 29 Del. 104, 97 A. 238, as follows: "The purpose of the Legislatures in passing statutes of this kind is equality. In this state the intention was to prevent both parties, unless called as a witness by the opposite party, giving testimony of transactions with or statements by the deceased, concerning which the deceased, if living, could of his own knowledge contradict, corroborate or explain." And, as stated in Newman v. Tipton, 191 Tenn. 461, 234 S. W. 2d 994: "All the cases from all jurisdictions hold that the statute was primarily intended to guard against an evil which might result from testimony

of the living against the dead; that death having silenced the one, the law silences the other." See, also, Strode v. Dyer, 115 W. Va. 733, 177 S. E. 878; Boyd v. Williams, 207 N. C. 30, 175 S. E. 832; VanMeter v. Goldfarb, 317 Ill. 620, 148 N. E. 391, 41 A. L. R. 343; Maciejczak v. Bartell, 187 Wash. 113, 60 P. 2d 31; 97 C. J. S., Witnesses, § 132b, p. 558.

It will be noted, insofar as here material, that our statute relates itself to "any transaction * * * had between the deceased person and the witness." We said, in Wilson v. Wilson, 83 Neb. 562, 120 N. W. 147, that: "The word 'transaction,' as used in this section, embraces every variety of affairs, the subject of negotiations, actions, or contracts between the parties."

Black's Law Dictionary (3rd Ed.), p. 1747, as it relates to this subject, defines the word "transaction" as follows: "A 'transaction' between a witness and a decedent, within statutory provisions excluding evidence of such transactions, embraces every variety of affairs which can form the subject of negotiations, interviews, or actions between two persons, and includes every method by which one person can derive impressions or information from the conduct, condition, or language of another."

And in VanMeter v. Goldfarb, *supra,* quoting from Barnett's Admr. v. Brand, 165 Ky. 616, 177 S. W. 461, the court said: " 'The word "transaction" as used in the statute relating to the admissibility of evidence of transactions or communications with deceased persons, has often received judicial interpretation, and is held to mean every variety of affairs which forms the subject of negotiations or actions between the parties.' " See, also, Krause v. Emmons, *supra;* Maciejczak v. Bartell, *supra.* As stated in Krause v. Emmons, *supra*: "In general terms a transaction, within the terms of the statute, may be said to be an occurrence or action of which both decedent and the other party had knowledge, and to which the decedent if living would be equally

qualified to testify with the other party."

Bearing in mind this definition of "transaction," courts generally hold that statutes, such as ours, apply to tort actions as well as those arising out of contract. See, Maciejczak v. Bartell, *supra;* Newman v. Tipton, *supra;* Strode v. Dyer, *supra;* Hallowach v. Priest, *supra;* Southern Natural Gas Co. v. Davidson, 225 Ala. 171, 142 So. 63; Boyd v. Williams, *supra;* Wright v. Wilson, *supra*; 3 Jones on Evidence (4th Ed.), § 774a, p. 1412; 97 C. J. S., Witnesses, § 133a, p. 564; Annotation, 36 A. L. R. 959. As stated in Hallowach v. Priest, *supra*: "The statute makes no distinction between actions of contract and actions of tort. Nor do we think there is any distinction in reason. The statutory policy that living parties should not be permitted to tell their stories when the lips of adverse parties are sealed by death applies with equal force to torts and contracts. In torts, as in contracts, all the parties ordinarily are cognizant of the circumstances attending the tort. And if by reason of death some of them cannot testify, the others should not. That is the policy of the statute."

We said in Nelson v. Janssen, 144 Neb. 811, 14 N. W. 2d 662, that: "A transaction or conversation, within the meaning of the statute, is an action participated in by witness and decedent and to which the decedent could testify of his own personal knowledge, if alive." See, also, In re Estate of House, 145 Neb. 866, 18 N. W. 2d 500, 159 A. L. R. 401; Hlavaty v. Blair, 101 Neb. 414, 163 N. W. 330. It would, of course, have no application to independent acts performed in which decedent did not participate and to which, because thereof, he could not have testified of his personal knowledge. Bosteder v. Duling, 115 Neb. 557, 213 N. W. 809. See, also, Newman v. Tipton, *supra.*

While the question here presented has not been passed on by this court it has received the attention of numerous other state and federal courts. There are apparently three viewpoints as to the effect of such a statute under

comparable situations. The majority view is that the survivor cannot testify either as to his own actions or those of decedent. See, Southern Natural Gas Co. v. Davidson, *supra*; Andreades v. McMillan, *supra*; Stephens v. Short, 41 Wyo. 324, 285 P. 797; Miller v. Walsh's Admx., 240 Ky. 822, 43 S. W. 2d 42; VanMeter v. Goldfarb, *supra;* Wright v. Wilson, *supra;* Maciejczak v. Bartell, *supra.* As stated in Southern Natural Gas Co. v. Davidson, *supra*: "* * * the test is that it relates to some personal dealings whether others have an equal opportunity to see and observe or not. The concurring conduct of the participants constituting the res gestae of a personal conflict or encounter between them has been held to be a transaction within the effect of such a statute. * * * The conduct of Ed Green constituting that which is alleged to have been negligent and a breach of duty to plaintiff causing his injuries and damage, which occurred in his presence, and a part of the res gestae of such negligent conduct was of the nature of personal dealings with plaintiff under the rule, and constituted a 'transaction' within the meaning of our statute."

And as stated in Miller v. Walsh's Admx., *supra*: "The speed and movement of the truck, the sounding of the horn, and all that Gentner observed and did, as well as the movements of the deceased, were so closely related to, and inseparably connected with, the accident as to bring them within the knowledge or observation of the deceased, make them a necessary part of the accident, and thus constitute a transaction with the deceased. As the offered evidence concerned a transaction with the deceased, there can be no doubt that, under the Code, Gentner, who was a party defendant, was not a competent witness on his own behalf."

Footnote 21, p. 619, to Wright v. Wilson, *supra,* quotes and states as follows: "2 Wigmore on Evidence, 3rd Ed., § 578 'The scope of this modern rule excludes the testimony of the survivor of a transaction with a decedent, when offered against the latter's estate.' The note

to this adds '* * * the jurisdictions not recognizing this disqualification are half a dozen only.' "

There are some cases that hold the survivor is permitted to testify as to his own actions but not as to those of the decedent. See, Kilmer v. Gustason, 211 F. 2d 781; U. S. A. C. Transport v. Corley, 202 F. 2d 8; McCarthy v. Woolston, 210 App. Div. 152, 205 N. Y. S. 507. We can see no logical reason for such a holding for if the factual situation brings it within the statute then the statute necessarily excludes all of the testimony relating thereto.

There is a third view to the effect that the survivor can testify both as to his own actions and those of the decedent. See Rankin v. Morgan, 193 Ark. 751, 102 S. W. 2d 552. Of the cases cited by the parties under this holding we have found only this one to be squarely in point on both fact and statute. It holds that: "A collision and incidents connected therewith are not transactions with the testator or intestate as the case may be." It is significant to note that the opinion recites: "The parties have favored us only to the extent that they have stated the issue without furnishing citations to authorities supporting their respective contentions." It is apparent that the court did not make any research therefor as the opinion cites none of the numerous cases of other jurisdictions that have dealt with the question.

We have come to the conclusion that the factual situation here presented is a "transaction" within the meaning of section 25-1202, R. R. S. 1943, and that the disqualification provided for by the statute had application to the testimony of the father.

We have not overlooked certain cases cited by the parties such as Turbot v. Repp, 247 Iowa 69, 72 N. W. 2d 565; Shaneybrook v. Blizzard, *supra;* Krantz v. Krantz, 211 Wis. 249, 248 N. W. 155; Boyd v. Williams, *supra;* Davis v. Pearson, 220 N. C. 163, 16 S. E. 2d 655; Strode v. Dyer, *supra.* In these cases the courts are divided on the question of whether or not a factual situation,

such as here presented, can be said to come within the scope of the statute therein involved. In each of these cases the statute involved had additional qualifications to the word "transaction," such as: "to any *personal* transaction * * * between such witness and deceased person," or "to any transaction had with * * * (decedent) * * * *personally,*" or "to any transaction * * * by him *personally* with a deceased * * * person," or "in regard to any *personal* transaction," or "*personal* transaction." (Emphasis ours.) Because thereof we do not think opinions dealing therewith can properly be said to relate themselves as authority for the construction of a statute such as ours or to opinions of the majority view wherein they were dealing with statutes relating only to "transactions."

In this respect we have not overlooked the following language originally appearing in Harnett v. Holdrege, 5 Neb. (Unoff.) 114, 97 N. W. 443, and subsequently quoted in In Estate of House, *supra:* "Under our present statute, to require the evidence of an interested party to be excluded, it must appear that the testimony relates to something of a personal nature passing between the witness and the deceased." However, a careful analysis of these two opinions discloses that this statement is not the basis for the decision therein arrived at on this issue and therefore merely dicta.

In Harnett v. Holdrege, *supra,* the action involved was on the two notes brought by the trustee of a trust created by the last will and testament of Hannah S. Allen, deceased. Service was had on three of the defendants charged as being indorsers on these notes. They appeared therein and answered, alleging the notes had been materially altered after they had signed them as indorsers. At the trial two of these indorsers, Foss and Dewesse, were permitted to testify as to the condition of the notes at the time they indorsed them, which was in the absence of the deceased. On appeal the question was raised as to whether or not this evidence was

competent under the statute herein involved. In passing on the question of the competency thereof, in view of the factual situation and the statute, the court held: "In Kroh v. Heins, 48 Neb., 691, we held that section 329 of the Civil Code does not apply where the transaction or conversation was not between the witness and the deceased person, but between the latter and a third party, in which the witness took no part. This case seems to be directly in point. It does not appear that the defendants, or either of them, ever saw the deceased, or that they ever transacted any business with her or ever had any conversation with her about the notes in suit. It follows that their evidence was competent, and was properly received."

In In re Estate of House, *supra,* a claim was filed against the estate of Merton E. House, deceased, based on a promissory note. Claimant was permitted to identify the signature of the deceased, having qualified as being familiar therewith. Passing on the question of the competency thereof, in view of the statute, the court held: "A majority of the courts hold generally that an interested party is competent, if otherwise qualified, to testify to the genuineness of the signature or handwriting of a deceased person, notwithstanding the statutory rule excluding transactions or conversations with a decedent, since such testimony involves a matter of opinion and not a personal transaction or conversation between the witness and decedent."

In In re Estate of House, *supra,* the author cites the rule here applicable and which we have hereinbefore set forth. It is as follows: "A transaction or conversation within the meaning of section 7894, Rev. St. 1913, (now sec. 25-1202, R. S. 1943), is an action participated in by witness and decedent and to which, if alive, decedent could testify of his personal knowledge." Hlavaty v. Blair, *supra.* This principle carries out the purpose of our statute which is well stated in 97 C. J. S., Witnesses, § 132b, p. 558, as follows: "The purpose of the

dead man statutes is to prevent injustice and fraud, and to put the parties on equal terms."

It is interesting to note that originally our statute was much broader in its scope. Laws 1866, part II, § 329, p. 449. Therein it provided that: "* * * nor shall any person having a direct legal interest in the result of any civil cause or proceeding, be a competent witness therein, when the adverse party is an executor, administrator or legal representative of a deceased person." Our present statute, which materially limited the former code provision, was enacted by the Legislature in 1883. See Laws 1883, c. 83, § 1, p. 328. The effect of the change is stated in Sharmer v. McIntosh, 43 Neb. 509, 61 N. W. 727, as follows: "But this section was amended (Session Laws, 1883, ch. 83,) so as not to render the person interested adversely to the representative of the deceased person incompetent as a witness, but to render merely his testimony as to transactions and conversations with the deceased incompetent as evidence, with the exceptions provided in the act."

This is a subject the Legislature has dealt with from the state's very beginning. If the present statute is still too severe it can be dealt with by the Legislature and made more liberal but we do not think that should be done by judicial opinion for such would be judicial legislation. In some states the legislatures have done so. See, McCormick on Evidence, § 65, p. 143; Andreades v. McMillan, *supra*. As stated in Strode v. Dyer, *supra:* "Whatever may be our views on the policy of the West Virginia statute as interpreted herein, we believe the change, if any, should be made by the legislature." And in Wright v. Wilson, *supra,* the court speaking on the same question, said: "The rule excluding a survivor's testimony seems to stand in the almost unique situation of being condemned by all of the modern writers on the law of evidence. It is said to be as unsound and undesirable as the rule excluding the testimony of parties of which the survivor rule is a part. But we believe

this to be a case where a rule so thoroughly established through many generations of judicial history should be removed by legislative action * * *." If the Legislature should amend the present act so as to relate it to "personal transactions" or "transactions had personally with the deceased" we can then properly determine whether or not a transaction, such as here, would come within the scope thereof.

Having come to the conclusion that the father should not have been permitted to testify as to either his own actions or those of the decedent as it relates to their vehicles immediately before and at the time of the accident the question arises, is the trial court's order directing a verdict for the appellee, and dismissing appellant's petition, in error?

In considering this question the appellant is entitled to the benefit of the following principles:

"A motion for a directed verdict or its equivalent must be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed, and such party is entitled to have every controverted fact resolved in his favor and have the benefit of every inference that can reasonably be deduced from the evidence." Behrens v. Gottula, 160 Neb. 103, 69 N. W. 2d 384.

"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." Davis v. Dennert, 162 Neb. 65, 75 N. W. 2d 112.

But, of course, negligence is never presumed. The burden of proving negligence is on the party alleging it and merely establishing that an accident happened does not prove it. Wolcott v. Drake, 162 Neb. 56, 75 N. W. 2d 107. Nor can a verdict be based on conjecture or

surmise. Bowers v. Kugler, 140 Neb. 684, 1 N. W. 2d 299. As stated in Price v. King, 161 Neb. 123, 72 N. W. 2d 603: "Negligence must be proved by direct evidence or by facts from which such negligence can be reasonably inferred. In the absence of such proof, negligence cannot be presumed." Nor can the presumption raised by the instinct of self preservation benefit the appellant for such would also be in favor of the decedent. Wolcott v. Drake, *supra.*

In addition to the factual situation already set forth the only addition that need be added thereto is that the state trooper, who was at the scene of the accident very shortly after it happened, testified he saw skid marks in the gravel made by the tires of the station wagon extending back from the rear thereof south for a distance of some 17 to 18 feet. He testified the tracks started at the rear end thereof from the point where the station wagon hit the car. He also testified he could find none to the west of the point of impact, that being the direction from which the sedan had come.

We turn then to the six specifications of negligence alleged by the appellant, which we have hereinbefore set out. There is no evidence in the record from which the speed of decedent's car, or how it was operated, can be ascertained. Consequently there is no evidence to support specifications (a), (b), (c), and (f). Specifications (d) and (e) deal with appellant's alleged claim of right-of-way and the rules applicable thereto as set forth in Wolfe v. Mendel, 165 Neb. 16, 84 N. W. 2d 109. However, appellant did not necessarily have the right-of-way merely because he approached the intersection from the right for if decedent entered the intersection first then he would have had the right-of-way. See Long v. Whalen, 160 Neb. 813, 71 N. W. 2d 496. To permit the jury, under the factual situation presented, to decide who had the right-of-way would require it to guess in regard thereto as there is no evidence on which to properly base a conclusion on that issue. The same

would be true as to the other claims of negligence, since any conclusion in regard thereto would have to be based solely on the physical facts established. We do not think they are sufficient for that purpose. See, Wolcott v. Drake, *supra;* Ulrich v. Batchelder, 143 Neb. 697, 10 N. W. 2d 637; Bowers v. Kugler, *supra.*

In view of what we have herein held we come to the conclusion that the trial court's ruling, holding that appellant has not made a case, is correct. We therefore affirm the action of the trial court in dismissing appellant's petition.

AFFIRMED.

CARTER, J., dissenting.

I disagree with that part of the majority opinion holding that the conduct of the operators of motor vehicles prior to a collision, the location and speed of such vehicles, and the physical facts existing at the scene of an accident, constitute a transaction within the meaning of the dead man's statute.

The word transaction as used in the dead man's statute means a personal transaction with the deceased, as this court has heretofore indicated. See, Harnett v. Holdrege, 5 Neb. (Unoff.) 114, 97 N. W. 443; Fitch v. Martin, 74 Neb. 538, 104 N. W. 1072; In re Estate of Baker, 144 Neb. 797, 14 N. W. 2d 585, 155 A. L. R. 950; In re Estate of House, 145 Neb. 866, 18 N. W. 2d 500, 159 A. L. R. 401. It means a transaction in which each is an active participant; a mutual transaction between the deceased and the surviving party. It does not prohibit the survivor from describing an event or physical situation, or the movement or actions of a deceased person, quite independent and apart, and in no way connected with, or prompted or influenced by reason of, the conduct of the party testifying. Thus construed, the dead man's statute does not bar the testimony of the survivor as to his observation and description of the physical situation, and the movements and actions of the participants at the time of the accident.

While there is a division of authority on the subject, I am of the opinion that the following cases support the better rule: Shaneybrook v. Blizzard, 209 Md. 304, 121 A. 2d 218; Seligman v. Hammond, 205 Wis. 199, 236 N. W. 115; Krantz v. Krantz, 211 Wis. 249, 248 N. W. 155; McCarthy v. Woolston, 210 App. Div. 152, 205 N. Y. S. 507; Rankin v. Morgan, 193 Ark. 751, 102 S. W. 2d 552; In re Estate of Talty, 232 Iowa 280, 5 N. W. 2d 584, 144 A. L. R 859; Krause v. Emmons, 29 Del. 104, 97 A. 238; U. S. A. C. Transport v. Corley (Ga.), 202 F. 2d 8; Kilmer v. Gustason (Fla.), 211 F. 2d 781. Independent acts have never heretofore been held to be within the dead man's statute by this court. See, Larson v. Swingley, 105 Neb. 116, 179 N. W. 303; Bosteder v. Duling, 115 Neb. 557, 213 N. W. 809.

The majority places a broad and unlimited meaning on the word transaction. The dead man's statute, section 25-1202, R. R. S. 1943, is an exception to the general statute, section 25-1201, R. R. S. 1943, stating who is competent to testify as a witness. The exception ought to be strictly construed. It ought not to be given the broadest definition that can be found. Statutes which have the effect of limiting the evidence in a judicial hearing to something less than all the available evidence should be most narrowly construed. This, for the reason that justice will not ordinarily prevail where only a part of the available evidence affords the only support for the judgment rendered.

CHAPPELL, J., concurs in this dissent.

KENNETH SIMPSON, APPELLEE, V. CITY OF GRAND ISLAND, A MUNICIPAL CORPORATION, ET AL., APPELLANTS.
89 N. W. 2d 117

Filed April 4, 1958. No. 34339.

1. **Appeal and Error.** The right of appeal in this state is statutory,

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

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

3. **Municipal Corporations.** The preservation of order, the enforcement of law, the protection of life and property, and the suppression of crime are attributes of state sovereignty and matters of state-wide concern, and when the Legislature enacts a general law upon any of these subjects with respect to cities of a particular class, such law applies to all cities of the class, including home rule cities.

4. ———. An act creating civil service rights for members of paid police departments in cities of a specified class is a matter of state-wide concern and applicable to all cities of such class, including home rule cities.

5. ———. Under the civil service statute, Chapter 19, article 18, R. R. S. 1943, as amended by chapter 48, Laws 1957, cities may, in good faith by appropriate action, abolish positions because of financial necessity or the dictates of sound business management.

6. ———. While the rights accruing under the civil service act are not property rights within the ordinary meaning of that term, they are rights which are entitled to the protection of the law.

7. ———. The statutory provision for the organization of a civil service commission contained in the civil service act is mandatory, and a failure to comply therewith suspends the power to discharge an employee within the act because the city has failed to establish the commission to which the power to discharge was delegated by the Legislature.

8. **Statutes.** When a statute creates a new right and provides the remedy for its violation, the mode prescribed by the statute must be followed ordinarily to secure the benefits emanating from such statute.

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

Carl E. Willard, for appellants.

Wellensiek & Weaver, for appellee.

Bernard S. Gradwohl and *John M. Gradwohl,* amici curiae.

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

CARTER, J.

This is an appeal from a judgment of the district court holding that Chapter 19, article 18, R. R. S. 1943, as amended by Laws 1957, chapter 48, page 228, involves a matter of state-wide concern and therefore is applicable to the city of Grand Island, a home rule charter city. The trial court further held that the plaintiff in error was improperly discharged from the police department of the city under the terms of the act and that he was entitled to a position in such department from and after the abolishment of the position he held on April 9, 1957. The city of Grand Island has appealed.

For convenience we shall refer to the appellee as the plaintiff, and the appellant, city of Grand Island, as the defendant.

On May 3, 1956, plaintiff was appointed to the position of assistant chief of police in the police department of the defendant. On April 9, 1957, the city council, by an ordinance properly enacted, abolished the position of assistant chief of police. Plaintiff was notified of the abolishment of his position. He was paid until April 15, 1957. His services in the police department were treated as terminated as of that date. On April 16, 1957, plaintiff asserted in writing to the city council that he had been improperly deprived of his civil service rights under the provisions of Chapter 19, article 18, R. R. S. 1943, as amended by Laws 1957, chapter 48, page 228, which we shall hereafter refer to as the civil service act, and demanded of the city council of the defendant that it take action to protect such rights. The city council took no decisive action and, for all practical purposes, denied plaintiff's claim. The plaintiff sought a review of the action of the city council by a proceeding in error to the district court. The defendant contends that the proceeding in the district court was a

purported appeal from the action of the city council or an original action, neither of which is authorized by law. Before discussing the nature of the proceeding it is necessary to refer to certain provisions of the act before us.

The part of the 1957 amendments to the civil service act with which we are here concerned became effective on April 1, 1957. It created a civil service commission whose duties were described in the act. Among those duties is one which requires the commission to determine the civil service rights of members of the police department. From an order determining such rights, a party interested was given a right of appeal to the district court. The city council had not appointed such a commission or taken any steps to bring the city within the civil service act when plaintiff's claim was presented to it. There was no provision for an appeal in such a situation as the city council then had before it. In such a situation the only method of obtaining a review of the action of the city council was by petition in error. This court has consistently held that where no statutory right of review has been provided, proceedings in error afford the only remedy. From v. Sutton, 156 Neb. 411, 56 N. W. 2d 441; Jungman v. Coolidge, 157 Neb. 122, 58 N. W. 2d 828. It seems clear that the only remedy available to plaintiff was by a proceeding in error to the district court. This is in accord with the provisions of sections 25-1901 and 25-1903, R. R. S. 1943, as interpreted by this court in Roberts v. City of Mitchell, 131 Neb. 672, 269 N. W. 515.

The contention of the defendant that the proceeding was not on error does not appear to have merit. The instrument filed in the district court was denominated a petition in error. It pointed out that the city council had refused to establish a civil service commission, or to put the civil service act into effect. It asserted that the city council by its nonaction in refusing to put the act in effect had deprived the plaintiff of the benefits

of that act, including his service rights based on qualifications and length of service. The petition in error alleged that the city council was in error in not granting to him the benefits of the civil service statute. We think the petition in error was what it purported to be and properly raised the errors of law of the city council in refusing to give any consideration to the rights allegedly due plaintiff under the civil service act. It was not an appeal or the institution of an original action, nor did it purport to be such.

The defendant contends that the civil service act is not applicable to the city of Grand Island because of its status as a home rule charter city. The act provides that it shall apply to every city in the state having a population of more than 5,000 inhabitants and having a full paid fire or police department, except that it shall not apply to cities with a population in excess of 40,000 which have adopted or will hereafter adopt a home rule charter. Whether or not the civil service act is applicable to Grand Island, a city admittedly having a population of less than 40,000 and more than 5,000, is dependent upon whether or not the act is of state-wide or local concern. The act deals solely with employees in paid fire and police departments. The rule is stated in Axberg v. City of Lincoln, 141 Neb. 55, 2 N. W. 2d 613, 141 A. L. R. 894, a case involving the question as to whether or not a general statute relating to pensions for superannuated and disabled firemen was of state-wide or local concern. In holding that such pensions were of state-wide concern and applicable to home rule charter cities, this court announced the following rule: "The preservation of order, the enforcement of law, the protection of life and property, and the suppression of crime are attributes of state sovereignty and matters of state-wide concern, and when the legislature enacts a general law upon any of these subjects with respect to cities of a particular class, such law applies to all cities of the class, including home rule cities." A statute pro-

viding a form of civil service in cities of a designated class for paid police departments pertains to the enforcement of law and the suppression of crime, and are clearly of state-wide concern under the holdings of this court. See, State ex rel. Herman v. City of Grand Island, 145 Neb. 150, 15 N. W. 2d 341; Michelson v. City of Grand Island, 154 Neb. 654, 48 N. W. 2d 769, 26 A. L. R. 2d 1346; Nagle v. City of Grand Island, 144 Neb. 67, 12 N. W. 2d 540; McMaster v Wilkinson, 145 Neb. 39, 15 N. W. 2d 348, 155 A. L. R. 667; Omaha Parking Authority v. City of Omaha, 163 Neb. 97, 77 N. W. 2d 862. As a result of our holdings in these cases it is apparent that the civil service act before us dealt with a matter of state-wide concern, to wit, the maintenance of law and order. It is therefore superior to provisions of a home rule charter in conflict therewith.

The record shows that the position designated as assistant chief of police was abolished by a properly enacted city ordinance. A municipality may in good faith abolish a position because of financial necessity or reasons of sound business management. Wood v. Loveless, 244 Iowa 919, 58 N. W. 2d 368. There is, of course, a presumption that legislative bodies of governmental subdivisions act in good faith. There is no evidence that the city council acted otherwise in the present case. The action of the city council in abolishing the position of assistant chief of police was therefore a proper exercise of its powers.

It is provided by section 3 of the 1957 amendments to the civil service act as follows: "The classified civil service and the provisions of this act shall include all full paid employees of the fire or police department of each city coming within its purview, including the chief of that department. All appointments to and promotions in such departments shall be made solely on merit, efficiency, and fitness, which shall be ascertained by open competitive examination and impartial investigation. No person shall be reinstated in or transferred, sus-

pended, or discharged from any such place, position, or employment contrary to the provisions of this act." Other provisions of the act detail the methods by which the civil service employees within the scope of the act may assert their rights under it. While such rights are not property rights in the usual sense, they are rights which are entitled to the protection of the law. State ex rel. Spurck v. Civil Service Board, 226 Minn. 240, 32 N. W. 2d 574.

The record shows that the civil service act here questioned became effective for all purposes on April 1, 1957. The rights of plaintiff under the act accrued as of that date by the terms of the act itself. Plaintiff's pay was terminated as of April 15, 1957, and, while not entitled to continue thereafter as assistant chief of police, he could not properly be discharged from the police department except in the manner provided in the act. No attempt was made to comply with the provisions of the act in this respect, and consequently he remains an employee of the police department. The failure of the city council to comply with the statute cannot be held to vest any authority in the city to discharge a member of the police department in a manner contrary to the provisions of the act. The failure of the city council to provide a civil service commission under the terms of the civil service act had the effect of suspending the power of discharge which is lodged solely in the commission by the act. The power of discharge cannot be exercised because the city has failed to establish the commission to which the power of discharge was delegated by the Legislature. Logan v. City of Two Rivers, 222 Wis. 89, 267 N. W. 36. The plaintiff does not lose his civil service rights under the act because the city fails to take the steps to make the act effective. The statutes may not be circumvented in any such manner. We hold therefore that plaintiff's purported discharge from the police department was without validity and noneffective.

The plaintiff has cross-appealed, contending that the district court should have determined the position and wage scale to which he was entitled after his position of assistant chief of police was abolished. The record contains a roster of employees in the police department which shows the rank, compensation, time of employment, and dates of promotions. The only evidence in the record is that plaintiff is a highly qualified police officer, who had served in excess of the minimum of 6 months required by the act. He was therefore entitled to the benefits of the act.

By section 6 of the 1957 amendments to the act it is provided in part: "No person in the classified civil service, who shall have been permanently appointed or inducted into civil service under the provisions of this act, shall be removed, suspended, demoted, or discharged except for cause and then only upon the written accusation of the appointing power or any citizen or taxpayer. * * * Any person so removed, suspended, demoted, or discharged may, within ten days from the time of his removal, suspension, demotion, or discharge, file with the commission a written demand for an investigation, whereupon the commission shall conduct such investigation. * * * If it shall find that the removal, suspension, or demotion was made for political or religious reasons or was not made in good faith for cause, order the immediate reinstatement or re-employment of such person in the office, place, position, or employment from which such person was removed, suspended, demoted, or discharged, which reinstatement shall, if the commission in its discretion so provides, be retroactive and entitle such person to pay or compensation from the time of such removal, suspension, demotion, or discharge. * * * If such judgment or order be concurred in by the commission or a majority thereof, the accused may appeal therefrom to the district court."

The civil service act is remedial in character. It invests employees included within its scope with rights

which they did not theretofore possess. It provides the procedure by which such rights are to be enforced. The act is mandatory upon all cities within its scope and imposes a duty to appoint members to the civil service commission thus created. The remedy available to the plaintiff for the enforcement of his civil service rights is contained in the act itself. The controlling rule is: "If an affirmative statute, which is introductory of a new law, direct a thing to be done in a certain manner, that thing shall not, even though there are no negative words, be done in any other manner, the mode prescribed by statute for the exercise of a power, must be adopted. In some cases, a strict, and even literal, compliance is required. This is particularly true in regard to enactments modifying the course of the common law." Vore v. State, 158 Neb. 222, 63 N. W. 2d 141. See, also, 50 Am. Jur., Statutes, § 19, p. 40.

The judgment of the district court found that the civil service act was applicable to the city of Grand Island and that plaintiff was not discharged from the police department of the city under the provisions of the civil service statute. This disposed of all issues properly raised by the petition in error. Since the position of assistant chief of police was properly abolished by the city council, the plaintiff cannot be returned to that position. The act contemplates that the civil service commission shall determine in the first instance the position to which he was entitled when the position he occupied was abolished. The city council has no power to do so. The district court on petition in error, in determining the correctness of the quasi-judicial acts of the city council, cannot make an order on the merits of the case which is beyond the powers of the tribunal to make, from which the petition in error emanated. We do not think there is merit in the error assigned by the cross-appeal.

The trial court having entered judgment in accordance

with the holdings of this opinion, the judgment of the district court is affirmed.

AFFIRMED.

VERNON LEWIS, DOING BUSINESS AS LEWIS OIL COMPANY, APPELLEE, V. OSCAR HISKEY, APPELLANT.
89 N. W. 2d 132

Filed April 4, 1958. No. 34341.

1. **Trial: Appeal and Error.** 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 on appeal unless clearly wrong.
2. **Appeal and Error.** In such a case, 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. **Limitations of Actions.** Where there is a running account between the parties consisting of unsettled items of debit and credit, and the dealing between the parties was continuous and not interrupted for a sufficient length of time for the running of the statute, such items of account are not barred by the statute of limitations.

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

J. Max Harding and *E. D. Warnsholz,* for appellant.

Ginsburg, Rosenberg & Ginsburg, for appellee.

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

CHAPPELL, J.

Plaintiff, Vernon Lewis, doing business as Lewis Oil Company, originally filed this action against defendant, Oscar Hiskey, in the municipal court where defendant was admittedly served with summons on December 14, 1955. Therein and on appeal to the district court, plain-

tiff sought to recover upon an alleged open running unpaid general account for petroleum products purchased by defendant, the date of the last purchase being December 15, 1951. In the municipal court defendant's answer was a general denial. After a trial on the merits in that court, a judgment was rendered in favor of plaintiff and against defendant, whereupon he appealed to the district court. Therein plaintiff's petition was duly filed and defendant answered, denying generally and alleging that the statute of limitations had barred all claims of plaintiff prior to December 13, 1951. Plaintiff's motion to strike defendant's plea of the statute of limitations from his answer because same had changed the issues on appeal was overruled. Thereafter, defendant's motion for summary judgment was overruled, from which he appealed to this court where such appeal was dismissed on December 8, 1956. See Docket No. 34150. After issuance of the mandate of this court, defendant filed an amended answer which denied generally and alleged in substance that all of the plaintiff's claims had been barred by the statute of limitations. The statute relied upon was section 25-212, R. R. S. 1943.

Some 12 interrogatories submitted by plaintiff were served upon defendant, who answered in part as hereinafter indicated. A jury was waived and the cause was tried on the merits to the court, whereupon a judgment was rendered in favor of plaintiff and against defendant for $615.77 and costs, including an allowance of $75 for services of plaintiff's attorneys. Upon the overruling of defendant's motion for new trial, wherein he assigned as error that the judgment was not sustained by sufficient evidence and was contrary to law, defendant appealed, renewing said assignments. We conclude that they have no merit.

There are well-established rules of law which are applicable and controlling in this case. They are that: "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." In such a case, "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." Wallace v. Insurance Co. of North America, 162 Neb. 172, 75 N. W. 2d 549. See, also, Ord v. Benson, 163 Neb. 367, 79 N. W. 2d 713.

As early as In re Estate of Holloway, 89 Neb. 403, 131 N. W. 606, this court held: "Where there is a running account between the parties consisting of unsettled items of debit and credit and the dealing between the parties was continuous, and not interrupted for a sufficient length of time for the running of the statute, such items of account are not barred by the statute of limitations." In the opinion it was said: "The administrator urges that some of these disputed items were barred by the statute of limitations. Where there are unsettled items of debit and credit in an account between parties, each succeeding item is applied upon the true balance. If the dealings between the parties are suspended for a sufficient length of time, the statute of limitations will run, but, if the transactions are continuous, the statute will not apply." Such conclusion was predicated upon the premise that whether there was a running account consisting of unsettled items of debit and credit, and the dealings between the parties were continuous and not suspended for a sufficient length of time for the statute of limitations to run, depends upon the facts and circumstances of each particular case. See, also, Fairchild v. Fairchild Clay Products Co., 141 Neb. 356, 3 N. W. 2d 581.

In 54 C. J. S., Limitations of Actions, § 165, p. 118, citing In re Estate of Holloway, *supra,* and other authorities, it is said: "In order for later items to take earlier items out of the operation of the statute of limitations

the account must be continuous; and where the transactions between the parties are independent and remote the rule does not apply."

In Pankau v. Boyer, 141 Neb. 310, 3 N. W. 2d 634, relied upon by defendant, a jury was waived and the cause was tried to the court on the pleadings alone. It is entirely distinguishable from the case at bar. Plaintiff therein simply brought an action on account for services rendered and medicines furnished defendants. He attached a copy of the debit and credit account to his petition and made it a part thereof, which demonstrated upon its face that dealings between the parties were not continuous but were unrelated, separate, independent transactions which had been interrupted for a sufficient length of time for the running of the statute, except on the last item of December 18, 1935. Any other conclusion than that the account was so barred by the statute of limitations would have been clearly wrong. The same may also be said of the facts in Reeves v. Nye, 28 Neb. 571, 44 N. W. 736, relied upon by defendant. On the other hand, Mizer v. Emigh, 63 Neb. 245, 88 N. W. 479, relied upon by defendant, simply held that: "A payment made on an account by a person other than the debtor, without his authority, knowledge and consent, will not toll the running of the statute of limitations." That opinion is not in point or controlling here.

In the light of the foregoing authorities, we have examined the record, which, as summarized and important here, discloses the following: Plaintiff had been engaged in the operation of a wholesale and retail petroleum products and related merchandise business for some 27 or 28 years under the trade name of Lewis Oil Company. During 1950 and 1951 he maintained an established place of business at 1600 P Street in Lincoln. During that period, plaintiff's wife also worked at plaintiff's place of business, waiting on trade and keeping all of plaintiff's books and records. Also, during

that period, defendant was engaged in the trucking business and owned and operated a car and several dump trucks in the hauling of gravel and rock in and out of Lincoln and between Lincoln, Hastings, and McCook. Defendant furnished the trucks, paid all expenses for their operation and maintenance, and generally furnished drivers for the trucks used in his business, but sometimes the company for whom he hauled furnished the drivers of the trucks used by defendant, and he did not know who such drivers were.

In December 1950 defendant, who did not know how much merchandise would be required or what jobs it would be used upon, had a conversation with plaintiff wherein defendant requested the right to purchase from plaintiff petroleum products on credit to be used in defendant's business. Thereupon, it was agreed that plaintiff would furnish defendant such products for an indefinite period with no time fixed for payment, so that defendant would not be required to pay cash or furnish his drivers with needed cash every time they purchased plaintiff's products, and that defendant could pay for same each week or month or at such intervals as might be convenient and he was able to do so. In that connection, defendant admitted that it was intended that he could accumulate purchases over a period of time which was not fixed, so that he could subsequently make payments thereon and would not have to be bothered with making payments on each transaction as it arose or at any particular time.

In that connection, plaintiff produced his original ledger sheet pertaining to defendant's account, which had been made by plaintiff's wife from original sales slips depicting purchases by defendant which were all produced, offered in evidence, and received without objection. The ledger was a regular form of permanent business record such as was regularly made and kept by plaintiff and his wife along with all other accounts. It showed the exact state of plaintiff's account with de-

fendant, including all items purchased by defendant, the date thereof, the charges made therefor, and all items of credit for payments made by defendant upon a general running continuous account, rather than at any particular time or upon any specific purchases. After appropriate foundation had been laid, plaintiff's ledger sheet was offered and received in evidence.

That ledger sheet disclosed substantially the following: Defendant made purchases on December 21, 26, and 29, 1950, leaving a balance of $6 unpaid. He made purchases on January 4, 9, 11, 15, 17, 19, 20, and 25, 1951, leaving a balance of $45.68 unpaid. He made a purchase on February 3, 1951, and, for the first time, paid $20 on account, leaving a balance of $27.68 unpaid. He made a purchase on March 26, 1951, leaving a balance of $28.76. He made purchases on April 7, 11, 13, 14, 17, 18, 19, 20, 25, and 28, 1951. In that connection, he paid $11 on account April 11, 1951, and $50 on account April 28, 1951, leaving a balance of $61.19 unpaid. He made purchases on May 8, 11, 19, 25, and 29, 1951, and paid $20 on account May 19, leaving a balance of $79.17 unpaid. He made purchases on June 11, 16, and 29, 1951, leaving a balance of $96.32 unpaid. He made purchases on July 6, 14, 16, 19, 21, 23, 24, 27, and 31, 1951. Also, on July 31, 1951, he paid $50 on account, leaving a balance of $130.06 unpaid. He made purchases on August 1, 2, 3, 6, 8, 10, 11, 12, 16, 22, and 24, 1951, leaving a balance of $240.52 unpaid. He made purchases on October 16, 17, 20, 22, 23, 24, 25, 26, 27, 29, 30, and 31, 1951. Also, on October 16, 1951, he paid $25 on account, leaving a balance of $340.98 unpaid. He made purchases on November 2, 3, 6, 9, 12, 13, 14, 17, 19, 21, 23, 24, 26, 28, 29, and 30, 1951. Also, on November 17, 1951, he paid $67 on account, leaving a balance of $530.80 unpaid. He made purchases on December 1, 3, 4, 5, 6, 7, and 15, 1951.

In that connection, the evidence shows that on some of the foregoing dates, defendant made two or more purchases. Also, on December 6, 1951, defendant paid

$150 on account, leaving a balance unpaid on December 15, 1951, of $470.07, which amount with interest plaintiff sought to recover in this action, having testified that it was the correct amount due and unpaid. Admittedly, demand for payment therefor and failure or refusal to pay same was made prior to the making of defendant's income tax return in 1952.

The original sale slips were made out in duplicate by plaintiff or his wife, covering each individual purchase. Some of them were signed and some were unsigned. However, each and all of them showed the particular transactions had with defendant or his family or his employees for defendant on his general account. Some of such slips even identified defendant's trucks or cars which were used at the time of the particular purchases. In that connection, defendant admitted that he was a trucker during 1950 and 1951, and did business with plaintiff during that period, but stated that he did not purchase any of the merchandise as shown by the sale slips which were not signed by him. As will be observed, the record as heretofore and hereinafter set forth refutes such denial. On the other hand, defendant admitted that he had a conversation with plaintiff about purchases on credit in December 1950; that he made the payments heretofore set forth on general account; and that he did purchase the merchandise where his signature appeared on the slips. He also testified that he did not know two drivers whose names appeared on five sale slips, but that was not strange in view of the fact, as aforesaid, that admittedly the companies for whom defendant worked sometimes furnished drivers for trucks used by defendant in his business, and he did not even know who such drivers were.

It will be noted that by interrogatories served upon and in answers made thereto by defendant, which were offered and received in evidence, defendant admitted that during 1950 and 1951 he owned and operated three Ford dump trucks and a passenger car, and directly

employed four persons in his dump truck business operations of which he kept records. He admitted that purchases of petroleum products were made from plaintiff and used in the operation of his dump truck business during 1950 and 1951, and that some such purchases were made from plaintiff's wife. Defendant admitted that he kept purchase tickets and a general ledger record of his operations, but stated that they would not be made available for inspection by plaintiff or his attorneys. At the trial, however, he testified as an excuse for not producing such tickets and records that he had lost most of them except those in possession of his attorneys, and they were not produced.

Defendant denied that he made the purchase evidenced by the sale slip dated December 15, 1951, and made out to "Oscar Hiskey," which indicated that he had purchased two quarts of U. S. I. for $1.60, and one valve core for 10 cents, a total of $1.70. Such slip was separately identified as exhibit 2-G after having been previously offered and received in evidence without objection. As a matter of fact, however, defendant's brief filed in this court admitted that he had made that particular purchase and contended that the statute of limitations had barred all claims except that one.

On the other hand, plaintiff's wife testified that with the exhibit before her, she personally recalled the specific transaction on December 15, 1951, whereat she personally made out the sale slip and waited upon defendant, who personally made the purchases. She remembered such transaction with defendant, because "U. S. I.," a permanent anti-freeze, was very expensive, so, as shown on the slip, she first charged defendant $2 for two quarts thereof, and so indicated on the slip, then crossed it out and charged defendant $1.60 therefor, because he used a lot of it and she recalled that they had theretofore given him a special lower price upon it. As a matter of fact, in order to identify the purchase thereof, and the price of $1.60, plaintiff's wife wrote "Oscar,"

which appears in parentheses under the $1.60 charge, so that she would remember who got it at that price, and so that defendant would see that he did so. We conclude that the evidence heretofore set forth was amply sufficient to support the findings and judgment of the trial court that the statute of limitations did not bar plaintiff's claim.

Plaintiff also argued in this court that the defense of the statute of limitations was not available to defendant in the case at bar for the reason that it was not asserted as an issue upon the original trial in the municipal court and that its inclusion in defendant's answer filed in the district court unlawfully changed the issues upon appeal. However, in the light of our conclusions in this case, we do not deem it necessary to discuss that question.

For reasons heretofore stated, we conclude that the judgment of the trial court should be and hereby is affirmed. All costs are taxed to defendant, including $150 as fees for the services of plaintiff's attorneys in this court, as provided by section 25-1801, R. R. S. 1943.

AFFIRMED.

ELLA LONG ET AL., APPELLANTS, V. MAGNOLIA PETROLEUM COMPANY, APPELLEE.

89 N. W. 2d 245

Filed April 11, 1958. No. 34223.

1. **Juries.** In a law action a party is entitled to a jury trial as a matter of right.
2. **Actions: Pleading.** The essential character of the cause of action and the remedy or relief it seeks, as shown by the allegations of the petition, determine whether a particular action is one at law or in equity, unaffected by the conclusions of the pleader or what the pleader calls it, or the prayer for relief.
3. **Trial.** The purpose of a pretrial conference is to simplify the issues; amend the pleadings, when necessary; and avoid unnecessary proof of facts at the trial.

4. ———. The participants in a pretrial conference must adhere to the spirit of that procedure and are held to have waived questions not there presented.
5. ———. Modification of a pretrial order may be had at the trial to prevent manifest injustice, but the modification should be by direction and not by indirection. That is, modification must be attended by a degree of directness and formality such as is appropriate to a court order of such magnitude that from the time of its entry it controls the subsequent course of the action.
6. ———. The subsequent course of an action is controlled by the agreements made at pretrial conference so long as they remain unmodified and that would be true on appeal.
7. **Contracts.** Where there is a question as to the meaning of a contract, it is to be construed most strongly against the party preparing it.
8. ———. When a contract is optional in respect to one party, it is to be construed strictly in favor of the party that is bound and against the one who is not bound.
9. ———. In construing a written instrument for the purpose of ascertaining the intention of the parties, resort must be had to the instrument as a whole and, if possible, effect must be given to every part thereof.
10. ———. In construing a writing it is the duty of the court to give to words used their ordinary and popularly accepted meaning in the absence of explanation or qualification.
11. ———. A written contract expressed by clear and unambiguous language is not subject to interpretation or construction.
12. ———. Courts are not at liberty to rewrite the contract made by the parties, nor should the courts add language to that used by the parties and thus change the plain expressed intention of the parties as set out in the contract.
13. **Mines and Minerals.** An oil and gas lease containing the "unless" clause confers an optional right upon the lessee, and should be strictly construed in favor of the lessor and against the lessee, and time is of the essence of the contract. A failure on the part of the lessee to commence the drilling of a well or to pay the rental as stipulated automatically terminates the lease contract.
14. ———. Such a delay rental clause is a special limitation, time is of the essence of the contract, and failure of the lessee or his assigns to tender or pay rentals within the specified time automatically terminates the lease without any affirmative action by the lessor, or anyone else, for that purpose.
15. **Forfeitures.** Forfeitures are looked upon by courts with ill

favor and will be enforced only when the strict letter of the contract requires it.

16. **Mines and Minerals: Forfeitures.** When a lease terminates by its own terms the equitable rule as to relieving against forfeitures is not applicable thereto.

17. **Mines and Minerals.** The general test of production in paying quantities is whether it is reasonably possible to market or use oil producible at date of completion of the well and thereafter with some pecuniary profit, excluding from consideration expenses and liabilities incurred in bringing the well to completion.

18. ———. When there is nothing in an oil lease providing for a forfeiture or termination thereof for failure of the lessee to produce oil and gas in paying quantities during the primary term of the lease, the failure of lessee to produce oil or gas in paying quantities during such term will not, by itself, result in a defeasance ipso facto. To hold otherwise would constitute a writing of provisions into the lease which are not contained therein. This we cannot do.

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

Halcomb, O'Brien, Knapp & Everson, for appellants.

Wright, Simmons & Harris, Charles B. Wallace, R. T. Wilkinson, Jr., Frank C. Bolton, Jr., and *Jack E. Earnest,* for appellee.

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

WENKE, J.

This is an appeal from the district court for Kimball County. It involves an action initiated therein on December 16, 1955, by Ella Long, widow, and her five children to obtain the release of an oil and gas lease on record in Kimball County which had been entered into by them with the Magnolia Petroleum Company. The trial court dismissed the petition of plaintiffs. Plaintiffs thereupon filed a motion for new trial and, from the overruling thereof, took this appeal. We shall herein refer to the appellants as lessors and to appellee as lessee.

On September 11, 1950, the lessors entered into the oil and gas lease with lessee, a Texas corporation authorized to do business in the State of Nebraska. The lease covered approximately 1,280 acres of land in Kimball County. It was recorded on December 14, 1950, in Book 4, Oil and Gas Records of Kimball County, pages 391-393, in the office of the county clerk of Kimball County. The statutory procedural steps required by sections 57-201 to 57-204, R. S. Supp., 1955, were complied with by the parties to the lease, which procedures raised the issue of whether or not the lease had become "forfeited" (terminated). This action was thereupon instituted by the lessors under and pursuant to the authority of section 57-205, R. R. S. 1943.

The basis for the action is the claim that the lease, as to approximately 1,160 acres covered thereby, had terminated because the lessee had failed to pay the (delay) rental due thereunder as of September 11, 1955. In this respect we said in Valentine Oil Co. v. Powers, 157 Neb. 71, 59 N. W. 2d 150: "* * * the responsibility of properly construing the lease and making timely payment or tender of delay rentals is imposed upon the lessee or his assignee, * * *." One hundred twenty acres of land covered by the lease were farmed out by lessee to the Sunbeam Oil Company and is not involved in this action as the lessors admit that the Sunbeam Oil Company paid the rental thereon which they claim was due under the terms of the lease on September 11, 1955.

The lessee, within the time provided for that purpose by section 57-204, R. S. Supp., 1955, notified the county clerk, ex officio register of deeds of Kimball County, in writing that the "lease has not been forfeited" and that it claimed the lease to be in full force and effect. Under this situation this section of the statute provides: "* * * the owner of the land shall be entitled to the remedies now provided by law for the cancellation of such disputed lease." The statute so providing is section 57-205, R. R. S. 1943, and it provides that: "Should the

owner of such lease neglect or refuse to execute a surrender as provided in section 57-201, then the owner of the leased premises may sue in any court of competent jurisdiction to obtain such surrender, and he may also recover in such action of the lessee, his successors or assigns, the sum of one hundred dollars as damages, and all costs, together with a reasonable attorney's fee for preparing and prosecuting the suit, and any additional damages that the evidence in the case will warrant. In all such actions, writs of attachment may issue as in other cases."

Lessors asked for but were refused a jury trial, the matter being tried to the court. They now contend such refusal was prejudicial error, claiming the present action is a law action. It will be noted that the Legislature, in section 57-204, R. S. Supp., 1955, referred to such action as one for the "cancellation of such disputed lease."

We said in Yeiser v. Broadwell, 80 Neb. 718, 115 N. W. 293, that: "In a law action a party is entitled to a jury trial as a matter of right. Const., art. I, sec. 6. Lett v. Hammond, 59 Neb. 339, * * *." See, also, Gandy v. Wiltse, 79 Neb. 280, 112 N. W. 569.

And in In re Guardianship of Warner, 137 Neb. 25, 288 N. W. 39, we said: "* * * section 6, art. I of our Constitution, provides: 'The right of trial by jury shall remain involate,' etc. We are committed to the view that this provision does not create or extend, but merely operates to preserve, the right of jury trial as it existed prior to the adoption of our Constitution of 1875. In other words, it may not be curtailed."

However, as stated in Mills v. Heckendorn, 135 Neb. 294, 281 N. W. 49: "The essential character of the cause of action and the remedy or relief it seeks, as shown by the allegations of the complaint, determine whether a particular action is one at law or in equity, unaffected by the conclusions of the pleader or what the pleader calls it, or the prayer for relief."

Section 25-21,112, R. R. S. 1943, provides: "Action to quiet title; scope of relief. An action may be brought and prosecuted to final decree, judgment or order, by any person or persons, whether in actual possession or not, claiming title to, or an estate in real estate against any person or persons who claim, or apparently have an adverse estate or interest therein, for the purpose of determining such estate or interest, canceling unenforceable liens, or claims against, or which appear to be against said real estate, and quieting the title to real estate."

Section 25-21,120, R. R. S. 1943, provides: "Action to quiet title; trial; appeal. The court shall try such cause in like manner as other equitable actions and shall enter therein such orders and decrees as the parties may be entitled to. Appeals from final orders may be had as in other actions."

We think the essential character of the relief sought by the lessors is a surrender (cancellation) of the lease, thus bringing the action specifically within those referred to in section 25-21,112, R. R. S. 1943, and the fact that the statute (§ 57-205, R. R. S. 1943) provides the lessor may also recover therein damages, costs, and an attorney's fee does not change the essential character thereof.

Lessors call our attention to the fact that the Montana Supreme Court has held to the contrary under similar statutes. See Solberg v. Sunburst Oil & Gas Co., 70 Mont. 177, 225 P. 612. They then cite the following principles and, based thereon, argue we should follow that court:

"It is a general rule of law that, where a question of statutory construction is one of novel impression, it is proper to resort to decisions of courts of other states construing statutory language which is identical or of similar import. Indeed, it is highly desirable that a statute be given a similar interpretation by the courts

of the several states wherein it is in force." 50 Am. Jur., Statutes, § 323, p. 315.

"When a statute has been adopted from another state, ordinarily the construction given prior to its adoption by the courts of that state will be followed in this state, in the absence of any indication of a contrary intention on the part of the Legislature." Illian v. McManaman, 156 Neb. 12, 54 N. W. 2d 244.

While these principles have application in situations to which it can be said they apply we do not think they are controlling here for the following reasons: First, we do not think the statutory construction here is one of novel impression; second, there is nothing in the record to show that we adopted our statutes on this subject from Montana; third, we are obliged to follow our statutes relating thereto; and fourth, we do not agree with the reasoning of the Montana court to the effect that because the statute also authorizes judgment for a penalty ($100), attorney's fee, and damages, when a lease has been forfeited, it thereby becomes an action at law when the essential purpose of the action is to obtain the cancellation thereof. As stated in the Montana opinion: "First the forfeiture must be shown" and "Unless a forfeiture has occurred, there is no right of recovery of the penalty or damages, * * *." That, we think, is the essential character of the action and what rights flow therefrom, such as a penalty, costs, attorney's fee, and any additional damages that the evidence will warrant are only ancillary thereto. As stated in 1 C. J. S., Actions, § 54, p. 1158: "Actions of an equitable nature include * * * an action for the cancellation of an instrument, * * * Where both legal and equitable relief are demanded, or are essential to a complete determination of the controversy, the action is ordinarily classified according to what appears to be its primary purpose. * * * if the primary cause of action is equitable, the case is of an equitable nature, although incidental issues are of a legal nature. Hence, as of an equitable char-

acter, have been classified * * * an action which, although ultimately for the recovery of a money judgment, makes such recovery dependent upon the cancellation or reformation of an instrument which is also sought; * * *."

We find the trial court was correct in denying lessors a jury trial.

Lessors further contend the trial court did not properly limit the issues on the part of the lessee when it permitted it to defend the action on grounds other than those advanced by it prior to the beginning of this litigation (See O'Neil v. Union Nat. Life Ins. Co., 162 Neb. 284, 75 N. W. 2d 739; Kucera v. Kavan, 165 Neb. 131, 84 N. W. 2d 207) and on grounds other than those set out in its pleadings filed in the action. They also contend the trial court, by its holding, decided the cause on issues not properly before it in view of the pretrial order relating thereto, to which neither of the parties took any exceptions. Since this is an equity action, and we must review the record de novo, the following has application to the latter contention: "A wrong reason for a correct conclusion does not militate against the decision." Stratbucker v. Junge, 153 Neb. 885, 46 N. W. 2d 486.

Our Revised Rules, as they relate to "Pre-Trial Procedure" and the formulating of issues thereby, provide: "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." Revised Rules, 1957, Supreme Court of Nebraska, page 35.

The purpose of a pretrial conference is to simplify the issues; amend the pleadings, when necessary; and avoid unnecessary proof of facts at the trial. See, McDonald v. Bowles, 152 F. 2d 741; Jenkins v. Devine Foods, Inc., 3 N. J. 450, 70 A. 2d 736, 22 A. L. R. 2d 593; Hensgen Bros., Inc. v. Grip, 13 N. J. Super. 105, 80 A. 2d 207.

The participants in a pretrial conference must adhere to the spirit of that procedure and are held to have waived questions not there presented. See, Jenkins v. Devine Foods, Inc., *supra;* Hensgen Bros., Inc. v. Grip, *supra.*

Modification may be had at the trial to prevent manifest injustice, but the modification should be by direction and not by indirection. That is, modification must be attended by a degree of directness and formality such as is appropriate to a court order of such magnitude that from the time of its entry it "controls the subsequent course of action." See, Jenkins v. Devine Foods, Inc., *supra;* Hensgen Bros., Inc. v. Grip, *supra.*

The subsequent course of an action is controlled by the agreements made at pretrial conference so long as they remain unmodified. See Johnson v. Glassley, 118 Ind. App. 704, 83 N. E. 2d 488. And that would be true on appeal. See Carlson v. Hannah, 6 N. J. 202, 78 A. 2d 83. We shall consider the appeal accordingly.

Insofar as material to this appeal the lease provides as follows:

"2. Subject to the other provisions herein contained, this lease shall remain in force for a term of ten (10) years from this date (called 'primary term'), and as long thereafter as oil, liquid hydrocarbons, gas or their respective constituent products, or any of them, is produced from said land or land with which said land is pooled.

"3. The royalties to be paid by lessee are: (a) on oil, and on other liquid hydrocarbons saved at the well, one-

eighth of that produced and saved from said land, same to be delivered free of cost at the wells or to the credit of lessor in the pipe line to which the wells may be connected; (b) on gas, including casinghead gas and all gaseous substances, produced from said land and sold or used off the premises or in the manufacture of gasoline or other products therefrom, the market value at the mouth of the well of one-eighth of the gas sold or used, provided that on gas sold at the wells the royalty shall be one-eighth of the amount realized from such sale; and (c) if at any time while there is a gas well or wells on the above land (and for the purposes of this clause (c) the term 'gas well' shall include wells capable of producing natural gas, condensate, distillate or any gaseous substance and wells classified as gas wells by any governmental authority) such well or wells are shut in, and if this lease is not continued in force by some other provision hereof, then it shall nevertheless continue in force for a period of ninety (90) days from the date such well or wells are shut in, and before the expiration of any such ninety-day (90-day) period, lessee or any assignee hereunder may pay or tender an advance annual royalty equal to the amount of delay rentals provided for in this lease for the acreage then held under this lease by the party making such payment or tender, and if such payment or tender is made, this lease shall continue in force and it shall be considered that gas is being produced from the leased premises in paying quantities within the meaning of paragraph 2 hereof for one (1) year from the date such well or wells are shut in, and in like manner subsequent advance annual royalty payments may be made or tendered and this lease shall continue in force and it will be considered that gas is being produced from the leased premises in paying quantities within the meaning of said paragraph 2 during any annual period for which such royalty is so paid or tendered; such advance royalty may be paid or tendered in the same manner as pro-

vided herein for the payment or tender of delay rentals; royalty accruing to the owners thereof on any production from the leased premises during any annual period for which advance royalty is paid may be credited against such advance payment.

"4. If operations for drilling are not commenced on said land or on land pooled therewith on or before one (1) year from this date, this lease shall terminate as to both parties, unless on or before one (1) year from this date lessee shall pay or tender to the lessor a rental of One Thousand Two Hundred Eighty & No/100 Dollars ($1280.00) which shall cover the privilege of deferring commencement of such operations for a period of twelve (12) months. In like manner and upon like payments or tenders, annually, the commencement of said operations may be further deferred for successive periods of the same number of months, each during the primary term. * * *

"6. If, prior to discovery of oil, liquid hydrocarbons, gas or their respective constituent products, or any of them, on said land or on land pooled therewith, lessee should drill and abandon a dry hole or holes thereon, or if, after discovery of oil, liquid hydrocarbons, gas or their respective constituent products, or any of them, the production thereof should cease from any cause, this lease shall not terminate if lessee commences additional drilling or reworking operations within sixty (60) days thereafter, or (if it be within the primary term) commences or resumes the payment or tender of rentals on or before the rental paying date next ensuing after the expiration of three (3) months from the date of completion and abandonment of said dry hole or holes or the cessation of production. If, at the expiration of the primary term, oil, liquid hydrocarbons, gas or their respective constituent products, or any of them, is not being produced on said land or land pooled therewith but lessee is then engaged in operations for drilling, mining, or reworking of any well or wells thereon, this

lease shall remain in force so long as such operations or said additional operations are commenced and prosecuted (whether on the same or successive wells) with no cessation of more than sixty (60) consecutive days, and, if they result in production, so long thereafter as oil, liquid hydrocarbons, gas or their respective constituent products, or any of them, is produced from said land or land pooled therewith. In the event a well or wells producing oil or gas in paying quantities should be brought in on adjacent land and within three hundred thirty feet (330 ft.) of and draining the leased premises, lessee agrees to drill such offset wells as a reasonably prudent operator would drill under the same or similar circumstances."

It is admitted that lessee did not pay or tender payment of any rentals on or before September 11, 1955, on the 1,160 acres herein involved. Lessee contends that under the factual situation here presented the lease did not require it to do so.

As to the construction of the lease the following principles are applicable. See Hafeman v. Gem Oil Co., 163 Neb. 438, 80 N. W. 2d 139.

" 'Where there is a question as to the meaning of a contract, it is to be construed most strongly against the party preparing it.' Greenough v. Willcox, 213 N. W. 175 (238 Mich. 52)." Ericson v. Nebraska-Iowa Farm Investment Co., 134 Neb. 391, 278 N. W. 841.

"When a contract is optional in respect to one party it is to be construed strictly in favor of the party that is bound and against the one who is not bound." McDaniel v. Hager-Stevenson Oil Co., 75 Mont. 356, 243 P. 582.

"In construing a written instrument for the purpose of ascertaining the intention of the parties, resort must be had to the instrument as a whole and, if possible, effect must be given to every part thereof." Smith v. United States Fidelity & Guaranty Co., 142 Neb. 321, 6

N. W. 2d 81. See, also, Hansen v. E. L. Bruce Co., 162 Neb. 759, 77 N. W. 2d 458.

"In construing a writing it is the duty of the court to give to words used their ordinary and popularly accepted meaning in the absence of explanation or qualification." Peetz v. Masek Auto Supply Co., 161 Neb. 588, 74 N. W. 2d 474.

"A written contract expressed by clear and unambiguous language is not subject to interpretation or construction." Hansen v. E. L. Bruce Co., *supra*. See, also, Hafeman v. Gem Oil Co., *supra*.

Courts, in construing any written instrument, must construe the same so as to carry into effect the intention of the parties as found in the language the parties used. Courts are not at liberty to rewrite the contracts made by the parties, nor should the courts add language to that used by the parties and thus change the plain expressed intention of the parties as set out in the contract.

"The intention of the parties to a written contract expressed by clear and unambiguous language must be determined from its contents." Hansen v. E. L. Bruce Co., *supra*.

It will be noted that the habendum clause (section 2) does not merely provide for a primary term of 10 years, and as long thereafter as production continues, but makes such terms subject to the other provisions therein contained, which would include sections 3, 4, and 6. See Rogers v. Osborn, 152 Tex. 540, 261 S. W. 2d 311.

Section 4 of the lease, during the primary term thereof with which we are here concerned, created, as long as it had application, what is referred to in the oil and gas industry as an "unless" lease. As stated in 2 Summers Oil & Gas (Perm. Ed.), § 339, p. 223: "An important distinction in the legal relations between lessor and lessee under the drill or pay type of lease and the unless type of lease which has been heretofore mentioned, is that under the drill or pay lease the lessee expressly

promises to drill or pay; but under the unless lease the contract merely provides that if the lessee does not drill within a stipulated time the lease is void unless he pays. There being no promise on part of the lessee under the unless lease to pay the delay rental there is no duty to pay, and an action consequently cannot be maintained to recover it. The provision for payment is looked upon as merely stating a condition upon which, in absence of drilling, the lease may be continued or terminated."

We held in Fritsche v. Turner, 133 Neb. 633, 276 N. W. 403, by quoting from McKinlay v. Feagins, 82 Okl. 193, 198 P. 997, that: "'An oil and gas lease containing the "unless" clause confers an optional right upon the lessee, and should be strictly construed in favor of the lessor and against the lessee, and time is of the essence of the contract.' * * * a failure on the part of the lessee to commence the drilling of a well or to pay the rental as stipulated automatically terminated the lease contract." See, also, Valentine Oil Co. v. Powers, *supra*. As therein held: "Such a delay rental clause is a special limitation, time is of the essence of the contract, and failure of the lessee or his assigns to tender or pay rentals within the specified time automatically terminates the lease without any affirmative action by the lessor, or any one else, for that purpose." And: "As stated in Humble Oil Co. v. Davis (Tex. Comm. App.), 296 S. W. 285: 'It was a limitation upon the term or period of the grant, and, upon the failure to drill or pay as aforesaid, the estate created by the lease ceased and reverted to the lessors.'" See, also, McNamer Realty Co. v. Sunburst Oil & Gas Co., 76 Mont. 332, 247 P. 166; Hopkins v. Zeigler, 259 F. 43; Berthelote v. Loy Oil Co., 95 Mont. 434, 28 P. 2d 187; Colby v. Sun Oil Co. (Tex. Civ. App.), 288 S. W. 2d 221; W. T. Waggoner Estate v. Sigler Oil Co., 118 Tex. 509, 19 S. W. 2d 27.

It is true that equity does not favor forfeitures. See, Hannah v. American Live Stock Ins. Co., 111 Neb. 660, 197 N. W. 404; Donnelly v. Sovereign Camp, W.O.W., 111

Neb. 499, 197 N. W. 125; Wisdom v. Minchen (Tex. Civ. App.), 154 S. W. 2d 330; West v. Continental Oil Co., 91 F. Supp. 505. As stated in Hannah v. American Live Stock Ins. Co., *supra*: "'Forfeitures are looked upon by courts with ill favor, and will be enforced only when the strict letter of the contract requires it; * * *.' Haas v. Mutual Life Ins. Co., 84 Neb. 682." However, it is also true that forfeit and terminate are not synonymous. See, Schneider v. Springmann, 25 F. 2d 255; Kugel v. Young, 132 Colo. 529, 291 P. 2d 695; Woodson Oil Co. v. Pruett (Tex. Civ. App.), 281 S. W. 2d 159; Gillespie v. Bobo, 271 F. 641; Baldwin v. Kubetz, 148 Cal. App. 2d 937, 307 P. 2d 1005. As stated in Kugel v. Young, *supra*: "While appellate courts, through the use of inaccurate terminology, have frequently referred to the termination of an unless lease as a 'forfeiture,' there actually is no element of forfeiture involved. The lessor is not required to do anything, but the lessee's failure to meet the conditions of the contract automatically terminates it. The interest created in the lessee by such a lease does not become forfeited upon failure to comply with its conditions; it simply expires." When a lease terminates by its own terms the equitable rule as to relieving against forfeitures is not applicable thereto.

A producing oil well was brought in on the premises on November 12, 1952. This brought into play the provisions of section 6 of the lease. Lessee contends that the provisions of section 4 and section 6, as they relate to the lease terminating, are different and result in different legal statuses between the lessors and lessee. In this respect section 4 provides "this lease shall terminate * * * unless" whereas section 6 provides "this lease shall not terminate if." Lessee concedes the language of section 4 is a clause of specific limitation but contends the language of section 6, when applicable, creates a condition subsequent. In view of what we hereinafter find the evidence adduced establishes it is not necessary to answer this question although it presents a very nice

question of law. See Knight v. Chicago Corp., 144 Tex. 98, 188 S. W. 2d 564. A discussion thereof may be found in South Penn Oil Co. v. Snodgrass, 71 W. Va. 438, 76 S. E. 961, 43 L. R. A. N. S. 848; Colby v. Sun Oil Co., *supra;* Carrothers v. Stanolind Oil & Gas Co., 134 F. Supp. 191.

In view of the fact that a producing well was brought in on the premises in November 1952 we come first to the factual question of whether or not, within the meaning of the language of section 6 of the lease which is applicable thereto, the production thereof had ceased for any cause prior to September 11, 1955, and, if it had, whether or not the lessee had exercised any of the other permissive methods therein provided to prevent the lease from terminating. In order to properly answer the first phase of the foregoing statement it is necessary to determine what the parties meant by the use of the following language therein contained, to wit: "* * * if, after discovery of oil, * * * the production thereof should cease from any cause, * * *."

It is lessors' position that the word "production," whenever used in the lease, means "production in paying quantities," which is generally defined by the courts as follows: " 'The general test of production in paying quantities is whether it is reasonably possible to market or use gas (here oil) producible at date of completion of the well and immediately thereafter with some pecuniary profit, excluding from consideration expenses and liabilities incurred in bringing the well to completion.' " Continental Oil Co. v. Boston-Texas Land Trust, 221 F. 2d 124. See, also, annotations in 48 A. L. R. at page 887, 84 A. L. R. at page 761, and 91 A. L. R. at page 900. And this is the construction placed by most courts on the period following the "primary term" of a lease although only the word "production" is used in the lease in relation thereto. As said in Garcia v. King, 139 Tex. 578, 164 S. W. 2d 509: " 'Frequently oil and gas leases in the "thereafter" clause provide that the lease is to continue

after the fixed term so long as oil or gas is produced in "paying quantities." Most courts hold the legal effect of that clause and of the one "so long as oil and gas is produced" to be the same; and to extend the lease under a clause such as is before us, the production must be in paying quantities.' (Berthelote v. Loy Oil Co., 95 Mont. 434, 28 P. 2d 187.)" There is, however, authority to the contrary. See Denker v. Mid-Continent Petroleum Corp., 56 F. 2d 725, 84 A. L. R. 756. In Garcia v. King, *supra,* the court discussed the reason for its holding in the following language: "In order to understand and properly interpret the language used by the parties we must consider the objects and purposes intended to be accomplished by them in entering into the contract. The object of the contract was to secure development of the property for the mutual benefit of the parties. It was contemplated that this would be done during the primary period of the contract. So far as the lessees were concerned, the object in providing for a continuation of the lease for an indefinite time after the expiration of the primary period, was to allow the lessees to reap the full fruits of the investments made by them in developing the property. Obviously, if the lease could no longer be operated at a profit, there were no fruits for them to reap. The lessors should not be required to suffer a continuation of the lease after the expiration of the primary period merely for speculation purposes on the part of the lessees. Since the lease was no longer yielding a profit to the lessees at the termination of the primary period, the object sought to be accomplished by the continuation thereof had ceased, and the lease had terminated." However, these cases do not relate to the primary term. That the parties so understood the meaning of the word "produced" in section 2 as it related to the period after the primary term is evidenced by subsection (c) of section 3 of the lease.

That the parties to the lease understood there was a difference in meaning between the use of the word pro-

duction and to produce in paying quantities is evidenced by the use of these expressions in different provisions of the lease. As we have already said, courts are not at liberty to rewrite the contract made by the parties, nor should the courts add language to that used by the parties and thus change the plain expressed intention of the parties as set out in the contract. And, as stated in Peetz v. Masek Auto Supply Co., *supra*: "* * * it is the duty of the court to give to words used their ordinary and popularly accepted meaning in the absence of explanation or qualification." "Cease," according to Webster's New Twentieth Century Dictionary (2d Ed.), page 289, means "to end; to stop; to discontinue" and this, we believe, is the ordinary and popularly accepted meaning thereof and the one here intended by the parties. And, as stated in Rogers v. Osborn, *supra*: "The word 'production' means marketable oil or gas."

We think the following language of section 6 of the lease, to wit, "if, after discovery of oil, * * * the production thereof should cease from any cause," has no application when, during the primary term of the lease to which it has application, the lessee, in good faith and with reasonable diligence, works, or causes to be reworked, a well thereon which is producing marketable oil in some quantity, the amount thereof not being controlling as the word cease means to end, stop, or discontinue. While we have found no case directly in point so holding, the cases of Baker v. Huffman, 176 Kan. 554, 271 P. 2d 276, and Murphy v. Garfield Oil Co., 98 Okl. 273, 225 P. 676, discuss the question. As stated in Murphy v. Garfield Oil Co., *supra*: "If an oil well or gas well drilled, whether oil or gas was in paying quantities or not—just so oil or gas was obtained—not a dry hole—one such well was sufficient to prolong the life of the contract for the initiative period and to keep the contract in force; after the initiative period oil or gas in paying quantities were necessary. The first five years of the contract is given for the purpose of exploring, and

a well with any showing of oil or gas is sufficient consideration under the terms of this contract for this period, but oil or gas in paying quantities must be had to continue the contract after this period, and this is reasonable." Therein the court went on to say: "The business of exploring for oil and gas and of producing the same is uncertain and expensive. One must command large capital and take a long time to drill a well in search of these elements. There is nothing certain as to where they are situated in the earth and there is no way of knowing except to send the drill into the earth. After all the work and the great expense, the result is more often than otherwise a dry hole and the lessee loses his time and money and has no encouragement to continue the adventure. Sometimes the result is a small showing of oil and gas and the lessee is encouraged to continue the adventure, and it is only reasonable and right that he should have the full exploring period set out in the contract to make successful the adventure." In Baker v. Huffman, *supra*, the court went on to say: "We find nothing in the contract providing for a forfeiture or cancellation of the lease for the failure of the lessees to produce oil and gas in paying quantities during the primary term of the lease. The failure of lessees to produce or failure, alone, of production in paying quantities during the primary term of the lease did not result in a defeasance ipso facto. To hold otherwise would be to read into the lease express provisions which did not exist, and this we cannot do."

Lessee brought in Ella Long No. 1 as a producing well on the leased premises on November 12, 1952, at a cost of $93,037.51. There was put up in connection with this well 4 stock (storage) tanks for marketable oil and a heater treater to be used for removing water and basic sediment from the fluid pumped from the well in case the fluid pumped was not oil of marketable (salable) quality. This well came in as a good producer and continued to produce quite well until December

1954 when the amount of fluid pumped not only declined materially in quantity but also in quality to the point where it could not be pumped directly into the stock tanks but, beginning with December 11, 1954, it had to be pumped directly into the heater treater for treatment before it was fit for sale.

With this general decline in the amount of fluid obtainable from the well the lessee began, and carried out for about 2 months, what is referred to as a pumping schedule. This consists of pumping the well either 4, 8, or 16 hours a day over a period of some 2 weeks to a month for each thereof, thus allowing time for additional fluid to enter the well base to be pumped out. This is a generally recognized production practice used in the oil industry to increase the flow of a well and often results in doing so. However, in this instance it did not do so.

When this method failed the lessee endeavored to increase the well's capacity to produce by reworking it with what is referred to in the record as a "sandfrac" treatment which is performed with some fluid (in this case water and oil). This fluid is flushed down the well bore under pressure in order to put new fractures in the producing formation and also clean out the old fractures which nature had created therein, thus providing openings for the oil to flow into the well bore. This job was started on February 14, 1955, and completed on February 23, 1955, at a cost of $3,551. Pumping was again started on February 23, 1955, and, by March 7, 1955, all of the oil used in the reworking of the well had been recovered.

After all the oil used had been recovered the lessee continued to pump the well but no substantial increase in the flow was obtained by the work done.

A "run" is a transfer of crude oil from the stock tanks, where it is stored on the leased premises after production, to a pipe line. The record shows that in November 1954 lessee made a run of 343.07 barrels of oil from the stock

tanks of Ella Long No. 1 and in October 1955 a run of 338.32 barrels of oil therefrom. While not large it shows that lessee was operating this well during this period and securing salable oil therefrom, although most of it had to be treated. We have examined all of the evidence relating thereto and while there is conflict therein we have come to the conclusion that lessee operated the well on Ella Long No. 1 during all of the time herein material in good faith and with an honest endeavor to increase the production therefrom and, as a result, the production therefrom never ceased from any cause within the intent and meaning of section 6, so as to make the provisions thereof relating to the payment of rentals applicable. In view thereof we find lessors' contention that by lessee's failure to pay rent on or before September 11, 1955, they were entitled to have the lease declared void and canceled to be without merit.

Earlier in this opinion we mentioned the fact that lessee had farmed out to the Sunbeam Oil Company a tract of 120 acres of the total it had leased from lessors. On July 15, 1955, the Sunbeam Oil Company commenced to drill a well thereon and continued to do so until July 26, 1955, when it had reached a depth of 6,160 feet. It then abandoned the operation as a dry hole.

Assuming, solely for the purpose of discussion, that lessee had ceased to produce oil from Ella Long No. 1 at any time within 60 days prior to July 15, 1955, when Sunbeam commenced to drill, would that have extended the option to pay rent past September 11, 1955? In this respect the lease provides in section 6: "* * * if, after discovery of oil, * * * the production thereof should cease from any cause, this lease shall not terminate if lessee commences additional drilling * * * operations within sixty (60) days thereafter, or (if it be within the primary term) commences or resumes the payment or tender of rentals on or before the rental paying date next ensuing after the expiration of three (3) months from date of completion and abandonment of said dry hole or holes

or the cessation of production." Since the additional drilling was not abandoned as a dry hole until July 26, 1955, the time to commence or resume the payment of rentals extended beyond September 11, 1955, and consequently lessee could not be in default thereof.

In addition to the two wells already referred to two other dry holes were dug on the leased premises: One, referred to as Sunbeam and Stout Ella Long, in July 1953; and the other, by Rogers Oil Company and referred to as Travis No. 1, in August 1953. Both were dug under farm-out arrangements with the lessee.

Since September 11, 1955, the lessee has brought in Ella Long B No. 1 as a producer at a cost of $61,226.17. The site therefor was staked out on September 23, 1955; it was prepared for drilling on September 26, 1955; the well was spudded in on October 7, 1955; and it was brought in as a producer on November 1, 1955, and seems to have good flow. Lessee, on November 17, 1955, selected a site for Ella Long No. 2 but has not proceeded to spud it in because of this litigation. In addition thereto Ella Long No. 1 was restored to better production in March 1956.

The foregoing has nothing to do with the immediate question herein involved, that is, whether or not production had ceased, but does bear on the good faith and reasonable diligence with which lessee has and is developing the leased premises during the primary period of the lease.

Other questions have been raised by the parties but in view of what we have said and held herein a discussion thereof becomes unnecessary. We find the action taken by the trial court to be correct and therefore affirm its judgment dismissing the petition of lessors.

AFFIRMED.

IN RE ESTATE OF LINCOLN CLARENCE APPLEGATE, DECEASED. MARY E. BROWN, APPELLEE, V. EMILY S. APPLEGATE, APPELLANT.

89 N. W. 2d 233

Filed April 11, 1958. No. 34313.

1. **Wills.** The probate of a will is the proof before the county court that the instrument offered as the last will and testament of a deceased person was signed by the testator as his will and witnessed in the manner required by statute, and that the testator, at the time of its execution, was of sound mind.
2. ———. The construction of a will is generally for the courts to determine after the instrument has been admitted to probate.
3. ———. Unless it appears from the will itself, without the necessity of applying rules of construction, that a purported will is completely abortive as a will, it should be admitted to probate.
4. ———. Ordinarily a probate court is without jurisdiction in determining whether or not a will should be admitted to probate to consider its legal effect.
5. ———. The part of the rule announced in In re Estate of Strelow, 117 Neb. 168, 220 N. W. 251, providing that a legatee or devisee petitioning for the probate of a will must allege and prove that such legatee or devisee, under the law as well as under the will, is entitled to the legacy or devise, is disapproved.
6. **Wills: Executors and Administrators.** A probate court may properly construe a will for the purpose of advising an executor or administrator in order to expedite the administration of the estate of the testator. It adjudicates nothing other than the rights and liabilities of the executor or administrator.
7. ———: ———. The power to construe a will in controversies between an executor or administrator and one claiming adversely to the estate, or between claimants under the will, is in the district court.

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

Evans & Kelley, for appellant.

Baskins & Baskins, for appellee.

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

CARTER, J.

This is an appeal from a judgment of the district court affirming an order of the county court admitting the will of Lincoln Clarence Applegate to probate. The objector, Emily S. Applegate, has appealed.

A petition for the probate of the will of Lincoln Clarence Applegate was filed in the county court of Lincoln County on November 3, 1956. Objections to the probate of the will were filed by Emily S. Applegate on November 27, 1956. The will was admitted to probate by the county court on April 17, 1957, after notice and hearing. By stipulation of the parties the case was tried on appeal on the pleadings filed in the county court.

It was stipulated by the parties that the deceased died on September 7, 1956, and was a resident of Lincoln County at the time of his death. He was a single man at the time of his death, and had never been married. It was stipulated, also, that Emily S. Applegate, the objector, was the mother of the deceased and his sole heir at law. In addition to his mother, deceased left surviving him three brothers and four sisters, one of whom is the petitioner. Three sisters and one brother were or had been married and had a total of 14 children who were, of course, nieces and nephews of the deceased. The remaining brothers and sister had never married. It was further stipulated that deceased left surviving more distant relatives than those above enumerated. The real estate owned by the deceased and the value of the personal property left by him was likewise stipulated.

No testimony was taken in the district court. The evidence of the two witnesses to the will as given in the county court was admitted in evidence by stipulation. At the close of the evidence the parties stipulated that the purported will of the deceased was properly executed according to law, that deceased was mentally competent at the time of its execution, and that there was no un-

due influence or duress practiced upon the deceased at or before the execution of the will.

It is the contention of the objector that an instrument, testamentary in form, which fails to make a valid disposition of property or to name a devisee or legatee capable of taking under it, is not entitled to be admitted to probate, and that the present will falls within this rule. On the other hand, the petitioner contends that when the provisions of a will are subject to construction, it will be presumed that the testator intended to make a valid disposition of his property and that it is for the courts, after a will has been admitted to probate, to determine questions of construction and legal effect of a will, and the validity of particular provisions, bequests, and devises.

The will provided that all of the property of the deceased was given to Mary E. Brown and Ellen Ruth Applegate in trust for the uses and purposes provided in the will, with full power and authority to sell the property as soon after the death of the testator as it is practicable to do so. The will contained no residuary clause. The provisions of the will giving rise to the respective contentions of the parties, and the only provisions in the will purporting to make a disposition of the property of the deceased, provide:

"Upon the sale and disposition of my property as hereinabove directed, I direct that the proceeds therefrom, together with all monies belonging to my estate, be held by my said sisters Mary E. Brown and Ellen Ruth Applegate in trust for the use, benefit, comfort and maintenance of my nieces and nephews and such others of my relatives as may in the discretion of my said sisters warrant and require financial aid and assistance; and I hereby give full power and authority to my said sisters to invest all of the monies and proceeds of my estate and to expend the interest accumulated from such proceeds, investments and funds for the purposes and uses as herein set forth.

"It is my intention that upon my death my entire estate be reduced to money as promptly and profitably as possible and such funds invested by my trustees named herein, the income and interest therefrom to be used for the benefit of such of my relatives as may require financial aid and assistance."

The county court has exclusive jurisdiction to probate a will. The probate of a will has been defined to be the proof before an officer authorized by law that an instrument offered to be proved or recorded is the last will and testament of the deceased person whose testamentary act it is alleged to be. It necessarily includes proof that the instrument purporting to be a will has been signed by the testator in the presence of at least two witnesses, who at his request signed the same as witnesses, as the statute requires; and that the testator, at the time of the execution thereof, was of sound mind. Walker v. Ehresman, 79 Neb. 775, 113 N. W. 218; Higgins v. Vandeveer, 85 Neb. 89, 122 N. W. 843; In re Estate of Renter, 148 Neb. 776, 29 N. W. 2d 466. It stands to reason, however, that a probate court is not required to admit to probate every instrument which may have been executed in the ceremonial form required of a will. The instrument must purport to be a will. It must purport to make a testamentary disposition of some property. It must purport to designate an ascertainable person or class of persons as beneficiaries. But generally speaking, a probate court is without jurisdiction, in admitting a will to probate, to construe its legal effect. Higgins v. Vandeveer, *supra.*

The right to dispose of property by will at death is favored by the law; it is a valuable right which will be sustained whenever possible. It is the policy of the law to uphold devises and bequests and, if possible, to enforce them consistently with rules of law. A will should not be invalidated except for compelling reasons. Provisions of a will repugnant to law or against public policy are void, and provisions which are impossible of

fulfillment are inoperative. But the valid portions of a will are to be carried out in accordance with the intentions of the testator as gleaned from the four corners of the will, even though it results in a partial intestacy of the deceased's estate.

The construction of a will is generally a matter for the courts to determine after the instrument has been admitted to probate. Unless it appears from the will itself, without the necessity of applying rules of construction, that a purported will is completely abortive, it should be admitted to probate. The probate court, however, has no power to determine questions relating to the construction or interpretation and legal effect of a will, or to the validity and effect of particular provisions, bequests, and devises, as between interested parties, although it has a limited power to do so for the purpose of advising an executor or administrator in order to expedite the administration of the estate. But the power of the county court to construe a will, incidental to its administration in that court, is not binding in controversies between an executor or administrator and one claiming adversely to the estate, or between adverse claimants under the will. These rules were made clear in the recent case of Lutcavish v. Eaton, *ante* p. 268, 89 N. W. 2d 44.

The objector relies upon the case of In re Estate of Strelow, 117 Neb. 168, 220 N. W. 251, wherein it is said: "Hence, a legatee or devisee who seeks probate of a claimed will carries the burden of alleging and proving, not only that the testator was possessed of authority and capacity to make the will, but also that the instrument is in legal form, and that he as such legatee or devisee, under the law as well as under the will, is entitled to the legacy or devise." We disapprove that part of the foregoing statement which requires that a devisee or legatee must allege and prove, in order to obtain the admission of a will to probate, "that he as such legatee or devisee, under the law as well as under the will, is entitled to the legacy or devise." This, for the reason that

it has the effect of requiring a construction of the will, the jurisdiction for the determination of which is in the district court insofar as the rights of the legatee or devisee are concerned. A further reason is that the construction of a will, whether by the district court or the limited purposes for which a probate court may construe it, is for disposition after the admission of the will to probate. It is noteworthy, we think, that in the four cases in which this rule in the Strelow case is cited, the portion which we now disapprove was not included, and by inference disapproved. See, In re Estate of Slattery, 125 Neb. 194, 249 N. W. 597; In re Estate of Wotke, 133 Neb. 739, 277 N. W. 45; In re Estate of Witte, 145 Neb. 295, 16 N. W. 2d 203; In re Estate of Lodge, 123 Neb. 531, 243 N. W. 781.

An examination of the provisions of the will, which we have heretofore quoted, presents questions of construction and interpretation, and questions as to validity of particular provisions, bequests, and devises, particularly as they bear upon the trust purported to have been created by the will. It is contended that the purported trust is void because the beneficiaries thereof are of an undeterminable class because of the inclusion of the term "relatives." It is urged that the provisions violate the rule against perpetuities. It is also urged that the trust is invalid because of a failure of the testator to dispose of the remainder of the trust property after the termination of the uses and purposes of the trust. These are matters for determination after the will has been admitted to probate, even if it appears that it may be subsequently adjudicated that the purported will fails to validly dispose of any property of the estate of the deceased. They are matters which the county court could not properly consider in determining whether or not the will should be admitted to probate. Neither the district court, nor this court, has any greater authority on appeal than the court of original jurisdiction in dealing with the admissibility of the will for probate. The

will is not one from which it can be determined upon its face, without applying rules of construction, that it fails to make a valid disposition of the property of the deceased, or a part thereof. The will was, therefore, properly admitted to probate.

The district court having arrived at the same conclusion, the order of the district court admitting the will to probate is affirmed.

AFFIRMED.

SIMMONS, C. J., dissenting.

I dissent insofar as this case rests upon and involves Lutcavish v. Eaton, *ante* p. 268, 89 N. W. 2d 44, and for the reasons given in my dissent there.

WILLIAM NIKLAUS, APPELLEE, V. PHOENIX INDEMNITY COMPANY OF NEW YORK, APPELLANT, JOHN M. PRIEST, INTERVENER-APPELLANT.

89 N. W. 2d 258

Filed April 11, 1958. No. 34328.

1. **Principal and Surety.** Suretyship is a contractual relation resulting from an agreement whereby one person, the surety, engages to be answerable for the debt, default, or miscarriage of another, the principal.
2. ———. The surety's obligation is not an original and direct one for the performance of his own act, but is accessory or collateral to the obligation contracted by the principal.
3. ———. The liability of the surety for the debt of the holder of the obligation is no greater and no less than that of the principal.
4. **Judgments.** A party should not be vexed more than once for the same cause of action, and the doctrine of res judicata ordinarily includes not only the things which were determined in the former action but also any other matter properly involved which might have been raised and determined therein.
5. ———. It is a fundamental principle of jurisprudence that material facts or questions which were in issue in a former action, and were there admitted or judicially determined, are conclusively settled by a judgment rendered therein, and that such facts or questions become res judicata and may not again be litigated in a subsequent action.

6. ———. The conclusiveness of a judicial determination is not affected by the kind of proceeding or form of action in which it was made or by a difference in form or object of the litigation in which the adjudication was made and that in which res judicata is pleaded.

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

Cline, Williams, Wright & Johnson and *Richard N. Thompson,* for appellant.

John M. Priest, pro se.

J. A. Hayward, for appellee.

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

MESSMORE, J.

This is an action brought in the district court for Lancaster County by William Niklaus, plaintiff, against the Phoenix Indemnity Company of New York, defendant. John M. Priest filed a petition in intervention in the action. The purpose of the action was to recover on an appeal bond given in an action in forcible entry and detainer, required on appeal of such action by section 27-1416, R. R. S. 1943. Trial by jury was waived and trial had to the court. Judgment was rendered in favor of the plaintiff in the sum of $887.70, together with interest in the sum of $205.78. Defendant and intervener filed separate motions for new trial, both of which motions were overruled. Defendant and intervener appeal from the order of the court overruling their motions for new trial.

For convenience we will refer to the parties as designated in the district court.

The plaintiff's amended petition alleged that the plaintiff owned the entire premises of 3145 Holdrege Street in Lincoln, Nebraska, the same being improved and consisting of a building with two apartments referred to

as the upper and lower apartments; that on or about November 1, 1944, John M. Priest and Mabel V. Priest went into possession of the upper apartment of said premises for which they were to pay an initial rental of $35 a month which was increased to $40 a month and later to $45 a month; that under this arrangement all rents were paid by the Priests to December 1, 1948; that from this date on, the occupancy of the premises by the Priests was unlawful; and that on March 24, 1953, a judgment of restitution of the premises was issued for the benefit of the plaintiff and for eviction of the Priests. The amended petition further alleged that the defendant was indebted to the plaintiff on its bond for the reasonable rental of the upper apartment of the premises above described. It was further alleged that no part of the rental had been paid. Plaintiff prayed judgment against the defendant in the sum of $5,351.72, together with interest thereon at the rate of 6 percent per annum from July 1, 1954, and for costs of the action.

The amended petition also contained certain allegations pleading the same subject matter that was pleaded by the plaintiff herein as defendant cross-petitioner in a former action which was a foreclosure of a mortgage action. For the most part, such allegations were stricken from the amended petition in this action upon motion of the defendant.

The defendant's answer admitted that on or about April 1, 1953, a bond was issued by its agent which was approved and filed in the justice court on April 2, 1953, in a proceeding entitled William Niklaus, plaintiff, v. John M. Priest and Mabel V. Priest, defendants; and that final judgment was entered in said proceeding by the district court in favor of the plaintiff and against said defendants, and the plaintiff was placed in possession of said premises on March 26, 1954. The answer specifically denied each and every allegation contained in the plaintiff's amended petition not expressly admitted. The defendant further alleged in its answer that any

obligation of the defendant by reason of the undertaking theretofore referred to was an obligation as surety only for John M. Priest; that by reason of litigation in the district court it was adjudicated that John M. Priest was not indebted to plaintiff William Niklaus for rental of the premises described in his petition during the period covered by defendant's undertaking; and that by reason of such adjudication plaintiff could not recover from the defendant in this proceeding. The prayer was for dismissal of the plaintiff's petition and for recovery of costs expended.

John M. Priest filed a petition in intervention denying generally the allegations contained in the plaintiff's amended petition, and alleging that all matters or claims pleaded in the plaintiff's amended petition had been previously adjudicated in a former action titled T. R. P. Stocker et al. v. William Niklaus et al., and that the present action and the former action were between the same parties or those in privity with one of the defendants and the intervener. The petition in intervention further alleged that paragraph 7 set out in the answer and cross-petition of William Niklaus in the case of T. R. P. Stocker et al. v. William Niklaus et al., alleged as follows: That T. R. P. Stocker, John M. Priest, and Mabel V. Priest were indebted to William Niklaus in the sum of $2,168.25 for the use and occupation of the said premises from January 1, 1952, to March 27, 1954, no part of which sum had been paid; and further alleged that paragraph XI as set out in the petition of William Niklaus in this action reads as follows: That the defendant was indebted to the plaintiff on its bond for the reasonable rental of the upper apartment of the premises above described from December 1, 1948, to March 27, 1954, plus interest on the above payments calculated to July 1, 1954, in the total sum of $5,351.72, and no part of said sum had been paid. It was further alleged that said former action was one in which William Niklaus, defendant therein, by way of answer and cross-

petition, raised all material allegations and issues found in the present action; and that a decree was entered on May 13, 1954, in the former action and William Niklaus paid all claims as well as all costs as required by the decree which was accepted as final. The petition in intervention further pleaded estoppel on the part of the plaintiff to relitigate the same subject matter as was determined in the former action, and prayed that this action be dismissed and intervener recover his costs expended.

The plaintiff testified that he was the owner of the property at 3145 Holdrege Street. At this point objection was interposed by the intervener to any testimony by this witness on the grounds of res judicata and that all issues raised in the present case had been previously adjudicated in a former action, Stocker et al. v. William Niklaus et al. (The identity of this action will be further covered later in the opinion.) The defendant joined in the objection. The objection was overruled. The plaintiff proceeded to testify that he had owned the property since 1924. He described the improvements and the size of the apartments, and testified that the property consisted of an upper and lower apartment; and that during the period between April 1, 1953, and April 1, 1954, the reasonable rental value of the upper apartment was $75 a month, or in excess of that amount, with the renter paying the utilities. On cross-examination he testified that John M. Priest paid no rent; that there was an agreement in the 1940's that the rent would be $45 a month, which agreement was canceled January 1, 1952; and that he recovered possession of the upper apartment of the premises on March 26, 1954, and rented it immediately for $75 a month with the renter paying the utilities. There was further testimony on behalf of the plaintiff and the defendant as to the reasonable rental value of the upper apartment of the premises.

At the conclusion of the plaintiff's testimony the in-

tervener moved to strike all of the plaintiff's testimony on the grounds of res judicata. This motion was overruled.

The record discloses that a mortgage foreclosure action was brought in the district court for Lancaster County titled: "T. R. P. Stocker, et al., Plaintiff, v. William Niklaus, Mary Niklaus, John M. Priest, Mabel V. Priest, and Lincoln Sheet Metal & Roofing Company, et al., Defendants. Docket 181, Page 287." The plaintiffs in the above-mentioned action sought to foreclose a mortgage which they held upon the premises involved in the instant case. The plaintiff in the present action filed an "Amended supplemental and cross-petition" in the foreclosure case. In paragraph VII of the second cause of action contained in said cross-petition, he alleged: "T. R. P. Stocker, John M. Priest and Mabel V. Priest are indebted to William Niklaus in the sum of $2,168.25 for the use and occupation of said premises (the premises here involved) above described from January 1, 1952, to March 27, 1954. No part of said sum has been paid."

In paragraph X of that pleading the plaintiff here and defendant in the foreclosure action, prayed judgment against "T. R. P. Stocker John M. Priest and Mabel B. (sic) Priest and each of them in the sum of $3,878.25, together with interest thereon at the legal rate from April 1, 1954, and costs."

Also in paragraph X of the "amended supplemental and cross-petition" the plaintiff here and defendant in the foreclosure action alleged: "The said William Niklaus waives the tortious conduct of the said T. R. P. Stocker, John M. Priest and Mabel V. Priest and sues herein upon contract implied by law to recover the amount of the items above set forth." (The items set forth were in substance $1,000 damages for destruction of property, interference with the relationship with the tenants of the lower apartment causing loss to William Niklaus, money loaned by William Niklaus to John M.

Priest, and other charges against John M. Priest, Mabel V. Priest, and T. R. P. Stocker which we deem unnecessary to otherwise summarize for the purpose of this appeal.)

John M. Priest and Mabel V. Priest answered the "amended supplemental and cross-petition" as follows: "By way of further answer the defendants Johm (sic) Priest and Mabel Priest, separately, and each in their own right, deny generally each and every allegation contained in the alleged purported answer and cross petition contained, filed herein by the defendant William Niklaus."

On April 13, 1954, Judge Lyle E. Jackson, presiding in the district court for Lancaster County, entered a decree in the case titled "T. R. P. Stocker, and Pansy L. Stocker, Plaintiffs, v. William Niklaus, Mary Niklaus, Lincoln Sheet Metal and Roofing Company, a corporation, Harry R. McNurlin, Hazel McNurlin, John Priest and Mabel V. Priest, Defendants." Harry R. McNurlin and Hazel McNurlin, who were tenants of William Niklaus, failed to appear, plead, or demur. Default against them was taken. Defendants William Niklaus, Mary Niklaus, Lincoln Sheet Metal and Roofing Company, a corporation, John Priest, and Mabel V. Priest appeared, filed answers and other pleadings. Plaintiffs appeared in person and by T. R. P. Stocker as attorney for plaintiffs. Defendant William Niklaus appeared in person and by his attorney, Herbert Baird. Mary Niklaus appeared by her attorney, Herbert Baird. John M. Priest appeared in person, and Mabel Priest appeared by her attorney T. R. P. Stocker. Trial was had, evidence adduced, and the cause argued and submitted. The decree then disclosed that on May 13, 1954, briefs having been furnished the court, the court found generally for the plaintiffs and against all of the defendants. The court found the amounts due under the mortgage and that the mortgage was a first lien on the premises herein involved; and fixed the total amount of indebtedness

owing from William Niklaus to the plaintiffs Stocker, and the amount owing the Lincoln Sheet Metal and Roofing Company, a corporation, declaring this amount to be a second lien on the premises owned by William Niklaus. With respect to the defendants Priest, the court found that they were not then in possession of any part of the premises and claimed no interest therein. All costs were taxed to the defendants William Niklaus and Mary Niklaus.

At the conclusion of the instant case, the court permitted the intervener to file his petition in intervention. The court then entered judgment as heretofore set forth.

The bond sued on in this action was an appeal bond given in an action of forcible entry and detainer and required in such appeals by section 27-1416, R. R. S. 1943, which is to the effect that the party appealing shall give an appeal bond with two or more sureties and in case of appeal by the defendant, that he will satisfy the final judgment and costs, and will pay a reasonable rent for the premises during the time he shall unlawfully withhold the same.

Suretyship is a contractual relation resulting from an agreement whereby one person, the surety, engages to be answerable for the debt, default, or miscarriage of another, the principal. The surety's obligation is not an original and direct one for the performance of his own act, but is accessory or collateral to the obligation contracted by the principal. It is of the essence of the surety's contract that there be a valid obligation. 50 Am. Jur., Suretyship, § 2, p. 903.

In Kroncke v. Madsen, 56 Neb. 609, 77 N. W. 202, the court said: "The liability of the surety for the debt to the holder of the obligation is no greater and no less than that of the principal. (Wilson v. Campbell, 1 Scam. [Ill.] 493; Berg v. Radcliff, 6 Johns. Ch. [N. Y.] 307.)"

The defendant asserts that if the principal in whose behalf the appeal bond was given had a valid defense to

the plaintiff's claim for nonpayment of rent from the date the appeal bond was written until the premises were restored to the plaintiff, the defendant, under such circumstances, would not be liable on the bond. Therefore, under the principles of res judicata announced by this court in its decisions, the plaintiff is barred from recovering the reasonable rental value of the premises occupied by John M. Priest, the principal on the bond, during the period in question, by reason of a prior adjudication between the plaintiff and the intervener in this action and principal on the bond, John M. Priest.

That the defense of res judicata is available to the defendant in the instant case, the defendant cites Shepard v. City of Friend, 141 Neb. 866, 5 N. W. 2d 108. In the cited case, in a former action the plaintiffs had sought injunctive relief to prevent the city from continuing to cause alleged damages to the plaintiffs' property. Such injunctive relief was denied. In the second action the plaintiffs sued the city for causing damage to their property. In applying the doctrine of res judicata, this court said: "The defense of res adjudicata becomes available when a question of fact has been put directly in issue in an action between the same parties or their privies and an adjudication had thereon. Wilch v. Phelps, 16 Neb. 515, 20 N. W. 840; Morgan v. Mitchell, 52 Neb. 667, 72 N. W. 1055; Wittenberg v. Mollyneaux, 60 Neb. 583, 83 N. W. 842; State v. Savage, 64 Neb. 684, 702, 90 N. W. 898, 91 N. W. 557." The court further said: "Examination discloses without question that in the case at bar the same facts are pleaded as ground for relief as were pleaded in the former action. * * * The only differences between the two actions is that in the former injunctive relief was sought by reason of damage, whereas in the latter recovery of a money judgment for damages was sought; the former was an action in equity and the latter in law." The court then went on to say: "The fact that the plaintiffs did not seek to recover damages in the former action is not a matter to be considered

of consequence here. The rule is that a party should not be vexed more than once for the same cause of action, and the doctrine of res adjudicata includes not only the things which were determined in the former suit, but also any other matter properly involved which might have been raised and determined therein. State v. Broatch, 68 Neb. 687, 94 N. W. 1016; Triska v. Miller, 86 Neb. 503, 125 N. W. 1070; State v. Newman Grove State Bank, 128 Neb. 422, 259 N. W. 170; Blum v. Truelsen, 139 Neb. 282, 297 N. W. 136. The fact that the former action was in equity and this one is in law can make no difference. In Triska v. Miller, supra, the court said: 'In the instant case the proceedings and judgments in the foreclosure suit, in the action in equity and in the ejectment action, are pleaded in bar to the plaintiffs' petition. The court heard evidence upon the merits, as well as upon the pleas in bar. The finding is general in favor of the defendants, so that the record does not disclose whether the decree is based on the merits or upon the judgments referred to, but if the evidence sustains any defense pleaded the decree should be affirmed.' In the light of the question before the court this language was tantamount to a holding that, if there was a finding of fact in either the foreclosure action, the equity action, or the action at law on the same issues of fact as were presented in the action then before the court, such finding would be res adjudicata. See, also, Williamsburg Savings Bank v. Town of Solon, 136 N. Y. 465, 32 N. E. 1058."

In the instant case the defendant asserts that the facts relied upon by the plaintiff are identical to those which he interposed as a defense and cross-claim in the foreclosure action heretofore set out. The basis of the plea of res judicata is: The answer and cross-petition of the defendant Niklaus in the former action alleged that: "T. R. P. Stocker, John M. Priest and Mabel V. Priest are indebted to William Niklaus in the sum of $2,168.25 for the use and occupation of said premises

above described from January 1, 1952, to March 27, 1954. No part of said sum has been paid." The prayer of this cause of action in the former case stated: "WHEREFORE William Niklaus prays judgment against T. R. P. Stocker John M. Priest and Mabel B. (V.) Priest *and each of them* in the sum of $3,878.25 together with interest thereon * * *." (Emphasis supplied.) Included in the item of $3,878.25 prayed for is the claim for rent which constitutes the basis of the action presently before the court. This was put in issue by the pleadings filed in the former case. There was an identity of causes of action established by the pleadings and evidence adduced in the present case. In disposing of the former litigation, the court found that "the court being fully advised in the premises, finds generally for the plaintiffs and against all of the defendants; * * *." This constitutes a final determination of the issues raised by the defendant Niklaus in the former litigation and may properly be pleaded as res judicata in the present action.

Although the foreclosure action was of an equitable nature and the present case is one at law, the above-cited case holds that this does not vitiate the defense of res judicata. For other cases relating to the doctrine of res judicata see, also, Wheeler v. Brady, 126 Neb. 297, 253 N. W. 338; Glissmann v. Bauermeister, 149 Neb. 131, 30 N. W. 2d 649; Burnett v. Central Nebraska Public Power & Irr. Dist., 147 Neb. 458, 23 N. W. 2d 661; Dutch v. Welpton, 121 Neb. 480, 237 N. W. 579; In re Estate of Gifford, 133 Neb. 331, 275 N. W. 273; Wightman v. City of Wayne, 144 Neb. 871, 15 N. W. 2d 78; Wightman v. City of Wayne, 148 Neb. 700, 28 N. W. 2d 575; Morrell v. Towle, 141 Neb. 370, 3 N. W. 2d 655.

In the annotation, 83 A. L. R. 648, it is pointed out: "Based on the rule that what has been once adjudicated cannot be the subject of a later independent action or claim, it is established that an unavailing defense, legal or equitable, if within the jurisdiction of the court, in

one suit cannot be made the basis of a plea for affirmative relief, either by separate action or by a counterclaim in a subsequent suit, the prior decision in favor of the first plaintiff being conclusive." Cases are cited from several jurisdictions of this country.

In Anderson v. Anderson, 155 Neb. 1, 50 N. W. 2d 224, the court held: "All matters in issue in a former action and judicially determined are conclusively put at rest by a judgment therein and may not again be litigated in a subsequent action." The court went on to say: "It has often been said and has recently been repeated by this court in Baum v. McBride, 152 Neb. 152, 40 N. W. 2d 649, that: 'It is a fundamental principle of jurisprudence that material facts or questions which were in issue in a former action, and were there admitted or judicially determined, are conclusively settled by a judgment rendered therein, and that such facts or questions become res judicata and may not again be litigated in a subsequent action.' See, also, Nelson v. Nelson, 152 Neb. 741, 42 N. W. 2d 654; Callahan v. Prewitt, 143 Neb. 793, 13 N. W. 2d 660; Shepard v. City of Friend, 141 Neb. 866, 5 N. W. 2d 108." See, also, Slater v. Skirving, 51 Neb. 108, 70 N. W. 493, 66 Am. S. R. 444.

An examination of the decree in the case of T. R. P. Stocker and Pansy L. Stocker, plaintiffs, v. William Niklaus, Mary Niklaus, Lincoln Sheet Metal and Roofing Company, a corporation, Harry R. McNurlin, Hazel McNurlin, John Priest, and Mabel V. Priest, defendants, in the district court for Lancaster County shows that the court in that case found generally for the plaintiffs and against all of the defendants and that the allegations of the plaintiffs' petition were true. The costs were taxed against the defendant William Niklaus in that case.

As stated in City of Wayne v. Adams, 156 Neb. 297, 56 N. W. 2d 117: "The conclusiveness of a judicial determination is not affected by the kind of proceeding or form of action in which it was made or by a difference in form or object of the litigation in which the adjudication

was made and that in which res judicata is pleaded." See, also, 50 C. J. S., Judgments, § 691, p. 150.

In Webber v. City of Scottsbluff, 155 Neb. 60, 50 N. W. 2d 541, this court said: "The rule is well settled that a judgment on the merits in the trial of a civil action constitutes an effective bar and estoppel in a subsequent action upon the same claim or demand, not only as to every matter offered and received to sustain or defeat the claim or demand, but also as to any other admissible matter which might have been offered for such purpose." See, also, Lowe v. Prospect Hill Cemetery Assn., 75 Neb. 85, 106 N. W. 429.

We conclude, in the light of the pleadings and the authorities heretofore cited, that the trial court committed prejudicial error by failing to find that the doctrine of res judicata applied to the instant case.

The judgment of the trial court is reversed and the cause remanded with directions to enter judgment in favor of the defendant.

REVERSED AND REMANDED WITH DIRECTIONS.

YEAGER and WENKE, JJ., participating on briefs.

ALEX REIZENSTEIN, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.

89 N. W. 2d 265

Filed April 18, 1958. No. 34302.

SUPPLEMENTAL OPINION

ERROR to the district court for Scotts Bluff County: CLAIBOURNE G. PERRY, JUDGE. On motion for rehearing. See 165 Neb. 865, 87 N. W. 2d 560, for original opinion. *Former opinion modified. Motion for rehearing overruled.*

LaVerne H. Hansen, for plaintiff in error.

Clarence S. Beck, Attorney General, and *Cecil S. Brubaker,* for defendant in error.

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

MESSMORE, J.

The record in this case has been re-examined particularly with reference to the motion for rehearing filed. From this re-examination no basis has been found to justify a departure from the determination made by the original opinion. 165 Neb. 865, 87 N. W. 2d 560.

Inadvertence however does appear in the opinion and misunderstanding may flow from it. In this light the last full paragraph on page 870 of the Nebraska Report in which the opinion is reported is withdrawn and the following is substituted therefor: The defendant offered in evidence the shorthand notes of a statement made by the defendant. The statement was not received in evidence but it is in the bill of exceptions and was made available to the defendant before the trial was concluded. There will be reference to this statement later herein.

Also the last full paragraph on page 872 of the Nebraska Report and the one following are withdrawn and the following two paragraphs are substituted therefor: If any abuse of discretion was involved the defendant was afforded the opportunity to demonstrate it. He called the reporter who took the statement and by inquiry from him attempted to get the shorthand notes containing the statement into evidence. Objection was made and sustained. The notes were identified as exhibit No. 52. The court ordered the preparation and production of a transcript of the notes as a substitute for the notes. This transcript appears in the bill of exceptions and is identified as exhibit No. 52. Thus on the record presented for review the attorney for the defendant had available for examination the contents of the statement before the conclusion of the trial.

In the light of the fact that the trial court made available to the attorney for the defendant the contents of

the statement and an opportunity, before the trial was over, to examine it and to ascertain whether or not his client had been prejudiced by the refusal to produce the statement when requested and to call attention to the particular prejudice, if any in fact existed, but in these respects he failed to act, it does not appear that he is on this review entitled to assert successfully that the trial court abused its discretion in this area.

The motion for rehearing is denied.

FORMER OPINION MODIFIED.

MOTION FOR REHEARING OVERRULED.

YEAGER, J., participating on briefs.

ROGER EDGAR, APPELLANT, V. OMAHA PUBLIC POWER DISTRICT, A CORPORATION, APPELLEE.

89 N. W. 2d 238

Filed April 18, 1958. No. 34306.

1. **Trial.** A motion for directed verdict or for judgment notwithstanding the verdict must, for the purpose of decision thereon, be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed. Such party is entitled to have every controverted fact resolved in his favor, and to have the benefit of every inference that can reasonably be deduced from the evidence.
2. **Appeal and Error.** An appeal from an order of the district court granting a motion for a judgment notwithstanding the verdict requires this court to consider the entire record and to determine whether it does or does not justify the action of the trial court.
3. **Trial.** Where the facts adduced to sustain an issue are such that reasonable minds can draw but one conclusion therefrom, it is the duty of the court to decide the question, as a matter of law, rather than submit it to a jury for determination.
4. **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 by evidence which would justify the trier of facts in arriving at a different conclusion.
5. **False Imprisonment.** One who merely states to an officer what

he knows of a supposed offense or gives information to an officer tending to show that a crime has been committed, without making any charge or requesting an arrest, does not thereby make himself liable for false arrest and imprisonment.

6. ———. Accompanying an officer to identify one suspected of an offense or to identify property involved therein is no more than the giving of information in assistance of the officer, and unless accompanied by acts of affirmative direction, persuasion, or request for or voluntary participation in an arrest and imprisonment of the suspected offender by the officer, his informer is not liable for false arrest and imprisonment.

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

Gaines, Spittler & Moore, for appellant.

Fraser, Crofoot, Wenstrand, Stryker & Marshall, for appellee.

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

CHAPPELL, J.

Plaintiff, Roger Edgar, brought this action against defendant, Omaha Public Power District, seeking to recover damages for alleged false arrest and imprisonment. As far as important here, defendant's answer was a general denial. Upon trial to a jury, defendant's motions for directed verdict, made at conclusion of plaintiff's evidence and renewed at conclusion of all the evidence, were overruled. Thereupon, the jury returned a verdict in favor of plaintiff and against defendant, and judgment was rendered thereon. Defendant then filed a motion for judgment notwithstanding the verdict or in the alternative for a new trial. After a hearing, the trial court sustained defendant's motion for judgment notwithstanding the verdict, and vacated and set aside the verdict and judgment theretofore rendered. Therefrom plaintiff appealed, assigning that the trial court erred in sustaining defendant's motion and rendering judgment for defendant, which was allegedly

not sustained by the evidence but was contrary thereto and contrary to law. We conclude that the assignment has no merit. In that connection, since defendant's cross-appeal relating to the alleged erroneous overruling of its motion for new trial became pertinent only if plaintiff's assignment of error was sustained, it falls of its own weight by affirmance of the judgment of the trial court, and requires no further discussion.

The only question requiring decision on the merits is whether or not the trial court erred in concluding that the evidence was insufficient to sustain a verdict and judgment in favor of plaintiff. The procedure for determination of that question has been well established.

In that connection, this court has held that: "A motion for directed verdict or for judgment notwithstanding the verdict must, for the purpose of decision thereon, be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed. Such party is entitled to have every controverted fact resolved in his favor, and to have the benefit of every inference that can reasonably be deduced from the evidence." Crane v. Whitcomb, 160 Neb. 527, 70 N. W. 2d 496.

As held in Wagoun v. Chicago, B. & Q. R. R., 155 Neb. 132, 50 N. W. 2d 810: "An appeal from an order of the district court granting a motion for a judgment notwithstanding the verdict requires this court to consider the entire record and to determine whether it does or does not justify the action of the trial court."

As said in Fairmont Creamery Co. v. Thompson, 139 Neb. 677, 298 N. W. 551: "A mere scintilla of evidence is not enough to require the submission of an issue to the jury. The rule is well stated in Farr Co. v. Union P. R. Co., 106 Fed. (2d) 437, as follows: '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.' " See, also, Armer v. Omaha & C. B. St. Ry. Co., 153 Neb. 352, 44 N. W. 2d 640.

In Kohl v. Unkel, 163 Neb. 257, 79 N. W. 2d 405, this court held: "Where the facts adduced to sustain an issue are such that reasonable minds can draw but one conclusion therefrom, it is the duty of the court to decide the question, as a matter of law, rather than submit it to a jury for determination."

Also, in Leach v. Treber, 164 Neb. 419, 82 N. W. 2d 544, we held: "If, from undisputed evidence, different minds may not reasonably reach different conclusions or draw different inferences, the trial court should render judgment consistent with the facts.

"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 by evidence which would justify the trier of facts in arriving at a different conclusion." See, also, Davis v. Dennert, 162 Neb. 65, 75 N. W. 2d 112.

In addition, this court and many others have established the fundamental evidentiary basis of liability for false arrest and imprisonment. For example, in Baker v. Coon, 102 Neb. 243, 166 N. W. 555, this court held: "One who merely states to an officer what he knows of a supposed offense, without making any charge or requesting an arrest, does not thereby make himself liable for false imprisonment."

In Jonson v. Heller, 142 Neb. 380, 6 N. W. 2d 359, plaintiff Jonson, who was an employee of defendant, S. N. Wolbach Sons, Inc., sought damages from said corporation and one Samuel G. Heller, in charge thereof, for false imprisonment. In that opinion, reversing a judgment in favor of plaintiff and dismissing the cause, it was said: "A gladstone bag was stolen from the store, which fact was reported to Heller, who in turn reported it to the chief of police, and a request was

made upon the chief of police that he make an investigation. Pursuant to this request the chief of police sent an officer or officers to the store. The officer or officers did not know the plaintiff so, on request, defendant Heller described him. Thereupon and after plaintiff left the store, an officer requested plaintiff to accompany him to the police station. Plaintiff did accompany him to the police station where he remained for questioning for some period of time when he was allowed to leave.

"There is no direct evidence whatever, nor is there any evidence from which a reasonable inference could be drawn, that Heller or any one on his behalf or on behalf of the defendant corporation accused plaintiff of the taking of the bag, or requested or suggested his detention, or in any wise directed, counseled or advised the chief of police or any police officer in the investigation which had been requested. On the record whatever was done in the investigation was at the sole instance of the chief of police." As hereinafter observed, that case is comparable in all material respects with that at bar.

As stated in 22 Am. Jur., False Imprisonment, § 33, p. 376, citing supporting authorities: "Where a person merely directs the attention of a police officer to what he supposes to be a breach of the peace and the officer, without other direction, arrests the offender on his own responsibility, the person who did nothing more than to communicate the facts to the officer is not liable for causing the arrest, even though it is made without a warrant. If the arrest is made without the knowledge and consent of such person, there is no liability."

Also, as stated in 35 C. J. S., False Imprisonment, § 24, p. 527, citing supporting authorities: "An individual who directs or requests an illegal arrest is liable for false imprisonment, but one who merely gives information regarding an offense does not incur liability."

In Annotation, 21 A. L. R. 2d, § 23, p. 694, citing and discussing authorities, it is said: "The mere giving of information to an officer tending to show that a crime has been committed is not enough to render the informer guilty of a resulting false imprisonment by an officer, and this is so even if the information purports to show that the person later falsely arrested is the one who committed the alleged crime."

Also, in Annotation, 21 A. L. R. 2d, § 26, p. 703, citing and discussing authorities, it is said: "Where the investigation was of some past offense, and the defendant's part in it was that of assisting officers to discover or apprehend the offender, the defendant's liability depends on evidence that he not only promoted the investigation, or took an active part in it, but affirmatively directed or procured the police to arrest the plaintiff without warrant as the guilty person."

Also, as said in Annotation, 21 A. L. R. 2d, § 26, p. 707: "The mere fact that when a police officer accosted the plaintiffs and asked them to go to the police station with him and detained them there, the officer was accompanied by the defendant's superintendent, will not warrant the inference that the police did not act entirely on their own judgment, and in the performance of their duties as public officers."

Further, as said in Annotation, 21 A. L. R. 2d, § 27, p. 710: "Accompanying an officer to identify one suspected of an offense, especially if it is done at the request of the officer, is no more than the giving of information in assistance of the police, and if not accompanied by acts of affirmative persuasion or of voluntary participation in the physical trespass, is not ground of liability."

In the light of the foregoing authorities, we have examined the record, which, as summarized, fairly discloses the following: Plaintiff was employed as a lineman for Commonwealth Electric Company doing subcontract work for defendant which was engaged in the

production and distribution of electric power.

For sometime prior to about June 8 or 9, 1955, substantial quantities of valuable wire had been disappearing by theft from defendant's various substations in the Omaha area. There had been a dozen or more such incidents, the most recent having occurred on June 6, 1955. Such losses had been reported to the Omaha police department by Paul Feistner, defendant's superintendent of distribution. However, the police had not been able by investigation to uncover any definite evidence indicating who was responsible for defendant's losses.

There is some confusion about dates, but on June 8 or 9, 1955, defendant's assistant superintendent of distribution, one George Foot, attended an invitation meeting at defendant's North Omaha plant to watch tests being run on some new equipment. He left that meeting about 11 p. m., and started home in a company car. With defendant's recent wire thefts in mind, he decided to drive by two of its substations on his way home. He drove past the substation at Thirty-first and Sprague Streets without noticing anything unusual, and then proceeded to defendant's substation at Forty-sixth Avenue and Jones Street.

As Foot approached the latter spot at about 11:30 p. m., he saw a car parked at the north curb, headed west, without lights, in the vicinity of the substation gate. The right door of the parked car was open, with a man standing at the curb about 10 feet from the gate. As Foot proceeded slowly past, he saw and noted the front license plate number of the parked car. He then turned around at the end of the block and drove slowly back, whereupon he saw and noted the license plate number again on the rear of the parked car. However, as he so approached again, the other car drove away. Foot then stopped his car and first checked over defendant's yard with his car spotlight. He then got out of his car and, unlocking the gate, checked de-

fendant's yard with his flashlight, but found nothing missing. In that connection, it was subsequently ascertained that no property had disappeared from defendant's substations on the night involved.

There were few residences in the general area of defendant's substation at Forty-sixth Avenue and Jones Street, and as usual there was no other traffic on such streets at that time of night. It was too dark for Foot to identify the man standing at the curb or to form more than a vague description of the parked car. It was Foot's impression that it was one of the smaller makes, light grey or green in color, and not a late model. However, he did get a good look at the parked car's license plates, both front and rear, and was certain that they were Nebraska license number 1-19275.

The next morning Foot reported what he had observed to Feistner, his superior, who thereafter reported that information by telephone to the Omaha police department. In doing so, however, Feistner did not suggest what the police should do with the information so reported by him.

On the morning of June 11, 1955, two detectives from the police department appeared at Feistner's office. They had been assigned to and received instructions from the detective bureau to investigate the report made by Feistner. Such visit by the detectives had not been requested by Feistner, but was made as routine procedure when such information had been given to the police department. In that connection, the record discloses that such detectives had theretofore checked appropriate sources of information and found that license number 1-19275 was registered in the name of plaintiff's wife and that she and plaintiff lived in a trailer court. There the detectives had also theretofore visited briefly with plaintiff and his wife about their car and where it had been on the night involved. They had then informed plaintiff that they would check a little more and return later, which they did.

Both plaintiff's witnesses and those of defendant substantially agreed in all material respects regarding what was said and done in Feistner's office and what occurred thereafter. After the detectives arrived at Feistner's office, Foot was invited to come there. At that time he again identified the license number of the parked car seen by him, but stated that he was not sure that he could identify the car itself. One detective, as a witness for plaintiff, recalled that Foot described it as a "light green or gray car." The other detective, as a witness for plaintiff, recalled that Foot said the car "looked to him as if it might be a Plymouth."

After a discussion of the matter, both detectives, and Feistner as well, expressed the opinion that it was suspicious that a car would be parked in front of defendant's substation at such a late hour in so isolated a place and under such circumstances as heretofore described. Feistner suggested to the detectives that he thought they should check on the license number of the parked car and interview the driver if he could be found. However, it was the independent judgment of both detectives that the circumstances warranted such action, and they did so upon their own responsibility. Neither Feistner nor Foot requested or suggested that anything else should be done. As testified by one such detective, "That was left up to us." As stated by the other detective, "There was nothing unusual whatsoever. We had the information given to us that a car was parked near the Supply Yard at 11:30 at night and in all cases of that type the time element is a predominating factor and it was worthy of investigation. We considered it worthy and I went through with it."

At conclusion of the conference, at Feistner's office, the detectives requested Foot to go with them to the trailer court where plaintiff's car was parked, and identify it. Thus he went with them in the police car. Upon arrival, he identified the license number but was

unable to identify the car itself as the one he had seen parked at defendant's substation, and he so informed the detectives.

Upon arrival, the detectives parked their car about 50 feet from plaintiff's trailer and left Foot sitting in the back seat of the police car while they went into plaintiff's trailer, where they remained 5 or 10 minutes talking with plaintiff in the presence of his wife. Foot was not in any position to and did not see, hear, or direct anything that went on while the detectives were inside plaintiff's trailer. When they came out, one detective and plaintiff, whom Foot did not then know, got in plaintiff's car, and the other detective and Foot got in the police car, whereupon they drove away. In that connection, plaintiff drove his own car and the other detective drove the police car. Thereafter, while driving away or preparing to do so, Foot was told by the detective who drove the police car that they were going to the police station, but Foot was not told whether plaintiff was going voluntarily or involuntarily, or what the detective intended to do with plaintiff. As a matter of fact, as testified by plaintiff, the detective said to him, " 'You come with us and we will straighten this up' " and plaintiff replied " 'All right.' "

Upon arrival at the police station, Foot was told to wait in an outer office and he did so while the detectives and plaintiff went into the detective bureau. Some 15 or 20 minutes later, one of the detectives told Foot to go down and wait in the police car and in a few moments the detective would take Foot back to defendant's office. That was done without Foot having directed or taken any part in the proceedings at the police station, and at the time he left he did not know what had been done or what other information had been obtained by the police except that the detective who drove him back to defendant's office commented on the way that they were continuing to question plaintiff about defendant's recent wire losses.

In that connection, the detectives who took plaintiff and Foot to the police station took no further part in the matter after arriving there. The questioning of plaintiff was conducted by an inspector and a captain of detectives. After questioning plaintiff about his background, employment, and whereabouts on the night in question, the captain decided to order plaintiff booked for investigation, and he did so without consulting with or notifying defendant or any of its representatives aforesaid. Thus, during the remainder of Saturday, June 11, 1955, and part of the next day, plaintiff was held in jail and questioned at various times by the captain and inspector. Throughout such proceedings, plaintiff denied that his car was parked at defendant's substation as heretofore set forth, and denied any connection with the thefts of wire, although, as expressed by plaintiff, "I stuck my neck out and it caused me more grief," by expressing an opinion as to why and how the losses occurred, which expression led the captain and inspector to intensify their interrogation of plaintiff.

On Sunday afternoon, plaintiff was released from jail on bond. On Monday morning following, he voluntarily appeared before another captain of detectives who gave plaintiff some five polygraph tests, the results of which were inconclusive. On Monday afternoon plaintiff went back to work for Commonwealth Electric Company, and continued to do so until in November 1955 when he left and went to work for another company in California. In the meantime, however, this action was filed on October 28, 1955.

Feistner and Foot did not even know that plaintiff had been booked and jailed by the police until after plaintiff had returned to work. The police department did not so advise them or any other representative of defendant in any manner during plaintiff's arrest or confinement. The first time they knew of it was when the captain or inspector of detectives called Feistner by telephone and advised him that nothing had been dis-

covered that would connect the license number reported to the police with any of defendant's wire thefts.

The record discloses that no employee of defendant ever promoted, suggested, directed, or requested plaintiff's arrest. The police did so on their own initiative without any request. The inspector, as a witness for plaintiff, testified: "After they gave us that information * * * we take action without a request." Also, no representative of defendant ever offered or agreed to file a complaint against plaintiff, or told any police officer that he believed plaintiff had committed a crime. As a matter of fact, when called about it, Feistner said he would not care to file any charge against plaintiff.

Other evidence relating to plaintiff's alleged expenses and damages appears in the record, but in view of our conclusions, its recitation here would serve no useful purpose. In the light of the record and applicable controlling authorities heretofore cited, we conclude that the evidence was insufficient to support any verdict and judgment for plaintiff and against defendant.

To hold otherwise would not only impair the official machinery for the ascertainment of truth by investigation of reported crimes, but would also interfere with and tend to make impossible the enforcement of criminal law by tending to destroy with fear and threats the recognized right and duty of the public to give information to law enforcement officers, which is a most effective instrument in the administration of criminal justice.

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

AFFIRMED.